1. PAUL, ET AL. v. THE RIVA PARTNERS, SC20200155

(1) Unopposed Motion for Final Approval of Class Action Settlement

(2) Unopposed Application for Approval of Fees, Costs, Service Payments

This is a class action lawsuit alleging wage and hour violations by defendant The Riva Partners, LP ("Riva"), who operate The Riva Grill. Plaintiffs, individually and on behalf of all similarly situated non-exempt employees ("Class Members") who worked for defendant, move for final approval of a Class Settlement. Plaintiffs also move for an award of attorney fees and costs, claims administration fees, and Class Representative service awards. Defendant does not oppose plaintiffs' motions.

Having reviewed and considered plaintiffs' papers and documentary evidence, the court grants plaintiffs' motion for final approval of the Class Settlement, and for attorney fees and costs, claims administration fees, and Class Representative service awards.

A. Background

On February 24, 2020, plaintiffs exhausted the prefiling requirements of the PAGA. (Mot., Decl. of Daniel F. Gaines, ¶ 8.)

This action was commenced on November 5, 2020. On February 28, 2022, plaintiffs filed a First Amended Complaint ("FAC") asserting causes of action for (1) failure to pay all wages due (Lab. Code, §§ 510, 558, 1194, 1194.2, 1195, 1197, 1198); (2) failure to pay all gratuities (Lab. Code, §§ 350, 351); (3) failure to provide rest periods or compensation in lieu thereof (Lab. Code, § 226.7; IWC Wage Order 5-2001); (4) failure to provide meal periods or compensation in lieu thereof (Lab. Code §§ 226.7, 512; IWC Wage Order 5-2001); (5) failure to reimburse all business-related expenses (Lab. Code, § 2802); (6) knowing and intentional failure to comply with itemized employee wage statement provisions (Lab. Code, § 226, subds. (a), (e)); (7) failure to pay wages at separation of employment (Lab. Code, §§ 201–203); (8) violations of Business and Professions Code section 17200; and (9) penalties pursuant to the Private Attorneys General Act ("PAGA"), Labor Code section 2698, et seq.

On November 2, 2021, following the exchange of information and documents, the parties engaged in settlement negotiations with the assistance of Judge David I. Brown (Ret.). (Mot., Gaines Decl., ¶ 14.) Although the initial mediation attempt was not successful, the parties continued settlement discussions with the help of Judge Brown. (Ibid.)

In March 2022 plaintiffs moved for class certification. On May 19, 2022, the court posted a tentative ruling on plaintiffs' motion. Oral argument was heard on May 20, 2022, and the matter was taken under submission. Thereafter, the court received a declaration from plaintiffs' counsel regarding her inability to appear at the hearing on May 20, 2022. The court agreed to set the matter for further proceedings on July 15, 2022, to allow plaintiffs' counsel to appear for oral argument on the motion.

Prior to the July 15 hearing date, the parties reached a resolution of the action and a Notice of Settlement of Entire Case was filed on July 14, 2022.

B. Overview of the Settlement

1. SETTLEMENT CLASS

The Settlement Class is defined as follows: "all individuals who worked for Defendant as a non-exempt employee in California at any time between November 5, 2016 and July 15, 2022." (Mot., Gaines Decl., Ex. B, ¶ A(5).)

On December 9, 2022, the Claims Administrator, ILYM Group, Inc. ("ILYM") received the court approved text for the Notice Packet from Class Counsel. (Mot., Decl. of Lluvia Islas, ¶ 4.) ILYM prepared a draft of the formatted Notice, which was approved by the parties' counsel prior to mailing. (Ibid.)

On December 14, 2022, ILYM received the class data file from defense counsel, which contained the names, Social Security numbers, last known mailing addresses, and the number of applicable total wages worked for each of the 583 individuals identified as potential Class Members. (Id., Islas Decl., ¶ 5.) ILYM then processed the names through

the National Change of Address Database and updated the list with any updated addresses located. (Id., Islas Decl., ¶ 6.)

Class Notice was sent by mail on December 27, 2022. (Id., Islas Decl., ¶ 7.) Notice was mailed in both English and Spanish. Some 236 Notices were returned as undeliverable and 1 Notice was returned with a forwarding address. (Id., Islas Decl., ¶ 8.) Skip trace searches were performed for those 235 Notices without forwarding addresses. (Ibid.) Of the 235 Notices, ILYM found 62 additional updated addresses. (Ibid.) A total of 63 Notices were remailed to those updated addresses. (Id., Islas Decl., ¶ 9.) A total of 173 Notices were deemed undeliverable. (Id., Islas Decl., ¶ 10.)

Class Members were given 60 days, or until a postmark deadline of February 25, 2022, to submit objections to, or request to be excluded from, the settlement. Zero (0) objections and one (1) request for exclusion have been received from Class Members. (Id., Islas Decl., ¶¶ 11, 12.) A total of 582, or 99.83%, of the Class Members will participate in the settlement. (Id., Islas Decl., ¶ 13.)

2. SETTLEMENT TERMS

Defendant will pay a total sum of $350,000 ("Gross Fund") in full settlement of all claims against defendant. (Mot., Gaines Decl., Ex. B, ¶ C(19)(a).) The Gross Fund covers settlement payments to the Class Members, service awards to the Class Representatives, attorney fees and costs, claims administration fees, and all amounts to be paid to the California Labor and Workforce Development Agency ("LWDA"). (Ibid.)

A Net Settlement amount of $148,000 is available to pay to the Class Members. Participating Class Members will receive a proportional share of the Net Settlement based on the number of total wages worked by Class Members during the Class Period, with an estimated average gross payment of $274.36. (Id., Islas Decl., ¶ 14.) The lowest estimated share is $0.12, and the highest estimated share is $2,989.69. (Ibid.) The Gross Fund does not include defendant's share of employer payroll taxes, which shall be paid separately by defendant. (Id., Gaines Decl., Ex. B, ¶ C(19)(a).)

Defendant is required to deposit the amount for the Gross Fund and all employer payroll tax obligations with ILYM in two equal installments; the first due no later than 10 calendar days after the Effective Date of the settlement and the second due no later than September 15, 2023. (Id., Gaines Decl., Ex. B, ¶ E(35).) ILYM will disburse each installment within 15 calendar days after its receipt thereof, with the Class Members, named plaintiffs, Class Counsel, the LWDA, and ILYM each being paid one-half of their total payments due under the agreement after defendant's deposit of each installment. (Id., Ex. B, ¶ E(36).) Class Members' checks will remain negotiable for 180 days. (Ibid.) The value of any checks uncashed more than 180 days after mailing will be canceled and the gross amount of the checks paid to the Office of the California State Controller – Unclaimed Property Fund, to be held in the name of the respective Class Member. (Ibid.)

Class Counsel requests an attorney fee award of $122,500 (35% of the Gross Fund), plus reimbursement of $18,048.96 in litigation costs, and the two Class Representatives request service payment awards of $15,000 each. (Id., Ex. B, ¶ C(19)(e)–(g).)

The settlement allocates $10,000 to the PAGA claims, which represents about 2.9% of the Gross Fund. Of that amount, $7,500 (75%) will be paid to the LWDA, and the remaining $2,500 (25%) will be included in the Net Settlement for payment to the Class Members. (Id., Ex. A, ¶ C(19)(d).) The LWDA has not objected or responded to the Joint Stipulation of Class Action Settlement and Release of Claims, which was submitted via LWDA's online submission interface. (Id., ¶ 55 & Ex. D.)

C. Legal Standards for Final Approval of Class Settlement

To protect the interests of absent class members, class action settlements must be reviewed and approved by the court. California follows a two-step procedure for court approval: (1) the court reviews the terms of the settlement and form of settlement notice to the class and provides or denies preliminary approval; and later, (2) the court considers objections by class members and grants or denies final approval. (Cal. Rules of Ct., rule 3.769.)

" 'The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.' [Citations.] 'The courts are supposed to be the guardians of the class.' [Citation.]" (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 129.) As such, "[t]he court must determine the settlement is fair, adequate, and reasonable." (Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801.) " 'To make this determination, the factual record before the ... court must be sufficiently developed.' [Citation.]" (Kullar, supra, 168 Cal.App.4th at p. 130.)

"The trial court has broad discretion to determine whether the settlement is fair. [Citation.] It should consider relevant factors, such as [1] the strength of plaintiffs' case, [2] the risk, expense, complexity and likely duration of further litigation, [3] the risk of maintaining class action status through trial, [4] the amount offered in settlement, [5] the extent of discovery completed and the stage of the proceedings, [6] the experience and views of counsel, [7] the presence of a governmental participant, and [8] the reaction of the class members to the proposed settlement." (Dunk, supra, 48 Cal.App.4th at p. 1801 [numbers added].)

"The list of factors is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.' [Citation.] 'Ultimately, the [trial] court's determination is nothing more than "an amalgam of delicate balancing, gross approximations and rough justice." [Citation.]' [Citation.]" (Ibid.)

"[T]he court in Dunk asserted that 'a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced

in similar litigation; and (4) the percentage of objectors is small.' [Citation.]" (Kullar, supra, 168 Cal.App.4th at p. 128.) " 'This initial presumption must then withstand the test of the plaintiffs' likelihood of success.' [Citation.] 'The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." ' [Citations.] The court 'must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case,' but nonetheless it 'must eschew any rubber stamp approval in favor of an independent evaluation.' [Citation.]" (Id. at p. 130.)

Because this matter also proposes to settle claims under California's PAGA, the court must further consider the criteria that apply under that statute. (See Lab. Code, § 2699, subd. (*l*)(2).) There is a lack of guidance in the statute and case law concerning the basis upon which a settlement may be approved. Although not binding authority, in O'Connor v. Uber Technologies, Inc. (N.D. Cal. 2016) 201 F.Supp.3d 1110, the court denied approval of class action settlements that included PAGA claims in part because the plaintiffs' claims added up to as much as $1 billion in PAGA penalties but the parties settled those claims for $1 million, or 0.1% of their alleged maximum value. As the court stated, "where plaintiffs bring a PAGA representative claim, they take on a special responsibility to their fellow aggrieved workers who are effectively bound by any judgment. [Citation.] Such a plaintiff also owes responsibility to the public at large; they act, as the statute's name suggests, as a private attorney general, and 75% of the penalties go to the LWDA 'for enforcement of labor laws … and for education of employers and employees about their rights and responsibilities under this code.' " (Id. at p. 1134.)

In O'Connor, the LWDA itself filed a brief stating that "[i]t is thus important that when a PAGA claim is settled, the relief provided for under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public and, in the context of a class action, the court evaluate whether the settlement meets the

standards of being 'fundamentally fair, reasonable, and adequate' with reference to the public policies underlying the PAGA." (Id. at p. 1133.)

D. Analysis of the Settlement Agreement

The court presumes the settlement is fair and reasonable given that (a) it was reached through arms-length bargaining with the assistance of an experienced and neutral mediator, (b) there was sufficient time for investigation and discovery since commencement of litigation on November 5, 2020, (c) Class Counsel have particularized experience with the claims at issue in the case, and (d) there appear to be no objections by any party or Class Member. (See Dunk, supra, 48 Cal.App.4th at p. 1802.)

Class Counsel provided declarations in support of the request for attorney fees representing about 35%, or $122,500, of the $350,000.00 Gross Fund, as set forth in the settlement and Class Notice. Adequate information has been provided for a lodestar analysis of the attorney fee request, and Class Counsel represents the requested fee award is justified under that analysis. Counsel provided a total number of attorney hours in support of the fee request and explained why the fee request is reasonable given the time spent and value of the legal work performed. Counsel represents that 302.8 attorney hours have been spent by counsel at rates of $550–$750 per hour, which does not include expected additional attorney hours preparing for and attending the final approval hearing and dealing with claims administration issues. Counsel calculates that the lodestar amount is $225,035, which means the requested attorney fee award is essentially the lodestar with a "negative" multiplier of 0.54.

Counsel additionally provided sufficient cost information indicating incurred actual costs of $18,048.96. These costs are less than the $30,000 cap provided in the Settlement Agreement.

The court finds the requested attorney fees and costs appear reasonable under the circumstances. Additionally, counsel provided declarations demonstrating sufficient

previous experience with class actions to further support the reasonableness of the award.

ILYM, the Claims Administrator, provided a declaration describing the work it has performed to date and work to be performed after final approval of the settlement. The court finds the amount requested as compensation to ILYM—$12,000—appears reasonable.

Unclaimed settlement proceeds will be sent to the State Controller, to be held pursuant to the Unclaimed Property Law (Civ. Code, § 1500, et seq.), in the name of the Class Member to whom the check was issued, until such time that the property is claimed, which the court finds fulfills the purposes of the lawsuit and is otherwise appropriate. (See Code Civ. Proc., § 384.)

The court previously approved a service payment award of $15,000 and finds that the requested Class Representative payment of $15,000 each is appropriate under the circumstances.

On review of the moving papers and documentary evidence submitted, the court finds, given the established presumption that the settlement is fair and reasonable under the circumstances of this case, and, particularly, given the absence of any objection or opposition following the Class Notice, that the settlement is fair and reasonable and that the motion for final approval and the application for fees and costs should be, and are hereby, granted.

TENTATIVE RULING # 1: PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPLICATION FOR APPROVAL OF ATTORNEY FEES AND COSTS, CLAIMS ADMINISTRATION FEES, AND CLASS REPRESENTATIVE SERVICE PAYMENTS ARE GRANTED AS REQUESTED. 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.

2. CURTZWILER v. BARTON MEMORIAL HOSPITAL, ET AL., 22CV0087

Special Motion to Strike Plaintiff's Complaint

On January 10, 2022, plaintiff Kenneth Curtzwiler commenced this defamation action against defendants Barton Memorial Hospital, Jen Dawn, and Jenna Palacio. Pending is Jen Dawn's ("defendant") special motion to strike plaintiff's complaint as a strategic lawsuit against public participation pursuant to Code of Civil Procedure section 425.16 ("Anti-SLAPP").

Legal Principles

In evaluating a special motion to strike under the anti-SLAPP statute, the court conducts a potentially two-step inquiry. (Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67.)

First, the defendant has the burden of making a threshold showing that the plaintiff's claim arises from protected activity. (Navellier v. Sletten (2002) 29 Cal.4th 82, 88.) To meet its burden, the defendant must demonstrate its act underlying the plaintiff's claim fits one of the categories set forth in subdivision (e) of the anti-SLAPP statute. (Navellier, supra, 29 Cal.4th at p. 88.) Specifically, subdivision (e) provides, in part as relevant here, that an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes … (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(3), (4).)

Second, if the defendant meets its burden under the first prong, then the court proceeds to the next step of the inquiry. In applying the second prong of the anti-SLAPP test, the court asks "whether the plaintiff has demonstrated a probability of prevailing on the claim." (Equilon, supra, 29 Cal.4th at p. 67.)

Discussion

Here, defendant provided evidence that her statements were made in a public forum about an issue of public interest. Specifically, plaintiff's complaint alleges that defendant's purported defamatory and damaging statements about plaintiff were made on June 15, 2020, on Facebook. State courts have held that Facebook's website is a public forum. "Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute." (Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41, fn. 4; see also Cross v. Facebook, Inc. (2017) 14 Cal.App.5th 190, 199 [finding that Facebook is a public forum as it is accessible to anyone who consents to Facebook's Terms].)

As such, the remaining question is whether defendant's statements addressed "an issue of public interest." It should be noted that plaintiff's complaint does not quote or describe the purported defamatory statements made by defendant about plaintiff. Thus, the court cannot determine for certain the substance of defendant's statements. Presumably, the statements were about plaintiff's conduct and/or character given that he alleges in his complaint that he lost 70% of his business and his reputation was damaged as a result of defendant's statements.

Plaintiff declares in his complaint that he is "well known" in the South Lake Tahoe community. (Compl., p. 4.) He ran for county supervisor in 2014, 2018, and 2022 (Mot., Balough Decl., Exs. A–D), and therefore is a public political figure. (See Edward v. Ellis (2021) 72 Cal.App.5th 780, 789.) " ' "[A]n issue of public interest" … is *any issue in which the public is interested*.' [Citation.]" (Rivera v. First DataBank, Inc. (2010) 187 Cal.App.4th 709, 716 [italics in original].) " ' "[A] matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citation.] ... [T]here should be some degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation].... [T]he focus of the speaker's

conduct should be the public interest....” ’ [Citation.] Nevertheless, it may encompass activity between private people. [Citation.]” (Rivera, supra, 187 Cal.App.4th at p. 716 [first alteration and last two omissions added].) Given that plaintiff is a public figure in the community and has run for public office multiple times, the court finds that plaintiff’s conduct and character are very much an issue of public interest in South Lake Tahoe and the area comprising District 5 of the El Dorado County Board of Supervisors.

Based on the foregoing, the court finds that defendant met her burden of making a threshold showing that her statements arose out of protected activity. (See Code Civ. Proc., § 425.16, subd. (e).) As such, the burden shifts to plaintiff to demonstrate a probability of prevailing on the claim. (See Equilon, supra, 29 Cal.4th at p. 67.)

Plaintiff has not met this burden. As an initial matter, he did not file an opposition to the motion. Even so, the court finds that plaintiff cannot demonstrate a probability of prevailing on the claim. The statute of limitations for bringing a defamation claim is one year. (Code Civ. Proc., § 340, subd. (c).) The complaint declares that the statements were posted on Facebook on June 15, 2020. Plaintiff does not set forth any facts in his complaint about late discovery of the alleged defamatory posts. Thus, he had to file an action by June 15, 2021. This action was not filed until January 2022. Because the face of the complaint clearly establishes that plaintiff’s action is barred by the relevant statute of limitations, there is no probability of plaintiff prevailing on the claim.

Accordingly, defendant Jen Dawn’s special motion to strike is granted. “[A] prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney’s fees and costs.” (Code Civ. Proc., § 425.16, subd. (c)(1).) Having reviewed and considered the pleadings and defendant’s moving papers, the court finds that defendant is entitled to a total award of $5,235.00 in attorney fees and costs.

TENTATIVE RULING # 2: DEFENDANT JEN DAWN’S SPECIAL MOTION TO STRIKE PLAINTIFF’S COMPLAINT AGAINST HER IS GRANTED. JUDGMENT IS TO BE ENTERED

AGAINST PLAINTIFF AND IN FAVOR OF DEFENDANT JEN DAWN. DEFENDANT IS AWARDED $5,235.00 IN ATTORNEY FEES AND COSTS. 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.

3. REYES, ET AL. v. STATE OF CAL. DEPARTMENT OF TRANSPORTATION, SC20200027

Oral Argument Re: 4/14/23 Tentative Ruling

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, APRIL 21, 2023, IN DEPARTMENT FOUR.

4. WALLACE, ET AL. v. HENDERSON, ET AL., SC20210157

(1) Motion to Compel Charles Henderson's Production of Documents in Response to Requests for Production of Documents

(2) Motion to Compel Further Deposition Testimony from Charles Henderson

(3) Motion to Compel Further Deposition Testimony from Mark Henderson

(4) Motion to Compel Mark Henderson's Production of Documents in Response to Requests for Production of Documents

(5) Motion to Compel Defendants' Compliance With Statements of Compliance Re: Initial Responses to Discovery

Having reviewed the file and finding multiple discovery issues to be resolved, multiple motions to be heard simultaneously, and that there are numerous and voluminous documents to be reviewed which will make the inquiry inordinately time consuming, the court finds that this is a case in which it is necessary to appoint a discovery referee. (Taggares v. Superior Court (1998) 62 Cal.App.4th 94, 105; Code Civ. Proc., § 639, subd. (a)(5).)

On the court's own motion pursuant to Code of Civil Procedure section 639, subdivision (a)(5), the court will appoint a discovery referee in this case to hear, determine, and report to the court regarding the five pending discovery motions. The court will issue its order no later than May 10, 2023.

TENTATIVE RULING # 4: MATTERS ARE OFF CALENDAR. THE PARTIES ARE REFERRED TO THE FULL TEXT OF THE TENTATIVE RULING.

5. LOPEZ, ET AL. v. GENERAL MOTORS, 22CV0619

Motion to Compel Deposition Attendance of a Person Most Qualified and Custodian of Records

This is a lemon law action. Plaintiffs move, pursuant to Code of Civil Procedure section 2025.450, subdivision (a), for an order compelling defendant General Motors LLC to produce a person most qualified and custodian of records ("PMQ") to be deposed in accordance with Code of Civil Procedure section 2025.230. Plaintiffs further request that the court impose monetary sanctions against defendant and defense counsel.

On December 7, 2022, plaintiffs served defendant via email with a notice of deposition of defendant's PMQ. (Mot., Thomas Decl., Ex. A.) The notice also identified 26 matters for examination and 17 requests for production of documents. (Ibid.) Although the deposition was scheduled for December 29, 2022, plaintiffs' counsel requested alternative dates by December 22, 2022, if defense counsel and the PMQ were unavailable on December 29. (Ibid.)

In an email sent December 28, 2022, plaintiffs' counsel acknowledged receipt of defendant's objections to the notice, but indicated that defendant did not provide any alternative dates for the deposition. (Id., Exs. B, C.) The email from plaintiffs' counsel provided Zoom information for the December 29 deposition. (Ibid.) On December 29, 2022, neither defendant nor the PMQ appeared for the deposition. (Id., Thomas Decl., ¶ 9.) Subsequently, plaintiffs' counsel sent multiple emails to defense counsel requesting alternative dates for the PMQ deposition. (Id., Thomas Decl., ¶ 10 & Ex. B.)

In opposition, defendant states that its objections to the notice encompassed not only the unilaterally scheduled date, but also that the 26 matters for examination and 17 requests for production of documents were not, inter alia, specified with sufficient particularity, were overly broad, and were irrelevant to this action. Defendant contends that plaintiffs did not engage in meaningful meet and confer efforts prior to proceeding

with the December 29 deposition and taking a statement of defendant's non-appearance, or before filing this motion.

"An oral deposition shall be scheduled for a date at least 10 days after service of the deposition notice." (Code Civ. Proc., § 2025.270(a).) If a party served with a deposition notice objects to it, that party must serve a written objection on the party seeking to take the deposition at least 3 days before the date on which the deposition is scheduled. (Code Civ. Proc., § 2025.410(a), (b).) The objection must specify any errors or irregularities in the notice. (Id., subd. (a).)

"The effect of making written objections to a deposition notice is twofold. First, the objecting party need not attend the deposition. Indeed, if the objecting party attends the deposition, any objections to the notice are waived. Second, if the trial court sustains the objections, any subsequent deposition cannot be used at trial against the objecting party. [Citation.]

"However, objecting to the deposition notice alone does not stay the deposition pending determination of the validity of the objections. To stay taking of the deposition until a determination is made regarding the validity of the objections, the objecting party must also file a motion for an order staying the deposition and quashing the deposition notice. [Citation]." (Moore & Thomas, Cal. Civ. Prac. Procedure (Apr. 2023) § 13:54.)

The court finds that defendant's written objections to the notice were timely served via email on December 21, 2022. Thus, defense counsel and the PMQ were not required to appear for the deposition on December 29, 2022. In its objection, defendant agreed to produce a PMQ to testify about the matters for examination numbers 1–10, subject to objections based on attorney-client privilege or attorney work product. Defendant objected to the remaining matters as overly broad and not relevant to the subject matter of the action. Regarding the requests for production of documents, defendant states it identified and referred plaintiffs to specific documents already in plaintiff's possession,

custody, or control that it contends were responsive to plaintiffs' document requests, pursuant to Code of Civil Procedure section 2030.230.

After plaintiffs' receipt of defendant's objections, plaintiffs' counsel should have made a meaningful, good faith effort to meet and confer about all of defendant's objections, not only the deposition date. Merely emailing defense counsel multiple times asking for alternative dates for the deposition does nothing to address defendant's substantive objections. Moreover, the court does not view one sentence emails as a meaningful attempt to meet and confer.

Plaintiffs' motion is denied without prejudice. Counsel for the parties must make meaningful, good faith efforts to resolve defendant's objections to the deposition notice prior to either plaintiffs renewing their motion to compel deposition attendance or defendant bringing a motion for order staying the deposition and quashing the deposition notice. Under the circumstances, the court finds that an award of sanctions for either party is not warranted.

TENTATIVE RULING # 5: PLAINTIFFS' MOTION TO COMPEL DEPOSITION ATTENDANCE OF A PERSON MOST QUALIFIED AND CUSTODIAN OF RECORDS IS DENIED WITHOUT PREJUDICE. 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.

6. PAVLOVA v. FORD MOTOR CO., ET AL., 22CV1701

Defendants' Motions to Compel Arbitration and Stay Action

This is a lemon law action. Plaintiff Viktoriya Pavlova's Complaint asserts causes of action against defendants Ford Motor Company ("Ford") and Performance Automotive Group, Inc., dba Elk Grove Ford ("Dealership") for the following: (1) violations of Civil Code section 1793.2, subdivisions (a)(3), (b), and (d); (2) breach of the implied warranty of merchantability (§§ 1791.1, 1794, and 1795.5; (3) and negligent repair.

On March 2, 2023, defendants filed separate motions to compel arbitration and to stay the action pursuant to the holding in Felisilda v. FCA US LLC (2020) 53 Cal.App.5th 486, and Code of Civil Procedure section 1281.4.

On April 17, 2023, plaintiff filed an opposition as well as a Request for Dismissal of the Complaint without prejudice solely as to the Dealership. Accordingly, the Dealership's motion is moot as it is no longer a party to this action.

Ford filed its reply on April 21, 2023.

1. Legal Principles

Ford's motion is made pursuant to the California Arbitration Act ("CAA"), Code of Civil Procedure section 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 Community Hospital Foundation (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 "to compel arbitration is simply a suit in equity seeking specific performance of that contract." (Engineers & Architects Assn. v. Community Development Dept. (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 Community Clinic (2021) 72 Cal.App.5th 158, 165–166.)

2. Preliminary Matters

Plaintiff's request for judicial notice ("RJN") of Exhibits A, B, and C is granted. (Evid. Code § 452, subds. (d)(1), (e); Cal. Rules of Ct., rule 8.1115, subd. (d) ["A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published."].)

3. Discussion

Ford contends that it may enforce the Arbitration Provision found in the "**RETAIL INSTALLMENT SALE CONTRACT — SIMPLE FINANCE CHARGE (WITH ARBITRATION PROVISION)**" ("Sale Contract") executed by plaintiff at the time of purchase of the subject vehicle on September 7, 2020. (Mot., Rogerson Decl., ¶ 2 & Ex. A, p. 1 [capitalization and bolding in original].) Ford argues it can enforce the provision on either a theory of equitable estoppel or as a third-party beneficiary.

The Arbitration Provision states, in part: "Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our

employee, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract, or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action." (Id., Ex. A, p. 7.)

As noted earlier, on page 1 of the Sale Contract, the title of the contract includes notice of an arbitration provision. (Id., Ex. A, p. 1.) Also on page 1, in a box in the lower right side of the page, is an agreement to arbitrate: "**Agreement to Arbitrate:** By signing below, you agree that, pursuant to the Arbitration Provision on page 7 of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate." (Ibid.) The agreement contains plaintiff's electronic signature. (Ibid.)

On page 6 of the Sale Contract, just above the signature block that plaintiff signed, is the following statement: "**YOU AGREE TO THE TERMS OF THIS CONTRACT**, **YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT**, **WE GAVE IT TO YOU**, **AND YOU WERE FREE TO TAKE IT AND REVIEW IT**. **YOU ACKNOWLEDGE THAT YOU HAVE READ ALL PAGES OF THIS CONTRACT**, **INCLUDING THE ARBITRATION PROVISION ON PAGE 7 OF THIS CONTRACT**, **BEFORE SIGNING BELOW**. **YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT**." (Id., Ex. A, p. 6 [capitalization and bolding in original].)

Based on the foregoing, the court finds that Ford met its initial burden of producing prima facie evidence of the existence of a written agreement to arbitrate. Moreover, in opposition to the motion, plaintiff does not contest the existence of the Sale Contract, the authenticity of the signatures on the contract, or the conscionability of the Arbitration Provision. Rather, plaintiff argues that Ford, as a non-signatory to the Sale Contract,

cannot enforce the Arbitration Provision under the doctrine of equitable estoppel or as a third-party beneficiary.

3.1 EQUITABLE ESTOPPEL

Generally, only a party to an arbitration agreement may enforce the agreement, but the doctrine of equitable estoppel is an exception that allows a non-signatory to enforce an agreement. (Felisilda, supra, 53 Cal.App.5th at p. 495.) "Under the doctrine of equitable estoppel, 'as applied in "both federal and California decisional authority, a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations." [Citations.] "By relying on contract terms in a claim against a nonsignatory defendant, even if not exclusively, a plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement." [Citations.]' [Citation.]" (Id. at pp. 495–496.) "Where the equitable estoppel doctrine applies, the nonsignatory has a right to enforce the arbitration agreement." (JSM Tuscany, LLC v. Superior Court (2011) 193 Cal.App.4th 1222, 1237, fn. 18.)

" 'The fundamental point' is that a party is 'not entitled to make use of [a contract containing an arbitration clause] as long as it worked to [their] advantage, then attempt to avoid its application in defining the forum in which [their] dispute … should be resolved.' [Citation.]" (Jensen v. U-Haul Co. of Cal. (2017) 18 Cal.App.5th 295, 306 [second and third alterations added].) In determining whether a plaintiff's claim is founded on or intimately connected with the sales contract, the court examines the facts of the operative complaint. (Goldman v. KPMG, LLP (2009) 173 Cal.App.4th 209, 229–230.)

The court of appeal in Felisilda held that a nonsignatory may compel arbitration "when claims against the nonsignatory are found in and inextricably bound with the obligations imposed by the agreement containing the arbitration clause." (Id., supra, 53 Cal.App.5th at pp. 495–496.) In Felisilda, the plaintiffs brought claims against the

dealership and the manufacturer under the Song-Beverly Consumer Warranty Act. (Id. at p. 489.) The arbitration award in favor of the manufacturer was ultimately confirmed. (Ibid.) The plaintiffs appealed, arguing in part that the trial court lacked discretion to order the plaintiffs to arbitrate their claim against nonsignatory FCA in the first place. (Ibid.)

The Felisilda court held that plaintiffs were estopped from refusing to arbitrate their claims against the manufacturer. The court reasoned that the complaint alleged the sales contract was the source of the warranties at the heart of the case. (Id. at p. 496.) Further, the plaintiffs' claim against the manufacturer directly relates to the "condition of the vehicle." (Id. at p. 497.) Thus, "[b]ecause the Felisildas expressly agreed to arbitrate claims arising out of the condition of the vehicle—even against third party nonsignatories to the sales contract—they are estopped from refusing to arbitrate their claim against FCA." (Id. at p. 497.)

Citing to Felisilda, Ford argues that plaintiff's claims arise out of the purchase of the subject vehicle that form the basis of the Sale Contract. As such, Ford argues that they may enforce the arbitration provision under the doctrine of equitable estoppel.

In opposition, plaintiff argues that Ford should not be allowed to enforce the arbitration agreement under equitable estoppel because plaintiff's claims are not rooted in the Sale Contract and the language in the Sale Contract makes clear that the contract is distinct from the express warranties. Plaintiff further argues that Felisilda is distinguishable from this case because plaintiff has no claims against the Dealership, the signatory to the arbitration agreement.

The Arbitration Provision in this action is essentially identical as the arbitration provision in Felisilda, including that arbitration applies to claims concerning the "condition of the vehicle" and includes "any resulting transaction or relationship … with third parties who do not sign this contract …." Moreover, as with Felisilda, plaintiff here initiated her action against both the manufacturer and the Dealership, but later dismissed the dealership.

Further, the Complaint alleges that a warranty contract was issued in connection with the subject vehicle. While the Complaint attempts to distinguish Ford's warranty from the Sale Contract itself, the manufacturer's warranty is included as part of the Sale Contract. The same argument was raised by the plaintiffs in Felisilda, whose sales agreement contained the same warranty language as here. The court in Felisilda rejected the argument because "the Felisildas expressly agreed to arbitrate claims arising out of the condition of the vehicle – even against third party nonsignatories to the sales contract …." (Id., supra, at p. 497.) As such, the attempt to differentiate the manufacturer's warranty versus the dealership's warranty is not determinative of the issue of equitable estoppel.

As Felisilda stated, " 'The fundamental point' is that a party is 'not entitled to make use of [a contract containing an arbitration clause] as long as it worked to [their] advantage, then attempt to avoid its application in defining the forum in which [their] dispute … should be resolved.' " (Felisilda at p. 496 [second and third alteration added].) Here, plaintiff's actions are indicative of an attempt to avoid arbitration against another defendant, Ford. Plaintiff filed her lawsuit against both Ford and the Dealership. It was only when both parties moved to compel arbitration that plaintiff dismissed the complaint, without prejudice, against the Dealership on the same day that plaintiff filed her opposition to the motion. As such, there is a public policy reason to find that plaintiff is equitably estopped from preventing Ford from arbitrating.

Lastly, the recent decision in Ochoa is not binding. This court is bound to follow the reasoning in Felisilda since it is controlling precedent and El Dorado County is part of the jurisdiction of the Third Appellate District. The reasoning and holding of Felisilda lead to the conclusion that the doctrine of equitable estoppel permits Ford to compel arbitration of plaintiff's claims against it.

3.2 THIRD PARTY BENEFICIARIES

Because Ford may compel arbitration on a theory of equitable estoppel, the court need not continue to analyze Ford's third-party beneficiary theory for compelling arbitration.

3.3 STAY OF PROCEEDINGS

Pursuant to Code of Civil Procedure section 1281.4, Ford's request for a stay of this action pending the outcome of arbitration is granted.

In conclusion, Ford's motion to compel arbitration and to stay this action is granted. Performance Automotive Group's motion to compel arbitration is moot.

TENTATIVE RULING # 6: DEFENDANT PERFORMANCE AUTOMOTIVE GROUP'S MOTION TO COMPEL ARBITRATION IS MOOT. DEFENDANT FORD MOTOR COMPANY'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION 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.