APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

STATUTORY PROVISIONS INVOLVED

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

ORDER DENYING PETITION FOR REVIEW, SUPREME COURT OF CALIFORNIA (JANUARY 31, 2024)

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SARAH PEREZ,

Plaintiff and Respondent,

v.

CALIFORNIA HERBAL REMEDIES, LLC,

Defendant and Appellant.

S282987

Court of Appeal, Second Appellate District, Division Four - No. B321576

Before: GUERRERO, Chief Justice.

The petition for review is denied.

/s/ Guerrero
Chief Justice

OPINION, COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR (OCTOBER 31, 2023)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

SARAH PEREZ,

Plaintiff and Respondent,

v.

CALIFORNIA HERBAL REMEDIES, LLC,

Defendant and Appellant.

B321576

(Los Angeles County
Super. Ct. No. 21STCV14519)

Appeal from an order of the Superior Court of Los Angeles County, Amy D. Hogue, Judge.

Before: CURREY, P.J., COLLINS, J., ZUKIN, J.

Appellant California Herbal Remedies, Inc. (CHR)[1] appeals from an order compelling discovery responses

[1] CHR was originally sued as California Herbal Remedies, LLC. Perez filed an amendment in November 2021 to correct the name

and an accompanying award of monetary sanctions in favor of respondent Sarah Perez, a former employee. CHR contends that the trial court erred in ordering it to provide names and contact information of employees for the purposes of class notice. CHR further contends that it acted with substantial justification in opposing Perez's motions to compel, and therefore that the $10,000 sanctions order was an abuse of discretion.

We do not reach the substance of CHR's challenge to the discovery order, as that order is not appealable and CHR did not seek writ relief. As for the sanctions order, CHR has made no showing of substantial justification in opposing the motions to compel. We therefore dismiss the portion of the appeal related to the order compelling discovery and affirm the trial court's sanctions order.

FACTUAL AND PROCEDURAL HISTORY

I. Complaint

CHR owns a retail store licensed to sell cannabis in Los Angeles, California. Perez alleges that she was employed by CHR "as a storefront hostess, sales associate, and cultivation maintenance worker" from approximately November 2020 to January 2021.

Perez filed a class action complaint against CHR in April 2021. She ultimately filed the operative second amended class and representative action complaint (SAC) in December 2021. The SAC alleged claims for failure to pay minimum wages and other violations of

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to California Herbal Remedies, Inc. Although CHR identified itself as the corporation in its notice of appeal, its briefing on appeal refers to both names.

the California Labor Code, a claim for unfair business practices, and a claim for civil penalties under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.). Perez brought the lawsuit on behalf of herself and a putative class of employees who worked for CHR as "hourly-paid non-exempt" employees between April 2017 and the date when class notice was sent.

II. Discovery and Motion to Compel

At the initial status conference on October 13, 2021, the court ordered the parties to proceed with the *Belaire-West* process.[2] The court made the same order at another conference on December 2, 2021. CHR did not comply.

Perez propounded a set of five special interrogatories and a set of six requests for production of documents on CHR in December 2021, seeking class information, such as the names and contact information for all putative class members, as well as the employee handbook and her personnel file. In January 2022, CHR served responses containing only objections, including more than 10 pages of general objections and nine pages of objections to each request.

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[2] As discussed in *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 558-559 (*Belaire-West*), courts may utilize an opt-out process in order to balance a class-action plaintiff's right to discover witnesses and putative class members' contact information with the privacy rights of the putative class members. In this process, the employer submits employee contact information to a third-party administrator, who then contacts the employees and provides them with the option to opt out of having their contact information disclosed to the plaintiff's attorney.

After discussing available dates with the parties, the court set an informal discovery conference for February 22, 2022. Because the deadline for Perez to file motions to compel discovery fell on the same day, she requested an extension from CHR's counsel. According to Perez, CHR refused to grant an extension, causing Perez to seek relief from the court. On February 3, 2022, the court issued a minute order tolling the filing deadline for Perez's motions to compel discovery to March 30, 2022.

On February 16, 2022, Perez filed an informal discovery conference statement in advance of the scheduled February 22 conference. She outlined pending discovery issues, including CHR's failure to respond to a draft *Belaire-West* notice and request for approximate class size in contravention of prior court orders, and CHR's failure to provide substantive responses to discovery. At the conference on February 22, 2022, the court ordered CHR to provide substantive verified discovery responses and a class list by March 22. These orders were memorialized in the court's minute order from the hearing and a notice of ruling served on CHR's counsel.

In a letter on March 11, 2022, CHR's counsel stated that CHR "will not be supplementing any discovery responses" based on the objection that Perez "waived [her] right to the discovery by not complying with the informal discovery conference prerequisites nor filing [a motion to compel] within the 45-day deadline." Perez reported to the court on March 23, 2022 that CHR had not complied with any of the court's February 22, 2022 orders. CHR did not dispute this report, but stated it intended to move to strike the

SAC based on Perez's purported waiver of "her right to compel further response to her discovery."

At a status conference on March 30, 2022, the court issued an order to show cause (OSC) why sanctions of $1,000 should not be imposed against counsel for CHR for failure to comply with the court's February 22, 2022 order. The court set a hearing on the OSC for April 26, 2022, with a written response by CHR's counsel due April 21, 2022. The court also extended Perez's motion to compel deadline to May 2, 2022.

CHR filed a motion to strike the SAC on April 4, 2022. CHR also filed a response to the OSC on April 18, stating that CHR's counsel had complied "with all aspects of what his memorialization of the February 22, 2022 hearing [*sic*]." Specifically, CHR's counsel argued that his compliance consisted of the submission of two items requested by the court—CHR's proposed motion to strike and case law supporting his objection to discovery on the basis that Perez purportedly conspired with her counsel to be hired by CHR for the purpose of instigating litigation. CHR's counsel did not dispute that CHR had failed to serve substantive discovery responses or a class list, as ordered; instead, he stated that there were "a few disconnects" between what he understood and what the court ordered on February 22, 2022, but that they "are more form over substance."

At the April 26, 2022 hearing, the court denied CHR's motion to strike. The court found that Perez had not waived her right to compel further discovery responses and, even if she had, such waiver would not be a basis on which to strike the entire complaint. The court also discharged the OSC and set a hearing date for Perez's motions to compel discovery, noting that it

would address the issue of sanctions in the context of the discovery motions.

Perez filed her motions to compel further responses to the special interrogatories and document requests on May 2, 2022. She sought sanctions of $22,360, arguing that CHR had refused to discuss the discovery and had failed to provide any substantive responses despite the court's prior orders. In opposition, CHR argued that Perez failed to attempt to informally resolve the discovery issues as required under Code of Civil Procedure section 2016.040[3] and failed to timely file a motion to compel. It also argued that it had made "significant and repeated efforts to meet and confer" to avoid motion practice, specifically by drafting the motion to strike and seeking informal discovery regarding CHR's claim of barratry, i.e., that Perez was a planted employee. CHR also argued that it properly refused to provide discovery due to privacy concerns, specifically related to its claim that Perez was not a genuine employee.

At the hearing on the motions to compel on May 26, 2022, counsel for CHR argued only that the sanctions amount should be reduced. The court took the matter under submission. The following day, the court issued a written order granting the motions to compel and awarding sanctions of $10,000 against CHR and its counsel. The court detailed CHR's failures to comply with prior orders, including the court's orders in Octo-

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[3] Section 2016.040 requires that a "meet and confer declaration in support of a motion [to compel] shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." All further statutory references are to the Code of Civil Procedure unless otherwise specified.

ber and December 2021 to proceed with the *Belaire-West* process. Further, at the informal discovery conference on February 22, 2022, the court gave CHR "additional time to amend its responses rather than face a motion to compel." CHR again failed to comply, and had not provided any substantive discovery responses.

The court also found that Perez had "reasonably and in good faith attempted to resolve the deficiencies in CA Herbal's responses." The court again rejected CHR's contention that Perez waived the right to move to compel. The court also rejected CHR's privacy argument, noting that those concerns were adequately protected under the *Belaire-West* process. The court found that CHR had not acted with substantial justification in opposing the motions to compel, concluding that CHR's "repeated failure to adhere to direct court orders requiring it to provide contact information . . . and substantive responses to discovery completely undermines any pretext of substantial justification." The court also noted that the issues raised were "not close calls," but involved routinely discoverable information. Further, the court found that CHR's privacy objection was "particularly meritless" in the context of Perez's document requests, which did not seek employee contact information but rather, for example, the employee handbook and Perez's own personnel file.

CHR timely appealed from the court's May 27, 2022 ruling.

DISCUSSION

CHR contends the trial court erred in granting Perez's motions to compel discovery and awarding sanctions against CHR and its counsel. We agree with Perez that only the sanctions order is appealable pur-

suant to section 904.1, subdivision (a)(12). We therefore dismiss the portion of the appeal arising from the court's order granting the motions to compel as interlocutory. As to the sanctions, we find no abuse of discretion by the trial court. We therefore affirm the trial court's sanctions order.

I. Appealability

CHR appeals from the trial court's order of May 27, 2022, which includes the order granting Perez's motions to compel further responses to discovery and the award of $10,000 in sanctions against CHR and its counsel. Perez contends that only the sanctions portion of the order is appealable. We agree.

"The right to appeal is wholly statutory." (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.) "Unless an order is expressly made appealable by a statute, this court has no jurisdiction to consider it." (*Levinson Arshonsky & Kurtz LLP v. Kim* (2019) 35 Cal.App.5th 896, 903; see also *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.)

Under section 904.1(a)(12), an appeal may be taken from "an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." There is no comparable statutory right to appeal from a prejudgment discovery order. (*See Montano v. Wet Seal Retail, Inc.* (2015) 7 Cal.App.5th 1248, 1259; *Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1432.) Instead, discovery orders are appealable as part of an appeal from a final judgment. (*See Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1060.) In addition, a party may petition for extraordinary writ relief

related to discovery matters, including to prevent discovery of information protected by a right of privacy. (*See, e.g., Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 300 [granting in part writ petition regarding class notice to medical patients].)

Here, the monetary sanctions imposed by the trial court are appealable under section 904.1(a)(12). But no other portion of the court's May 27, 2022 order is directly appealable. Tellingly, the cases cited by CHR in support of its contention that it may appeal the entire order involve writ review rather than direct appeal. (*See Los Angeles Gay & Lesbian Center v. Superior Court, supra*, 194 Cal.App.4th at p. 300; *City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272, 282 ["'Writ review is appropriate in discovery matters where, as here, it is necessary to address 'questions of first impression that are of general importance to the trial courts and to the [legal] profession, and where general guidelines can be laid down for future cases.'"].)

CHR admits it did not seek writ review. Instead, it argues that the entire discovery order is appealable because the court issued a single order granting the motions to compel and awarding sanctions. It cites no authority to support this contention. CHR's reliance on *Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469 (*Rail-Transport*) is inapposite, as that case involved an appeal challenging only discovery sanctions. (*Id.* at p. 475 ["the discovery sanction imposed against RTEA exceeds $5,000 and is therefore appealable"].) The fact that section 904.1(a)(12) permits appeals from "orders" does not encompass orders other than those expressly included

in the statute. (§ 904.1(a)(12); *Rail-Transport, supra*, 46 Cal.App.4th at p.474; *see also Deck v. Developers Investment Co., Inc.* (2023) 89 Cal.App.5th 808, 829 (*Deck*) [in appeal from order granting both issue and monetary sanctions, dismissing portion of appeal regarding issue sanctions and considering portion regarding monetary sanctions, as that order was "by statute severable and immediately appealable"].)

As such, we dismiss the portion of the appeal taken from the trial court's order granting Perez's motions to compel discovery.

II. Order Granting Sanctions

We turn to the appealable portion of the court's order, the award of discovery sanctions against CHR and its counsel. As relevant here, section 2023.010 authorizes a trial court to impose monetary sanctions for conduct amounting to a misuse of the discovery process, including "[m]aking, without substantial justification, an unmeritorious objection to discovery" (*id.*, subd. (e)); "[m]aking an evasive response to discovery" (*id.*, subd. (f)); "[d]isobeying a court order to provide discovery" (*id.*, subd. (g)); and "opposing, unsuccessfully and without substantial justification, a motion to compel . . . discovery" (*id.*, subd. (h)). "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (§ 2023.030, subd. (a).)

A court shall impose a monetary sanction against "any party, person, or attorney" who unsuccessfully opposes a motion to compel a further response to

interrogatories or to requests for production of documents "unless [the court] finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (§§ 2030.300, subd. (d), 2031.300, subd. (c).)

Thus, monetary sanctions are mandatory absent a finding of substantial justification. (*See Deck, supra*, 89 Cal.App.5th at pp. 829-830.) "'The trial court has broad discretion in deciding whether to impose sanctions and in setting the amount of monetary sanctions.'" (*Id.* at pp. 823-824, quoting *Cornerstone Realty Advisors, LLC v. Summit Healthcare REIT, Inc.* (2020) 56 Cal.App.5th 771, 789.) We review a trial court order imposing discovery sanctions for abuse of that discretion. (*Deck, supra*, 89 Cal.App.5th at p. 823.)

Apart from arguing that the trial court's initial order compelling discovery responses was in error, CHR makes no independent showing that the trial court abused its direction in finding that CHR lacked substantial justification in opposing the motions to compel. Moreover, the record amply demonstrates that the trial court was well within its discretion in awarding sanctions here. CHR served voluminous objections to Perez's discovery requests without any substantive responses, including boilerplate privacy objections to requests that did not call for private information. CHR has provided no justification for its blanket failure to cooperate in discovery, even assuming its privacy objections were properly raised. Moreover, CHR repeatedly refused to obey the trial court's orders to supplement its responses and provide information to engage in the standard *Belaire-West* process. We also note that, although CHR repeatedly argues

on appeal that the trial court failed to consider the heightened privacy concerns of its employees due to the dangers of working for a cannabis retailer, CHR did not raise this argument until after the trial court had granted the motions to compel. Instead, in its voluminous objections to discovery, opposition to the motions to compel, and motion to strike the SAC, CHR raised only a general privacy objection tied to its accusation that Perez was a "plant" and not a true employee. As such, we find no abuse of discretion in the sanctions award against CHR and its counsel.

DISPOSITION

The May 27, 2022 order awarding sanctions is affirmed. The remainder of the appeal is dismissed. Perez is entitled to her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

/s/ Collins, J.

We concur:

/s/ Currey, P.J.

/s/ Zukin, J.

ORDER GRANTING PLAINTIFF'S MOTIONS TO COMPEL FURTHER RESPONSES, SUPERIOR COURT OF THE STATE OF CALIFORNIA (MAY 27, 2022)

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SARAH PEREZ, individually, and
on behalf of all others similarly situated,

Plaintiff,

v.

CALIFORNIA HERBAL REMEDIES, INC.,
a California corporation; and DOES
1 through 10, inclusive,

Defendants.

Case No.: 21STCV14519

Before: Amy D. HOGUE, Judge of the Superior Court.

ORDER GRANTING PLAINTIFF'S MOTIONS TO COMPEL FURTHER RESPONSES TO (1) SPECIAL INTERROGATORIES, SET ONE, AND (2) REQUEST FOR PRODUCTION, SET ONE AND AWARDING SANCTIONS IN THE AMOUNT OF $10,000

Plaintiff Sara Perez moves to compel from defendant California Herbal Remedies, Inc. ("CA Herbal") further responses to her (1) Special Interrogatories. Set One. and (2) Requests for Production of Documents. Set One—two motions total. She also requests the Court impose monetary sanctions of $22,360. CA Herbal opposes the motions to compel and requests for sanctions.

For the following reasons, the Court GRANTS Perez's motions and awards a total of $10,000 in mandatory sanctions as required by the Code of Civil Procedure.

I. Allegations

Individually and on behalf of a putative class, Perez brings seven wage-and-hour claims and a Private Attorneys General Act (PAGA) claim against her alleged former employer, CA Herbal. (Second Amended Class and Representative Action Complaint (Dec. 8, 2021) ¶¶ 30-99.)

II. Procedural History

As established in *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 558-559 (*Belaire-West*), an accepted procedure for balancing a class-action plaintiff's right to discover witnesses and putative class members' contact information and the

privacy rights of the putative class members, is the defendant/employer's submission of employee contact information to a third party administrator who then contacts the employees and invites them to "opt out" of having their contact information disclosed to the plaintiff's attorney (a "*Belaire-West* process"). Consistent with *Belaire-West* and the standard practice for class actions pending in the Los Angeles Superior Court complex civil courts, the Court, at the Initial Status Conference on October 13, 2021, ordered the parties to "proceed with the Belaire-West process and share the cost equally." (Minute Order: Initial Status Conference (Oct. 13, 2021) p. 1; Notice of Ruling on October 13, 2021 (Oct. 18, 2021) p. 1.) After CA Herbal failed to turn over contact information to an administrator, the Court on December 2 again ordered the parties to "move forward with the Belaire-West process as ordered on 10/13/21." (Minute Order: Further Status Conference (Dec. 2, 2021) p. 1.) CA Herbal failed to comply with this order, even after Perez's counsel emailed a draft notice to CA Herbal's counsel on December 9, 2021. (Plaintiff's Informal Discovery Conference Statement (Feb. 16, 2022) p. 2; Feghali Decl., ¶ 5, Exh. 3.)

Meanwhile, on December 9, 2021, Perez propounded Special Interrogatories asking for the employees' contact information (Interrogatories (1) through (5)) and served Requests for Production of Documents. CA Herbal served its responses on January 8, 2022. (Feghali Decl., ¶¶ 4, 6.) Every response is the same: one paragraph of boilerplate objections preceded by nearly ten pages of accusations and arguments which, although prolix, can be distilled into two arguments: (1) Perez either does not exist or is a different person and (2)

this case is not a class action and thus should be transferred out of the Court's Complex Division. (*See* Order Denying Defendant's Motion to Strike Second Amended Complaint (Apr. 26, 2022) pp. 2-3.)

At an informal discovery conference on February 22, 2022, the Court gave CA Herbal additional time to amend its responses rather than face a motion to compel. Specifically, the Court ordered CA Herbal to disclose the putative class size by March 15 and provide a class list and substantive, verified discovery responses by March 22. (Minute Order: Further Status Conference (Feb. 22, 2022) p. 1.) CA Herbal again failed to comply with the Court's orders. On March 30 the Court issued an Order to Show Cause (OSC) why CA Herbal's counsel should not be sanctioned $1,000 for failing to comply with the Court's orders, ordered defense counsel to file a written response to the OSC, and set a hearing for April 26, 2022, the same date reserved to hear CA Herbal's motion to strike. (Minute Order: Further Status Conference (Mar. 30, 2022) p. 1.) The Court also tolled the deadline for Perez to file a motion to compel to May 2, 2022. (*Ibid.*) On April 26, the Court denied CA Herbal's motion to strike and discharged the OSC re sanctions in favor of a hearing on Perez's motions to compel, tentatively scheduled for May 26.

To date, CA Herbal has failed to comply with the Court's February 22, 2022 order. It has not provided any substantive discovery responses or a verification.

III. Motion to Compel Further Responses to Special Interrogatories, Set One

Perez moves to compel further responses from CA Herbal to her Special Interrogatories, Set One five special interrogatories total.

- Interrogatory No. 1: Identify (by stating the full name, last known address, last known phone number(s), last known e-mail address-(es), and dates of employment) every person employed in the State of California by California Herbal Remedies, Inc. in an hourly-paid, non-exempt position at any time since April 15, 2017.
- Interrogatory No. 2: State the total number of individuals who are currently employed in the State of California by California Herbal Remedies, Inc. in an hourly-paid, non-exempt position.
- Interrogatory No. 3: State the total number of individuals who were employed in the State of California by California Herbal Remedies, Inc. in any hourly-paid, non-exempt position at any time since April 15, 2017, but are no longer employed by California Herbal Remedies, Inc.
- Interrogatory No. 4: Identify (by stating the full name, last known address, last known phone number(s), last known e-mail address-(es), and dates of employment) every former employee of California Herbal Remedies, Inc. who was employed in an exempt job position that directly supervised any employee of Defendant working in an hourly-paid, non-

exempt position at any time since April 15, 2017.

- Interrogatory No. 5: Identify (by stating the full name) every person who is currently employed in the State of California by California Herbal Remedies, Inc. in an exempt position that directly supervises any employee of Defendant working in an hourly-paid, non-exempt position.

(Declaration of Allen Feghali in Support ("Feghali Decl."), ¶ 4, Exh. 2.)

A. Legal Standard

After receiving interrogatory responses, the propounding party may move for an order compelling a further response if she deems any of the following apply: (1) An answer to the interrogatory is evasive or incomplete; (2) an exercise of the option to produce documents under section 2030.230 is unwarranted or the required specification of those documents is inadequate; or (3) an objection to an interrogatory is without merit or too general. (Code Civ. Proc., § 2030.300, subd. (a).) The burden of "justifying any objection and failure to respond remains at all times with the party resisting an interrogatory." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 541 (*Williams*).)

B. Analysis

Perez contends CA Herbal's responses are evasive and incomplete and its objections without merit and too general. (Motion Brief, 4:21-26.) In opposition to Perez's motion to compel, CA Herbal makes four arguments: Perez (1) failed to first meet and confer as

required by Code of Civil Procedure section 2016.040, (2) waived her right to compel further responses, and (3) seeks private information that is protected from disclosure; and, lastly, (4) CA Herbal is willing to mediate.

1. Meet and Confer

"A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (Code Civ. Proc., § 2016.040.) This rule is designed to "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order." (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1293.) CA Herbal argues Perez fails to meet this requirement.

The evidence shows Perez's counsel reasonably and in good faith attempted to resolve the deficiencies in CA Herbal's responses. Counsel presents evidence that he emailed counsel for CA Herbal on January 10, 2022, two days after CA Herbal served its responses. (Feghali Decl., Exh. 5.) The email states Perez's position that CA Herbal's objections were improper and lacked merit, and points out that the Court had ordered the parties to engage in a *Belaire-West* process. (*Ibid.*) Counsel for CA Herbal replied on January 11, mainly to discuss a "stipulation to transfer the case out of the Complex Litigation department," but also mentioned dates for "live meet and confers." (Feghali Decl., Exh. 6.) On January 12, the parties exchanged emails regarding dates for an Informal Discovery conference, and counsel for Perez reiterated that he "need[ed] to discuss the improper responses to the discovery duly propounded on Defendant." (Feghali

Decl., Exh. 7.) Counsel for Perez again addressed CA Herbal's discovery responses in an email on January 17; counsel for CA Herbal, in response, did not address discovery but repeated his position that the parties should stipulate to transfer the case out of the civil complex division. (Feghali Decl., Exhs. 8-9.) The evidence also shows that Perez's counsel twice requested from opposing counsel an extension on the deadline to file a motion to compel. (Feghali Decl., Exhs. 10 [Jan. 20 email letter], 11 [Jan. 27, 2021 letter].)

Perez satisfies the meet-and-confer attempt requirement of section 2016.040.

2. Waiver

CA Herbal next argues Perez waived the right to compel further responses. The Court previously addressed and rejected this argument when CA Herbal raised it as a reason to strike Perez's complaint. (Order Denying Defendant's Motion to Strike Second Amended Complaint (Apr. 26, 2022) pp. 4-6.)

3. Privacy

CA Herbal argues its refusal to provide the requested information arises out of its "[concern] with the possibility/probability that Plaintiff was, in fact, a 'plant' that sought employment with Defendant only for the purpose of gaining the appearance of standing to pursue the instant action," which "gives rise to Defendant's justifiable unease with not only proceeding with litigation but, directly pertinent to the Motion, producing records that would bear on private information related to Defendant's current and former employees." (Opposition Brief, 6:6-12.)

As mentioned, Perez's special interrogatories, requesting the contact information of CA Herbal's employees, implicate conflicting interests. On the one hand, the "state Constitution expressly grants Californians a right of privacy," and "[p]rotection of informational privacy is the provision's central concern." (*Williams, supra,* 3 Cal.5th at p. 552 [citing Cal. Const., art. 1, § l].) "[A]bsent employees have a bona fide interest in the confidentiality of their contract information" which, "[w]hile less sensitive than one's medical history or financial data," is nevertheless "generally considered private." (*Williams,* at p. 554.) On the other hand, in putative class actions, "the contact information of those a plaintiff purports to represent is routinely discoverable as an essential prerequisite to effectively seeking group relief, without any requirement that the plaintiff first show good cause." (*Id.* at p. 537.) The same is true of a representative PAGA action—the representative aggrieved employee is entitled to discover other employees' contact information as "a first step to identifying other aggrieved employees and obtaining admissible evidence of the violations and policies alleged in the complaint." (*Id.* at pp. 537, 543.) Fellow class members and aggrieved employees "are potential percipient witnesses to alleged illegalities, and it is on that basis their contract information become relevant." (*Id.* at p. 547 [citing *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 374 (*Pioneer*)].)

The reconciling of these interests is well established. Courts have first applied the "analytical framework" for evaluating a claim of invasion of privacy established by *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1—the three *Hill* criteria.

The person whose privacy rights are at stake—in this case, CA Herbal's employees—must (1) possess a "legally protected privacy interest," (2) have a reasonable expectation of privacy under the circumstances, and (3) the privacy invasion must be "serious in nature, scope, and actual or potential impact." (*Hill*, at pp. 35-37.) "If a claimant meets these criteria, the court must balance the privacy interest at stake against other competing or countervailing interests." (*Belaire-West, supra*, 149 Cal.App.4th at pp. 558-559 [citing *Pioneer, supra*, 40 Cal.4th at pp. 370-371].)

As explained in *Belaire-West,* employees whose contact information is sought from their employer in discovery generally cannot satisfy *Hill* criteria (2) and (3). Their contact information (1) is a legally protected privacy interest, but in giving their information to their employer, they (2) "might reasonably expect, and even hope, that their names and addresses would be given" to "a class action plaintiff who may ultimately recover for them unpaid wages [or other relief] that they are owed." (*Williams, supra,* 3 Cal.5th at p. 554; *Belaire-West, supra,* 149 Cal.App.4th at p. 561.) And though (3) contact information can be misused, it is "not particularly sensitive, unlike medical or financial details," and any potential misuse is mitigated if the disclosure is "limited to the named plaintiff in a putative class action filed against their employer following a written notice to each employee giving them the opportunity to object to the disclosure of that information." (*id.* at pp. 561-562.) This written notice is accordingly called a *Belaire-West* notice, and in this case, the Court has ordered the parties to proceed with, and share the cost of issuing, a *Belaire-West* notice. (Minute Order: Initial Status Conference (Oct.

13, 2021) p. 1; Minute Order: Further Status Conference (Dec. 2, 2021) p. 1 ["Parties are to move forward with the Belaire-West process as ordered on 10/13/2021."].)

Based on its "significant reason to believe" that Perez's counsel engaged in barratry or improperly solicited her, CA Herbal impliedly argues that (3) the privacy invasion here is more serious in potential impact. (Opposition Brief, 7:24-27.) The Court is not persuaded by this argument for several reasons. First, the Supreme Court has said that, if a *Belaire-West* notice is given, "there is no justification for concluding disclosure of contact information, after affording affected individuals the opportunity to opt out, would entail a serious invasion of privacy." (*Williams, supra*, 3 Cal.5th at p. 555.) Second, class counsel, like any other attorney, is bound by the Rules of Professional Conduct. Third, a plaintiff and her attorney are "permitted precertification communication with potential class members for the purpose of investigation and preparation of their claims or defenses." (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 578.) Rules 7.2 (Advertising) and 7.3 (Solicitation) of the Rules of Professional Conduct expressly exempt lawyer communications that are "authorized by law, such as court-approved class action notices." (Rules Prof. Conduct, rule 7.2, com. 2.) Court-imposed limitations on pre-certification communications with putative class members, in the view of the Court of Appeal of this district, are a prior restraint on the right to free speech, permissible "only if the opposing party seeks an injunction, protective order[,] or other relief" and makes a showing of "direct, immediate[,] and irreparable harm." (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 300.) CA Herbal's

unsubstantiated concerns do not heighten the seriousness of the potential privacy invasion in this case.

In sum, CA Herbal's concerns with litigating this case and producing information based on matters outside the allegations of the complaint does not abrogate Perez's right to discover relevant, nonprivileged information.

4. Mediation

Lastly, CA Herbal argues it has "repeatedly expressed" to Perez its "willingness (and, in fact, desire) to mediate this matter." (Opposition Brief, 10:4-9.) This argument is irrelevant to CA Herbal's duty to provide substantive discovery responses.

C. Monetary Sanctions

Perez asks the Court impose $12,395 in sanctions.

A court "shall" impose a Chapter 7 monetary sanction against any party, person, or attorney who "unsuccessfully makes or opposes a motion to compel a further response to interrogatories," unless the court finds the one subject to sanction "acted with substantial justification" or "other circumstances" make imposing sanctions "unjust." (Code Civ. Proc., § 2030.300, subd. (d).) A court has limited discretion to decline to impose sanctions: "[M]onetary sanctions, in an amount incurred, including attorney fees, by anyone as a result of the offending conduct, must be imposed unless the trial court finds the sanctioned party acted with substantial justification or the sanction is otherwise unjust." (*Kwan Software Engineering Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74.) The sanction represents

"the reasonable expenses, including attorney's fees, incurred by anyone as a result" of the misuse of the discovery process, and is not designed to punish, but to put the moving party in the same position he would have been in "had he obtained the requested discovery." (Code Civ. Proc., § 2023.030, subd. (a); *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1259-1260.)

"Substantial justification" means a justification that is "well-grounded in both law and fact." (*Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743, 748-749 (*Diepenbrock*) [privilege, law on which was "unsettled" and "not clearly established," provided substantial justification]; *City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272, 292 [city acted with "substantial justification" where no case had previously addressed whether Discovery Act applies to California Public Records Act proceeding].)

CA Herbal argues it acted with substantial justification. This argument is undermined by Defendant's repeated failure to adhere to direct court orders requiring it to provide contact information pursuant to *Bel-Aire West* and substantive responses to discovery completely undermines any pretext of substantial justification. Moreover, the issues raised by Perez's motion are not close calls. Class members' and aggrieved employees' contact information is routinely discoverable in class and PAGA actions. CA Herbal's privacy objection was squarely addressed in *Belaire-West* and *Williams*, among other cases; indeed, CA Herbal cites *Belaire-West* and—the latter extensively—in its Opposition Brief. (Opposition Brief, pp. 7-8.) Because its reasons were not "well-grounded in both law and fact,"

CA Herbal had no substantial justification. (*Diepenbrock, supra*, 208 Cal.App.4th at pp. 748-749.)

Perez's counsel requests $12,935 in sanctions. This figure represents 27.1 total attorney hours spent on the motion to compel. (Feghali Decl., ¶¶ 22-23.) Attorney Feghali worked for 8.3 hours, plus an anticipated 3 hours, for 11.3 hours total at a rate of $650/hr. ($7,345); attorney Kamarzarian worked for 15.8 hours at a rate of $350/hr. ($5,530). (*Ibid.* [$7,345 + $5,530 = $12,875].) Perez also requests the $60 fee she paid to file the motion. (*Id.* at ¶¶ 24-25 [$12,875 + $60 = $12,935].)

The Court finds that $6,000 is a reasonable amount for the mandatory fee-shifting sanctions on the motion to compel further responses to Special Interrogatories, Set One.

IV. Motion to Compel Further Responses to Requests for Production, Set One

Perez moves to compel further responses from CA Herbal to her Requests for Production, Set One—six requests total.

- Request for Production No. 1: All DOCUMENTS that REFER or RELATE TO or constitute reports of the amount of time worked by CLASS MEMBERS through any electronic, telephonic, or manual time keeping systems (including spreadsheets), including records maintained by DEFENDANT (including hours surveys, driving records and global positioning system (GPS) records), DEFENDANT'S human resources department, DEFENDANT'S managers, DEFEND-

ANT'S information technology department, CLASS MEMBERS themselves (including hours surveys, driving records and global positioning system (GPS) records), DEFENDANT'S other employees, or third parties through billing systems or other systems.

- Request for Production No. 2: All DOCUMENTS that constitute, refer to, or relate to DEFENDANT'S policies, practices, and guidelines for tracking and/or keeping records of hours worked or overtime hours worked by CLASS MEMBERS during the relevant time period.
- Request for Production No. 3: One exemplar of every version of any employee handbook provided to any CLASS MEMBER at any time since April 15, 2017.
- Request for Production No. 4: All DOCUMENTS that refer or relate to declarations or witness statements DEFENDANT (including its employees and agents) has communicated to and/or obtained from any CLASS MEMBER.
- Request for Production No. 5: All DOCUMENTS that refer or relate to the categories of monies paid to each CLASS MEMBER (*e.g.*, hourly pay, bonuses, piece-rate, etc.)
- Request for Production No. 6: All documents that refer or relate to Plaintiff Sarah Noel Perez, including his complete PERSONNEL FILE, time records, payroll records, work schedules, and all documents he has signed.

(Declaration of Allen Feghali in Support of Plaintiff's Motion to Compel Further Responses to Requests for Production of Documents ("Feghali Decl. II"), ¶ 4, Exh. 2.)

A. Legal Standard

After receiving a response to its request for production, the propounding party may move for an order compelling a further response if it deems any of the following apply: (1) a statement of compliance with the demand is incomplete; (2) a representation of inability to comply is inadequate, incomplete, or invasive; or (3) an objection in the response is without merit or too general. (Code Civ. Proc., § 2031.310, subd. (a).) The moving party bears the burden of "set[ting] forth specific facts showing good cause justifying the discovery sought by the demand"; it meets this burden, when there is no "privilege issue" or claim of work product, "simply by a fact-specific showing of relevance." (Code Civ. Proc., § 2031.310, subd. (b)(1); *Glenfed Development Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117; *Sosa v. CashCall, Inc.* (2020) 49 Cal.App.5th 42, 47.)

B. Analysis

Perez contends CA Herbal's objections are without merit and too general. She propounded her Requests for Production on December 9, 2021, and CA Herbal served its responses on January 8, 2022. (Feghali Decl. II, ¶¶ 4, 6.) Like its responses to Perez's Special Interrogatories, for every Request for Production, CA Herbal raised one paragraph of boilerplate objections preceded by nearly ten pages of accusations and arguments—a total of 67 pages. (*Id.* at Exh. 4.)

Perez meets her initial burden of showing good cause for the discovery sought by the demands. All six requests seek documents relevant to her burden at class certification where she must prove, among other things, that common issues predominate her claims, which are based on CA Herbal's alleged employment policies and practices. (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28.) Evidence that an employer "consistently applied" a "uniform policy" to a group of employees, for example, is key evidence that claims based on the policy are "suitable for class treatment." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1024-1025, 1033.) As for Perez's own personnel file, Labor Code section 1198.5 gives her the right to "inspect and receive" a copy of it from CA Herbal.

In opposition, CA Herbal makes the same arguments it made in opposition to Perez's motion to compel further responses to her Special Interrogatories. The Court adopts its analysis above, but observes that CA Herbal's privacy objection is particularly meritless here because Perez does not seek documents revealing employee contact information. There was accordingly no basis for CA Herbal to object, for example, that to protect its employees' contact information, it would not produce an exemplar of its employee handbook(s) (RFP No. 3) or Perez's own personnel file (RFP No. 6).

C. Sanctions

Except for certain electronically stored information (not relevant here), "the court shall impose a monetary sanction under Chapter 7 . . . against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to a demand, unless it finds that the one subject to the sanction

acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2031.310, subd. (h).) Like most discovery sanctions, the sanction on the party who unsuccessfully opposes a motion to compel represents "the reasonable expenses, including attorney's fees, incurred by anyone as a result" of the misuse of the discovery process. (Code Civ. Proc., § 2023.030, subd. (a).)

Perez's counsel requests $9,965 in sanctions, representing 21.l total attorney hours spent on the motion to compel. (Feghali Decl. II, ¶¶ 22-23.) Attorney Feghali worked for 6.4 hours, and anticipated working an additional 2 hours, for 8.4 hours total at a rate of $650/hr. ($5,460); attorney Kamarzarian worked for 12.7 hours at a rate of $350/hr. ($4,445). (*Ibid.* [$5,460 + $4,445 = $9,905].) Perez also requests the $60 fee she paid to file the motion. (*Id.* at ¶¶ 24-25 [$9,905 + $60 = $9,965].)

The Court finds that $4,000 is a reasonable amount for mandatory fee-shifting sanctions on the motion to compel production of documents.

V. Summary

The Court GRANTS Perez's motions to compel CA Herbal to provide further responses to her (1) Special Interrogatories, Set One, and (2) Requests for Production, Set One. The Court imposes on CA Herbal and its counsel, jointly and severally, monetary sanctions in the amount of $10,000 payable on or before June 27, 2022. The Court orders CA Herbal to produce documents and to serve verified, substantive responses on or before June 15, 2022.

/s/ Amy D. Hogue
Judge of the Superior Court

Dated: May 27, 2022

ORDER DENYING REHEARING, COURT OF APPEAL OF THE STATE OF CALIFORNIA (NOVEMBER 30, 2023)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

SARAH PEREZ,

Plaintiff and Respondent,

v.

CALIFORNIA HERBAL REMEDIES, LLC,

Defendant and Appellant.

B321576

(Super. Ct. No. 21STCV14519)
Los Angeles County

Before: CURREY, P.J., COLLINS, J., ZUKIN, J.

ORDER

The court received a late petition for rehearing from appellant on November 29, 2023. Permission to file the late petition for rehearing is DENIED as untimely.

/s/ Collins, J. /s/ Currey, P.J. /s/ Zukin, J.

RELEVANT STATUTORY PROVISIONS

21 U.S.C.A. § 841—Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which

cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant

is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or

both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits

such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as

provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)

(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results

from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a

fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definition

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be

sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is

acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that—

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means—

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date

rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other heath[1] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import,

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[1] So in original. Probably should be "health".

or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally—

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally—

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(g) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections[2] 823(g) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

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[2] So in original. Probably should be "section".

(3) Inapplicability

(A) This subsection does not apply to—

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to—

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

SUPPORT LETTER FROM THE NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS (MAY 10, 2023)

NATIONAL ASSOCIATION OF
FEDERALLY-INSURED CREDIT UNIONS
3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
F: 703.5241082
nafcu@nafcu.org | nafcu.org

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

The Honorable Tim Scott
Ranking Member
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

RE: Tomorrow's Hearing: "Examining Cannabis Banking Challenges of Small Businesses and Workers."

Dear Chairman Brown and Ranking Member Scott:

I write to you today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's Committee hearing, "Examining Cannabis Banking Challenges of

Small Businesses and Workers." NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 135 million consumers with personal and small business financial service products. With the recent introduction of the bipartisan and bicameral S. 1323, the Secure and Fair Enforcement (SAFE) Banking Act of 2023, we are pleased to see the Committee moving forward on this important issue.

As the Committee is aware, the vast majority of states have authorized varying degrees of marijuana use, ranging from limited medical use to decriminalization and recreational use at the state level. NAFCU has heard from a number of our member credit unions in these states that they are being approached by their members, or potential members, that have a small business in or are serving the legal cannabis industry in their state and are seeking banking services for their small business.

As the cultivation, sale, distribution, and possession of marijuana remains illegal at the federal level under Schedule I of the Controlled Substances Act, the majority of credit unions remain hesitant to provide financial services to these members and their small businesses. While the 2013 memo from U.S. Deputy Attorney General James M. Cole (Cole Memo) and the 2014 guidance from the Financial Crimes Enforcement Network (FinCEN) have attempted to provide clarity to financial institutions, uncertainty remains for financial institutions in this area. Guidance can be rescinded at any time, and, in fact, former Attorney General Jeff Sessions took action in 2018 to essentially rescind the Cole Memo. For financial institutions, such as credit unions, there are additional regulatory challenges that compound the uncertainty

of providing financial services to state-authorized marijuana-related businesses (MRBs). These go beyond just concerns about criminal or civil penalties, but also extend to requirements related to proper Suspicious Activity Report (SAR) and anti-money laundering (AML) filings as required under the Bank Secrecy Act, access to federal deposit insurance and a Federal Reserve master account, and even potential issues with the Internal Revenue Service (IRS). Missteps in these areas could prove devastating to an institution. It should be noted that these risks also exist when providing financial services to ancillary businesses that provide products and services to MRBs and fall within the credit union's field of membership, even if the state-authorized MRB does not.

NAFCU does not have, and is not taking, a position on the broader question of the legalization or decriminalization of marijuana to any degree at the federal or state level. However, we do support Congress taking the steps found in S. 1323, the SAFE Banking Act of 2023, to provide greater clarity and legal certainty at the federal level for credit unions that choose to provide financial services to state-authorized MRBs and ancillary businesses that may serve those businesses in states where such activity is legal. While the SAFE Banking Act of 2023 does not address every issue on this front, it seeks to provide a safe harbor for financial institutions that wish to serve such businesses and would be an important step towards improving clarity and addressing what is often perceived as misalignment between federal and state laws. It is with this in mind that NAFCU urges you to support the SAFE Banking Act of 2023 and advance it in the Senate.

Thank you for your attention to this important issue. We look forward to continuing to work with you on this and other issues of importance to credit unions. Should you have any questions or require any additional information, please do not hesitate to contact me or Amber Milenkevich, NAFCU's Senior Associate Director of Legislative Affairs, at amilenkevich@nafcu.org.

Sincerely,

/s/ Brad Thaler
Vice President of Legislative Affairs

cc: Members of the Senate Banking, Housing, and Urban Affairs Committee

SUPPORT LETTER FROM THE ELECTRONIC TRANSACTION ASSOCIATION (MAY 1, 2023)

ELECTRONIC TRANSACTION ASSOCIATION
1620 L Street NW, Suite 1020
Washington, DC 20036
202.828.2635
electran.org

The Honorable Dave Joyce
House of Representatives
Washington, DC 20515

The Honorable Steve Daines
U.S. Senate
Washington, DC 20510

The Honorable Earl Blumenauer
House of Representatives
Washington, DC 20515

The Honorable Jeff Merkley
U.S. Senate
Washington, DC 20510

Dear Representatives Joyce and Blumenauer and Senators Daines and Merkley:

On behalf of the members of the Electronic Transactions Association (ETA), I am writing in support of the bipartisan Secure and Fair Enforcement Banking Act of 2021 (SAFE Banking Act). We appreciate your leadership on addressing the conflict between federal and state laws to allow states that have legalized med-

ical or recreational use of cannabis to bring that commerce into the banking system.

ETA is the world's leading advocacy and trade association for the payments industry. Our members span the breadth of significant payments and fintech companies, from the largest incumbent players to the emerging disruptors in the U.S and in more than a dozen countries around the world. ETA members make commerce possible by processing approximately $44 trillion annually in purchases worldwide and deploying payments innovation to merchants and consumers.

Forty-seven states, four U.S. territories, and the District of Columbia have legalized some form of recreational or medical cannabis, including CBD. Yet current law restricts legitimate licensed cannabis businesses from accessing financial industry services and products, resulting in businesses operating in all cash — posing a serious public safety risk for communities.

The conflict between state and federal laws forces businesses to operate on a cash-only basis and has created significant legal and compliance concerns for financial institutions that wish to provide banking services to cannabis related businesses in states where it is currently legal. The SAFE Banking Act would allow legitimate cannabis businesses to access the safety and security of the banking ecosystem in states that have legalized cannabis. Having access to the banking system is an important step toward enabling financial services for cannabis-related businesses and makes it easier for businesses to track revenues for taxation purposes, decreases a public safety threat as cash intensive businesses are often

targets for criminal activity, and allows proper tracking of finances for BSA/AML compliance.

ETA takes no position on the legalization or decriminalizing cannabis at the state or federal level for medicinal or recreational uses. However, ETA does support legislation that would resolve the conflict between state and federal laws to allow financial institutions to serve cannabis related businesses in states where these businesses are legal under state law.

ETA is pleased to support the SAFE Banking and urges Congress to quickly consider this important issue. If you have any questions, please contact me or ETA's Executive Vice President, Scott Talbott at stalbott@electran.org.

Sincerely,

/s/ Jeff Patchen
Director of Government Affairs
Electronic Transactions Association

SUPPORT LETTER FROM THE INDEPENDENT COMMUNITY BANKERS OF AMERICA (APRIL 28, 2023)

INDEPENDENT COMMUNITY BANKERS OF AMERICA
Derek B. Williams, *Chairman*
Lucas White, *Chairman-Elect*
Jock E. Hopkins, *Vice Chairman*
Sarah Getzlaff, *Treasurer*
James H. Sills, III, *Secretary*
Brad M. Bolton, *Immediate Past Chairman*
Rebeca Romero Rainey, *President and CEO*

The Honorable Jeff Merkley
U.S. Senate
Washington, D.C. 20510

The Honorable Steve Daines
U.S. Senate
Washington, D.C. 20510

Dear Senator Merkley and Senator Daines:

On behalf of the Independent Community Bankers of America (ICBA) and the nearly 50,000 locations we represent, I write to express our strong support for the SAFE Banking Act (S. 1323). Your legislation would resolve a conflict between state and federal law and address a critical public safety concern. We are pleased that it enjoys strong, bipartisan support.

S. 1323 would create a safe harbor from federal sanctions for financial institutions that serve cannabis-related businesses (CRBs), as well as their numerous

service providers, in states and other jurisdictions where cannabis is legal. ICBA polling conducted by Morning Consult found that two-thirds of voters support cannabis banking access.

S. 1323 is essential for the ongoing ability of community banks to effectively serve their communities. It would also alleviate the significant threat to public safety posed by cash intensive CRBs effectively being shut out of the banking industry. According to the same poll referenced above, 71 percent of voters agree that allowing cannabis-related businesses to access the banking system would help reduce the risk of robbery and assault at CRBs — showing the importance of the policy to public safety.

Thank you again for introducing this important legislation. We look forward to working with you to advance it into law.

Sincerely

/s/
Rebeca Romero Rainey
President & CEO

SUPPORT LETTER FROM THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (MAY 10, 2023)

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Sean M. O'Brien
General President
25 Louisiana Avenue, NW
Washington, DC 20001

Fred E. Zuckerman
General Secretary-Treasurer
202-624-6800
www.teamster.org

VIA Electronic Transmission
United States Senate
Washington, D.C. 20510

Senator Sherrod Brown — Chairman
Senate Committee on Banking,
Housing and Urban Affairs

Senator Tim Scott — Ranking Member
Senate Committee on Banking
Housing and Urban Affairs

Dear Chairman Brown and Ranking Member Scott,

On behalf of the 1.2 million members of the International Brotherhood of Teamsters, I would like to submit a statement for the record in support of S. 1323, the Secure and Fair Enforcement (SAFE) Banking

Act. The Teamsters represent thousands of cannabis workers in retail and transportation. This legislation would drastically improve workplace safety conditions by allowing banks and other financial institutions to provide services to legitimate cannabis-related businesses.

When businesses can't operate normally by accessing the traditional financial infrastructure of this country, it poses a risk not just to the business but to their employees. Cannabis workers, many of whom are Teamster members, must operate in an all-cash environment which puts them and their customers at risk to violent theft and robbery. Workers themselves often find it difficult to secure mortgages or access to basic banking, like a checking account because financial institutions are overly and unfairly cautious about the source of their income.

There are thousands working in the cultivation, distribution, and sale of cannabis for both personal and recreational use in 38 states. These workers deserve a safe workplace that provides meaningful wages, healthcare, and access to retirement security. Unfortunately, many of these workers cannot engage in a meaningful partnership with their employer, in part because of how the cannabis industry is forced to operate in the financial dark.

Teamster members at three Chicago, IL dispensaries for example were forced to walk off the job twice, earlier this year. The employer, Green Thumb Industries engaged in multiple Unfair Labor Practice (ULP) violations, and workers were forced to go on strike. As Congress works to establish the necessary guardrails around cannabis legalization, the labor and safety interests of workers in this industry must

be considered paramount. Passing SAFE Banking is a necessary part of this process and will improve worker safety conditions while also easing operational burdens for employers at the same time.

The Teamsters are committed to helping the cannabis industry grow through the passage of the SAFE Banking Act, which will make sure these companies prioritize the care and safety of their workers. I thank you for the opportunity to submit this formal statement for this hearing: Examining Cannabis Banking Challenges of Small Businesses and Workers.

Sincerely,

/s/ Sean M. O'Brien
General President
International Brotherhood of Teamsters

SUPPORT LETTER FROM VARIOUS INSURANCE ASSOCIATIONS (MAY 9, 2023)

Dear Senators Merkley and Daines
and Representatives Joyce and Blumenauer:

We, the undersigned U.S. trade associations, write to express support for the SAFE Banking Act of 2023. Collectively, we represent a majority of the companies, agents, and brokers offering property-casualty, life, title, and reinsurance (collectively, "insurers") in the U.S. We appreciate your leadership in seeking needed clarity for insurance transactions related to marijuana businesses that are otherwise permissible under state law.

The insurance industry is potentially exposed to liability arising from the differences of the legal treatment of marijuana and marijuana products under federal and state law and regulation at the state level. However, with the inclusion of key language from the Clarifying Law Around Insurance of Marijuana Act, sponsored by Senators Menendez, Paul, Tester, Daines, and Merkley and Representatives Velazquez and Davidson, the SAFE Banking Act's safe harbor provisions would prevent federal criminal prosecution of and civil liability for agents, brokers, and insurers, their officers, directors or employees when engaging in the business of insurance in states that have legalized marijuana in some form.

By resolving the legal uncertainty presented by the dueling state and federal treatment of marijuana, the insurance industry can serve both State-sanctioned marijuana businesses and other commercial and personal lines consumers who may have a direct or indirect relationship to State-legalized marijuana, and still be in compliance with the law. Insurers must also continue to satisfy all applicable state statutory or regulatory requirements, such as those pertaining to consumer protections and claims payments.

We greatly appreciate your leadership, and we look forward to continuing to work with you and Congress to ensure our industry is not caught between conflicting obligations under federal and state law.

Sincerely,

American Land Title Association (ALTA)

American Council of Life Insurers (ACLI)

American Property Casualty
Insurance Association (APCIA)

The Council of Insurance Agents & Brokers (CIAB)

Independent Insurance
Agents & Brokers of America (IIABA)

National Association of
Mutual Insurance Companies (NAMIC)

National Association of
Professional Insurance Agents (PIA)

Reinsurance Association of America (RAA)

Wholesale & Specialty Insurance Association (WSIA)

SUPPORT LETTER FROM THE AMERICAN BANKERS ASSOCIATION (MAY 3, 2023)

AMERICAN BANKERS ASSOCIATION
Kirsten Sutton
Executive Vice President
Congressional Relations & Legislative Affairs
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The Honorable Charles Schumer
Senate Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Kevin McCarthy
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

The Honorable Mitch McConnell
Senate Minority Leader
United States Senate
Washington, D.C. 20510

The Honorable Hakeem Jeffries
House Minority Leader
United States House of Representatives
Washington, D.C. 20515

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

The Honorable Patrick McHenry
Chairman
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

The Honorable Tim Scott
Ranking Member
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

Dear Speaker McCarthy, Majority Leader Schumer, Minority Leaders McConnell and Jeffries, Chairmen Brown and McHenry, and Ranking Members Scott and Waters:

On behalf of the American Bankers Association (ABA), I am writing to express our strong support for H.R. 2891 /S. 1323, the Secure and Fair Enforcement Banking Act (SAFE Banking Act) of 2023 sponsored by Senators Jeff Merkley (D-OR) and Steve Daines (R-MT) and Representatives Dave Joyce (R-OH-14) and Earl Blumenauer (D-OR-03). This important legislation

would help bring certainty to an important issue that has become a challenge for so many of our nation's communities and the banks that serve them.

The SAFE Banking Act is an urgently needed, and widely supported, bipartisan solution that will allow banks to handle not only the proceeds from both state-licensed cannabis businesses and the ancillary businesses—accountants, skilled trades, landlords, law firms, and other service providers—those businesses rely upon to operate, but also accept deposits from and make loans to employees of those businesses. Federal law currently prevents banks from banking cannabis businesses and these ancillary businesses, without fear of federal sanctions. As a result, this industry is operating primarily in cash, which is not only a public safety risk, but also undermines the ability for regulators, tax collectors, and law enforcement to monitor the industry effectively.

Financial institutions must adhere to stringent anti-money laundering and counter-terrorist financing reporting requirements, so bringing this industry into the regulated banking system will provide much-needed visibility into its financial activity. Processing transactions through bank accounts instead of in cash would ensure that regulators and law enforcement have the necessary tools to identify bad actors and also enhance tax collection and financial transparency in the thirty-seven states where cannabis is now legal at the state level.

While ABA does not take a position on the legalization of cannabis, our member banks find themselves in conflict between state and federal law, with local communities encouraging them to bank cannabis businesses and federal law prohibiting it.

The Controlled Substances Act (21 U.S.C. § 801 et seq.) classifies cannabis as an illegal drug and prohibits its use for any purpose. For banks, that means that all proceeds generated by a cannabis-related or ancillary business, even when operating in compliance with state law, are unlawful under federal law, and so any attempt to conduct a financial transaction with that money (including simply accepting a deposit) can be considered money-laundering. Thus, banking cannabis businesses, or any of the non-cannabis focused vendors or businesses that serve them, places banks in the untenable position of dealing with these state-authorized businesses at significant risk of regulatory sanction, loss of access to the payments system or even the potential loss of the bank charter itself.

Currently, the only directive available to financial institutions in connection with cannabis-related accounts comes from guidance issued by the Financial Crimes Enforcement Network (FinCEN) in 2014. That guidance, which references a now-rescinded memorandum from the U.S. Department of Justice (the "Cole Memo"), describes how financial institutions can report cannabis-related business activity consistent with their anti-money laundering obligations. However, it merely creates a system for reporting activity that is illegal under federal law but otherwise legal under state law and does not create a safe harbor or otherwise modify federal law to protect banks from criminal and civil liability for providing financial services to state-sanctioned cannabis businesses.

The bipartisan, bicameral, SAFE Banking Act would provide that legal and regulatory clarity for banks and help facilitate access to financial services for state-sanctioned cannabis businesses while strength-

ening the ability of financial institutions and law enforcement to detect unlawful activity.

The bill specifies that proceeds from a state-sanctioned cannabis business would not be considered unlawful under federal money laundering statutes or any other federal law, which is necessary to allow the provision of financial services to state-sanctioned cannabis businesses as well as any ancillary businesses that derive some portion of their income from those businesses. The bill would also direct FinCEN, and the federal banking regulators through the Federal Financial Institutions Examination Council, to issue guidance and exam procedures for banks doing business with state-sanctioned cannabis businesses. Explicit, consistent direction from federal financial regulators will provide needed clarity for banks and help them better evaluate the risks and supervisory expectations for cannabis-related customers.

This legislation has garnered strong bipartisan support in both the House and Senate, and ABA urges all Members of Congress to please join in cosponsoring the SAFE Banking Act. ABA also requests swift consideration of these bills in both the Senate Banking and House Financial Services Committees, through regular order, and further advocates for swift passage by Congress.

Sincerely,

/s/ Kirsten Sutton

cc: Members of the U.S. Senate
Members of the U.S. House of Representatives