SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/13/2025

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties email or call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of their decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, parties are to provide an **EMAIL NOTIFICATION TO THE DEPARTMENT OF THE REQUEST TO ARGUE AND SPECIFICATION OF ISSUES TO BE ARGUED**. Dept. 39's email address is: dept39@contracosta.courts.ca.gov. Warning: this email address is not to be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

**Submission of Orders After Hearing in Department 39 Cases**

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

**Courtroom Clerk's Calendar**

**1. 9:00 AM CASE NUMBER: C24-01508**
**CASE NAME: DAVID PARKS VS. CARL MAST**
***FURTHER CASE MANAGEMENT CONFERENCE**
**FILED BY:**
****TENTATIVE RULING:****

Continued to April 3, 2025, 9:00 a.m. (to be heard with the Appraised Value Motion, which was continued to that date and time by stipulation and order entered February 2, 2025.

**2. 9:01 AM CASE NUMBER: C22-01428**
**CASE NAME: ROBERT ANTHONY VS. DRESSER-RAND COMPANY**
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL AND PAGA SETTLEMENT**
**FILED BY: ANTHONY, ROBERT**
****TENTATIVE RULING:****
Pursuant to the Court's direction at the hearing on 1/30/25, the parties were to report to the Court if the escalator cause has been triggered. If it had not, the settlement shall be approved without need for a further appearance, and if it has been, then they are to appear. As of the posting of the tentative ruling, the Court has not been advised that the clause has been triggered.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/13/2025

**3. 9:01 AM CASE NUMBER: C24-00258**
**CASE NAME: DAVID SILVA VS. FCA US, LLC**
***HEARING ON MOTION FOR DISCOVERY TO COMPEL DEPO OF DEF FCA CUSTOMER SERVICE W/ PROD OF DOCS**
**FILED BY: SILVA, DAVID**
****TENTATIVE RULING:****

Withdrawn by moving party February 5, 2025.

**Law & Motion**

**4. 9:00 AM CASE NUMBER: C22-00633**
**CASE NAME: TOM JONG VS. JOHN MUIR HEALTH**
**HEARING ON SUMMARY MOTION**
**FILED BY: BALAGTAS, JAY MICHAEL S., MD**
****TENTATIVE RULING:****

Continued by the Court to March 20, 2025.

Plaintiffs' evidence in support of opposition to defendants' motion for summary judgment [vol 2.] is missing bookmarks to the exhibits. Plaintiffs should file and serve an errata to this document by February 20, 2025, that contains the appropriate bookmarks, but is otherwise unchanged.

**5. 9:00 AM CASE NUMBER: C22-00633**
**CASE NAME: TOM JONG VS. JOHN MUIR HEALTH**
**HEARING ON SUMMARY MOTION**
**FILED BY: POAGE, JEFF**
****TENTATIVE RULING:****

Continued by the Court to March 20, 2025.

**6. 9:00 AM CASE NUMBER: C22-00633**
**CASE NAME: TOM JONG VS. JOHN MUIR HEALTH**
**HEARING ON SUMMARY MOTION**
**FILED BY: JOHN MUIR HEALTH**
****TENTATIVE RULING:****

Continued by the Court to March 20, 2025.

**7. 9:00 AM CASE NUMBER: C22-00724**

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/13/2025

**CASE NAME: FLORENCIO QUIROZ VS. PRESTIGE GUNITE, LP**
***HEARING ON MOTION IN RE: COMPLIANCE**
**FILED BY:**
****TENTATIVE RULING:****

The Declaration of the Settlement Administrator shows that the settlement has been implemented. The Administrator is authorized to distribute the remaining portion of the attorney's fees ($8,010.62) to class counsel. No further proceedings are contemplated.

**8. 9:00 AM CASE NUMBER: C22-00791**
**CASE NAME: WAYNE CAPTAIN, JR. VS. RUBICON ENTERPRISES, INC.**
**HEARING IN RE: COMPLIANCE**
**FILED BY:**
****TENTATIVE RULING:****

Continued by request of plaintiff to August 14, 2025, 9:00 a.m.

**9. 9:00 AM CASE NUMBER: C22-01352**
**CASE NAME: ETHAN LYNCH VS. JOHN MUIR HEALTH, A CORPORATION**
***HEARING ON MOTION IN RE: TO STRIKE OR TAX COSTS**
**FILED BY: LYNCH, ETHAN RANDALL**
****TENTATIVE RULING:****

Plaintiff Ethan Lynch moves to strike or tax costs of defendant John Muir Health, largely asserting the lack of supporting documentation. Defendant John Muir Health (JMH) responds on a number of grounds: (1) that the motion was filed after the fifteen-day time deadline from service of the cost memorandum; (2) that the notice of motion with the actual hearing date was not timely served; and (3) that all of the cost items are reasonable and necessary.

Failure to serve and file the motion within the time limit waives any objection to the claimed costs. The court, however, may grant relief under Code of Civil Procedure section 473(b) for mistake, inadvertence, surprise, or excusable neglect. (*Douglas v. Willis* (1994) 27 Cal.App.4$^{th}$ 287, 290.)

The memorandum of costs was served September 17, 2024, and plaintiff filed the motion on October 8, 2024, 21 days later. Nonetheless, plaintiff's motion recites those dates and the fifteen-day requirement but states that the motion is timely. The declaration of paralegal Alissa Townsend, however, acknowledges that the motion was not timely. She attests that she lives and works in South Carolina, which suffered a tragic hurricane, leaving her without power during the relevant time period and unable to work. This more than explains her difficulties, but it does not address the failure to act of either counsel or his firm (who were not subject to the hurricane), and therefore does not show excusable neglect.

Nor does it explain failure to serve the notice of motion the required sixteen days before the hearing. Following the practice in this county (see Local Rule 3.41), plaintiff filed the motion without a

hearing date, and in the course of processing it, the clerk assigned it a hearing date and time, and printed it on the face of the notice of motion. It is then incumbent on the moving party to serve the document on the opposing party. Plaintiff did not do so, and defense counsel did not become aware of the filing until fewer than sixteen court days before the hearing. No justification is offered for that.

Thus, the motion is denied on grounds of untimeliness. In order to avoid the additional consumption of resources that would be caused by a subsequent motion to set aside the order, the Court will address the merits of the cost issues.

The party filing the cost memorandum bears the initial burden of showing that the statute allows the item and is proper on its face. (*Ladas v. California Sate Auto. Assn*. (1993) 19 Cal.App.4th 761, 774-776.) For items that are expressly permitted by statute, the burden is on the objecting party to establish that the costs were not necessary or reasonable, based on evidence. (*Litt v. Eisenhower Med. Ctr.* (2015) 237 Cal.App.4th 1217, 1224.) For items that are not expressly allowed, the burden of proof is on the party claiming them to show that they were reasonable and necessary. (*Foothill-DeAnza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11, 29.)

As to Item 1, motion fees, plaintiff offers no evidence that they were not reasonably necessary to the conduct of the litigation.

As to Item 4, deposition costs, plaintiff offers no evidence or analysis of why the depositions other than Ethan Lynch and Brian Lynch were not reasonably necessary

As to Item 5, service of process, plaintiff offers no evidence that they were not reasonably necessary to the conduct of the litigation.

As to Item 8, Expert fees, JMH points out, and defendant does not contest, that plaintiff declined a section 998 offer. CCP § 1033.5(b)(1) provides that "fees of experts not ordered by the court" are "not allowable as costs, except when expressly authorized by law[.]" CCP § 998 constitutes such an exception, providing that if "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post offer costs and shall pay the defendant's costs from the time of the offer. In addition…the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover post offer costs of the services of expert witnesses." (CCP § 998(c).)

While the Court still retains discretion in determining whether to allow expert costs, the party moving to tax the expert costs, however, has the burden of showing that the fees were improper and unnecessary. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 989.) Plaintiff has presumably is aware of the manner in which the experts were used, and therefore is in a position to present evidence on the issue, but has failed to do so.

As to Item 16, "Other," mediation fees are allowable in the discretion of the court. (*Berkeley Cement, Inc. v. Regents of Univ. of Cal*. (2019) 30 Cal.App.5th 1133, 1140, 1142-1143.) The additional

subpoena costs were associated with the mediation. Plaintiff argues only that mediation fees are categorically not a reimbursable expense, and does not otherwise attack the item.

The motion to strike or tax costs is denied.

**10. 9:00 AM CASE NUMBER: C23-01431**
**CASE NAME: MARK HIGGINS VS. PACPIZZA LLC, A DELAWARE LIMITED LIABILITY COMPANY**
***HEARING ON MOTION IN RE: LIFT STAY AND PROCEED W/ PAGA CLAIMS**
**FILED BY: HIGGINS, MARK**
****TENTATIVE RULING:****

Before the Court is a motion to lift the stay and allow Plaintiff to proceed with Plaintiff's PAGA claim. For the reasons set forth, the motion is **denied**.

**Background**

Plaintiff Mark Higgins was employed by defendant PacPizza, LLC as an hourly, non-exempt employee from approximately May 2022 to the filing of his complaint in June 2023. (Compl. ¶ 20.) Plaintiff filed a complaint alleging a single cause of action under the California Private Attorneys General Act, Labor Code section 2698 *et seq.* ("PAGA") for multiple Labor Code violations he contends he and other aggrieved employees of PacPizza have sustained.

PacPizza moved to compel arbitration of Plaintiff's claims. The motion was granted pursuant to the order filed November 17, 2023. The order also stayed the action pending the conclusion of the parties' arbitration. (11/17/2023 Order p. 2.)

On October 10, 2024, Plaintiff filed a motion to lift the stay imposed on pursuit of the PAGA claims before the Court. Plaintiff contends the stay should be lifted because defendant PacPizza failed to timely pay arbitration fees due under Code of Civil Procedure section 1281.97 and has therefore materially breached the arbitration agreement and waived the right to require Plaintiff to arbitrate his individual Labor Code claims. PacPizza opposes the motion.

**Requests for Judicial Notice**

Plaintiff Higgins requests the Court take judicial notice of four trial court orders from superior courts of other counties addressing motions under Code of Civil Procedure section 1298 and 1299 for attorneys' fees. (Pl. RJN Exhs. A-D.) The request is **denied.** Trial court orders are not precedential. (Unpublished trial court decisions are not precedential and may not be cited as legal authority. (*Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761; *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 830-831 ["a written trial court ruling has no precedential value"].) The request is also **denied** because the trial court orders have no relevance as evidence in this case.

Defendant PacPizza requests the Court take judicial notice of an order of the United States District Court for the Northern District of California issued in December 2022 that has not been accepted for

publication on Westlaw or Lexis, and the JAMS Employment Arbitration Rules & Procedures effective June 1, 2021 to the present. (Def. RJN Exhs. 1 and 2.) The Court **denies** the request as to the unpublished federal district court order which is not binding precedent. Though the Court could consider the decision as persuasive authority, the Court does not find the federal district court order relevant in the face of multiple published precedential decisions of the California courts on the issues subject to the motion. (*Walker v. Apple, Inc.* (2016) 4 Cal.App.5th 1098, 1108, fn. 3 [" 'Although not binding precedent on our court, we may consider relevant, unpublished federal district court opinions as persuasive.'," quoting *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6].) The Court grants the unopposed request for judicial notice of the JAMS Rules.

**Defendant's Procedural Objections to the Motion**

Defendant contends the motion is procedurally defective because the notice of motion and motion fails to state the grounds on which the motion is made or the statutory basis for the relief sought. The notice of motion and motion are procedurally defective under Code of Civil Procedure section 1010 for those reasons, but defendant has not been prejudiced as defendant clearly has understood and responded to the substantive basis for the motion detailed in plaintiff's memorandum in support of the motion.

Defendant points to plaintiff's repeated reference to Code of Civil Procedure section 1281.97 in his memorandum and argument that defendant's payment was untimely. Defendant correctly argues that statute applies to fees for initiating an arbitration, defendant timely paid the fee for initiating the arbitration, and plaintiff has not submitted evidence demonstrating the initiating fee was not timely paid. The Court interprets plaintiff's motion as based on Code of Civil Procedure section 1281.98, which has almost identical invoice and payment timing provisions for fees to continue the arbitration.

**Retainer as Not A "Fee" and Judicial Estoppel**

The Court rejects defendant's argument that Code of Civil Procedure section 1281.98(a) does not apply to the "retainer" payment invoiced by JAMS because the retainer is not a "fee" and the statute only applies to a fee. JAMS itself characterizes the retainer as a fee its May 17, 2024 invoice and schedule of fees. (Shatikian Decl. Exh. F [5/17/2024 invoice, stating "Retainer for services: To be applied to professional time (session time, pre and post session reading, research, preparation, conference calls, travel, etc.), expenses, and case management fees. Please review the Neutral's fee schedule regarding case management fee and cancellation policies."]; Exh. G ["General Fee Schedule" for arbitrator Brand, listing "Professional Fees" as $8,500 per day].) That the retainer is a fee is consistent with the common definition of a fee as "a fixed charge" or "a sum paid or charged for a service." (https://www.merriam-webster.com/dictionary/fee accessed 2/4/2024.) (Evid. Code § 451(e) [court shall take judicial notice of "[t]he true signification of all English words and phrases and of all legal expressions."].)

The Court also rejects plaintiff's argument that defendant is judicially estopped from asserting the FAA governs. Plaintiff has not proven the elements of judicial estoppel with evidence. Defendant

argued in its motion that the FAA governed (MPA ISO MTC Arb. pp. 11-12), the issue of whether the FAA provided the procedural rules governing the arbitration agreement was not raised or litigated in the motion to compel arbitration, nor was the application of the FAA procedural rules an issue determined in the Court's ruling ordering the case to arbitration. The primary issue in dispute and determined was whether Higgins signed and therefore agreed to the arbitration agreement which, after oral argument, the Court concluded defendant had proven.

**The California Arbitration Act Statutes**

In his original moving papers, Plaintiff argued that defendant failed to timely pay fees due under Code of Civil Procedure section 1281.97, which is part of the California Arbitration Act, Code of Civil Procedure section 1281 *et seq.* ("CAA"). Concurrent with his reply papers, Plaintiff filed a notice of "errata" indicating that Plaintiff intended to cite Code of Civil Procedure section 1281.98. As the opposition pointed out, PacPizza timely paid its portion of the fees to initiate the arbitration, which Plaintiff does not contest in the reply. (Bodzin Decl. ¶¶ 13-16 and Exhs. D-G.)

The provisions of sections 1281.97 and 1281.98 that are material to the determination of the motion are essentially the same, the difference being that section 1281.97 pertains to "fees or costs to initiate an arbitration" and section 1281.98 pertains to "fees or costs required to continue an arbitration." (Compare Code Civ. Proc. § 1281.97(a)(1) to Code Civ. Proc. § 1281.98(a)(1).) Plaintiff's motion cites a case as governing authority, *Doe v. Superior Court* (2023) 95 Cal.App.5th 346, that addresses Code of Civil Procedure section 1281.98. It is clear from the opposition that defendant understood the motion intended to address the fees to continue the arbitration.

Code of Civil Procedure section 1281.98 provides in pertinent part:

> (a)
>
> (1) In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration provider, that the drafting party pay certain fees and costs during the pendency of an arbitration proceeding, if the fees or costs required to continue the arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach.
>
> (2) The arbitration provider shall provide an invoice for any fees and costs required for the arbitration proceeding to continue to all of the parties to the arbitration. **The invoice** shall be provided in its entirety, shall state the full amount owed and the date that payment is due, and **shall be sent to all parties** by the same means on the same day. To avoid delay, absent an express provision in the arbitration

> agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the parties as due upon receipt. Any extension of time for the due date shall be agreed upon by all parties. Once the invoice has been paid, the arbitration provider shall provide to all parties a document that reflects the date on which the invoice was paid.

(Code Civ. Proc. § 1281.98(a)(1) and (2) [emphasis added].)

**Analysis**

**A. Delegation**

Defendant argues in the opposition that the delegation clause the parties agreed to in their arbitration agreement as well as the JAMS arbitration rules require the arbitrator to determine whether defendant met the payment requirement time deadline under Code of Civil Procedure section 1281.98(a). Plaintiff's reply does not address the delegation clause in the arbitration agreement and asserts the delegation clause in the JAMS rules does not apply because of defendant's material breach of the arbitration agreement under Code of Civil Procedure section 1281.98.

Two published decisions of the Courts of Appeal, not cited in the briefing, persuade the Court that the Court's function to determine whether there has been a violation of these statutes. (*See Cvejik v. Skyview Capital, LLC* (2023) 92 Cal.App.5th 1073, 1079 [addressing Code of Civil Procedure section 1281.98, stating "The statute's intent for the trial court to decide this statutory issue controls. [Citation omitted.]"].) (*See also* Williams v. *West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, 1069 ["Section 1281.98 established a narrow but unilateral entitlement to withdraw from arbitration. The trial court's review of the withdrawal is within its vestigial jurisdiction. Even if the matter were not within the trial court's vestigial jurisdiction, the Legislature's unambiguous provision for employees and consumers covered by section 1281.98 to unilaterally withdraw from arbitration and proceed in a court of appropriate jurisdiction compels the conclusion that the Legislature intended courts to exercise jurisdiction over such proceedings, as a matter of positive law."].)

**B. FAA Governance and Preemption**

Defendant raises two distinct arguments in its opposition to the motion under the Federal Arbitration Act, 9 U.S.C. section 1 *et seq.* ("FAA"). First, defendant contends that the parties agreed in the arbitration agreement that the FAA "governs" the arbitration agreement. Though not stated in these words, the Court interprets that argument as an argument the parties agreed that the FAA's substantive as well as procedural provisions govern the arbitration, which would make Code of Civil Procedure section 1281.98 inapplicable because it is a procedural provision of the CAA. Second, defendant contends that the FAA preempts Code of Civil Procedure section 1281.98, because it fails

to provide equal treatment in the enforcement of arbitration agreements as the enforcement of other contracts. Plaintiff's reply addresses only the second argument.

Arguably, whether the FAA governs in lieu of the CAA procedural provisions or whether the FAA preempts the statute is irrelevant to the ultimate outcome of the motion. The Court concludes below that defendant's payment was timely under Code of Civil Procedure section 1281.98(a), and the motion should be denied on that ground.

1. FAA Governance

Though the FAA's substantive law on arbitration may govern an arbitration agreement, when a motion to compel arbitration is filed in California state court, California's procedural provisions in the CAA apply unless the arbitration agreement expressly provides that the parties have adopted the FAA procedural rules. (*Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 644; *Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761, 771, 775-778; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 179.) (*See also Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394 ["Our opinion does not preclude parties to an arbitration agreement to expressly designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law."].) The interpretation of an arbitration agreement when no extrinsic evidence is offered is a question of law and reviewed de novo on appeal. (*Victrola 89, LLC v. Jaman Properties 8 LLC* (2020) 46 Cal.App.5th 337, 346.)

In *Victrola 89, supra,* the Court held the FAA governed procedurally and substantively by the terms of the agreement, precluding the trial court from denying the motion to compel arbitration because of the risk of inconsistent rulings under Code of Civil Procedure section 1281.2(c). The agreement stated, "Enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act." (*Id.* at 343.) Based on its *de novo* review and relying on *Valencia v. Smyth, supra*, the Court concluded "the parties intended to incorporate the FAA with respect to compelling arbitration. . . . [P]revious cases have held that when an arbitration agreement provides that its 'enforcement' shall be governed by California law, the California Arbitration Act (CAA) governs a party's motion to compel arbitration. It follows that when an agreement provides that its 'enforcement' shall be governed by the FAA, the FAA governs a party's motion to compel arbitration." (*Id.*) (*See also Hernandez v. Sohnen Enterprises, Inc.* (2024) 102 Cal.App.5th 222, 241 [FAA procedural and substantive rules govern arbitration agreement that states the agreement is "governed by" the FAA].) In Victrola 89, the Court explained that "the Agreement's specific directive that its enforcement will be governed by the FAA is paramount to any general statement that disputes will be decided as provided by California law. [¶] Further, that a party 'may' be compelled to arbitrate under the CAA is permissive, whereas the sentence that enforcement of the agreement 'shall' be governed by the FAA is mandatory. 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' (Civ. Code, § 1641.) Taken as a whole, the Agreement's

references to California law fail to override its explicit provision that enforcement of the Agreement is to be governed by the FAA." (*Victrola 89, supra,* 46 Cal.App.5th at 350.)

The arbitration agreement in this case is unlike the agreements in *Victrola 89* and *Hernandez*. As defendant sets forth in the Bodzin Declaration, the arbitration agreement in this case states the agreement is "made under the provisions of the [FAA] and will be construed and governed accordingly," (Bodzin Decl. para. 4), but it also says arbitration "shall be conducted in accordance with [applicable JAMS rules} and requirements of California law and the [FAA] regarding the terms and enforcement of arbitration agreements" (Bodzin Decl. para. 6). (Emphasis added.) At best, the provisions are ambiguous, as the agreement contains two separate mandatory provisions, unlike the permissive provision invoking California law in the arbitration agreement in *Victrola 89*. The arbitration agreement here explicitly mandates that the arbitration is "conducted in accordance with . . . [the] requirements of California law . . . regarding the terms and enforcement of" the arbitration agreement, a more specific provision than the general governing law provision which would seem to require the CAA procedural law applicable to the enforcement of the arbitration agreement to apply, rather than exclusively adopting the FAA's procedural rules. Because the arbitration agreement does not expressly adopt the FAA procedural rules to the exclusion of California law, including the CAA, particularly with respect to the "terms and enforcement" of the arbitration agreement, Code of Civil Procedure section 1281.98 applies, unless its application is preempted by the FAA. (*See Keeton v. Tesla, Inc.* (2024) 103 Cal.App.5th 26, 37 and fn. 5, 38 and fn. 6, and 39-40.)

2. FAA Preemption

There is a split of published California authority as to whether the FAA preempts Code of Civil Procedure sections 1281.97 and 1281.98 because they do not accord equal treatment to arbitration agreements and impose a burden on the enforcement of arbitration agreements that is not similarly imposed on other contracts under California law. The issue is one which will ultimately be decided by the California Supreme Court as the Court has accepted review of at least two of the conflicting decisions, *Hernandez v. Sohnen Enterprises, Inc., supra,* 102 Cal.App.5th 222 (holding the FAA preempts the statutes), and *Keeton v. Tesla, Inc.* (2024) 103 Cal.App.5th 26, a decision of the First District Court of Appeal that holds the FAA does not preempt the statutes. Given the split, the Court chooses to follow *Keeton v. Tesla, Inc., supra,* and the weight of published California decisions which hold these statutes are not preempted by the FAA. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [allowing trial courts to exercise discretion to choose which published authority to apply when there is a conflict].)

**C. Interpretation of Code of Civil Procedure section 1281.98 and Application to the Evidence**

The evidence raises a question of statutory interpretation as to whether notice of the availability of an uploaded document on the JAMS website or the email from JAMS that actually transmitted the invoice to the parties triggers the start of the 30-day grace period for payment of the "due upon

receipt" invoice. (*Compare* Bogosyan Reply Decl. Exh. B to Bodzin Opp. Decl. Exhs. F and H.) There appears to be no dispute that the June 19, 2024 payment is timely if the date which triggered the due date is May 22, 2024 when the email from "billing admin" was sent to the parties transmitting a copy of the invoice, but Plaintiff contends a May 17, 2024 notification the invoice was "uploaded" to the JAMS website started the payment clock. The Court concludes, based on a fair reading of the language of Code of Civil Procedure section 1281.98(a)(2) in its entirety as well as the evidence before the Court, the May 22, 2024 billing notification which "sent" the retainer invoice to the parties is what started the 30-day grace period deadline for payment under the statute.

Plaintiff's moving papers attached only copies of the invoice dated May 17, 2024, stating that is when JAMS "issued" the invoice but without any evidence of when or how it was sent to the parties or when or who received the copy of the invoice, since the invoice is "due upon receipt" pursuant to the statute. (Shatikian Decl. ¶ 7 and Exhs. F [showing payment on June 19, 2024] and G; Code Civ. Proc. § 1281.98(a)(2).) The opposition pointed out there was no evidence of how the invoice was sent or that it was received by defense counsel, and defendant presented evidence that its counsel "received" the invoice with a May 22, 2024 email from JAMS, arguing May 22, 2024 is the date the 30-day deadline begins to run. (Bodzin Decl. ¶ 18 and Exhs. F, H.)

Plaintiff submits a declaration in reply which attaches a copy of an email, apparently forwarded to the declarant Bogosyan by another attorney Talar DerOhannessian (Bogosyan Decl. Exh. B.) The email lists only talar@calljustice.com as the recipient of the email. The email states: "Dear Talar, [¶] Here are all of the new Notifications within JAMS Access. Click here to login to JAMS Access to see the Notifications. [¶] Log Notification . . . Appointment of Arbitrator and Retainer Invoice.pdf is uploaded to case [Higgins matter]." (Bogosyan Decl. Exh. B.)

The applicable statutory language states the invoice must be "provided in its entirety, shall state the full amount owed and the date that payment is due, and shall be sent to all parties by the same means on the same day." (Code Civ. Proc. § 1281.98(a)(2).) Plaintiff in his reply asks the Court to assume that the attorneys for the defendants received the "notification" of the availability of the invoice on the JAMS website on the same day and in the same manner as attorney DerOhannessian received it, but the Court does not have evidence that is the case. (*Compare* Bogosyan Decl. Exhs. B, C, and D.)

Only the May 22, 2024 email shows it was sent to all counsel for both parties at the same time, by the same means, and sent a complete copy of the retainer invoice. (Bogosyan Decl. Exh. D and Bodzin Decl. Exh. F.) The transmission of a notice that the invoice was "uploaded" to a JAMS website where it could be "accessed" is not the same as the invoice being "sent" to the parties, which is the language used in Code of Civil Procedure section 1281.98(a)(2). The statute also uses the word "provided," which has multiple dictionary definitions meaning to "give" or "put something in possession of" another person but can mean "make available." (*Compare* https://www.merriam-webster.com/dictionary/provide [to supply or make available (something wanted or needed] to https://www.oxfordlearnersdictionaries.com/us/definition/english/provide [to give something to

somebody or make it available for them to use] and https://dictionary.cambridge.org/us/dictionary/english/provide#google_vignette [to give someone something that they need], all accessed 2/7/2025.)

The meaning of "provide" as to "give" is most consistent with the statutory language that mandates that the arbitration invoice (not merely a notification of availability) be "sent" and that the time deadline for payment runs from the "receipt" of the invoice. (Code Civ. Proc. § 1281.98(a)(2).) As a result, the operative date starting the 30-day payment period ran from May 22, 2024 when the invoice was sent by email to defendant's counsel and all other counsel, as evidenced by the documents attached as Exhibit F to the Bodzin Declaration and Exhibit D to the Bogosyan Declaration.

**11. 9:00 AM CASE NUMBER: C23-02091**
**CASE NAME: BE KIND PRODUCTION, INC. VS. WILLIAM TYMA**
***HEARING ON MOTION IN RE: INTERVENTION**
**FILED BY: TYMA, WILLIAM J.**
****TENTATIVE RULING:****
Withdrawn by moving party 2/5/25.

**12. 9:00 AM CASE NUMBER: C24-01508**
**CASE NAME: DAVID PARKS VS. CARL MAST**
***HEARING ON MOTION IN RE: TO DETERMINE & ADOPT APPRAISED VALUE PURSUANT TO THE PARTITION OF REAL PROPERTY ACT AND FOR ORDER DISBURSING AMOUNTS TO BE HELD BY THE COURT TO PLAINTIFFS AND REALLOCATING INTERESTS OF PLAINTIFFS UNDER THE PARTITION OF REAL PROPERTY ACT**
**FILED BY: MAST, CARL**
****TENTATIVE RULING:****

Continued by stipulation and order to April 3, 2025, 9:00 a.m.

**13. 9:00 AM CASE NUMBER: C24-01714**
**CASE NAME: ANITA AHMADI VS. JAWEED SHAGHASI**
**HEARING ON DEMURRER TO: COMPLAINT**
**FILED BY: NEWREZ LLC**
****TENTATIVE RULING:****

Before the Court is Defendant Newrez dba Shellpoint Mortgage Servicing fka Specialized Loan Servicing, LLC ("Defendant" or "Newrez")'s Demurrer to Plaintiff Anita Ahmadi ("Plaintiff" or "Ahmadi")'s Complaint. Defendant demurs to Plaintiff's causes of action for (4) slander of title, (5) unjust enrichment, (6) violation of Business & Professions Code § 17200, (7) cancellation of instruments, and (8) declaratory judgment.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/13/2025

For the following reasons, the Demurrer is **overruled**.

Judicial Notice

Defendant requests judicial notice of several Court documents from case number C23-00325. The unopposed Request is **granted**. ("A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914, 918; Evid. Code §§ 452(a), 452(d), 453.)

Plaintiff requests judicial notice of several Contra Costa County Records as well as a press release and a news article. The Request is **granted-in-part** and **denied-in-part**. The Request is **granted** with respect to Exhibits A and B. (Evid. Code §§ 452, 453.) With respect to Exhibits C and D, it is arguable whether they clearly fall within the provisions of Evidence Code section 452, subdivision (h), as "[f]acts and propositions that are not reasonably subject to dispute" that are "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Defendant opposes this request on several grounds. The request is **denied**. (See *People v. Massie* (1998) 19 Cal. 4th 550, 566, fn. 4, 967 P.2d 29 [refusing to take judicial notice of newspaper articles] and *People v. Ramos* (1997) 15 Cal. 4th 1133, 1167 [affirming refusal to take judicial notice].)

Brief Factual and Procedural Background

This case is one of several between Anita Ahmadi and Jaweed Shaghasi and subject to a pending motion to consolidate in C23-00325 set for hearing on March 24, 2025. In the instant case, Plaintiff alleges that she purchased 209 Falcon Place, Clayton, CA 94517 in 1993 for her family and herself. (Complaint at ¶¶ 9, 10.) Plaintiff's mother and sibling continued to live in the subject property after she and her husband, Defendant Jaweed Shaghasi, purchased a separate home together. (*Id*. at ¶ 12.) Plaintiff alleges that Shaghasi fraudulently executed a Power of Attorney in her name which he then used to obtain a loan from the bank to encumber the property at 209 Falcon Place. (*Id*. at ¶¶ 13, 15, 16.) Plaintiff further alleges that the Deed of Trust has her forged signature. (*Id*. at ¶ 17.)

The Complaint alleges that Defendant Shaghasi defaulted on the Loan, following Ahmadi and Shagasi's religious divorce. (Complaint at ¶¶ 24, 25.) According to the Complaint, Plaintiff learned about the Loan when Defendant Newrez (formerly known as SLS) contacted her in May 2023. (*Id*. at ¶ 26.)

Legal Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law." (*Holiday Matinee, Inc. v. Rambus, Inc*. (2004) 118 Cal.App.4th 1413, 1420.) A complaint "is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 ("*Doe*")), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) Legal conclusions are insufficient. (*Id*. at 1098–1099; *Doe* at 551, fn. 5.) The Court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of

contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

Analysis

As a threshold issue, the Court notes that both parties present a very different view of the meet and confer efforts prior to the filing of the instant Demurrer. However, the Court declines to overrule the Demurrer on the grounds that Defendant's meet and confer efforts were disingenuous.

(4) Slander of Title

First, Defendant demurs to Plaintiff's slander of title claim on the grounds that "Newrez is merely the servicing company taking payments under the mortgage agreement between Shaghasi [and Ahmadi] and VirtualBank as lender." (Dem. at 12:13-14.)

The elements for slander of title are: (1) a publication; (2) without privilege or justification; (3) that is false; and (4) causes direct and immediate pecuniary loss. (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198-199, overruled in other part by *Baral v. Schnitt* (2016) 1 Cal.5th 376, 381.)

Here, the Complaint alleges that "the Bank recording the [Deed of Trust] purports to give them security interest in Plaintiff's Property. The Bank's recording of the [Deed of Trust] was illegal and wrongful because it was done without Plaintiff's knowledge or consent." (Complaint at ¶ 60.) Slander of title requires a false statement be knowingly made about title. (*Howard v. KUTAK ROCK LLP Schaniel* (1980) 113 Cal.App.3d 256, 264.) A deed of trust "carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in payment of his debt." (*Lupertino v. Carbahal* (1973) 35 Cal. App. 3d 742, 748.) However, here Plaintiff alleges that the underlying debt is invalid as it was procured by fraud by Defendant Shaghasi, and that her signature on the deed of trust is a forgery. (Complaint at ¶¶ 13, 15.) Plaintiff has alleged facts sufficient to state a cause of action for slander of title and though not entirely clear, Defendant's liability for this cause of action would appear to be based on an agency theory as the loan servicer.

That said, the Court notes that Plaintiff's opposition argument that "the flood of default notices, demands for payment, notices of intent to foreclosure-related documents published by NewRez and its predecessor, SLS, are disparaging Plaintiff's title" (Opp. at 12:17-19) lacks merit. Civil Code § 2924(d) renders as § 47 "privileged communications" the "mailing, publication, and delivery" of foreclosure notices and "performance" of foreclosure procedures. "[W]e conclude that the protection granted to nonjudicial foreclosure . . . is the qualified common interest privilege of section 47, subdivision (c)(1)." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 341.)

The Demurrer to the fourth cause of action for slander of title is **overruled**.

(5) Unjust Enrichment

Similarly, Defendant demurs to the cause of action for unjust enrichment on the grounds that their actions "do not raise to the level of unjust enrichment because Newrez has no equitable interest in the property, they merely provide a service to VirtualBank in exchange for a standardized fee." (Dem. at 12:7-8.)

The elements of an unjust enrichment claim are the "receipt of a benefit and [the] unjust retention of the benefit at the expense of another." (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593.)

The Complaint alleges that "the Bank is unjustly retaining interest on the Plaintiff's property to Plaintiff's detriment because the Bank now claims interest over Plaintiff's property on a Loan that was never issued to the Plaintiff and that Plaintiff never received any Loan or benefit therefrom." (Complaint at ¶ 67.) Defendant concedes in their Demurrer that they receive a fee from the bank for servicing the Loan that Plaintiff alleges is fraudulent.

The Demurrer to the fifth cause of action for unjust enrichment is **overruled**.

(6) Violation of Cal. Bus. & Prof. Code § 17200

Plaintiff has dismissed this cause of action against Defendant Newrez.

(7) Cancellation of Instruments

Defendant demurs to Plaintiff's seventh cause of action for cancellation of instruments on the grounds that "Newrez is simply paid a fee to administer and service a file." (Dem. at 14:12-13.)

The Complaint seeks cancellation of the Power of Attorney and the Deed of Trust recorded against the subject property.

Section 3412 provides that "[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a *person against whom it is void or voidable*, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Italics added; see *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818-819.)

The Complaint alleges that the Power of Attorney and Deed of Trust are both void. (Complaint at ¶ 81.)

Defendant's argument that has no interest in the property is belied by its role as loan servicer, the ostensible agent of the lender. While it may be the case that it has no connection to the Power of Attorney, by its own admission it services the debt secured by the Deed of Trust.

The Demurrer to the seventh cause of action for cancellation of instruments is **overruled**.

(8) Declaratory Relief

Finally, Defendant demurs to Plaintiff's eighth cause of action for declaratory relief on the grounds that "Newrez has no interest, and claims no interest, in the subject property. As such any declaration of rights to the property is unrelated to Newrez, warranting dismissal of this cause of action without leave to amend." (Dem. at 14:20-23.)

"Strictly speaking, a demurrer is a procedurally inappropriate method for disposing of a complaint for declaratory relief." (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal. App. 4th 187, 221 [disapproved on other grounds].) Nevertheless, the court may sustain a demurrer to a declaratory relief claim if the complaint fails to allege an actual or present controversy, or that the controversy is not "justiciable." The court also may sustain a demurrer without leave to amend if it determines that

a judicial declaration is not "necessary or proper at the time under all the circumstances." (CCP §1061; *DeLaura v. Beckett* (2006) 137 Cal. App. 4th 542, 545.)

Defendant's argument lacks merit. As Defendant Newrez has argued repeatedly in its Demurrer, it is a loan servicer for the loan secured against the property. Plaintiff alleges that Defendant is "threatening to foreclose on the Plaintiff's Property based on this fraudulent Loan that Plaintiff did not receive." (Complaint at ¶ 32.) Plaintiff has alleged a controversy between herself and Newrez.

The Demurrer to the eighth cause of action for declaratory relief is **overruled**.

**14. 9:00 AM CASE NUMBER: MS5031**
**CASE NAME: PETITION OF: PARAQUAT CASES**
**HEARING IN RE: APPILCATION FOR PRO HAC VICE AS TO LAWRENCE R. COHAN FOR PLTFS**
**FILED BY: PARAQUAT CASES**
***TENTATIVE RULING:***
Granted.

**15. 9:00 AM CASE NUMBER: MSC21-01283**
**CASE NAME: BEROTTE VS. CIVIC CENTER MOTEL**
***HEARING ON MOTION FOR DISCOVERY TO COMPEL DEPOSITION OF PLTF MARIE SCHNACKER AND PROD OF DOCS**
**FILED BY: BEROTTE, DEWAYNE**
***TENTATIVE RULING:***

Defendants move to compel the depositions of plaintiff Dewayne Berotte and plaintiff Marie Schnacker. Each motion includes a request for sanctions in the amount of $4,500. The two motions will be considered together.

**Facts:**

On July 15, 2024, the previously assigned judge in this case ordered that all discovery in the case be complete by October 31, 2024.

On August 16, 2024, defense counsel electronically served two deposition notices, which included requests for production of documents, setting the depositions for September 19, 2024 (one at 10:00 a.m., and the other at 2:00 p.m. The notice was not accompanied by any message indicating a willingness to discuss the deposition timing. (Two other depositions were noticed, but are not part of this motion.)

Plaintiffs' counsel served written objections on September 4, 2024, which was timely. The stated objections included that the date of the deposition was set without advance consultation, that the location of the depositions was 55 miles from the deponent's residence, and that the deponents preferred to attend remotely.

On September 6, defense counsel sent a lengthy meet and confer letter, to which plaintiffs' counsel did not respond, despite several emails and voice mails. The letter pointed out that there is no requirement of advance consultation, that there is no "55-mile limit" (and deponents lived less than 55 miles from the deposition location anyway), and that while counsel and the court reporter have the option of attending remotely, the witness does not (without agreement).

On September 18, 2025, plaintiffs' counsel (through a Legal Assistant) sent an email to defense counsel stating in substance only that "I will have dates for depositions in October sent to you by the end of the day today." Defense counsel sent an email response requesting a more substantive response.

On September 19, defense counsel emailed a letter (dated September 18) asking if the witnesses would be appearing that day. On the same day, at 4:28 p.m., counsel for plaintiffs sent an email referring to a conversation with counsel's paralegal earlier in the day and proposing various alternative dates.

Defense counsel filed the pending motions on September 26, 2024.

After the motions were filed, some sort of agreement was reached, and the parties represent that the depositions were taken in October.

Defense counsel seeks a $4,500 sanction for each motion, based on ten hours of work at $450 per hour.

Plaintiff filed a late opposition, asserting the belief that the motions would be off calendar because the depositions had been taken.

**Legal Authorities:**

Rule of Court 3.1348(a) specifically provides: "The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed." Failure to oppose or filing of a supplemental response "shall not be deemed an admission that the motion was proper or that sanctions should be awarded." (CRC 3.1348(b).)

Section 2025.450(a) provides that where a party has received a deposition notice and has not objected and failed to appear, a motion to compel appearance may be filed. If the motion is granted, the court shall grant a monetary sanction unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (§ 2025.450(g).) Under Code of Civil Procedure section 2023.030(a), however, the court has separate authority to impose a monetary sanction against a party engaging "in the misuse of the discovery process," which is defined to include "making, without substantial justification, an unmeritorious objection to discovery[.]" (CCP § 2023.010(e).) It also includes "failing to respond or to

submit to authorized methods of discovery (§ 2023.010(d)) and "failing to confer… in a reasonable and good faith attempt to resolve informally any dispute concerning discovery." (§ 2023.010(i).)

Among the evident purposes of the provisions of the statute and Rules of Court is to assure that a party cannot unjustifiably refuse to respond to discovery, put the propounding party to the time and expense of filing a motion to compel, and then avoid any accountability by subsequently supplementing the discovery responses.

Objections to a deposition are timely if made in writing and served at least three days before the date noticed for the deposition. (§ 2025.410(a).) The service of objections, however, does not stay the deposition. If the party moves for "an order staying the taking of the deposition[,]" then "[t]he taking of the deposition is stayed pending the determination of this motion." (§ 2025.410(c).)

The Contra Costa Superior Court Local Rules, Chapter 8, Standards of Professional Courtesy, Rule 2.120(a)(1) provides that "Attorneys should communicate with opposing counsel before scheduling depositions[.]" Rule 2.91(c) provides that Chapter 8 "is not a substitute for the statutes and rules, and no provision of this Code is intended to be a method to extend time limitations of statutes and rules[.]"

**Analysis:**

Defense counsel sent deposition notices without consulting about the schedule beforehand or offering to do so contemporaneously with sending the notice. The Code provisions do not require such an effort, but the Local Standards of Professional courtesy do. They do not supersede the code requirements. But in addressing whether sanctions should be awarded, they are a relevant consideration.

Plaintiffs' counsel, for their part, appear to believe that there is a requirement of such advance consultation, such that they were entitled to assert it as a basis for its written objections, and then fail to appear at the deposition. But objections, even valid ones (which many of the asserted objections were not) do not stay the taking of the deposition.

After the objections were made, defense counsel sent a meet and confer letter. Plaintiffs' counsel did not respond until the day before the deposition. Plaintiffs' counsel responded in writing only on the day of the deposition. They continue to assert that the service of objections automatically stayed the deposition. They also continue to assert that the motion should have gone off calendar once the depositions were taken.

Defense Counsel should have consulted with plaintiffs' counsel about scheduling before sending the deposition notices, even though there was some time pressure from the court's earlier order. In addition, the motion to compel attendance was filed after plaintiffs' counsel had agreed to produce the witnesses, although apparently no specific agreement had yet been reached. Plaintiffs' counsel, however, made improper objections, failed to appear for the depositions without notice or filing a motion to stay the depositions, did not respond substantively to the meet and confer letter

until the day of the deposition, only firmly agreed to the time and place of the deposition after a motion to compel had been filed, and assumed that the motion would go off calendar because the depositions were taken. All things considered, plaintiffs' counsel have committed discovery abuse as defined in Code of Civil Procedure section 2023.010, subdivisions (d), (e), and (i). A monetary award will be entered on each motion, but it will be greatly reduced because of defense counsel's conduct.

The motion to compel the deposition of Dewayne Berotte is denied as moot, but the request for sanctions is granted in the amount of $995 (in attorney's fees), payable within 30 days of notice of this order.

The motion to compel the deposition of Marie Schnacker is denied as moot, but the request for sanctions is granted in the amount of $995 (in attorney's fees), payable within 30 days of notice of this order.

**16. 9:00 AM CASE NUMBER: MSC21-01283**
**CASE NAME: BEROTTE VS. CIVIC CENTER MOTEL**
***HEARING ON MOTION FOR DISCOVERY COMPEL DEPO OF PLTF DEWAYNE BEROTTE AND PROD OF DOCS**
**FILED BY: JOURNEY HOSPITALITY INC., DBA CIVIC CENTER MOTEL (ERRONEOUSLY SUED AS "CIVIC CENTER MOTEL")**
***TENTATIVE RULING:***

See line 15.

**17. 9:00 AM CASE NUMBER: MSC21-01751**
**CASE NAME: JOSE BELTRAN VS. MONUMENT CONSTRUCTION INC**
***HEARING ON MOTION IN RE: FINAL APPROVAL**
**FILED BY:**
***TENTATIVE RULING:***
Plaintiff Jose Beltran moves for final approval of his class action and PAGA settlement with defendant Monument Construction, Inc. Hearing required to address the issue of the escalator clause in Par. 8 of the agreement.

A. **Background and Settlement Terms**

Defendant is a full-service commercial-site construction company. Plaintiff worked there as a general laborer and landscaper from 2016 to 2020.

The original complaint was filed on August 27, 2021, as a class action. PAGA claims were added by later amendment.

The settlement would create a gross settlement fund of $1,000,000. The class representative payment to the plaintiff would be $10,000. Attorney's fees would be $333,333 (one-third of the

settlement). Litigation costs would not exceed $30,000. The settlement administrator's costs are estimated at $9,500. PAGA penalties would be $75,000, resulting in a payment of $56,250 to the LWDA. The net amount paid directly to the class members would be about $542,167, not including distribution of PAGA penalties. The fund is non-reversionary. There are an estimated 540 class members. Based on the estimated class size, the average net payment for each class member is approximately just over $1,000. The individual payments will vary considerably, however, because of the allocation formula prorating payments according to the number of weeks worked during the relevant time. The number of aggrieved employees for PAGA purposes is smaller, about 312, because the starting date of the relevant period is later.

The entire settlement amount will be deposited with the settlement administrator in two installments. The first installment will be paid within 14 days after the effective date of the settlement. The second will be 180 days later.

The proposed settlement would certify a class of all current and former non-exempt employees employed at Defendants' California facilities between August 27, 2017 and now. For PAGA purposes, the period covered by the settlement is August 27, 2020 to now.

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the class period.

Settlement checks not cashed within 180 days will be cancelled, and the funds will be directed to the controller's unclaimed property fund.

The settlement contains release language covering all claims and causes of action, alleged or which could have reasonably been alleged based on the allegations in the operative pleading, including a number of specified claims. Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ("A court cannot release claims that are outside the scope of the allegations of the complaint.") "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Formal discovery was undertaken, resulting in the production of substantial documents. The matter settled after arms-length negotiations, which included a session with an experienced mediator.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. For example, much of plaintiff's allegations centers on possible off-the-clock work, including missed or skipped meal breaks and rest breaks. Defendant, however, pointed out that its formal policies prohibit off-the-clock work, and asserted that it would have had no knowledge of employees beginning work before punching in or

continuing after punching out. Further, it argued that it was required to make meal and rest breaks available, but not required to ensure that they be taken, so long as no employer policy prevented or discouraged taking such breaks. As to unreimbursed employee expenses (such as cell phone use, mileage, and tools), plaintiff would have been called on to show that such expenses were in fact incurred, were reasonably necessary to job performance, and were unreimbursed. Furthermore, the fact-intensive character of such claims would have presented a serious obstacle to class certification.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code § 2699(e)(2) (PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory.")) Moreover, recent decisions may make it difficult for PAGA plaintiffs to recover statutory penalties, as opposed to actual missed wages. (See, e.g., *Naranjo v. Spectrum Security Services, Inc.* (2024) 15 Cal.5th 1056.)

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

Preliminary approval was entered by the Court on October 23, 2024. Since then, on December 2, 2024, notice was provided to the class of approximately 700 members. 48 notices were returned as undeliverable, for which skip tracing found 24 addresses. No class member has either objected to the settlement or asked to be excluded.

B. **Legal Standards**

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro*, 69 Cal.App.5th 521.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees". (*Id*., at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th

273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "The court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "Where the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

The settlement agreement includes an escalator provision (Par. 8), to be triggered in the event that the number of covered employees or work weeks turns out to be materially higher than now estimated. If the clause is triggered and the defendant elects to increase the total payment, no further approval will be needed. In granting preliminary approval, the Court cautioned the parties that in the event the clause would result in a significant modification of the settlement (such as cutting back the covered period), it would be prudent to seek further approval from the Court. It appears to the Court that the clause may have been triggered. The original estimate of class size was 540, but the Settlement Administrator's declaration states that 700 people were sent notice. (Nava Dec., Par. 7.) While the escalator clause is based on Pay Periods, not class members, the increase in class members may result in a similar increase in pay periods.

C. **Attorney Fees and Costs**

Plaintiff seeks one-third of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) Following typical practice, however, the fee award was deferred to this motion for final approval.

Counsel have submitted an estimated lodestar of $167,497.50, based on documented hours expended at a blended hourly rate of $575. Given the actual requested fee of $333,333.33, there is an implied multiplier of 1.99. Under the circumstances of this case, the Court finds that no adjustment is necessary, and the attorney's fee is approved.

Litigation costs of $14,839.80, which are less than the estimate at the time of preliminary approval, are reasonable and are approved.

Plaintiff Jose Beltran requests a representative payment of $10,000. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009)

175 Cal.App.4th 785, 804-07. Although counsel's memorandum of points and authorities cites to a Beltran Declaration (p. 18, line 26; p. 19, l. 7.), there is no such declaration in the court file. In the absence of any further information concerning such items as the number of hours Mr. Beltran worked on the case, or whether he released a broader set of claims, which may have had some value, the Court awards $5,000.

Costs of $9,500 to the settlement administrator are reasonable and are approved.

D. **Conclusion**

The Court finds that the settlement is fair, reasonable, and adequate, and is approved, with the reduction of the representative fee from $10,000 to $5,000, and subject to resolution of the issue concerning the escalator clause. Counsel should be prepared at the hearing to address the issue.

Counsel will be directed to prepare an order reflecting this tentative ruling, and the other findings in the previously submitted proposed order. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented, which shall be chosen in consultation with the Department Clerk. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. Five percent of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

**18. 9:00 AM CASE NUMBER: MSL17-02267**
**CASE NAME: FORD MOTOR VS SAUCEDO**
***HEARING ON MOTION IN RE: MOTION FOR ORDER SETTING ASIDE AND VACATING DISMISSAL/ENTRY OF JUDGMENT PUR TO STIP FILED BY PLN ON 9/17/24**
**FILED BY: FORD MOTOR CREDIT COMPANY LLC**
****TENTATIVE RULING:****

Plaintiff previously moved to enforce this judgment, and on May 23, 2024, the Court (the Honorable Charles Stephen Treat), ruled as follows:

> Plaintiff's unopposed motion to vacate dismissal and enter judgment against defendant under Code of Civil Procedure § 664.6 is **denied**. This settlement was made in 2017, and defendant has been in default of payment since June 2019. No explanation is offered for why plaintiff has waited nearly five years before acting on this default. The Court notes that if plaintiff had simply pursued a cause of action for breach of the settlement agreement, the statute of limitations would have run above a year ago. Section 664.6 is not intended to give a creditor an infinite extension of time in which to pursue its rights after default.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/13/2025

Plaintiff has filed virtually the same motion, with no new facts, and no disclosure that the motion previously was denied. It is essentially a motion to reconsider under Code of Civil Procedure section 1008, but it not brought within ten days, and does not state grounds for reconsideration.

The motion is denied.

**Law & Motion**
**ADD-ON**

**19. 9:00 AM CASE NUMBER: C23-02586**
**CASE NAME: FLORENCE DROCAN VS. FULL CIRCLE OF CHOICES**
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL HEARING**
**FILED BY:**
****TENTATIVE RULING:****
Counsel submitted a supplemental declaration establishing that Housing Consortium of the East Bay is an appropriate Cy Pres recipient. Accordingly, the settlement is approved and the motion is granted.