

Tentative Rulings for October 7, 2020
Departments 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG03709 *Sameer v. Khera* (Dept. 501)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

18CECG00417 *Villarreal v. Wildwood Express* is continued to Thursday, October 22, 2020 (Dept. 501)

20CECG01299 *Mooradian v. State of California Department of Transportation* is continued to Wednesday, October 28, 2020 (Dept. 503)

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Tentative Rulings for Department 403

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Tentative Rulings for Department 501

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(20)

Tentative Ruling

Re: *Green v. Doe*
Superior Court Case No. 20CECG00048

Hearing Date: October 7, 2020 (Dept. 501)

Motion: by Plaintiff for Order Allowing Plaintiff to File his Certificate of Merit Under Seal and for In Camera Review of Same

Tentative Ruling:

To grant and sign the proposed order. (Code Civ. Proc. § 340.1.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DTT on 10/2/2020.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Deli Delicious Franchising, Inc. v. Namdarian***
Superior Court Case No. 20CECG02037

Hearing Date: October 7, 2020 (Dept. 501)

Motion: by Plaintiff Deli Delicious Franchising, Inc., For Preliminary Injunction Against Defendants Sam Siamak Namdarian and Akoo, Inc., and Request for Attorney's Fees and Costs

Tentative Ruling:

To strike, *sua sponte*, all reply papers filed by plaintiff on September 30, 2020, and to order the motion off calendar, without prejudice to the motion being re-calendared. The clerk is ordered to designate the reply papers as stricken in the court's online case management system, Odyssey.

Explanation:

No ruling on the merits can be made at this juncture. Defendants have attempted to oppose this motion, but the clerk correctly rejected their attempt to file their supporting declarations "under seal" without first obtaining a court order. Without the declarations, the court cannot consider the opposition.

Plaintiffs did the same with their reply papers, with all five documents bearing the designation "FILED UNDER SEAL," also without first obtaining a court order. The clerk did not reject this filing as it should have, so instead the court has stricken these documents.

The parties must follow the requirements of California Rules of Court, rules 2.550 and 2.551, and file *motions to seal*, and make the required showing of an overriding interest in having documents sealed which overcomes the right of the public access to the court's record, and that the proposed sealing is narrowly tailored, and that there is no less restrictive means than sealing to achieve the claimed overriding interest. The court will not accommodate the parties' attempt to circumvent the Rules of Court.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DTT on 10/2/2020.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***BRE SSP Property Owner v. Donaghy***
Superior Court Case No. 18CECG00080

Hearing Date: October 7, 2020 (Dept. 501)

Motion: by Plaintiff BRE SSP for Attorney's Fees

Tentative Ruling:

To grant plaintiff BRE SSP's motion for attorney's fees in the amount of \$110,160. (Civ. Code § 1717; Code Civ. Proc., §§ 1032, 1033.5.)

Explanation:

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

Also, under Code of Civil Procedure section 1033.5, attorney's fees are allowable as an item of costs when authorized by contract. (Code Civ. Proc. § 1033.5, subd. (a)(10)(A).)

The contract at issue in this case contained a clause that provided that the prevailing party in any litigation regarding breach of the agreement would be entitled to recover its attorney's fees and costs. (Ex. A to First Amended Complaint, p. 16, ¶ 18.) The court has already determined that plaintiff is the prevailing party on the contract claim, and that plaintiff is entitled to recover its costs. (See Statement of Decision, 11:13-15.) Therefore, plaintiff is also entitled to its reasonable attorney's fees incurred in litigating any contract claims.

"[T]he trial court has broad authority to determine the amount of a reasonable fee. As we have explained: 'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong' - meaning that it abused its discretion.'" (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095, internal citations omitted.)

"As the Court of Appeal herein observed, the fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' The reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in

order to fix the fee at the fair market value for the legal services provided. Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*Ibid*, internal citations omitted.)

"It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court The value of legal services performed in a case is a matter in which the trial court has its own expertise. The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-624, internal citations omitted.)

Plaintiff's counsel has requested \$110,160 in fees based on 244.8 hours of time billed at an hourly rate of \$450. It does appear that counsel's hourly rate is reasonable, as it is consistent with the rates allowed in other Fresno Superior Court actions, and it is also considerably less than the rate that plaintiff's counsel actually billed plaintiff. In addition, defendants have not taken issue with the reasonableness of the requested rate. Therefore, the court intends to use \$450 as the reasonable rate for computing fees.

Defendants contend that plaintiff's counsel billed an excessive number of hours on the case and that defense counsel billed about half as many hours on the same tasks, so the court should reduce the plaintiff's fees by approximately 50 percent. However, it appears that plaintiff's counsel incurred a large number of hours of work on the case due in large part to defendants' decision to litigate the case very aggressively. While defendants claim that the case was fairly simple and only required minimal discovery and a short two-day bench trial, defendants also chose to file two demurrers, a cross-complaint, a motion for summary judgment, a petition for writ of mandate to the Court of Appeal, and a motion for judgment on the pleadings. Plaintiff was required to defend against these motions and pleadings. Plaintiff was also successful in moving to strike some of defendants' cross-claims under the anti-SLAPP statute.

It was defendants' own litigious conduct that led to the high number of hours incurred by plaintiff's counsel in this case. When a party engages in aggressive litigation tactics, it cannot complain that its opponent's fee award has increased in response. A defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response. (*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 304.) Simply put, parties "cannot litigate tenaciously and then be heard to complain about the time necessarily spent ... in response." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 638-639.) Since plaintiff was forced to incur fees to defend against multiple demurrers, a cross-complaint, a motion for summary judgment, a petition for writ of mandate to the Court of Appeal, and a motion for judgment on the pleadings all filed by defendants, defendants cannot now complain that plaintiff incurred a substantial amount of fees.

It also appears that the amount of hours incurred by plaintiff's counsel was reasonable given the nature of the litigation, its difficulty, the amount involved, the skill

required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case. While the case involved a relatively straightforward legal issue, namely the interpretation and enforceability of the restrictive use covenant in the real estate purchase agreement, defendant chose to mount a vigorous defense against the complaint by filing demurrers, a motion for summary judgment, and a motion for judgment on the pleadings raising statute of limitations and waiver issues that plaintiff needed to address. Plaintiff also had to spend time on a special motion to strike portions of the cross-complaint. The amounts of time spent on these tasks appear to have been reasonable and warranted under the circumstances. Plaintiff's counsel also spent a reasonable amount of time preparing for trial, as well as writing post-trial briefs. Furthermore, plaintiff's counsel is not claiming any time for the other timekeepers at his firm, or billing for travel time from Los Angeles to Fresno.

Defendants contend that plaintiff's counsel did not need to spend as much time as he did on opposing the demurrers, opposing the summary judgment motion, preparing for the trial and the post-trial briefs, and so forth, contending that defense counsel only spent about half as much on the same tasks. However, defense counsel never states how much time he actually spent on the tasks he mentions in his declaration, or what his own billing rate is. If he bills at a substantially lower hourly rate than plaintiff's counsel, then it would not be surprising that his billings are lower. In any event, the fact that defense counsel ultimately billed less than plaintiff's counsel does not establish that plaintiff's billings are unreasonably high, especially in light of the fact that plaintiff ultimately prevailed on its claims. As a result, defense counsel has not shown that plaintiff's requested fees are unreasonably high.

For the foregoing reasons, the court intends to grant plaintiff's motion for attorney's fees, and award the full amount of fees requested.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DTT on 10/5/2020.
(Judge's initials) (Date)

Tentative Rulings for Department 502

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(03)

Tentative Ruling

Re: ***Killian v. Mann***
Superior Court Case No. 19CECG03149

Hearing Date: October 7, 2020 (Dept. 502)

Motion: By Plaintiff Isiah Killian for an Order Permitting Pre-Trial
Discovery of Defendant Alfred Mann's Financial Condition
under Civil Code Section 3295(c)

Tentative Ruling:

To deny plaintiff's motion for pretrial discovery of defendant Alfred Mann's financial condition pursuant to Civil Code section 3295, subdivision (c).

Explanation:

Under Civil Code section 3295, subdivision (c), "No pretrial discovery by the plaintiff shall be permitted with respect to the evidence [of defendant's financial condition] unless the court enters an order permitting such discovery pursuant to this subdivision." (Civ. Code, § 3295, subd. (c).)

"Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial." (Civ. Code, § 3295, subd. (c).)

"Thus, the statute makes it clear that a party desiring discovery of a defendant's financial information must bring a motion in order to obtain such information. Then, the trial court must determine whether the plaintiff has established a 'substantial probability' of prevailing on the claim for punitive damages. 'In this context, a "substantial probability" of prevailing on a claim for punitive damages means that it is "very likely" that the plaintiff will prevail on such a claim or there is a " 'strong likelihood" ' that the plaintiff will prevail on such a claim.'" (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 283, quoting *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 120.)

However, the trial court may, in its discretion, order defendant to produce its financial records after trial and after a determination that defendant is liable for punitive damages. (*Id.* at p. 284, citing *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 609.)

In order to prevail on a claim for punitive damages, plaintiff must prove by clear and convincing evidence that defendant was guilty of fraud, oppression, or malice.

(Civil Code § 3294, subd. (a).) "As used in this section, the following definitions shall apply: [¶] (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(1)-(3).)

"To prove that a tort was maliciously perpetrated it is not necessary to establish a specific intent against the person wronged. Oppression or malice supplying such intent may be established by the conduct of the perpetrator." (*Farmy v. College Housing, Inc.* (1975) 48 Cal.App.3d 166, 174.) "In California, malice is the basis for assessing punitive damages for nonintentional conduct; that is, acts performed without intent to harm. Nonintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, or should know, it is highly probable that harm will result." (*Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 381, internal citations omitted.)

Here, plaintiff contends that he has a substantial probability of prevailing on his claim for punitive damages against defendant, as the evidence suggests that defendant intentionally drove in a reckless and aggressive manner and caused plaintiff to swerve and crash his truck, resulting in severe injuries. (Exhibits A to H to Watters decl.)

According to the testimony of multiple witnesses, defendant drove his Land Rover at a high rate of speed that was well over the speed limit, passed other vehicles in an aggressive manner, followed extremely closely behind other vehicles, wove in and out of traffic, and cut off several vehicles after passing them. Defendant admitted that he was driving on a suspended license, although he denied being aware of the fact that his license was suspended at the time of the incident. He claimed that he saw plaintiff driving erratically, passing other cars dangerously at a high rate of speed, and cutting off other cars when he passed them. He testified that he was driving very fast in an attempt to catch plaintiff's vehicle and record his license plate, although he further admitted that neither he nor his passenger actually recorded the plaintiff's plate.

Defendant drove very close to the rear of plaintiff's truck, then tried to pass him on the right in the slow lane. He made a "thumbs down" gesture to plaintiff as he was driving alongside him. He then attempted to get in front of plaintiff's vehicle, which made other drivers believe that the vehicles were trying to race each other, and that something bad might happen. Defendant eventually passed plaintiff's truck. According to one witness, defendant then cut in front of plaintiff's truck very close at approximately 80 or 85 miles per hour. Plaintiff claims that defendant's sudden move made him swerve and brake to avoid a collision, which caused him to lose control of his truck and crash. However, defendant denies that he cut in front of plaintiff's truck, and testified that he never left the number two lane before plaintiff crashed. There is no dispute that there was no contact between the two vehicles. In any event, plaintiff's truck crashed and rolled, causing him serious injuries, including the permanent loss of use of his left arm and a traumatic brain injury.

Defendant testified that he stopped and went back to the accident scene immediately after the crash, but did not get out to check on plaintiff. His passenger testified that she got out and checked on plaintiff, but did not stay at the scene. Defendant claims that he and his passenger stayed at the scene for at least five minutes and called 911 to report the accident. However, they admit that they left the scene without speaking to first responders or the California Highway Patrol. The other witnesses reported that defendant stopped but did not get out to check on plaintiff, and left the scene quickly. Defendant then brought his passenger back to her vehicle in Prather. When he returned to his own home, he took a different route that avoided the accident scene. He stated that the reason he did not take the same route back home was to avoid the traffic from the accident.

While the evidence described above indicates that defendant may have driven aggressively and perhaps even recklessly, plaintiff has not met his burden of showing that he has a substantial probability of prevailing on his punitive damage claim. It does not appear that there is a strong likelihood that a jury would find that defendant's conduct qualifies as the type of malicious or oppressive behavior that is required to support the imposition of punitive damages. The evidence does not indicate that defendant intentionally caused plaintiff to crash or ran him off the road. Instead, defendant drove at high speed behind him and then tried to pass him in the right hand lane. The two vehicles never made contact. There is conflicting testimony with regard to whether defendant cut in front of plaintiff and thus caused the crash, and it is unclear whether a jury would believe defendant's version of events or the testimony of the other witness who claims to have seen him cut plaintiff off. If defendant did not cut plaintiff off, then it is questionable whether he has any liability for the accident, much less that he engaged in the type of intentional conduct that would warrant imposing punitive damages.

Also, it is extremely rare for courts to permit punitive damages in cases of negligent driving that do not involve an intoxicated driver. "[O]rdinarily, routine negligent or even reckless disobedience of traffic laws would not justify an award of punitive damages." (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899-900.) Here, although there may be aggravating circumstances beyond ordinary negligent driving, plaintiff has not shown that there is a strong likelihood that he will prevail on his punitive damage claim based on the evidence presented. Therefore, the court intends to deny plaintiff's motion for pre-trial discovery of defendant's financial condition.

However, the court notes that this determination is not intended to be a determination of the merits of the plaintiff's punitive damage claim. (Civil Code § 3295, subd. (c).) Also, the court's decision here will not bar plaintiff from seeking discovery of defendant's financial condition after trial if the jury finds that defendant is liable and punitive damages are warranted. (*I-CA Enterprises, Inc. v. Palram Americas, Inc.*, *supra*, 235 Cal.App.4th at p. 284.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: RTM on 9/28/20.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Valenzuela v. Yang***
Superior Court Case No. 20CECG00074

Hearing Date: October 7, 2020 (Dept. 502)

Motion: By Plaintiff for Leave to File an Amended Complaint

Tentative Ruling:

To deny.

Explanation:

A motion to amend is directed to the sound discretion of the trial court. (Code of Civ. Proc., §§ 473 subd. (a)(1) and 576.) The policy favoring amendment is sufficiently strong that denial of leave to amend is considered rarely justified. (See *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296 [courts “bound to apply” policy of great liberality in permitting amendments to complaint at any stage of proceedings, up to and including trial]; *Desny v. Wilder* (1956) 46 Cal.2d 715, 751 [“Great liberality is indulged in matters of amendment to the end that lawsuits may be determined upon their merits.”]; *Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366, 1380 [leave to amend to be liberally granted]; *Landis v. Superior Court* (1965) 232 Cal.App.2d 548, 554 [court should indulge in great liberality in permitting amendment so as not to deprive litigant of his/her day in court].) Briefly put, “it is a rare case in which a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.” (*Morgan v. Superior Court of Cal. In and For Los Angeles County* (1959) 172 Cal.App.2d 527, 530, citations and quotation marks omitted.)

However, amendment is generally permissible only where the defect can be cured. (*Grievess v. Superior Court* (1984) 157 Cal.App.3d 159, 168 [referring to Code of Civ. Proc., § 576.]) Moreover, it is not an abuse of discretion to deny leave to amend where the proposed amended complaint clearly fails to state a valid cause of action, such as where the statute of limitations bars the proposed claims against defendant. (*Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1773; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.) For example, “[Code of Civil Procedure] section 473 does not provide relief from such errors that result in the running of the applicable statute of limitations.” (*Life Savings Bank v. Wilhelm* (2000) 84 Cal.App.4th 174, 177.)

Additionally, “[i]n certain circumstances a party has been allowed to amend his complaint to add or substitute new plaintiffs after the statute of limitations has run.” (*Guenter v. Lomas & Nettleton Co., supra*, 140 Cal.App.3d 460, 467.) However, eligible circumstances generally arise from technical defects of an already named plaintiff or factors outside the control of counsel. (See *Bartolo v. Superior Court* (1975) 51 Cal.App.3d 526, 534 [substitution of plaintiff where “there was a technical defect in the plaintiff’s

status (an administrator for a deceased plaintiff; a stockholder in place of a corporation; etc.); a necessary party was joined; or a nominal plaintiff was removed and the real party in interest took his place.”]; see also *Dhuyvetter v. City of Fresno* (1980) 110 Cal.App.3d 659, 666 [class decertification after running of statute of limitations sufficient to allow former class members to be named as individual plaintiffs]; *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 722-723 [amendment to substitute plaintiffs after the running of the statute of limitations permissible in light of issuance of contemporaneous court opinion addressing applicable subject matter].)

Lastly, joinder under Code of Civil Procedure, section 378 is proper only if the request is made before the running of the statute of limitations. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 407 fn. 29; *Bartolo v. Superior Court, supra*, 51 Cal.App.3d 526, 529-530.)

Here, plaintiffs claim that prospective plaintiff Benilda Obina Diola was inadvertently omitted from the complaint. (Iles Decl. ¶¶2, 11.) Plaintiffs acknowledge that the applicable statute of limitations ran on January 9, 2020. (Iles Decl. ¶3.)

Amending a complaint to add a plaintiff after the running of the statute of limitations is only permissible under particular circumstances, generally substitutions to cure technical defects or precipitated by contemporaneous changes in law or precedent. (See *Guenter v. Lomas & Nettleton Co.* (1983) 140 Cal.App.3d 460, 467; *Bartolo v. Superior Court, supra*, 51 Cal.App.3d 526, 534; *Dhuyvetter v. City of Fresno, supra*, 110 Cal.App.3d 659, 666; *Jensen v. Royal Pools, supra*, 48 Cal.App.3d 717, 722-723.)

The circumstances generally allowing for amendment are not present here because the basis for relief is counsel’s inadvertent omission of the prospective plaintiff. Errors resulting in the running of the statute of limitations are not a proper basis for relief under Code of Civil Procedure, section 473. (*Life Savings Bank v. Wilhelm, supra*, 84 Cal.App.4th 174, 177.) Furthermore, only curable defects are permissible for amendment under Code of Civil Procedure, section 576. (*Grieves, supra*, 157 Cal.App.3d 159, 168.) Essentially, “though a trial court has discretion to vacate the entry of a default or subsequent judgment, this discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief” (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.)

Similarly, relief under Code of Civil Procedure, section 378 is unavailable, again, due to the running of the applicable statute of limitations. (*Rodriguez, supra*, 12 Cal.3d 382, fn. 29.)

The authorities principally relied on by plaintiffs do not hold otherwise. Particularly, *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 Cal.2d 596, involved substitution of a fictitiously named defendant. (*Id.* at 600.) Furthermore, while there is evidence of the inadvertent omission, there is no evidence that defendant has quietly taken advantage of plaintiffs’ counsel’s mistake. (*Smith v. Los Angeles Bookbinders Union No. 63* (1955) 133 Cal.App.2d 486, disapproved on other grounds as stated in *MacLeod v. Tribune Publishing Co., Inc.* (1959) 52 Cal.2d 536, 551, [“The quiet speed of plaintiffs’ attorney in

seeking a default judgment without the knowledge of defendants' counsel is not to be commended."].)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: RTM **on** 10/5/20.
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Gonzales v. Bansal, et al.***
Superior Court Case no. 18CECG02044

Hearing Date: October 7, 2020 (Dept. 502)

Motions: Applications of Edward Gibbons and Kyle Seay to appear as counsel
pro hac vice

Tentative Ruling:

To deny without prejudice. (Cal. Rules of Court, rule 9.40(a)(b).)

Explanation:

No person is eligible to appear as counsel *pro hac vice* in the State of California if the person is regularly employed here; or is regularly engaged in substantial business, professional, or other activities in the State of California. (Cal. Rules of Court, rule 9.40(a)(2), (3).) Further, repeated appearances may constitute a cause for denial. (Id. at (b).

In the case at bench, the applications do not address whether Messrs. Gibbons and Seay are regularly employed in this state, whether they are regularly engaged in substantial business, etc., activities here, or whether they have appeared in California repeatedly. Accordingly, the applications are both denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: RTM on 10/6/20.
(Judge's initials) (Date)

Tentative Rulings for Department 503

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(24)

Tentative Ruling

Re: ***Giddings v. Fresno Community Hospital and Medical Center***
Superior Court Case No. 20CECG00951

Hearing Date: October 7, 2020 (Dept. 503)
In the event oral argument is timely requested, it will be heard on October 7, 2020, at 2:00 p.m., in Dept. 503.

Motion: By Defendant Fresno Community Hospital and Medical Center to Compel Arbitration and to Dismiss or Stay the Action Pending Arbitration

Tentative Ruling:

To grant the motion to compel arbitration and to stay the action pending arbitration. However, the court severs the confidentiality provision found in paragraph 6 of the Dispute Resolution Agreement, with the remaining provisions continuing in full force and effect. To overrule all of defendant's evidentiary objections.

Explanation:

When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine: (1) whether the agreement exists, and (2) if any defense to its enforcement is raised, whether it is enforceable. The party seeking to compel arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. The party claiming a defense bears the same burden as to the defense. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.)

Defendant has shown by a preponderance of the evidence that an agreement to arbitrate exists. The court finds that plaintiff accepted the terms of the Dispute Resolution Agreement ("DRA") by reviewing and electronically confirming his receipt of the employee handbook and DRA, continuing employment with defendant, and not taking steps to opt out of the DRA. Plaintiff's supporting declarations regarding his and other employees' feeling that they felt forced to sign the DRA are unavailing. The court does not find unconscionability in sufficient degree to warrant denying enforcement of the parties' agreement to arbitrate.

If the court finds as a matter of law that a contract or any portion of it was unconscionable at the time it was made, the court may refuse to enforce it, or may enforce the contract without the unconscionable provisions, or limit their application to avoid any unconscionable result. (Civ. Code, § 1670.5, subd. (a).) There are two prongs considered in this analysis: procedural unconscionability and substantive unconscionability. Both must be present for a court to exercise its discretion to refuse to enforce an arbitration agreement under the doctrine of unconscionability. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113 ("Armendariz"); *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197

Cal.App.4th 1146, 1158—even though contract may have been adhesive, it was enforceable because not substantively unconscionable; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1124 [accord].) But they need not be present in equal amounts; essentially a sliding scale is used, and where there is substantive unconscionability, less procedural unconscionability need be shown. (*Armendariz, supra*, at pp. 113-114.)

In the employment context specifically, the agreement must include the following five minimum requirements designed to provide necessary safeguards to protect unwaivable statutory rights where important public policies are implicated: (1) a neutral arbitrator; (2) adequate discovery; (3) a written, reasoned, opinion from the arbitrator; (4) identical types of relief as available in a judicial forum; and (5) that undue costs of arbitration will not be placed on the employee. (*Armendariz, supra*, 24 Cal.4th at p. 102 [FEHA claim]; *Mercurio v. Superior Court* (2002) 96 Cal.App.4th 167, 180 [FEHA; Lab. Code, §§ 230.8, 970]; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 382 [PAGA].) Plaintiff has alleged a Labor Code violation, so the *Armendariz* factors apply.

The DRA provides for a neutral arbitrator, gives the parties the right to conduct discovery, and requires a written opinion from the arbitrator. It provides that each party will bear his/its own attorney fees, but that the costs of arbitration will be borne by defendant. Paragraph 2 indicates that it applies to the same types of claims which could be brought in civil court, and paragraph 6 allows the arbitrator to award any remedy a party would be entitled to under applicable law. Thus, all the *Armendariz* factors are met.

Procedural unconscionability addresses the manner in which the contract was negotiated and the parties' circumstances at that time, and focuses on the factors of oppression or surprise. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1327; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 113.) Oppression "arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party." (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) "Surprise" involves the extent to which the supposedly agreed-upon terms are buried in an overly complex form; it deals with "the disappointed reasonable expectations of the weaker party." (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406.)

While here the court agrees that plaintiff had virtually no choice about entering into the DRA, this provides, at most, a small amount of procedural unconscionability, since he was clearly given the right and opportunity to opt out of the agreement, which he was "forced" to acknowledge at the same time he electronically signed the DRA. The opt-out paragraph in the agreement was made conspicuous by the first sentence of that paragraph stating, in bold lettering, "**Your Right to Opt Out.**" It was plainly worded, with little "legalese." It specified that plaintiff had 30 days to exercise the right to opt out, that he could either pick up an opt-out form from Human Resources ("HR"), or just mail to corporate headquarters a signed and dated statement that he was opting out, which was required to include his name and ID number.

Thus, even if defendant's procedure virtually forces its employees to enter into the DRA, the employees are clearly given the right to opt out, are clearly told about that

right, are given a reasonable amount of time to exercise that right, and can do so without ever stepping into the HR Department, since one of the two ways to opt out was to simply send a written statement to that effect to corporate headquarters. The employees are also told there will be no negative consequences from opting out. Thus, despite the manner of opting *in*, this is not a “take-it-or-leave-it” proposition. (*Davis v. O’Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1073 [“[I]f an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable.”].) The procedural barrier to opting out was low, and the window of time given to exercise the opt-out right gave the employee sufficient time to read the agreement, and obtain independent legal advice concerning it, if he wished. There was no need (as plaintiff’s supporting declarations all intimate) to interrupt the testing process and walk over to HR to fill out the opt-out form. Further, the “busyness of work” is not a sufficient basis to find defendant’s requirement for the employee to give written notice of opting out to be found unconscionable, where the short opt-out statement could have been written very quickly during off-hours and simply placed in the mail. No procedural unconscionability exists when the totality of circumstances are considered.

Substantive unconscionability exists if the terms of the agreement are overly harsh or one-sided, shock the conscience, are unduly oppressive, or are unreasonably favorable to the party seeking to compel arbitration. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 909-910.) To find substantive unconscionability, the court must find a *significant* degree of unfairness. A simple “bad bargain” does not qualify. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244-1245.)

In this case, the court finds that the confidentiality provision is sufficiently unconscionable to address. This sentence reads: “Except as may be permitted or required by law, as determined by the arbitrator, neither party nor the arbitrator may disclose the existence, content or results of any arbitration handled under this agreement without the prior written consent of all parties.” In *Davis v. O’Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1078, the court found that an arbitration agreement with a similar provision unfairly favored the employer because it would prevent the employee from contacting other employees to assist in arbitrating the claim (for instance, to determine if they had been subjected to the same conduct), and thus it would “handicap if not stifle” the employee’s ability to conduct discovery.

However, the court has discretion as to whether to sever an unconscionable provision or refuse to enforce the entire agreement. (Civ. Code, § 1670.5; *Armendariz, supra*, 24 Cal.4th at p. 114.) Furthermore, the last sentence of paragraph 6 of the DRA has a severability provision, providing that any provision found to be unenforceable can be severed, with the remaining terms to continue in effect. Severing the confidentiality provision is appropriate here.

Finally, the court acknowledges plaintiff’s request that the court strike the reply brief, if one were filed, but it denies that request since plaintiff is incorrect. Even though defendant correctly cited the arbitration statutes for the standards to use in ruling on its motion, defendant filed a *motion* and not a *petition* to arbitrate. Although this is often confused, a *petition* to compel arbitration is for use where no civil complaint has yet been filed, and the defendant’s request for an order compelling arbitration is the first pleading

