Tentative Rulings for September 29, 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).)

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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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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(27)

Tentative Ruling

Re: ***Kimberlee Gobel v. Allen Clyde, DPM***
Superior Court Case No. 20CECG00500

Hearing Date: September 29, 2022 (Dept. 403)

Motions (2x): By Plaintiff for Order Permitting Discovery of Defendant's Financial Condition

By Defendant to Bifurcate Discovery and Protective Order

Tentative Ruling:

In light of the stay order filed by the Fifth District Court of Appeal on September 26, 2022, this action is stayed and the motions on calendar for Thursday, September 29, 2022 are therefore vacated. (Code Civ. Proc., §§ 916, 923; *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727.) Counsel is instructed to notify this court when the writ proceedings pending before the appellate court have concluded. (Cal. Rules of Court, rule 3.650.)

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 09/27/22.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Raymond Guyton v. Dycora Transitional Health-Quail Lake LLC***
Superior Court Case No. 21CECG01765

Hearing Date: September 29, 2022 (Dept. 403)

Motions: by Plaintiff for an Order:
(1) Compelling the Deposition of Defendant Dycora Transitional Health—Quail Lake LLC's Person Most Knowledgeable with Production of Documents;
(2) Compelling Dycora Transitional Health—Quail Lake LLC, Anaiskus LLC, Cass Enterprises LLC and William Foster Group LLC's Responses to Requests for Production, Set One; and
(3) For Monetary Sanctions

Tentative Ruling:

To grant plaintiff's motion to compel the deposition of Dycora Transitional Health—Quail Lake LLC's ("Dycora—Quail Lake") person most knowledgeable. Defendant Dycora—Quail Lake shall produce the person most qualified to testify regarding categories 1-16. (Code Civ. Proc., § 2025.450, subd. (a).) To grant plaintiff's motion to compel document production regarding requests 7, 9-11, 19, 20, and 22. Dycora—Quail Lake shall also serve a privilege log that identifies each withheld document pertaining to production requests 1-6, 8, 12-18, 21, 23, 24, with particularity and provides sufficient factual information for plaintiff to evaluate each privilege claim. (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1120.) Alternatively, Dycora—Quail Lake may also serve the remaining documents sought if it should determine that a privilege is inapplicable.

To grant plaintiff's motions to compel defendants Dycora—Quail Lake, Anaiskus LLC, Cass Enterprises LLC, William Foster Group LLC's responses to each respective set of requests for production of documents. (Code Civ. Proc., § 2031.300.) Defendants shall serve verified responses without objections within 30 days of the date of the service of this order.

To award monetary sanctions in the amount of $2900, payable within 10 days of the date of this order, with the time to run from service of this minute order by the clerk.

Explanation:

Deposition of Person Most Knowledgeable:

Under Code of Civil Procedure section 2025.450, subdivision (a),

> If, after service of a deposition notice, a party to the action or an officer, director, managing agent, or employee of a party, or a person designated by an organization that is a party under Section 2025.230, without having

> served a valid objection under Section 2025.410, fails to appear for examination, or to proceed with it, or to produce for inspection any document, electronically stored information, or tangible thing described in the deposition notice, the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice.

(Code Civ. Proc., § 2025.450, subd. (a).)

Also, under section 2025.450, subdivision (b),

> The motion shall set forth specific facts showing good cause justifying the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice.

(Code Civ. Proc., § 2025.450, subd. (b)(1).)

Plaintiff served a deposition notice on defendant Dycora—Quail Lake, noticing the deposition of Dycora—Quail Lake's person most knowledgeable ("PMK") regarding 16 categories of information and requesting production of 24 categories of records, with the deposition set for November 18, 2021. Plaintiff's counsel also offered to consider alternative dates that might be provided by defense counsel if the date was not practical. Defense counsel then served various objections and refused to produce the witness at the time and date stated on the deposition notice. In response to Dycora—Quail Lake's objections, plaintiff's counsel sent a letter proposing further alternative dates for the deposition and addressing the objections raised. Ultimately, after multiple attempts at meeting and conferring by telephone and letters, defense counsel failed to provide available dates for the deposition.

Dycora—Quail Lake objects to and will not produce a witness for all topics of inquiry and requests for production. The objections are on the following grounds: overbroad, vague, compound, attorney-client privilege and/or work product doctrine, requires the preparation of a compilation or abstract, and invasion of privacy.

Most of Dycora—Quail Lake's boilerplate objections are without merit. The court initially notes that the compound objection, governed by Code of Civil Procedure, section 2030.060, subdivision (f), is inapplicable to oral deposition questions. The objection indicating that the answer requires the preparation of a compilation is similarly governed Code of Civil Procedure, section 2030.060 and inapplicable to oral deposition questions. Also, an overbroad objection is invalid unless the ground is that the breadth imposes undue burden or is irrelevant to the subject matter, which is not implicated here. (See Code Civ. Proc., § 2017.010.) Even if this were the case, the deponent could move for a protective order and has not done so. (Code Civ. Proc., § 2025.420, subd. (b).)

- Vagueness and Ambiguity:

Vagueness and ambiguity are valid grounds for objection only where the question is wholly unintelligible. (*Deyo v. Kilborne* (1978) 84 Cal.App.3d 771, 783 [the question must be answered if "the nature of the information sought is apparent"].) Moreover, plaintiff has attached exemplary blank 530, 612, and 802 forms and referenced the sample forms in each request as necessary. Thus, the court finds the ambiguity objections to be without merit.

- Invasion of Privacy:

Dycora—Quail Lake objects to Topic of Inquiry No. 15, and Request for Production Nos. 3, 6, 12-17, 21, and 23 for invasion of privacy. Topic of Inquiry No. 15 seeks information regarding the business relationship between the deponent and Dycora—Quail Lake and the content of and identity of the custodian of any documents which reflect such relationship. The requests for production seek documents relating to the facilities' employees and operations, such as: work schedules, employee sign-in sheets, time sheets, complaints about understaffing, staffing levels, budgeting, unusual occurrence logs, exit interviews, the number of admitted residents suffering from specified conditions, etc. As such, Dycora—Quail Lake raises an additional objection that the requests invade the privacy of third parties.

To establish a privacy claim, the defendant must show there is a legally protected privacy interest, an objectively reasonable expectation of privacy, and a serious invasion of the privacy interest. (*Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 26.)

"Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests. Protective measures, safeguards and other alternatives may minimize the privacy intrusion. For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged." (*Pioneer Electronics v. Superior Court* (2007) 40 Cal.4th 360, 371 [internal citations omitted].)

Dycora—Quail Lake fails to identify a legally protected privacy interest. And even if such a privacy interest existed, plaintiff's discovery requests explicitly instruct that the names of all other residents may be redacted from the production. The right of privacy is not infringed where "neither disclosure of the patients' identities nor disclosure of identifying medical information [is] requested." (*Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital* (1982) 135 Cal.App.3d 561, 565.)

- Attorney-Client Privilege and/or Work Product Doctrine:

Although Dycora—Quail Lake asserts that the answers and documents are privileged attorney-client and/or work product information, defendant has not produced a privilege log or made any attempt to show that the documents are protected. "[A] responding party may object to [a discovery request] that seeks privileged *information* by clearly stating the objection and particular privilege invoked. But the *existence* of a document containing privileged information is not privileged." (*Hernandez v. Superior*

Court (2003) 112 Cal.App.4th 285, 293 ["Interrogatories may be used to discover the existence of documents in the other party's possession. If an interrogatory asks the responding party to identify a document, an adequate response must include a description of the document." (emphasis in original, citations omitted)].)

As pertaining to the document requests, "[w]hen confronted with a deficient privilege log that fails to provide the necessary information to rule on attorney-client and work product objections, a trial court may order the responding party to provide a further privilege log that includes the necessary information to rule on those objections, but may not order the privileges waived because serving a deficient privilege log, or even failing to serve a privilege log, is not one of the three statutorily authorized methods for waiving the attorney-client privilege." (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1120.)

Consequently, the court orders the deposition of Dycora—Quail Lake's PMK. Dycora—Quail Lake shall produce the person most qualified to testify regarding categories 1-16 and the documents sought in the requests for productions numbers 7, 9-11, 19, 20, and 22. Dycora—Quail Lake shall also serve a privilege log that identifies each withheld document pertaining to production requests 1-6, 8, 12-18, 21, 23, 24, with particularity and provides sufficient factual information for plaintiff to evaluate each privilege claim. Alternatively, Dycora—Quail Lake may also serve the remaining documents sought if it should determine that a privilege is inapplicable.

Document Requests:

Defendants have had ample time to respond to the discovery propounded by plaintiff, and have not done so. Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and work product protection. (Code Civ. Proc., § 2031.300, subd. (a); see *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905–906.)

Monetary Sanctions:

Sanctions are mandatory unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc., §§ 2031.300, subd. (c) [Document demands], 2023.010, subd. (d) [misuse of discovery].) No opposition was filed, so no facts were presented to warrant finding sanctions unjust. The sanction amount awarded disallows the costs for reviewing an opposition, preparing a reply and appearance at the hearing, as this proved unnecessary. Since the motions to compel initial responses are essentially identical, the court finds it reasonable to allow two hours for the preparation of those motions at the hourly rate of $650, provided by counsel. The court also allows four hours for the preparation of the motion to compel attendance, at the hourly rates of $150 per hour for two hours and $650 per hour for two hours, as provided by counsel. The motion costs are also awarded. Thus, the total amount of sanctions awarded is $3200 ($2900 in fees and $300 in motion costs).

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 09/27/22.
(Judge's initials) (Date)

(34)

Tentative Ruling

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

Hearing Date: September 29, 2022 (Dept. 403)

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

Tentative Ruling:

To grant the motion to compel arbitration and to stay proceedings pending arbitration of plaintiff's claims against both American Credit Acceptance, LLC and Lithia NC, Inc. However, the fee-shifting clause from the arbitration provision is deemed severed from the Retail Installment Sale Contract.

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 to be reimbursed by plaintiff if he or she finds any of plaintiff's claims frivolous under applicable law. (Pacheco Decl., Exh. A, p. 7: "The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law.") The fee shifting provision would allow the arbitrator to award fees and costs not awardable under the Code of Civil Procedure. 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 adequately demonstrated the unconscionability of the fee shifting provision of the agreement.

Here, the fee shifting provision can be fairly regarded as collateral to the purpose of the contract, and the provision can be stricken without affecting any of the other provisions. With that adjustment, there is no substantive unconscionability, and the agreement must be enforced.

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.

Potential Conflicting Rulings

The original parties to the RISC were Defendant Lithia NC, Inc. and plaintiff. Lithia has now filed a joinder to ACA's motion to compel arbitration.

Defendant ACA had proposed the court stay litigation of the complaint against Lithia while arbitration proceeds against ACA pursuant to the terms of the arbitration agreement. In light of Lithia's joinder to the motion to compel arbitration, a stay is not necessary and all parties will proceed to arbitration.

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 09/28/22.
(Judge's initials) (Date)