Tentative Rulings for February 10, 2022
Department 502

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

Begin at the next page

(03)

Tentative Ruling

Re: ***Valencia v. Wawona Packing Co., LLC***
Superior Court Case No. 21CECG01163

Hearing Date: February 10, 2022 (Dept. 502)

Motion: Defendant's Motion to Bifurcate Trial and Sequence Discovery

Tentative Ruling:

To deny defendant's motion to bifurcate the trial and sequence discovery. (Code Civ. Proc. §§ 598, 1048, subd. (b).)

Explanation:

The decision to grant or deny a motion to bifurcate issues and to have separate trials, lies within the court's sound discretion. (Code Civ. Proc., §§ 598, 1048, subd. (b); *Grappo v. Coventry Financial Corp*. (1991) 235 Cal.App.3d 496, 503-504; see also *Cook v. Superior Court* (1971) 19 Cal.App.3d 832, 834.) The court also has the power to "provide for the orderly conduct of proceedings before it," and to "amend and control its process and orders so as to make them conform to law and justice." (Civ. Proc. Code § 128, subd. (a)(3), (8).)

Here, defendant claims that it has reason to believe that plaintiff may not have standing to bring his claims under PAGA because there is no record that plaintiff was ever an employee of defendant or suffered any Labor Code violations, and thus he is not an "aggrieved employee" for the purposes of PAGA. (Labor Code § 2699, subd. (a).) Defendant also alleges that it would require significant time and effort to produce employee records and conduct discovery into plaintiff's PAGA and class action claims, which would be wasted if it is later determined that plaintiff never had standing to bring his claims in the first place. Therefore, defendant urges the court to limit discovery to just the issue of whether plaintiff has standing to bring claims on behalf of the other employees, and then hold a separate trial on the issue of whether plaintiff has standing as an aggrieved employee. Only if plaintiff can present evidence showing that he is actually an aggrieved employee would he be allowed to conduct discovery into the class and PAGA claims on behalf of the other employees, and ultimately go to trial on those claims.

To establish standing to bring a PAGA claim, the plaintiff must be an aggrieved employee against whom the alleged violations were committed. (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 83-84.) "Under PAGA, an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 865.)

However, in *Williams v. Superior Court* (2017) 3 Cal.5th 531, the California Supreme Court rejected the contention that "broad discovery in PAGA actions should be limited until after a plaintiff has supplied proof of alleged violations." (*Id.* at pp. 544-545.) "We recognize that in a particular case there may be special reason to limit or postpone a representative plaintiff's access to contact information for those he or she seeks to represent, but the default position is that such information is within the proper scope of discovery, an essential first step to prosecution of any representative action." (*Id*. at p. 544.)

"Nothing in Labor Code section 2699.3, subdivision (a)(1)(A), indicates the 'facts and theories' provided in support of 'alleged' violations must satisfy a particular threshold of weightiness, beyond the requirements of nonfrivolousness generally applicable to any civil filing." (*Id*. at p. 545, internal citation omitted.) "PAGA's standing provision similarly contains no evidence of a legislative intent to impose a heightened preliminary proof requirement. Suit may be brought by any 'aggrieved employee'; in turn, an 'aggrieved employee' is defined as 'any person who was employed by the *alleged* violator and against whom one or more of the *alleged* violations was committed'. If the Legislature intended to demand more than mere allegations as a condition to the filing of suit or preliminary discovery, it could have specified as much. That it did not implies no such heightened requirement was intended." (*Id*. at p. 546, internal citations omitted, italics in original.)

"Moreover, to insert such a requirement into PAGA would undercut the clear legislative purposes the act was designed to serve. PAGA was intended to advance the state's public policy of affording employees workplaces free of Labor Code violations, notwithstanding the inability of state agencies to monitor every employer or industry. By expanding the universe of those who might enforce the law, and the sanctions violators might be subject to, the Legislature sought to remediate present violations and deter future ones. These purposes would be ill-served by presuming, notwithstanding the failure explicitly to so indicate in the text, that deputized aggrieved employees must satisfy a PAGA-specific heightened proof standard at the threshold, before discovery." (*Ibid*, internal citations omitted.)

"As discussed above, to show the merits of one's case has never been a threshold requirement for discovery in individual or class action cases; it is not a threshold requirement here. True, PAGA imposes a standing requirement; to bring an action, one must have suffered harm. But the way to raise lack of standing is to plead it as an affirmative defense, and thereafter to bring a motion for summary adjudication or summary judgment, not to resist discovery until a plaintiff proves he or she has standing." (*Id.* at pp. 558–559, internal citations omitted.)

In the present case, defendant seeks a similar limitation on plaintiff's ability to seek discovery that the California Supreme Court in *Williams* rejected. Defendant wishes to prevent plaintiff from conducting any discovery in the action other than discovery regarding his own standing as an aggrieved employee until after he has proved up that he does in fact have standing to bring his claims under PAGA. Yet under *Williams*, the plaintiff is not required to first prove that he has standing as an aggrieved employee before he can proceed with discovery in the case. (*Williams*, *supra*, at pp. 544-546, 558-559.) As the *Williams* court held, it is enough for plaintiff to allege in the complaint that

he was an employee of the defendant, and that he suffered a Labor Code violation during his employment. (*Id*. at p. 546.) There is nothing in section 2699 that adds an additional requirement that the plaintiff offer evidence at the outset of his case to prove he actually is an aggrieved employee. (*Ibid*.) The court will not insert such a requirement where none exists in the language of the statute. Since plaintiff has alleged that he was an employee of defendant and that he suffered Labor Code violations during his employment, the court will not require him to offer evidence to prove his standing at the outset of the case before he can conduct discovery.

Also, while defendant suggests that plaintiff may not have ever worked for it, defendant has not pointed to any compelling evidence to suggest that plaintiff was not its employee at any time during the class period. Defendant claims that it has reason to believe that plaintiff was not its employee because it was not able to locate any record of an employee with plaintiff's name in its personnel records, or anyone with a similar name. (Erevia decl., ¶ 4.) However, defendant also admits that it has employed over 15,000 employees from April of 2017 to the present, that its records are voluminous, that many of its records are handwritten, and that it would take weeks or months to go through all of the records to investigate plaintiff's claims. (*Id*. at ¶¶ 3, 6, 7.) Thus, it seems possible that defendant's inability to determine whether plaintiff was ever its employee is a result of defendants' own voluminous and poorly organized records, rather than the fact that plaintiff never worked for defendant.

For his own part, plaintiff has submitted a copy of a wage statement with defendant's name and address on it, which is addressed to a "David Flores." (Exhibit A to Feghali decl.) It is somewhat ambiguous whether "David Flores" is the same person as plaintiff, whose full name is David Flores Valencia. Plaintiff himself has not submitted a declaration stating that he worked for defendant or that the wage statement is his. His attorney is the only one who has submitted a declaration to authenticate the wage statement. Nevertheless, the wage statement does appear to indicate that plaintiff worked for defendant, which would support his allegation that he is an aggrieved employee for the purposes of PAGA.

In any event, there does not appear to be good cause here to grant the motion to sequence discovery or bifurcate the trial of the action. As discussed above, plaintiff is not required to prove that he actually is an aggrieved employee in order to seek discovery under PAGA. He only has to allege that he worked for defendant and that defendant violated the Labor Code with regard to his employment. (*Williams*, *supra*, at pp. 544-546.) Since he has alleged these facts in his complaint, he should be allowed to conduct full discovery into his claims, regardless of whether such discovery might be inconvenient to defendant.

Nor has defendant shown that there is good cause to bifurcate the trial, as bifurcation would essentially require plaintiff to try the same issues twice, at least with regard to the issue of his standing to bring the PAGA and class claims. Such duplication would not serve judicial economy or the convenience of the parties, and would be prejudicial to plaintiff. Conducting two separate trials would also likely lead to substantial delays in resolving plaintiff's claims, particularly given the court's congested calendar. Therefore, it does not appear that bifurcation would result in greater efficiency, and in fact it would likely create the opposite effect.

Defendant relies on a federal District Court case and two California Superior Court cases to support its contention that bifurcation of the issue of standing is common in PAGA actions. (*Stafford v. Dollar Tree Stores, Inc*. (E.D. Cal. 2014) 2014 WL 6633396 at * 4 [granting bifurcation of standing issue where plaintiff purported to represent more than 3,000 employees]; *Ybarra v. Apartment Inv. and Mgmt. Co*. (L.A. County Sup. Ct., Feb. 26, 2016) 2016 WL 1359893 at * 3 [trial court granted motion bifurcate trial and conduct discovery on whether plaintiff was aggrieved employee]; *Starks v. Cortex Indus., Inc*. (L.A. County Sup. Ct., April 19, 2017) 2017 WL 4176595 at * 1 [parties stipulated to bifurcate trial into two parts, with first part dealing with issue of whether plaintiff was an aggrieved employee under PAGA].) However, none of these cases are binding authorities on this court, as they are not published appellate court or Supreme Court decisions. In any event, they were decided before *Williams*, and it is not clear that their holdings are relevant after the California Supreme Court's decision in *Williams*. Therefore, the court declines to rely on them in making its ruling in the present case.

Defendant has argued that bifurcation and sequencing discovery would serve the purposes of PAGA, since it would prevent wasted time and party resources on claims where the plaintiff is not an aggrieved employee, as well as preventing "shakedown lawsuits" brought by plaintiffs who lack standing to sue but nevertheless extort settlements from employers who would rather settle questionable cases than incur significant litigation costs. However, the Supreme Court in *Williams* held that requiring the plaintiff to prove that he has standing is contrary to the policy goals underlying PAGA.

"[T]o insert such a requirement into PAGA would undercut the clear legislative purposes the act was designed to serve. PAGA was intended to advance the state's public policy of affording employees workplaces free of Labor Code violations, notwithstanding the inability of state agencies to monitor every employer or industry. By expanding the universe of those who might enforce the law, and the sanctions violators might be subject to, the Legislature sought to remediate present violations and deter future ones. These purposes would be ill-served by presuming, notwithstanding the failure explicitly to so indicate in the text, that deputized aggrieved employees must satisfy a PAGA-specific heightened proof standard at the threshold, before discovery." (*Williams, supra*, 3 Cal.5th at p. 546, internal citations omitted.)

Likewise, here the defendant seeks to impose a requirement that the plaintiff prove his own standing as an aggrieved employee before proceeding with discovery or trial of the representative claims. The language of PAGA does not impose such a requirement at the outset of the case, and the court will not insert such a requirement by limiting discovery and holding a mini-trial on plaintiff's status as an aggrieved employee. Requiring plaintiff to essentially prove at the outset of the case that he is an aggrieved employee would not serve the goals of PAGA, and would actually undermine them by making it more difficult for plaintiffs to bring claims for violations of the Labor Code. Nor has defendant presented any evidence that would tend to show that the plaintiff's case is nothing more than a meritless "shakedown lawsuit" brought to extort a settlement out of the employer. Indeed, plaintiff has submitted at least some evidence that appears to indicate that he was an employee of defendant and that he may have suffered at least one Labor Code violation.

Therefore, the court intends to deny defendant's motion to bifurcate the trial and sequence discovery.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 2/7/2022.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Weber et al. v. Arellano***
Superior Court Case No. 20CECG00623

Hearing Date: February 10, 2022 (Dept. 502)

Motion: Petition for Approval of Compromise of Disputed Claim of Minor

Tentative Ruling:

To deny.

Explanation:

In Attachment 8 petitioner is required to provide a report of the claimant's current condition. Paragraph 8(a) of the Petition states that the claimant is fully recovered from her injuries, but the medical records provided do not include a report of her current condition or any record showing that she has fully recovered. The most recent report is from the chiropractor indicating that the claimant was 60% recovered at that time. The petition must be accompanied by a report of the claimant's current condition, or documentation showing full recovery.

Section 11b(6) of the Petition requires an explanation of the "Reasons for the apportionment of the settlement payments between the claimant and each other plaintiff or claimant …." Attachment 11b(6) states, "There is no apportionment of settlement funds. Defendants are paying the full value of each claim based upon the severity of each of their injuries."

From the medical records provided, it appears that the injuries suffered by Brittany Weber were similar to those suffered by claimant, yet the settlement payment to Brittany Weber is $240,000, compared to $15,000 for claimant. The court requires a more detailed explanation in Attachment 11b(6), including information about the policy limits and generally the nature of Brittany Weber's injuries.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 2/7/22.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Public Employment Relations Board v. Clovis Unified School District***
Superior Court Case No. 21CECG02548

Hearing Date: February 10, 2022 (Dept. 502)

Motion: By Petitioner Public Employment Relations Board's Motion for a Preliminary Injunction

Tentative Ruling:

To deny.

Explanation:

Injunctive Relief under the Educational Employees Relations Act

To further its stated purpose of promoting improvement of personnel management within the California public school system (Gov. Code., §3540), the Education Employees Relations Act ("EERA") permits public school employees to participate and form in representative organizations and prevents the employers from denying such rights. (Gov. Code., §§ 3543; 3543.5; *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 894 (*Modesto*).) The EERA authorizes "appropriate temporary relief or restraining order[s]" (Gov. Code, § 3541.3, subd. (j)), however, before such injunctive relief is granted, "the trial court must determine that there exists *reasonable cause* to believe an unfair labor practice has been committed and that the relief sought is *just and proper." (Modesto, supra,* 136 Cal.App.3d at p. 896-897 *[*noting that "[w]e believe that traditional equitable considerations would certainly come into play during this part of the test.*"].)*

In addition, generally "'the trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court's province to resolve conflicts.' " (*Hilb, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 Cal.App.4th 1812, 1820.) Consideration of injunctive relief in an unfair labor practice case may involve hearsay. (*Coffman v. Queen of the Valley Medical Center* (9th Cir. 2018) 895 F.3d 717, 729.)

Reasonable Cause

Whether there is reasonable cause to believe an unfair labor practice has been committed requires only a "minimal" burden of proof and is met if the theory is "neither insubstantial nor frivolous." (*Modesto, supra,* 136 Cal.App.3d at p. 896-897.) Accordingly, the "key question is *not* whether PERB's theory would eventually prevail, but whether it is *insubstantial* or *frivolous." (Ibid.)* In addition, PERB is vested with "[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what

remedy is necessary to effectuate the purposes of this chapter …." (Gov. Code., § 3541.5; *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1458.) Although the court generally is not "bound by the recommendations" of the administrative agency (*Modesto, supra,* 136 Cal.App.3d 881, 896), deference to their statutory interpretations and determination is afforded. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 53; *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831.) In essence, there is "a general scheme of recognizing the importance of deferring to the expertise of PERB in appropriate circumstances." (*Modesto, supra,* 136 Cal.App.3d at p. 894.)

Furthermore, "[i]t is unlawful for a public school employer to do any of the following: [¶] (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." (Gov. Code, § 3543.5, subd. (d).) And "[a] public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization …." (Gov. Code, § 3550.)

The motions filed by the Public Employment Relations Board ("PERB") and the Association of Clovis Educators ("ACE"), as well as the PERB decision filed on December 17, 2021, contend there is reasonable cause to believe District has committed unfair practices because it has not acted neutrally and has favored Faculty Senate ("FS") to the detriment of ACE. As plainly summarized in the PERB decision, "[w]ithout an injunction, the District can continue to use the Senate as *cudgel to crush* ACE's organizing efforts." (PERB decision, pg. 39, emphasis added.)

In its motion, PERB asserts the claims made in its unfair practices charge as the basis for injunctive relief, contending that District committed unfair practices by "(1) financing and supporting FS's representation of employees; (2) dominating and interfering with the administration and governance of FS; (3) breaching its duty of strict neutrality by favoring FS over ACE; (4) interfering with ACE's statutory right to organize and represent employees, as well as the employees' right to be represented by an employee organization of their own choosing; (5) supporting FS's statements declaring that it is the recognized representative of teachers and opposing unionization of teachers; and (6) surveilling e-mail communications between ACE and its supporters." (Mtn, pg. 1:15-21.)

Clovis Unified School District's ("District") opposition is supported by a declaration from its associate superintendent, Barry Jager ("Jager"), who has held the position since 2014. Jager's declaration notes that previous vehicle and miscellaneous supply allowances have been discontinued (*Id*. at ¶¶ 13-17), and equal access is and will be afforded to ACE for purposes of meeting with superintendents and accessing committees and meetings. (*Id*. at ¶¶ 23-24.) Jager's declaration also states that the FS president is relieved of teaching duties as a "teacher on special assignment," but notes that the president's release time is 100% and the vice president's release time is 40%. (*Id*. ¶ 12.) He also notes that although employment matters may be presented by FS, their relationship with District "is not a bargaining relationship." (*Id*. at ¶¶ 2, 4.)

PERB's reply contends that the decision filed December 17, 2021 establishes reasonable cause of District's continued favoritism and dominance of FS. However, unlike the "hastily" created unions addressed in the PERB decision (see PERB decision pp. 37-38), here there is credible evidence that FS has existed since 1982, is comprised of senators who are peer selected, and is internally governed. (Jager, ¶ 2.) Furthermore, District has undertaken to provide ACE equal access to leadership, superintendents and committees and meetings (Jager Decl. ¶¶ 22-24), and has ceased distributing the materials contended to be "anti-union," such as "Doc's Charge." (*Id*. at ¶ 34.)

PERB's reply also contends that District continues to provide financial support to FS. However, it is undisputed that ACE declared its intent to unionize less than a year ago, and FS has had a lengthy and substantial existence. (Jager, Decl. ¶ 2.) Accordingly, to the extent FS is an appropriate employee organization despite the absence of a bargaining relationship (see Gov. Code, § 3543.2 [setting forth limitations of what constitutes an employee organization]), given FS's lengthy existence and historical operational input, the close proximity of ACE's formation, and the pendency of this litigation, the release time provided to one and half positions does not demonstrate the same degree of reactionary dominance displayed in the cases relied upon and discussed in the PERB decision. (See PERB Decision, pp. 37-38.) Therefore, District is not substantially exerting dominance or otherwise interfering with organizational activities sufficient to establish the "reasonable cause" prong required for interim injunctive relief. (cf. *Modesto, supra,* 136 Cal.App.3d at p. 901-902 [substantive reasonable cause demonstrated because the district refused to continue meeting and negotiating following exhaustion of statutory impasse procedures].)

Just and Proper

The just and proper standard is met "[w]here there exists a probability that the purposes of [EERA] will be frustrated unless temporary relief is granted or the circumstances of a case create a reasonable apprehension that the efficacy of the [Board's] final order may be nullified, or the administrative procedures will be rendered meaningless." (*Modesto, supra,* 136 Cal.App.3d at p. 902, internal brackets and quotations omitted.) However, "where the injunction is sought solely to prevent recurrence of proscribed conduct which has, in good faith been discontinued, there is no equitable reason for an injunction." (*People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 476.) Furthermore, it is error to grant a preliminary injunction where there is no showing that the subject activities will repeat or recur. (*Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 431; *Donald v. Cafe Royale, Inc*. (1990) 218 Cal.App.3d 168, 184 ["An injunction should not be granted as punishment for past acts where it is unlikely that they will recur."].)

With the exception of "release time," Barry Jager's 15 page declaration largely provides assurances of equal access to ACE (see e.g., Jager Decl. ¶¶ 21, 22, 23, 24, 33, and 34), and there does not appear to be any cognizable challenge to Jager's ability to attest to these assurances or substantive attacks to his credibility. In addition, as it relates to release time, the PERB decision notes that "PERB precedent does not clearly

demarcate the line between permissible and impermissible employer support." (See PERB Decision, pg. 25.) And, "[t]he general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action." (*Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1280.) Accordingly, because it is not clear that release time is itself an unfair practice, and because that issue can be clarified by future PERB determinations and remedied on final adjudication, disrupting the status quo by eliminating the time release provisions is not required to serve the purposes of the EERA. (*Modesto, supra,* 136 Cal.App.3d at pp. 886-887.)

Consequently, in light of District's substantive actions to assure equal treatment between ACE and FS, it does not appear that PERB's administrative procedures will be rendered meaningless without injunctive relief. Therefore, it does not appear just and proper to issue the subject injunction.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 2/8/2022.
(Judge's initials) (Date)

(30) **Tentative Ruling**

Re: ***George Krikorian Stables, LLC v. World Wide Horse Services, Inc.***
Superior Court Case No. 21CECG03300

Hearing Date: February 10, 2022 (Dept. 502)

Motion: Application to Appear Pro Hac Vice re: Robert D. Kinsey, Jr.

Tentative Ruling:

To grant.

Explanation:

California Rules of Court, rule 9.40 sets for the requirements for eligibility to be admitted pro hac vice in this state. If such requirements are met, the decision whether to admit or deny the application is a discretionary decision.

Attorney Robert D. Kinsey, Jr. meets all the mandatory provisions of rule 9.40, and this court exercises discretion to so admit him for this case.

Pursuant to California Rules of Court, rule 391(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 2/8/2022 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Stegmeir et al. v. Willow Creek Post Acute, LLC et al.***
Superior Court Case No. 21CECG02163

Hearing Date: February 10, 2022 (Dept. 502)

Motion: by defendants to compel arbitration

Tentative Ruling:

To grant and order plaintiffs to arbitrate their claims against defendants. This action is stayed pending completion of arbitration.

To deny plaintiffs' request to include provisions in the order appointing an arbitrator, providing for any means to discovery, or declaring that defendants are solely responsible for arbitration fees.

Explanation:

Plaintiffs filed a complaint for damages for the wrongful death of decedent Donald Stegmeir, for elder abuse pursuant to the Elder Adult and Dependent Adult Civil Protection Act, and for negligent hiring and supervision. In response, defendants filed a petition to compel arbitration, citing an arbitration agreement ("Agreement") among the parties. In opposition, plaintiffs do not contest the Agreement nor its application to the complaint. Rather, plaintiffs oppose on the limited basis that any order to compel arbitration include provisions stating that California discovery laws must be observed, that defendants are responsible for the arbitration fees, and naming an arbitrator.

As a preliminary note, as the parties agree that the Agreement is valid and applies to the issues raised in the complaint, the petition to compel arbitration is granted, and the parties are ordered to arbitration. As defendants requested a stay in their moving papers, the matter is stayed pending outcome of the arbitration. (Code Civ. Proc. § 1281.4.)

Discovery

Plaintiffs request that the order compelling arbitration include a provision that California discovery laws control. Though the Agreement states, as defendants point out in their petition, that the Federal Arbitration Act ("FAA") shall control, California courts are not beholden to federal procedural rules to the extent that California procedure does not conflict.

As plaintiffs note, the California Supreme Court disagrees with the wholesale adoption of federal law, holding that "[b]ecause the California procedure for deciding motions to compel serves to further, rather than defeat, full and uniform effectuation of the federal law's objectives, the California law, rather than section 4 of the [FAA], is to be followed in California courts." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14

Cal.4th 394, 410 [emphasis added].) Like other federal procedural rules, to the extent the state procedures do not defeat the rights granted by Congress, federal procedural rules are not binding on California courts' determination to compel arbitration. (*Id.* at p. 396.) Thus, to the extent that California procedure does not frustrate federal law, California procedure controls in California courts.

Plaintiffs argue that Code of Civil Procedure section 1283.05 demands certain discovery, in accordance with the Civil Discovery Act, be made available to them in arbitration because, as section 1283.1 declares, the provisions of section 1283.05 are incorporated, as a matter of law, into any arbitration agreement involving injury or wrongful death. (Code Civ. Proc. §§ 1283.05, 1283.1.)

Code of Civil Procedure section 1283.05 provides, in pertinent part:

> (a) After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of Title 3 of Part 4, and in Title 4 (commencing with Section 2016.010) of Part 4, as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section.

Code of Civil Procedure section 1283.1 provides:

> (a) All of the provisions of Section 1283.05 shall be conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another.

Defendants concede the substance of the two provisions cited by plaintiffs. However, defendants correctly argue that these provisions do not empower the court to enforce adherence to such provisions. Defendants rely on *Alexander v. Blue Cross of California*, (2001) 88 Cal.App.4th 1082, which is instructive.

In *Alexander*, among other issues, a dispute arose as to whether an arbitrator exceeded the scope of his powers regarding discovery. (*Id.* at pp. 1086-1087.) The arbitrator heard and granted plaintiff's prehearing discovery motions to compel responses as to interrogatories and requests for admissions, but did not grant the request for admissions be deemed admitted. (*Id.* at p. 1086.) On review, the Court of Appeals found as follows. As a general rule, the right to discovery is highly restricted in arbitration proceedings. (*Id.* at p. 1088, *citing Coast Plaza Doctors Hospital v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 690, fn. 9.) The court found that Code of Civil Procedure sections 1283.05 and 1283.1 conferred authority in any arbitration arising out of or resulting

from injury to, or death of, a person caused by the wrongful act or neglect of another, and that that authority was broad to order discovery. (*Alexander*, *supra*, 88 Cal.App.4th at p. 1088.)

Moreover, the arbitrator ruled that section 1283.1 applied due to the case involving personal injury from a wrongful act, and ordered discovery pursuant to section 1283.05. (*Alexander*, *supra*, 88 Cal.App.4th at p. 1088.) Though the plaintiff contended that the mandatory incorporation of the provisions of section 1283.05 meant that California discovery laws controlled the arbitrator's power to enforce discovery, and thus any order inconsistent with California law meant that the arbitrator had exceeded the scope of his powers, the court disagreed. (*Id.* at p. 1089.) The court agreed with the arbitrator's finding that section 1283.05 gives the arbitrator power to enforce rights, remedies, procedures, duties, liabilities, and obligations of discovery, but it does not give the arbitrator the obligation, or impose a requirement to do so. (*Ibid.*) The court concluded that "the plain and commonsense meaning of these terms is that the arbitrator has the power, but not the duty, to impose discovery sanctions short of arrest or imprisonment." (*Id.* at p. 1090.)

In sum, discovery matters are within the realm of the arbitrator's control, and the arbitrator is empowered, but not required, to follow California discovery law. (*Alexander*, *supra*, 88 Cal.App.4th at p. 1090.)[1]

Arbitrator Fees

Plaintiffs request that the order compelling arbitration include that defendants be responsible for the entire arbitration fee pursuant to the Agreement. The pertinent provision states:

> For arbitrations initiated by the Resident, the Resident shall pay for one half of the fees and expenses of arbitration, up to the lessor of the then-existing fee for filing a lawsuit in the federal district court with jurisdiction over the county in which the Facility is located or the then-existing fee for filing a lawsuit in the state superior court in the county in which the Facility is located. For arbitrations initiated by the Facility, the Resident shall not pay any portion of the fees and expenses of arbitration. The Facility shall pay for all fees and expenses of arbitration not paid by the Resident, unless the Resident objects and wishes to pay some portion of those fees and expenses, not to exceed one-half of the fees and expenses. Except as required by law and except with respect to any costs and fees that may be awarded by the arbitrator, each party shall bear its own costs and fees

[1] Plaintiffs additionally argue that they are entitled to discovery under the *Armendariz* factors governing unconscionability of arbitration provisions. (*Armendariz v. Foundation Health Psychcare Svcs., Inc.* (2000) 24 Cal.4th 83.) Plaintiffs make no specific argument other than that for an arbitration provision to not be unconscionable, *Armendariz* requires assurances of adequate discovery. (*Id.* at pp. 104-105.) *Armendariz* does not change the outcome. As noted in *Armendariz*, implied in the arbitration agreement is the agreement, absent express language to the contrary, to such procedures as necessary to arbitrate the claim. (*Id.* at p. 106.) Such procedures are, however, determined by the arbitrator, and subject to limited review under Code of Civil Procedure section 1286.2. (*Ibid.*)

> for the arbitration, including attorney's fees. (Declaration of Hunter McLane, ¶ 5 and Ex. B.)

Defendants in reply make no specific argument on this issue.

When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 433.) This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. (*Ibid.*)

A plain reading of the Agreement reveals that decedent and defendant Willow Creek Healthcare Center agreed that all disputes, controversies, demands, or claims, that relate to or arise out of the provision of services by Willow Creek Healthcare Center to decedent, including any action for injury or death arising from negligence, wrongful death, intentional tort, or statutory cause of action, including the Elder Abuse and Dependent Adult Civil Protection Act, will be determined by submission to arbitration, and not by a lawsuit or court process except as California law provides for judicial review of arbitration proceedings. (McLane Decl., ¶ 5, and Ex. B, ¶ 2.)

Thus, though plaintiffs argue that defendants bring the present motion to compel arbitration, plaintiffs' filing of the instant action rather than seeking arbitration at the first instance compels a finding that plaintiffs, not defendants, initiated proceedings. The Agreement binds all successors, such as plaintiffs. (McLane Decl., ¶ 5, and Ex. B, ¶ 7.) Thus, as the Agreement dictates, plaintiffs shall be responsible for arbitration fees, up to a total of the filing fee of this complaint in a Superior Court of California. (McLane Decl., ¶ 5, and Ex. B, ¶ 9.) To the extent that the fees of arbitration are not covered by plaintiffs' portion, Willow Creek Healthcare Center agreed to be responsible for the balance absent plaintiffs' objection otherwise. (*Ibid.*) Therefore, plaintiffs request that the order reflect that defendants are the initiating party and therefore bound to pay all costs of the arbitrator is denied.

Arbitrator

Plaintiffs request that the order compelling arbitration include the naming of an arbitrator. All parties refer to Code of Civil Procedure section 1281.6.[2] Section 1281.6 provides:

> If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed

[2] The federal equivalent, under Section 5 of Title 9 of the United States Code, is not materially different.

> fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.

A plain review of the Agreement reveals no particular method for selection of the arbitrator other than that the arbitrator must be an attorney or retired judge. (McLane Decl., ¶ 5, and Ex. B, ¶ 8.)

However, in the parties' meet and confer efforts, a method was proposed, and adhered to. (Plaintiffs' Opposition, Ex. 2, p. 9.) On September 24, 2021, plaintiffs forwarded four names in the Southern California area, and alternatively, five additional names, should defendants require the arbitration site be Fresno County per the Agreement. (*Ibid.*) Plaintiffs proposed that if defendants were unsatisfied with the names, defendants could name four alternatives. (*Ibid.*) Should neither side agree to a name on the other's list, the parties would strike all but one name from their own list, and submit the two remaining names to the court for selection. (*Ibid.*) In response on October 13, 2021, defendants stated dissatisfaction with plaintiffs' proposed arbitrators, and as requested, listed four of their own proposed arbitrators. (*Id.*, Ex. 4.)

Through the parties' actions, the court finds that the parties agreed to plaintiffs' proposed method of selecting an arbitrator. In keeping with that implied agreement, the parties are directed to meet and confer further as to the arbitrator, and if necessary, petition the court under Code of Civil Procedure section 1281.6.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 2/8/2022.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Troupe et al. v. Willow Creek Post Acute, LLC et al.***
Superior Court Case No. 21CECG02330

Hearing Date: February 10, 2022 (Dept. 502)

Motion: by defendants to compel arbitration

Tentative Ruling:

To grant and order plaintiffs to arbitrate their claims against defendants. This action is stayed pending completion of arbitration.

To deny plaintiffs' request to include provisions in the order appointing an arbitrator, providing for any means to discovery, or declaring that defendants are solely responsible for arbitration fees.

Explanation:

Plaintiffs filed a complaint for damages for the wrongful death of decedent Sandra Troupe, for elder abuse pursuant to the Elder Adult and Dependent Adult Civil Protection Act, and for negligent hiring and supervision. In response, defendants filed a petition to compel arbitration, citing an arbitration agreement ("Agreement") among the parties. In opposition, plaintiffs do not contest the Agreement nor its application to the complaint. Rather, plaintiffs oppose on the limited basis that any order to compel arbitration include provisions: stating that California discovery laws must be observed, stating that defendants are responsible for the arbitration fees, and naming an arbitrator.

As a preliminary note, as the parties agree that the Agreement is valid and applies to the issues raised in the complaint, the petition to compel arbitration is granted, and the parties are ordered to arbitration. As defendants requested a stay in their moving papers, the matter is stayed pending outcome of the arbitration. (Code Civ. Proc. § 1281.4.)

Discovery

Plaintiffs request that the order compelling arbitration include a provision that California discovery laws control. Though the Agreement states, as defendants point out in their petition, that the Federal Arbitration Act ("FAA") shall control, California courts are not beholden to federal procedural rules to the extent that California procedure does not conflict.

As plaintiffs note, the California Supreme Court disagrees with the wholesale adoption of federal law, holding that "[b]ecause the California procedure for deciding motions to compel serves to further, rather than defeat, full and uniform effectuation of the federal law's objectives, the California law, rather than section 4 of the [FAA], is to be followed in California courts." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14

Cal.4th 394, 410 [emphasis added].) Like other federal procedural rules, to the extent the state procedures do not defeat the rights granted by Congress, federal procedural rules are not binding on California courts' determination to compel arbitration. (*Id.* at p. 396.) Thus, to the extent that California procedure does not frustrate federal, California procedure controls in California courts.

Plaintiffs argue that Code of Civil Procedure section 1283.05 demands certain discovery, in accordance with the Civil Discovery Act, be made available to them in arbitration because, as section 1283.1 declares, the provisions of section 1283.05 are incorporated, as a matter of law, into any arbitration agreement involving injury or wrongful death. (Code Civ. Proc. §§ 1283.05, 1283.1.)

Code of Civil Procedure section 1283.05 provides, in pertinent part:

> (a) After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of Title 3 of Part 4, and in Title 4 (commencing with Section 2016.010) of Part 4, as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section.

Code of Civil Procedure section 1283.1 provides:

> (a) All of the provisions of Section 1283.05 shall be conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another.

Defendants concede the substance of the two provisions cited by plaintiffs. However, defendants correctly argue that these provisions do not empower the court to enforce adherence to such provisions. Defendants rely on *Alexander v. Blue Cross of California*, (2001) 88 Cal.App.4th 1082, which is instructive.

In *Alexander*, among other issues, a dispute arose as to whether an arbitrator exceeded the scope of his powers regarding discovery. (*Id.* at pp. 1086-1087.) The arbitrator heard and granted plaintiff's prehearing discovery motions to compel responses as to interrogatories and requests for admissions, but did not grant the request for admissions be deemed admitted. (*Id.* at p. 1086.) On review, the Court of Appeals found as follows. As a general rule, the right to discovery is highly restricted in arbitration proceedings. (*Id.* at p. 1088, *citing Coast Plaza Doctors Hospital v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 690, fn. 9.) The court found that Code of Civil Procedure sections 1283.05 and 1283.1 conferred authority in any arbitration arising out of or resulting

from injury to, or death of, a person caused by the wrongful act or neglect of another, and that that authority was broad to order discovery. (*Alexander*, *supra*, 88 Cal.App.4th at p. 1088.)

Moreover, the arbitrator ruled that section 1283.1 applied due to the case involving personal injury from a wrongful act, and ordered discovery pursuant to section 1283.05. (*Alexander*, *supra*, 88 Cal.App.4th at p. 1088.) Though the plaintiff contended that the mandatory incorporation of the provisions of section 1283.05 meant that California discovery laws controlled the arbitrator's power to enforce discovery, and thus any order inconsistent with California law meant that the arbitrator had exceeded the scope of his powers, the court disagreed. (*Id.* at p. 1089.) The court agreed with the arbitrator's finding that section 1283.05 gives the arbitrator power to enforce rights, remedies, procedures, duties, liabilities, and obligations of discovery, but it does not give the arbitrator the obligation, or impose a requirement to do so. (*Ibid.*) The court concluded that "the plain and commonsense meaning of these terms is that the arbitrator has the power, but not the duty, to impose discovery sanctions short of arrest or imprisonment." (*Id.* at p. 1090.)

In sum, discovery matters are within the realm of the arbitrator's control, and the arbitrator is empowered, but not required, to follow California discovery law. (*Alexander*, *supra*, 88 Cal.App.4th at p. 1090.)[1]

Arbitrator Fees

Plaintiffs request that the order compelling arbitration include that defendants be responsible for the entire arbitration fee pursuant to the Agreement. The pertinent provision states:

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