Tentative Rulings for September 22, 2022
Department 403

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).)

22CECG02606 ***Sarabjit Kaur v. Vallarta Properties, Inc.*** **(Dept. 403)**

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(35)

Tentative Ruling

Re: ***Veronica Duran v. Pitman Farms, Inc.***
Superior Court Case No. 18CECG01995

Hearing Date: September 22, 2022 (Dept. 403)

Motion: Plaintiff's Motion for Preliminary Approval of Class Settlement

Tentative Ruling:

To grant.

Explanation:

On August 11, 2022, plaintiff previously sought preliminary approval of a class settlement. The court considered the motion and issued a tentative ruling. The court determined that class certification for purposes of settlement was appropriate, and that the proposed settlement was a reasonable compromise, with exception of one portion. The court required further information as to fees sought. At the August 11, 2022 hearing, the court granted leave to file a supplemental declaration. On August 16, 2022, plaintiff filed a supplemental declaration. Upon review of the supplemental declaration, the court grants the motion for preliminary approval of class settlement.

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: KCK on 09/20/22 .
(Judge's initials) (Date)

(37)

Tentative Ruling

Re:	***Lydia Veniegas v. Carlos Ramirez*** Superior Court Case No. 22CECG00945
Hearing Date:	September 22, 2022 (Dept. 403)
Motion:	By Michael David Myers to Appear as Counsel *Pro Hac Vice*

Tentative Ruling:

To deny without prejudice.

Explanation:

California Rules of Court, Rule 9.40 articulates the method by which an out of state attorney may apply to appear as counsel pro hac vice in a California state court. Here, counsel has not complied with the procedures in place for making such an application.

First and foremost, California Rules of Court, Rule 9.40, subdivision (c) provides that the State Bar is to be given notice pursuant to the Code of Civil Procedure section 1005 for an application to appear as counsel *pro hac vice*. California Rules of Court, Rule 9.40, subdivision (e) articulates that counsel must provide a copy of the application and submit a $50.00 fee for the application to the State Bar. In his application, Mr. Myers makes no indication that he has complied with this rule. There is no proof the application or payment were submitted to the State Bar of California. Additionally, the proof of service filed concurrently with the application to this court does not indicate service to the State Bar of California. With any subsequent applications to appear as counsel *pro hac vice*, counsel must provide the court with proof of compliance with this rule.

The application fails to meet the requirements in additional ways. First, counsel has not declared where he resides, and that he does not reside in California, has not been regularly employed in California, and has not regularly engaged in substantial business in California. (California Rules of Court, Rule 9.40 (a).) Second, counsel has not included all of the information required in California Rules of Court, Rule 9.40, subdivision (d). In particular, counsel has not included his residence information or provided proof of membership in good standing for the courts he in which he is admitted to practice. With any subsequent applications to appear as counsel *pro hac vice*, counsel must include all of the required information pursuant to California Rules of Court, Rule 9.40, subdivision (d) in his declaration. Counsel should obtain and provide the court with any relevant Certificates of Good Standing with any subsequent application.

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: KCK on 09/20/22.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Deisy Ascencio v. State of California (Lead Case)***
Superior Court Case No. 13CECG03569

Hearing Date: September 22, 2022 (Dept. 403)

Motion: By Plaintiffs for Settlement Distribution

Tentative Ruling:

To continue to Thursday, November 3, 2022 at 3:30pm in Department 403.

Explanation:

Service of the motion is defective. First, not all parties have been served and an attorney who has not appeared in this matter is included in the proof of service. The Court's records indicate the following counsel represent the parties: Jeremy C. Thomas for the State of California, John Fitzpatrick Vannucci for the Ascencio and Granados plaintiffs, Joshua D Naggar for the Hernandez plaintiffs, and Victoria Allard Bernhardt for the defendants the Estates of Aida Perez and Jose Perez. Should counsel have authority for service to Stanley J. Radtke and John F. Vannucci, then counsel must provide said authority. Second, the proof of service is not signed.

In addition to the issues with service, there were typographical errors contained in the Proposed Orders. In Paragraph 7, the math appears to be in error. In Paragraph 8, the distribution amount appears to be in error based on the amounts indicated in the accompanying documents.

The court assumes counsel can correct the errors. The court will therefore continue the motion to November 3, 2022 to afford time for proper service and for the corrections to be made to the Proposed Orders. The revised papers must be filed by October 17, 2022.

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: KCK on 09/20/22.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Roseann Molina v. Lithia NC, Inc.***
Superior Court Case No. 22CECG00160

Hearing Date: September 22, 2022 (Dept. 403)

Motion: by Defendant American Credit Acceptance, LLC to Compel Arbitration

Tentative Ruling:

To continue the hearing to September 29, 2022 at 3:30 p.m. in Department 403. Defendant Lithia NC, Inc. is directed to submit a brief as detailed below no later than Tuesday, September 27, 2022.

Explanation:

Plaintiff contracted to purchase the vehicle from Lithia Nissan of Clovis on credit. (Pacheco Decl., ¶5, Exh. A.)The dealership then assigned its interest in the contract to American Credit Acceptance, LLC (ACA). (Pacheco Decl. ¶¶ 6-9, Exh. B; Henao Decl. ¶¶ 7, 11-12.) The retail sales installment contract (RISC) contained an agreement to arbitrate disputes that arise between plaintiff purchaser and Lithia Nissan or its assigns, which arise out of or relate to the credit application, purchase or condition of the vehicle, the contract or any resulting transaction or relationship. ACA now moves the court to compel arbitration of plaintiff's claims pursuant to the arbitration provision of the RISC.

In moving to compel arbitration, defendant 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.)

The alleged arbitration agreement in this case is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, et seq. Section 2 of the FAA provides for enforcement of arbitration provisions in any contract "evidencing a transaction involving commerce." (9 U.S.C. § 2.) To determine whether there is an enforceable arbitration agreement, courts apply state law principles related to formation, revocation, and enforcement of contracts. (*Banner Entertainment, Inc. v. Alchemy Filmworks, Inc.* (1998) 62 Cal.App.4th 348, 357.)

In the case at bench, plaintiff does not deny signing the arbitration agreement but argues that the defendant has not properly introduced evidence of the agreement. Plaintiff has not filed an objection to the evidence submitted by defendant in support of its motion. The declaration of Al Pacheco, the General Manager of Defendant Lithia, states that it is the custom and practice of defendant to maintain sales documents in a

sales file and that the documents in the file are made at or near the time of the events and occurrences described therein. (Pacheco Decl. ¶ 3.) Defendant maintains these records in the ordinary course of business and it is the regular practice of defendant Lithia to made and rely on such records. (Ibid.) The Retail Installment Sales Contract containing the Arbitration Provision is attached to the Pacheco Declaration. (Id. at ¶ 5, Exh. A.) Plaintiff does not challenge that the signature thereto is hers. This is sufficient to demonstrate the existence of the arbitration agreement defendant seeks to enforce.

Plaintiff opposes the motion on the basis that her Consumer Legal Remedy Act and Unfair Competition Law and Magnuson-Moss Warranty Act claims are not arbitrable, that the arbitration provision is unconscionable, and that forcing plaintiff to arbitrate against ACA while defendant Lithia NC, Inc. proceeds in court is inefficient and would lead to conflicting rulings.

Arbitrability of Plaintiff's Claims

The language of the provision specifies that the determination of whether a claim or dispute is arbitrable is to be resolved by the arbitrator. "Any claim or dispute … (including the interpretation an scope of this Arbitration Provision, and the arbitrability of the claims or dispute), between you or us or our … assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action." (Pacheco Decl., Exh. A, p. 7.) The provision also specifies that where federal law provides that a claim or dispute is not subject to binding arbitration the provision shall not apply. (Ibid.)

Plaintiff contends the injunctive remedies sought in her causes of action pursuant to the CLRA and UCL exempt these claims from arbitration. Plaintiff cites *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, a class action complaint against Citibank, which relied upon the *Broughton v. Cigna Healthplans of Calif*. (1999) 21 Cal.4th 1066 California Supreme Court decision holding that claims for injunctive relief were inarbitrable. Likewise *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 holds that Unfair Competition Law claims seeking injunctive relief are to be brought in "any court of competent jurisdiction" and are thus not intended to be subject to arbitration. (*Id*. at p. 361 (emphasis in original).)

Defendant contends that the CLRA and UCL claims asserted by plaintiff seek private injunctive relief, not public injunctive relief, and are arbitrable under the Broughton-Cruz rule. "Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief." (*McGill v. Citibank, N.A.*, *supra*, 2 Cal.5th 945 at 955.) Plaintiff directs the court to paragraphs 33 and 56 demonstrating that she seeks public injunctive relief in the form of an order "enjoining and prohibiting Lithia from engaging in the acts, practices and conduct described in the complaint" and "enjoining such future conduct and other orders and judgments to restore to Plaintiff any money paid for the unlawfully, unfairly, and/or fraudulently sold vehicle." Defendant argues that these vague and generalized requests primarily address the plaintiff's harm and does not extend to the public at large. (*Johnson v. JP Morgan Chase Bank, N.A.*

(C.D. Cal. Sept. 18. 2018, No. EDCV172477) 2018 WL 4726042 at *6.) Those provisions cited by plaintiff as demonstrating the public nature of the injunctive relief sought do not appear to be designed to prevent injury to the public as a whole as opposed to a group of individuals similarly situated to plaintiff. The court declines to find these causes of action are not subject to arbitration as a matter of law.

Plaintiff also contends that her Magnuson-Moss Warranty Act claims are not subject to arbitration because the service contract was a separate agreement and did not contain an arbitration provision. She further contends that the plain language of the statute evinces Congressional intention that the consumer has access to courts. (See, 15 U.S.C § 2310(d)(1).) The arbitration provision incorporates "any resulting transaction or relationship" into the definition of what the parties to the contract intend to arbitrate. (Pacheco Decl. Exh. A, p. 7.) Plaintiff has not demonstrated that the service contract between the same parties to the RISC was not intended to be incorporated as a further resulting transaction out of the RISC. Further, where courts have compelled MMWA claims to arbitration, the arbitration agreement was contained in the warranty. In one such matter, the sales contract contained a binding arbitration provision incorporating agreements or instruments arising out of or relating to the sales contract as well as a separate "Binding Arbitration Agreement." (See, Walton v. Rose Mobile Homes, LLC (5th Cir. 2002) 298 F.3d 470, 472 fn. 1.) The only authority within the Ninth Circuit cited by either party is an order from the district court of Arizona finding that the parties' written agreement to arbitrate disputes contained within the purchase contract should be honored and indicating that the Federal Arbitration Act's liberal policy in favor of arbitration supports finding the MMWA permits binding arbitration. (*Dombrowski v. General Motors Corp.* (D. Ariz. 2004) 318 F.Supp.2d 850, 851, fn. 1.) As such, the court will not make the determination here that the MMWA claim is precluded from binding arbitration as a matter of law.

Unconscionability

The doctrine of unconscionability has " 'both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results." (*Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83, 114.) To invalidate an arbitration agreement, the court must find both procedural and substantive unconscionability. (*Id*. at p. 122; *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1533; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.)

Plaintiff contends that the arbitration provision is procedurally unconscionable because the provision is not conspicuous. Examining the agreement, I disagree with this characterization. The titled of the document indicates there is an arbitration provision, on the signature page there is an acknowledgement that the buyer signing the agreement has had the opportunity to take and review the contract and has read all the pages including the arbitration agreement before signing. (See Pacheco Decl. Exh. A, at pp. 1 and 6.) Additionally, the arbitration provision is on a separate page, boxed and clearly titled "Arbitration Provision." (Id. at p. 7.) The reader is alerted several times that the contract includes an arbitration provision. Further, the provision itself includes bolded, language at the top that the provision affects the buyer's legal rights.

Plaintiff further argues that it is a contract of adhesion and oppressive as a matter of law. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 711.) This assertion is not refuted by defendant. Thus, there is some degree of procedural unconscionability.

" ' "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.]' " (*Tiri v. Luck Chances, Inc.* (2014) 226 Cal.App.4th 231, 243–244.) "Both, however, need not be present to the same degree. A sliding scale is applied so that ' " 'the 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.' " ' " (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 178.) "The party opposing arbitration has the burden of proving unconscionability." (*Tiri*, *supra,* at p. 244.)

Plaintiff contends the contract is substantively unconscionable based on the fees provision giving the arbitrator authority to order defendant ACA's fees paid pursuant to the agreement (up to $5,000 toward the filing fee, administration fee, and arbitrator fees) to be reimbursed by plaintiff if he or she finds any of plaintiff's claims frivolous under applicable law. Further, the provision is silent as to which party will bear the costs and fees for an appeal under the FAA. Even if the rules of the arbitration forum do not include a fee shifting provision, the provision governs. Plaintiff asserts this is overly harsh and would dissuade consumers for initiating arbitration. (*Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 88.) Plaintiff has not demonstrated how the arbitration provision allowing the arbitrator to award fees and costs if the claims are determined to be frivolous is any different than the risk a litigant takes filing an action in court with the potential of having the opposing side's fees and costs awarded should they prevail. Given the mild degree of procedural unconscionability attributable for the adhesive nature of the contract, plaintiff has not demonstrated a significant degree of substantive unconscionability that would support a finding that the arbitration provision is unconscionable.

The court intends to enforce the arbitration provision within the RISC and allow the arbitrator to make the determinations whether the claims within the complaint are arbitrable, as specified in the arbitration provision.

Plaintiff has requested that arbitration proceed with JAMS and not AAA, consistent with the arbitration provision that the purchaser may choose another organization to conduct the arbitration subject to Lithia's/its assignee's approval. Defendant ACA has indicated it will agree to arbitrate though JAMS.

<u>Potential Conflicting Rulings</u>

The original parties to the RISC were Defendant Lithia NC, Inc. and plaintiff. Lithia is named as a defendant in this action and asserts as its 40th affirmative defense that it believes the claims within the complaint are subject to arbitration and reserves the right to demand arbitration. Lithia has not demanded arbitration, joined in this motion or filed any other pleading to indicate that it intends to arbitrate or continue in this action. Although Code of Civil Procedure section 1281.2(c) allows the court to refuse to enforce the arbitration or to stay the arbitration pending the outcomes of litigation, the FAA contains no such provision and would allow the arbitration to proceed. (9 U.S.C. § 3, 4.)

Defendant ACA proposes the court stay litigation of the complaint against Lithia while arbitration proceeds against ACA pursuant to the terms of the arbitration agreement. Given that all cause of action are pled against both Litha and ACA, plaintiff's argument that forcing her to proceed separately against each defendant is inefficient and costly has merit but a mechanism to refuse to enforce the arbitration provision on such grounds is not present within the FAA. Before making a final order, the court requests a response from Lithia why it should not be compelled to arbitration based on its assertion that arbitration is mandatory within its 40th Affirmative Defense.

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: KCK on 09/21/22 .
(Judge's initials) (Date)