**Tentative Rulings for February 3, 2026**
**Department 403**

**For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)**

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**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).)** ***The above rule also applies to cases listed in this "must appear" section.***

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

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 403

Begin at the next page

(03)

**Tentative Ruling**

Re: ***Zupancic v. Gold***
Case No. 24CECG04902

Hearing Date: February 3, 2026 (Dept. 403)

Motion: Plaintiff's Motion for Summary Adjudication

**Tentative Ruling:**

To deny plaintiff's motion for summary adjudication.

**Explanation:**

Plaintiff moves for summary adjudication of the issue of whether defendant Paige Gold had a duty to argue in opposition to Stephen Labiak's motion for summary judgment that Labiak's representation of plaintiff extended until at least December 7, 2018. Plaintiff contends that, as her attorney, Gold had a legal and ethical duty to protect her interests in her case against Labiak (*Zupancic v. Labiak*, Fresno Superior Court case number 19CECG04425). In that case, Labiak successfully moved for summary judgment on the ground that plaintiff failed to file her complaint against him within the one-year statute of limitation for legal malpractice actions. Plaintiff argues that, that if Gold had made the argument that Labiak's representation did not end until December 7, 2018, the court would have found that plaintiff filed her action against Labiak less than a year after the representation ended and thus the statute of limitations had not run on plaintiff's claim.

Notably, plaintiff does not seek to adjudicate the issue of whether defendant actually breached her duty by failing to make the argument, or whether the breach caused her any damages. She only seeks to adjudicate the issue of whether defendant had the duty to make the argument that the representation continued until at least December 7, 2018.

Generally, "[a]n attorney is required to perform any service for which he has been hired with 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' Furthermore, 'it is an attorney's duty to "protect his client in every possible way," and it is a violation of that duty for the attorney to "assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances." The attorney is "precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interest."' An attorney's failure to perform in accordance with his duty is negligence." (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1143, citations omitted.) Moreover, "[a]n attorney's duty, the breach of which amounts to negligence, is not limited to his failure to use the *skill* required of lawyers. Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances." (*Id.* at p. 1147, italics in original.)

Attorney malpractice is a type of negligence that "consists of the failure of an attorney to 'use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.'" (*Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1034, citations omitted.)

Here, plaintiff does not move for summary adjudication of the issue of whether Gold had a duty to use skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess when she represented plaintiff in her case against Labiak. It is clear that Gold had such a duty, as there is no dispute that she was retained to represent plaintiff in the underlying litigation against Labiak. Nor does plaintiff seek adjudication of the issue of whether Gold had a duty to protect her interests in all ethical ways and in all circumstances. Again, there is no dispute that Gold had such a duty as plaintiff's attorney.

Instead, plaintiff seeks to adjudicate the issue of whether Gold had a duty to raise a very specific argument, namely that Labiak's representation of plaintiff in the original action did not end until December 7, 2018, when he met with plaintiff for the last time to give her the settlement check. Plaintiff claims that she urged Gold to argue that Labiak had given her legal advice at the last meeting, and alleges that she told Gold exactly what happened during the meeting. (Zupancic decl., ¶ 5.) She contends that, if Gold had made the argument as she asked, the trial court would not have granted Labiak's motion, as it would have found that the statute had not yet run on her claim against him.

However, while an attorney has a duty to diligently and skillfully represent their client, plaintiff has not cited to any authorities stating that an attorney has a duty to make a specific argument that a client urges them to make. In fact, even if the clients urges them to do so, attorneys are ethically barred from raising arguments or defenses that are not supported by existing law, or supported by a good faith argument for an extension, modification, or reversal of existing law. (Cal. Rules of Professional Conduct, Rule 3.1(a)(2).) Lawyers are also ethically barred from asserting a position in litigation without probable cause for the purpose of harassing or injuring any person. (Cal. Rules of Professional Conduct, Rule 3.1(a)(1).) In addition, lawyers are ethically forbidden from using "means that have no substantial purpose but to delay or prolong the proceeding or to cause needless expense." (Cal. Rules of Professional Conduct, Rule 3.2.) Furthermore, lawyers shall not knowingly making false statements of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. (Cal. Rules of Professional Conduct, Rule 3.3(a)(1).) Lawyers are also forbidden from offering evidence that the lawyer knows to be false. (Cal. Rules of Professional Conduct, Rule 3.3(a)(3).) "A lawyer may refuse to offer evidence, … that the lawyer reasonably believes is false." (*Ibid*.)

Thus, while Gold had a duty to diligently and skillfully represent plaintiff in the underlying case against Labiak, she did not have a duty to make any argument that plaintiff urged her to make, regardless of whether it was supported by the facts and the law. Gold contends that she did raise the argument in her written opposition to Labiak's summary judgment that there was a triable issue of fact as to whether the statute of limitations had run because Labiak continued to represent plaintiff up until he delivered the settlement check to her on December 7, 2018. A review of the opposition filed by plaintiff in the *Labiak* action confirms that Gold did indeed argue that there was a triable issue as to when the representation ended, and that the statute had not run because Labiak continued to represent plaintiff up to the time that he gave her the settlement

check. (Gold's Opposition, Exhibit A, Plaintiff's Opposition to Summary Judgment in case no. 19CECG04425, pp. 15:10-17:9.)

However, Gold alleges that she did not make the argument urged by plaintiff, that Labiak gave her legal advice on December 7, 2018, because she had no plausible basis for making the argument, and that it would have been unethical for her to waste the court's time by making an unsupported argument. (Gold decl., ¶¶ 7-9.) As discussed above, an attorney has an ethical duty not to take positions that are not supported by the facts or law, or for the purposes of delaying the proceedings or harassing the other party. (Cal. Rules of Professional Conduct, Rules 3.1-3.2.) Nor may an attorney knowingly present false evidence, even if their client insists that they do so. (Cal. Rules of Professional Conduct, Rule 3.3.) Here, Gold contends that it would have been a violation of her ethical duties to present the argument that plaintiff asked her to make, as it was not supported by the law or facts. If she is correct that the argument was unsupported by law or facts, then Gold did not have an ethical or legal duty to make it to the court. In fact, she had an ethical duty not to make the argument.

While plaintiff contends that she had a genuine belief that Labiak offered her legal advice on December 7, 2018, and that she told Gold about her belief when she was deciding whether to make the argument, she has not provided any specific facts showing that Labiak actually gave her any legal advice at their last meeting. Her declaration only asserts the legal conclusion that, "at the time of my meeting with Labiak on December 7, 2018 I believed, and still believe, that the meeting constituted a continuation of legal representation. Labiak gave me legal advice with respect to signing a second settlement agreement. I informed Gold of this prior to her filing an opposition to Attorney Labiak's motion for summary judgment…" (Zupancic decl., ¶ 8.) Yet plaintiff is not an attorney, and thus is not qualified to render an opinion as to whether Labiak's statements to her constituted legal advice. Her legal conclusion that Labiak gave her legal advice at their last meeting is not sufficient to show that the representation extended to December 7, 2018, or that Gold had a duty to make that argument to the court.

In her opposition, Gold admits that plaintiff asked her to make the argument that Labiak's representation continued to December 7, 2018, because his settlement agreement discussion had constituted legal advice. (Gold decl., ¶ 4.) However, Gold refused to make the argument, as she did not believe that making the argument would change the judge's mind. (*Ibid*.) She did not believe that there was any plausible basis for making the argument that plaintiff urged her to make, and that making the argument would only have wasted the court's time and potentially violated the Rules of Professional Conduct. (*Id*. at ¶¶ 7-9.)

Thus, there is at least a triable issue of material fact as to whether Gold owed plaintiff a duty to make the argument that she urged her to make. As an experienced attorney, Gold had discretion to decide whether to make the argument or not, and whether the argument had any chance of being successful or whether it was simply going to waste the court's and the parties' time. Attorneys are not required to make every argument their clients ask them to make, even if they are unsupported by the law or facts. If Gold was correct that the argument was unsupported, then she had a duty not to make the argument. Ultimately, the question of whether Gold had a duty to make the argument under the circumstances, and whether her decision not to make the

argument was reasonable, is an issue of fact that should be determined by the trier of fact. As a result, the court intends to deny the motion for summary adjudication.

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: lmg on 1-30-26.**
(Judge's initials) (Date)

(46)

**Tentative Ruling**

Re: ***Ernest McKinney v. Ameris Bank***
Superior Court Case No. 25CECG02832

Hearing Date: February 3, 2026 (Dept. 403)

Motion: Demurrer

**Tentative Ruling:**

To sustain the demurrer to each cause of action, without leave to amend. (Code Civ. Proc. § 430.10, subd. (e).)

**Explanation:**

Defendant Ameris Bank ("defendant") demurs to the First Amended Complaint ("FAC") filed by plaintiff Ernest R. McKinney ("plaintiff") on October 1, 2025, on the grounds that the FAC fails to state a cause of action, pursuant to Code of Civil Procedure section 430.10 subdivision (e).

In the FAC, plaintiff alleges three "causes of action" for Wrongful Foreclosure, Breach of Duty and Failure to Respond to Tender, and Injunctive Relief. Plaintiff alleges that on or about May 9, 2025, he tendered a promissory note to defendant intended to satisfy his outstanding mortgage debt in full. (FAC, ¶ 7.) Plaintiff also served a Notice of Tender, demanding a response within ten days. (*Id*., ¶ 8.) Plaintiff asserts that since defendant did not respond to the promissory note within ten days, defendant is "deemed in dishonor" under the UCC. (*Id*., ¶ 9.) Plaintiff in his FAC seeks to enjoin defendant from proceeding with any foreclosure activity on his property.

*Judicial Notice*

Items (1) through (4) of defendant's Request for Judicial Notice are granted to the extent they demonstrate that such records exist, but not for the truths of any of the matters asserted therefrom. (*Steed v. Dept. of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.) The court takes judicial notice of Item (5).

*Legal Standard for Demurrers*

On a demurrer, a court's function is limited to testing the legal sufficiency of the complaint. A demurrer is simply not the appropriate procedure for determining the truth of disputed facts. (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 113-114.) In determining a demurrer, the court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.) The demurrer does not admit mere contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On general demurrer, the court determines if the essential facts of any valid cause of action have been stated. (*Gruenberg v. Aetna*

*Ins. Co.* (1973) 9 Cal.3d 566, 572; Code Civ. Proc. § 430.10 subd. (e).) Leave to amend may be granted if there is a reasonable possibility that plaintiff could state a cause of action. (*Blank v. Kirwan*, supra, 39 Cal.3d at 318.)

*Wrongful Foreclosure*

Plaintiff alleges that defendant has "proceed[ed] unlawfully toward foreclose" because defendant failed to respond to his promissory note, which he believes to have satisfied his mortgage obligation. (FAC., ¶ 2; *see* Prayer, ¶ 2.) These are mere conclusions. Plaintiff fails to assert any legal elements of this cause of action, and fails to plead any supporting facts. Additionally, as defendant points out, a foreclosure sale has not yet occurred; therefore, there can be no wrongful foreclosure on which to base this claim. (See Opp., 3:5-6.)

*Breach of Duty and Failure to Respond to Tender*

Plaintiff does not allege what "duty" the defendant breached. If plaintiff is attempting to allege that defendant had a duty to respond to his promissory note, plaintiff has not established that a "failure to respond to tender" was a duty owed and thereby could be breached. Plaintiff fails to assert any legal elements of this "cause of action" and fails to plead any facts to support this contention.

*Preliminary and Permanent Injunctive Relief*

"Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted." (*Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 356, citing *Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168.) Plaintiff has not sufficiently alleged either of his first two causes of action, for which injunctive relief may be granted.

The court finds the FAC is insufficiently pled, and intends to sustain the demurrer to the FAC without leave to amend. As plaintiff has failed to demonstrate there are additional facts to support his causes of action, leave to amend will not be granted.

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: lmg on 1-30-26.**
(Judge's initials) (Date)

(34)

**Tentative Ruling**

Re: ***Perez-Rizo v. Kids Kare Schools, Inc.***
Superior Court Case No. 25CECG02312

Hearing Date: February 3, 2026 (Dept. 403)

Motion: by Defendant to Compel Arbitration

**Tentative Ruling:**

To grant defendant Kids Kare Schools, Inc.'s motion to compel arbitration of plaintiff's claims and stay plaintiff's court action pending the arbitration of plaintiff's claims.

**Explanation:**

Pursuant to California Code of Civil Procedure section 1281.2, "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement. (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (Civ. Proc. Code § 1281.2, paragraph breaks omitted.)

"[W]hen 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 whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement - either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see § 1281.2, subds. (a), (b)) - that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp*. (1996)14 Cal. 4th 394, 413.) Thus, in ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute, and general principles of California contract law guide the court in making this determination. (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534.)

By its terms, the agreement is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq. Section 2 of the FAA provides for enforcement of arbitration provisions in any contract "evidencing a transaction involving commerce." (9 U.S.C. § 2.) To determine whether there is an enforceable arbitration agreement, courts apply state law

principles related to formation, revocation, and enforcement of contracts. (*Banner Entertainment, Inc. v. Alchemy Filmworks, Inc.* (1998) 62 Cal.App.4th 348, 357.) Moving defendants are not required to submit evidence of impact on interstate commerce to establish FAA preemption. (See *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 157; *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 387, 394.) Plaintiff does not challenge the governance of the FAA.

Here, defendant has met its burden of showing that there is an agreement to arbitrate the claims that plaintiff has raised in her complaint. Defendant has presented a copy of the "Alternative Dispute Resolution Policy" that plaintiff signed during the course of her employment. (Xiong Decl., ¶¶ 8-11, and Exhibit A thereto.) The agreement states that plaintiff and defendant agree to arbitrate "all disputes which may arise during the course or as a result of the employment relationship that are otherwise arbitrable under existing law including but not limited to any rights or claims under … (5) the California Fair Employment and Housing Act; (6) the California Labor Code … (14) the California Business and Professions Code … ." (*Id*. at Ex. A, p. 1.) "The Policy is not intended to apply to (1) claims that the courts or statutes of the applicable jurisdiction have expressly held are not subject to mandatory arbitration, where such decisions or legislation are not preempted by the FAA or other applicable laws … ." (*Id*. at Ex. A, pp. 1-2.) Thus, the agreement applies to the plaintiff's claims for unpaid wages, missed meal and rest breaks, and other claims under the Labor Code or Unfair Competition Law as well as her FEHA claims.

In her opposition, plaintiff does not deny that she signed the arbitration agreement. Plaintiff argues the agreement is unenforceable due to procedural and substantive unconscionability. Plaintiff argues the agreement is procedurally unconscionable as a contract of adhesion and that she was not given an opportunity to review the document prior to signing. Plaintiff additionally argues inadequate third-party discovery, subjecting sexual harassment claims to arbitration and a waiver of participation in representative actions make the agreement substantively unconscionable. Plaintiff asserts the problematic provisions cannot be severed to make the agreement enforceable. However, plaintiff's opposition fails to meet her burden of showing that she did not agree to arbitrate her claims, or that the agreement is unenforceable.

To the extent that plaintiff argues that the Policy is a contract of adhesion and mandatory for employment, courts will generally enforce mandatory arbitration clauses in employment contracts as long as there are no other factors that render the agreement unconscionable. "[A]s *Gilmer* and its progeny make clear, the compulsory nature of a predispute arbitration agreement does not render the agreement unenforceable on grounds of coercion or for lack of voluntariness." (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1129.) "As one federal court has accurately noted: 'Arbitration clauses such as the one in *Gilmer* are, for the average employee, not the product of bargaining but a non-negotiable adhesion contract. Consent to the arbitration clause is the price for obtaining or retaining employment.' Even so, the courts have characterized the arbitration agreement in *Gilmer*—despite its compulsory nature—as consensual and voluntary." (*Ibid*, citations omitted.) Therefore, the fact that the arbitration agreement is a contract of adhesion does not render the agreement unenforceable.

Plaintiff additionally argues procedural unconscionably by describing her inability to review the agreement before signing and the failure to provide her a copy of the agreement. (Perez-Rizo Decl., ¶¶ 4-6.) The characterization of the presentation of the document contradicts the declaration of Kristine Xiong who described explaining the document as voluntary and providing the employee with the opportunity to review the document at home. (Xiong Decl., ¶¶ 8-11.) The circumstances surrounding the presentation and signing of the document support finding some additional procedural unconscionability in addition to the procedural unconscionability in the mandatory, take-it-or-leave-it nature of the agreement itself.

Mandatory arbitration clauses in employment contracts are enforceable if they provide essential fairness to the employee. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at pp. 90-91; see also *24 Hour Fitness v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212 [arbitration clause in employee handbook was not unconscionable where it provided all parties with substantially same rights and remedies].) In the employment context, an 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.)

Plaintiff argues these minimum standards are not met because inadequate third-party discovery is permitted. With respect to discovery, the arbitration agreement incorporates the provisions of Code of Civil Procedure section 1283.05. This section provides for parties to the arbitration the ability to use all discovery and procedures under the Civil Discovery Act "as if the subject matter of the arbitration were pending before a superior court of this state" with the caveat depositions shall not be taken without leave of the arbitrator. (Code Civ. Proc., § 1283.05, subd. (a) and (e).) The incorporation of the California Arbitration Act's discovery provisions is not a limitation on discovery that would support finding the agreement unconscionable.

The court is likewise unpersuaded that providing for mediation prior to commencing arbitration supports finding the agreement is substantively unconscionable.

Plaintiff additionally asserts provisions of the Policy requiring arbitration of sexual harassment claims and requiring claims to be brought only in an individual capacity require finding the agreement substantively unconscionable. The quoted language of the agreement within plaintiff's memorandum requiring the arbitration of sexual harassment claims is not consistent with the terms of the agreement expressly naming sexual assault or sexual harassment claims among those to which the Policy does not apply. (Xiong Decl., Ex. A, p. 2.) With regard to the contention that the requirement that claims only be pursued in an individual and not representative capacity is substantively unconscionable, the court notes that the agreement was intended to be covered by the Federal Arbitration Act. California's state law rendering such a waiver unenforceable and substantively unconscionable is preempted by federal law where an agreement is to be governed under the FAA. (*AT&T Mobility v. LLC v. Concepcion* (2011) 563 U.S. 333, 341.) Plaintiff has raised no dispute as to the applicability of the FAA to this agreement.

Plaintiff's arguments regarding substantive unconscionablity are not supported by evidence or legal authority. The court finds the agreement is enforceable and intends to order the parties to attend arbitration pursuant to the terms of the Alternative Dispute Resolution Policy.

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: lmg on 1-30-26.**
(Judge's initials) (Date)

(36)

**Tentative Ruling**

Re: ***Seele, et al. v. Nino, et al.***
Superior Court Case No. 24CECG05051

Hearing Date: February 3, 2026 (Dept. 403)

Motion: Default Prove-Up

**Tentative Ruling:**

To deny without prejudice.

**Explanation:**

Breach of Partnership

Although the complaint alleges a cause of action for breach of partnership agreement, plaintiff's evidence seems to suggest that plaintiff and Nino Land & Investment Co., LLC are members of a limited liability company, PUP II LLC. (See Seele Decl., Exh. AA.) Plaintiff uses the terms partnership and limited liability company interchangeably within the complaint. Plaintiff also refers to the "First Amended and Restated Limited Liability Company Agreement of PUP II LLC" attached as Exhibit AA to plaintiff's declaration as a "Partnership Agreement". However, a partnership and a limited liability company are two distinct legal entities with different liability and formation rules.

Since plaintiff presents evidence suggesting that PUP II LLC is in fact, a limited liability company, this ruling assumes that PUP II LLC is a limited liability company.

Breach of Fiduciary Duties

The complaint alleges that defendants are alter egos as one another and have breached their fiduciary duties by: misappropriating company assets for their own personal use and benefit, failing to distribute profits from the company, withholding financial information and accounting records from plaintiff, converting company funds and assets to entities under defendant's control, and failing to remove plaintiff's wage garnishment or settle personal debts.

*Misappropriation or Conversion of Assets*

While defendants admit liability on all well pled causes of action by defaulting, misappropriation and conversion are legal conclusions and there are no facts alleged to support such conclusions. Moreover, plaintiff must present evidence proving the amount of damages. (*Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560.) Plaintiff does not provide any information to show how plaintiff has been damaged by the conclusory allegations of misappropriation and conversion of company assets. Although plaintiff

generally alleges that defendants have failed to pay contractors or vendors for services performed on properties owned by the company, it is not known what contractors or vendors are owed, what services were performed, and which properties plaintiff is referring to. Similarly, while plaintiff generally asserts that defendants have transferred company assets to defendants' other entities or that defendants have sold company properties without plaintiff's consent, no facts are provided to support these general allegations. Therefore, the court has insufficient information to determine a proper judgment as to these allegations.

*Distribution*

Unless the operating agreement provides otherwise, a member has no right to a distribution before the dissolution and winding up of the limited liability company unless the limited liability company decides to make an interim distribution. "A person has a right to a distribution before the dissolution and winding up of a limited liability company *only if the limited liability company decides to make an interim distribution*." (Corps. Code, § 17704.04, subd. (b), emphasis added.) Moreover, the First Amended and Restated Limited Liability Company Agreement (the "LLC Agreement") attached to plaintiff's declaration does not provide a schedule of distributions.[1] Rather, the LLC Agreement provides that members shall be entitled to distributions only to the extent that any are actually available, and distributions shall be made in the "sole and absolute discretion" of the manager, Nino Land & Investment Co., LLC. (Seele Decl., Exh. AA at §§ 3.3, 5.1(a).) There is no allegation or evidence that PUP II LLC ever made a distribution to which plaintiff would be entitled to.

*Withholding Information*

While plaintiff does plead sufficient allegations to support a claim that defendants have failed to allow inspection of the records, there is no showing of any monetary damages resulting from the failure to disclose information.

*Wage Garnishment*

Although plaintiff alleges that defendant "failed to honor the terms of the partnership by . . . [f]ailing to remove [p]laintiff's wage garnishment or settle personal debts related to the properties, as agreed. . ." (Compl., ¶ 19), there does not appear to be any reference to removal of plaintiff's personal wage garnishments in the LLC Agreement. (See Seele Decl., Exh. AA.)

To the extent that plaintiff is alleging that PUP II LLC has not settled his debts as promised, the LLC Agreement does not provide for such terms. The LLC Agreement only provides that the manager "will use commercially reasonable efforts to assist Pacific Urban Properties, LLC in restructuring its liabilities. . .[;]" that the manager and the company "reserve the right to negotiate, defend, litigate and/or restructure the secured liens and any related liabilities in their sole discretion[;]" and that the company will make payments to specific creditors in an effort to reduce the liabilities of Pacific Urban

[1] To the extent that a distribution schedule is included in the agreement, plaintiff is directed to cite to the section or attachment providing such information in any future application.

Properties, LLC. (*Id*., at Exh. AA, § 4.6(b)-(d).) The court notes that Pacific Urban Properties, LLC is not a party to this action. To the extent that plaintiff assumes that Pacific Urban Properties, LLC and plaintiff are one in the same, a limited liability company is a separate legal entity from its owners.

*Proposed Judgment*

The proposed judgment does not adequately separate the damages in which plaintiff seeks individually, as opposed to those he seeks derivatively on behalf of PUP II LLC. Damages awarded in a derivative action belong to the limited liability company rather than the plaintiff.

Also, the judgment sought exceeds the relief demanded in the complaint. "In all default judgments the demand sets a ceiling on recovery." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 824 [including default judgments entered as discovery sanction]; *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1294 [including default judgment entered as terminating sanction].) Relief that is not demanded in the complaint cannot be granted by default judgment, even if that relief otherwise would have been proper. (Code Civ. Proc., § 580, subd. (a); *Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1018 [default judgment for sum in excess of that demanded in complaint is void].)

Here, the complaint prays for damages in an amount "no less than $500,000." However, the proposed judgment seeks $1,125,000 in damages.

A prayer for "damages in excess of" a specified amount will not support a default judgment for more than that amount. (*Becker v. S.PV. Const. Co., Inc.* (1980) 27 Cal.3d 489, 494-495 [complaint praying for "damages in excess of $78,600" sets recovery ceiling of $78,600]; *Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1173.) "[I]n *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493–494, where a complaint sought damages ' "in excess of $20,000," ' the Supreme Court held that a default judgment awarding $26,457.50 violated [Code of Civil Procedure] section 580." (*Air Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1018-1019.)

At most, here, plaintiff has noticed defendants of damages in the amount of $500,000. Therefore, the court cannot enter default judgment in an amount in excess of $500,000. Plaintiffs have the option of either re-filing their application for default judgment seeking the reduced judgment, or alternatively, plaintiffs may amend the complaint to seek the larger amount. (See *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 755 [plaintiff given option to amend complaint to state full amount of damages]; *Behm v. Clear View Technologies* (2015) 241 Cal.App.4th 1, 17 [court simply struck excess damages].) However, such an amendment vacates the underling default and puts the entire matter back at issue. (*Julius Schifaugh IV Consulting Service, Inc. v. Avaris Capital, Inc.* (2008) 164 Cal.App.4th 1393, 1397.)

*Proof Required for Amount of Damages*

Plaintiff must provide evidence to prove up the amount of its damages. Plaintiff's declaration providing a conclusory summation of events is insufficient. Plaintiff must present evidence proving the amount of damages. Without such evidence, the court may refuse to enter judgment in any amount, notwithstanding defendants' default. (*Taliaferro* v. *Hoogs* (1963) 219 Cal.App.2d 559, 560.)

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: lmg on 2-2-26.**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Perez v. Rosenbalm Rockery, Inc.***
Superior Court Case No. 24CECG00952

Hearing Date: February 3, 2026 (Dept. 403)

Motion: Plaintiffs' Motion for Preliminary Approval of Class Action Settlement

**Tentative Ruling:**

To deny without prejudice.

**Explanation:**

*Certification of Class for Settlement*

Settlements preceding class certification are scrutinized more carefully to make sure that absent class members' rights are adequately protected, although there is less scrutiny of manageability issues. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 240; see *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1803, fn. 9, 19.a) The trial court has a "fiduciary responsibility" as the guardian of the absentee class members' rights to decide whether to approve a settlement of a class action. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.)

A precertification settlement may stipulate that a defined class be conditionally certified for settlement purposes. The court may make an order approving or denying certification of a provisional settlement class after the preliminary settlement hearing. (Cal. Rules of Court, rule 3.769(d).) Before the court may approve the settlement, however, the settlement class must satisfy the normal prerequisites for a class action. (*Amchem Products, Inc. v. Windsor* (1997) 521 US 591, 625-627.)

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313.)

Plaintiffs bear the burden of establishing the propriety of class treatment *with admissible evidence*. (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 470 [trial court's ruling on certification supported by substantial evidence generally not disturbed on appeal]; *Lockheed Martin Corp. v. Superior Court*, *supra,* 29 Cal.4th at pp. 1107-1108 [plaintiff's burden to produce substantial evidence].)

Counsel represents defendant has represented that there are approximately 137 class members. (Winn Decl., ¶ 18.) However, no admissible evidence is submitted as to

this number. Nor is there any evidence of ascertainability, such as a showing that the class members are identifiable from defendant's own records. A conclusory statement to this effect in the points and authorities is insufficient. In a future motion for preliminary approval, a declaration from defendant should be submitted, establishing the number of class members and ascertainability.

Under the community of interest requirement, the class representative must be able to represent the class adequately. (*Caro v. Procter & Gamble* (1993) 18 Cal.App.4th 644, 669.) "[I]t has never been the law in California that the class representative must have identical interests with the class members . . . The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.)

Usually, in wage and hour class actions, the distinctive feature that permits class certification is that the employees have the same job title or perform similar jobs, and the employer treats all in that discrete group in the same allegedly unlawful fashion. In *Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004, 1017, "no evidence of common policies or means of proof was supplied, and the trial court therefore erred in certifying a subclass."

Nor have plaintiffs established community of interest or typicality. Plaintiffs assert that "Plaintiffs allege that their claims are similar to that of the other Class Members and that Plaintiffs' claims arise out of the same alleged course of conduct giving rise to the claims of the other Class Members." But there is no evidence of this. Plaintiff Perez was employed as a Dispatcher, Customer Service Attendant, and Yard Assistant, with duties including responding to calls and orders, creating schedules for drivers, preparing paperwork, creating invoices, dispatching directions and maps to the team, handling procurement for yards, and keeping inventory for the Madera and Fresno facilities. (Perez Decl., ¶ 2.) He offers conclusory statements, such as "and the other employees regularly experienced working off-the-clock, such as often receiving time sensitive phone calls prior to clocking in for our shifts. For example, I often had to respond to the dispatcher regarding drivers who were scheduled to work before me. Additionally, I and the other employees frequently experienced late, missed, and/or interrupted meal and rest periods. For example, due to understaffing, it became a regular practice for management to interrupt our meal periods or have us take late meal periods to address customer needs." (Perez Decl., ¶ 4.) Torres' declaration reads the same, though he was employed as a Yard Worker and Customer Service Representative with duties including selling and loading products, assisting customers to select products for their projects, and handling phone orders, quotes, and estimates. (Perez Decl., ¶ 2.) The settlement class includes all non-exempt employees of defendant during the class period (December 8, 2019 through January 2, 2025). No evidence is presented showing that the two plaintiffs' jobs are similar to those of the other purported class members, or all employees within the class were subjected to the same working conditions, employment policies or practices. The motion is not supported by evidence of common policies and practices applicable to the whole proposed class.

The adequacy of representation component of the community of interest requirement for class certification comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit. " 'The adequacy inquiry … serves to uncover conflicts of interest between named parties and the class they seek to represent.' [Citation.] '… To assure "adequate" representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class. [Citation.]' [Citation.]" (*J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212.)

"[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 669.) This consideration is satisfied, as counsel has substantial class action experience.

*Settlement Approval*

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 129.) "[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished … [therefore] the factual record must be before the … court must be sufficiently developed." (*Id.* at p. 130.)

*Clark v. America Residential Services* (2009) 175 Cal.App.4th 785 vacated approval of a class settlement coupled with class certification, an award of $25,000 each to two named plaintiffs, and more. The problem was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (*Id*. at p. 793.)

Here, informal discovery and production of time and pay records occurred, which were analyzed by an expert, providing the basis for counsel's estimations of defendant's maximum potential exposure. Counsel provides an adequate discussion of the weaknesses and risks involved in taking the case through trial, sufficient to conclude that the proposed settlement is fair and reasonable.

The court can preliminarily approve the requested award of attorney's fees and costs. Plaintiffs' counsel seek $141,667 in attorney fees, which is 1/3 of the total gross settlement, plus costs of up to $40,000. 1/3 is within the range of fees that have been approved by other courts in class actions, which frequently approve fees based on a percentage of the common fund. (*City & County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-11; *Quinn v. State* (1975) 15 Cal.3d 162, 168; see also *Apple Computer,*

*Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1270; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26.)

While it is true that courts have found fee awards based on a percentage of the common fund are reasonable, the California Supreme Court has also found that the trial court has discretion to conduct a lodestar "cross-check" to double check the reasonableness of the requested fees. (*Laffitte v. Robert Half Intern. Inc*. (2016) 1 Cal.5th 480, 503-504 [although class counsel may obtain fees based on a percentage of the class settlement, courts may also perform a lodestar cross-check to ensure that the fees are reasonable in light of the number of hours worked and the attorneys' reasonable hourly rates].)

The court prefers to do a lodestar analysis as a cross-check on the reasonableness of the fees. Counsel provides preliminary information showing that their lodestar totals $96,365. The court finds the billing rates to be reasonable. With the final approval motion counsel will need to produce detailed billing records. While the court may award a lesser amount of fees on final approval, the information submitted is sufficient to preliminarily approve the requested fee award. The court will approve payment of only the actual costs incurred, which must also be documented.

The motion seeks preliminary approval of $10,000 enhancement payments to both plaintiffs. Plaintiffs' counsel includes in his declaration a conclusory statement that the enhancement payment is reasonable, but includes no specific information about plaintiffs' services to the class. Plaintiffs Perez and Torres estimate that they spent 45-50 and 47-53 hours on this matter, respectively. Based on the information provided, the court will approve $4,000 for enhancement payments each.

The settlement provides that class administrator Apex Class Action LLC will be paid $7,000, even though it agreed to cap its fee at $6,500. The court will approve no more than the actual cost of administration.

Finally, the scope of the released claims is overbroad. Case law requires that releases in class cases be limited to claims arising from the same factual predicate. (*Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700; *Class Plaintiffs v. Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287.)

The release of class claims is appropriately tailored only to those violations alleged in the Complaint. However, the settlement also attempts to release claims under the Private Attorneys General Act. While notice to the LWDA was given prior to filing suit (See Winn Decl., Exh. 2), the Complaint on file includes no cause of action for PAGA penalties. Accordingly, the settlement is overbroad and the settlement cannot be approved as drafted. This simply is not a PAGA action.

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: lmg on 2-2-26 .**
(Judge's initials) (Date)