

Tentative Rulings for April 21, 2022
Department 501

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).)

20CECG00357 Embrey v. Valley Petroleum & Lift, Inc. (Dept. 501)

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

21CECG02078 *Reich v. Srabian* is continued to Tuesday, May 10, 2022 at 3:30 p.m. in Dept. 501

21CECG02805 *Tutelian & Company, Inc. v. Arias* is continued to Tuesday, May 10, 2022 at 3:30 p.m. in Dept. 501

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Tentative Rulings for Department 501

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Tentative Ruling

Re: ***Corona v. Nissan North America, Inc.***
Superior Court Case No. 19CECG02708

Hearing Date: April 21, 2022 (Dept. 501)

Motion: (1) by Plaintiff to Compel Deposition Appearance of Defendant's Person Most Knowledgeable and Request for Sanctions

(2) by Plaintiff to Compel Depositions of Lithia Nissan of Clovis's Person Most Qualified and Timothy Bowden, Tatoya Thomas, Fred Erese and unnamed service technician

Tentative Ruling:

To deny plaintiff's motion to compel defendant Nissan North America, Inc.'s person most knowledgeable and custodian of records to attend his or her deposition, and to produce documents pursuant to the demand for production of documents served with the deposition notice. (Code Civ. Proc. § 2025.450.) To deny plaintiffs' request for sanctions against defendant. (Code Civ. Proc. § 2025.450(g)(1).)

To deny plaintiff's motion to compel Lithia Nissan of Clovis's person most qualified and Timothy Bowden, Tatoya Thomas, Fred Erese and unnamed service technician to attend his or her deposition.

Explanation:

Motion to Compel Defendant's PMK Deposition

Plaintiff seeks to compel the deposition of Nissan North America, Inc.'s ("Nissan") person most knowledgeable (PMK) and custodian of records, and to compel production of various categories of records. They served Nissan with the deposition notice setting the deposition for November 25, 2020. The notice also included a demand for production of various documents. In an attached letter, plaintiffs' counsel offered to consider alternative dates that might be provided by defense counsel if the November 25th 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. However, defense counsel also stated that defendant would produce the witness at another mutually agreed upon time and date and that the witness would discuss relevant and non-privileged aspects of the categories listed in the deposition notice.

In response to defendant's objections, plaintiff's counsel emailed defendant to request alternate dates for the deposition on November 24, 2020. Defendant did not respond. Despite the objection, Plaintiff "took a statement of nonappearance" on November 25, 2020 when defendant did not appear for the deposition. (Morse Decl. ¶ 6, Exh. D.) Plaintiffs' counsel again contacted defendant on December 7, 2020 advising of

the “nonappearance” and requesting alternative dates. Defendant responded and a meet and confer phone call was planned to be initiated by plaintiff the following day. (Ornelas Decl. ¶ 5.) There was no phone call but rather the instant motion was filed December 14, 2020. It does not appear that plaintiff's counsel ever addressed the substantive objections raised in the defendant's response to the deposition notice or engaged in voice-to voice meet and confer regarding the rescheduling of the deposition prior to filing a motion to compel. Therefore, it does not appear that plaintiff's counsel engaged in good faith meet and confer efforts with regard to defendant's objections to the deposition notice. Such a failure to meet and confer is enough, by itself, to justify denying the motion to compel. (Code Civ. Proc. § 2025.450(b)(2); *Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1437-1438.)

Defendant has represented that its PMK will be made available to testify at a mutually convenient date and time and as such it does not appear that an order compelling the appearance is necessary. Indeed it appears that parties previously had an agreement that the deposition of Nissan's PMK would go forward in March 2021 with the testimony being used for multiple cases between the Knight Law Group and Nissan however plaintiff's counsel withdrew his consent for the “global” deposition and has since not rescheduled the deposition. At a minimum a Request for Pretrial Discovery Conference was required under Local Rule 2.1.17 and plaintiff withdrew that request on October 5, 2021.

This dispute appears to be one that should have been settled informally between the parties within the year since it was filed. Plaintiff filed a request for pretrial discovery conference on September 2, 2021 however it was withdrawn on October 5, 2021 before a substantive ruling on the request was made. It is unclear whether any substantive, good faith meet and confer efforts have transpired in the year since this motion was filed but based upon the record presented in the moving papers there has been none.

Therefore, the court intends to deny the motion to compel defendant's PMK to appear at the deposition. The court also intends to deny plaintiff's request for monetary sanctions against defendant and its counsel, as plaintiff has not shown any effort beyond two emails to meet and confer to schedule the deposition before the filing of this motion or that the defendant's objections were unjustified.

Motion to Compel Lithia Nissan of Clovis's PMQ and Employees' Depositions

Plaintiff's counsel alleges that plaintiffs served their notice of deposition of nonparty Litha Nissan of Clovis's person most qualified and custodian of records as well as four service department employees on November 2, 2020. Subpoenas were issued October 29, 2020 for the nonparty witnesses. Plaintiff emailed the notices and subpoenas to defendant requesting available dates if the depositions could not go forward on the date noticed and inquiring whether defense counsel was representing the dealership and its employees. (Morse Decl., Exh. A.) On November 12, 2021, defendant served a list of objections to the notice indicating Nissan's counsel was not available on the date unilaterally set and objecting to any production or testimony of trade secrets or confidential records by any of the deponents. (Id. at Exh. C-G.) The objection also makes clear that the deponents are not employees of defendant Nissan.

On November 18, 2020, Plaintiffs' counsel took a statement of non-appearance. (Morse Decl. ¶ 7, Exh. H.) The declaration of Heidi Alexander dated December 14, 2021 appears to be the "statement of non-appearance" referred to by Attorney Morse. This declaration represents that the objection received indicated Nissan's objection stated it would not produce a witness at the time and date indicated and that neither defendant nor its counsel appeared on November 18, 2020. (Morse Decl., Exh. H at ¶¶ 4-5.)

There are several problems with this motion: the first, regarding the proof of service of the Notice of Deposition on the nonparty witnesses, the second regarding the notice of this motion on the nonparty witnesses to be compelled, and the third regarding evidence that the deponents failed to appear for the deposition.

As to the Notice of Deposition, plaintiff has not provided effective proof that the nonparty witnesses were given proper notice to appear at the deposition. The proof of personal service must show the date and time of service; otherwise, it is not a valid proof of service. (Code Civ. Proc., § 1011(b) [requiring personal service of moving papers between hours of 8:00 a.m. and 8:00 p.m.]; see, e.g., Judicial Council Form POS-020, *Proof of Service—Civil*, ¶ 3.) The proofs of service of the deposition subpoenas attached as Exhibit A to the declaration of Amy Morse have not been completed and signed under penalty of perjury. Without proof that the witnesses were cited to appear at the deposition, the court has no power to compel their attendance at a new deposition date.

A motion to compel answers or production regarding a nonparty deponent must be personally served unless that deponent agrees to accept service by mail or electronic service. (Cal. Rules of Court, Rule 3.1346.)

Rule 3.1346:

A written notice and all moving papers supporting a motion to compel an answer to a deposition question or to compel production of a document or tangible thing from a nonparty deponent must be personally served on the nonparty deponent unless the nonparty deponent agrees to accept service by mail or electronic service at an address or electronic service address specified on the deposition record.

When a notice of motion is used to compel the attendance of a non-party deponent, then that deponent must be given personal service regarding the hearing. This is clearly required on a motion to compel regarding a non-party deponent who has attended the deposition (see Cal. Rules of Court, Rule 3.1346), so by logical extension it must be required for a non-party who failed to attend. Rule 3.1346 also requires service of the notice of motion and all moving papers, and by logical extension this is also required for a non-appearing non-party deponent, since they should likewise have the benefit of knowing the information given to the court.

The Notice of Motion seeks to compel nonparties, Lithia Nissan of Clovis and four of its employees to appear for deposition and has failed to serve notice of this motion upon the nonparty deponents. Although the email accompanying the notice of deposition to counsel for defendant inquires as to whether counsel will be representing Lithia Nissan of Clovis, there is no evidence of an agreement by counsel to represent

Lithia Nissan of Clovis or its employees. Further, the objections served by defendant indicate only that counsel for defendant will not be present due to unavailability and reiterates that the deponent is not an employee of defendant Nissan. (Morse Decl., Exhs. C-G). There is no representation in the objection whether defendant will or will not produce the witness as is represented in the moving papers. (Alexander Decl. ¶4.)

The Declaration of Heidi Alexander is filed separately and attached to the Declaration of Amy Morse and is meant to serve as the "statement of non-appearance" of deponents at the subject deposition. (Morse Decl. ¶ 7.) Attorney Alexander states that neither Defendant nor its counsel appeared for the deposition of Lithia Nissan of Clovis's PMQ as noticed. (Alexander Decl. ¶ 5.) There is no representation of whether the *deponents* appeared for the deposition contained in this declaration. Further, it is unclear why an attorney declaration drafted for purposes of this motion is meant to represent a statement of non-appearance at deposition if a court reporter was present at the proceedings and ready to proceed with the deposition as is understood when counsel represents that a statement of non-appearance was taken.

Due to the insufficient proof of service of the subpoenas, lack of notice of this motion to the nonparty deponents, and deficient evidence of the non-party failure to appear at the depositions, the motion is denied 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: DTT **on** 1/6/2022.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Mariscal v. Sunwest Fruit Co., Inc.***
Superior Court Case No. 21CECG02579

Hearing Date: April 21, 2022 (Dept. 501)

Motion: by Defendant Sunwest Fruit Co., Inc., for an order compelling arbitration and staying proceedings

Tentative Ruling:

To grant and order plaintiff to arbitrate his claims against defendant Sunwest Fruit Co., Inc. The action is stayed pending completion of arbitration. (Code Civ. Proc., § 1281.4.)

Explanation:

"California law, like federal law, favors enforcement of valid arbitration agreements." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97.) "When presented with a petition to compel arbitration, the initial issue before the court is whether an agreement has been formed." (*Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 129.) In addition, arbitration is a " 'matter of consent, not coercion,'" and " 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236; see also *Marcus & Millichap Real Est. Inv. Brokerage Co.* (1998) 68 Cal.App.4th 83, 89.)

In addition, "[o]nce the moving party has satisfied its burden, the litigant opposing arbitration must demonstrate grounds which require that the agreement to arbitrate not be enforced." (*Harris v. TAP Worldwide* (2016) 248 Cal.App.4th 373, 380-381; see also *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413-414 [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.)]; *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.)

Defendant's motion is supported by a declaration from its owner, Martin Britz, which attaches the Agreement and Acknowledgement of Receipt of Alternative Dispute Resolution Policy ("Arbitration Agreement") document presented to plaintiff and signed by him on January 5, 2009 upon his hiring and again on November 6, 2012. The Arbitration Agreement provided that plaintiff would resolve any dispute between him and defendant arising out of or related to his employment through final and binding arbitration. Mr. Britz' declaration also states that plaintiff signed each agreement and chose not to exercise the opt-out procedure offered with each dispute resolution policy.

Considering the uncontroverted evidence that plaintiff expressly accepted the arbitration agreements by his signings in January 2009 and November, 2012, defendant has established its burden to show an enforceable agreement to arbitrate. Considering

that plaintiff has not opposed this motion, there is no claim that the arbitration agreement should not be enforced. Therefore, defendant's motion for an order compelling arbitration and staying these proceedings is granted.

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: DTT **on** 4/19/2022 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Miranda v. Ocegueda***
Superior Court Number: 22CECG00327

Hearing Date: April 21, 2022 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. The court intends to sign the proposed Orders, as modified. No appearances necessary.

Explanation:

The balance amounts stated in section 8 (b) and (c) are inconsistent in the proposed Order Approving Compromise (MC-351 [proposed]). The court intends to correct this via interlineation using the amount requested in the Petition (\$4,349.58). (Petition MC-350, § 16.)

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: DTT on 4/19/2022.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: **Lopez v. Ocegueda**
Superior Court Number: 22CECG00328

Hearing Date: April 21, 2022 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. The court intends to sign the proposed Orders, as modified. No appearances necessary.

Explanation:

The balance amounts stated in section 8 (b) and (c) are inconsistent in the proposed Order Approving Compromise (MC-351 [proposed]). The court intends to correct this via interlineation using the amount requested in the Petition (\$4,349.58). (Petition MC-350, § 16.)

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: DTT on 4/19/2022.
(Judge's initials) (Date)