1. SLATER v. RALEY'S SOUTH Y CENTER, SC20210019

Case Management Conference

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY FEBRUARY 25, 2022, IN DEPARTMENT FOUR.

2. BARACKMAN v. TEAZ N PLEAZ, INC., SC20200179

Final Approval of Class Action Settlement

Pending is plaintiff's unopposed motion for final approval of class settlement. The court preliminarily approved the agreement on October 12, 2021. Having reviewed and considered plaintiff's moving papers, given defendant's non-opposition, and there being no objections, the motion is granted.

1. CLASS CERTIFICATION

The court already granted the motion for preliminary approval and certification of the class and found that the class is sufficiently numerous and ascertainable to warrant certification for the purpose of approving the settlement. There is no reason for the court to reconsider its decision granting certification of the class.

Therefore, the court intends to certify the class for the purpose of final approval of the settlement.

2. SETTLEMENT

2.1 Legal Principles

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required … before securing the court's approval as fair." (*Koby v. ARS Nat'l Services, Inc.* (9th Cir. 2017) 846 F.3d 1071, 1079.) "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement …. The courts are

supposed to be the guardians of the class." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129.)

" '[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished.' [Citations.] 'To make this determination, the factual record before the … court must be sufficiently developed.' [Citation.]" (*Id.* at p. 130.) The court must be leery of a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Id.* at p. 129.)

2.2 The Settlement Is Fair and Reasonable

Previously, the court found that the settlement was fair and reasonable based on the evidence plaintiff submitted in support of the motion for preliminary approval. It does not appear that there is any reason for the court to reconsider its decision in this regard.

The settlement class covers all current and former non-exempt employees of Teaz N Pleaz, Inc., dba Seductions, employed in California between October 12, 2016, and May 10, 2021. There are 154 employees in the settlement class. The gross settlement amount is $225,000. The net settlement fund will be $106,500 after the class representative service award, class counsel fees and costs, PAGA/LWDA allocation, and settlement administration costs. The entire net settlement amount will be distributed to all settlement class members who did not opt out.

The settlement administrator (ILYM Group) sent out the notice packets on November 2, 2021, after the court granted preliminary approval of the settlement. Thirty-three notice packets were returned as undeliverable. Of those 33, ILYM Group was able to obtain updated addresses for 14 members and it re-sent notices to those 14. As of the date of the motion, a total of 19 packets have been deemed undeliverable.

Class members had until December 17, 2021, to submit objections or requests for exclusion. As of the date of filing of the motion for final approval, no objections or exclusions have been received. Thus, the participation rate is 100% of the 154 Settlement Class Members. The lack of any objections or exclusions supports plaintiff's contention that the settlement is fair, adequate, and reasonable.

Plaintiff estimates that each class member will receive an average of $707.79, with the highest estimated payment being $3,871.88. This appears to be an excellent result for the class members. Again, the lack of any objections or exclusions shows that the class members believe that the settlement is fair and reasonable.

Also, the settlement was reached after investigation and discovery, and was the product of arms' length negotiations and mediation between the parties. Furthermore, class counsel are experienced in similar types of class action litigation. These factors also weigh in favor of finding that the settlement is fair and reasonable.

In addition, while the amount of the settlement is less than the total potential value of plaintiff's claims if she prevailed at trial, plaintiff made a decision to settle for less than the full value of her claims based on the risks and uncertainties of litigating the case. Also, the settlement represents between 33.7% of defendant's liability exposure to damages, and 17.1% of defendant's liability exposure for damages and penalties, so the amount of the settlement is still fairly high compared to the total potential value of the case. It appears that plaintiff's acceptance of a smaller amount to avoid the uncertainties of litigation was reasonable here. Therefore, the court intends to find that the settlement is fair, reasonable, and adequate.

3. Attorney Fees and Costs

Plaintiff's counsel seeks a total award of $90,000, which is comprised of $75,000 in attorney fees and reimbursement for costs and expenses not to exceed $15,000. The requested attorney fees represents 1/3 of the gross settlement. The agreement

provides for an award of up to 1/3 of the total gross settlement. Therefore, the request for attorney fees is consistent with the agreement.

Also, the California Supreme Court in *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, held that a court has discretion to grant attorney fees in class actions based on a percentage of the total recovery. (*Id*. at pp. 503–504.) However, the trial court may also use a lodestar calculation to double check the reasonableness of the fee award. (*Id*. at pp. 504–506.)

In the present case, counsel's request for an award equal to 1/3 of the gross settlement appears to be reasonable, especially in light of counsel's experience and the considerable work involved in litigating the case, the risks and potential value of the claims, as well as the results achieved for the class. Plaintiff's counsel has also provided a lodestar calculation of fees, which indicates that a traditional lodestar calculation, to date, is $76,710 exclusive of costs. Thus, the fee request is equal to a lodestar with a modest 0.97 multiplier. The court finds that counsel has adequately justified their request for $75,000 in attorney fees, and the court intends to approve the requested attorney fees.

Likewise, the request for reimbursement of costs not to exceed $15,000 appears to be reasonable, and the court intends to approve it.

4. Payment to Class Representative

Plaintiff also seeks court approval of a $10,000 payment to Jessica Barackman as the named class representative. The amount is based on the work done by Ms. Barackman, as well as the risks she took in being named as class representative, which could have resulted in an award of attorney fees and costs against her if she lost at trial, as well as the danger of being blacklisted by other employers for suing a former employer.

The amount of the payment does not appear to be unusually great in comparison to the awards approved in other cases. Therefore, it appears that the requested $10,000 payment to Ms. Barackman is reasonable and the court intends to approve it.

5. Payment to Class Administrator

Plaintiff also requests court approval of a $8,500 payment to ILYM Group for the costs of administering the settlement. The administrative cost payment appears to be reasonable given the amount of work to be performed in sending out class notices, tracking down missing class members, handling questions from class members and parties, sending out payments to class members, and providing declarations in support of the motions for class settlement approval. Therefore, plaintiff has shown that the payment of $8,500 to the class administrator is reasonable and the court will approve the payment.

2.6 Payment to LWDA under PAGA

Finally, plaintiff seeks approval of $10,000 for settlement of civil penalties under PAGA, Labor Code § 2698, et seq., 75% (or $7,500) of which will be paid to the LWDA pursuant to Labor Code § 2699(i), and $2,500 to the Net Settlement Amount for distribution to the Participating Class Members. The amount to be paid for settlement of civil penalties under PAGA appears to be reasonable. In addition, the LWDA has been served with a copy of the settlement as well as preliminary and final approval motions, and it has not objected to the request to approve the settlement. Therefore, the court intends to find that the payment is reasonable.

TENTATIVE RULING # 2: MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT IS 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.

3. ALVARADO, ET AL. v. AMERICAN HONDA MOTOR CO., SC20210001

Motion to Compel Arbitration and Stay Proceedings

This is a Lemon Law action. Plaintiffs' complaint asserts three causes of action under the Song-Beverly Consumer Warranty Act, Civil Code § 1790, et seq., and one cause of action for fraudulent inducement–concealment. Pending is defendant American Honda Motor Company's ("Honda") motion to compel arbitration pursuant to Code of Civil Procedure § 1281.2, asserting that this lawsuit is bound by a written agreement to arbitrate.

1. LEGAL PRINCIPLES

The California Arbitration Act ("CAA"), Code of Civil Procedure §§ 1280, et seq., 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 of 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 of 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.) Thus, 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.)

A motion to compel arbitration "is simply a suit in equity seeking specific performance of that contract." (*Engineers & Architects Ass'n v. Cmty. Dev. Dep't* (1994) 30 Cal.App.4th 644, 653.) The party seeking to compel arbitration bears the burden of proving the existence of an arbitration agreement, while the party opposing arbitration bears the burden of showing the arbitration provision cannot be interpreted to cover the claims in the complaint. (*EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1321; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 239.)

2. DISCUSSION

Honda contends that plaintiffs agreed to arbitrate all claims pursuant to an arbitration agreement executed by plaintiffs as part of the sales contract. The sales contract is between plaintiff and the seller, Shingle Springs Honda, who is not a party to the lawsuit. (Mot., Declaration of Kevin Petrie, Ex. A.) The arbitration agreement extends to claims arising out of the purchase or condition of the vehicle, the sales contract "or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract." (*Id.*, Ex. A, p. 6, ¶ 3.) The arbitration agreement provides that arbitration may be invoked at the election of either the buyer or the seller.

Plaintiffs oppose the motion, arguing that (1) Honda waived any right it may have had to arbitration, (2) arbitration cannot be compelled by Honda as a non-signatory, and (3) the arbitration clause is procedurally and substantively unconscionable.

The court agrees with plaintiffs that Honda waived the right to arbitrate due to its unreasonable delay in demanding arbitration.

The issue of waiver is a question of fact to be determined by the court. (*Engalla v. Permanente Med. Group, Inc.* (1997) 15 Cal.4th 951, 982.) "Where, as here, no deadline for demanding arbitration is specified in the agreement, the courts allow a *reasonable* time. A party who does not demand arbitration within a reasonable time is considered to have waived the right to arbitrate." (*Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1099 [emphasis in original].) In determining waiver, a court can consider " '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party. [Citations.]' [Citation.]" (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992.)

Although it is true that Honda's new counsel only substituted in on January 5, 2022, this action was commenced a year ago, on January 4, 2021. In its CMC Statement filed on April 20, 2021, Honda's previous counsel requested a jury trial. That same day, Honda posted the required jury fees. Honda's actions, to date, are inconsistent with the right to arbitrate. Further, the "litigation machinery has been substantially invoked." (*Sobremonte*, *supra*, 61 Cal.App.4th at p. 992.) This matter has been actively litigated since its commencement. The parties have already been before this court on one discovery-related motion, and another discovery-related motion is set for hearing on March 11, 2022.

Additionally, if the court were to order arbitration now, plaintiffs would suffer unfair prejudice. Specifically, trial is currently set for July 25, 2022. Plaintiffs would

lose their July 2022 trial date and, by having to start over in an arbitration proceeding, they would be deprived of the benefits of arbitration; i.e., "a speedy and relatively inexpensive means of dispute resolution." (*Moncharsh*, *supra*, 3 Cal.4th at p. 9.)

Given the procedural history of this case, Honda's actions, the impending trial in July 2022, and Honda's unreasonable delay in moving for arbitration, the court finds that Honda waived the right to arbitrate.

TENTATIVE RULING # 3: DEFENDANT'S MOTION TO COMPEL ARBITRATION 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) 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.

4. PERFECT UNION SLT, LLC v. CITY OF S. LAKE TAHOE, SC20210172

Demurrer to First Amended Complaint

Plaintiff Perfect Union SLT, LLC, filed its original complaint in this action on September 22, 2021. On December 6, 2021, plaintiff filed a First Amended Complaint ("FAC") against the City of South Lake Tahoe ("City") for breach of contract[1] arising out of the termination of a Development Use Agreement ("Agreement") concerning the development and operation of a cannabis microbusiness. Pending is the City's demurrer to the FAC.

1. STANDARD OF REVIEW

A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code of Civ. Proc. § 430.30(a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Comm'n on Children's Television, Inc. v. Gen. Foods Corp*. (1983) 35 Cal.3d 197, 213.) All properly pleaded allegations of fact in the complaint are accepted as true, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid*.)

2. PRELIMINARY MATTERS

The City's request for judicial notice is denied as the subject documents are not necessary to the court's determination of the demurrer. Instead, the court relied upon the exhibits to the FAC. "Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become

[1] There are four causes of action for breach of contract based on different theories: (1) declaratory relief, (2) damages, (3) specific performance, and (4) mandatory injunction.

a part of the complaint and may be considered on demurrer. [Citations.]" (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.)

3. DISCUSSION

There are two grounds for the demurrer. First, the City demurs to the entirety of the FAC on the basis that it was filed and served past the 90-day statute of limitations to challenge the City Council's decision to terminate the Agreement. Second, in the alternative, the City demurs to the 2nd C/A on the basis that the claim fails because the Agreement includes a "no damages" provision.

The demurrer on the basis of untimeliness is overruled. City ordinances "take effect 30 days after their final passage." (Gov. Code § 36937.) Here, the final passage (i.e., the second reading) of the ordinance terminating the Agreement took place on June 15, 2021. (FAC, Ex. D.) The ordinance did not take effect until July 15, 2021. Plaintiff's original complaint was filed September 22, 2021, which is less than 90 days after the effective date of the ordinance. Thus, this action was timely filed.

The City's demurrer to the 2nd C/A is also overruled. Liberally construing the allegations of the FAC, whether the "no damages" provision applies to the facts of this case will necessitate resolution of disputed facts. As such, the issue cannot be resolved on demurrer.

TENTATIVE RULING # 4: THE CITY OF SOUTH LAKE TAHOE'S DEMURRER TO THE FIRST AMENDED COMPLAINT IS OVERRULED. THE CITY MUST ANSWER THE FIRST AMENDED COMPLAINT 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

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5. BERNSTEIN v. SEBRING, PC20180264

Motion for Protective Order

Defendant moves for a protective order limiting his deposition to no more than 60 minutes and allowing him to appear remotely at the deposition due to COVID-19. He argues he has already spent 7 hours in deposition by plaintiff on the same issues, and, given the pandemic, defendant does not want to appear in person in the same room with strangers.

The motion is denied. Plaintiff has the right to depose defendant in this action. While this action might be similar to these parties' previous litigation in El Dorado County Superior Court Case No. PC20140070, the claims are not identical. Moreover, this action was filed four years after the prior action and defendant's previous testimony might be stale and outdated. Accordingly, defendant has not demonstrated good cause for limiting his deposition to 60 minutes. (See Code of Civ. Proc. § 2025.420(b).)

Regarding defendant's request to appear remotely, plaintiff submitted a proposed procedure which ameliorates defendant's COVID concerns.

TENTATIVE RULING # 5: DEFENDANT'S MOTION FOR PROTECTIVE ORDER IS DENIED. PLAINTIFF'S PROPOSED DEPOSITION PROCEDURE SHALL BE IMPLEMENTED FOR DEFENDANT'S DEPOSITION. 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.

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