Tentative Rulings for February 9, 2023
Department 503

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)

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.

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

21CECG00731 ***Paul Denham v. K. Powell*** **is continued to Thursday, July 27, 2023, at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

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(03)

Tentative Ruling

Re:	***Sanchez v. Wonderful Pistachios and Almonds*** Superior Court Case No. 20CECG00111
Hearing Date:	February 9, 2023 (Dept. 503)
Motion:	By Defendant Wonderful Pistachios and Almonds to Confirm Arbitrator's Award By Plaintiff Susana Sanchez to Vacate Arbitrator's Award

Tentative Ruling:

To grant defendant Wonderful Pistachios and Almonds' petition to confirm the arbitrator's award. (Code Civ. Proc., §§ 1285, 1286.) To deny plaintiff Susana Sanchez's petition to vacate the arbitrator's award. (Code Civ. Proc., § 1285.2.)

If oral argument is timely requested, the matter will be heard on Wednesday, February 22, 2023 at 3:30 p.m. in Dept. 503

Explanation:

Under Code of Civil Procedure section 1285, "Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award." (Code Civ. Proc., § 1285.) "A response to a petition under this chapter may request the court to dismiss the petition or to confirm, correct or vacate the award." (Code Civ. Proc., § 1285.2.) "If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made, whether rendered in this state or another state, unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding." (Code Civ. Proc., § 1286.)

Also, under section 1286.2, "the court shall vacate the award if the court determines any of the following: (1) The award was procured by corruption, fraud or other undue means. (2) There was corruption in any of the arbitrators. (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision." (Code Civ. Proc., § 1286.2, subd. (a), paragraph breaks omitted.)

The Code of Civil Procedure sections dealing with vacation and correction of arbitrational warrants provide exclusive grounds upon which court may review a private arbitration award. (*J. Alexander Securities, Inc. v. Mendez* (1993) 17 Cal.App.4th 1083.) "[A]n award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction)." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33.) Absent proof of one of the grounds listed in those sections, a court may not intervene. Even "the existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review." (*Ibid*.)

In the present case, defendant moves to confirm the final arbitration award entered by the arbitrator on May 31, 2022, and plaintiff has filed her petition to vacate the arbitration award. Plaintiff contends that the arbitration award should be vacated because the arbitrator refused to hear evidence to support her opposition to the defendant's motion to dismiss her original claims for intentional infliction of emotional distress, and he applied a one-year statute of limitations to dismiss the IIED claim rather than the three-year statute that applies to IIED claims. However, to the extent that plaintiff argues that the arbitrator's decision is invalid because it applied the wrong statute of limitations, the alleged fact that an arbitrator's decision is legally incorrect is not a valid basis for overturning the award. (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at pp. 6, 33.) Therefore, plaintiff's contentions regarding the purported legal incorrectness of the arbitrator's decision are irrelevant and do not provide a basis for vacating the award.

Next, while plaintiff claims that the arbitrator refused to hear evidence that she wanted to present, she has not explained what evidence she could have presented that would have been likely to change the outcome of the motion. It does not appear that it would have been proper to present evidence in opposition to the motion, as the motion before the arbitrator was a motion to dismiss under JAMS Rule 18, which is analogous to a demurrer for failure to state facts sufficient to constitute a cause of action. (See Exhibit D to Pecht decl., Arbitrator's Final Ruling on Motion to Dismiss.) Thus, in deciding the motion to dismiss, the arbitrator could only consider whether the complaint stated valid causes of action on its face and whether those claims were barred by the applicable statutes of limitation, not any extrinsic evidence.

In any event, plaintiff has not pointed to any other evidence that she could have submitted to the arbitrator that would have been likely to change the arbitrator's ruling. Given the fact that the motion was based on the dates of the events alleged in the complaint, which the arbitrator determined showed that the statute had run on plaintiff's claims, it does not appear that plaintiff would have been able to present additional evidence that would have changed the arbitrator's decision. Plaintiff claims that she could have presented more evidence of improper conduct by defendant both before and after she was locked in the shed that would have supported her IIED claim, but she provides no further explanation of what such evidence would have consisted of. It is also notable that plaintiff's second claim with the DFEH that supported her additional claims for discrimination and harassment under FEHA did not allege any misconduct other than the claim that she was locked in the shed by her supervisor and another employee of defendant, which were the same facts that she alleged in her original complaint. (See

Exhibit G to Pecht decl., Exhibit A, October 27, 2021 Complaint to DFEH.) Thus, it does not appear that plaintiff actually attempted to submit any new evidence to the arbitrator that was likely to change the outcome of the motion to dismiss, or that the arbitrator refused to hear the new evidence.

Plaintiff next argues that the arbitrator's award should be vacated because he refused to hear any evidence from plaintiff before granting the defendant's motion for summary disposition of her FEHA causes of action. She contends that the arbitrator's decision to dismiss the FEHA claims as untimely was incorrect because he applied the old statute, which requires a court action to be filed within one year of the date the DFEH issues the right-to-sue letter, rather than the new version of the statute that allows complaints to be filed within three years of the incident that forms the basis for the plaintiff's claim. She also contends that the issuance of the second right-to-sue letter by the DFEH indicated that the DFEH was allowing the claim to proceed even though it was filed more than a year after the incident, and that the arbitrator should have given deference to this interpretation by the DFEH and found that the FEHA claims were not untimely. She contends that, since she filed her FEHA claims in arbitration within one year of the issuance of the second right-to-sue letter, her claims were still timely and should not have been dismissed.

Again, however, plaintiff has failed to show that the arbitrator refused to allow her to present evidence that would have affected the outcome of the hearing. It is not even clear what further evidence plaintiff could have presented here. The issue before the arbitrator was essentially a question of law, namely whether plaintiff's FEHA claims were time-barred because they were filed more than a year after the issuance of the first right-to-sue letter, or whether the second right-to-sue letter reset the clock and revived her claims. The arbitrator found based on the undisputed facts in the record that plaintiff's FEHA claims were time-barred. While plaintiff disagrees with the arbitrator's decision and argues that it was legally incorrect because the revised statute extended the time for filing her complaint with the DFEH, her claim of legal error does not provide a valid basis for vacating the award. (*Moncharsh, supra*, at pp. 6, 33.)

Next, plaintiff argues that the award was made in excess of the arbitrator's authority because the validity of the FEHA claims was not subject to arbitration, and the arbitrator also failed to hear any evidence on this issue. However, plaintiff herself voluntarily submitted her FEHA claims to arbitration in October of 2021, so she cannot now claim that the validity of those claims is not subject to arbitration. (See Exhibits F and G to Pecht decl., Plaintiff's Notices of Additional Claim.) Furthermore, the arbitration agreement itself clearly provides that all disputes arising out of the employment relationship, including claims under FEHA for harassment and discrimination, must be resolved in arbitration. (Exhibit B to Pecht decl., Arbitration Agreement, ¶ 2.) Therefore, plaintiff's contention that the issue of the validity of the FEHA claims is not subject to arbitration is clearly without merit.

Plaintiff also argues that defendant's motion to dismiss the FEHA claims was an attempt to "collaterally attack" the validity of the DFEH's issuance of the second right-to-sue letter, and that defendant failed to join the DFEH as an indispensable party or seek administrative review of the DFEH's decision by way of a writ of mandamus. However, there is nothing in the record that supports plaintiff's contention here. The documents

submitted to the court show that the DFEH issued the second right-to-sue letter in response to plaintiff's filing her second complaint with the DFEH regarding the October 22, 2018 incident where plaintiff was locked into a silo by defendant's employees. (Exhibit G to Pecht decl., Exhibit A.) Yet, as the arbitrator noted, the DFEH was legally required to issue the right-to-sue letter after plaintiff filed her second complaint. (See *Scott v. Gino Morena Enterprises, LLC,* (9th Cir. 2018) 888 F.3d 1101, 1107, discussing the analogous federal statute requiring the EEOC to issue a right-to-sue letter.) Such an action is merely a prerequisite to filing a civil action, but it does not imply that the DFEH made any decision regarding the timeliness or propriety of the second complaint. In other words, the issuance of the right-to-sue letter was a ministerial act by the DFEH rather than a reasoned decision on the issue of whether the plaintiff's second administrative complaint was timely or not. As such, the arbitrator was not required to give deference to the DFEH's "decision" to issue the right-to-sue letter or take evidence regarding the DFEH's reasons for issuing the letter. The letter was issued by the DFEH as part of its mandatory duties under the law, so no further discovery or evidence was required on this issue. In fact, the right-to-sue letter states that " the DFEH does not review or edit the complaint form to ensure that it meets procedural or statutory requirements." (Attachment 8(c) to Petition to Confirm Arbitrator's Award, Final Award, p. 10, fn. 1.) Thus, plaintiff has failed to show that the arbitrator refused to hear evidence that was relevant to the outcome of the case.

Nor was the DFEH an indispensable party to the case, and in fact plaintiff admits that the DFEH could not have been joined to the arbitration proceeding because it was not a party to the arbitration agreement. (Petition to Vacate Award, Points and Authorities, p. 8, lines 23-25.) Nor was it necessary for the defendant to file a petition for a writ of mandate to challenge the DFEH's "decision" to issue the right-to-sue letter, as there was no "decision." The DFEH simply performed its ministerial duty and issued the letter in response to the plaintiff's second complaint, as it was required to do by law.

Plaintiff next argues that the validity of the FEHA claims was not subject to arbitration because, under paragraph 6 of the arbitration agreement, "nothing in this Agreement should be interpreted as restricting or prohibiting you from filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board (specifically including but not limited to the filing prosecution of an unfair labor practice charge), the Department of Labor, the Occupational Safety and Health Commission, any other federal, state, or local administrative agency charged with investigating and/or prosecuting complaints under any applicable federal, state or municipal law or regulation." Plaintiff contends that this language means that the arbitration clause cannot restrict or prohibit an employee from filing a charge with a state agency like the DFEH, and therefore defendant cannot use the arbitration process to argue that the right-to-sue letter was invalid.

Yet plaintiff's interpretation ignores the plain language of the arbitration agreement, which makes it clear that the agreement is not intended to prevent an employee from filing a complaint with the DFEH or other government agency. (Paragraph 6 to Arbitration Agreement.) In other words, the DFEH complaint process itself does not have to be arbitrated. The agreement says nothing about whether the arbitrator can later make a determination of whether the plaintiff's complaint to the DFEH was made in a timely manner, or whether the FEHA claims are time-barred. Here, neither

defendant nor the arbitrator ever did anything to prevent plaintiff from filing her complaint with the DFEH, and in fact plaintiff filed two separate complaints with the DFEH and received right-to-sue letters as a result.

Also, the arbitrator did not rule on whether the right-to-sue letters were properly issued by the DFEH. Instead, he found that the plaintiff's FEHA claims were untimely as they were brought more than a year after the first right-to-sue letter had been issued. His decision did not exceed his powers under the arbitration agreement, which clearly allowed him to rule on the validity of claims under FEHA. Therefore, plaintiff has failed to show that the arbitrator's award was in excess of his authority.

Next, plaintiff argues that JAMS Rule 18 regarding summary disposition motions deprived her of her right to have the arbitrator hear all of the evidence before making a decision. She contends that, because Rule 18 requires the arbitrator to make a preliminary determination of whether a summary disposition motion is "likely to succeed and dispose of or narrow the issues in the case" before allowing the motion to be heard, the Rule effectively requires the arbitrator to prejudge the case before hearing any evidence. She also contends that the Rule sets forth a vague and undefined burden of proof, namely whether a motion is "likely" to prevail, which is not a standard recognized in the law, and therefore the Rule is too vague to be applied.

However, plaintiff has failed to show that Rule 18 is void or too vague to be enforceable. Under Rule 18, "[t]he Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The Request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case." (JAMS Rule 18.)

Thus, the Rule requires the arbitrator to make a preliminary determination as to whether the motion for summary disposition is likely to succeed before allowing the motion to go forward. There is nothing in the Rule that requires the arbitrator to make a final determination of the motion's merits before hearing the underlying motion and opposition, however. The arbitrator only has to conclude that the motion has a likelihood of success, and he or she must then go on to hear the arguments and evidence as with any other motion. Clearly, the arbitrator could change his or her mind before making a final decision on the motion. Therefore, Rule 18 does not require the arbitrator to commit to any prejudgment of the merits of the motion or deny the opposing party the chance to present evidence. Nor has plaintiff shown that she was actually denied the opportunity to present evidence or argument at the hearing on the dispositive motions.

Also, while plaintiff argues that the "likely to succeed" standard of proof is too vague to be enforced, plaintiff cites no authorities that hold that such a standard is overly vague or unenforceable. The "likely to succeed" standard appears to be simply a way for the arbitrator to use his or her judgment to make a simple determination of whether the motion has any chance of prevailing before allowing it to be brought. Plaintiff has failed to show that the standard is overly vague or unenforceable such that it deprived her of her right to a fair hearing or to present evidence. Again, plaintiff has not pointed

to anything in the record that tends to show that she was not allowed to present her evidence in opposition to the dispositive motion, or that she was prejudiced as a result.

Plaintiff also argues that the arbitrator violated her right to a fair hearing by ruling on the validity of JAMS Rule 18 rather than referring the matter to the Superior Court for a ruling. She contends that the arbitrator had no authority to determine whether Rule 18 was valid, and that he should have granted her request to stay the arbitration and refer the issue back to the court for a ruling on the Rule's validity. She further contends that the JAMS Rules do not give the arbitrator the authority to make rulings on the validity of the JAMS Rules, and that it was a conflict of interest for the arbitrator, who is employed by JAMS, to make this determination.

However, JAMS Rule 11 specifically states that, "[o]nce appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final." (JAMS Rule 11(a).) Thus, the JAMS Rules clearly do authorize the arbitrator to resolve disputes about the interpretation and applicability of the Rules, and to make binding decisions about those rules. As a result, there was no need to stay the matter and refer it back to the Superior Court for a ruling on the validity of Rule 18. Indeed, doing so would have defeated the purpose of the court's order sending the parties to arbitration. Nor does it appear that the arbitrator had a conflict of interest in making his ruling on the validity of Rule 18, and in fact he was required to do so under Rule 11.

Finally, plaintiff argues that she should have been permitted to conduct further discovery into the basis for the DFEH's right-to-sue letter, including the internal policies of the DFEH and its interpretation of the applicable law. She contends that the arbitrator denied her the chance to present such evidence and oppose the defendant's motion to dispose of her FEHA claims.

However, this argument appears to be nothing more than a restatement of plaintiff's prior contentions regarding the right-to-sue letter. As discussed above, plaintiff had no right to discover the DFEH's reasons for issuing the right-to-sue letter because the issuance of such letters is a purely ministerial act that the DFEH was required to perform under the law after plaintiff filed her administrative complaint. Nor would discovery have been likely to reveal anything relevant, as the DFEH's issuance of the letter was not a reasoned decision regarding the merits or timeliness of plaintiff's claim. It was simply a clerical act required under the law in response to plaintiff's complaint.

As a result, plaintiff has failed to show that the arbitrator's award should be vacated, and the court intends to deny her petition to vacate the award. The court will instead grant defendant's petition to confirm the award.

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: jyh on 2/7/23.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Maria Chavarin De Gamez v. California Fruit Basket, Inc. et al.***
Superior Court Case No. 20CECG02531

Hearing Date: February 9, 2023 (Dept. 503)

Motion: by plaintiff for Final Approval of Class Settlement

Tentative Ruling:

To grant plaintiff's motion for final approval of the class settlement, class representative's enhancement payment, attorney's fees and costs, and payment to the Labor and Workforce Development Agency; and settlement administrator's fees.

If oral argument is timely requested, the matter will be heard on Wednesday, February 22, 2023 at 3:30 p.m. in Dept. 503

Explanation:

1. Class Certification

The court has already granted the motion for preliminary approval and certification of the class and found that the class is sufficiently numerous and ascertainable to warrant certification for the purpose of approving the settlement. There is no reason for the court to reconsider its decision granting certification of the class. Therefore, the court certifies the class for the purpose of final approval of the settlement.

2. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." (*Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079.)

"[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 . . . The courts are supposed to be the guardians of the class." (*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.) The court must be leery of a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Id*. at p. 129.)

b. The Settlement Is Fair and Reasonable

Previously, the court found that the settlement was fair and reasonable based on the evidence that plaintiff submitted in support of the motion for preliminary approval. It does not appear that there is any reason for the court to reconsider its decision in this regard.

The settlement class covers all current and former California Fruit Basket, Inc. and Melkonian Enterprises, Inc. employees in California who worked for defendant at any time during the period of August 28, 2016 to June 16, 2021. The parties estimate that there are approximately 191 employees in the settlement class.

The gross settlement amount is $420,000.00. The net settlement fund will be distributed to the class members based on the proportionate number of workweeks that he or she worked during the class period. Plaintiff estimates that each class member will receive an average of $844.62, with the highest estimated payment being $3,734.20. This appears to be a considerable result for the class members under the circumstances.

The settlement administrator, Phoenix Settlement Administrators, sent out the notice packets on October 28, 2022, after the court granted preliminary approval of the settlement. Seven of the notice packets could not be delivered. Class members had until December 12, 2022 to submit objections, requests for exclusion, or disputes. To date, no objections or disputes have been received and only one class member has opted out of the settlement. Thus, the participation rate is 99.48 percent of the class. The lack of any objections or disputes supports plaintiff's contention that the settlement is fair, adequate, and reasonable.

Also, the settlement was reached after investigation and discovery, and was the product of arms' length negotiations and mediation between the parties. Furthermore, class counsel is experienced in similar types of class action litigation. These factors also weigh in favor of finding that the settlement is fair and reasonable.

In addition, while the amount of the settlement is less than the total potential value of plaintiff's claims if he prevailed at trial, plaintiff made a reasonable decision to settle for less than the full value of his claims based on the risks and uncertainties of litigating the case. Therefore, the court finds that the settlement is fair, reasonable, and adequate.

3. Attorney's Fees and Costs

Plaintiff's counsel seeks an award of $140,000.00 in attorney's fees, or 33.33 percent of the gross settlement, plus $16,183.46 in court costs. The agreement provides

for an award of up to 1/3 of the total gross settlement. Therefore, the request for attorney's fees is consistent with the agreement.

Also, the California Supreme Court in *Laffitte v. Robert Half Intern. Inc*. (2016) 1 Cal.5th 480 held that a court has discretion to grant attorney's fees in class actions based on a percentage of the total recovery. (*Id*. at pp. 503-504.) However, the trial court may also use a lodestar calculation to double check the reasonableness of the fee award. (*Id*. at pp. 504-506.)

Plaintiff's counsel has provided a proposed lodestar calculation of fees, and seeks a multiplier of 0.95, totaling an award equal to 1/3 of the gross settlement. The court finds the hourly blended rate of $609 as reasonable in light of counsel's experience. However, the amount of hours spent in legal research and motion work are excessive. Counsel does not identify any unique legal issues with the present matter that warrant 68.4 hours of case review and legal research. Neither does the court's docket support 63.9 hours of pleadings and motion work. Both totals will be reduced by half. In light of the reduction, the lodestar multiplier requested is 1.31. This request appears to be reasonable in light of the work involved in litigating the case, the risks and potential value of the claims, as well as the results achieved for the class. Therefore, counsel has adequately justified his request for $140,000.00 in fees, and the court approves the requested fees. Likewise, the request for $16,183.46 in court costs appears to be reasonable, and is approved.

4. Payment to Class Representative

Plaintiffs also seek court approval of a $5,000 payment to the named class representative, Maria Chavarin De Gamez. The amount is based on the work done by plaintiff, as well as the risks she took in being named as class representative, which could have resulted in an award of fees and costs against her if she lost at trial. The amount of the payment does not appear to be unusually great in comparison to the awards approved in other cases. Also, it does appear that the class representative did considerable work in the case and took some real risks in choosing to represent the class. Therefore, it appears that the requested $5,000 payment to the named class representative is reasonable and the court approves it.

5. Payment to LWDA under PAGA

Plaintiffs also seek approval of $5,000.00 to be paid to settle the PAGA claim, 75 percent of which will be paid to the LWDA pursuant to Labor Code section 2699, subdivision (i). The amount to be paid to settle the PAGA claim appears to be reasonable. In addition, the LWDA has been served with a copy of the settlement as well as preliminary and final approval motions, and it has not objected to the request to approve the settlement. Therefore, the court finds that the payment to settle the PAGA claim is reasonable.

6. Payment to Class Administrator

Plaintiffs also request court approval of a $6,250.00 payment to the claims administrator Phoenix Settlement Administratros for the costs of administering the settlement. The administrative cost payment appears to be reasonable given the

amount of work to be performed in sending out class notices, tracking down missing class members, handling questions from class members and parties, and sending out payments to class members, as well as providing declarations in support of the motions for class settlement approval.

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: jyh on 2/7/23.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Smith v. Big 5 Sporting Goods, Inc.***
Superior Court Case No. 20CECG03682

Hearing Date: February 9, 2023 (Dept. 503)

Motion: by Defendant to Compel Arbitration

Tentative Ruling:

To divide plaintiff's Private Attorneys General Act ("PAGA") claim into individual and representative claims, grant the motion, and order plaintiff to arbitrate the individual portion of his PAGA claim against defendant, and dismiss the representative portion of the PAGA claim.

If oral argument is timely requested, the matter will be heard on Wednesday, February 22, 2023 at 3:30 p.m. in Dept. 503

Explanation:

Under the Federal Arbitration Act ("FAA"),

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(9 U.S.C. § 2.)

"In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" (*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 478, internal citations omitted.)

"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.'" (*Market Ins. Corp. v. Integrity Ins. Co*. (1987) 188 Cal.App.3d 1095, 1098, internal citations omitted.)

"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. [Citation.]' [Citations.] [¶] 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 [emphasis in original].)

> [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 [Code Civ. Proc.,] § 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 [brackets added] ("*Rosenthal*").)

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, 540-543.)

In the case at bench, defendant Big 5 Sporting Goods, Inc.'s motion to compel arbitration is supported by the declaration of its Human Resources Compliance Manager, Donny Sanchez. Mr. Sanchez attests to the procedure by which applicants create accounts with unique usernames and passwords for the purpose of submitting an application for employment and use those same credentials to login to the online Career Center to review and complete onboarding paperwork if an offer of employment is made. (Sanchez decl. ¶ 3.) Within the onboarding documents is the Mutual Agreement to Arbitrate Claims (Agreement). (Ibid.) According to the log og an applicant's accessing the Career Center, as kept in the ordinary course of business, plaintiff Aaron Smith accessed the onboarding documents in the Career Center and executed the Agreement on April 3, 2019 at 11:39 a.m. (*Id*. at ¶ 4, Exh. B.) Plaintiff also physically signed a copy of the Agreement on June 28, 2019, which was sent to defendant's headquarters and placed in plaintiff's personnel file. (Id. at ¶ 5, Exh. C.)

Plaintiff does not dispute the authenticity of the Agreement produced by defendant. Plaintiff opposes the motion to compel on the basis that it is unenforceable as an unconscionable agreement under California law.

Unconscionability

Plaintiff opposes the motion, arguing that both procedural and substantive unconscionability are present due to the change in law forcing Plaintiff's PAGA claim to be split into individual and non-individual claims for purposes of arbitrating the individual PAGA claim. (See *Viking River Cruises, Inc. v. Moriana* (2022) __ U.S. __, 142 S.Ct. 1906 ("*Viking River*").) "Because unconscionability is a reason for refusing to enforce contracts

generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which, as noted, provides that arbitration agreements are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (9 U.S.C. § 2), recognized that 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements ....'" (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 114, internal citation omitted, italics in original.)

"The party resisting arbitration bears the burden of proving unconscionability. Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' '[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.'" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247, internal citations omitted.)

Plaintiff contends the Agreement is procedurally unconscionable because at the time he signed the agreement to arbitrate a PAGA claim could not be forced into arbitration, thus he did not consent to arbitrate a PAGA claim. This is the sole basis for finding the Agreement was procedurally unconscionable.

"[P]rocedural unconscionability requires oppression or surprise. '"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."' (*Pinnacle Museum Tower Assn., supra,* 55 Cal.4th at 247, internal citations omitted.) Although the *Viking River* holding affects the arbitrability of plaintiff's PAGA claim, a lack of ability to negotiate terms or hidden clause is the source of the "surprise." The plain language of the agreement states that the Federal Arbitration Act will govern the agreement and plaintiff has presented no evidence to support that this provision was a surprise. (See Sanchez Decl. ¶¶ 4,5, Exh. B and C.) Plaintiff has not provided authority to support his position that a change in law governing the agreement is considered procedurally unconscionable. Counter to plaintiff's contention, parties are deemed to have contemplated and consented to post-contract changes to the law where, like the FAA here, it is incorporated into the contract. (*Gallo v. Wood Ranch USA, Inc*. (2022) 81 Cal.App.5th 621, 642 [provisions of the California Arbitration Act not in existence at the time the arbitration agreement was signed deemed to have been consented to by parties to the agreement].)

Even if the court agreed that there was some evidence of procedural unconscionability as argued by plaintiff, the amount of substantive unconscionability would need to be significant to find the agreement unenforceable. (*Pinnacle Museum Tower Assn., supra,* 55 Cal.4th at 247, internal citations omitted.)

Plaintiff contends certain terms of the Agreement are substantively unconscionable because waivers of PAGA actions are contrary to law. Plaintiff argues that enforcing the agreement under *Viking River* and splitting the PAGA claim into his individual claim subject to arbitration and non-individual claims is in effect a forced

waiver of the PAGA claim because it loses its representative nature. "[E]very PAGA action, whether seeking penalties for Labor Code violations solely as to only one aggrieved employee - the plaintiff bringing the action - or as to other employees as well, is a representative action on behalf of the state." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 394 (Chin, J. concurring).) Under plaintiff's interpretation, there is no "individual" PAGA claim because it is an inherently representative action.

As a rule, "an employee's right to bring a PAGA action is unwaivable." (*Iskanian, supra,* 59 Cal.4th at p. 383 ("*Iskanian*"), overruled in part by *Viking River Cruises, Inc. v. Moriana, supra,* 142 S.Ct. 1906.) Until recently, an agreement to separately arbitrate or litigate individual PAGA claims was invalid. (*Iskanian*, *supra*, 59 Cal.4th at pp. 383-384.) That holding in *Iskanian* was overturned by the U.S. Supreme Court in *Viking River*, *supra*, 142 S.Ct. at p. 1924.)[1] Thus, although an employee is always entitled to state a PAGA claim, his or her individual claim may be compelled to arbitration. (*Ibid.*)

Plaintiff argues that the language of the Agreement improperly calls for the wholesale waiver of any PAGA claim, and therefore is invalid under the upheld portion of *Iskanian*. (*Viking River*, *supra*, 142 S.Ct. at pp. 1924-1925.) However, a plain reading of the agreement does not support plaintiff's conclusion. (See Sanchez Decl. ¶¶ 4, 5, Exh. B and C.) The Agreement expressly states that "arbitration shall occur on an individual basis only" and plaintiff "waive[s] the right to initiate, participate in, or recover through, any class or collective action." (*Ibid*.) In other words, the waiver does not contemplate a waiver of any individual rights, and cannot be read to be a wholesale waiver.

Although plaintiff argues that a PAGA claim can only be pursued as a representative claim and not on an individual basis, *Viking River* held that an individual's PAGA claim for violations that employee suffered may be separated from the non-individual claims - those the state could pursue on behalf of all other employees. (*Viking River*, *supra*, 142 S.Ct. at pp. 1924-1925.) The Court explained that a PAGA action is representative in two senses: they are brought by employees acting as representatives of the State and representative in that the employee can join the claims arising out of event involving other employees. (*Id*. at p. 1916.) The individual PAGA claim is understood to be brought in a representative capacity as an agent or proxy of the State, counter to the argument made by plaintiff. (*Ibid*.) The language of the Agreement dictates that the arbitration shall occur on an individual basis and does not explicitly exclude representative actions, consistent with pursuing the individual PAGA claim as contemplated in *Viking River*. Thus, plaintiff's individual claims were not subject to waiver and do not support finding the Agreement to be substantively unconscionable. Plaintiff can pursue the PAGA action, albeit on a smaller scale.

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[1] The U.S. Supreme Court concluded that, because the rule against separating individual from representative claims under PAGA was incompatible with the goals of the Federal Arbitration Act, the Federal Arbitration Act preempted the rule. (*Viking River*, *supra*, 142 S.Ct. at p. 1924.) The Supreme Court found that, under this particular rule, parties who otherwise agreed to arbitrate their claims were impermissibly coerced into withholding those claims because PAGA allows an individual to magnify the scope of the claims beyond that which the parties agreed. (*Id.* at pp. 1915, 1924-1925 ["An employee who alleges he or she suffered a single violation is entitled to use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability."].)

Plaintiff's disagreement with the reasoning and holdings of Viking River is clear, however, disagreement with binding United States Supreme Court authority is not a valid basis for denying the motion to compel arbitration now before the court.

Dismissal of the Non-Individual, Representative PAGA Claims

Defendant seeks to dismiss plaintiff's representative claim for lack of standing, pursuant to *Viking River*, *supra*. In *Viking River*, the U.S. Supreme Court noted:

> [A]s we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit.

(*Viking River*, *supra*, 142 S.Ct. at p. 1925, internal citations omitted.)

Plaintiff argues that an aggrieved employee, and thus one who has standing to maintain a PAGA action**,** an action brought on behalf of the Labor and Workforce Development Agency ("LWDA"), includes one who has settled his or her individual claims. (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 90-91 ("*Kim*").) Kim is not instructive.

At issue in *Kim* was the question of whether an employee loses standing to pursue a claim under PAGA if the employee settles and dismisses his or her individual claims for Labor Code violations. (*Kim*, *supra*, 9 Cal.5th at p. 80.) The answer to that question does not address the facts of the present case. *Kim* only addressed the condition where an employee settles his private claims, and found that the employee retained standing to bring the LWDA's claim for civil penalties, a PAGA claim. Here, there is only a PAGA claim. The complaint only seeks to recover civil penalties on behalf of the LWDA. Plaintiff's claims for recovery for Labor Code violations were previously brought on behalf of himself and similarly situated persons have been dismissed by stipulation of the parties. (See August 11, 2022 Stipulation Requesting Dismissal of Individual and Class Claims Pursuant to Cal. Rules of Court, Rule 3.770(a) and Order Thereon.) There will be no settling of plaintiff's private claims to potentially affect plaintiff's PAGA claim. In sum, *Kim*'s holding that "PAGA standing is not lost when representatives settle their claims for individual relief" does not reach the issue now before the court.

The question here is more narrowly tailored: where plaintiff "settles" (or otherwise resolves) the LWDA's claim arising from violations of the Labor Code he endured, whether he may continue to represent the LWDA in its claims arising from violations of the Labor Code others endured. *Kim* could not have addressed this question. The law at the time *Kim* was decided precluded the splitting of a PAGA claim into an "individual" portion and on-behalf-of-others "representative" portion, the preclusion now abrogated by

Viking River as discussed above. It is axiomatic that cases are not authority for propositions not considered. (*People v. Gilbert* (1969) 1 Cal.3d 475, 482.)

The plain language of the statute states:

> Notwithstanding any other provision of law, any provision of [the] [Labor] [C]ode that provides for a civil penalty to be assessed and collected … for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself *and* other current or former employees ….

(Lab. Code, § 2699, subd. (a), emphasis added.)

The statute facially requires, conjunctively, that the aggrieved employee bring the action on behalf of himself and other current or former employees. This reading is consistent with the legislative intent, identified in *Kim*, which noted that "[i]t is apparent that PAGA's standing requirement was meant to be a departure from the 'general public' standing originally allowed by the [Unfair Competition Law]." (*Kim*, *supra*, 9 Cal.5th at p. 90.) In other words, the statute requires a plaintiff have civil penalties attributable to violations he endured to represent the civil penalties attributable to violations others endured, such that plaintiff's interests extend beyond that of the general public. As plaintiff's "individual" PAGA claim is subject to resolution through arbitration, what remains is a claim upon which plaintiff no longer may bring on behalf of himself and, therefore, other current and former employees.

Therefore, the representative portion of plaintiff's claim is dismissed.[2]

Plaintiff's reliance on *Gavriiloglou v. Prime Healthcare Management Inc*. (2022) 83 Cal.App.5th 595 for the proposition that his representative claim is not subject to issue preclusion by the arbitration of his individual claims is misplaced. In *Gavriiloglou*, plaintiff's own claims for Labor Code violations were litigated in arbitration and thus did not preclude the plaintiff's ability to bring a PAGA action on behalf of the Labor Workforce Development Agency. (*Id*. at p. 603.) The case at bench is distinguishable. Plaintiff's claims for his own Labor Code violations were dismissed and his individual PAGA claim on behalf of the LWDA is subject to arbitration. The court declines to extend the holding in *Gavriiloglou* as urged by plaintiff.

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.

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[2] Plaintiff urges the court to issue a stay of the action because the issue of dismissal is pending before the California Supreme Court. (*See Adolph v. Uber Technologies, Inc.*, S274671, review granted July 20, 2022.) The court declines to do so. The court notes that there is a procedure if it is determined that there has been a change of law that warrants reconsideration of an order. (Code Civ. Proc. § 1008, subd. (c).)

Tentative Ruling
Issued By: jyh on 2/8/23.
(Judge's initials) (Date)