Tentative Rulings for August 6, 2025
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.

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(20)

Tentative Ruling

Re: ***Floyd v. Everk, Jr. et al.***
Superior Court Case No. 25CECG00553

Hearing Date: August 6, 2025 (Dept. 503)

Motion: By Defendants to Compel Arbitration

Tentative Ruling:

To grant the motion to compel arbitration and order plaintiff Angela Floyd to arbitrate his individual claims against defendants, dismiss the class claims, and stay the action pending completion of arbitration.

Explanation:

Plaintiff brings a wage and hour class action on behalf of herself and all aggrieved employees. Defendants now seek an order compelling plaintiff's individual claims to arbitration and dismissal of the class claims pursuant to a class action waiver.

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2) However, there is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505) Thus, when a motion to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine: (1) whether the agreement exists, and (2) if any defense to its enforcement is raised, whether it is enforceable. The moving party bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. The party claiming a defense bears the same burden as to the defense. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.)

As part of the onboarding process for her employment by Everk Hospitality Group, Inc. ("EHG"), plaintiff was provided with EHG's employee handbook, the last section of which includes an "Arbitration and Class Action Waiver." (Everk Decl., ¶ 10, Ex. A, p. 17.) Plaintiff does not dispute the existence of an agreement to arbitrate.

Defendants have shown that the Federal Arbitration Act ("FAA") applies, which is necessary for the class claims dismissal that defendants seek (see Lab. Code, §§ 229, 432.6). Arbitration agreements involving commerce "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.)

The United States Supreme Court has identified "three categories of activity that Congress may regulate under the commerce power: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce and persons or things in interstate commerce, and (3) those activities having a substantial relation to interstate

commerce." (*United States v. Lopez* (1995) 514 U.S. 549, 558–559.) "The party asserting FAA preemption bears the burden to present evidence establishing a contract with the arbitration provision affects one of the three categories of activity, and a failure to do so renders the FAA inapplicable." (*Carbajal v. SWPSC, Inc.* (2016) 245 Cal.App.4th 227, 238.) The moving party must offer declarations or other evidence demonstrating an impact on interstate commerce. (*Carbajal, supra*, at 239-241; *Lane v. Francis Capital Management, LLC* (2014) 224 Cal.App.4th 676, 688.)

Evidence submitted with the moving papers show that EHG owns and manages Vyxn Restaurant & Lounge (the "Vyxn"), a restaurant, bar, and lounge located in Fresno. (Everk Decl., ¶ 4.) EHG is also the parent company of Woodward Restaurant Group, Inc., which owns and manages Woodward American Grill ("Woodward Restaurant"). (Id., ¶ 5.) Plaintiff worked at the Vyxn as a bartender and bottle service representative, and at Woodward Restaurant as a server. (Everk Decl., ¶¶ 8, 9.) Vyxn and the Woodward Restaurant's businesses involve serving foods and beverages, and providing entertainment to customers, including out-of-state visitors, to the Greater Fresno region. (Everk Decl., ¶ 6.) Both businesses regularly purchase and utilize goods from various suppliers located outside of California, including Miami and New York. (Id.) The Vyxn and Woodward Restaurant advertise their businesses online and in social media posts in order to attract customers, including those traveling through Fresno from out-of-state. (Id.)

Defendants offered further evidence with the reply in response to plaintiff's contention that the evidence submitted with the moving papers was inadequate and lacked sufficient detail. As a bartender and bottle service representative at the Vyxn, plaintiff's job responsibilities included providing food, beverage and entertainment to customers who visited the Vyxn, including those visiting from out of state. (Suppl. Everk Decl., ¶ 6.) Plaintiff regularly promoted Vyxn's events online via her social media webpages and on defendants' social media webpage for Vyxn to customers including those from out-of-state, and regularly interacted with and communicated with DJ's who were hired by defendants to travel from out-of-state to perform live music sets the Vyxn. (Id.) Similarly, while working as a server for the Woodward Restaurant, plaintiff's job responsibilities including taking orders and providing food and beverage to customers who visited the restaurant, including those who visited out-of-state. (Id., ¶ 7.) As a bottle service representative and bartender for Vxyn and a server at the Woodward Restaurant, plaintiff was also tasked with hosting certain recruiting events at these two businesses, in partnership with Fresno State University, to recruit out-of-state athletes to attend Fresno State. (Id. at ¶ 8.) For these recruiting events, plaintiff assisted in advertising and promoting these events online, and providing food, alcohol, and beverages to Fresno State student prospects, and their parents and coaches, many of whom who traveled to the Vxyn or the Woodward Restaurant, from out-of-state. (Id.)

Plaintiff objects to the supplemental evidence, as reply evidence typically is not allowed. The court will allow it in this case, as it merely supplements and offers further detail about the evidence submitted with the moving papers. If requested by plaintiff, the court will allow her to file a supplemental brief addressing the reply evidence only. This would eliminate any potential prejudice to the consideration of the reply evidence.

The court finds that the evidence submitted shows that the employment agreement and plaintiff's employment in particular sufficiently affect interstate

commerce to invoke application of the FAA and preemption of California state laws prohibiting arbitration of the wage and hour claims. The class claims waiver can be enforced.

Plaintiff contends that the arbitration agreement is unconscionable. If the court finds as a matter of law that a contract or any portion of it was unconscionable at the time it was made, the court may refuse to enforce it, or may enforce the contract without the unconscionable provisions, or limit their application to avoid any unconscionable result. (Civ. Code, § 1670.5, subd. (a).) There are two prongs considered in this analysis: procedural unconscionability and substantive unconscionability. Both must be present for a court to exercise its discretion to refuse to enforce an arbitration agreement under the doctrine of unconscionability. (*Armendariz v. Foundation Health Psychcare Services., Inc.* (2000) 24 Cal.4th 83, 113.) They need not be present in equal amounts; essentially a sliding scale is used, and where there is substantive unconscionability, less procedural unconscionable need be shown. (*Id.* at pp. 113-114.)

Plaintiff contends that the arbitration agreement is procedurally unconscionable because it is a contract of adhesion drafted by EHG without any negotiation. A contract of adhesion is one imposed and drafted by the party of superior bargaining strength, and relegates to the subscribing party only the opportunity to adhere to the contract or reject it. (*Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159.)

Adhesion does not *per se* render the arbitration agreement unenforceable, as such contracts "are an inevitable fact of life for all citizens, businessman and consumer alike." (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817-818.) A finding of procedural unconscionability does not mean that a contract will not be enforced. The degree of scrutiny applied is less where the contract of adhesion was not accompanied by surprise or other sharp practices. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.)

The substantive unconscionability inquiry considers whether the overall bargain is overly harsh or unreasonably one sided. (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) California courts have stated the standard variously, defining it as, for example: so one sided as to shock the conscience (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246,); unduly oppressive (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925); and unfairly one sided (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071).

In *Armendariz, supra,* 24 Cal.4th at 100, the court held an arbitration agreement must, at a minimum, provide for neutral arbitrators, adequate discovery, a written award subject to limited judicial review, the same types of relief which would be available from a court, and the employees must not be required to bear any type of expense they would not be required to bear if their claims were brought in a court. These requirements do not apply to just FEHA claims. (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 180.) Plaintiff does not dispute that the agreement satisfies the *Armendariz* requirements.

In support of her substantive unconscionability arguments, plaintiff points to provisions in the Employee Handbook that have nothing to do with arbitration. Plaintiff

does not claim that the terms of the Arbitration Agreement itself, which is contained on the last page of the Employee Handbook, is unduly harsh, oppressive, or one-sided.

Regarding the confidentiality provision, the Employee Handbook states, "Everk Hospitality Group requires that employees do not disclose information held to be confidential by Everk Hospitality Group." (Everk Decl., ¶ 10, Ex. A, at 11.) Plaintiff relies on *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223 and *Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, in arguing that the provision renders the agreement unconscionable. In *Alberto*, the court read the arbitration agreement and confidentiality agreement together because both agreements addressed how to resolve disputes arising from plaintiff's employment with defendant. (*Alberto*, at pp. 490-91.) In *Murrey*, the court read the arbitration agreement and confidentiality clause together because the confidentiality clause specifically restricted the employee from discussing the arbitration award. (*Murray*, at pp. 1253-1254.)

The decision on whether to sever unconscionable terms from an agreement is " 'reviewed for abuse of discretion' " under Civil Code section 1670.5. (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821.) Here, since the confidentiality provision does not relate specifically to employment-related disputes or arbitration, or restrict plaintiff's ability to discuss an arbitration award, the provision does not render the agreement substantively unconscionable.

Plaintiff also contends that the provisions releasing pre-employment claims (Everk Decl., ¶ 10, Ex. A at 17) and the non-disparagement provision (ibid.) are unconscionable. The non-disparagement provision prohibits both the employee and defendants from "making any oral or written public statements , social media posts or online reviews that are disparaging" of the other party, yet only the employee is subject to "incur a fee of $25,000 payable to EHG/JE within three business days of breach." (Everk Decl., ¶ 10, Ex. A, at 17.) This is one-sided, but both provisions can easily be severed, and they do not relate to the arbitration itself. (See *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 70 ["a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.")].

Plaintiff points out that the arbitration agreement fails to exclude claims related to sexual harassment and/or assault, which are not arbitrable pursuant to the Ending Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (9 U.S.C. §§ 401-402). However, plaintiff makes no such claims here. This can also be easily severed, and it has no consequence to the issues at play in this action.

Finally, plaintiff contends that the provision for injunctive relief is unconscionable. The provision states that either party "may, in its, his or her option, seek injunctive relief in court related to the improper use, disclosure or misappropriation of a party's private, proprietary, confidential or trade secret information." (Everk Decl., ¶ 10, Ex. A at 17.) Plaintiff contends that while the provision is mutual on its face, employers are more likely to seek injunctive relief against an employee than vice-versa, thus evidencing a lack of mutuality. However, such a provision does not render an arbitration agreement so one-sided that it places the employee in an unfair position, even if the employer is more likely to seek provisional relief. (See *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1248.)

The court finds that plaintiff fails to demonstrate that the Arbitration Agreement is unonscionable. Accordingly, plaintiff fails to demonstrate a defense to enforcement.

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: js on 8/1/2025.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Dr. Joseph J. Penbera v. Adam Frerichs***
Superior Court Case No. 24CECG05594

Hearing Date: August 6, 2025 (Dept. 503)

Motion: Defendants' Demurrer to the Second Cause of Action

Tentative Ruling:

To overrule the demurrer, with Defendants granted 10 days' leave to file their answer to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 545.) The test is whether a plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of a plaintiff's possible difficulty or inability in proving the allegations of the complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) In assessing the sufficiency of the complaint against the demurrer, we treat the demurrer as admitting all material facts properly pleaded, bearing in mind the appellate courts' well established policy of liberality in reviewing a demurrer sustained without leave to amend, liberally construing the allegations with a view to attaining substantial justice among the parties. (*Glaire v. LaLanne-Paris Health Spa, Inc*. (1974) 12 Cal.3d 915, 918.)

Here, Defendants demur as to the second cause of action for breach of contract arguing that Plaintiffs have insufficiently alleged breach and damages. A breach of contract is the unexcused failure to perform the terms of the contract. (*Chen v. PayPal, Inc*. (2021) 61 Cal.App.5th 559, 570.) Breach does not occur where a party exercises a right secured by the contract. (*Ibid*.) Here, Plaintiffs allege that Defendants have failed and refused to remove Dr. Penbera as a guarantor despite repeated demands to do so (FAC, ¶ 28.) Defendants argue that the provision in the amendment to the 2018 Agreement of pledges of Dr. Penbera's personal assets to satisfy business debts means that it can keep Dr. Penbera on as a guarantor. (FAC, ¶ 24.)

The contract says Dr. Penbera shall not be liable for past, current, or future liabilities once majority control is attained by Frerichs. (2018 Agreement, ¶ 3(b).) It does not explicitly say how this term would be accomplished. The Amendment provides for increases in the amount owed to Dr. Penebra in the event of personal pledges made by him. (2018 Amendment.)

As Defendants have noted, "courts may look to the nature and circumstances of the contract to effectuate the intent of the parties where it can be reasonably ascertained." (*Hewlett-Packard Co. v. Oracle Corp*. (2021) 65 Cal.App.5th 506, 545.)

Without commenting on the terms, the Court would note that here both parties appear to agree the general goal of the contracts at issue was the transfer of the business from Plaintiffs to Defendants. To that end, they drafted several contracts with various provisions anticipating scenarios where that transition did not occur immediately and completely. The Court is not inclined to make a determination on demurrer as to what would or would not constitute a breach under these circumstances. It is enough that Plaintiff has alleged failure to remove him as a guarantor is a breach where the contract is largely silent regarding how removal of liability would occur. The Court will not assess the merits of Plaintiffs' claims on demurrer.

Defendants also argue that Plaintiffs have insufficiently alleged damages. Here, damages have been alleged in the alternative. Plaintiffs have alleged that damages in the amount of $2.85 million either potentially exist as a liability or that damages in the amount of $2.85 million are currently owed to match the existing obligation on loans for which Dr. Penbera remains as a guarantor. (FAC, ¶ 29.) The Court need not address the arguments presented by Defendants as to the speculative nature of the damages as Plaintiffs have alleged an amount is currently due to Dr. Penbera.

The Court overrules the demurrer to the second cause of action.

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

Tentative Ruling
Issued By: JS on 8/4/2025.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Johanna Romo v. Premium Urgent Care, Inc.***
Superior Court Case No. 24CECG05023

Hearing Date: August 6, 2025 (Dept. 503)

Motion: By Defendant to Compel Arbitration

Tentative Ruling:

To continue the matter to Wednesday, September 3, 2025 at 3:30 p.m. in Department 503. The parties are to provide supplemental briefing on the issue of unconscionability. Supplemental briefing is due no later than August 22, 2025 and shall not exceed 10 pages.

Discovery is stayed until the Court issues its ruling on this motion.

Explanation:

On July 15, 2024, the California Supreme Court issued its ruling in *Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478. In it, the Supreme Court addressed unconscionability. In light of the fact that the parties had completed their briefing prior to the ruling in *Ramirez*, the Court is ordering further briefing on the issue of unconscionability, particularly substantive unconscionability, to address *Ramirez*.

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: JS on 8/4/2025.
(Judge's initials) (Date)

(47)

Tentative Ruling

Re: ***Ramiro Soto v Andrea Fuentes***
Superior Court Case No. 25CECG00123
Hearing Date: August 6, 2025 (Dept. 503)

Motion: By Defendant to Set Aside Entry of Default Judgment

Tentative Ruling:

To deny without prejudice.

Explanation:

According to the court's record, plaintiff served the complaint on January 22, 2025 and the court entered moving defendant's default on March 3, 2025. Entry of court judgment has not occurred.

Defendant seeks to set aside the entry of default judgment under Code of Civil Procedure sections 473, subdivisions (b) and (d); 473.5; 418.10 and California Civil Code section 1788.61.

With respect to Code of Civil Procedure sections 473, subdivisions (b) and (d) and section 473.5, defendant has not provided any case authority to warrant setting aside the entry of default judgment pertaining to her unique circumstances that she did not receive service due to her disabilities or her limited English speaking skills. (See Decl. filed concurrently with defendant's motion, on June 16, 2025.)

Code of Civil Procedure section 418.10 does not apply as the Court has jurisdiction in this case. California Civil Code section 1788.61 does not apply as plaintiff is not a "debt purchaser."

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: JS on 8/5/2025.
(Judge's initials) (Date)