Tentative Rulings for November 2, 2022
Department 1

To request oral argument, you must notify Judicial Secretary Amy Norton at (760) 904-5722 and inform all other counsel no later than 4:30 p.m.

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings. (See Riverside Superior Court Local Rule 3316.) Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at https://www.riverside.courts.ca.gov/OnlineServices/TentativeRulings/tentative-rulings.php. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

If the Court has issued a tentative ruling, no hearing will be conducted on the motion unless one of the parties requests oral argument. To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department 1 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear telephonically, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

If oral argument is requested, the hearing will be conducted at 8:30 A.M., even if the hearing had been scheduled to begin at 9:00 A.M.

IN LIGHT OF THE CORONAVIRUS PANDEMIC, IF ORAL ARGUMENT HAS BEEN REQUESTED, THE COURT ENCOURAGES COUNSEL AND SELF-REPRESENTED PARTIES TO APPEAR AT THE HEARING OF THE MOTION TELEPHONICALLY RATHER THAN IN PERSON.

TO APPEAR TELEPHONICALLY: On the day of the hearing, call into one of the phone numbers listed below, and input the meeting number (followed by #):

- Call-in Numbers: 1-833-568-8864 (Toll Free), 1-669-254-5252, 1-669-216-1590, 1-551-285-1373 or 1-646-828-7666
- Meeting Number: 160 638 4172

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

For additional information and instructions on telephonic appearances, visit the court's website at https://www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php

Effective May 3, 2021, official court reporters will not be available in unlimited civil for any pretrial proceedings, law and motion matters, case management hearings, civil restraining orders, and civil petitions. (See General Administrative Order No. 2021-19-1)

1.

CVRI2102600	ROBERT LOPEZ HERNANDEZ, JR. VS KARHAY LLC	MOTION FOR APPROVAL OF PAGA SETTLEMENT

Tentative Ruling:

The plaintiff's motion for approval of a proposed PAGA settlement is not granted. The hearing is continued to 12-16-22. No later than 12-8-22, the plaintiff shall file amended, supplemental, or revised documents sufficient to address the issues listed under ##4 and 5 below, and otherwise to fully comply with the Court's CMO.

Analysis:

The plaintiff's first motion for approval was denied in part on 6-30-22, and denied in its entirety on 7-28-22 after the parties could not reach agreement on the terms of a revised release. On 9-12-22, the plaintiff filed a second motion for approval.

1. Enhancement:

The motion seeks a $1,000 enhancement for the plaintiff. (Memo., pp. 19-20.) That request was denied on 6-30-22. As the Court explained at the time: "The CMO, at § F.7.c., requires a declaration from the plaintiff providing an evidentiary basis for an enhancement award, such as the time spent on litigation related activities, any expenses incurred, any risk or adverse consequences of filing the lawsuit and any other benefits received. The declaration from the plaintiff, filed 6-28-22, is not signed, and thus fails to provide any evidentiary basis for the award. Moreover, it fails to describe the services he performed or to estimate the time that the plaintiff incurred as a PAGA representative. Any reward that the plaintiff might be entitled to for initiating this lawsuit was provided by the settlement of his individual claim. Besides, the Court is not aware of any persuasive authority that PAGA authorizes such enhancement awards to be deducted from the penalties due to the LWDA."

The renewal of that previously denied request constitutes a motion for reconsideration. (Code Civ. Proc., § 1008.) A motion for reconsideration requires a showing of new law or new evidence that could not have reasonably been presented at the prior hearing. Here, there is no such showing. Accordingly, the motion for reconsideration is denied, and the request for an enhancement is once again denied.

Additionally, given that the plaintiff is collecting $75,000 in satisfaction of unpled claims, his request for additional funds at the expense of the LWDA is unjustified.

2. Attorney's Costs:

The motion seeks attorney costs. (Memo., pp. 22-23.) The Court denied that request on 6-30-22, explaining that, contrary to § F.5.d. of the CMO, no evidence had been submitted to support that request. Accordingly, the renewal of that request is a motion for reconsideration, which must be supported by new law or new evidence that could not have been offered at the prior hearing.

This time, the request is supported by evidence. (Decl. of LaCour, ¶ 73; Exh. G.) However, no evidence is offered as to why that evidence could not have been presented in the earlier motion. Therefore, the motion for reconsideration fails to provide the detail required by § F.5.d. For both reasons, the request for costs is once again denied.

3. Administrator's Fee

The plaintiff seeks approval of an administrator's fee in the sum of $8,310.74. (Memo., p. 23.) That request is denied. The administrator is seeking $5,500, not $8,310.74. (See Exh. E, p. 1.) That flat fee is approved.

4. Attorney's Fees

It does not appear that any attorney's fees are being deducted from the individual settlement. If, as counsel indicates, all work performed on Plaintiff's PAGA claim was work that would have needed to be performed to prosecute the individual claim (Lacour Decl., ¶ 65), why should all attorney's fees be allocated to the PAGA claim?

The typical contingency fee is one third. Absent an extraordinary settlement, the Court is unlikely to award a greater percentage.

5. Other Issues Concerning the Settlement:

The declaration is inconsistent regarding the amendment. Paragraph 2 says that the amended agreement is Exhibit A. But paragraph 3 refers to a proposed amendment and says that counsel was unable to attach an executed amended agreement. That inconsistency must be resolved.

The amended settlement agreement was executed in September of 2022. (Ex. A.) The notice of the settlement was sent to the LWDA on June 28, 2022. (Ex. D.) Thus, there is no evidence that the LDWA has been notified of the terms of the settlement as amended.

The agreement regarding the individual settlement is not executed.

The individual settlement agreement recites that it pertains to an action pending in Los Angeles County.

The consideration to be paid pursuant to the individual settlement agreement is said to be based upon 5 years of lost wages allegedly suffered by the plaintiff as the result of a retaliatory constructive termination, but no evidence is offered of when that termination occurred or what the plaintiff's lost-of-income damages have been since the date of that termination. Indeed, the plaintiff's declaration mentions nothing about any retaliation, termination, or lost wages. Without that evidence, the Court cannot determine the approximate value of the plaintiff's individual claims and cannot conclude that the over-all settlement is fair.

Although one is not explicitly required by the CMO, there is no proposed order or judgment.

2.

CVRI2105444	MENDEZ VS MURILLO	MOTION TO TAX COSTS

Tentative Ruling:

The plaintiffs' motion is granted in part and denied in part. In particular, it is granted to the extent that it seeks to tax the costs claimed by the defendants in item Nos. 11 and 16, which result in a reduction of $163, bringing the total of recoverable costs down to $1,535.84. The motion is denied to the extent that the plaintiffs seek to recover their own costs of service of the defendants pursuant to Code of Civil Procedure section 415.30, subdivision (d).

As to the case management conference scheduled concurrently, the plaintiffs and the cross-complainants shall be prepared to explain why there has not been any proof of service filed regarding defendants and cross-defendants Nous Annuit and Desert Shores Trailer Park, Incorporated.

Analysis:

Item No. 11 ($14 for court reporter fees): Defendants do not dispute this item should be taxed.

Item No. 16 ($149 for filing service provider fee for advancing fees): This item is neither specifically allowable nor prohibited by Code of Civil Procedure section 1033.5. Therefore, recovery is within the Court's discretion.

Defendants contend their electronic filing service provider charged a mandatory 10% of filing fees for having to advance fees. Code of Civil Procedure section 1010.6 allows a party to choose the electronic filing servicer provider when the court requires electronic filing and service in civil actions. (Code Civ. Proc., § 1010.6, subd. (d)(2).) Plaintiffs offer evidence that their own provider does not charge any "advancing fee." (Declaration of Jose Luis Fuentes.) Defendants' choice of a provider that charges these fees is merely convenient, not necessary to litigation and should not have to be borne by Plaintiffs. This item is taxed.

Plaintiff's own costs The plaintiffs also seek to recover the cost of effecting personal service of a copy of the summons and complaint on Sheila Eichar, a.k.a., Sheila Weldon, Anthony Weldon, and the Weldon Trust. They offer evidence that notices and acknowledgment forms were mailed to the defendants at an address in Las Vegas, that the defendants did not sign and return those acknowledgments, as a result of which the plaintiffs were compelled to incur $805 in process server fees.

The request is denied. The unstated but obvious premise of section 415.30 is that the address to which the N&A was mailed was the defendant's actual mailing address. Here, the uncontradicted evidence is that the defendants had not lived at that address for 18 years, and had not received mail at that address for 15 years. Under those conditions, the prerequisite mailing did not occur, and thus the request for reimbursement of the cost of personal service fails. The plaintiffs' assertion that email is a sufficient substitute finds no support in the statute, which expressly requires either "first class mail or air mail."

Moreover, for subdivision (d) to apply, the language of the notice must comply with subdivision (b). There is no evidence here of what the notice said, and thus no compliance with subdivision (b) has been demonstrated.

3.

CVRI2200642	R. VS ELECTRONIC ARTS, INC.	(1) DEFENDANT ELECTRONIC ARTS INC.'S MOTION TO COMPEL ARBITRATION AND TO STAY (2) PLAINTIFF J.R. I'S REQUEST FOR DISMISSAL.

Tentative Ruling:

The request of plaintiff J.R. I to dismiss the action as to him is denied.

As noted in the Court's minutes of 9-30-22, the defendant's motion to compel arbitration is granted as to plaintiff T.M.

The defendant's motion to compel arbitration is granted as to J.R. I.

The defendant's motion to compel arbitration as to plaintiff J.R. II is denied.

Analysis:

J.R. I

The application to dismiss J.R. I does not comply with sections E.1., E.2., and E.5. of the Court's case management order.

Plaintiff J.R. I having continued to use the defendant's services after the complaint was filed and after his purported disaffirmation dated 8-17-22, there is no unequivocal expression of an intent to disaffirm the agreement. Therefore, the motion to compel arbitration of his claims is granted. However, in light of his intention to dismiss his complaint, the prosecution of the class action is not stayed pending the resolution of the arbitration.

J.R. II

"'Although threshold questions of arbitrability are ordinarily for courts to decide in the first instance under the FAA [citation], the '[p]arties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement.'" (*Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 891-892, quoting from *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 239.)

"'There are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability.'" (*Aanderud v. Superior Court, supra,* 13 Cal.App.5th at p. 892.)

Here, the agreement states: "All disputes, claims or controversies arising out of or relating to this Agreement, any EA Service and its marketing, or the relationship between you and EA, including the validity, enforceability, and scope of this Section 15 ("Disputes"), shall be determined exclusively by binding arbitration. This includes claims that accrued before you entered into this Agreement. The only Disputes not covered by this Section 15 are claims (i) regarding the infringement, protection or validity of your, EA's or EA's licensors' trade secrets, copyright, trademark or patent rights;. . . ." That language is clear and unmistakable. The plaintiffs do not contend otherwise.

The second prerequisite upon which the effectiveness of a delegation clause depends is that the delegation must not be revocable under state contract defenses, such as fraud, duress, or unconscionability. Here, the contract is revocable under such a state contract defense: Family Code section 6710. Therefore, the delegation clause is not effective, and the issue of the enforceability of the agreement as against these two minor plaintiffs remains an issue for the court.

Upon considering the relevant evidence, the Court finds that plaintiff J.R. II has unequivocally disaffirmed his agreement, both by discontinuing his use of the defendant's service shortly after the complaint was filed, and by expressly disaffirming the contract in his declaration filed 8-17-22. Therefore, there is no arbitration agreement to enforce. As to this plaintiff, therefore, the motion is denied.

4.

RIC1903673	BUTLER VS K. HOVNANIAN'S FOUR SEASONS AT BEAUMONT LLC	MOTION TO SUBSTITUTE PLAINTIFFS IN LIGHT OF TRANSFER OF TITLE

Tentative Ruling:

The unopposed motion of plaintiff Fields to substitute plaintiffs is granted. The plaintiff shall prepare and submit a proposed order no later than 11-9-22.

5.

RIC2003238	CCOLE, LLC V. CITY OF LAKE ELSINORE	PETITION FOR WRIT OF MANDATE (CEQA)

Tentative Ruling:

The City's request for judicial notice is granted as to Exhibits 1, 2, and 3, and denied as to Exhibits 4 and 5. Exhibits 1, 2, and 3 are subject to judicial notice and arguably relevant. Exhibit 4 is not subject to judicial notice. Exhibit 5 is subject to judicial notice but irrelevant.

The petitioner's request for judicial notice is granted.

The petitioner's request to strike the City's answer is denied. The remedy for the filing of a responsive pleading after the deadline for doing so is a request for entry of default, not an order striking the responsive pleading. Besides, there is no showing of how the petitioner was prejudiced by the filing of the answer a couple days later than the Court had ordered.

CCOLE Can Prosecute this Proceeding

The City requested judicial notice of the records of the Secretary of State to show that the petitioner was a suspended limited liability company, and thus unable to prosecute this petition or any other action. Thereafter, the petitioner cured its status with the Secretary of State, and it is once again in good standing. (Petitioner's RJN, Exhibit 1.) The petitioner having been in good standing when the petition was filed and being in good standing now, the fact of its interim suspension appears to be of no continuing significance.

Whether Petitioner Has Standing:

The petition alleges: "The members of CCOLE reside in or visit the City of Lake Elsinore in the County of Riverside, State of California." (Petition, ¶ 1.) CCOLE's members are described as "residents, community members, and visitors to the City of Lake Elsinore." (Id., ¶ 2.)

In its answer, the City alleges "that CCOLE is a limited liability company that . . . was formed by employees of a real estate development firm located in Newport Beach, California for the sole purpose of using litigation to cause economic harm to Real Parties in Interest and to otherwise delay sound development in the City. Respondent further alleges on information and belief that CCOLE has a single manager (Theodore Flood) that is the Director of Leasing for the aforementioned real estate development firm and that no member of CCOLE resides in the City of Lake Elsinore." (¶ 1.)

CCOLE filed a replication, by which it responded to the City's Answer. In response to ¶ 1 of the answer, the "Petitioner admit[ted] CCOLE, LLC is a limited liability company located in Newport Beach. . . . Petitioner admits no member of Concerned Citizens resides in the City of Lake Elsinore." (Replication, ¶ 1.) Because they are made in a pleading, those are binding judicial admissions, removing those facts from controversy.

Factual allegations in an answer to a petition for writ of mandate are deemed to be true unless those allegations are controverted, either by a denial in a replication or by evidence at trial. (*Lotus Car Limited v. Municipal Court, Southern Judicial Dist., San Mateo County* (1968) 263 Cal.App.2d 264, 268; see also *Elliott v. Contractors' State License Bd.* (1990) 224 Cal.App.3d 1048, 1054; *Epstein v. Vision Service Plan* (2020) 56 Cal.App.5th 223, 229.)

Applying that rule means that the uncontroverted allegations of the City's answer are also deemed to be without dispute, i.e., the allegations that CCOLE "was formed by employees of a real estate development firm located in Newport Beach, California for the sole purpose of using litigation to cause economic harm to Real Parties in Interest and to otherwise delay sound development in the City," that "CCOLE has a single manager (Theodore Flood) that is the Director of Leasing for the aforementioned real estate development firm," and that "no member of CCOLE resides in the City of Lake Elsinore."

In paragraph 2 of the City's Answer, the City alleges "that CCOLE's 'members,' to the extent that CCOLE has any member other than manager Theodore Flood, are not residents, community members or visitors to the City of Lake Elsinore." In response to that paragraph, the petitioner generally denied the allegations. Therefore, other than the allegation that none of the petitioner's members are residents of Lake Elsinore, which the petitioner has already admitted, all of those allegations are controverted.

The Court regrets that it does not yet have a complete tentative ruling. The parties shall appear, prepared to argue.