Tentative Rulings for February 8, 2023
Department 501

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(20)

Tentative Ruling

Re: ***Tutelian & Company, Inc. v. Arias, et al.***
Superior Court Case No. 21CECG02805

Hearing Date: February 8, 2023 (Dept. 501)

Motion: by Defendant Miguel Arias for an Award of Attorneys' Fees

Tentative Ruling:

To grant and award $27,689.50 in attorneys' fees and $2,155.36 in costs.

Explanation:

A special motion to strike ("anti-SLAPP motion") provides a procedural remedy to dismiss nonmeritorious litigation meant to chill the valid exercise of the constitutional rights to petition or engage in free speech. (Code Civ. Proc., §425.16, subd. (a); see *Martinez v. Metabolife Intern., Inc*. (2003) 113 Cal.App.4th 181, 186.) Defendant Miguel Arias prevailed on his anti-SLAPP motion directed at plaintiff Tutelian & Company, Inc.'s Complaint, and now moves for an award of attorneys' fees. The prevailing defendant on a special motion to strike "shall be entitled" to recover their attorneys' fees and costs, and this award is mandatory. (Code Civ. Proc., § 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)

Although the anti-SLAPP statute does not expressly so provide, it has been interpreted to allow awards of only such fees that the court deems reasonable. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 362.) Courts apply the lodestar approach (number of hours reasonably expended multiplied by a reasonable hourly rate prevailing in community) in determining the fee award under Code of Civil Procedure section 425.16. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, 1136.) The prevailing defendant is entitled to recover fees incurred in making the motion for attorneys' fees. (*Id.* at p. 1141.)

Arias seeks $27,689.50 in attorneys' fees plus $2,155.36 in costs. Counsel charges a reasonable $375 per hour for the primary handling attorney, $225 per hour for associate attorneys, and $150 per hour for paralegals. Counsel spent 102.35 hours on this matter. Plaintiff has not opposed the motion or challenged the costs via motion to strike or tax. The court finds the fees and costs incurred to be reasonable, and intends to grant the unopposed motion.

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 2/2/2023 .
(Judge's initials) (Date)

(37)

Tentative Ruling

Re:	***In Re: Peachtree Settlement Funding, LLC*** Superior Court Case No. 22CECG04078
Hearing Date:	February 8, 2023 (Dept. 501)
Motion:	by Petitioner Peachtree Settlement Funding, LLC for Order Approving Transfer of Payment Rights

Tentative Ruling:

To deny. (Ins. Code, § 10139.5.)

Explanation:

The Structured Settlement Protection Act governs transfers of structured settlement payments to factoring companies for immediate cash payments. (See Ins. Code, §§ 10134, et seq.) The Act's purpose is to "protect structured settlement payees from exploitation by factoring companies." (*RSL Funding, LLC v. Alford* (2015) 239 Cal.App.4th 741, 745.) The Act provides that a transfer of structured settlement payment rights is void unless the following conditions are met:

1) The transfer is fair and reasonable, and in the payee's best interest, taking into account the welfare and support of the payee's dependents (Ins. Code, § 10137, subd. (a)); and
2) The transfer complies with the requirements of the Act, will not contravene other applicable law, and the judge has reviewed and approved the transfer (Ins. Code, § 10137, subd. (b); Ins. Code, § 10139.5.).

To determine what is fair and reasonable, and in the payee's best interest, the court is to consider the totality of the circumstances and the factors listed in Insurance Code section 10139.5, subdivision (b), including the purpose of the transfer and the payee's financial and economic situation. (Ins. Code, § 10139.5.)

Here, petitioner Peachtree Settlement Funding, LLC has not demonstrated how this transfer is in Mr. Hagerty's best interest. Petitioner has not demonstrated that the financial terms of the transfer are fair and reasonable where it is utilizing a discount rate of 16.34 percent and the amount Mr. Hagerty is to receive ($46,500) is $24,000 less than the amount to which he would be entitled ($70,500) in two years and six months. (Ins. Code, § 10139.5, subd. (b)(9).)

Additionally, while the court has received Mr. Hagerty's declaration and his signed waiver of independent legal or financial counsel, the court remains concerned as to why Mr. Hagerty is waiving such counsel. According to the Purchase Contract, petitioner agrees to pay the fees of Mr. Hagerty's independent counsel, accountant or actuary up to $1,500 should he exercise his right to seek independent counsel. While Mr. Hagerty claims he is experiencing financial hardship, he did not indicate this is the only or most beneficial means by which he can obtain necessary funds. If Mr. Hagerty were to

exercise his right to obtain independent legal or financial counsel, he might discover that he has alternatives.

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 2/6/2023 .
(Judge's initials) (Date)

(37) **Tentative Ruling**

Re: ***Jose Robles v. Costco, a corporation***
Superior Court Case No. 20CECG00497

Hearing Date: February 8, 2023 (Dept. 501)

Motion: by Defendant Bee Sweet Citrus, Inc., for Good Faith Settlement Determination

Tentative Ruling:

To grant. (Code Civil Proc., § 877.6.)

Explanation:

Under Code of Civil Procedure section 877.6, a settlement entered by one or more of several joint tortfeasors may be determined by the court to be in "good faith." The court determines whether a settlement is within the "good faith ballpark" by considering the following factors (evaluated as of the time of the settlement): 1) a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability; 2) the amount paid in settlement; 3) a recognition that a settlor should pay less in settlement than if found liable after a trial; 4) the allocation of the settlement proceeds among plaintiffs; 5) the settlor's financial condition and insurance policy limits, if any; and 6) evidence of any collusion, fraud, or tortious conduct between the settlor and the plaintiffs aimed at making the nonsettling parties pay more than their fair share. (*Tech-Bilt, Inc. v. Woodward–Clyde & Associates* (1985) 38 Cal.3d 488, 499; *Oldham v. California Capital Fund, Inc.* (2003) 109 Cal.App.4th 421, 432 ["In other words, the superior court must understand the size of the settlement pie, how the pie is sliced, and who is getting which slice."].)

A determination that the settlement was made in good faith bars any other joint tortfeasor or co-obligor from further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. (Code Civ. Proc. § 877.6, subd. (c).) All parties required to be noticed have been given notice of this motion and no one has filed an opposition or otherwise objected to the settlement. Indeed, all parties have stipulated that the settlement is in good faith. The settlement between defendant Bee Sweet Citrus, Inc., on one hand, and plaintiffs Jose Javier Robles and Tania Payan, on the other, is found and determined to be in good faith as set forth in Code of Civil Procedure § 877.6. (*Tech-Bilt, Inc. v. Woodward–Clyde & Associates* (1985) 38 Cal.3d 488, 499.)

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 2/6/2023 .
(Judge's initials) (Date)

(38) **<u>Tentative Ruling</u>**

Re: ***LVNV Funding LLC v. Reyes***
Superior Court Case No. 22CECG01128

Hearing Date: February 8, 2023 (Dept. 501)

Motion: by Plaintiff LVNV Funding LLC that Matters in Requests for Admissions be Deemed Admitted

Tentative Ruling:

To deny.

Explanation:

All that needs to be established to support an order compelling discovery responses or deeming requests for admissions admitted is to show that the discovery was properly served, and that no responses were received by the due date. Where a party fails to timely respond to a propounding party's request for admissions, the court must grant the propounding party's motion requesting that matters be deemed admitted, unless it finds that the party to whom the requests were directed has served, prior to the hearing on the motion, a proposed response that is substantially in compliance with Code of Civil Procedure section 2033.220. (Code Civ. Proc. §2033.280(c); see also *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 778.) "Substantial compliance" means compliance with respect to " 'every reasonable objective of the statute.' [Citation.]" (*Id*. at p. 779.) Where the responding party serves its responses before the hearing, the court "has no discretion but to deny the motion." (*Id*. at p. 776.) Here, the discovery at issue was served on defendant by mail on May 27, 2022, and responses were due on July 1, 2022. As of November 8, 2022, no responses had been received and the instant motion was filed. (Stambultsyan Decl. ¶¶ 2-3.) The motion is unopposed.

The proof of service accompanying the motion indicates service on defendant by mail to 6687 E. Andrews Ave., Fresno, CA 93727. Copies of the subject discovery attached to the supporting declaration of plaintiff's counsel indicate that the discovery was also served on defendant by mail to 6687 E. Andrews Ave., Fresno, CA 93727. However, defendant's correspondence address on file with the court is 3120 Rubino Drive, #113, San Jose CA 95125. The Answer filed by defendant on May 17, 2022 also indicates that defendant's address is 3120 Rubino Drive, #113, San Jose CA 95125. Thus, plaintiff has failed to show that defendant was properly served notice of the motion and the discovery at issue. As such, plaintiff's motion to deem admissions admitted is denied.

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: <u>DTT</u> on <u>2/6/2023</u>.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Jordan Yarnell v. Michael Cadillac, Inc.***
Superior Court Case No. 20CECG02289

Hearing Date: February 8, 2023 (Dept. 501)

Motion: by Defendant for an Order Compelling Arbitration

Tentative Ruling:

To deny.

Explanation:

Plaintiff brings a single cause of action under the Private Attorneys' General Act ("PAGA") on behalf of himself and all aggrieved employees under Labor Code section 2698, et seq. Defendant now seeks an order compelling plaintiff to private arbitration of his PAGA claim as an individual, and to dismiss the representative portion of the PAGA claim brought on behalf of all aggrieved employees.

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) There is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505.) When a motion 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 moving party 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.)

In addition, "California courts traditionally have maintained a strong preference for arbitration as a speedy and inexpensive method of dispute resolution. To this end, 'arbitration agreements should be liberally construed', with 'doubts concerning the scope of arbitrable issues [being] resolved in favor of arbitration [citations].'" (*Market Ins. Corp. v. Integrity Ins. Co*. (1987) 188 Cal. App. 3d 1095, 1098, internal citations omitted.) Nevertheless, the courts must not " invent special, arbitration-preferring procedural rules." (*Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, 1713.)

Plaintiff argues that ambiguities should be resolved in his favor, pursuant to the canon that contractual uncertainties are construed against the drafter. (Civ. Code, § 1654.) Cases applying Federal Arbitration Association rules (like the rule referenced in the purported arbitration agreement here), generally do not follow that canon. (See *Western Bagel Company, Inc. v. Superior Court of Los Angeles County* (2021) 66 Cal.App.5th 649, 654-655.) Accordingly, "'doubts concerning the scope of arbitrable

issues [being] resolved in favor of arbitration [citations].'" (*Market Ins. Corp. v. Integrity Ins. Co*., supra, 188 Cal. App. 3d at p. 1098.)

Agreement to Arbitrate

"This strong policy has resulted in the general rule that arbitration should be upheld 'unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute. [¶] It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute.'" (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1062, citations omitted.)

However, "[a]s our Supreme Court stressed several decades ago, the contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration: 'Although "[t]he law favors contracts for arbitration of disputes between parties, 'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate....'" In determining the scope of an arbitration clause, "[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made." [¶] Following on from this, and as other courts of appeal have regularly observed, the terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested. This is so because '[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate.'" (*Bono v. David, supra,* 147 Cal.App.4th at p. 1063, citations 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.)

Here, defendant alleges that plaintiff agreed to arbitrate all disputes arising out of his employment when he was originally hired by defendant, that the agreement covers all of the claims that plaintiff has raised in his complaint, and that the agreement is not unconscionable or unenforceable, so the court should order the parties to arbitrate the plaintiff's claims. Furthermore, defendant argues that, under the recent United States Supreme Court decision in *Viking River Cruises v. Moriana* (2022) 142 S. Ct. 1906, plaintiff's

individual claims under PAGA may be severed from the non-individual PAGA claims and arbitrated separately. The non-individual claims under PAGA should be either dismissed as plaintiff lacks standing to bring, or stayed pending the outcome of the arbitration.

Defendant has failed to meet its burden of showing the existence of a valid agreement to arbitrate between the parties, so there is no need for the court to reach the other issues raised by the motion. "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842, (*Ruiz*) internal citations omitted.)

"'In California, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate,"' and the party seeking arbitration bears the burden of proving the existence of an arbitration agreement." (*Ruiz, supra,* 232 Cal.App.4th at p. 842, internal citations omitted.) Where the moving party relies on a written agreement purportedly signed by the plaintiff, the moving party must authenticate the agreement before it may be received into evidence. (*Id*. at p. 843.) " 'Authentication of a writing means (a) the introduction of evidence *sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is* or (b) the establishment of such facts by any other means provided by law.'" (*Ibid*, internal citations omitted.)

In *Ruiz*, *supra*, 232 Cal.App.4th 836 the Court of Appeal held that the trial court properly denied a petition to compel arbitration where the defendant failed to present sufficient evidence to authenticate the purported electronic signature of the plaintiff on the arbitration agreement. "Main summarily asserted in her initial declaration that Ruiz was the person who electronically signed the 2011 agreement 'on or about September 21, 2011,' but she did not explain how she arrived at that conclusion or inferred Ruiz was the person who electronically signed the 2011 agreement… Main never explained how Ruiz's printed electronic signature, or the date and time printed next to the signature, came to be placed on the 2011 agreement. More specifically, Main did not explain how she ascertained that the electronic signature on the 2011 agreement was 'the act of' Ruiz." (*Id.* at pp. 843–844, internal citation omitted.)

Ruiz denied recalling electronically signing the agreement, and the defendant's employee's statement that he did sign it was not supported by any further explanation, so it "left a critical gap in the evidence supporting the petition." (*Ruiz, supra,* 232 Cal.App.4th at p. 844.) "In the face of Ruiz's failure to recall electronically signing the 2011 agreement, the fact the 2011 agreement had an electronic signature on it in the name of Ruiz, and a date and time stamp for the signature, was insufficient to support a finding that the electronic signature was, in fact, 'the act of' Ruiz. For the same reason, the evidence was insufficient to support a finding that the electronic signature was what Moss Bros. claimed it was: the electronic signature of Ruiz. This was not a difficult evidentiary burden to meet, but it was not met here." (*Ibid*, internal citations omitted.)

On the other hand, in *Condee v. Longwood Management Corp*. (2001) 88 Cal.App.4th 215, the Court of Appeal held that the trial court erred in denying a petition to compel arbitration based on the lack of proper authentication of the arbitration agreement. The Court of Appeal noted that the opposing party did not challenge the authenticity of the signature on the agreement, so the petitioner was not required to follow the normal procedures for document authentication in order to establish the existence of the agreement under section 1281.2. (*Id*. at pp. 218-219.) "A plain reading of the statute indicates that as a preliminary matter the court is only required to make a finding of the agreement's existence, not an evidentiary determination of its validity." (*Id.* at p. 219.) The court also pointed out that Rule of Court 371 (now Rule 3.1330) only requires the party moving to compel arbitration to provide the court with a copy of the arbitration agreement or a recitation of its terms. (*Ibid*.) The agreement does not have to be entered into evidence. (*Ibid*.) Once the petitioner alleges that the agreement exists, the burden shifts to the respondent to prove the falsity of the agreement, or that it is unenforceable. (*Ibid*.)

However, as the court in *Ruiz* explained, while the petitioner is not required *as a preliminary matter* to authenticate the opposing party's signature on the arbitration agreement, if the opposing party then challenges the authenticity of the signature by either denying it was his or by claiming he did not recall signing the agreement, then the moving party has the burden of proving by a preponderance of the evidence that the signature is authentic. (*Ruiz*, *supra*, 232 Cal.App.4th at p. 846.) If the moving party fails to meet its burden of proving the opposing party signed the agreement, then the motion to compel arbitration should be denied. (*Ibid*.)

Defendant's motion presents the arbitration agreement bearing plaintiff's handwritten signature. (See Moore, Decl. Ex. 1 and 2.) Plaintiff claims that he has reviewed the arbitration agreement, but does not remember the document. (Yarnell, Decl., ¶ 3.) He did not understand what arbitration was. (*Id*. at ¶¶ 6-7.) A similar statement was found to satisfy a plaintiff's burden in *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 167-168.) Defendant asserts *Iyere v. Wise Auto Group* (Jan. 19, 2023, A163967) ____ Cal.App.5th ___ 2023 WL 314122, which disagreed with *Gamboa*, but held that the agreement before it could be identified through the defendant's custodian of records, who had provided a declaration based on personal knowledge to which the plaintiffs had not objected to. (*Id*. at p. 6.) Unlike the lack of objection in *Iyere*, here plaintiff has objected to Moore's declaration on various grounds, including lack of foundation, lack of personal knowledge, hearsay, and lack of authentication. (See Plaintiff's Objections to Defendant's Evidence.) Consequently, plaintiff has effectively challenged the authenticity of the arbitration agreement and the burden shifts back to defendant to present evidence rebutting plaintiff's denial that he agreed to arbitration. (*Ruiz*, *supra*, 232 Cal.App.4th at p. 843-844.)

Defendant relies on the declaration by its Controller and Corporate Secretary, Jeff Moore, to establish the existence of an arbitration agreement between plaintiff and defendant. Moore states he obtained the documents containing the arbitration agreement from plaintiff's personnel file, which is kept in the normal course of business. (Moore, Decl. ¶7.) Moore states he is familiar with the generation and maintenance of personnel records because of his duties and responsibilities. (*Id*. at ¶ 2.)

Plaintiff claims that he was removed to a separate facility and pressured into signing a stack of unexplained documents. Yet, Moore concludes that plaintiff "filled out and reviewed this employment application at his leisure, including the arbitration agreement, without any pressure or coercion from any officer, employee, agent or otherwise of the dealership." (Moore, Decl. ¶ 5, p. 3:7-9.) Moore does not state he was present at the time the agreements were presented to plaintiff, nor does he state the extent of his knowledge of onboarding or new employee orientation procedures.

Consequently, defendant's evidence is insufficient to meet its burden of showing by a preponderance of the evidence that the signature on the agreement is plaintiff's. The declaration of Moore that defendant provided in support of the motion to compel does not appear to be based on personal knowledge, as Moore never states that he was present when plaintiff allegedly signed the agreement, nor does he explain how he knows that plaintiff signed the agreement. Moore is the Controller and Corporate Secretary of defendant, not a human resources employee, and there is no indication that he was present or that he has direct personal knowledge that plaintiff signed the agreement. Moore appears to be simply assuming that plaintiff signed the agreement because the company's policy is to have new employees sign the arbitration agreement and there is a signature on the agreement in the name of plaintiff, but there he provides no other explanation for why he believes that plaintiff was the person who signed the agreement. Nor has he provided enough facts to show that the business records exception to the rule against hearsay applies here. Therefore, the court sustains plaintiff's objections to the Moore declaration on the grounds of lack of foundation, lack of authentication, lack of personal knowledge, and hearsay.

Without the Moore declaration and the attached copy of the purported arbitration agreement, defendant has failed to meet its burden of showing that an arbitration agreement existed between the parties. Defendant has not filed any supplemental declarations or other evidence that would tend to rebut plaintiff's claim that he does not recall ever signing the agreement and that he would not have agreed to waive his right to try the case before a jury. As a result, the court denies defendant's motion to compel arbitration, as defendant has not shown that there was an agreement between the parties to arbitrate all disputes arising out of the employment relationship. The court also denies the related motion to dismiss the remaining non-individual PAGA claims, and the alternative request to stay the remaining claims.

<u>Unconscionability</u>

"Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement …." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).) Unconscionability has both a procedural and a substantive element. While both must be present, they need not be present in the same degree and are evaluated on a sliding scale. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*).) "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

Procedural Unconscionability

Procedural unconscionability involves " ' "oppression or surprise due to unequal bargaining power." ' " (*Baltazar v. Forever 21, Inc*. (2016) 62 Cal.4th 1237, 1243.) It exists where there is " ' " ' "an absence of meaningful choice on the part of one of the parties" ' " ' " to a contract, such as with a contract of adhesion. (*Ibid*.) Furthermore, the California Supreme Court has noted that "in the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armedariz, supra,* 24 Cal.4th at p. 115.)

Previous courts have found procedural unconscionability on the basis of oppression and surprise where an employee is pressured into signing a complexly worded arbitration agreement as a condition of employment without meaningful opportunity for review or negotiation. (See *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329 (*Kinney*); see also *Nunez v. Cycad Management LLC* (2022) 77 Cal.App.5th 276, 284 (*Nunez*) ["Significant oppression is shown when, as here, an arbitration agreement is presented to an employee while he is working, along with other documents, neither its contents nor its significance are explained, and the employee is told he must sign the agreement to keep his job.].)

Defendant admits that all employees must sign the dispute resolution provisions. (Moore, Decl. ¶ 4; Petition, at p. 2:8-9.) In his declaration, plaintiff states he was removed to a separate facility and sat in a room with unknown individuals who handed him "packets" of papers to sign. (Yarnell, Decl. ¶5.) Aside from being instructed to sign certain pages, he does not recall any explanation of what the documents were, or their consequence. (*Id*. ¶5.) These circumstances, which indicate of a lack of an opportunity to meaningfully review the arbitration agreement and negotiate its terms, are of a nature sufficient to find procedural unconscionability. (*Kinney, supra,* 70 Cal.App.4th at p. 1329; *Nunez, supra,* 77 Cal.App.5th at p. 284.)

Substantive Unconscionability

Plaintiff argues that the arbitration is substantively unconscionable because it would operate to waive statutory rights. (Opp. at p. 11:1-8.) However, only "wholesale waiver" results in invalidity. (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1925 [noting that the state court rule of invalidity of wholesale waivers was not preempted].) Nevertheless, plaintiff also argues that the arbitration agreement is substantively unconscionable because it does not clearly guarantee the employer will pay the fees unique to arbitration, does not address judicial appellate procedure, and does not bind defendant because it is not countersigned.

The subject arbitration agreement specifies that its costs and fees provisions should control should Code of Civil Procedure section 1284.2 conflict with other substantive statutory provisions. (Moore, Decl. ¶ 7.) However, this provision, which would control in the case of conflict, appears inconsistent with the California Supreme Court's conclusion that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee

to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz, supra,* 24 Cal.4th at p. 110-111.) In addition, under the terms of the agreement (i.e. not solely because of the lack of a countersignature [see Moore Decl. ¶ 4]) only plaintiff is forced to arbitration, which appears inconsistent with traditional concepts of mutuality and severability. (*Id*. at pp. 120-121, 124.)

Therefore, there is a basis to find unconscionability, as an alternative ground for denial.

<u>Waiver</u>

The California Supreme Court follows the federal rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 320, 323.)

" 'In determining waiver, a court can consider "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party."'" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196, internal citations omitted.)

Plaintiff filed his Complaint in August 2020 and in November defendant filed an amended Answer which, along with eighteen other affirmative defenses, asserted the existence of an arbitration agreement. Despite this early assertion, defendant did not file this motion until January 2023, twenty-eight (28) months into the case after first suggestion the possibility of "discuss[ing]" arbitration in August 2022. (See DerOhannessian, Decl. ¶ 10, Ex. E.)

During the almost two year period between assertion of the existence of an arbitration agreement in November 2020 and the request to discuss arbitration in August 2022, defendant responded to discovery (DerOhannessian Decl. ¶¶ 3-4), agreed to and filed a selection of an Alternative Dispute Resolution ("ADR") mediator, and agreed to declare the case complex. (*Id*. at ¶ 5.) Although there has been little law and motion activity, defendant's actions, after the early assertion of an arbitration agreement, are inconsistent with an intent to invoke arbitration.

Furthermore, the selection of an ADR mediator through the court's ADR system and the agreement to declare the case complex invoke specific and substantial court "machinery" involving (at least in the case of ADR mediation) court oversight. Finally, even after the suggestion to discuss arbitration in August 2022, defense counsel thereafter

committed to a mediation date and thus reasonably led plaintiff's counsel into assuming the possibility of arbitration was deferred pending completion the California Supreme Court's review of *Adolph v. Uber Techs., Inc*., (Cal.Ct.App. Apr. 11, 2022, No. G059860) 2022 WL 1073853, review granted July 20, 2022, S274671.)

Therefore, there is a basis to find waiver, as an alternative ground for denial.

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 2/7/2023 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In re Faith Lee***
Superior Court Case No. 23CECG00197

Hearing Date: February 8, 2023 (Dept. 501)

Motion: Petition to Approve Compromise of Disputed Claim of Minor

Tentative Ruling:

To continue the hearing regarding the Amended Petition filed on February 3, 2023, to Tuesday, February 28, 2023, at 3:30 p.m. in Department 501. The hearing date of February 8, 2023, was for the original Petition. Counsel should have obtained a new date for the Amended Petition.

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 2/7/2023 .
(Judge's initials) (Date)