1. MATTER OF K.W. 22CV0277

OSC Re: Name Change.

TENTATIVE RULING # 1: THE PETITION IS GRANTED.

2. CALIFORNIA HYDRONICS CORP. v. DIV 15 TECH PC-20210490

Plaintiff's Application for Right to Attach Order and Writ of Attachment.

On September 1, 2021, plaintiff filed a complaint against defendant DIV 15 Tech, a California Corporation asserting causes of action for breach of contract, common count, and quantum meruit allegedly arising from agreements in the form of purchase orders and failure to make payments due and owing in the amount of $73,135.19.

Plaintiff seeks issuance of a writ of attachment of any of the defendant's property as it is not a natural person in the total amount of $251,938, representing $5,000 in estimated costs and $121,300 in estimated attorney fees to prosecute the action. The declaration filed in support of the verified application states: declarant is the CFO of plaintiff; plaintiff is a California Corporation doing business as a hydronics supplier and contractor, duly licensed by the State of California; a copy of defendant's credit application is attached as Exhibit A; in approximately 2019 defendant purchased a pump skid from plaintiff by submitting a purchase order, a true and correct copy is attached as Exhibit B; the pump skid identified in Exhibit B was delivered to the construction project on September 29, 2019 as confirmed by the bill of lading from the shipper, a true and correct copy being attached as Exhibit C; true and correct copies of pump skid related invoices are attached as Exhibits D-F; and while plaintiff has issued one credit in the amount of $89.10 related to the pump skid, plaintiff has not been paid in full for the pump skid and there remains $73,135.59 unpaid by defendant. (Declaration of Curtis Roe in Support of Application, paragraphs 2-10; and Exhibits A-F.)

Plaintiff's counsel declares plaintiffs have so far incurred $9,555.50 in attorney fees and $1,111.25 in costs; and it is estimated that plaintiff will incur $11,541.40 in interest from February 15, 2022, through trial, $101,300 in additional attorney fees and an additional $5,000

in costs, which includes trial prep and trial time for two attorneys. (Declaration of M. Jonathan Robb, Jr in Support of Application, paragraphs 2-4.)

"Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought." (Code of Civil Procedure, § 484.010.)

Defendant filed its answer to the complaint on November 2, 2021.

The proof of service filed with the court declares that defendant was served the documents related to the hearing on the application for writ of attachment by email on February 14, 2022.

The date and time of hearing appears to have been assigned by the clerk when the papers were filed on February 16, 2022. Therefore, the document served on defense counsel on February 14, 2022, could not have noticed the date and time of the hearing on April 8, 2022. An amended notice of hearing was filed on February 22, 2022, which stated the hearing would take place on April 8, 2022, at 8:30 a.m. in Department Nine. The proof of service attached to the amended notice declares that "**PLAINTIFF'S NOTICE OF FURTHER CASE MANAGEMENT CONFERENCE**" was served by email to defense counsel on February 17, 2022. (Emphasis in original.)

The court questioned whether the designation of what was served in the proof of service was a clerical error.

Defendant filed a request for continuance for lack of valid service on April 7, 2022 wherein it contended: upon viewing the February 17, 2022 email that had the notice of hearing and Judicial Council Form AT-115 application, defendant notified plaintiff's counsel about defendant's objection to service by electronic means; defendant expected service of further

supporting documents for the application would thereafter be served by electronic means or mail; after receiving plaintiff's notice of non-opposition by email, defense counsel was surprised as he believed there had been no service of the supporting documents; and defense counsel later discovered that the supporting documents were emailed on February 14, 2022 before the date of hearing had been assigned and had ended up in a "trash file". Defendant further contended that defendant is not insolvent; there is no request for attorney fees in the complaint, therefore attorney fees should not be included in the amount to be secured by the equipment; and assuming the court determines a bond is appropriate, it should not exceed $73,135.59.

The court continued the hearing from April 8, 2022, to April 29, 2022, and directed the response to the application to be filed at least nine days before the hearing date.

The amended proof of service filed on April 8, 2022, declares that on February 17, 2022, the amended notice of hearing was served by email or electronic transmission on defense counsel.

Defendant opposes the application on the following grounds: the future attorney fees and costs claimed in the application are unreasonable and unwarranted; the declaration in support of the claim for $9,555.50 in past attorney fees fails to articulate in any meaningful way what the alleged time was for; the plaintiff's counsel failed to show the hourly rates of the two attorneys claiming fees, the basis for a combined rate of $1,155 per hour for the two attorneys, and whether that rate is reasonably based upon the attorneys' experience and qualifications; the declaration failed to show whether those rates are reasonable in the prevailing community; and should the court grant the petition, the attachment amount should be limited to a total amount of $100,000, representing the alleged unpaid contract amount, interest and costs.

There was no reply to the opposition in the court's file at the time this tentative ruling was prepared.

Pursuant to Code of Civil Procedure, § 484.090 in order to issue an order of attachment, the court must find all of the following: (1) The claim upon which the attachment is based is one upon which an attachment may be issued; (2) the applicant has established the probable validity of the claim upon which the attachment is based; (3) the attachment is not sought for a purpose other than the recovery on the claim upon which the request for attachment is based; and (4) the amount to be secured by the attachment is greater than zero. In order to establish the probable validity of the claim, the applicant must show that it is more likely than not it will obtain a judgment against the defendant on its claim. (Code of Civil Procedure, § 481.190.) "Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees." (Code of Civil Procedure, § 483.010(a).)

"The following property of the defendant is subject to attachment: ¶ (a) Where the defendant is a corporation, all corporate property for which a method of levy is provided by Article 2 (commencing with Section 488.300) of Chapter 8…" (Code of Civil Procedure, § 487.010(a).)

"Except as provided in paragraph (2) of subdivision (a) of Section 3439.07 of the Civil Code, the following property is exempt from attachment: ¶ (a) All property exempt from enforcement of a money judgment. ¶ (b) Property which is necessary for the support of a defendant who is a natural person or the family of such defendant supported in whole or in part by the defendant. ¶ (c) "Earnings" as defined by Section 706.011. ¶ (d) All property not subject to attachment pursuant to Section 487.010." (Code of Civil Procedure, § 487.020.)

"In determining the probable validity of a claim where the defendant makes an appearance, the court must consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation. (Law Revision Commission Comment to section 481.190.)" (Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 Cal.App.3d 1110, 1120.) Therefore, the burden is on the moving party to establish grounds for an order of attachment. (Loeb and Loeb, supra at page 1120; Pos-A-Traction, Inc. v. Kelly-Springfield Tire Co., Div. of Goodyear Tire & Rubber Co. (2000) 112 F.Supp.2d 1178, 1181.) "The application shall be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based." (Code of Civil Procedure, § 484.030.) A verified complaint that satisfies the requirements of Section 482.040 may be used in lieu of or in addition to an affidavit. (Code of Civil Procedure, § 482.040.) The opposition shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. (Code of Civil Procedure, § 484.060(a).) Since attachment is a purely statutory remedy, it is subject to strict construction. (Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp. (1994) 29 Cal.App.4th 1459, 1466.)

Inasmuch as an award of attorney fees is not sought in the complaint, plaintiff can not claim projected attorney fees as the amount that is secured by the subject equipment. Therefore, the amount of the claim of attachment is limited to $73,135.59 as the claimed unpaid balance under the two agreements, $30,294.54 in interest through February 15, 2022, $11,541.40 in interest from February 15, 2022, through trial, and an additional $5,000 in costs through the date of trial. The court grants the application for a writ of attachment in the amount of $119,971.53.

Undertaking Required

Before the issuance of a writ of attachment the plaintiff is required to file an undertaking to compensate the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff. (Code of Civil Procedure, § 489.210.) The undertaking shall be $10,000. (Code of Civil Procedure, § 489.220(a).) That amount may be increased upon objection to the undertaking and the court finding that the probable recovery for a wrongful attachment exceeds the amount of the undertaking. (Code of Civil Procedure, § 489.220(b).)

Defendant has argued that assuming the court determines a bond is appropriate, it should not exceed $100,000.

There is no evidence before the court to establish that the probable recovery for a wrongful attachment would exceed $10,000. While defendant has filed a general denial and several affirmative defenses, there is no evidence that disputed the calculation of the amounts allegedly due and owing on the contracts and that interest is not due and owing. On the other hand, the declaration of plaintiff's Chief Financial Officer presents evidence concerning the amount remaining due and owing on the contracts. There is insufficient evidence to establish that the probable recovery for a wrongful attachment would exceed a bond in the amount of $10,000. Bond is set in the amount of $10,000.

TENTATIVE RULING # 2: PLAINTIFF'S APPLICATION FOR RIGHT TO ATTACH ORDER AND WRIT OF ATTACHMENT IS GRANTED IN THE AMOUNT OF $119,971.53. BOND IS SET ON THE AMOUNT OF $10,000. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS

ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, APRIL 29, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

3. BARBARA v. PCH PROPERTY MANAGEMENT PC-20190228

Petition to Approve Compromise of Minor's Disputed Claim.

The petition states the minor sustained minor injuries arising from exposure to excess moisture and mold. Petitioner requests the court authorize a compromise of the minor's claim against defendant/respondent in the gross amount of $3,500.

The petition states that there are no outstanding medical bills or liens for the medical assessment and treatment in January 2018 in connection with respiratory injuries; and that no reimbursement for medical expenses is required, leaving the entire $3,500 settlement amount to be deposited into a blocked account.

The petition states that the minor has fully recovered from the injuries allegedly suffered. There is no current doctor's report concerning the minor's condition and prognosis of recovery as required by Local Rule 7.10.12A.(3).

The minor's attorney expects to be paid attorney fees, which apparently are not being paid from the settlement amount. The petition states that the fee agreement and settlement agreement are confidential, which can be presented to the court. Petitioner requests that the agreements not be filed. The court uses a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability. (Rules of Court, Rule 7.955(a)(1).) Petitioner and counsel need to address the issue at the hearing.

Pursuant to Rules of Court, Rule 7.952(a) the petitioner and the minor are required to appear at hearings on petitions to approve minor compromises, unless the court dispenses with the requirement upon finding good cause.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, APRIL 29, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. MARKGRAF v. RUSSELL 21CV0186

Motion for Order Prescribing Service on Defendants by Publication and Mailing.

Plaintiff filed an action asserting causes of action against defendants for personal injury, property damage, and wrongful death. Plaintiff moves for an order authorizing service on defendants on the following grounds: despite the exercise of due diligence, plaintiff has been unable to serve or locate defendants for service.

Code of Civil Procedure, § 415.50 provides: "(a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that: ¶ (1) A cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action; or ¶ (2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property. ¶ (b) The court shall order the summons to be published in a named newspaper, published in this state, that is most likely to give actual notice to the party to be served and direct that a copy of the summons, the complaint, and the order for publication be forthwith mailed to the party if his or her address is ascertained before expiration of the time prescribed for publication of the summons. Except as otherwise provided by statute, the publication shall be made as provided by Section 6064 of the Government Code unless the court, in its discretion, orders publication for a longer period. ¶ (c) Service of a summons in this manner is deemed complete as provided in Section 6064 of the Government Code. ¶ (d) Notwithstanding an order for publication of the summons, a summons may be

served in another manner authorized by this chapter, in which event the service shall supersede any published summons…"

The Judicial Council Comments to Section 415.50 state in pertinent part: "Section 415.50 provides a method for effecting service upon a defendant whose whereabouts are unknown and who has no known fixed location where service can be otherwise effected in a manner specified in this article. It is the traditional method of service of process by publication. The applicable rules dealing with such service are essentially the same as under the former law, except that service by publication under Section 415.50 is limited to instances where a better method of service specified in Sections 415.10 through 415.40 is not available, *i.e.*, by delivering process to the defendant or his agent personally (Sections 415.10, 416.90), or at his dwelling house, usual place of abode, or usual place of business (Section 415.20), or by means of ordinary first-class mail or airmail, or registered or certified airmail (Sections 415.30, 415.40). (See generally *Vorburg v. Vorburg* (1941) 18 Cal.2d 794, 117 P.2d 875; *Rue v. Quinn* (1902) 137 Cal. 651, 656, 70 P. 732; *Forbes v. Hyde* (1866) 31 Cal. 342, 350; see also Comment, 37 Cal.L.Rev. 80, 86-88.) These methods of service make service by publication unnecessary except where a defendant's whereabouts and his dwelling house or usual place of abode, etc., cannot be ascertained with reasonable diligence, and where no person who may be served on his behalf can be located with reasonable diligence. ¶ The term "reasonable diligence" takes its meaning from the former law: it denotes a thorough, systematic investigation and inquiry conducted in good faith by the party or his agent or attorney (See *Vorburg v. Vorburg*, *supra*, at 797; *Stern v. Judson* (1912), 163 Cal. 726, 736, 127 P. 38; *Rue v. Quin*n, *supra*, at 657). A number of honest attempts to learn defendant's whereabouts or his address by inquiry of relatives, friends, and acquaintances, or of his employer, and by investigation of appropriate city and telephone directories, the voters' register, and the real and

personal property index in the assessor's office, near the defendant's last known location, are generally sufficient. These are the likely sources of information, and consequently must be searched before resorting to service by publication. ¶The first step in service by publication is the filing of a prescribed affidavit showing in detail (1) probative facts indicating a sincere desire and a thorough search to locate the defendant, including the dates thereof and any attempts to serve the defendant by another method of service (*Rue v. Quinn*, *supra*, at 656; *Chapman v. Moore* (1907) 151 Cal. 509, 513, 91 P. 324; *Forbes v. Hyde*, *supra*, at 350), and either (2) that a cause of action exists against the defendant or that he is a necessary or proper party, or (3) that the action consists in whole or in part in excluding defendant from any interest in property in this state that is subject to the jurisdiction of the court. Such an affidavit in proper form is a jurisdictional basis of the order for publication. (*Forbes v. Hyde*, *supra*, at 350)…"

Declarations of registered process servers provide evidence of unsuccessful attempts to serve defendants at their last known address, which was listed in the CHP Traffic Collision Report concerning the subject accident; that during the attempted service at their last known address a person at the property told the process served that both defendants are deceased; and that attempted service at a potential address for defendants in Fresno was unsuccessful and the person at the address told the process server that the new owner has lived at that address for two years.

Plaintiff's counsel states in the memorandum of points and authorities in support of the motion that plaintiff has been unable to confirm with defendants' insurer that they are deceased and has been unable to find any other evidence that they are deceased, and, therefore, plaintiff is informed and believes that that the allegations of defendants' deaths were made to evade service. Plaintiff's counsel also states that defendants' insurer has refused to accept service on behalf of defendants.

Plaintiff requests that the court issue an order authorizing service of the summons and complaint by publication in the *Mountain Democrat* and by mailing to the last known address of defendants in Placerville.

It appears under the circumstances presented that there are parties to be served who cannot with reasonable diligence be served in another manner; a cause of action exists against the parties upon whom service is to be made or they are necessary or proper parties to the action; and the parties to be served have or claim an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding those parties from any interest in the property.

The motion is granted.

TENTATIVE RULING # 4: PLAINTIFF'S MOTION FOR ORDER PRESCRIBING SERVICE ON DEFENDANTS BY PUBLICATION AND MAILING IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT

WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, APRIL 29, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. PETITION OF J.G. WENTWORTH ORIGINATIONS, LLC 22CV0279

Petition to Approve Transfer of Payment Rights.

Payee C.T. has agreed to sell a portion of payee's share of the monthly payments of his annuity in the total amount of $50,242.68, which the petitioner states have a present value of $37,582.87. In exchange, payee C.T. will be paid $10,000. The petition states that the funds are to be used to pay bills and that the payee has had three prior sales of structured settlement payments approved in April 2021, September 2021, and February 2022.

Petitioner seeks an order approving the transfer of the structured settlement payments pursuant to the provisions of Insurance Code, §§ 10134, et seq. on the ground that the transfer of the structured settlement payment rights is fair and reasonable and in the best interest of the payee, taking into account the welfare and support of the payee's dependents. (Insurance Code, 10137(a).)

"No transfer of structured settlement payment rights, either directly or indirectly, shall be effective by a payee domiciled in this state, or by a payee entitled to receive payments under a structured settlement funded by an insurance contract issued by an insurer domiciled in this state or owned by an insurer or corporation domiciled in this state, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee, unless all of the provisions of this section are satisfied." (Insurance Code, § 10136(a).)

Notice of the hearing and copies of the petitioning papers must be filed and served 20 days prior to the hearing, plus 5 calendar days for mailing by U.S. Mail. (Insurance Code, §§ 10139.2 and 10139.5(f)(2).).)

Notice of the hearing and copies of the petitioning papers must be filed and served 20 days prior to the hearing, plus 2 court days when served by express mail. (Insurance Code, §10139.5(f)(2) and Code of Civil Procedure, § 1013(c).)

The proofs of service in the court's file declare that petitioner served notice of the hearing, the petition, and supporting documents on the beneficiary/payee of the structured settlement payments, the annuity issuer and the payment obligor by mail and overnight mail on March 11, 2022.

There is no declaration in the court's file executed by the payee addressing the factors the court must consider in ruling on this motion.

"When determining whether the proposed transfer should be approved, including whether the transfer is fair, reasonable, and in the payee's best interest, taking into account the welfare and support of the payee's dependents, the court shall consider the totality of the circumstances, including, but not limited to, all of the following: ¶ (1) The reasonable preference and desire of the payee to complete the proposed transaction, taking into account the payee's age, mental capacity, legal knowledge, and apparent maturity level. ¶ (2) The stated purpose of the transfer. ¶ (3) The payee's financial and economic situation. ¶ (4) The terms of the transaction, including whether the payee is transferring monthly or lump sum payments or all or a portion of his or her future payments. ¶ (5) Whether, when the settlement was completed, the future periodic payments that are the subject of the proposed transfer were intended to pay for the future medical care and treatment of the payee relating to injuries sustained by the payee in the incident that was the subject of the settlement and whether the payee still needs those future payments to pay for that future care and treatment. ¶ (6) Whether, when the settlement was completed, the future periodic payments that are the subject of the proposed transfer were intended to provide for the necessary living expenses of

the payee and whether the payee still needs the future structured settlement payments to pay for future necessary living expenses. ¶ (7) Whether the payee is, at the time of the proposed transfer, likely to require future medical care and treatment for the injuries that the payee sustained in connection with the incident that was the subject of the settlement and whether the payee lacks other resources, including insurance, sufficient to cover those future medical expenses. ¶ (8) Whether the payee has other means of income or support, aside from the structured settlement payments that are the subject of the proposed transfer, sufficient to meet the payee's future financial obligations for maintenance and support of the payee's dependents, specifically including, but not limited to, the payee's child support obligations, if any. The payee shall disclose to the transferee and the court his or her court-ordered child support or maintenance obligations for the court's consideration. ¶ (9) Whether the financial terms of the transaction, including the discount rate applied to determine the amount to be paid to the payee, the expenses and costs of the transaction for both the payee and the transferee, the size of the transaction, the available financial alternatives to the payee to achieve the payee's stated objectives, are fair and reasonable. ¶ (10) Whether the payee completed previous transactions involving the payee's structured settlement payments and the timing and size of the previous transactions and whether the payee was satisfied with any previous transaction. ¶ (11) Whether the transferee attempted previous transactions involving the payee's structured settlement payments that were denied, or that were dismissed or withdrawn prior to a decision on the merits, within the past five years. ¶ (12) Whether, to the best of the transferee's knowledge after making inquiry with the payee, the payee has attempted structured settlement payment transfer transactions with another person or entity, other than the transferee, that were denied, or which were dismissed or withdrawn prior to a decision on the merits, within the past five years. ¶ (13) Whether the payee, or his or her family or

dependents, are in or are facing a hardship situation. ¶ (14) Whether the payee received independent legal or financial advice regarding the transaction. The court may deny or defer ruling on the petition for approval of a transfer of structured settlement payment rights if the court believes that the payee does not fully understand the proposed transaction and that independent legal or financial advice regarding the transaction should be obtained by the payee. ¶ (15) Any other factors or facts that the payee, the transferee, or any other interested party calls to the attention of the reviewing court or that the court determines should be considered in reviewing the transfer." (Insurance Code, §10139.5(b).)

Absent a declaration addressing these factors, the court can not make an informed decision based on consideration of the various factors required and will have no alternative other than to deny the motion due to lack of proof.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, APRIL 29, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

6. LACEY v. UNEMPLOYMENT INS. PC-20200620

(1) Review Hearing Re: Status.

(2) Hearing Re: Petition for Writ of Mandate.

Petitioner seeks to overturn the Unemployment Insurance Appeals Board's decision to reverse an Employment Development Department examiner's decision granting petitioner's claim for unemployment insurance benefits.

The real party in interest, Cameron Park Rent a Storage, answered the petition and filed an opposition.

Petitioner filed a response to the real party in interest's answer and opposition.

On December 13, 2021, respondent California Unemployment Insurance Appeals Board filed an answer to the petition.

On April 8, 2022, the court entered a judgment upon stipulation for remand for a new administrative hearing. The parties agreed that the stipulation was a settlement of the disputed claims; and within two weeks after respondent issues an order vacating and setting aside the administrative decision and providing for a new hearing, petitioner shall dismiss the petition for writ of mandate without prejudice.

On April 15, 2022, plaintiff filed a notice of unconditional settlement of the entire case, which stated that a request for dismissal would be filed in 45 days..

TENTATIVE RULING # 6: THE HEARING DATE ON THIS MATTER WAS PREVIOUSLY VACATED.

7. SV ADVENTURES v. MOUNTAIN MIKES PIZZA, LLC 21CV0381

Defendant's Motion to Compel Arbitration and Stay Action.

The action involves a dispute between former franchisee plaintiffs and franchisor defendant. Plaintiffs contend that defendant Mountain Mikes Pizza, LLC has submitted an arbitration claim with the American Arbitration Association (AAA) in Orange County and amended the arbitration claim to include trademark infringement claims. Plaintiff sought issuance of a preliminary injunction enjoining any further proceedings in the arbitration proceeding.

Defendant Mountain Mikes Pizza, LLC submitted an arbitration claim with the American Arbitration Association (AAA) in Orange County and amended the arbitration claim to include trademark infringement claims. Plaintiffs petitioned for a TRO and preliminary injunction staying arbitration proceedings. The court issued a tentative ruling granting the preliminary injunction. On April 15, 2022, the court heard oral argument on the matter and took it under submission.

Prior to the hearing on the OSC Re: Preliminary injunction, on March 17, 2022, defendant filed a motion to compel plaintiffs to submit to arbitration. Defendant contends that the court should compel the plaintiffs to submit their claims to binding arbitration and stay this litigation pending the completion of arbitration. Defendant argues: plaintiffs agreed to be bound by the arbitration agreement attached to the Franchise Disclosure Document (FDD) when they executed the assignment of the franchise agreement and guaranty; the parties have agreed in Paragraph 17.F. of the arbitration provision that the arbitrator must decide the issue of enforceability of the arbitration agreement (Adyani Declaration in Opposition, Exhibit 2.), which is a clear delegation clause that leaves the court with no jurisdiction to decide the enforceability of the arbitration provision; the proper venue for determination of the enforceability of the

arbitration agreement is by the arbitrator in the arbitration proceeding and not the court; the plaintiffs' claims are clearly within the scope of the arbitration agreement and should be arbitrated; the unconscionability argument is primarily premised upon the claim that defendant did not provide plaintiffs with a copy of the franchise agreement, which is false, because they received a copy from the prior franchisee, therefore, plaintiffs are not likely to prevail on a claim that the franchise agreement is procedurally unconscionable; plaintiffs also obtained the information in the other franchise agreements they entered into regarding their other Mountain Mike Pizza restaurants; a "take it or leave it" arbitration provision is not per se procedurally unconscionable, therefore, the agreement must also be procedurally unconscionable in another manner in order for the court to determine the arbitration provision is procedurally unconscionable; the agreement is not substantively unconscionable as the venue provision and other provisions do not shock the conscience; there is no requirement for plaintiffs to initial the arbitration provision in order to agree to it; a class waiver is not substantively unconscionable; arbitrating the dispute near defendants offices does not shock the conscience; the arbitration agreement is mutual and there are no non-mutual provisions; the jury waiver is not substantively unconscionable; even if there are unconscionable terms, the court can sever those terms and enforce the remaining terms of the arbitration agreement; and this action should be stayed pending the outcome of arbitration.

Plaintiffs oppose the motion to compel arbitration on the following grounds: there is no delegation clause in the subject agreement requiring the arbitrator to determine the validity and scope of the arbitration clause; the reference to the AAA rules is insufficient, because a copy of the rules was not attached to the agreement and there was no specific delegation in the language of the agreement itself; the arbitration proceedings initiated by defendant includes claims that are not within the scope of arbitration, such as alleged trademark infringement

claims and claims related to alleged trademark infringement after the termination of the franchise agreement; the arbitration provision of the franchise agreement is procedurally and substantively unconscionable; the arbitration agreement is procedurally unconscionable, because it is a contract of adhesion; various provisions of the agreement are substantively unconscionable; the arbitration proceeding that was filed constitutes a pre-litigation jury waiver of matters not subject to the arbitration agreement; and the arbitration proceeding is not properly venued in Orange County.

Defendant replied: plaintiffs concede they assented to the arbitration provision when they executed the assignment and assumption of the franchise agreement and executed the guaranty; the arbitration agreement clearly and unmistakably provides that the validity and scope of the arbitration provisions must be decided by the arbitrator and not the court; the reference in the agreement to the AAA Commercial Arbitration rules as applicable to the arbitration, which includes the rule that the arbitrator determines enforceability and scope of arbitration, clearly and unmistakably provides in the agreement that the issue will be decided by an arbitrator and not a court; plaintiff's claims are covered by the agreement and it is irrelevant if defendant has raised matters not within the scope of the arbitration agreement in the arbitration; although it is for the arbitrator to decide enforceability of the arbitration agreement, the agreement is not procedurally and substantively unconscionable; and the action should be stayed pending arbitration.

Motion to Compel Arbitration and Stay Litigation

Except for specifically enumerated exceptions, the court must order the petitioner and respondent to arbitrate a controversy, if the court finds that a written agreement to arbitrate the controversy exists. (See Code of Civil Procedure, § 1281.2.)

"If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first." (Code Civil Procedure, § 1281.12.)

"…when a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see § 1281.2, subds. (a), (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. (*Strauch v. Eyring*, *supra*, 30 Cal.App.4th at p. 186.)" (Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 413.)

"In California, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420, 100 Cal.Rptr.2d 818; see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972–973, 64 Cal.Rptr.2d 843, 938 P.2d 903.) Generally, an arbitration agreement must be memorialized in writing. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th

1351, 1363, 95 Cal.Rptr.3d 252.) A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact (e.g., *Craig,* at p. 420, 100 Cal.Rptr.2d 818 [employee's continued employment constitutes acceptance of an arbitration agreement proposed by the employer]) or be effectuated by delegated consent (e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 852–854, 114 Cal.Rptr.3d 263, 237 P.3d 584 (*Ruiz*).) An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215, 78 Cal.Rptr.2d 533.)" (Emphasis added.) (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236.)

"A written agreement to arbitrate is fundamental, because Code of Civil Procedure section 1281.2 permits a court to order the parties to arbitrate a matter only if it determines that an agreement to arbitrate exists. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356, 72 Cal.Rptr.2d 598; *Berman v. Renart Sportswear Corp.* (1963) 222 Cal.App.2d 385, 388-389, 35 Cal.Rptr. 218.) Indeed, when the trial court reviews a petition to compel arbitration, the threshold question is whether there is an agreement to arbitrate. (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683, 57 Cal.Rptr.2d 867.)" (Villa Milano Homeowners Ass'n v. Il Davorge (2001) 84 Cal.App.4th 819, 824-825.)

"Once a court grants the petition to compel arbitration and stays the action at law, the action at law sits in the twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters submitted to arbitration. This vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits (in which case the action at law

should be dismissed because of the res judicata effects of the arbitration award *Division of Labor Standards Enforcement v. Williams* (1981) 121 Cal.App.3d 302, 309, 175 Cal.Rptr. 347; Rest.2d Judgments, § 84) or not (at which point the action at law may resume to determine the rights of the parties). (Cf. *Lord v. Garland* (1946) 27 Cal.2d 840, 851, 168 P.2d 5; *Shuffer v. Board of Trustees* (1977) 67 Cal.App.3d 208, 217, 136 Cal.Rptr. 527 [discussing effect of interlocutory judgment pursuant to § 597 abating second action at law pending resolution of first action of law].) The court also retains a separate, limited jurisdiction over the contractual arbitration which was the subject of the section 1281.2 petition: "After a petition has been filed *under this title* [i.e., "Title 9" (§§ 1280–1294.2)], the court in which such petition was filed retains jurisdiction to determine *any subsequent petition* involving the same agreement to arbitrate and the same controversy, and *any such subsequent petition* shall be filed in the same proceeding." (§ 1292.6 [emphasis added].)" (Brock v. Kaiser Foundation Hospitals (1992) 10 Cal.App.4th 1790, 1796.)

""The purpose of the statutory stay [required pursuant to section 1281.4] is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved. [Citations.] [¶] In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective. [Citation.]" (*Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374–1375, 71 Cal.Rptr.2d 164 (*Federal Ins. Co.*).) ¶ In *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1199–1200, 58 Cal.Rptr.3d 904 (*SWAB Financial*), the Court of Appeal emphasized that, after granting a petition to compel arbitration and staying a lawsuit, the scope of jurisdiction that a trial court retains is extremely narrow: ¶ "The trial court was ... authorized under Code of Civil Procedure section 1281.4 to stay pending judicial actions. But beyond that, the trial court's power to interfere in the pending arbitration was strictly limited. [Citations.].... [¶] ... Once a

petition is granted and the lawsuit is stayed, "the action at law sits in the twilight zone of abatement with the trial court retaining merely vestigial jurisdiction over matters submitted to arbitration." [Citation.] During that time, under its "vestigial" jurisdiction, a court may: appoint arbitrators if the method selected by the parties fails ([Code Civ. Proc.,] § 1281.6); grant a provisional remedy "but only upon the ground that the award to which an applicant may be entitled may be rendered ineffectual without provisional relief" ([Code Civ. Proc.,] § 1281.8, subd. (b)); and confirm, correct or vacate the arbitration award ([Code Civ. Proc.,] § 1285). Absent an agreement to withdraw the controversy from arbitration, however, no judicial act is authorized.' [Citation.]"" (MKJA, Inc. v. 123 Fit Franchising, LLC (2011) 191 Cal.App.4th 643, 658–659.)

With the above-cited legal principles in mind, the court will rule on the motion to compel arbitration and stay this litigation.

Arbitration Provision

Defense counsel declares in support of the motion: he understood that plaintiffs received a copy of the subject agreement, because on March 26, 2008 they signed a receipt acknowledging that they received the subject agreement, which is established by Defense Exhibit 3 that is attached to Steven Adjani's declaration in support of the motion to compel arbitration; on February 28, 2022 plaintiffs' counsel responded to correspondence sent by defense counsel wherein she stated that plaintiffs stand by their declarations 100%, because they never received the franchise agreement from defendant; and that correspondence also admits that plaintiffs received a large box of documents from the prior franchisee, which included the subject franchise agreement. (Declaration of Ryan Bykerk in Support of Motion to Compel Arbitration, paragraphs 2 and 4; and Exhibit 9 – February 28, 2022 Correspondence from Plaintiff's Counsel, page 1, second paragraph.)

Plaintiffs Salvatore Viscuso and Sandra Viscuso declare: they are shareholders of plaintiff SV Adventures, Inc., which has a principal place of business in El Dorado Hills; plaintiffs live in Placer County; on April 23, 2008 they were assigned the subject franchise by means of a six page assignment that incorporates by reference the underlying franchise agreement; a copy of the underlying franchise agreement was not attached to the assignment; the franchisor never provided plaintiffs with a copy of the underlying franchise agreement; they were told they had to take the underlying franchise agreement as it existed and no negotiations would take place as they were assuming obligations already agreed to; on August 3, 2021 plaintiff through counsel gave defendant notice that they were not renewing the franchise beyond the January 2, 2022 expiration date; after more than 60 days expired after that notice was sent, without defendant indicating an intent to purchase the franchise, plaintiffs began to rebrand the store as Viscuso's Pizza and Draft House with new signage, paint and recipes; on November 18, 2021 plaintiffs received an email from defendant stating the franchise agreement expires in January 2, 2022 and that defendant was exercising its option under Section 15.E. of the franchise agreement to purchase the subject restaurant; on December 22, 2022 [sic] the complaint was filed in this action; plaintiffs were never personally served the arbitration claim or the federal action; plaintiffs are a team owning and operating the business for 15 years and they have personal guarantees on the lease of the store and would be liable if another franchisee occupied the leased space; the food delivery and all services that support the restaurant are in their names and plaintiffs would be liable for someone else's mistakes if they were to turn over the business without having time to transfer liability, thereby causing them severe and irreparable injury; all witnesses to be called in this case are located in Northern California; and the landlord of the premises, DC Management, LLC will be a witness and is located in El Dorado County, in addition to numerous customers, which will refute the claim of

trademark infringement. (court's emphasis.) (Declaration of Kathleen C. Lyon in Opposition to Defendant's Motion to Compel Arbitration, paragraph 6, Exhibit C – Omnibus Declaration of Plaintiffs in Support of Application, paragraphs 1, 2, 4-13, and 15-22.)

Plaintiffs admittedly received a copy of the subject agreement from the prior franchisee. Even assuming plaintiffs did not read the subject franchise agreement, that does not excuse them from a claim that the arbitration agreement in the underlying franchise agreement applies. However, that does not lead to a conclusion that the arbitration clause is enforceable as there remain issues concerning unconscionability of the arbitration clause to consider.

The question then becomes whether the arbitrator or the court has jurisdiction to determine the validity of the arbitration provision in the agreement.

A line of cases hold that an arbitrator decides whether or not the disputes are arbitrable only where it is established by *clear and unmistakable* evidence that the parties elected to have the arbitrator, rather than the court, decide which grievances are arbitrable. (Emphasis in original.) (Hartley v. Superior Court (2011) 196 Cal.App.4th 1249, 1254-1255.)

The Third District Court of Appeal has recently held: "Arbitration agreements are construed to give effect to the intention of the parties. (*Aanderud, supra*, 13 Cal.App.5th at p. 890, 221 Cal.Rptr.3d 225.) "If contractual language is clear and explicit, it governs. [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.) ¶ When a dispute arises between parties to an arbitration agreement, the parties may disagree not only about the merits of the dispute but also about "the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute." (*Henry Schein, Inc. v. Archer and White Sales, Inc.* (2019) ––– U.S. ––––– [139 S.Ct. 524, 527, 202 L.Ed.2d 480] (*Schein*).) The high court has recognized that parties may "agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying

merits disputes." (*Ibid*.) Such threshold or "gateway" questions of arbitrability include whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. (*Id.* at p. ——— [139 S.Ct. at p. 529].) Indeed, "an 'agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the ... court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.' " (*Ibid.*) ¶ The question of who has the power to decide issues of arbitrability "turns upon what the parties agreed about *that* matter." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (*First Options*).) If the parties agreed to submit arbitrability questions to the arbitrator, then the court reviews the arbitrator's decision under the same standard it reviews other decisions by the arbitrator. (*Ibid.*) "If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration. [Citations.]" (*Ibid*.) ¶ Courts presume that the parties intend *courts*, not arbitrators, to decide threshold issues of arbitrability. (*Aanderud, supra*, 13 Cal.App.5th at p. 891, 221 Cal.Rptr.3d 225.) Accordingly, " '[t]here are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability.' [Citation.] The 'clear and unmistakable' test reflects a '*heightened* standard of proof' that reverses the typical presumption in favor of the arbitration of disputes. [Citation.]" (*Id.* at p. 892, 221 Cal.Rptr.3d 225.) Where the agreement is silent or ambiguous on the question of who decides threshold arbitrability questions, the court and not the arbitrator should

decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide. (*First Options, supra*, 514 U.S. at p. 945, 115 S.Ct. 1920.)" (Emphasis added.) (Sandoval-Ryan v. Oleander Holdings LLC (2020) 58 Cal.App.5th 217, 222–223.)

Defendant argues: the plaintiffs received a copy of the franchise agreement from the prior franchisee from whom plaintiffs acquired the franchise; the then current agreement was also sent to them by defendant as an exhibit to the Franchise Disclosure Document; plaintiffs signed a receipt that acknowledged they received the agreement; plaintiffs signed the assignment and assumption agreement on April 23, 2008; and the arbitration provision of the then operative/current agreement provides in Section 17.F. that any dispute between plaintiffs and defendant, including disputes over the enforceability of the agreement itself, would be resolved by binding arbitration (Emphasis added.) (See Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 2.).

Defendant contends that the franchise agreement included in the Franchise Disclosure Document attached as Exhibit 2 to the declaration of Steven Adyani in Support of the Motion to Compel Arbitration is the operative agreement and not the franchise agreement executed by Concept Acquisitions, LLC, and the Galstyans on January 3, and 18, 2007.

The arbitration provision in Exhibit 1 of the Declaration of Steven Adyani in Support of Motion to Compel Arbitration is the only franchise agreement assigned and assumed by plaintiff.

The arbitration provision in the franchise agreement between the predecessor franchisee and defendant, which was executed on January 3, and 18, 2007, provides: **"EXCEPT FOR CONTROVERSIES, DISPUTES OR CLAIMS RELATED TO OR BASED ON YOUR USE OF THE MARKS AFTER THE EXPIRATION OF TERMINATION OF THIS AGREEMENT, ALL**

CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN US AND OUR AFFILIATES, AND OUR AFFILIATES' RESPECTIVE SHAREHOLDERS, OFFICERS, DIRECTORS, AGENTS, AND/OR EMPLOYEES AND YOU (AND YOUR OWNERS, GUARANTORS, AFFILIATES AND EMPLOYEES, IF APPLICABLE) ARISING OUT OF OR RELATED TO: ¶ * * * (3) THE VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THOSE AGREEMENTS; ¶ * * * MUST BE SUBMITTED FOR BINDING ARBITRATION TO THE AMERICAN ARBITRATION ASSOCIATION…" (Emphasis in Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

Steven Adyani declares: he is the vice-president of operations for defendant and is familiar with the corporate records; the corporate records reflect that on January 3, 2007 the Galstyans entered into a franchise agreement with defendant's predecessor, Concept Acquisitions, LLC, and a true and correct copy of that agreement is attached as Exhibit 1; the corporate records also reflect that on March 26, 2008 plaintiffs acknowledged receipt of the Franchise Disclosure Document that included the franchise agreement as Exhibit B, which is attached as Exhibit 2; and on April 23, 2008 plaintiff executed an assignment and assumption agreement thereby assuming all of the prior franchisee's obligations under the franchise agreement, which is attached as Exhibit 4. (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, paragraphs 1, and 3-5.)

Exhibit 2 of the declaration of Steven Adyani in Opposition to Motion is a standard Franchise Disclosure Document, which includes a blank, unexecuted franchise agreement that purportedly is the agreement between Concept Acquisitions, LLC, and an unnamed franchise owner. The arbitration provision in that blank, unexecuted franchise agreement is materially

different from the executed January 3, 2007, Concept Acquisitions, LLC franchise agreement with the Galstyans. The agreement attached as Exhibit B to the Franchise Disclosure Document provides with respect to matters that are to be decided by the arbitration: "**(3) THE SCOPE OR VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU (OR YOUR OWNERS) AND US OR ANY PROVISION OF ANY OF THESE AGREEMENTS (INCLUDING THE VALIDITY AND SCOPE OF THE ARBITRATION OBLIGATION UNDER THIS SECTION, WHICH WE AND YOU ACKNOWLEDGE IS TO BE DETERMINED BY AN ARBITRATOR AND NOT BY A COURT)…**" (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 2 - Franchise Disclosure Document, Exhibit B, paragraph 17.F.(3).)

The assignment and assumption agreement entered into between Concept Acquisitions, LLC, franchisees Galstyan, and plaintiffs on April 23, 2008 expressly provides: the subject assigned and assumed franchise agreement was the defendant's franchise agreement with the Galstyans dated January 3, 2007; the recitals in the agreement are incorporated into and made part of the agreement by reference; the franchisee transfers, sets over, and assigns to assignee all of the franchisee's rights to and interest in the subject franchise agreement and the restaurant and all related rights; and the assignee accepts the assignment from the franchisee and assumes the franchisee's obligations, agreements, commitments, duties and liabilities under the subject franchise agreement. (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 4 – Assignment and Assumption Agreement, 1st Recital, page 1, and paragraphs 1-3.)

Plaintiffs agreed to be assigned and assume the franchise agreement entered between defendant/Concept Acquisitions, LLC and the Galstyans, which was executed by Concept Acquisitions, LLC, and the Galstyans on January 3, and 18, 2007, not a purported

current/operative blank, sample franchise agreement attached as an exhibit to a disclosure document. Therefore, the operative franchise agreement arbitration provision is found in defense Exhibit 1. The arbitration agreement itself does not include any specific language that provided that the validity and scope of the arbitration obligation under this arbitration section was acknowledged/agreed to be determined by an arbitrator and not by a court.

The arbitration language in the January 3, 2007, franchise agreement is distinguishable from the language found in Aanderund v. Superior Court (2017) 13 Cal.App.5th 880, 892 and is not squarely on point.

"Here, the arbitration provision states that the parties "agree to arbitrate all disputes, claims and controversies arising out of or relating to ... (iv) the interpretation, validity, or enforceability of this Agreement, including the determination of the scope or applicability of this Section 5 [the "Arbitration of Disputes" section]. ..." This language delegates to the arbitrator questions of arbitrability and is clear and unmistakable evidence that the parties intended to arbitrate arbitrability. (See, e.g., *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1560, 173 Cal.Rptr.3d 241 [noting delegation clause that provided "[t]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement" was clear and unmistakable]; *Momot v. Mastro* (9th Cir. 2011) 652 F.3d 982, 988 [language that delegated authority to arbitrator to determine "the validity or application of any of the provisions of" the arbitration clause was a clear and unmistakable agreement to arbitrate the question of arbitrability].)" (Emphasis added.) (Aanderud v. Superior Court (2017) 13 Cal.App.5th 880, 892.)

The language in the arbitration provision at issue in Aanderund, supra, stated that the interpretation, validity, and enforceability of this agreement, including the determination of the scope or applicability of this Section 5.." were subject to arbitration as a dispute, claim and

controversy arising from the agreement. No such specific language as to enforceability of the arbitration provision, including the scope and applicability of the provision, being determined by the arbitrator is present in the January 3, 2007, agreement. Only a general, vague reference to the validity of agreement is present in that agreement.

Defendant also argues that merely by referring to the American Arbitration Association's Commercial Arbitration Rules in the body of a lengthy arbitration clause is a clear, unmistakable, and explicit delegation of the authority of the arbitrator to decide enforceability and scope issues concerning the arbitration agreement, because a single provision in the rules provides for such a delegation.

The arbitration provision of the January 3, 2007 franchise agreement states: "…**THE ARBITRATION PROCEEDINGS WILL BE CONDUCTED BY ONE ARBITRATOR … AND, EXCEPT AS PROVIDED IN THIS AGREEMENT, IN ACCORDANCE WITH THE THEN CURRENT COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION**…" (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

"Establishing the "clear and unmistakable rule" is easy. The hard part is applying it. Just how "clear and unmistakable" must the parties be if they choose to have an arbitrator decide his or her own jurisdiction? An easy case is obviously when there is explicit language in the actual signed document to that effect. For example: "We want the arbitrators selected pursuant to this contract to have the power to decide whether what is put before them is actually arbitrable under this contract." But life is rarely that easy. When lawyers have the prescience to write clauses like that, their contracts usually don't get to appellate courts. Cases that do get to the appellate courts often turn on the problem of whether an agreement to be bound by a

certain body of rules e.g., American Arbitration Association or National Association of Securities Dealers rules, is *itself* sufficient to show that the parties "clearly and unmistakably agreed" that arbitrators would decide their own jurisdiction. ¶ Two California appellate cases, *Dream Theater, Inc. v. Dream Theater, supra,* 124 Cal.App.4th 547, 21 Cal.Rptr.3d 322, and *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 39 Cal.Rptr.3d 43 7 (*Rodriquez*) have gone so far as to conclude that incorporation of American Arbitration Association rules by reference *was* sufficient to "clearly and unmistakably" provide that arbitrators would have jurisdiction to decide their own jurisdiction. However, in those cases the appellate courts operated on the premise the American Arbitration Association rule providing for arbitrators to decide their own jurisdiction *actually existed at the time the contract was signed.* In *Dream Theater* we know the contract was signed after the adoption of rule 8, since the opinion mentions that the contract had been signed in October 2001. (*Dream Theater, supra,* 124 Cal.App.4th at p. 550, 21 Cal.Rptr.3d 322; see fn. 2, *ante.*) And while the *Rodriquez* opinion does not tell the reader precisely when the arbitration contract was signed, its treatment of the issue strongly suggests that AAA rule 8 was similarly in effect at the time of signing. If it wasn't, the opinion certainly gives no hint of that fact, or of any issue raised in that regard. [FN 10.] ¶ FN 10 Ajamian also argues that the Employment Agreement recognizes that she might bring "an action" against CantorCO2e relating to the "validity" or "efficacy" of the Employment Agreement. Appellants point out that the provision does not explicitly state that she can bring "an action" *in court.* ¶ We think that *Dream Theater* and *Rodriquez* represent the outer limits of the use of incorporation by reference of some body of rules incorporated by reference to confer upon arbitrators the power to decide their own jurisdiction. At least in those cases, the parties could go *look up* the AAA rules to which they were agreeing beforehand, and see that, yes, they were conferring on arbitrators

the power to decide if a dispute was arbitrable in the first place. To go beyond the incorporation of an *existent* rule and allow for the incorporation of a rule that might not even come into existence in the future, however, contravenes the clear and unmistakable rule. We decline to take the next step beyond *Dream Theater* and *Rodriquez*. ¶ Incorporating the *possibility* of a *future* rule by reference simply doesn't even meet the basic requirements for a valid incorporation by reference under simple state contract law. ¶ Most basically, what is being incorporated must *actually exist at the time of the incorporation,* so the parties can know exactly what they are incorporating. (See *In re Plumel's Estate* (1907) 151 Cal. 77, 80, 90 P. 192 ["in order to make out a case for the application of the doctrine of incorporation by reference, the paper referred to must not only be in existence at the time of the execution of the attested or properly executed paper, but that it must be referred to in the latter as an existent paper, so as to be capable of identification"].) ¶ Put another way, to have a valid incorporation by reference, the terms of the document being incorporated must be " ' "known or easily available" ' " to the contracting parties. (See *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1331, 90 Cal.Rptr.3d 589 [" ' "For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." ' "].) ¶ "Prediction," said Niels Bohr, "is very difficult, especially about the future." A rule that does not exist at the time of incorporation by reference fails the elementary test of being known or easily available at the time of incorporation. To allude to that old medieval con game from which we get the expression "pig in a poke"—where an unsuspecting buyer would buy what he or she thought was a pig in a bag only to later discover that it was an inedible cat or rat—in both *Dream Theater* and *Rodriquez* there was at

least *some thing* in the bag that the parties could look at. Here, by contrast, the bag was empty at the time of the transaction and *might* or might *not,* be later filled with a pig. Or a cat or rat or, for that matter, nothing." (Gilbert Street Developers, LLC v. La Quinta Homes, LLC (2009) 174 Cal.App.4th 1185, 1192–1194.)

The American Arbitration Association (AAA) has the AAA arbitration rules posted on its website. Rule 7(a) of the amended AAA Commercial Arbitration Rules effective October 1, 2013, provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."

Defendant has not provided any evidence that there was such a rule in effect at the time the franchise agreement was executed on January 3, 2007.

Defendants have not established that the incorporation of the AAA Commercial Arbitration Rules by reference into the arbitration provision in the 2007 franchise agreement assumed by plaintiffs clearly, unmistakably, and explicitly delegated to the arbitrator the resolution of threshold questions regarding the interpretation, validity, and enforceability of the arbitration agreement itself.

Furthermore, even assuming for the sake of argument only that defendant proves that the AAA arbitrator delegation rule was in effect at the time the arbitration agreement incorporated all AAA Commercial Arbitration Rules into the agreement, the severability provision in the agreement found at paragraph 17.A. expressly provides that the court may decide the issue of severability of a provision of the agreement leaving the remainder of the agreement in full effect and binding on the parties, which renders the purported agreement delegating authority of the arbitrator to decide enforceability and validity of the arbitration agreement ambiguous such that the agreement does not clearly, unmistakably, and explicitly delegate to the arbitrator

the resolution of threshold questions regarding the interpretation, validity, and enforceability of the arbitration agreement itself. This is an independent reason to find that the arbitrator has not been delegated the authority to decide the validity, scope, and enforceability of the arbitration agreement.

The severability provision states: "… each section, paragraph, term and provision of this Agreement, and any portion thereof, will be considered severable, and if, for any reason, any provision is held to be invalid or contrary to or in conflict with any applicable present or future law or regulation in a final, unappealable ruling issued by any court, agency or tribunal with competent jurisdiction in a proceeding to which we are a party, that ruling will not impair the operation of, or have any other effect upon, the other portions of this agreement…" (Emphasis added.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.A. (Subject Franchise Agreement Assigned to Plaintiffs.))

"As a general matter, where one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the *court* might also find provisions in the contract unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator. (*Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1565–1566, 98 Cal.Rptr.3d 743 [fact that the contract's severability clause authorized the " 'trier of fact of competent jurisdiction' "—instead of " 'arbitration panel' " or " 'panel of three (3) arbitrators' "—to sever unenforceable contractual provisions suggests that the court could find the arbitration provision unenforceable (italics omitted)].) ¶ Even broad arbitration clauses that *expressly* delegate the enforceability decision to arbitrators may not meet the clear and unmistakable test, where other language in the agreement creates an uncertainty in that regard. (*Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249, 1257–1258,

127 Cal.Rptr.3d 174 [following and applying *Parada*]); (see *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 888–894, 71 Cal.Rptr.3d 854 [parties' agreement did not clearly and unmistakably delegate issue of enforceability to arbitration, despite agreement's provision that " '[a]ny disputes concerning the interpretation or the enforceability of this arbitration agreement, including without limitation, its revocability or voidability for any cause, [and] the scope of arbitrable issues ... shall be decided by the arbitrator,' " where another provision indicated that the court might find a provision unenforceable].)" (Ajamian v. CantorCO2e, L.P. (2012) 203 Cal.App.4th 771, 792.)

"As in *Parada, supra,* 176 Cal.App.4th 1554, 1565, 98 Cal.Rptr.3d 743, we are not required to reach the issue because we agree that even if state and federal law agree on the point, the court's order here is erroneous because the account agreements do not clearly and unmistakably show they agreed to give the arbitrator the exclusive power to decide the gateway issue of arbitrability. Rather, the contract language conflicts on the issue of who is to decide arbitrability and creates ambiguity. ¶ Paragraph 15.11(a) of the purchase agreement provides: "**Arbitration of Claims.** The parties agree that any and all disputes, claims or controversies arising out of or relating to any transaction between them or to the breach, termination, enforcement, interpretation or validity of this Agreement, including the *determination of the scope and applicability of this agreement to arbitrate,* shall be subject to the terms of the [FAA] and shall be submitted to final and binding arbitration before JAMS, or its successor, in Orange County, California, in accordance with the laws of the State of California for agreements made in and to be performed in California." (Italics added.) ¶ Paragraph 15.11(d) of the purchase agreement provides that arbitration "shall be conducted in accordance with the provisions of JAMS Comprehensive Arbitration Rules and Procedures in effect at the time of filing the demand for arbitration." The paragraph advises the customer that

he or she can obtain a copy of JAMS' rules on its Internet Web site. ¶ Rule 11(c) of JAMS's rules stated at the relevant time: "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, ... shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." Ordinarily, the parties' agreement to arbitrate in accordance with such a rule "is clear and unmistakable evidence of the intent that the arbitrator will decide whether a [c]ontested [c]laim is arbitrable." (*Dream Theater, supra,* 124 Cal.App.4th at p. 557, 21 Cal.Rptr.3d 322.) ¶ Paragraph 15.11(h) of the purchase agreement, however, provides: "**No Waiver of Any Right to Provisional or Injunctive Relief.** *Nothing contained in this Agreement* shall in any way deprive a party of its right to obtain provisional, injunctive, or other *equitable relief from a court of competent jurisdiction,* pending dispute resolution and arbitration. For purposes of any proceeding for provisional, injunctive or *other equitable relief, the parties consent to the jurisdiction of, and venue in, the courts* of the State of California and the United States District Court, located in Orange County, California." (Italics added.) Paragraph 31.8 of the parties' loan agreement contains the same provision. ¶ A claim that a contract is unenforceable on the ground of unconscionability is an equitable matter. " 'That equity does not enforce unconscionable bargains is too well established to require elaborate citation.' " (*Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 643, 114 Cal.Rptr.3d 449; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 40, p. 333–334.) "Under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law *or in equity* for the voiding of any contract. [Citation.] Unconscionability is a recognized contract defense which can defeat an arbitration agreement." (*Arguelles–Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 836,

109 Cal.Rptr.3d 289, italics added.) ¶ Further, paragraph 15.14 of the purchase agreement provides: "**Severability.** In the event that any provision of this Agreement shall be determined by a *trier of fact of competent jurisdiction* to be unenforceable in any jurisdiction, ... the remainder of this Agreement shall remain binding...." (Italics added.) ¶ In *Parada,* the court held that read together, an arbitration provision and a severability provision in Monex account agreements that were similar to the ones quoted above, created an ambiguity as to who may determine unconscionability, and the ambiguity foreclosed Monex's argument that the issue was for the arbitrator's determination. (*Parada, supra,* 176 Cal.App.4th at pp. 1565–1566, 98 Cal.Rptr.3d 743.) As to the severability clause, the court explained, "Use of the term 'trier of fact of competent jurisdiction' instead of 'arbitration panel' or 'panel of three (e) arbitrators' suggests the trial court also may find a provision, including the arbitration provision, unenforceable." (*Id.* at p. 1566, 98 Cal.Rptr.3d 743.) ¶ Here, likewise, the account agreements do not meet the heightened standard that must be satisfied to vary from the general rule that the court decides the gateway issue of arbitrability. The severability clause here uses the term "trier of fact of competent jurisdiction," rather than the term "arbitrator," indicating the court has authority to decide whether an arbitration provision is unenforceable. As in *Parada,* " 'although one provision of the arbitration agreement stated that issues of enforceability or voidability were to be decided by the arbitrator, another provision indicated that the court might find a provision unenforceable.' " (*Parada, supra,* 176 Cal.App.4th at p. 1566, 98 Cal.Rptr.3d 743, citing *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 893–894, 71 Cal.Rptr.3d 854.) Further, one paragraph of the arbitration clause here authorizes the court to decide all equitable issues, notwithstanding another paragraph that authorizes the arbitrator to decide all disputes. When an agreement is ambiguous, "the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably

thought a judge, not an arbitrator, would decide." (*Dream Theater, supra,* 124 Cal.App.4th at p. 552, 21 Cal.Rptr.3d 322, citing *First Options, supra,* 514 U.S. at p. 945, 115 S.Ct. 1920.) We construe ambiguities against Monex as the drafting party. (*Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 909, 97 Cal.Rptr.2d 215.) ¶ We conclude Hartley is entitled to a judicial declaration of whether the arbitration clause is unconscionable, as requested in the complaint's twentieth count. [FN 4.] We also conclude that should the court find in favor of Monex on the issue of arbitrability, Hartley is entitled to a pre-arbitration judicial declaration of whether certain "contract disclaimers" in the account agreements are unconscionable or in violation of public policy, as requested in the complaint's nineteenth count, and to a court decision on the complaint's eleventh count for injunctive relief under the Consumers Legal Remedies Act (Civ.Code, § 1750 et seq.). Declaratory relief and injunctive relief are equitable remedies (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 633, 77 Cal.Rptr.3d 722; *D.C. v. Harvard–Westlake School* (2009) 176 Cal.App.4th 836, 856, 98 Cal.Rptr.3d 300) reserved to the court under paragraph 15.11(h) of the purchase agreement and paragraph 31.8 of the loan agreement." (Hartley v. Superior Court (2011) 196 Cal.App.4th 1249, 1256–1258.)

Expressly providing in the arbitration agreement that provisions or portions of the agreement may be held to be invalid or contrary to or in conflict with any applicable present or future law or regulation by any court, agency or tribunal with competent jurisdiction in a proceeding to which "we" are a party renders the ambiguous whether the arbitrator is the sole person who is agreed to decide the threshold arbitrability questions and, therefore, the agreement does not clearly, unmistakably, and explicitly delegate to the arbitrator the resolution of threshold questions regarding the interpretation, validity, and enforceability of the arbitration agreement itself.

The agreement being ambiguous on the question of who decides threshold arbitrability questions, the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide.

Agreement Unconscionability

"The party resisting arbitration bears the burden of proving unconscionability." (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 247.)

The lack of opportunity to negotiate terms of an employment/arbitration agreement and take or leave it nature of the adhesive aspect of an employment/arbitration agreement is not dispositive. (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.) "When, as here, there is no other indication of oppression or surprise, "the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high." (*Ajamian v. CantorCO2e* (2012) 203 Cal.App.4th 771, 796, 137 Cal.Rptr.3d 773; accord, *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 981-982, 104 Cal.Rptr.3d 341; see generally *Roman,* at p. 1471, fn. 2, 92 Cal.Rptr.3d 153["[w]hen bargaining power is not grossly unequal and reasonable alternatives exist, oppression typically inherent in adhesion contracts is minimal"].) [Footnote omitted.]" (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.)

"Even in adhesion contracts, courts will enforce provisions that are conspicuous, plain, and clear, and that do not "operate to defeat the reasonable expectations of the parties." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710, 131 Cal.Rptr. 882, 552 P.2d 1178.)" (Flores v. West Covina Auto Group (2013) 212 Cal.App.4th 895, 920.)

While the "take it or leave it" agreement is a contract of adhesion, there must be other factors present for a court to determine that the agreement is unenforceable due to

unconscionability. “Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. (Id. at pp. 817-819, 171 Cal.Rptr. 604, 623 P.2d 165.) "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781.) If the contract is adhesive, the court must then determine whether "other factors are present which, under established legal rules -- legislative or judicial -- operate to render it [unenforceable]." (*Scissor-Tail*, supra, at p. 820, 171 Cal.Rptr. 604, 623 P.2d 165, fn. omitted.)” (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113.)

“We explained the judicially created doctrine of unconscionability in *Scissor-Tail*, supra, 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165. Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. (Id. at pp. 817-819, 171 Cal.Rptr. 604, 623 P.2d 165.) "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781.) If the contract is adhesive, the court must then determine whether "other factors are present which, under established legal rules -- legislative or judicial -- operate to render it [unenforceable]." (*Scissor-Tail*, supra, at p. 820, 171 Cal.Rptr. 604, 623 P.2d 165, fn. omitted.) "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second -- a principle of equity applicable to all contracts generally -- is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context,

it is unduly oppressive or 'unconscionable.' " (Ibid.) Subsequent cases have referred to both the "reasonable expectations" and the "oppressive" limitations as being aspects of unconscionability. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487, 186 Cal.Rptr. 114 (A & M Produce Co.).) ¶ In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925, 216 Cal.Rptr. 345, 702 P.2d 503.) As section 1670.5, subdivision (a) states: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which, as noted, provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist [at law or in equity] for the revocation of any contract." The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (19 U.S.C. § 2), recognized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements...." (*Doctor's Associates, Inc. v. Casarotto*, supra, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902, italics added.) ¶ As explained in *A & M Produce Co.*, supra, 135 Cal.App.3d 473, 186 Cal.Rptr. 114, "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. (Id. at pp. 486-487, 186 Cal.Rptr. 114.) "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." (*Stirlen v. Supercuts, Inc.*, supra, 51 Cal.App.4th at p. 1533, 60 Cal.Rptr.2d 138 (Stirlen).) But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." (15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227; see also A & M Produce Co., supra, 135 Cal.App.3d at p. 487, 186 Cal.Rptr. 114.) In other words, 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." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113-114.)

"'The procedural element focuses on two factors: "oppression" and "surprise." [Citations.] "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." [Citations.] "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. [Citations.]' [Footnote omitted.] The substantive prong of unconscionability encompasses '"overly harsh" or "one-sided" results.' [Footnote omitted.] Stated another way, '[t]he substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner.' [Footnote omitted.] Both procedural and substantive unconscionability must be present to deny enforcement to the contract, but there may be an inverse relation between the two components, 'such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated.'

[Footnote omitted.]" (Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 722-723.)

With the above-cited principles in mind, the court will determine whether there exists procedural and substantive unconscionability such that the agreement to arbitrate is unenforceable, or is a valid, enforceable agreement.

- Procedural Unconscionability

Defendant argues there is no procedural unconscionability because plaintiffs did receive a copy of the franchise agreement with the arbitration provision; and a "take it or leave it" arbitration provision is not per se procedurally unconscionable; therefore, the agreement must also be procedurally unconscionable in another manner for the court to determine the arbitration provision is procedurally unconscionable.

The evidence presented in opposition to the motion to compel arbitration establishes that the franchise agreement is adhesive in nature as it was offered on a take it or leave it basis with no negotiations allowed and that there is some procedural unconscionability in the agreement.

The California Supreme Court has held that there is no obligation to highlight the arbitration clause of its contract or to specifically call that clause to the weaker party's attention. "…Valencia was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to Sanchez's attention. Any state law imposing such an obligation would be preempted by the FAA. (See *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 684, 687–688, 116 S.Ct. 1652, 134 L.Ed.2d 902 [holding state statute requiring arbitration clause to be in underlined capital letters on the first page of a contract is preempted]; but cf. *Concepcion, supra,* 563 U.S. at pp. ——, fn. 6, 131 S.Ct. at p. 1750, fn. 6 ["States remain free to take steps addressing the concerns that attend contracts of adhesion-

for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted."].) Furthermore, we have held that even when a customer is assured it is not necessary to read a standard form contract with an arbitration clause, "it is generally unreasonable, in reliance on such assurances, to neglect to read a written contract before signing it." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 424, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) ¶ Here the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability. Yet "a finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." (*Gentry, supra,* 42 Cal.4th at p. 469, 64 Cal.Rptr.3d 773, 165 P.3d 556.)" (Emphasis added.) (Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899, 914-915.)

The plaintiffs can hardly claim they were surprised that there was an arbitration provision in the franchise agreement they assumed as they admittedly received a copy of the subject agreement directly from the predecessor franchisee, the Galstyans.

Therefore, the only procedural unconscionability is that this is a contract of adhesion. Such procedurally unconscionability by itself will be sufficient to support a finding of unconscionability where both the substantive unconscionably and the procedural unconscionability together establish that the arbitration clause is unenforceable.

- Substantive Unconscionability

Defendant argues: the agreement is not substantively unconscionable as the venue provision and other provisions do not shock the conscience; a class waiver is not substantively unconscionable; arbitrating the dispute near defendant's offices does not shock the conscience; the arbitration agreement is mutual and there are no non-mutual provisions; and the jury waiver is not substantively unconscionable.

Plaintiffs argue the arbitration provision is substantively unconscionable for the following reasons: the contract gives the franchisor defendant access to a judicial forum to litigate intellectual property claims, while the provision requires that all claims brought by a franchisee be arbitrated resulting in the arbitration provision lacking mutuality; the arbitral forum is designated in the arbitration provision to be expressly limited to a location within ten miles of the franchisor's principal place of business in Florida, which is considerably more advantageous to the franchisor such that the imbalance favors a finding of substantive unconscionability; Section 17.K. of the agreement limits the statute of limitation for claims of the franchisee to one year, while franchisor claims for payments are not so limited resulting in the arbitration provision lacking mutuality; Section 17.I results in more imbalance and lack of mutuality in that it provides that the franchisor's remedies are unlimited, including punitive damages recoverable against the franchisee, while franchisee damages are strictly limited to actual damages and equitable relief thereby sheltering the stronger party from liability for certain damages; and paragraph 17.I includes an unlawful provision that constitutes a pre-litigation waiver of the right to jury trial in trademark and disclosure of confidential information actions the franchisor brings against the franchisee, which is not subject to arbitration.

""A provision is substantively unconscionable if it 'involves contract terms that are so one-side as to "shock the conscience," or that impose harsh or oppressive terms.' " (*Morris, supra,* 128 Cal.App.4th at p. 1322, 27 Cal.Rptr.3d 797.) Substantive unconscionability may be shown if the disputed contract provision falls outside the nondrafting party's reasonable expectations. (*Gutierrez, supra,* 114 Cal.App.4th at p. 88, 7 Cal.Rptr.3d 267.)" (Parada v. Superior Court (2009) 176 Cal.App.4th 1554, 1573.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. (*Armendariz,* at p. 114, 99

Cal.Rptr.2d 745, 6 P.3d 669; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159, 128 Cal.Rptr.3d 330.) A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.' " (*24 Hour Fitness, Inc. v. Superior Court, supra,* 66 Cal.App.4th at p. 1213, 78 Cal.Rptr.2d 533.)" (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246.)

"Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 88.)

One form of substantive unconscionability is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 119.)

""Substantively unconscionable terms may 'generally be described as unfairly one-sided.' [Citation.] For example, an agreement may lack 'a modicum of bilaterality' and therefore be unconscionable if the agreement requires 'arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.' " (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 713, 13 Cal.Rptr.3d 88, quoting *Armendariz, supra,* 24 Cal.4th at p. 119, 99 Cal.Rptr.2d 745, 6 P.3d 669.)" (Higgins v. Superior Court (2006) 140 Cal.App.4th 1238, 1253.)

Paragraph 17.D. of the agreement provides: "You agree that you will not withhold payment of any amounts owed to us on the grounds our alleged nonperformance of any of our obligations under this Agreement. You agree that all claims will, if not otherwise resolved, be submitted to arbitration as provided in Paragraph F of this Section." (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC

Franchise Agreement with the Galstyans, Paragraph 17.D. (Subject Franchise Agreement Assigned to Plaintiffs.))

The arbitration clause is found in paragraph 17.F. of the franchise agreement. It provides: **"EXCEPT FOR CONTROVERSIES, DISPUTES OR CLAIMS RELATED TO OR BASED ON YOUR USE OF THE MARKS AFTER THE EXPIRATION OR TERMINATION OF THIS AGREEMENT, ALL CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN US AND OUR AFFILIATES, AND OUR AFFILIATES' RESPECTIVE SHAREHOLDERS, OFFICERS, DIRECTORS, AGENTS, AND/OR EMPLOYEES AND YOU (AND YOUR OWNERS, GUARANTORS, AFFILIATES AND EMPLOYEES, IF APPLICABLE) ARISING OUT OF OR RELATED TO: ¶ (1) THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THESE AGREEMENTS; ¶ (2) OUR RELATIONSHIP WITH YOU; ¶ (3) THE VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THOSE AGREEMENTS; OR ¶ (4) ANY SYSTEM STANDARD RELATING TO THE ESTABLISHMENT OR OPERATION OF THE RESTAURANT; ¶ MUST BE SUBMITTED FOR BINDING ARBITRATION TO THE AMERICAN ARBITRATION ASSOCIATION. THE ARBITRATION PROCEEDINGS WILL BE CONDUCTED BY ONE ARBITRATOR AT A SUITABLE LOCATION CHOSEN BY THE ARBITRATOR THAT IS WITHIN TEN (10) MILES OF OUR THEN CURRENT PRINCIPAL BUSINESS ADDRESS IN FLORIDA**…" (Emphasis in Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

The arbitration provision further states: "…**THE ARBITRATOR WILL NOT HAVE THE RIGHT TO DECLARE ANY MARK GENERIC OR OTHERWISE INVALID OR, EXCEPT AS**

PROVIDED IN PARAGRAPH I OF THIS SECTION, TO AWARD EXEMPLARY OR PUNITIVE DAMAGES…"(Emphasis in Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

Paragraph 17.I of the underlying franchise agreement provides in part: "**EXCEPT FOR YOUR OBLIGATION TO INDEMNIFY US UNDER SECTION 16.D AND CLAIMS WE BRING AGAINST YOU FOR YOUR UNAUTHORIZED USE OF THE MARKS OR UNAUTHORIZED USE OR DISCLOSURE OF ANY CONFIDENTIAL INFORMATION, WE AND YOU AND YOUR RESPECTIVE OWNERS WAIVE TO THE FULLEST EXTENT PERMITTED BY LAW ANY RIGHT TO OR CLAIM FOR ANY CLAIM FOR PUNITIVE OR EXEMPLARY DAMAGES AGAINST THE OTHER AND AGREE THAT, IN THE EVENT OF A DISPUTE BETWEEN US, THE PARTY MAKING THE CLAIM WILL BE LIMITED TO EQUITABLE RELIEF AND TO RECOVERY OF ANY ACTUAL DAMAGES IT SUSTAINS.**" (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.I. (Subject Franchise Agreement Assigned to Plaintiffs.))

The franchisor defendant has access to a judicial forum to litigate intellectual property claims concerning trademarks and trademark use after the expiration of the franchise, while the arbitration provision requires that all claims brought by a franchisee be arbitrated. This is a lack of mutuality that favors the stronger party defendant.

In addition, there is a lack of mutuality of remedies concerning the availability of claims for punitive damages. The previously cited provisions allow the stronger party defendant, to recover punitive damages against the weaker party plaintiffs for claims of indemnity against the plaintiff franchisees and claims against the plaintiff franchisees for their alleged unauthorized

use of the marks or alleged unauthorized use or disclosure of any confidential information, while the plaintiffs have no right to claim and be awarded punitive damages under any circumstances.

"Where the party with stronger bargaining power has restricted the weaker party to the arbitral forum, but reserved for itself the ability to seek redress in either an arbitral or judicial forum, California courts have found a lack of mutuality supporting substantive unconscionability. As the California Supreme Court held in *Armendariz,* substantive unconscionability may manifest itself in the form of "an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." 24 Cal.4th at 119, 99 Cal.Rptr.2d 745, 6 P.3d 669; *see also Martinez,* 118 Cal.App.4th at 115, 12 Cal.Rptr.3d 663 (holding that an arbitration agreement requiring employees to arbitrate all claims, but reserving the right of employer to obtain injunctive or other equitable relief in a judicial forum for certain causes of action, lacks mutuality). ¶ In *O'Hare v. Municipal Resource Consultants,* 107 Cal.App.4th 267, 277, 132 Cal.Rptr.2d 116 (2003), the California Court of Appeal was called upon to analyze the unconscionability of an arbitration clause in an employment contract that required the employee to arbitrate all claims against the employer, but expressly permitted the employer to file a lawsuit seeking injunctive and equitable relief against the employee and remained silent as to the employer's obligation to arbitrate claims. The Court of Appeal there recognized that "unconscionability turns not only on a one-sided result, but also on an absence of justification for it." *Id.* at 273, 132 Cal.Rptr.2d 116 (internal quotation marks omitted). Therefore, the Court of Appeal rejected the employer's contention that it had a legitimate business justification in the "highly confidential and proprietary nature" of its auditing and consulting work for allowing it, but not the employee, to seek injunctive relief in court. *Id.* at 277, 132 Cal.Rptr.2d 116. Citing the California Supreme

Court's *Armendariz* opinion, the Court of Appeal noted that to constitute a reasonable business justification, the justification must be " 'something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum.' " *Id.* at 277, 132 Cal.Rptr.2d 116 (quoting *Armendariz,* 24 Cal.4th at 120, 99 Cal.Rptr.2d 745, 6 P.3d 669). Reasoning that the arbitration rules themselves permit such relief, the Court of Appeal held that there was no justification for the one-sided provision. *Id.* at 278, 132 Cal.Rptr.2d 116. Because the one-sided clause permeated the entire arbitration provision, the Court of Appeal refused to enforce it on grounds of unconscionability. *Id.* at 277–78, 132 Cal.Rptr.2d 116; *see also Flores,* 93 Cal.App.4th at 854, 113 Cal.Rptr.2d 376 (finding lack of mutuality of remedies where a debtor was forced to arbitrate any controversy arising out of a loan, but the lender could "proceed by judicial or non-judicial foreclosure, by self-help remedies such as setoff, and by injunctive relief to obtain appointment of a receiver"); *Stirlen,* 51 Cal.App.4th at 1539–42, 60 Cal.Rptr.2d 138 (finding an arbitration provision unconscionable where employment disputes were required to be submitted to arbitration, but breach of noncompete or confidentiality clause claims could be brought in court). ¶ The MailCoups arbitration provision lacks mutuality. Like the contract in *O'Hare,* it requires that Nagrampa submit to arbitration any controversy related to the franchise agreement, "or any breach thereof, including without limitation, any claim that this Agreement or any portion thereof is invalid, illegal or otherwise voidable or void," while reserving MailCoups's right to obtain any provisional remedy "including, without limitation, injunctive relief from any court of competent jurisdiction, as may be necessary in MailCoups's sole subjective judgment to protect its Service Marks and proprietary information." This language, read plainly, means that MailCoups could go to court to obtain "any provisional remedy," even if it related to a claim for breach of contract, as long as the claim also implicated MailCoups's Service Marks or proprietary information. Moreover, it is far more likely that

Nagrampa—and not MailCoups—would assert claims related to the invalidity or unenforceability of the non-negotiable contract written by MailCoups. Thus, this provision is clearly one-sided, effectively giving MailCoups the right to choose a judicial forum and eliminating such a forum for Nagrampa. California courts consistently have found such arbitration provisions unconscionable. *See Martinez,* 118 Cal.App.4th at 115, 12 Cal.Rptr.3d 663; *Mercuro,* 96 Cal.App.4th at 176, 116 Cal.Rptr.2d 671; *Stirlen,* 51 Cal.App.4th at 1541–42, 60 Cal.Rptr.2d 138." (Emphasis added.) (Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1285–1287.)

Paragraph 17.K. provides: "Except for claims arising from your non-payment or underpayment of amounts you owe us under this agreement, any and all claims arising out of or relating to this Agreement or our relationship with you will be barred unless a judicial or arbitration proceeding is commenced within one (1) year from the date on which the party asserting the claim knew or should have known of the facts giving rise to the claims." (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.K. (Subject Franchise Agreement Assigned to Plaintiffs.))

This is a provision that unfairly bars plaintiffs from asserting any claims arising from the agreement unless arbitration is commenced within one year and then allows the stronger defendant to assert claims arising under the agreement that plaintiffs failed to make payments under the contract to the defendant franchisor or made underpayments to the defendant franchisor within the much longer four-year statute of limitation for breach of contract. This is an unfair, one-sided provision.

The arbitral forum is expressly limited to a location within ten miles of the franchisor's principal place of business in Florida. It does not state that arbitration shall take place within

ten miles of the current principal place of defendant's business. (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

"…if the "place and manner" restrictions of a forum selection provision are "unduly oppressive," *see Bolter v. Superior Court,* 87 Cal.App.4th 900, 909–10, 104 Cal.Rptr.2d 888 (2001), or have the effect of shielding the stronger party from liability, *see Comb v. PayPal, Inc.,* 218 F.Supp.2d 1165, 1177 (N.D.Cal.2002), then the forum selection provision is unconscionable. To that end, a "party may attempt to make a showing that would warrant setting aside the forum-selection clause—that the agreement was affected by fraud, undue influence, or overweening bargaining power; that enforcement would be unreasonable and unjust; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court." *Mitsubishi Motors Corp.,* 473 U.S. at 632, 105 S.Ct. 3346 (citations and alterations omitted); *see also Hayes Children Leasing Co. v. NCR Corp.,* 37 Cal.App.4th 775, 787 n. 5, 43 Cal.Rptr.2d 650 (1995). Similarly, "California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable." *Am. Online, Inc. v. Superior Court,* 90 Cal.App.4th 1, 11, 108 Cal.Rptr.2d 699 (2001). The Court of Appeal discussed the rationale for this favorable treatment in *Wimsatt v. Beverly Hills Weight Loss Clinic Int'l, Inc.,* 32 Cal.App.4th 1511, 1523, 38 Cal.Rptr.2d 612 (1995), a case involving weight-loss center franchises. The Court of Appeal there stated that "[f]orum selection clauses *are* important in facilitating national and international commerce, and as a general rule should be welcomed." *Id.* However, this favorable treatment of forum selection clauses is conditioned on their free and voluntary procurement, "with the place chosen having some

logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement." *Am. Online,* 90 Cal.App.4th at 12, 108 Cal.Rptr.2d 699. Therefore, to be enforceable, the selected jurisdiction must be " 'suitable,' 'available,' and able to 'accomplish substantial justice.' " *Id.* (citing *Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). ¶ To assess the reasonableness of the "place and manner" provisions in the arbitration clause, we must take into account the "respective circumstances of the parties." *Bolter,* 87 Cal.App.4th at 909, 104 Cal.Rptr.2d 888. In *Bolter,* the Court of Appeal held that place and manner restrictions were unconscionable where small "Mom and Pop" franchisees located in California were required to travel to Utah to arbitrate their claims against an international carpet-cleaning franchisor. *Id.* The Court of Appeal found a forum selection provision unreasonable and "unduly oppressive" because the remote forum would work severe hardship upon the franchisees and would unfairly benefit the franchisor by effectively precluding the franchisees from asserting any claims against it. *Id.; see also Comb,* 218 F.Supp.2d at 1177 ("Limiting venue to PayPal's backyard appears to be yet one more means by which the arbitration clause serves to shield PayPal from liability instead of providing a neutral forum in which to arbitrate disputes."); *Armendariz,* 24 Cal.4th at 118, 99 Cal.Rptr.2d 745, 6 P.3d 669 (holding that structuring an arbitration provision to effectively preclude the other party from pursuing its claims would be unconscionable, because "[a]rbitration was not intended for this purpose")." (Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1287–1288.)

While the arbitration has been filed far to the South in Orange County, California, the arbitration agreement itself contains an even more harsh and oppressive term that this "Mom and Pop" plaintiff restaurant operation in El Dorado Hills must arbitrate across the nation in Florida. While plaintiffs operate several restaurants, they are not a large corporate entity and

can be considered a "Mom and Pop" operation when compared to defendant. The provision is substantively unconscionable.

As stated earlier, plaintiffs argue that paragraph 17.I includes an unlawful provision that constitutes a pre-litigation waiver of the right to jury trial in trademark and disclosure of confidential information actions the franchisor brings against the franchisee, which is not subject to arbitration.

"When parties elect a judicial forum in which to resolve their civil disputes, article I, section 16 of the California Constitution accords them the right to trial by jury (with limited exceptions not relevant in the present case). [Footnote omitted.] Our Constitution treats the historical right to a jury resolution of disputes that have been brought to a judicial forum as fundamental, providing that in "a civil cause," any waiver of the inviolate right to a jury determination must occur by the consent of the parties to the cause *as provided by statute.* (Cal. Const., art. I, § 16.) [Footnote omitted.] ¶ The statute implementing this constitutional provision is section 631. It holds inviolate the right to trial by jury, and prescribes that a jury may be waived in civil cases *only* as provided in subdivision (d) of its provisions. (§ 631, subd. (a).) Subdivision (d) describes six means by which the right to jury trial may be forfeited or waived, including failure to appear at trial, failure to demand jury trial within a specified period after the case is set for trial, failure to pay required fees in advance or during trial, oral consent in open court, or written consent filed with the clerk or the court." (Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 951.) The California Supreme Court held that Code of Civil Procedure, § 631 does not authorize predispute waiver of the right to jury trial in a California court (See Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 956–961.); and discussed the statutory provision allowing the predispute waiver of the right to a jury trial where the parties agree to arbitrate, which the California Supreme Court also distinguished from a pre-dispute waiver of a jury trial

in court proceedings as arbitration agreements are represent an agreement to avoid the judicial forum altogether. (Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 955.)

Paragraph 17.I of the underlying franchise agreement provides in part: "**WE AND YOU IRREVOCABLE WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER AT LAW OR IN EQUITY, BROUGHT BY EITHER OF US.**" (Emphasis in Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.I. (Subject Franchise Agreement Assigned to Plaintiffs.))

While the pre-dispute waiver of trial by jury in court actions involving trademark actions the franchisor brings against the franchisee that are not the subject of arbitration appears to be void as it violates the constitutional right to a jury trial in court, the potentially void provision does not establish a lack of mutuality in the arbitration agreement. Instead, the lack of mutuality involves the stronger defendant carving out claims that can be asserted only by the defendant franchisor as triable in court proceedings, materially reducing the statute of limitations for claims brought by plaintiffs against defendant, choice of an arbitration venue that is greatly inconvenient to plaintiffs, and disparate treatment regarding remedies, as stated earlier in this ruling.

The court finds that the totality of the circumstances establishes that there are numerous instances of substantive unconscionability in the arbitration agreement leading to a very strong level of substantive unconscionability. The totality of the substantively unconscionable provisions leads the court to find that they are so one-sided as to shock the conscience.

Both procedural and substantive unconscionability is present in the subject arbitration agreement and together they have a degree of unconscionability such that plaintiffs have

established that the arbitration provision is unenforceable and that these claims should be determined in the instant civil case and not by compelled arbitration.

Severance of Unconscionable Provisions in Order to Allow Arbitration

As an alternative to finding an arbitration clause unenforceable as unconscionable, the court has the discretion to sever the offending provision and enforce the remainder of the agreement, provided the central purpose of the contract is not tainted with unconscionability, the arbitration clause is not permeated with unconscionability, and the circumstances do not establish the unconscionable provision of the arbitration agreement was drafted in bad faith. (Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 92-93.)

"California law grants courts the discretion either "to sever an unconscionable provision or refuse to enforce the contract in its entirety." *Adams III,* 279 F.3d at 895; Cal. Civ.Code § 1670.5(a). In exercising this discretion, courts look to whether the "central purpose of the contract is tainted with illegality" or "the illegality is collateral to [its] main purpose." *Adams III,* 279 F.3d at 895 (quoting *Armendariz,* 24 Cal.4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d at 696–97). Even though the 1998 arbitration agreement is a revised version of the agreement we held unconscionable in *Adams III,* it is nonetheless permeated with objectionable provisions. While many of the terms of Circuit City's arbitration agreement appear facially neutral, the effect of these provisions is to obstruct its employees' ability to substantiate claims against Circuit City. *See Ferguson,* 298 F.3d at 787("While many of its arbitration provisions appear 'equally applicable to both parties, [these provisions] work to curtail the employee's ability to substantiate any claim against [the employer].' ") (quoting *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348). ¶ Circuit City correctly argues that the FAA articulates a strong public policy in favor of arbitration agreements. 9 U.S.C. § 2 (2002); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (holding that

"questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). Nevertheless, this "policy is manifestly undermined by provisions in arbitration clauses [that] seek to make the arbitration process itself an offensive weapon in one party's arsenal." *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348. ¶ While it is within this court's discretion to sever unconscionable provisions, because an "insidious pattern" [FN 24.] exists in Circuit City's arbitration agreement "that functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees," we conclude that the agreement is wholly unenforceable. *Adams III,* 279 F.3d at 892. The adhesive nature of the contract and the provisions with respect to coverage of claims, the statute of limitations, class claims, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to terminate or modify the agreement combine to stack the deck unconscionably in favor of Circuit City. Any earnest attempt to ameliorate the unconscionable aspects of Circuit City's arbitration agreement would require this court to assume the role of contract author rather than interpreter. Because that would extend far beyond the province of this court we are compelled to find the entire contract unenforceable. [FN 25.] *See Ferguson,* 298 F.3d at 787–88; *Adams III,* 279 F.3d at 895–96; *Armendariz,* 24 Cal.4th at 124–27, 99 Cal.Rptr.2d 745, 6 P.3d at 697–98. ¶ FN24. *Ferguson,* 298 F.3d at 787. ¶ FN25. Because we find that numerous provisions in Circuit City's arbitration agreement are substantively unconscionable, we decline to sever particular terms from the agreement, as the Sixth Circuit did in *Morrison.*" (Emphasis added.) (Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1180.)

There are numerous provisions in the arbitration agreement that are unconscionable thereby tainting and permeating the agreement with unconscionability and under such circumstances the court declines to sever the offensive terms of the agreement.

Defendant's Motion to Compel Arbitration and Stay Action is denied.

TENTATIVE RULING # 7: DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY ACTION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, APRIL 29, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. FENNESSY v. ALTOONIAN PC-20160016

Defendants DeVincenzi's and DeVincenzi and Associates, Inc.'s Motion for Determination of Good Faith Settlement.

Plaintiffs filed an action against defendants listing brokers and seller arising from the sale of a home to plaintiffs wherein defendants allegedly disclosed a death on the premises, but did not disclose the fact that the seller's mother had committed suicide by self-inflicted gunshot in the side yard of the property. Defendant Altoonian, the seller, filed a cross-complaint against broker defendants DeVincenzi and DeVincenzi and Associates, Inc. The 1st amended cross-complaint asserts causes of action for complete indemnity, partial indemnity, equitable contribution, breach of contract, breach of fiduciary duty, negligence, declaratory relief, and implied contractual indemnity.

Trial is set to commence on Tuesday, May 3, 2022. At the Issues Conference on April 15, 2022, the court ordered time shortened to hearing this motion for determination of good faith settlement prior to the trial date. The order further provides that the opposition shall be filed and served by April 22, 2022, and the reply filed and served by April 26, 2022. Counsels for all parties were present at the hearing by Zoom when these orders were issued.

Defendants DeVincenzi and DeVincenzi and Associates, Inc., the listing broker, have agreed to pay $300,000 in settlement of plaintiffs' claims. Defendants DeVincenzi and DeVincenzi and Associates, Inc. now move for a court determination under Code of Civil Procedure, § 877.6 that the settlement is in good faith. Defendants argue that while plaintiffs claim $334,000 in attorney fees and cost and damages totaling $200,000, the moving defendants' counsel considers the moving parties' maximum exposure to be $200,000, thereby

making the offered settlement amount of $300,000 within the good faith ballpark of the listing broker's potential share of liability.

Defendant Altoonian opposes the motion on the following grounds: the breach of listing agreement, breach of fiduciary duty, negligence, indemnity and contribution causes of action asserted against settling defendants DeVincenzi and DeVincenzi and Associates, Inc.in the 1st amended cross-complaint are not barred by a finding of good faith settlement of the underlying action as each of these causes of action arise from the listing agreement between defendant Altoonian and defendants DeVincenzi and DeVincenzi and Associates, Inc. and not the real property sale agreement between plaintiffs and defendant seller Altoonian.

Any party to an action in which it is alleged that two or more parties are joint tortfeasors is entitled to a court hearing on the issue of the good faith of a settlement between the plaintiff and one or more of the alleged tortfeasors. (Code of Civil Procedure, § 877.6(a)(1).)

The application shall indicate the settling parties, and the basis, terms, and amount of the settlement. (Code of Civil Procedure, § 877.6(a)(2).)

The issue of good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing and any counteraffidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing. (Code of Civil Procedure, § 877.6(b).)

A determination by the court that the settlement was made in good faith bars any other joint tortfeasor from bringing any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. (Code of Civil Procedure, § 877.6(c).)

In Tech-Built v. Woodward-Clyde & Associates (1985) 38 Cal.3rd 448, the California Supreme Court addressed the good faith requirement for settlements under Section 877.6.

The policies underlying the requirement, the Court said, "require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of non-settling defendants." (Tech-Built v. Woodward-Clyde & Associates (1985) 38 Cal.3rd 448, 499.)

Defendant Altoonian does not challenge the claim that the Tech-Built factors were satisfied by the moving papers. Defendant Altoonian only asserts that all causes of action of the cross-complaint, except equitable indemnity, declaratory relief, and implied contractual indemnity, arise from the listing agreement between defendants DeVincenzi and DeVincenzi and Associates, Inc. and defendant Altoonian and not the sales agreement between plaintiffs and defendant Altoonian, therefore, Section 877.6 does not apply to those causes of action and they can not be dismissed should the court find that the settlement by defendants DeVincenzi and DeVincenzi and Associates, Inc. was made in good faith. Therefore, defendant Altoonian has conceded that the settlement satisfies the Tech-Built factors entitling defendants DeVincenzi and DeVincenzi and Associates, Inc. to a finding that the settlement was entered into in good faith.

Complete Indemnity and Partial Indemnity/Contribution Causes of Action

Defendant Altoonian argues: the indemnity and contribution causes of action can not be dismissed pursuant to the provisions of Section 877.6, because they only arise from the listing agreement between defendant Altoonian and defendants DeVincenzi and DeVincenzi and Associates, Inc. and not the sales agreement between defendant Altoonian and plaintiffs.

Defendant Altoonian further contends that since the 1st amended cross-complaint alleges that defendants/cross-defendants DeVincenzi and DeVincenzi and Associates, Inc. were primarily responsible for plaintiffs' injuries, losses, and damages (1st Amended Complaint, paragraph 22.), the cross claims do not stem from his status as a joint tortfeasor.

The 1st amended cross-complaint alleges that there existed a listing agreement with DeVincenzi and DeVincenzi and Associates, Inc. entered on September 26, 2014; and plaintiffs filed the complaint on January 5, 2016. (1st Amended Complaint, paragraphs 18 and 19; and Exhibits A and B.) The complaint asserted causes of action for rescission and damages against seller defendant Altoonian, breach of the October 9, 2014 sales contract against seller defendant Altoonian, nondisclosure of material facts against seller defendant Altoonian, negligent misrepresentation against defendants Altoonian and DeVincenzi and DeVincenzi and Associates, Inc., intentional misrepresentation against defendants Altoonian and DeVincenzi and DeVincenzi and Associates, Inc., breach of duty to be faithful and honest against defendants DeVincenzi and DeVincenzi and Associates, Inc., and breach of duty to disclose against defendants DeVincenzi and DeVincenzi and Associates, Inc.

The 1st amended cross-complaint alleges the standard, "garden variety" facts to support causes of action for complete indemnity and partial indemnity. (1st Amended Complaint, paragraphs 21-24, 26-29, 31, and 32.)

"A joint tortfeasor includes joint, concurrent, and successive tortfeasors whose actions combine to cause the plaintiff's injury. (*GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419, 431, 261 Cal.Rptr. 626.)" (Newhall Land and Farming Co. v. McCarthy Const. (2001) 88 Cal.App.4th 769, 773.)

"The term "joint tortfeasor" as used in the comparative equitable indemnity context does not mean the defendants were "joined" as tortfeasors by the plaintiff; it is a broad term which

includes joint, concurrent and successive tortfeasors. (See *Considine Co. v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 767, 232 Cal.Rptr. 250.) "Where the transaction rests upon related facts, either concurrent or successive, joint or several, which legally create a detriment compensable against multiple actors, the right of indemnity should follow [*American Motorcycle v. Superior Court*, supra, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899] guidelines, unless a contract or statute otherwise provides." (*City of Sacramento v. Gemsch Investment Co.* (1981) 115 Cal.App.3d 869, 877, 171 Cal.Rptr. 764.)" (Gem Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal.App.3d 419, 431.)

Defendant/Cross-Complainant Altoonian alleged in the 1st amended cross-complaint that the primary liability for plaintiffs' injuries, losses, and damages, if any, rests upon cross-defendants; the liability of cross-complainant for the injuries, losses and damages allegedly sustained by plaintiffs is passive and secondary to the liability of cross-defendants; therefore, cross-complainant has an implied right to indemnity over and against cross-defendants. (1st Amended Cross-Complaint, paragraph 22.)

Allegations that a cross-defendant is primarily responsibility for plaintiffs' damages and cross-complainant has liability for the claims of the plaintiff necessarily admits that defendant/cross-complainant Altoonian was liable for some of the plaintiffs' damages as a joint, concurrent, and successive tortfeasor with DeVincenzi and DeVincenzi and Associates, Inc. whose actions combine to cause the plaintiff's injury.

Defendants Altoonian's, DeVincenzi's, and DeVincenzi and Associates, Inc.'s liability to plaintiffs allegedly arises from the sale of the property, failures to make full disclosures during the transaction, and misrepresentations concerning the seller's mother having committed suicide by gunshot to the head on the property. The court rejects the argument that the indemnity and partial indemnity/contribution causes of action only arise from the listing

agreement between defendant Altoonian and defendants DeVincenzi and DeVincenzi and Associates, Inc. and not the sales agreement between defendant Altoonian and plaintiffs.

The indemnity and partial indemnity/contribution causes of action of the 1st amended cross-complaint are to be dismissed upon finding of a good faith settlement between defendants DeVincenzi and DeVincenzi and Associates, Inc., and plaintiffs.

Breach of the September 2014 Listing Agreement Cause of Action

Defendants DeVincenzi and DeVincenzi and Associates, Inc. essentially assert in the moving papers that all the causes of action of defendant Altoonian's 1st Amended Cross-Complaint are barred by a finding of good faith settlement of the underlying action brought by plaintiff as they are either claims for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault, or are artfully pled indemnity claims in disguise.

The moving papers conclude that the court should grant the motion and bar any other joint tortfeasors or co-obligors from any further claims against the listing broker for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault; and bar sellers from maintaining causes of action for breach of contract, implied contractual indemnity, breach of fiduciary duty, and negligence. (Motion for Good Faith Settlement, page 10, lines 11-17.)

Defendant Altoonian argues the breach of contact cause of action of the 1st amended cross-complaint survives a finding of good faith settlement of the underlying action for the following reasons: defendants DeVincenzi and DeVincenzi and Associates, Inc. do not assert that the breach of contract claim is precluded by Section 877.6; the breach of contact claims are based upon an entirely different contract, the listing agreement, and not the sales agreement upon

which the complaint is premised; and defendants Altoonian, DeVincenzi and DeVincenzi and Associates, Inc. are not co-obligors on a single contract debt.

The breach of contract cause of action of the 1st amended cross-complaint alleges: "In any event that plaintiffs' allegations in their complaint are established and found to be true against Cross-Defendants DeVincenzi, Insight, and/or Roes 1-20, then Cross-Defendants DeVincenzi, Insight, and Roes 1-20 breached their written agreement, including the Residential Listing Agreement, by failing to, among other things, use of the utmost care, integrity, honesty and/or loyalty in dealing with Cross-Complainant and by failing to exercise reasonable skill, and care in the performance of their duties with respect to the sale and marketing of the property. In light of these failures, Cross-Defendants DeVincenzi, Insight, and Roes 1-20, are, among other things, not entitled to any of the compensation they received from Cross-Complainant for the sale of the Property, and their compensation should be returned to Cross-Complainant"; cross-complainant has suffered and will suffer other unspecified damages and losses proximately caused by cross-defendants' breaches of the written agreement; and cross-complainant prays for judgment awarding general and special damages in an amount according to proof against cross-defendants with respect to the breach of contract, breach of fiduciary duty, and negligence causes of action. (1st Amended Cross-Complaint, paragraphs 35 and 37; and Prayer Number 5.)

The plaintiffs' causes of action are premised upon alleged nondisclosure of the gruesome suicide and disclosure that it was a natural death; defendant Altoonian's and defendants DeVincenzi and DeVincenzi and Associates, Inc.'s alleged negligent misrepresentation by failure to disclose that a suicide occurred on the property; defendant Altoonian's and defendants DeVincenzi and DeVincenzi and Associates, Inc.'s alleged intentional misrepresentation that the decedent had a natural death by heart attack at the subject property

when the decedent instead killed herself in a gruesome suicide; (Complaint, paragraphs 27, 32, 34, 35, 38, 39, 44-47, 54, 58, and 59.)

"We believe the purpose and intent of the 1987 legislation amending section 877.6 to include "co-obligors on a contract debt" was to provide a similar efficient mechanism to determine the good faith of any settlement of a multiparty contract action. Nothing in the statute indicates anything to the contrary. Although there are no reported decisions construing the phrase "co-obligors on a contract debt," the plain language of the statute dictates the interpretation of this phrase refers to parties to a contract dispute which itself is the subject of the underlying litigation." (Pacific Estates, Inc. v. Superior Court (1993) 13 Cal.App.4th 1561, 1571.)

Clearly plaintiffs and defendants Altoonian, DeVincenzi and DeVincenzi and Associates, Inc. are no co-obligors on the contract dispute that is the subject of the underlying action.

However, the alleged breach of the listing agreement is intertwined with the alleged joint liability of defendants Altoonian and DeVincenzi and DeVincenzi and Associates, Inc. for misrepresentations and non-disclosure of the true nature of the death on the subject property, which damages plaintiffs. The alleged breach of the listing agreement arises from the plaintiffs establishing that the allegations of their complaint are true against defendants/cross-defendants DeVincenzi and DeVincenzi and Associates, Inc. Defendant Altoonian seeks to recover general and special damages arising from the finding that cross-defendants are liable as alleged in the underlying action.

"The purpose of this statute is to bar claims against a settling tortfeasor and thereby promote settlement. (*Singer Co. v. Superior Court* (1986) 179 Cal.App.3d 875, 890, 225 Cal.Rptr. 159.) Allowing a joint tortfeasor to bring an affirmative claim for damages that is actually an artfully pleaded claim for indemnity would contravene the purpose of the statute.

The Supreme Court has stressed the importance of interpreting section 877.6, subdivision (c) such that settlement is encouraged. (*Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 810, 251 Cal.Rptr. 202, 760 P.2d 399.) Few joint tortfeasors would be willing to settle with plaintiffs if they knew another tortfeasor could bring an action on the same issues by merely cloaking claims of indemnity in affirmative language. Therefore, a trial court must have the discretion to ferret out those claims that are in fact claims for indemnity. ¶ When a trial court considers the good faith of a settlement, it must determine each tortfeasor's proportionate share of liability. (*Tech–Bilt Inc. v. Woodward–Clyde & Associates* (1985) 38 Cal.3d 488, 499, 213 Cal.Rptr. 256, 698 P.2d 159.) The trial court's good faith determination must also "take into account the settling tortfeasor's potential liability for indemnity to a cotortfeasor, as well as the settling tortfeasor's potential liability to the plaintiff." (*Far West Financial Corp. v. D & S Co., supra,* 46 Cal.3d at p. 816, fn. 16, 251 Cal.Rptr. 202, 760 P.2d 399.) In so doing, a trial court must consider each of the plaintiff's claims and possible recoveries and the potential liability of the joint tortfeasors. If the claims between the joint tortfeasors are identical to those made by the plaintiffs or if the damages sought by the joint tortfeasors are those that the court would consider in determining the proportionate liability of the settling tortfeasor, then the claims are indemnity claims regardless of whether one or more of the claims are couched in affirmative language. A claim by a joint tortfeasor seeking neither indemnity nor contribution and which the trial court would not contemplate in determining the proportionate liability of a settling tortfeasor is not a claim for indemnity and hence survives a good faith settlement under section 877.6. If a claim is in fact one of indemnity, then it is barred pursuant to section 877.6. ¶ Indemnity has been defined as the obligation of one party to make good a loss or damage which another party has incurred. (*County of Los Angeles v. Superior Court* (1984) 155 Cal.App.3d 798, 802, 202 Cal.Rptr. 444.) Indemnity may arise by virtue of an express or implied contractual

provision or by the equities of the particular case. (*Ibid.*) Here, both appellants and respondents cross-complained seeking partial or total equitable indemnity for any damages suffered by the plaintiff. Respondents claimed that these damages, which were sought by the plaintiffs for misrepresentation of the size of the condominium unit and for failing to obtain a proper certificate of occupancy, were due to the negligence of appellants. Appellants, on the other hand, alleged that the plaintiffs' damages resulted due to the respondents' breach of their fiduciary duty. In both cases, however, indemnity liability rested on the identical failure to correctly represent the size of the condominium unit and to obtain the certificate of occupancy. ¶ While appellants, in their cross-complaint, have asserted a separate cause of action for breach of fiduciary duty in addition to their claims of indemnity and contribution, their entitlement to indemnification or contribution rests upon their ability to prove that respondents breached their fiduciary duty. They have alleged no additional basis for their claim to equitable indemnity. Hence, the trial court, in assessing the proportionate liability of the parties to the plaintiffs must have considered respondents' potential liability for indemnity to appellants based on appellants' breach of fiduciary duty cause of action. Although labeled by appellants as a breach of fiduciary duty cause of action, it was in effect simply an indemnity action just as respondents' indemnity action, which alleged negligence, was solely an indemnity action." (Cal-Jones Properties v. Evans Pacific Corp. (1989) 216 Cal.App.3d 324, 327–329.)

"A claim by a joint tortfeasor seeking neither indemnity nor contribution survives a good faith settlement under section 877.6. But a party may not avoid a section 877.6 motion by providing different labels for what are in reality indemnity or contribution claims. (*Cal–Jones Properties v. Evans Pacific Corp.* (1989) 216 Cal.App.3d 324, 327–328, 264 Cal.Rptr. 737. [court barred claim for breach of fiduciary duty as in reality an indemnity claim].) The words "indemnity" or "contribution" need not be used. It is the substance

of the claim that is determinative. (*Ibid.; Norco, supra,* 64 Cal.App.4th at p. 964, 75 Cal.Rptr.2d 456.) "Following a good faith determination, the judge doubtless may discuss disguised or artfully pleaded claims for indemnity or contribution—i.e., causes of action purporting to state direct claims but which, in fact, seek to recover derivative damages." (*Norco, supra,* at p. 964, 75 Cal.Rptr.2d 456; see *Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 607, 106 Cal.Rptr.2d 1 ["negligence claim is essentially a claim for indemnification" for purposes of good faith settlement consequences].)" (Emphasis added.) (Gackstetter v. Frawley (2006) 135 Cal.App.4th 1257, 1274.)

The breach of listing agreement cause of action is an artfully pleaded claim for indemnity for general and special damages arising from the alleged identical misrepresentations and nondisclosures by defendants Altoonian and defendants DeVincenzi and DeVincenzi and Associates, Inc. that are alleged as a basis for liability in the underlying action. The court finds that a ruling granting the motion for determination of good faith settlement will bar this breach of listing agreement cause of action.

Breach of Fiduciary Duty and Negligence Causes of Action

Defendants DeVincenzi and DeVincenzi and Associates, Inc. argue in the moving papers that the breach of fiduciary duty and negligence causes of action of the 1st amended complaint are actually artfully pled indemnity claims in disguise as cross-complainant seller has not alleged the seller suffered any damages as a result of an act or omission of listing agent DeVincenzi and DeVincenzi and Associates, Inc. except for the fact that cross-complainant has been sued by the plaintiff buyers in this litigation and it requests costs and attorney fees.

Defendant Altoonian argues that the breach of fiduciary duty and negligence causes of action of the 1st amended cross-complaint are not premised upon any obligations alleged in the underlying complaint and are premised upon violations of the 2014 listing agreement.

The fiduciary duty and negligence causes of action of the 1st amended cross-complaint allege: "In the even [sic] that Plaintiffs' allegations in their Complaint are established and found to be true against Cross-Defendants DeVincenzi, Insight, and/or Roes 1-20, then Cross-Defendants DeVincenzi, Insight, and Roes 1-20 breached their fiduciary duties to cross-complainant…"; cross-complainant had no knowledge of the alleged misrepresentations, omissions, and/or breaches, being made or omitted by cross-defendants to plaintiffs and did not authorize and would not have authorized any such misrepresentation, omission, and/or other breach; as a proximate cause of the breach of fiduciary duties, cross-complainant has suffered damages, including, but not limited to cross-defendant's' compensation received from cross-complainant for the property sale and attorney fees, costs and investigative fees; if plaintiffs succeed in their complaint against cross-complainant, further damages are claimed; cross-complainant is entitled to recover his damages that may result from plaintiff's legal action, including attorney's fees, and investigation costs to defend against plaintiff's case; in any event that Plaintiffs' allegations in their Complaint are established and found to be true against Cross-Defendants DeVincenzi, Insight, and/or Roes 1-20, then Cross-Defendants DeVincenzi, Insight, and Roes 1-20 breached their duties to cross-complainant to exercise reasonable skill and care in the performance of their duties with respect to the sale and marketing of the property; cross-complainant had no knowledge of the alleged misrepresentations, omissions, and/or breaches, being made or omitted by cross-defendants to plaintiffs and did not authorize and would not have authorized any such misrepresentation, omission, and/or other breach; cross-complainant incurred general and special damages from the breach of duty and if plaintiffs succeed in their complaint against cross-complainant, further damages are claimed, including damages that may result from plaintiffs' legal action, including, but not limited to, attorney fees, and litigations costs to defend against plaintiff's litigation; and

cross-complainant prays for judgment awarding general and special damages in an amount according to proof against cross-defendants with respect to the breach of contract, breach of fiduciary duty, and negligence causes of action. (1st Amended Cross-Complaint, paragraphs 41-44, 47, 48, and 50; and Prayer Number 5.)

"The purpose of this statute is to bar claims against a settling tortfeasor and thereby promote settlement. (*Singer Co. v. Superior Court* (1986) 179 Cal.App.3d 875, 890, 225 Cal.Rptr. 159.) Allowing a joint tortfeasor to bring an affirmative claim for damages that is actually an artfully pleaded claim for indemnity would contravene the purpose of the statute. The Supreme Court has stressed the importance of interpreting section 877.6, subdivision (c) such that settlement is encouraged. (*Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 810, 251 Cal.Rptr. 202, 760 P.2d 399.) Few joint tortfeasors would be willing to settle with plaintiffs if they knew another tortfeasor could bring an action on the same issues by merely cloaking claims of indemnity in affirmative language. Therefore, a trial court must have the discretion to ferret out those claims that are in fact claims for indemnity. ¶ When a trial court considers the good faith of a settlement, it must determine each tortfeasor's proportionate share of liability. (*Tech–Bilt Inc. v. Woodward–Clyde & Associates* (1985) 38 Cal.3d 488, 499, 213 Cal.Rptr. 256, 698 P.2d 159.) The trial court's good faith determination must also "take into account the settling tortfeasor's potential liability for indemnity to a cotortfeasor, as well as the settling tortfeasor's potential liability to the plaintiff." (*Far West Financial Corp. v. D & S Co., supra,* 46 Cal.3d at p. 816, fn. 16, 251 Cal.Rptr. 202, 760 P.2d 399.) In so doing, a trial court must consider each of the plaintiff's claims and possible recoveries and the potential liability of the joint tortfeasors. If the claims between the joint tortfeasors are identical to those made by the plaintiffs or if the damages sought by the joint tortfeasors are those that the court would consider in determining the proportionate liability of the settling tortfeasor, then the claims are

indemnity claims regardless of whether one or more of the claims are couched in affirmative language. A claim by a joint tortfeasor seeking neither indemnity nor contribution and which the trial court would not contemplate in determining the proportionate liability of a settling tortfeasor is not a claim for indemnity and hence survives a good faith settlement under section 877.6. If a claim is in fact one of indemnity, then it is barred pursuant to section 877.6. ¶ Indemnity has been defined as the obligation of one party to make good a loss or damage which another party has incurred. (*County of Los Angeles v. Superior Court* (1984) 155 Cal.App.3d 798, 802, 202 Cal.Rptr. 444.) Indemnity may arise by virtue of an express or implied contractual provision or by the equities of the particular case. (*Ibid.*) Here, both appellants and respondents cross-complained seeking partial or total equitable indemnity for any damages suffered by the plaintiff. Respondents claimed that these damages, which were sought by the plaintiffs for misrepresentation of the size of the condominium unit and for failing to obtain a proper certificate of occupancy, were due to the negligence of appellants. Appellants, on the other hand, alleged that the plaintiffs' damages resulted due to the respondents' breach of their fiduciary duty. In both cases, however, indemnity liability rested on the identical failure to correctly represent the size of the condominium unit and to obtain the certificate of occupancy. ¶ While appellants, in their cross-complaint, have asserted a separate cause of action for breach of fiduciary duty in addition to their claims of indemnity and contribution, their entitlement to indemnification or contribution rests upon their ability to prove that respondents breached their fiduciary duty. They have alleged no additional basis for their claim to equitable indemnity. Hence, the trial court, in assessing the proportionate liability of the parties to the plaintiffs must have considered respondents' potential liability for indemnity to appellants based on appellants' breach of fiduciary duty cause of action. Although labeled by appellants as a breach of fiduciary duty cause of action, it was in effect simply an indemnity action just as

respondents' indemnity action, which alleged negligence, was solely an indemnity action." (Cal-Jones Properties v. Evans Pacific Corp. (1989) 216 Cal.App.3d 324, 327–329.)

"A claim by a joint tortfeasor seeking neither indemnity nor contribution survives a good faith settlement under section 877.6. But a party may not avoid a section 877.6 motion by providing different labels for what are in reality indemnity or contribution claims. (*Cal–Jones Properties v. Evans Pacific Corp.* (1989) 216 Cal.App.3d 324, 327–328, 264 Cal.Rptr. 737. [court barred claim for breach of fiduciary duty as in reality an indemnity claim].) The words "indemnity" or "contribution" need not be used. It is the substance of the claim that is determinative. (*Ibid.; Norco, supra,* 64 Cal.App.4th at p. 964, 75 Cal.Rptr.2d 456.) "Following a good faith determination, the judge doubtless may discuss disguised or artfully pleaded claims for indemnity or contribution—i.e., causes of action purporting to state direct claims but which, in fact, seek to recover derivative damages." (*Norco, supra,* at p. 964, 75 Cal.Rptr.2d 456; see *Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 607, 106 Cal.Rptr.2d 1 ["negligence claim is essentially a claim for indemnification" for purposes of good faith settlement consequences].)" (Emphasis added.) (Gackstetter v. Frawley (2006) 135 Cal.App.4th 1257, 1274.)

The breach of fiduciary duty and negligence causes of action are an artfully pleaded claims for indemnity for general and special damages arising from the alleged identical misrepresentations and nondisclosures by defendants Altoonian and defendants DeVincenzi and DeVincenzi and Associates, Inc. that are alleged as a basis for liability in the underlying action. The court finds that a ruling granting the motion for determination of good faith settlement will bar these causes of action.

Declaratory Relief and Implied Contractual Indemnity Causes of Action

The declaratory relief and implied contractual indemnity causes of action of the 1st amended cross-complaint are expressly linked to indemnifying defendant Altoonian should he be found liable to plaintiffs. (1st Amended Cross-Complaint, paragraphs 52, 56, and 59.) Therefore, they are also artfully pleaded claims for indemnity.

Defendant/Cross-Complainant Altoonian has not opposed the court barring the declaratory relief and implied contractual indemnity causes of action of the 1st amended complaint. Therefore, defendant has conceded the court can properly enter a ruling barring these causes of action upon a finding of a good faith settlement of the underlying action.

In summary, defendants DeVincenzi's and DeVincenzi and Associates, Inc.'s Motion for Determination of Good Faith Settlement is granted. Pursuant to the provisions of Code of Civil Procedure, § 877.6 the court orders that all causes of action of Cross-Complainant Altoonian's 1st Amended Cross-Complaint are barred.

TENTATIVE RULING # 8: DEFENDANTS DEVINCENZI'S AND DEVINCENZI AND ASSOCIATES, INC.'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT IS GRANTED. PURSUANT TO THE PROVISIONS OF CODE OF CIVIL PROCEDURE, § 877.6 THE COURT ORDERS THAT ALL CAUSES OF ACTION OF CROSS-COMPLAINANT ALTOONIAN'S 1ST AMENDED CROSS-COMPLAINT ARE BARRED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID

NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, APRIL 29, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.