1. MASSARWEH v. CAMP RICHARDSON RESORT, INC., ET AL., SC20200086

Motion for Summary Judgment or, Alternatively, Summary Adjudication

Due to the late filing of plaintiff's opposition to the motion and the court's need for adequate time to review the parties' briefing, matter is continued to October 28, 2022.

TENTATIVE RULING # 1: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, OCTOBER 28, 2022, IN DEPARTMENT FOUR.

2. RDR BUILDERS, LP v. SECHRIST, ET AL., SC20180022

Case Management Conference

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, OCTOBER 7, 2022, IN DEPARTMENT FOUR.

3. CLOSSON, ET AL. v. SHERPA, ET AL., 22CV1076

Demurrer

Plaintiffs Dr. Robert Closson and Catherine Gaehwiler commenced this action on August 2, 2022. Their complaint asserts causes of action for negligent and intentional infliction of emotional distress, fraud, negligent concealment, breach of implied contract, and breach of the implied covenant of good faith and fair dealing against defendants Kanchhi Maya Sherpa and Ang Dawa Sherpa. Pending is defendants' demurrer to the complaint.

1. STANDARD OF REVIEW

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30(a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, 39 Cal.App.3d at p. 318.)

2. PRELIMINARY MATTERS

Defendants' request that the court take judicial notice of the related case, *Conservatorship of Sherpa*, El Dorado Superior Court Case No. SP20190003, is granted. (Evid. Code, § 452(d)(1).)

3. DISCUSSION

First, defendants demur on the grounds that plaintiffs violated the compulsory counter-claim rule pursuant to Code of Civil Procedure section 426.30(a). Section 426.30 states: "Except as otherwise provided by statute, if a party against whom a complaint has

been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." (*Id.*, subd. (a).)

By way of background, defendants are the parents and conservators of the conservatee, Pemba, in the above-entitled probate action. In February 2022 plaintiffs filed a petition to remove the parents/defendants as conservators and for plaintiffs to be appointed successor conservators of the person and estate. Plaintiffs' probate petition is opposed and the matter is still pending trial. The probate action includes, inter alia, allegations of force-feeding Pemba as one of the grounds for removing defendants as conservators. However, this action differs from the probate action in that the causes of action asserted here are plaintiffs' personal claims against defendants which arise out of their relationship and involvement with defendants as it relates to Pemba's care. But, this action is not directly related to, or brought on behalf of Pemba.

Code of Civil Procedure section 426.30(a) does not apply as there is no pending complaint that has been filed and served against plaintiffs which would require them to allege in a cross-complaint in the probate action any related cause of action they may have against defendants. Instead, if anything, section 426.30(a) would apply to defendants to now bring any claims they might have against plaintiffs in a cross-complaint or else they may not hereafter bring any related cause of action. The demurrer made pursuant to Code of Civil Procedure section 426.30(a) is overruled.

Plaintiffs' 1st C/A is for negligent infliction of emotional distress. There is no independent tort of negligent infliction of emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) "The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. [Citations.] That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship." (*Id.* at pp. 984–985.) "[U]nless the defendant has assumed a duty to plaintiff in which the

emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty." (*Id.* at p. 985.)

Plaintiffs assert that a duty of care is owed by virtue of their special relationship with Pemba. Plaintiff Gaehwiler states that she was Pemba's legal guardian and he lived with her for 11 years, and plaintiff has maintained a close relationship with Pemba even after the guardianship ended.

In support of plaintiffs' assertion of the existence of a duty of care by virtue of a special relationship, plaintiffs cite *Dillon v. Legg* (1968) 68 Cal.2d 728, and *Thing v. LaChusa* (1989) 48 Cal.3d 644. These cases do not support that a non-relative, former guardian who no longer lives with the former ward constitutes a special relationship for purposes of a bystander emotional distress claim.

Dillon and *Thing* both involve emotional distress claims brought by mothers. In *Dillon*, the mother was present and witnessed the death of her infant child. In *Thing*, the mother did not witness the injury to her child. The California Supreme Court ("CSC") held that a mother who did not witness the accident that injured her child could not recover damages for emotional distress. The CSC went on to conclude that "[i]n the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Id.* at p. 647.)

The CSC explained that "[n]o policy supports extension of the right to recover for NIED to a larger class of plaintiffs. Emotional distress is an intangible condition experienced by most persons, even absent negligence, at some time during their lives. Close relatives suffer serious, even debilitating, emotional reactions to the injury, death, serious illness, and evident suffering of loved ones. These reactions occur regardless of

the cause of the loved one's illness, injury, or death. That relatives will have severe emotional distress is an unavoidable aspect of the 'human condition.' The emotional distress for which monetary damages may be recovered, however, ought not to be that form of acute emotional distress or the transient emotional reaction to the occasional gruesome or horrible incident to which every person may potentially be exposed in an industrial and sometimes violent society. Regardless of the depth of feeling or the resultant physical or mental illness that results from witnessing violent events, persons unrelated to those injured or killed may not now recover for such emotional upheaval even if negligently caused. Close relatives who witness the accidental injury or death of a loved one and suffer emotional trauma may not recover when the loved one's conduct was the cause of that emotional trauma. The overwhelming majority of 'emotional distress' which we endure, therefore, is not compensable." (*Id.* at pp. 666–667.)

"In most cases no justification exists for permitting recovery for NIED by persons who are only distantly related to the injury victim. Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Id.* at pp. 667–668, fn. 10.)

Based on the holding and discussion in *Thing*, the court finds that plaintiffs have not adequately pleaded that defendants owe them a duty of care by virtue of a special relationship. The demurrer to the 1st C/A is sustained. There does not appear to be a reasonable possibility that the 1st C/A can be amended to cure the defect regarding a duty of care. As such, leave to amend is denied. (See *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.)

Next, defendants demur to plaintiffs' 2nd C/A for intentional infliction of emotional distress. " ' "The elements of a prima facie case for the tort of intentional infliction of emotional distress [are] … as follows: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard [for] the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional

distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " [Citation.]' [Citation.]" (*Wilkins v. Nat'l Broad. Co.* (1999) 71 Cal.App.4th 1066, 1087.) Whether conduct is extreme and outrageous is usually a question of fact. (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.) However, "many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Ibid.*)

"Liability for intentional infliction of emotional distress extends 'only to conduct so extreme and outrageous "as to go beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." ' [Citation.]" (*Coleman v. Republic Indem. Ins. Co.* (2005) 132 Cal.App.4th 403, 416.) Outrageous conduct differs from "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (Rest.2d Torts, § 46, com. d, p. 73.) "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." (*Ibid.*)

Furthermore, it is not enough that the conduct be intentional and outrageous. " 'The law limits claims of intentional infliction of emotional distress to egregious conduct *toward plaintiff* proximately caused by defendant.' [Citation.] The only exception to this rule is that recognized when the defendant is aware, but acts with reckless disregard, of the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 905–906 [italics in original].)

Plaintiffs' theory of recovery is that defendants acted with reckless disregard. Further, they allege that plaintiff Gaehwiler "suffered severe emotional distress and corresponding physical symptoms of humiliation, sleeplessness, and anxiety." (Compl., ¶ 15.) The court finds that these allegations do not support the element of severe

emotional distress. In addition, the 2nd C/A is asserted on behalf of both plaintiffs, but there are no allegations addressing Dr. Closson's specific emotional distress. The demurrer is sustained with leave to amend.

Plaintiffs' 3rd C/A and 4th C/A assert fraudulent and negligent concealment.

"[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West*, *Inc. v. Sanyo Fisher (USA) Corp*. (1992) 6 Cal.App.4th 603, 612–613.) The tort of negligent concealment does not require scienter or intent to be deceitful.

An essential element of causes of action for negligent and fraudulent concealment is duty. To state a cause of action for fraudulent and negligent concealment, the defendant must have been under a duty to disclose some fact to the plaintiff. (*Id.* at p. 613.) Both the 3rd C/A and 4th C/A fail to allege facts demonstrating that defendants owed plaintiffs a legal duty to disclose the subject information.

Additionally, "every element of a cause of action for fraud must be alleged both factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective complaint." (*Cooper v. Equity Gen. Ins*. (1990) 219 Cal.App.3d 1252, 1262.) "[T]he rationale for this ' "strict requirement[ ] of pleading" ' [citation] is not merely notice to the defendant. ' "The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense." ' [Citation.] Thus ' "the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect." ' [Citation.]

[¶] This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73 [italics in original].)

In both the 3rd and 4th C/A (mislabeled as the 5th C/A), plaintiffs allege that defendants made "promise[s] that Pemba would receive loving, attentive care from his biological family, and that Pemba's biological family would eventually be solely responsible for that care." (Compl., ¶¶ 20, 25.)

These alleged promises or representations are not clear or adequately definite in their terms, and the limits of defendants' expected performance are not sufficiently defined to put defendants on notice or to prepare a defense. (See *Ladas v. Cal. State Auto. Assn*. (1993) 19 Cal.App.4th 761, 770 ["To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages."].) "Promises too vague to be enforced will not support a fraud claim any more than they will one in contract." (*Rochlis v. Walt Disney Co*. (1993) 19 Cal.App.4th 201, 216, disapproved of on another ground in *Turner v. Anheuser-Busch*, *Inc*. (1994) 7 Cal.4th 1238, 1251.)

The demurrer to the 3rd C/A and 4th C/A are sustained with leave to amend.

The 5th C/A (mislabeled as the 6th C/A) alleges breach of an oral contract implied by conduct. The essential elements to be pleaded in a breach of contract claim are: (1) the existence of a contract implied by conduct; (2) plaintiff's performance of the contract or excuse for non-performance; (3) defendant's breach of the contract; and (4) resulting damages to the plaintiff. (*Lortz v. Connell* (1969) 273 Cal.App.2d 286, 290.) A breach is defined as defendant's unjustified or unexcused failure to perform. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 847.)

The complaint alleges that "[a]s part of the implied understanding between the parties, the parties each had a right to jointly contribute to Pemba's care, on the condition that Plaintiffs would continue to provide financial support and Defendants would provide

an attentive, appropriate, and loving home for Pemba, as his full-time caretakers." (Compl., ¶ 33.)

These promises are too vague to be enforced. "Under basic contract law '[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain.' [Citations.] 'Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable. [Citation.]' [Citation.]" (*Ladas*, *supra*, 19 Cal.App.4th at p. 770.) The terms "attentive," "loving," and "appropriate" are not reasonably certain, are indefinite, and are open to interpretation. Accordingly, the demurrer to the 5th C/A is sustained with leave to amend.

Because plaintiffs' breach of implied contract C/A fails, so, too, does their 6th C/A for breach of the implied covenant of good faith and fair dealing. The demurrer to the 6th C/A is sustained with leave to amend.

TENTATIVE RULING # 3: DEFENDANTS' DEMURRER TO THE 1ST CAUSE OF ACTION IS SUSTAINED WITHOUT LEAVE TO AMEND, AND THE DEMURRER TO THE 2ND, 3RD, 4TH, 5TH, AND 6TH CAUSES OF ACTION ARE SUSTAINED WITH LEAVE TO AMEND. DEFENDANTS' FIRST AMENDED COMPLAINT MUST BE FILED AND SERVED NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. 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) 573-3042 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. PARTIES MAY APPEAR IN PERSON AT THE

HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

4. RURAL COMMUNITIES UNITED v. COUNTY OF EL DORADO, PC20210189

Case Management Conference

TENTATIVE RULING # 4: AT THE PARTIES' REQUEST, MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, DECEMBER 9, 2022, IN DEPARTMENT FOUR.

5. FLETCHER, ET AL. v. FOX, 22CV0580

Motion to Compel Arbitration

On April 28, 2022, plaintiffs Tal Fletcher and Tahoe Sierra Transportation, LLC ("TST") filed a Complaint to Enforce Agreement to Settle Claims and for Declaratory Relief against defendant Brian Fox. Pending is plaintiffs' motion to compel arbitration of the claims in this action and of the claims asserted by defendant in his complaint filed with the California Department of Industrial Relations, Labor Commissioner's Office ("DLSE"), Case No. WC-CM-8178367, and to stay all proceedings until the completion of arbitration. The motion is opposed.

1. BACKGROUND

Plaintiff Tal Fletcher declares that in 2016 defendant telephoned him about driving for TST. (Reply, Reply Declaration of Tal S. Fletcher, Jr., ¶ 3.) On or about January 1, 2017, defendant acquired a membership interest in TST. (Compl., ¶ 4.) TST and defendant entered into a written agreement by which defendant provided transportation services to the public as a Member of TST. (Mot., Declaration of Tal S. Fletcher, Jr., Ex. A.) The service was primarily between Truckee and the north Lake Tahoe area and the Reno airport, but it also included service between other points within California. (Compl., ¶ 4) According to plaintiffs, in December 2017 defendant drove a TST vehicle to run personal errands and caused an accident which resulted in a total loss of the TST vehicle and the other driver's car. (Reply, Fletcher Reply Decl., ¶ 11.) Additionally, the other driver sustained serious injuries, TST's insurance carrier paid $500,000 to the injured driver, and there was a five-fold increase in TST's insurance costs. (*Ibid.*) Defendant ceased providing transportation services as a Member of TST in October 2018. (Compl., ¶ 4.)

On or about January 5, 2021, defendant filed a claim with the DLSE, asserting unpaid wages for services rendered between July 2016 and September 2018. (*Id.*, ¶ 6; Mot., Declaration of Jacqueline Loveless, Ex. A, p. 5.) Defendant subsequently added other claims to his wage claims. (Compl., ¶ 6.)

On January 10, 2022, plaintiffs assert that defendant offered to settle his DLSE claims against both plaintiffs and release each in writing from any and all claims by defendant in exchange for a payment of $22,000, payable in 12 monthly installments. (*Id.*, ¶ 7.) That same day, plaintiffs accepted defendant's offer in writing. (*Id.*, ¶ 8.)

Subsequently, defendant purportedly refused to proceed with and complete the settlement agreement. (*Id.*, ¶ 10.) Plaintiffs state they remain ready, willing, and able to perform pursuant to the terms of the settlement. (*Id.*, ¶ 11.) This action was commenced in April 2022.

2. LEGAL PRINCIPLES

Plaintiffs' motion is made pursuant to the California Arbitration Act ("CAA"), Code of Civil Procedure § 1280, et seq. The CAA sets forth "a comprehensive scheme regulating private arbitration in this state." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) California has a " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citations.]" (*Ibid*.) "Consequently, courts will ' "indulge every intendment to give effect to such proceedings." ' " (*Ibid*.) "In cases involving private arbitration, '[t]he scope of arbitration is ... a matter of agreement between the parties' [citation] …." (*Id*. at pp. 8–9.) "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) Furthermore, except for specifically enumerated exceptions, the court must order the parties to arbitrate a controversy if the court finds that a written agreement to arbitrate the controversy exists. (Code Civ. Proc., § 1281.2.)

Arbitration agreements are governed by state contract law and are "construed like other contracts to give effect to the intention of the parties." (*Crowell v. Downey Cmty. Hosp. Found.* (2002) 95 Cal.App.4th 730, 734, disapproved of on other grounds in *Cable Connection*, *Inc. v. DIRECTV*, *Inc*. (2008) 44 Cal.4th 1334.) A motion or petition "to compel arbitration is simply a suit in equity seeking specific performance of that contract."

(*Engineers & Architects Assn. v. Cmty. Dev. Dep't* (1994) 30 Cal.App.4th 644, 653.) If the contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) " 'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.' [Citations.]" (*Adajar v. RWR Homes*, *Inc*. (2008) 160 Cal.App.4th 563, 569.)

The moving party always bears the burden of persuasion to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.) The court's determination involves a three-step burden-shifting process.

In the first step of the process, the moving party bears the initial "burden of producing 'prima facie evidence of a written agreement to arbitrate the controversy.' [Citation.] The moving party 'can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature.' [Citation.] Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. [Citations.] For this step, 'it is not necessary to follow the normal procedures of document authentication.' [Citation.] If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.

"If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement. [Citation.] The opposing party can do this in several ways. For example, the opposing party may testify under oath or declare under penalty of perjury that the party never saw or does not remember seeing the agreement, or that the party never signed or does not remember signing the agreement. [Citations.]

"If the opposing party meets its burden of producing evidence, then in the third step, the moving party must establish with admissible evidence a valid arbitration agreement between the parties. The burden of proving the agreement by a preponderance of the evidence remains with the moving party. [Citation.]" (*Gamboa v. Northeast Cmty. Clinic* (2021) 72 Cal.App.5th 158, 165–166.)

3. DISCUSSION

As a preliminary issue, defendant argues that plaintiffs have waived the right to arbitrate as evidenced by their conduct in unreasonably delaying their demand to arbitrate.

The court does not agree. Plaintiffs state that multiple times in 2018 and 2019 TST attempted to resolve defendant's trip invoices with him and tried to come to an agreement on a reasonable amount to offset from the costs of defendant's 2017 accident. (Reply, Fletcher Reply Decl., ¶ 14.) Although defendant filed his DLSE complaint in December 2020, plaintiffs state they were not given notice of the complaint until late 2021. (*Ibid.*) Plaintiffs participated at the DLSE settlement conference in January 2022, and contend that a settlement agreement was reached. (Mot., Loveless Decl., ¶¶ 2–6 & Ex. B; Reply, Fletcher Reply Decl., ¶ 13.) It was only after defendant reneged on his alleged offer to settle that this litigation was filed on April 28, 2022. The instant motion was filed on August 9, 2022.

Based on the foregoing, the court finds that plaintiffs' conduct is not inconsistent with the intent to arbitrate, and plaintiffs did not waive the right to arbitrate.

Moving on, in the first step of the process plaintiffs have the burden of producing prima facie evidence of the existence of a written agreement to arbitrate the controversy. Plaintiff Fletcher declares that defendant signed the Operating Agreement for Tahoe Sierra Transportation, LLC ("Agreement"), effective January 1, 2017. (Mot., Fletcher Decl., ¶ 2 & Ex. A, p. 28.) Plaintiffs included a copy of the Agreement with its moving papers. (*Id.*, Ex. A.) Broadly speaking, the Agreement includes provisions addressing TST's organization, capitalization, members and voting, management and control of the

company, accounts and records, allocation and distribution of profits and losses, transfer of membership interests, dissolution and winding up, and dispute resolution. (*Id.*, Ex. A, p. 4.) The dispute resolution provision states that it applies to "any dispute arising out of the Agreement." (*Ibid.*) This language is broad enough to encompass defendant's wage claims as well as any additional claims related to his work terms or conditions at TST.

Based on the foregoing, the court finds that plaintiffs met their initial burden of producing prima facie evidence of the existence of a written agreement to arbitrate.

For the second step of the process, the burden now shifts to defendant to establish a defense to the enforcement of the arbitration agreement, including the burden of demonstrating that an exemption from arbitration applies.

Defendant contends that when Fletcher approached him about becoming a Member of TST, he asked for time to review the documents before signing. (Opp'n, Declaration of Brian Fox, ¶ 4.) He states that Fletcher pressured him to quickly sign the Agreement, defendant never read the Agreement before signing, he does not recall ever reading the dispute resolution provision of the Agreement, and even after reading that provision he did not understand that he was waiving his right to have employment claims adjudicated in court or with the state Labor Commissioner. (*Ibid.*)

The court finds that defendant's evidence is sufficient to shift the burden of production to plaintiffs to establish with admissible evidence a valid arbitration agreement between the parties.

Plaintiff Fletcher declares that defendant telephoned him in 2016 about driving for TST. At that time, he explained the unique business model to defendant and encouraged defendant to talk with other Members of TST, which defendant did. (Reply, Fletcher Reply Decl., ¶¶ 3–4.) He further explains there were no documents to review when defendant joined TST in 2016, so there was no pressure for defendant to sign any documents. (*Id.*, ¶ 8.) Fletcher explained to defendant that he would not be an employee of TST, but rather a Member of TST. (*Id.*, ¶ 4.) All drivers/Members paid for their own gasoline and other car

expenses. (*Id.*, ¶ 5.) For each trip, a Member submitted an invoice detailing the trip and, based on these invoices, payments to the drivers were made. (*Ibid.*) Drivers/Members had control over whether to accept or decline shifts. (*Id.*, ¶¶ 5, 9.)

Initially, TST's business model was part of an oral operating agreement. (*Id.*, ¶ 6.) In March and April 2019 TST's counsel advised TST to put the operating agreement in writing. (*Ibid.*) In April 2019 Fletcher went to defendant's construction worksite and personally presented defendant with a copy of the Agreement and a workers' compensation waiver to sign. (*Id.*, ¶ 8; Mot., Fletcher Decl., ¶ 2.) At the same time, Fletcher provided defendant with a copy of the Agreement for his own records and use. (Mot., Fletcher Decl., ¶ 2.) Fletcher states that defendant was not under pressure to sign and he did not ask for time to review the documents before signing. (Mot., Fletcher Decl., ¶ 2; Reply, Fletcher Reply Decl., ¶ 8.)

Based on this evidence, the court finds that plaintiffs have met their burden of persuasion of proving the existence of a dispute resolution provision, which includes arbitration, between the parties by a preponderance of the evidence. (See *Rosenthal*, *supra*, 14 Cal.4th at p. 413.)

It should be noted that while defendant states that he did not read the Agreement before signing and he does not recall ever reading the dispute resolution provision, he does not claim that he never signed the Agreement. Defendant's failure to recall ever reading the dispute resolution provision does not raise a triable issue of fact as it does not necessarily contradict plaintiffs' evidence that he did, in fact, sign the Agreement. (See *Joseph E. Di Lorento*, *Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 160.) Accordingly, the court finds it is not necessary to conduct an evidentiary hearing on this issue.

Lastly, defendant argues the agreement is unenforceable because it is procedurally and substantively unconscionable.

Civil Code section 1670.5 codifies unconscionability as a reason for refusing a contract's enforcement. It 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." (*Id.*, subd. (a).) This provision applies to arbitration agreements.

" '[U]nconscionability 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. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree.... [T]he 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. Found. Health Psychcare Services*, *Inc*. (2000) 24 Cal.4th 83, 114, abrogated in part on other grounds by *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.)

" ' "Procedural unconscionability" concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citation.] It focuses on factors of oppression and surprise. [Citation.] The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party.' [Citation.]" (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1319.)

While procedural unconscionability focuses on how the agreement was obtained and executed, "[s]ubstantive unconscionability focuses on whether the provision is overly harsh or one-sided and is shown if the disputed provision of the contract falls outside the 'reasonable expectations' of the nondrafting party or is 'unduly oppressive.' [Citations.]" (*Gutierrez v. Autowest*, *Inc*. (2003) 114 Cal.App.4th 77, 88.) "Substantively

unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (*Little v. Auto Stiegler*, *Inc*. (2003) 29 Cal.4th 1064, 1071.) "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*, *supra*, 114 Cal.App.4th at p. 88.) "[T]he paramount consideration in assessing [substantive] conscionability is mutuality." (*Abramson v. Juniper Networks*, *Inc*. (2004) 115 Cal.App.4th 638, 657.)

Though courts refuse to enforce agreements that are both procedurally and substantively unconscionable, the two factors need not each exist to the same degree. "[T]he 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*, *supra*, 24 Cal.4th at p. 114.)

Here, there is nothing indicating that the dispute resolution provision is a contract of adhesion. A contract of adhesion is " '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.' [Citation.]" (*Armendariz*, *supra*, 24 Cal.4th at p. 113.) Neither the Agreement nor the provision state that Members must agree to the dispute resolution provision or else they could not be drivers/Members. Defendant was provided a copy of the entire Agreement, which contains the dispute resolution provision. Defendant was apparently employed at another driving job when he asked about joining TST and then later when he signed the Agreement, and thus he was not desperate for employment and he did not have unequal bargaining power.

While defendant states that he does not recall reviewing the Agreement or reading the dispute resolution provision, "simply because a provision within a contract … is not read or understood by the nondrafting party does not justify a refusal to enforce it. The unbargained-for term may only be denied enforcement if it is also *substantively* unreasonable." (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 88 [italics in original].)

The dispute resolution provision is not one-sided or overly harsh and it applies equally to Members/drivers and TST. The entire dispute resolution scheme is not confusing and is straightforward. The provision states that the Members and TST "agree to meet and confer in good faith to attempt to resolve any dispute arising out of the Agreement." (Mot., Fletcher Decl., Ex. A, p. 26.) If meeting and conferring is unsuccessful, then the dispute "shall be submitted to mediation … under a mutually agreeable mediator, or, if one cannot be found, under the rules and through the assistance of Resolution Remedies; or, if a mediator is not available through Resolution Remedies, then a mediator selected through [JAMS]. If a dispute cannot be resolved by mediation, the dispute shall be submitted to binding arbitration … in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction." (*Ibid.*)

Although judicial review is limited, it is sufficient to ensure that arbitrators comply with the rights at issue. (*Armendariz*, *supra*, 24 Cal.4th at p. 98.)

This court is familiar with AAA's arbitration rules, which include, inter alia, the arbitrator's authority to order discovery. (Evid. Code, § 452(h).) Further, the dispute resolution provision does not in any way limit remedies to defendant. It also provides that the arbitrator has "full discretion to award the prevailing party all or any portion of that party's attorney fees and costs, including arbitration fees, depending upon what the arbitrator finds is just and equitable." (*Ibid.*) If the dispute resolution provision was to be modified, it must be in writing and approved by a majority of the Members, which included defendant. (*Id.*, Ex. A, p. 26, § 11.1.)

Given these procedures and conditions, the court does not find that the dispute resolution provision is either procedurally or substantively unconscionable. (Civ. Code, § 1670.5(a); *Armendariz*, *supra*, 24 Cal.4th at p. 98; *Serpa v. Cal. Sur. Investigations*, *Inc*. (2013) 215 Cal.App.4th 695, 704–710.)

In sum, the court finds that the arbitration agreement is valid and enforceable and is not unconscionable. Plaintiffs' motion is granted. This action and the DLSE proceedings are stayed pending the conclusion of arbitration.

TENTATIVE RULING # 5: PLAINTIFFS' MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS 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) 573-3042 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. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.