Tentative Rulings for May 20, 2025
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)

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.

24CECG05290 ***Julie Olvera v. Ace Parking Management, Inc.*** **is continued to Thursday, May 22, 2025, at 3:30 p.m. in Department 403.**

24CECG01452 ***Amanda Roe v. Sanger Unified School District*** **is continued to Thursday, May 22, 2025, at 3:30 p.m. in Department 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(03)

Tentative Ruling

Re: ***Rodriguez v. D.H. Blattner & Sons, LLC***
Case No. 23CECG04200

Hearing Date: May 20, 2025 (Dept. 403)

Motion: Plaintiff's Motion for Attorney's Fees on Appeal

If oral argument is timely requested, it will be entertained on Thursday, May 22, 2025, at 3:30 p.m. in Department 403.

Tentative Ruling:

To deny plaintiff's motion for attorney's fees on appeal.

Explanation:

The court intends to deny plaintiff's motion for his attorney's fees on appeal, as he has not yet prevailed on any of his FEHA claims, and thus he has not shown that he is entitled to his attorney's fees at this time.

Under FEHA, "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees…" (Gov. Code, § 12965, subd. (c)(6).) Thus, a prevailing plaintiff in a FEHA action is generally entitled to an award of his or her attorney's fees. "The United States Supreme Court has held that, in a Title VII case, a *prevailing plaintiff* should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a *prevailing defendant* may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. California courts have adopted this rule for attorney fee awards under the FEHA." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985, citations omitted, italics in original.)

FEHA does not define the term "prevailing party." However, where the governing statute does not define "prevailing party", courts apply a practical test to determine whether a party has prevailed in the litigation for the purpose of deciding whether to award them attorney's fees. (*Donner Management Co. v. Schaffer* (2006) 142 Cal.App.4th 1296, 1309-1310.) That is, "prevailing party status should be determined by the trial court based on an evaluation of whether a party prevailed 'on a practical level,'" based on the extent to which they realized their litigation objectives. (*Id.* at p. 1310; see also *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1022-1023.)

In the present case, plaintiff has not yet prevailed on the merits of any of his FEHA claims. None of his claims have yet gone to trial or been otherwise resolved, such as by summary adjudication or other dispositive motion. He has not obtained any money damages, nor has he obtained a declaratory judgment or injunctive relief. Nor has he obtained a decision from the Court of Appeal affirming a judgment in his favor. He did obtain an order from the trial court denying defendant's petition to compel him to

resolve his claims through arbitration, which the Court of Appeal subsequently affirmed in an unpublished decision. However, this was merely an interlocutory victory that did not resolve the merits of any of his underlying FEHA claims. The decision only addressed the narrow procedural question of which forum would be used to hear his claims, arbitration or the Superior Court. No court has yet addressed the question of whether he actually suffered retaliation, wrongful termination, or discrimination, or determined that he should receive any damages or other relief. Therefore, plaintiff has not yet obtained any practical relief or achieved his litigation objectives. As a result, he is not the "prevailing party" for the purpose of awarding attorney's fees under FEHA, and the court intends to deny his motion for fees as premature.

Plaintiff has argued that he is entitled to an award of his attorney's fees because the Court of Appeal's remittitur stated that he was entitled to his "costs", and that he is also entitled to an award of costs on appeal under California Rules of Court, rule 8.274(c) [*sic*, 8.278(a)].) Also, plaintiff notes that "the general principle [is] that statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals." (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) "'[W]here the right is statutory, the trial court is authorized to award attorney's fees as part of costs on appeal notwithstanding a lack of direction in the remittitur.'" (*Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 264, citations omitted.)

However, plaintiff's argument only shows that he is entitled to his costs on appeal, not his attorney's fees as well. While he is certainly entitled to recover his costs incurred in the appeal based on the language of Rule of Court 8.278(a) as well as the Court of Appeal's remittitur, the Court of Appeal's decision said nothing about awarding him his attorney's fees as well. Also, while he contends that he is entitled to an award of his fees on appeal under statute because FEHA provides for a fee award to a prevailing plaintiff, again, he has not yet prevailed on the merits of any of his FEHA claims. Nor has he obtained any other practical relief in the case. Therefore, since he is not yet the prevailing party under FEHA, he is not yet entitled to an award of his attorney's fees. As a result, the court intends to deny plaintiff's motion for his attorney's fees as premature.[1]

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

Tentative Ruling
Issued By: lmg on 5-16-25.
(Judge's initials) (Date)

[1] Defendant also contends that the fees motion is untimely because plaintiff filed his motion more than 40 days after the Court of Appeal issued its remittitur. (Cal. Rules of Court, rule 3.1702(c)(1); 8.278(c)(1).) However, while plaintiff did not file his fees motion or memo of costs until 41 days after the Court of Appeal issued its remittitur, the 40th day was March 31, 2025, which was a court holiday, Cesar Chavez Day. Therefore, the motion and memo were due by the next non-holiday. (Code Civ. Proc., § 12a, subd. (a).) Plaintiff filed his motion and memo of costs the next business day, so the motion and memo are timely.

(47)

Tentative Ruling

Re: **Sanchez v. Torres**
Superior Court Case No. 24CECG01785

Hearing Date: May 20, 2025 (Dept. 403)

Motion: Petition for compromise for Sanchez v. Torres

If oral argument is timely requested, it will be entertained on Thursday, May 22, 2025, at 3:30 p.m. in Department 403.

Tentative Ruling:

To grant petition. Order signed. No appearance necessary. The court sets a status conference for Wednesday, August 27, 2025, at 3:30 p.m., in Department 502, for confirmation of deposit of the minors' funds into the blocked accounts. If Petitioner files the Acknowledgment of Receipt of Order and Funds for Deposit in Blocked Account (MC-356) at least five court days before the hearing, the status conference will come off calendar.

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 5-16-25.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Rogers v. Casares et al.***
Superior Court Case No. 22CECG00402

Hearing Date: May 20, 2025 (Dept. 403)

Motion: By Defendant K&K Property Management and Kevin Christiansen to Strike Punitive Damages

If oral argument is timely requested, it will be entertained on Thursday, May 22, 2025, at 3:30 p.m. in Department 403.

Tentative Ruling:

To deny. Defendants K&K Property Management and Kevin Christiansen are directed to file an Answer within ten days of service of the order by the clerk.

Explanation:

Defendants K&K Property Management and Kevin Christiansen (together "Defendants") seek to strike several paragraphs from the complaint: 42, 58, 65, 79, and the prayer for relief for punitive damages.

Pleadings are to be construed liberally with a view to substantial justice between the parties. (Code Civ. Proc. § 452.) The allegations in the complaint are considered in context and presumed to be true. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

Defendants submit argument that the prayer for punitive damages is improper because plaintiffs Kristi Rogers and Nicole Sherfield (together "Plaintiffs") fail to allege sufficient facts detailing malice, oppression or fraud to support Civil Code section 3294 punitive damages. Civil Code section 3294, subdivision (a) provides:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

With respect to punitive damage allegations, mere legal conclusions of oppression, fraud or malice are insufficient and therefore may be stricken. (*Perkins v. Super. Ct.* (1981) 117 Cal.App.3d 1, 6.) However, if looking to the complaint as a whole, sufficient facts are alleged to support the allegations, then a motion to strike should be denied. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) Allegations that include conclusions of law or that are considered to be ultimate facts will stand if sufficient facts are alleged to support them. (*Ibid.*) Stated another way, if the facts and circumstances are set out clearly, concisely, and with sufficient particularity to apprise the opposite party

of what is called on to answer, such is sufficient to support a claim for punitive damages. (*Lehto v. Underground Const. Co.* (1977) 69 Cal.App.3d 933, 944.)

Malice means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (Code Civ. Proc., § 3294, subd. (c)(1).) Under the statute, malice does not require actual intent to harm. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299.) Thus, an allegation that a defendant intended to injure a plaintiff or acted conscious disregard of his or her safety suffices. (*See G.D. Searle & Co. v. Super. Ct.* (1975) 49 Cal.App.3d 22, 32-33.) Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. (*Pfeifer*, *supra*, 220 Cal.App.4th at p. 1299.) Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. (*Ibid.*)

Here, the Complaint alleges that Defendants knew of a prior bedbug infestation, and chose to ignore prior guest complaints. (Complaint, ¶ 27.) Further, the Complaint that Defendants authorized or ratified staff to not properly inspect and ensure that the property was free from bedbugs. (*Id.*, ¶¶ 28, 29.) These general allegations were supported with identified specific acts and dates. (*Id.*, ¶¶ 15-19.) Though Defendants argue that there are no explanations as to how they had knowledge, the Complaint alleges prior guest complaints. Though Defendants argue that there is a blind assertion of reckless disregard, the Complaint alleges that Defendants directed or approved staff actions to not inspect the property properly. These alleged facts support the otherwise conclusory comments of "reckless", "deliberate", and "intentional" upon which the prayer for punitive damages rests. The court finds that there is sufficient particularity to apprise Defendants of what they are called to answer. All other arguments go to factual disputes inappropriate on a pleading challenge. The motion 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: lmg on 5-16-25.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Patel v. California Department of Corrections and Rehabilitation***
Superior Court Case No. 23CECG04391

Hearing Date: May 20, 2025 (Dept. 403)

Motion: By Defendant California Department of Corrections and Rehabilitation for Summary Judgment, or Alternatively Summary Adjudication

If oral argument is timely requested, it will be entertained on Thursday, May 22, 2025, at 3:30 p.m. in Department 403.

Tentative Ruling:

To grant summary judgment. Within seven days of service of the order by the clerk, defendant shall submit a proposed judgment consistent with the court's summary judgment order.

Explanation:

Plaintiff Hetalben Patel asserts two causes of action against the California Department of Corrections and Rehabilitation ("CDCR"), where she works as a nurse: (1) California Family Rights Act ("CFRA") Rights Retaliation - [Gov. Code, § 12945.2(k)]; and (2) Violation of CFRA Rights [Gov. Code, § 12945.1 et seq.] Plaintiff alleges that she injured her knee hiking in February 2021 and exchanged some work shifts ("swapping") with other nurses to let her knee rest. She again injured her knee hiking in May 2021. Plaintiff was granted FMLA/CFRA leave in July of 2021. On 5/11/22 plaintiff's supervisors decided to retaliate against her for using FMLA/CFRA leave because she was too new to take significant time off. Prior to taking leave, from 4/13/20 – 5/11/22, CDCR allowed plaintiff to freely swap shifts with other nurses, which was important for plaintiff to recover from her injury. Starting 5/11/22 plaintiff's supervisor, Victor Soto, began denying plaintiff shift swaps, though section 19.9.17 of the SEIU master agreement states that RNs are permitted to exchange hours (otherwise known as swapping) without other nurses performing the same type of duties. He allowed her to take vacation time, but not swap shifts. "Plaintiff believes she took significant amounts of time off in the beginning of 2022 because of her family (father sick) and she was injured (FMLA/CFRA). Her supervisors then devised a plan to punish her for taking time off. Plaintiff alleges this plan is illegal because the plan included punishment for taking off FMLA/CFRA related reasons. Plaintiff experienced thereafter punishment any time she would attempt to use FMLA/CFRA leave. Victor Soto would pick and choose who and when Plaintiff would swap shifts with to try to control Plaintiff." (Complaint ¶ 28.) The following swap requests were denied that she submitted on 5/7/2022; 6/11/2022; 7/27/2022; 8/18/2022; 9/7/2022; 9/17/2022. (Complaint ¶ 29.) These swap requests were approved: 5/11/2022; 5/15/2022. (Complaint ¶ 30.) Thus, the essence of the complaint is that plaintiff's swap shift requests were denied in retaliation for the leave she had previously taken.

CDCR now moves for summary judgment, or alternatively for summary adjudication of the two causes of action.

Initially the court addresses the parties' evidentiary objections. Plaintiff objects to the declaration of Jill Steep, the current Supervising Registered Nurse. Plaintiff objects to the entirety of the Steep declaration because Steep has worked there only for the last 1.3 years, and was not employed during the relevant time-period. Accordingly, plaintiff contends, she does not have personal knowledge of the policies in place during the relevant time period when plaintiff's swap requests were denied. The objection is overruled. She is in a position to review business records maintained by CDCR, and the information she provides is from those records to which she has access. She also provides a copy of the relevant collective bargaining agreement (Bargaining Unit 17's Memorandum of Understanding (MOU) in place during the relevant time period (2020-2023; see Exh. C).

Plaintiff claims that the file relied upon by Steep is incomplete. The opposition brief claims, "Jill Step is using documentation from Patel's supervisor, Victor Soto. Victor Soto is also an SRN II, who is now deceased. Victor Soto admitted fraudulent recordkeeping in a deposition going to trial in Fresno County. Unfortunately, the original deposition transcript is being used in a separate case against CDCR involving the same group of employees, so we cannot attach it as evidence at this time until the trial is over." But there is no evidence whatsoever to support this, not even a declaration from counsel explaining this situation. The court cannot consider facts not supplied by way of competent evidence; unsupported statements in points and authorities carry no weight. (See *Calcor Space Facility, Inc. v. Superior* Court (1997) 53 Cal.App.4th 216, 224; *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578.) The objection to the Steep declaration is overruled.

The court sustains the eight objections to plaintiff's declaration. The challenged portions of her declaration are hearsay, legal conclusions, lack personal knowledge, or directly contradict her deposition testimony. (See *Gharibian v. Wawanesa General Ins. Co.* (2025) 108 Cal.App.5th 730, 739 ["It is well-settled that a party cannot create a triable issue of fact with a declaration that contradicts the declarant's earlier deposition testimony."])

In reviewing CFRA retaliation claims, the *McDonnell-Douglas* burden shifting analysis applies. (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248; accord *Choochagi v. Barracuda Networks, Inc.* (2020) 60 Cal.App.5th 444, 458.) Under *McDonnell Douglas*, courts use a burden-shifting framework to assess claims alleging employment discrimination or retaliation. (*Choochagi*, supra, 60 Cal.App.5th at p. 457.) In the summary judgment context, the employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nonretaliatory factors. (*Ibid.*) If the employer meets this initial burden, the plaintiff must demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with retaliatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional retaliation or other unlawful action. (*Ibid.*)

The California Family Rights Act (CFRA) is a portion of the Fair Employment and Housing Act (FEHA) that provides "protections to employees needing family leave or medical leave." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6.) CFRA entitles eligible employees to take up to twelve unpaid workweeks in a twelve-month period for family care and medical leave to care for their children, parents, or spouses, or to recover from their own serious health condition. (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487.)

"Violations of the CFRA generally fall into two types of claims: (1) 'interference' claims in which an employee alleges that an employer denied or interfered with her substantive rights to protected medical leave, and (2) 'retaliation' claims in which an employee alleges that she suffered an adverse employment action for exercising her right to CFRA leave." (*Id.* at pp. 487-488.) Plaintiff brings both types of claims here, with the first cause of action alleging retaliation.

"The elements of a cause of action for retaliation in violation of CFRA are (1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA [leave]." (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 604, citations and internal quotes omitted.)

First the court finds that plaintiff cannot establish that she was subjected to an adverse employment action.

> In California, an employee seeking recovery on a theory of unlawful discrimination or retaliation must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity. A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. Workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. If every minor change in working conditions or trivial action were a materially adverse action then any action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The plaintiff must show the employer's ... actions had a detrimental and substantial effect on the plaintiff's employment.

(*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386, internal quotations and citations omitted, citing *Yanowitz, Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455, and *Thomas v. Depart. of Corrections* (2000) 77 Cal.App.4th 507, 511.)

In *St. Myers v. Dignity Health* (2019) 44 Cal.App.5th 301, 318, the court held that the plaintiff failed to establish that she had suffered from an adverse employment action where, although she contended that her employer manipulated her schedule (among

other allegations), she did not produce evidence that it resulted in reduction in pay. Also, a change to a non-preferred schedule generally does not constitute an adverse employment action, where the pay, benefits and promotional opportunities are the same. (See *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358.)

Here, the only alleged adverse employment action is the denial of shift swaps on eight or nine occasions. Plaintiff describes the detrimental effects on her employment as follows: (1) plaintiff worked with severe knee pain; (2) plaintiff was denied her leave requests [no admissible evidence of this is submitted]; (3) Plaintiff was forced to take vacation when she needed to attend school and take care of family; and (4) plaintiff was subjected to unusual scrutiny and harassment by supervisory staff [plaintiff presents no specifics of what this consisted of]. (Patel Decl., 5.) However, plaintiff submits no evidence that her CFRA leave requests were denied, and cites to no authority that any of the other actions constitute adverse employment actions. As the authorities above establish, simply not getting your preferred work schedule does not constitute an adverse employment action. The only effect is that plaintiff had to work her regularly scheduled shift on the occasions when her swap requests were denied. There was no associated financial loss. There is no adverse employment action.

Moreover, defendant shows that there is no causal connection between plaintiff taking protected leave and denial of shift swaps. Plaintiff took protected leave in late 2021, and in March and April of 2022 (Patel Depo. 24:22-25:10, 27:10-16), and that her swaps began to be denied in May 2022. However, following her protected leave in April 2022, all but one of plaintiff's requests to swap shifts were approved through the end of July 2022. (See UMF 4.) Thirteen of 14 requests were approved from May to July 2022. (*Ibid.*) Eight of Plaintiff's nine swaps between August 2022 and October 2022. Under the swap policy, "employees who fail to adhere to the agreed upon conditions of the exchange shall be denied subsequent requests to exchange days off." (UMF 2-3.) On 3/6/22, 7/15/22 and 7/22/22 plaintiff failed to work on approved shift swaps, calling in sick or otherwise failing to work those shifts. (UMF 5.) It was only after this that plaintiff's swap requests began to be denied. (UMF 4.) Defendant presents a legitimate employment reason for the denials. Plaintiff's only evidence of improper motive consists of hearsay statements and speculation, to which objections should be sustained.

As for the second cause of action, to establish a CFRA interference claim the plaintiff must establish the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights. (*Moore, supra,* 248 Cal.App.4th at p. 250.) It is undisputed that CDCR never denied any of plaintiff's requests to take leave protected by FMLA or CFRA. (UMF 10-11.) Plaintiff admitted that no request for protected leave was denied, and that whenever she wanted to take a day off using FLMA, she was permitted to do so. (*Ibid.*) Plaintiff admitted that she never was threatened with an adverse action or job loss for taking time off of work. (UMF 12.) The opposition admits, "There is no dispute that when Patel formally requested CFRA, that she was not formally denied the time off." (Oppo. 10:8-9.) Instead of showing that her right to CFRA leave was denied plaintiff points to her retaliation claim, which fails as discussed above. Because plaintiff was never denied the ability to take leave protected by FMLA or CFRA, her CFRA interference claim necessarily fails.

Accordingly, the court intends to grant summary judgment in favor of CDCR.

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 5-16-25 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Newtek Small Business Finance LLC v. SLJ Petroleum Holdings, LLC***
Superior Court Case No. 25CECG00511

Hearing Date: May 20, 2025 (Dept. 403)

Motion: Petition for Order Permitting Inspection of Real Property

If oral argument is timely requested, it will be entertained on Thursday, May 22, 2025, at 3:30 p.m. in Department 403.

Tentative Ruling:

To deny without prejudice.

Explanation:

Civil Code section 2929.5, subdivision (a), provides that a secured lender may enter and inspect the real property in either of two situations:

> (1) Upon reasonable belief of the existence of a past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security not previously disclosed in writing to the secured lender in conjunction with the making, renewal, or modification of a loan, extension of credit, guaranty, or other obligation involving the borrower.
>
> (2) After the commencement of nonjudicial or judicial foreclosure proceedings against the real property security.

The petition attachments include the note memorializing the Small Business Administration loan allegedly in default, deed of trust for the property, and a notice of default recorded in Fresno County. If the court considers the declaration of Richard Finamore filed in support of the ex parte petition seeking the same order, petitioner has provided sufficient evidentiary support of the commencement of nonjudicial foreclosure proceedings. (Finamore Decl., ¶¶ 5-7, 14, Exh. 1, 2, 4.) However, there is no proof that defendant was served with notice of the date of the hearing on the petition at bench.

As a result of the lack of notice of the hearing date on this petition, the court intends to deny the petition without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: lmg on 5-16-25.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Matthew Moua v. Tesla, Inc.***
Superior Court Case No. 24CECG04319

Hearing Date: May 20, 2025 (Dept. 403)

Motion: By Defendant to Compel Arbitration and Stay the Proceedings Pending Arbitration

If oral argument is timely requested, it will be entertained on Thursday, May 22, 2025, at 3:30 p.m. in Department 403.

Tentative Ruling:

To deny.

Explanation:

Evidentiary Objections

Plaintiffs' objections to the Declaration of Raymond Kim, paragraphs 3, 4, 8, and Exhibit 1 are sustained to the extent they describe or rely on actions purportedly taken by Plaintiffs. Kim has not established personal knowledge that Plaintiffs performed the various actions asserted.

Merits

In moving to compel arbitration, defendants must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. The party opposing the motion must then prove by a preponderance of evidence that a ground for denial of the motion exists (e.g., fraud, unconscionability, etc.) (*Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *Hotels Nevada v. L.A. Pacific Ctr., Inc.* (2006) 144 Cal.App.4th 754, 758; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230.)

There is a strong policy in favor of arbitration. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.) Courts are to enforce arbitration agreements according to their terms. (*Ibid*.) 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.)

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 ruling on a motion to compel arbitration, the court must first address whether there was an agreement to arbitrate and whether the agreement covers the dispute. (*Omar v. Ralphs Grocery Co*. (2004) 118 Cal.App.4th 955, 960.) The moving party must first allege existence of an agreement to arbitrate. (C*ondee v. Longwood Management Corp*. (2001) 88 Cal.App.4th 215, 218.) Where the moving party has alleged the existence of an arbitration agreement, the burden shifts to the opposing party to prove the falsity of the purported agreement. (*Id*. at p. 219.) While neither party cited to a case which discusses the three-step burden shifting process, the third step would be relevant where the opposing party has met its burden, then the burden shifts back to the moving party to "establish with admissible evidence a valid arbitration agreement between the parties." (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165-166.)[2]

Here, Defendant filed its moving papers, which did establish prima facie evidence of an agreement to arbitrate. However, Plaintiffs filed an opposition which included Plaintiffs' declarations stating that a Tesla sales representative placed the order for them online, such that they never clicked on anything or saw any hyperlinks regarding terms and conditions. (Xiong Decl., ¶¶ 2-7; Moua Decl., ¶¶ 2-7.)

Here, Defendant met its initial burden of presenting prima facie evidence of an agreement to arbitrate between Plaintiffs and Defendant. Notably, at the first step, the burden is low for the moving party. (*Condee v. Longwood Management Corp*., *supra*, 88 Cal.App.4th at p. 218.) A moving party can either provide a copy of the agreement or set forth the terms of the agreement, verbatim. (*Ibid*.) **At this step**, there is no requirement to follow the normal procedures to authenticate the document. (*Id*. at pp. 218-219.)[3]

Thus the burden shifted to Plaintiffs to challenge the authenticity of the agreement. (*Id*. at p. 219.) Here, Plaintiffs have sufficiently challenged that they ever saw, let alone consented to, the terms and conditions. (Xiong Decl., ¶¶ 2-7; Moua Decl., ¶¶ 2-7.)

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[2] While neither party addressed the three-part burden shifting process, *Gamboa v. Northeast Community Clinic, supra*, 72 Cal.App.5th at pp. 165-166 describes the relevant burden at each step. 1) The moving party has the initial burden of producing prima facie evidence of a written agreement to arbitrate. 2) If the moving party meets this burden, then the opposing party has the burden of producing evidence to challenge the agreement's authenticity. 3) If the opposing party meets this burden, then the moving party must produce admissible evidence which establishes the existence of the agreement by a preponderance of the evidence.

[3] The court would note that the decision in *Condee* was to find error for denying the petition to arbitrate where the trial court had determined the agreement was not properly authenticated at the first step. The matter was remanded and the trial court was instructed to consider the other objections raised to enforcement of the agreement. Thus, it primarily addresses the first step and does not reach the second or third steps. (*Ibid*.)

Where the opposing party has sufficiently challenged the authenticity of the agreement, then the burden shifts back to the moving party to produce admissible evidence establishing the existence of the agreement by a preponderance of the evidence. (*Gamboa v. Northeast Community Clinic, supra*, 72 Cal.App.5th a pp. 165-166.) It is here where the moving party has failed to meet its burden. Defendant has established that an arbitration agreement *document* exists in its internal files. (See Kim Decl., ¶¶ 3-4.) Defendant has not established that Plaintiffs ever had any opportunity to see the agreement, let alone consent to it. Defendant has not produced a declaration of the sales representative who assisted Plaintiffs with their transaction. As such, Defendant has not demonstrated that Plaintiffs had an opportunity to view the arbitration agreement during the ordering process. Additionally, Defendant's argument that the agreement would have been available in the Plaintiffs' Tesla account is entirely unsupported in any of the declarations provided by Defendant. As such, Defendant has not established the existence of an agreement to arbitrate.

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 5-16-25.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re:	***Maria Del Socorro Gonzalez Deaver v. Babujyan Health Care, Inc.*** Superior Court Case No. 23CECG02642
Hearing Date:	May 20, 2025 (Dept. 403)
Motion:	(1) Defendant Vanik & Arsen, LLC's Demurrer to and Motion to Strike Portions of Third Amended Complaint (2) Defendant Babujyan Health Care, Inc.'s Demurrer to and Motion to Strike Portions of Third Amended Complaint

If oral argument is timely requested, it will be entertained on Thursday, May 22, 2025, at 3:30 p.m. in Department 403.

Tentative Ruling:

To sustain the demurrer to the first, second, third, fourth, and fifth causes of action of the Third Amended Complaint by defendants Vanik & Arsen LLC and Babujyan Health Care, Inc., without leave to amend. (Code Civ. Proc. § 430.10, subds. (e).) The prevailing parties are directed to submit to the court, within 10 days of service of the minute order, a proposed judgment dismissing the action as to the respective demurring defendant.

Explanation:

First thru Third Causes of Action (Discrimination)[4]

Plaintiff, as successor-in-interest to her late husband brings causes of action against defendants Babujyan Health Care, Inc. and Vanik & Arsen, LLC alleging causes of action for violations of the Americans with Disabilities Act, California Disabled Persons Act, and Unruh Civil Rights Act premised on decedent's lack of access to a Dynavox device necessary for communication, lack of speech therapy as prescribed by his doctors, and the facilities' failure to provide of prescribed pain medication and follow a prescribed hygiene protocol. (TAC ¶¶ 27-29, 36-39, 46, 52a-g, 66h-n.) The Third Amended Complaint alleges intentional acts on the part of defendants to deprive decedent of access to the Dynavox and speech therapy and failing to follow doctors' orders in the

[4] The California Disabled Persons Act (Civ. Code, § 54 ["DPA"]) "incorporates" provisions from the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) ("ADA"), and "make[s] them a basis for relief …." (*Brennon B. v. Superior Court of Contra Costa County* (2020) 57 Cal.App.5th 367, 405 (*Brennon*).) In addition, under the Unruh Civil Rights Act, "[a] violation of the right of any individual under the [ADA] shall also constitute a violation of this section." (Civ. Code, § subd. (f).) In addition, "[t]he DPA "substantially overlaps with and complements" the Unruh Civil Rights Act." (*Brennon, supra,* 57 Cal.App.5th at p. 405.) Consequently, given the overlap of controlling legal authority and alleged facts, discussion of these theories is combined.

care of decedent, however, the allegations include no allegations to suggest these acts were performed because of decedent's disability.

"To prevail on a Title III discrimination claim, the plaintiff must show that (1) she is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant <u>because of her disability</u>." (*Molski v. M.J. Cable, Inc.* (2007) 481 F.3d 724, 730, emphasis added.)

In the rulings for two previous demurrers, the court noted that plaintiff's allegations were insufficient to state or infer a denial of services because of decedent's disability. Plaintiff has not alleged new facts to support that the denial of services alleged was on the basis of decedent's disability.

Plaintiff renews her argument that *Munson v. Del Taco, Inc*. (2009) 46 Cal.4th 661 does not require allegations of intentional discrimination or discriminatory animus. In *Munson* the California Supreme Court concluded a plaintiff seeking damages under Civil Code section 52 alleging denial of full and equal treatment on the basis of disability in violation of the Unruh Civil Rights Act and the ADA need not prove intentional discrimination. (*Id*. at p. 678.) This holding does not negate that plaintiff must sufficiently allege that the denial of services is *on the basis of disability*, which is what is required to establish an ADA violation. The new allegations in the third amended complaint are described as "Acts of Intentional Discrimination" but are restatements of previously alleged facts regarding the Dynavox, speech therapy and failure to provide medications and care as prescribed by decedent's doctors. (TAC, ¶¶ 52a-g, 66h-n.) Although such allegations may support a claim for professional negligence, they are insufficient to state a claim for disability discrimination.

Plaintiff has not demonstrated that there are additional facts that can be pled to sufficiently allege discrimination on the basis of decedent's disability. Accordingly, leave to amend the first, second and third causes of action will not be granted.

With respect to arguments regarding ADA standing, this court is guided by the principle articulated by the United States Supreme Court that "state courts need not impose the same standing or remedial requirements that govern federal-court proceedings." (*City of Los Angeles v. Lyons* (1983) 461 U.S. 95, 113.) In other words, California courts "are guided by "prudential" [standing] considerations' " under state law. *(Limon v. Circle K Stores, Inc.* (2022) 84 Cal.App.5th 671, 690 [].) Accordingly,"[w]here a prima facie case has otherwise been made out ..., and in determining the availability of injunctive relief, the court must consider *the interests of third persons and of the general public.*" (*Loma Portal Civic Club v. American Airlines* (1964) 61 Cal.2d 582, 709.) Furthermore, "[u]nder California law, a "'successor in interest has standing to bring any causes of action that the decedent himself could have asserted.'" (*Saurman v. Peter's Landing Property Owner, LLC* (2024) 103 Cal.App.5th 1148, 1165, citation omitted.) Permitting a private right of action supports the public interest in preventing arbitrary deprivation of prescribed medical equipment, and it serves as a "continuance" of the decedent's "right to commence the same cause of action that [he] had before [his] death." (*Id.* at p. 1166.) The demurrer will not be sustained on the basis of plaintiff's standing to bring the claims.

Fourth Cause of Action (Elder Abuse)

In order to state a claim for elder abuse, plaintiff must allege that defendants are guilty of more than negligence. She must show that defendants acted recklessly, oppressively, fraudulently, or maliciously. (Welfare & Institutions Code § 15657; *Delaney v. Baker* (1999) 20 Cal.4th 23, 31.) "'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. [Citations omitted.] Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' [Citation.]" (*Id*. at pp. 31-32.)

"Section 15657.2 can therefore be read as making clear that the acts proscribed by section 15657 do not include acts of simple professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence." (*Id*. at p. 32.)

"As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' [Citation omitted.] Thus, the statutory definition of 'neglect' speaks not of the undertaking of medical services, but of the failure to provide medical care. [Citation.]" (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783.)

"The plaintiff must prove 'by clear and convincing evidence' that 'the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of' the neglect. Oppression, fraud and malice 'involve "intentional," "willful," or "conscious" wrongdoing of a "despicable" or "injurious" nature.' Recklessness involves ' "deliberate disregard" of the "high degree of probability" that an injury will occur' and 'rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it." ' Thus, the enhanced remedies are available only for ' "acts of egregious abuse" against elder and dependent adults.' In short, '[i]n order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages.'" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 405, internal citations omitted.)

"The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff

alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness). The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. Finally, the facts constituting the neglect and establishing the causal link between the neglect and the injury 'must be pleaded with particularity,' in accordance with the pleading rules governing statutory claims." (*Id.* at pp. 406–407, internal citations omitted.)

However, "[t]o survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872, internal citation omitted.)

Here, the third amended complaint alleges both defendants failed to comply with orders for daily skin assessments, bathing, and turning to prevent pressure ulcers and allowing decedent to sit in excrement and urine to the point of severe hyperkeratosis. (TAC, ¶ 88dh-j.) Plaintiff characterizes defendants' failure to provide care as reckless without stating facts to support the assertion. (TAC, ¶ 89.) The factual allegations bear resemblance to those found in *Delaney v. Baker* (1999) 20 Cal.4th 23, 27), in that the lack of care resulted in Ms. Delaney lying in her own urine and excrement and pressure ulcers. In *Delaney* there was evidence that the neglect was the result of rapid staff turnover of nursing staff, staffing shortages, and inadequate training to support finding recklessness. In the case at bench, in contrast, there are no allegations as to what conduct rendered the failure to provide the described care as "reckless" rather than mere negligence. Neither are there allegations to support finding the corporate defendants were aware of or ratified such conduct.

The demurrer to the Fourth Cause of Action in the Second Amended Complaint was sustained on the basis that plaintiff failed to plead factual allegations of specific conduct to support the conclusion that defendants recklessly allowed the bedsores to develop. The same deficiencies remain in the Third Amended Complaint. Plaintiff has not demonstrated in opposing this demurrer that there are additional facts to be pled with regard to the basis of her conclusion that the failure to provide adequate care was a result of recklessness, oppression, malice or fraudulent conduct on the part of defendant care facilities. Accordingly, the demurrer to the Fourth Cause of Action is sustained without leave to amend.

Fifth and Sixth Causes of Action (Loss of Consortium/Negligence Per Se) and Motion to Strike

Considering the inadequacy of the first four causes of action, there is similarly insufficient support for the remaining derivative causes of action and prayer for damages (i.e., the substance of the motion to strike). The demurrer to the Fifth and Sixth Causes of Action is sustained. The motions to strike punitive damages are moot in light of the court's ruling on the demurrer.

Statute of Limitations

Finally, both defendants also raise several statute of limitations defenses. Considering the lack of sufficient of factual allegations outlined above, these defenses cannot sufficiently be determined at this time.

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 5-19-25.
(Judge's initials) (Date)