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"The fact the parties intended to incorporate the terms of their agreement into a formal, long-form settlement document did not negate their intent that the term sheet would bind them."

ADR Case Update – Term Sheet Enforceable Under CCP § 664.6

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Term Sheet signed in mediation was enforceable despite intent to incorporate terms in subsequent settlement agreement.

In *BTHHM Berkeley, LLC v. Johnston* (Mar. 28, 2024) 2024 WL 1336433, Stewart Johnston leased commercial property to the predecessors of BTHHM Berkeley, LLC. Johnston agreed to hold the property while BTHHM applied to the City of Berkely for a permit to operate a cannabis dispensary. Once the City issued the permit, Johnston was to turn over possession of the property and the rent would double. However, Johnston refused to deliver possession when the permit issued. BTHHM sued for breach of contract. The parties participated in an all-day tele-mediation that resulted in a signed "Settlement Term Sheet Agreement." Later, Johnston attempted to rescind the agreement because he "was exhausted, confused, and feeling ill" at the end of the mediation, and signed the term sheet not knowing it was intended to be binding and enforceable. BTHHM moved to enforce the term sheet pursuant to Code of Civil Procedure Section 664.6. The trial court granted the motion and ultimately entered judgment against Johnston with an award of prejudgment interest. Johnston appealed.

Affirmed in part. Section 664.6 provides that "[i]f parties to pending litigation stipulate, in a writing signed by the parties … for settlement of the case … the court, upon motion, may enter judgment pursuant to the terms of the settlement." Here, the trial court found that the term sheet unambiguously reflected the parties' intent to execute a good faith settlement. The appellate court deferred to the trial court's finding that Johnston's self-serving statements that he did not intend to be bound by the term sheet were not credible. The fact the parties intended to incorporate the terms of their agreement into a formal, long-form settlement document did not negate their intent that the term sheet would bind them. The appellate court reversed the award of prejudgment interest, but otherwise affirmed the judgment.

Practice Pointer. This case makes clear that a term sheet is enforceable notwithstanding reference to a subsequent formal settlement agreement. To eliminate any argument to the contrary, consider adding language that makes clear the term sheet is to remain binding and enforceable even if the long-form agreement is never executed.

Health care agent's authority to make health care decisions did *not* include authority to bind principal to arbitration agreement (Cal. Sup. Ct.).

In *Harrod v. Country Oaks Partners, LLC* (Mar. 28, 2024) 2024 WL 1319134 , Charles Logan appointed his nephew, Mark Harrod, as his health care agent to make health care decisions. Logan did not use the statutory form, but a California Medical Association form based on and citing the California Health Care Decisions Law (Prob. Code, § 4600 et seq.) The form authorized Harrod to

consent to or refuse care, select providers, and receive and release medical information. Subsequently, Logan fell, broke his femur, and required a skilled nursing facility, Country Oaks Care Center, operated by Defendant Country Oaks Partners, LLC. In the admission process, Harrod signed an unalterable, state-mandated admission agreement on Logan's behalf. Harrod also signed a separate and optional arbitration agreement. After a one-month stay, Harrod sued Defendant as Logan's guardian ad litem for negligence and elder abuse. Defendant moved to compel arbitration. The trial court denied the motion, finding Harrod lacked authority to bind Logan to the arbitration agreement. The Court of Appeal affirmed and this appeal to the California Supreme Court followed.

"Signing the arbitration agreement was not a 'health care decision' that was within the agent's power."

Affirmed. The Health Care Decisions Law authorizes powers of attorney for health care and governs writings created under its authority. "Health care decisions" are defined as decisions regarding a patient's health care, which includes any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental health condition, including selection of providers, approval of tests or surgical procedures, and even the withdrawal of artificial nutrition and hydration. Accordingly, health care decisions deal with who may provide care and what may be done to the body of the principal. While Logan's power of attorney did not quote the Health Care Decisions Law definitions, the powers granted were substantially the same as those listed in the statute. Therefore, Logan's power of attorney authorized Harrod to make health care decisions. Signing the arbitration agreement was not a "health care decision" that was within the agent's power.

Since private arbitrations are not "court proceedings," in which two extra court days are provided for electronic service under CCP Section 1010.6, employer failed to meet statutory deadline for payments of arbitration fees.

"[P]rivate arbitrations are not 'court proceedings' and, therefore, do not fall under section 1010.6, so an additional two days is not added to the response time."

In *Suarez v. Superior Court (Rudolph & Sletten, Inc.)* (Jan. 24, 2024) 99 Cal.App.5th 32, Onecimo Sierra Suarez filed a wage and hour action against his former employer, Rudolph & Sletten, Inc. (R&S). R&S moved to stay the proceeding and compel arbitration under and arbitration agreement between the parties. The trial court granted the motion and Suarez initiated arbitration. On December 2, 2022, the private arbitration provider sent an email invoice for the initial filing fee to both parties that was marked "due upon receipt." R&S Did not pay its share of the fees until January 4th, 2023. Suarez sought to vacate the stay arguing that R&S missed the statutory deadline for payment of arbitration fees. R&S countered that its payment had been timely because Sections 12 and 1010.6 of the Code of Civil Procedure. The trial court agreed with R&S and compelled arbitration. Suarez petitioned for writ of mandate.

Petition granted. Under Code of Civil Procedure Section 1281.97, an employer that drafts an arbitration agreement must pay its share of initial arbitration fees within 30 days of the due date. Failure to do so is a material breach of the arbitration agreement and waiver of the employer's right to arbitration. Section 12 extends the deadline if it falls on a holiday. In addition, Section 1010.6 provides that documents may be served electronically in an action filed with the court, and adds to court days to any response deadline. However, private arbitrations are not "court proceedings" and, therefore, do not fall under section 1010.6, so an additional two days is not added to the response time. Here, R&S received an invoice by email on December 2 that was due upon receipt. The 30-day grace period extended the due date to January 1, 2023, a holiday. Because January 2

was also a holiday, the deadline was extended to January 3. R&S was not entitled to an additional two days (through January 5), because the proceeding was a private arbitration and not a court proceeding. Therefore, R&S's payment on January 4, 2023, was untimely.

Arbitrator may not extend deadline for payment of fees without agreement of *all* parties.

"Section 1281.98 does not allow for any extension of time for the due date absent an agreement 'by all parties.' (§ 1281.98, subd. (a)(2).) JAMS's September 30, 2022, letter allowing payment until October 28, 2022, did not cure Golden State's missed payment and material breach."

In *Hohenshelt v. Superior Court (Golden State Foods)* (Feb. 27, 2024) 99 Cal.App.5th 1319, Dana Hohenshelt filed a complaint against his former employer, Golden State Foods Corp., for retaliation and Labor Code violations. Golden State moved to compel arbitration according to the parties' arbitration agreement. The trial court granted the motion and stayed court proceedings pending binding arbitration. The arbitration commenced via Judicial Arbitration and Mediation Services (JAMS). An arbitrator was appointed on August 16, 2021. Per the arbitrator's fee schedule, "All fees are due and payable in advance of services rendered." On July 29, 2022, JAMS sent an invoice to Golden State for $32,300. On August 29, 2022, JAMS sent another invoice for $11,760. Both invoices were due to be paid within 30 days of their respective due dates; both invoices provide, that payment was "due upon receipt." On September 30, 2022, JAMS sent a letter stating: "Pursuant to our fee and cancellation policy, all fees must be paid in full by October 28, 2022, or your [arbitration] hearing may be subject to cancellation." Later that same day, on September 30, 2022, Hohenshelt notified JAMS and the court that because Golden State did not pay within 30 days of the due date, he was "unilaterally elect[ing]" to withdraw his claims from arbitration and to proceed in court pursuant to Code of Civil Procedure section 1281.98, subdivision (b)(1). On October 5, 2022, Golden State confirmed via email to Hohenshelt that "all outstanding fees have been paid in full." On October 6, 2022, Hohenshelt filed a motion to lift the litigation stay pending arbitration. On February 2, 2023, the court denied the motion. It deemed Golden State's payment timely based on the September 30, 2022, letter providing a new due date of October 28, 2022, for payment. The court held that "the arbitrator seemingly *set a new due date* of October 28, 2022." (Italics added.) Hohenshelt filed a writ petition challenging the court's denial of his motion to lift the litigation stay pending arbitration. He sought a peremptory writ of mandate directing the trial court to vacate its February 2, 2023, order and enter an order lifting the stay of litigation to allow him to pursue his claims in court.

Reversed and remanded. Golden State's arbitration fees were due to be paid within 30 days of the two invoices. Payment for the July 29, 2022 invoice was due August 28, 2022, and payment for the August 29, 2022, invoice was due September 28, 2022. Section 1281.98 entitled Hohenshelt to withdraw from the arbitration. Section 1281.98 does not allow for any extension of time for the due date absent an agreement "by all parties." (§ 1281.98, subd. (a)(2).) JAMS's September 30, 2022, letter allowing payment until October 28, 2022, did not cure Golden State's missed payment and material breach.

Justice Wiley dissented. In his view, Section 1281.98 is preempted by the Federal Arbitration Act.

By completing their orders online and agreeing to website's terms of use, consumers could be compelled to arbitrate (9th Cir.).

In *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. Feb. 12, 2024), Defendants were companies that operated e-commerce websites selling sporting goods. After hackers breached those websites, a group of consumers, including Plaintiff John Patrick, brought putative class actions. Defendants moved to compel arbitration based upon the terms of use on each website that included arbitration clauses. The district court found that Plaintiffs acknowledged those terms when they completed their orders and compelled arbitration. Plaintiffs appealed.

"An enforceable online contract may be formed based upon an inquiry notice theory if (1) the website provides reasonably conspicuous notice of the terms that will bind the consumer, and (2) the consumer takes some action that unambiguously manifests assent to those terms."

Affirmed. In contract formation, the parties must manifest their mutual assent to the terms of the agreement. An enforceable online contract may be formed based upon an inquiry notice theory if (1) the website provides reasonably conspicuous notice of the terms that will bind the consumer, and (2) the consumer takes some action that unambiguously manifests assent to those terms. This is true even if the consumer does not read the terms if the user is given notice of them. Here, immediately adjacent to a final button on each website to place an order was the following statement: "By submitting your order you ... agree to our privacy policy and terms of use." The phrase "terms of use" was a hyperlink to the respective Defendant's Terms that included arbitration. For those reasons, the district court properly compelled arbitration.

However, "Browsewrap" terms of use on website, which require no affirmative assent by consumer, are insufficient to compel arbitration.

In *Weeks v. Interactive Life Forms, LLC*, (Mar. 25, 2024) 2024 WL 1250215, Plaintiff Brian Weeks filed a putative class action against Defendant Interactive Life Forms, LLC, which operates an online business selling sex toys under the brand name Fleshlight. Weeks alleged the company falsely advertised and misrepresented products sold on its website. Interactive moved to compel arbitration, arguing that every page on its website included a hyperlink to the Terms of Use (TOU), which required mediation and arbitration. The TOU were contained in a "browsewrap agreement," where no affirmative action is required by the consumer to indicate assent. Interactive claimed that the mere browsing of the site constituted consent to the TOU. The trial court disagreed, finding that the design and content of Interactive's website was insufficient to put a reasonable consumer on notice of the TOU, and declined to compel arbitration. Interactive appealed.

"Generally, 'where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice.'"

Affirmed. As with all contracts, an agreement to arbitrate requires mutual manifestation of assent, whether by word or conduct. On the internet, "a manifestation of assent may be inferred from the consumer's actions on the website – including, for example, checking boxes and clicking buttons," known as "clickwrap" agreements. *Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, 461. Generally, "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice." *Nguyen v. Barnes & Noble, Inc.* (9th Cir. 2014) 763 F.3d 1171, 1178-79. Here, the Court of

Appeal found no reason to depart from this precedent, particularly because Weeks claimed he had not seen the TOU. Substantial evidence supported the trial court's finding that the website failed to put a reasonable consumer on notice of the TOU. Denial of the motion to compel arbitration was correct.

Airline may compel arbitration of claims by passengers, under doctrine of equitable estoppel, based upon arbitration clause in third-party booking website's Terms & Conditions (9th Cir.).

In *Herrera v. Cathay Pacific Airways Ltd.* (Mar. 11, 2024) 94 F.4th 1083, Plaintiffs Winifredo and Macaria Herrera filed a putative class action alleging that Cathay Pacific Airways failed to honor its contractual obligation to provide a cash refund for a flight for which they had purchased tickets through a third-party booking website, ASAP Tickets. The flight was cancelled as result of the COVID-19 public health emergency. The district court denied Cathay Pacific's motion to compel arbitration, and it appealed.

"Under California law, Plaintiffs were equitably estopped from avoiding the arbitration provision in ASAP's Terms & Conditions because the claims against Cathay Pacific (the nonsignatory) were 'intimately founded in and intertwined with the underlying contract.'"

Reversed and remanded. As matter of first impression, when a nonsignatory seeks to enforce an arbitration provision, an order denying a motion to compel arbitration based on the doctrine of equitable estoppel is reviewed de novo. Under California law, Plaintiffs were equitably estopped from avoiding the arbitration provision in ASAP's Terms & Conditions because the claims against Cathay Pacific (the nonsignatory) were "intimately founded in and intertwined with the underlying contract." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013). Here, the district court found that Cathay Pacific placed ASAP's conduct at issue by alleging that ASAP violated its own Terms & Conditions by creating refund restrictions that formed the basis of claim. Thus, Cathay Pacific's alleged breach of its General Conditions of Carriage for Passengers and Baggage was "intimately founded in and intertwined with" ASAP's alleged conduct under its Terms & Conditions. Accordingly, the doctrine of equitable estoppel was correctly applied to enforce the arbitration clause in ASAP's Terms & Conditions.

Justice Forrest dissented and filed a separate opinion. He would affirm the district court's denial of Cathay Pacific's motion to compel arbitration because he believes the Plaintiff's claim did not rely on or depend on the terms of their ASAP Tickets contract.

Reaching the opposite result, car manufacturer may not compel arbitration under equitable estoppel because claim based upon vehicle warranty, not on dealership contract that contained arbitration clause.

"Reliance is 'always the sine qua non of an appropriate situation for applying equitable estoppel.'"

In *Davis v. Nissan North America, Inc.* (Mar. 15, 2024) 2024 WL 1130508, Plaintiffs Damien Davis and Johnetta Lane purchased a Nissan Altima from Riverside Nissan, the dealership. The sales contract with the dealership included an arbitration clause. After experiencing various mechanical issues and attempted repairs of the vehicle, they sued Nissan North America, Inc. and Nissan San Bernardina, but not the dealership, for breach of warranty and other claims. Defendants moved to compel arbitration as third-party beneficiaries of the sales contract under the doctrine of equitable estoppel. The trial court denied the motion and defendants appealed.

Affirmed. If a plaintiff relies on the terms of an agreement to assert a claim against a nonsignatory defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause of that contract. Reliance is "always the sine qua non of an appropriate situation for applying equitable estoppel." *Fuentes v. TMCSF, Inc.* (2018) 26 Cal. App. 5th 541, 552. Here, plaintiffs were not relying on the terms of the sales contract to impose liability on Nissan. Rather they asserted statutory and tort claims for breach of warranty. Therefore, the trial court did not err in denying the motion to compel arbitration.

Because minor may disavow contract, rendering it null and void, court (not arbitrator) correctly denied motion to compel arbitration, notwithstanding delegation clause purportedly delegating question to arbitrator.

In *J.R. v. Electronic Arts, Inc.,* (Jan. 17, 2024) 98 Cal.App.5th 1107, minor J.R. II filed a putative class action against Electronic Arts Inc., (EA), the owner of the video game Apex Legends, alleging EA engaged in fraudulent business practices by inducing "impressionable minors" to play its free video game and "purchase cosmetic items, characters, lootboxes, and other items within the Apex Legends virtual world." EA moved to compel arbitration under the arbitration clause in its user agreement. J.R. II opposed the motion and asserted a disaffirmance defense base on his status as a minor under Family Code Section 6710. EA argued that the issue of arbitrability, including the disaffirmance defense, was for the arbitrator, and not the court, under the delegation clause in the user agreement. The trial court concluded the delegation clause was clear, but the provision was ineffectual because the entire user agreement was revocable by J.R. II under the Family Code, and denied EA's motion to compel arbitration.

"Therefore, under the Family Code, the entire user agreement, including the delegation provision was within it, was rendered null and void. The trial court (not the arbitrator) correctly decided and denied EA's motion to compel arbitration."

Affirmed. Section 6710 provides that "except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards." As set forth in *Berg v. Taylor* (2007) 148 Cal.App.4th 809, the contract may be avoided by any act or declaration disclosing an unequivocal intent to repudiate its binding force and effect. Here, J.R. II disaffirmed his user agreement with EA in his opposition. Therefore, under the Family Code, the entire user agreement, including the delegation provision was within it, was rendered null and void. The trial court (not the arbitrator) correctly decided and denied EA's motion to compel arbitration.

Arbitration agreement was unconscionable since it was not discussed with plaintiff when she accepted verbal employment offer and contained invalid PAGA waiver.

In *Hasty v. American Automobile Assn. of Northern California, Nevada and Utah* (Jan. 16, 2024) 98 Cal.App.5th 1041, Plaintiff Aljarice Hasty had been employed as an insurance sales agent for the American Automobile Association of Northern California, Nevada & Utah (Association). She sued for harassment, wrongful discharge, and retaliation arising out of her employment. The Association filed a petition to compel arbitration and a motion to stay the action pursuant to an arbitration agreement that was signed as part of Hasty's employment contract. Although the employment offer indicated Hasty would sign an arbitration agreement on her first day, she declared she did not physically or electronically sign the agreement that day. There was no mention of an arbitration agreement during her interview process or when she accepted a verbal employment offer. She left her prior employment after receiving that offer.

Further, Hasty did not own a computer or tablet, and had access to the Internet and employment documents only through her phone. The online portal through which she accessed the Association's employment documents allowed her to "Agree" without reviewing the documents. On those facts, the trial court found the arbitration agreement was unconscionable and exercised its discretion to decline severance of the unconscionable terms. The Association appealed, arguing the trial court erred in finding both procedural and substantive unconscionability and it abused its discretion by not severing any unconscionable terms.

"Procedural unconscionability addresses contract formation and requires surprise or oppression, where one party has no meaningful choice or opportunity to negotiate. Substantive unconscionability pertains to the fairness of contract terms."

Affirmed. Procedural unconscionability addresses contract formation and requires surprise or oppression, where one party has no meaningful choice or opportunity to negotiate. Substantive unconscionability pertains to the fairness of contract terms. Here, the contract was both procedurally and substantively unconscionable. The contract was one of adhesion since Hasty's consent to arbitration was imposed as a condition of her employment. Moreover, nothing in the record indicated the Association inquired into whether Hasty had the ability to view the documents electronically or was given direction on how to review documents before signature. The trial court also found elements of surprise in light of the physical presentation of terms. Finally, the substantive terms, such as the confidentiality provision and the Private Attorneys General Act claims waiver, were unconscionable or invalid. Because the agreement was "permeated with unconscionability," the trial court did not abuse its discretion by declining to sever the unconscionable terms and denying the motion to compel arbitration.

Under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, pre-dispute arbitration agreement invalid because no "dispute" existed before agreement signed.

In *Kader v. Southern California Medical Center, Inc.* (Jan. 29, 2024) 99 Cal.App.5th 214, Omar Kader signed an arbitration agreement with Southern California Medical Center (SCMC) in the regular course of his employment, without disclosing that he was being subjected to sexual harassment and assault. Congress subsequently enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the Act; 9 U.S.C. §§ 401), which invalidates pre-dispute arbitration agreements in certain circumstances. Following the effective date of the Act, Kader sued SCMC for claims arising from the alleged sexual conduct. SCMC filed a motion to compel arbitration, contending the Act did not invalidate the arbitration agreement because the alleged sexual conduct constituted a "dispute," which preexisted the parties' arbitration agreement and the effective date of the Act. The trial court ultimately denied the motion and SCMC appealed.

"The existence of alleged sexual harassment, without more, is insufficient to constitute a dispute under the Act."

Affirmed. The date that a dispute has arisen for purposes of the Act depends on the unique facts of each case, but a dispute does not arise merely from the fact of injury. For a dispute to arise, a party must first assert a right, claim, or demand, and the other party expresses disagreement or takes an adversarial posture. Both sides must express their disagreement, either through words or actions. The existence of alleged sexual harassment, without more, is insufficient to constitute a dispute under the Act. Because there was no evidence of a disagreement or controversy until *after* the date of the arbitration agreement and the effective date of the Act, when Kader filed charges with the Department of Fair Employment and Housing, the predispute arbitration agreement was invalid. The order denying the motion to compel arbitration was correct.

“When an order denying arbitration is based on failure to meet the burden of proof, the movant must show that the evidence was (1) ‘uncontradicted and unimpeached,” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’”

Motion to compel arbitration of dispute over solar panel system denied as companies failed to show that 81-year-old homeowner understood the contracts she signed.

In *Jones v. Solgen Construction* (Feb. 26, 2024) 99 Cal.App.5th 1178, 81-year-old Maryann Jones sued Solgen Construction, LLC and GoodLeap, LLC alleging she was tricked into signing a 25-year, $52,000 installation contract for home solar panels. Solgen installed the solar panels and GoodLeap provided financing. Both Defendants brought separate motions to compel arbitration based upon arbitration clauses in their respective contracts with Jones. Both contracts bear what purports to be Jones's electronic signature. The parties vigorously disputed the facts that led to the creation of those two electronically signed contracts. Jones claimed Solgen told her it was offering a free government program that would help low-income consumers get solar energy, and that she would never have signed a contract with a total cost of $52,564.28. The trial court denied the motion to compel since Defendants failed to meet their burden of showing a valid arbitration agreement with Jones existed. Both Defendants appealed arguing the evidence, specifically four audio recordings with Jones, established she signed the contracts voluntarily.

Affirmed. When an order denying arbitration is based on failure to meet the burden of proof, the movant must show that the evidence was (1) “uncontradicted and unimpeached,” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” Here, Defendants evidence was not uncontradicted and unimpeached. Jones’ declaration stated that she was told she would be enrolling in a free government program for low–income households in conjunction with PG&E, not that she would be entering into a 25–year, $52,000 loan contract with GoodLeap. Moreover, Jones’ age and lack of proficiency with technology were inconsistent with the proposition that she had adequate opportunity and ability to review and understand electronic contracts. The trial court properly credited Jones’ evidence placing more weight on it, especially since Solgen’s agents never emailed the installation contract to her, and gave false information to GoodLeap. Finally, the audio recordings submitted into evidence were not so clear and compelling that reversal was mandated because there were noticeable pauses in the recorded conversation with GoodLeap, and Jones expressed shock at the loan terms during the call.

PAGA plaintiffs may be compelled to arbitrate their individual claims while the representative claims proceed in court (9th Cir.).

In *Johnson v. Lowe’s Home Centers, LLC*, 93 F.4th 459 (9th Cir. Feb. 12, 2024), Maria Johnson was a former employee of Lowe's Home Centers, LLC, and signed a pre-dispute employment contract in which she agreed that any controversy arising from her employment by Lowe's would be settled by arbitration. She brought claims on behalf of herself and other Lowe's employees under California's Private Attorneys General Act of 2004 (“PAGA”) for alleged violations of the California Labor Code. The district court dismissed Johnson’s representative PAGA claims relying on *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), and compelled arbitration of her individual PAGA claim. She appealed.

"While this case was on appeal, the California Supreme Court in Adolph v. Uber Techs, Inc. (2023) 14 Cal. 5th 1104, corrected that interpretation of California law, holding that individual and representative PAGA claims may be severed where an individual PAGA claim may arbitrated while the representative claims remain in court."

Affirmed in part and vacated in part. An action brought against an employer under PAGA contains both "individual" and "non-individual" claims. An "individual" PAGA claim is based on a violation of California labor law that affects a PAGA plaintiff employee personally. A "non-individual" PAGA claim, sometimes referred to as a "representative" PAGA claim, is based on a violation of California labor law that affects other employees. When the district court dismissed those claims, its dismissal was consistent with California law as then interpreted by the United States Supreme Court in *Viking River.* While this case was on appeal, the California Supreme Court in *Adolph v. Uber Techs, Inc.* (2023) 14 Cal. 5th 1104, corrected that interpretation of California law, holding that individual and representative PAGA claims may be severed where an individual PAGA claim may arbitrated while the representative claims remain in court. Here, because Johnson signed a valid pre-dispute arbitration agreement, the district court properly compelled arbitration of her individual claims. However, relying on pre-*Adolph* case law, the district erred in dismissing the representative claims. Thus, the district court's order regarding the representative claims was vacated and the case remanded to allow the district court to apply California law as interpreted in *Adolph.*

Warehouse equipment operator, handling products along a supply chain that were moved interstate, fell under the FAA's transportation worker exemption, and could *not* be compelled to arbitrate (9th Cir.).

In *Ortiz v. Randstad Inhouse Services, LLC* (9th Cir. Mar. 12, 2024) 2024 WL 1061287, Adan Ortiz worked at a California warehouse facility that operated as a warehouse and distribution facilities for Adidas. Specifically, he was an equipment operator who would unload packages, mostly from international locations, and prepare them to leave the warehouse for destinations across the U.S. He ultimately filed a class action against his former employers. Pursuant to the arbitration agreement in Ortiz's employment contract, the employers moved to compel arbitration. Though the agreement covered Ortiz's claims, which generally related to the conditions of his employment, Ortiz opposed arbitration on the grounds that the agreement could not be enforced under either federal or state law. The district court agreed with Ortiz and declined to compel arbitration.

"Like the airport baggage handler in Saxon, Ortiz handled products near the heart of their supply chain that were moved interstate when he interacted with them. Although Ortiz fulfilled an admittedly small role in the process, he engaged in interstate commerce by ensuring that goods reached their final destinations in different states."

Affirmed. Under the Federal Arbitration Act (9 U.S.C. § 1), Ortiz qualified for the FAA's transportation worker exemption. To determine whether an employee qualifies as an exempt transportation worker, the court must first "define the relevant 'class of workers' to which" the worker belonged and then "determine whether that class of workers [was] engaged in foreign or interstate commerce." *Saxon v. Southwest Airlines Co.*, 596 U.S. 450 (2033). Here, the district court correctly concluded that Ortiz's class of workers played a direct and necessary role in the free flow of goods across borders. Like the airport baggage handler in *Saxon*, Ortiz handled products near the heart of their supply chain that were moved interstate when he interacted with them. Although Ortiz fulfilled an admittedly small role in the process, he engaged in interstate commerce by ensuring that goods reached their final destinations in different states. That Ortiz performed his duties on a purely local basis was not dispositive. The issue was the work's connection to the interstate flow of goods, not its geography.

Attempted waiver of right to seek public injunctive relief renders arbitration agreement unenforceable (9th Cir.).

In *McBurnie v. RAC Acceptance East LLC* (9th Cir. Mar. 14, 2024) 2024 WL 1101845, Shannon McBurnie and April Spruell filed a putative class action in district court against RAC Acceptance East, LLC, the owner and operator of retail stores that lease household and electronic items through rent-to-own contracts, alleging that RAC charged fees that violated California's consumer protection laws. RAC filed a motion to compel arbitration and acknowledged that the Ninth Circuit had previously found its arbitration agreement unenforceable under the holding in *Blair v. Rent-A-Center, Inc.*, 928 F. 3d 819 (9th Cir. 2019). Nevertheless, RAC argued that *Blair* was abrogated by the Supreme Court's subsequent ruling in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022). The district denied RAC's motion, concluding *Viking River* did not abrogate *Blair*. RAC appealed.

"RAC's arbitration agreement was rendered unenforceable because it violated the McGill rule by including a provision that completely waived the right to seek public injunctive relief and that provision was not severable from the rest of the arbitration agreement under Blair."

Affirmed. State law prohibits contractual waivers of a party's right to seek public injunctive relief. *McGill v. Citibank, N.A.* (2017) 2 Cal. 5th 945. RAC's arbitration agreement was rendered unenforceable because it violated the *McGill* rule by including a provision that completely waived the right to seek public injunctive relief and that provision was not severable from the rest of the arbitration agreement under *Blair*. Moreover, in *Viking River*, the Supreme Court held the Federal Arbitration Act prevented California's Private Attorney General Act from insulating individual claims from arbitration. Here, *Viking River* was not irreconcilable with *Blair* because the former dealt with Private Attorney General Act claims that were different from the public injunctive claim brought under the consumer protection statutes in *Blair* and the case at issue. Finally, *Viking River* struck down PAGA's mandatory joinder rule, which did not exist under the consumer statutes implicated in this case. The district court correctly refused to compel arbitration.

California company properly served notice to confirm arbitration award by mailing motion papers to Mexican Company's counsel (9th Cir.).

In Voltage Pictures, LLC v. Gussi, S.A. de C.V., 92 F.4th 815(9th Cir. Feb. 5, 2024), Voltage Pictures, a company bases in Los Angeles, entered into a Distribution and License Agreement with Gussi S.A., a Mexican company, to license distribution rights of a film in Latin America. The DLA included an arbitration agreement. After a dispute arose, Voltage initiated arbitration and obtained an award against Gussi. Voltage filed a motion in district court to confirm the award. Gussi sought to quash service. The district court ordered Voltage to effectuate service, observing that it had not done so under California law. Voltage then mailed its motion papers to Gussi's registered service agent in the U.S. and its address in Mexica via Federal Express, requesting a signed receipt after delivery. However, Gussi then argued that federal procedural law should be followed and that Section 9 of the Federal Arbitration Act required service by a U.S. marshal. Gussi also maintained that parallel proceedings in Mexico required the district court to abstain from confirming the arbitral award.

"Because of the impossibility of effectuating service by a U.S marshal with parties not residing within any U.S. judicial district, the marshal requirement under FAA Section 9 is inapplicable under those circumstances."

Finding no judicially noticeable order before it, the district court confirmed the award and entered judgment. Gussi appealed.

Affirmed. Because of the impossibility of effectuating service by a U.S marshal with parties not residing within any U.S. judicial district, the marshal requirement under FAA Section 9 is inapplicable under those circumstances. Rather, the district court turned to FAA Section 6 that governs service of written motions and notices in federal court, reasoning that because procedural rules pertaining to motions necessarily require notices, it indubitably governs notices. The district court then turned to Rule 5(b) of the Federal Rules of Civil Procedure as the default rule for serving notice to confirm an award when the marshal requirement cannot be accomplished because of a parties nonresidency. Here, Voltage's service met the requirements of Rule 5(b) –the motion papers were mailed to Gussi's counsel shortly before the motion was filed in district court. Therefore, service of the motion to confirm the arbitration award was sufficient, and the district court correctly entered judgment against Gussi.

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