These are the tentative rulings for civil law and motion matters set for Friday, December 20, 2019, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Thursday, December 19, 2019. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: All telephone appearances are governed by Local Rule 20.8. More information is available at the court's website: www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER GLENN M. HOLLEY AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 31, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. S-CV-0035393 Seibert, Robert Jr. vs. Seibert, James, et al

Application for Entry of Judgment

Plaintiff's application for entry of judgment pursuant to stipulation of judgment is granted. Plaintiff establishes that defendant James Seibert has failed to comply with the terms of the parties' settlement agreement, and the judgment declaring constructive trust entered December 28, 2018. Accordingly, pursuant to the terms of the parties' settlement agreement, the judgment in this action shall be amended to include and incorporate the parties' second stipulation to judgment, which includes a money judgment of $500,000 in favor of plaintiff.

Application for Return of Deposit

Plaintiff's application for return of deposit is granted. The clerk shall return the deposit filed on behalf of plaintiff in the amount of $10,000, payable to the Law Office of Ralph Laird Trust Account.

2. S-CV-0038637 King, Anna P. vs. Hyundai Motor America

The motion for prejudgment interest is continued to January 10, 2020, at 8:30 a.m. in Department 3, to be heard by the Honorable Michael W. Jones.

3. S-CV-0039378 Rakin, Andrey vs. American Way Construction, Inc., et al

Motion to Stay Proceedings and for Coordination

Defendants' request for judicial notice is granted.

Plaintiff's objections to evidence are sustained.

Defendants move to coordinate this action with Placer County Superior Court Case No. SCV-42249, *Andrey B. Abramov vs. Andrey Rakin, et al*, and for a stay pursuant to Code of Civil Procedure section 404.5 and California Rules of Court, rule 3.515. As a preliminary matter, the court will exercise its discretion and consider the substance of defendants' motion, despite plaintiff's contention that notice was insufficient.

Defendants' motion is denied. Defendants' notice of motion fails to set forth the statutory authority for coordination of the two cases. Coordination pursuant to Code of Civil Procedure sections 404 *et seq.* applies to civil actions pending in different courts. See Code Civ. Proc. § 404. Defendants' motion does not comply with any of the procedural requirements required for a petition for coordination, and does not in any event relate to cases pending in different courts. As there is no basis to coordinate the two cases, a stay of the current action is not warranted.

4. S-CV-0040701 Burgess, Nora, et al vs. Newcombe, Elliott, et al

Defendant Schaffer's Mill Community Association's motion for good faith settlement determination is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling party's proportionate share of liability for plaintiffs' injuries, and therefore is in good faith within the meaning of Code of Civil Procedure section 877.6.

5. S-CV-0041307 Wilmington Savings Fund Society vs. Stapleton, John M., et al

Defendant John Stapleton's request for judicial notice is granted.

Defendant's motion for reconsideration is denied. Judgment was entered in this action on November 7, 2019. The court loses jurisdiction to rule on a pending motion for reconsideration after entry of judgment. *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181. It is irrelevant if the motion is filed before entry of judgment. *Id.*

Defendant's alternative request for relief pursuant to Code of Civil Procedure section 473(b) is denied. Defendant sets forth no facts to support the conclusion that the court's order on the parties' respective motions for summary judgment were based on the mistake, inadvertence, surprise, or excusable neglect of defendant or his counsel. The declaration of counsel filed in connection with defendant's moving papers addresses only the requirements of Code of Civil Procedure section 1008(a). The supplemental declaration filed with defendant's reply also does not set forth any facts relating to relief pursuant to Code of Civil Procedure section 473(b).

6. S-CV-0041645 Krake, Denise, et al vs. Central Valley Diner, Inc.

The motion for preliminary approval of class action settlement is continued to January 10, 2020, at 8:30 a.m. in Department 3, to be heard by the Honorable Michael W. Jones.

7. S-CV-0041667 Smart, Nicole vs. The Cheesecake Factory Restaurants, Inc.

Defendants' request for judicial notice is granted.

Defendants The Cheesecake Factory Restaurants, Inc. and The Cheesecake Factory Incorporated demur to plaintiff's first amended complaint. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The court assumes the truth of all facts properly pleaded, and accepts as true all facts that may be implied or reasonably inferred from facts expressly alleged, unless they are contradicted by judicially noticed facts. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6. However, the court does not assume the truth of contentions, deductions, or conclusions of facts or law. *Id.*

The first amended complaint alleges an enforcement action under the Private Attorneys General Act of 2004, California Labor Code sections 2698 *et seq.* ("PAGA") to recover civil penalties for violations occurring at any time between one year prior to the submission of plaintiff's PAGA notice on June 15, 2018, until judgment. (FAC at 1:4-13.) Plaintiff was employed by defendants between 2008 and June 21, 2017.

Defendants argue that prior class action settlements bar all or some of the claims alleged by plaintiff. Specifically, a class action settlement agreement in *Abdelaziz v. The Cheesecake Factory Restaurants, Inc.* released the following claims:

> [A]ll known and unknown claims, demands, rights, liabilities, and causes of action that were or could have been asserted by the Employees based on the existing allegations contained in the First Amended Complaint filed in the Action that Defendants failed to provide duty-free meal breaks, failed to provide meal breaks, failed to pay meal premiums, and/or failed to keep records of meals and any and all derivative claims based on such alleged meal violations, including but not limited to under the Private Attorneys General Act (Labor Code Sections 2698, *et seq.*) and under Labor Code Sections 203, 226, 226.3, 226.7, 256, 512, 558 and 558.1. The Released Claims are limited to all Claims described above that could have been asserted by the Employees for the period November 14, 2015 through August 31, 2018.

Further, a class action settlement agreement in *Masters v. The Cheesecake Factory Restaurants, Inc.* released the following claims:

> [A]ll known and unknown claims … that were or could have been asserted by the Class based on the existing allegations contained in the Third Amended Complaint filed in the Arbitration including, but not limited to any claims for failure to pay overtime, failure to provide rest breaks, wage statement claims under Labor Code Section 226, waiting time penalties for failure to pay all wages due upon employment/termination under Labor Code Section 201, 202 and 203 and claims under [the UCL] and under the Private Attorneys General Act … based on the failure to pay overtime, the failure to provide rest breaks, any wage statement claims, and waiting time penalties claims for failure to pay all wages due upon employment termination.

Plaintiff admittedly alleges claims in this action which were settled in the *Abdelaziz* and *Masters* cases. However, plaintiff also alleges harm which was not alleged in the *Abdelaziz* or *Masters* cases, including the failure to pay split-shift premiums, the failure to pay reporting time premiums, the failure to provide sick leave or notice of available sick leave, the failure to reimburse for business expenses, and the failure to provide notice of material terms of employment. Defendants contend that the current action involves the same primary rights as were at stake in the *Abdelaziz* and *Masters* cases. "As a general matter, 'the same primary right' is at stake '[w]hen two actions involving the same parties seek compensation for the same harm.'" *Zakaryan v. The Men's Wearhouse, Inc.* (2019) 33 Cal.App.5th 659, 671. As previously noted by the court in ruling on defendants' motion for judgment on the pleadings, plaintiff's allegations support the contention that different harms are alleged to be at stake in this action, than that which were finally settled in the *Abdelaziz* or *Masters* cases. Specifically, plaintiff alleges Labor Code violations apart from the failure to provide meal breaks and pay meal premiums, and apart from the failure to pay wages in any form when due. Thus, the primary rights theory does not bar plaintiffs' first amended complaint.

Defendants alternatively argue that plaintiff is barred from seeking PAGA penalties based on certain claims which overlap with claims settled in the *Abdelaziz* or *Masters* actions. Plaintiff admits that some of her claims were previously released. (Opposition at 9:3-5.) Thus defendants request that the demurrer be sustained as to claims for civil penalties arising out of violations of Labor Code sections 202, 204, 226(a), 226.7, 510, 512(a), 1174, 1194, 1197.1 and 1198. However, plaintiff, who alleges standing for at least one Labor Code violation which has not been released by prior settlements, may continue to pursue penalties for unrelated violations by the same employer, even those that did not affect her. *Huff v. Securitas Svcs. USA, Inc.* (2018) 23 Cal.App.5th 745, 754. Accordingly, defendants' alternative request must be denied.

Defendants' demurrer to first amended complaint is overruled. Defendants shall file and serve their answer to the first amended complaint on or before January 3, 2020.

8. S-CV-0041897 Hawkins, Jerry, et al vs. Balzer, Trever, et al

Cross-complainants' request for judicial notice is granted.

Cross-defendant Wilfley Enterprises, Inc. dba Roof Doctors ("Wilfley") demurs to each cause of action set forth in the cross-complaint filed by cross-complainants Trever Balzer and

Sean F. Gleason. A party may demur where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The court assumes the truth of all facts properly pleaded, and accepts as true all facts that may be implied or reasonably inferred from facts expressly alleged, unless they are contradicted by judicially noticed facts. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6. However, the court does not assume the truth of contentions, deductions, or conclusions of facts or law. *Id.*

As a preliminary matter, contrary to Wilfley's contention, equitable indemnification or contribution principles may apply to a claim for negligent misrepresentation. *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 768-769. Nevertheless, the subject cross-complaint does not currently allege sufficient facts to show a right to indemnity or contribution against Wilfley. Accordingly, the demurrer is sustained with leave to amend.

Any amended cross-complaint shall be filed and served on or before January 10, 2020.

9. S-CV-0042451 Penna, Cynthia Della vs. Peters, David

Defendant Paul Freese's motion to compel further responses to requests for admission, set one, is granted.

Each answer to a request for admission "shall be as complete and straightforward as the information reasonably available to the responding party permits." Code Civ. Proc. § 2033.220(a). Request Nos. 1, 2 and 3 ask plaintiff to admit that she does not have evidence supporting certain allegations in the complaint, including (1) that moving defendant is a developer of mass-produced housing, (2) that moving defendant and the "developer defendants" are alter egos of each other; and (3) that moving defendant built at least three or four homes for defendants David and Cindy Peters. Plaintiff's responses to each of the foregoing requests state that she has insufficient information to admit or deny. Such responses are not complete and straightforward, as plaintiff can respond as to whether she is aware of any evidence supporting her own allegations, regardless of whether such evidence is hearsay.

Plaintiff shall serve verified further responses to the subject discovery requests on or before January 20, 2020.

The parties' requests for sanctions are denied.

10. S-CV-0042933 Sveen, Cheyanne vs. Heritage Hotel Group, Inc., et al

The motion to compel further responses to discovery is continued to January 10, 2020, at 8:30 a.m. in Department 3, to be heard by the Honorable Michael W. Jones. The court apologizes for any inconvenience to the parties.

11. S-CV-0043249 Jones, Lloyd D. vs. California Forensic Medical Group

Defendant's motion for leave to amend answer is denied without prejudice. As a preliminary matter, although defendant's motion references "an affirmative defense as to MICRA and an affirmative defense as to the comparative fault of plaintiff", the proposed amended answer actually adds seven new affirmative defenses. In addition, defendant's motion fails to comply with California Rules of Court, rule 3.1324. Specifically, the notice of motion does not identify by page, paragraph and line number the additions to the prior pleading. Cal. R. Ct., rule 3.1324(a). Further, the motion is not accompanied by a declaration stating the purpose and effect of the proposed amendments, why the proposed amendments are necessary and proper, when the facts giving rise to the proposed amendments were discovered, and the reasons why the request was not made earlier. Cal. R. Ct., rule 3.1324(b).

12. S-CV-0043365 Saheb, Fariba vs. Sadek, Nick

Defendants' request for judicial notice is granted.

Defendants Ibrahim Salama ("Salama") and Souzan Herzallah ("Herzallah") move to compel arbitration with respect to plaintiff's claims in this action. The arbitration statutes evidence a strong public policy in favor of arbitration that is frequently approved and enforced by the courts. *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706; *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1405. "A strong public policy favors the arbitration of disputes, and doubts should be resolved in favor of deferring to arbitration proceedings." *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1282; *Laswell v. AG Seal Beach, LLC, supra*, at 1405. Under both federal and state law, a threshold question for any petition to compel arbitration is whether there exists an agreement to arbitrate. *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396. In this case, Salama establishes the existence of an agreement between himself and plaintiff to arbitrate disputes arising out of the residential purchase agreement signed in connection with Salama's purchase of plaintiff's home.

Although plaintiff does not deny the existence of an arbitration agreement, she argues that moving defendants engaged in bad faith actions or willful misconduct which constitute grounds to rescind the agreement and a waiver of the right to compel arbitration. Where an opposing party alleges fraud or misconduct in obtaining the agreement to arbitrate, such actions may constitute grounds for rescission which must be resolved by the court. *Moseley v. Electronic Missile Facilities, Inc.* (1963) 374 U.S. 167, 170-171. However, where the opposing party claims that the contract as a whole was fraudulently induced, that issue must be resolved by the arbitrator, not the court. *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-446; *see also Engalla v. Permanente Med. Group, Inc.* (1997) 15 Cal.4th 951, 983. In this case, as plaintiff alleges that defendants' fraudulent misrepresentation of material facts induced her to enter into the residential purchase agreement, this issue must be resolved by the arbitrator, and does not preclude enforcement of the arbitration agreement.

Plaintiff alternatively opposes the motion pursuant to Code of Civil Procedure section 1281.2(c), based on the possibility of conflicting rulings on common issues of fact or law. Plaintiff does not establish that her pending claims against Salama's real estate broker create a

high probability of inconsistent rulings. In any event, the court finds that the appropriate course of action in this case is to stay the litigation pending arbitration of plaintiff's claims against Salama. Code Civ. Proc. § 1281.2(c). Further, the court finds that plaintiff's claims against Herzallah are inextricably intertwined with the allegations against signatory Salama, such that Herzallah may also enforce the arbitration clause against plaintiff on grounds of equitable estoppel. *Goldman v. KPMG LLP* (2009) 173 Cal.App.4th 209, 217-218.

Based on the foregoing, Salama and Herzallah's motion to compel arbitration is granted, and the current action is stayed pending the outcome of the arbitration. **The case management conference set January 7, 2020, is hereby vacated. The court sets an order to show cause re: status of arbitration for August 25, 2020, at 11:30 a.m. in Department 40.**

13. S-CV-0043547 Wells Fargo Bank, N.A. vs. Sentient Law Group L.P., et al

The motion for discharge from liability is continued to January 3, 2020, at 8:30 a.m. in Department 31.

14. S-CV-0043751 Rhoades, Stefanie vs. Santander Consumer USA, Inc.

Defendant Santander Consumer USA Inc. moves to compel arbitration of plaintiff's claims in this action.

The arbitration statutes evidence a strong public policy in favor of arbitration that is frequently approved and enforced by the courts. *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706; *Laswell v. AG Seal Beach, LLC, et al* (2010) 189 Cal.App.4th 1399, 1405. Under both federal and state law, a threshold question for any petition to compel arbitration is whether there exists an agreement to arbitrate. *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396. It is the petitioner that carries this initial burden of proving, by a preponderance of the evidence, the existence of a valid arbitration agreement. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972. "'[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 648; *see Cronus Investments, Inc. v. Concierge Svcs.* (2005) 35 Cal.4th 376, 384-385.

Defendant establishes the existence of an arbitration agreement covering plaintiff's claims in this action. Plaintiff acknowledged receiving defendant's arbitration policy shortly after she was hired, and further acknowledged that the arbitration policy "is a condition of continued employment with [defendant] and that by continuing employment after being presented with this Arbitration policy, the associate is subject to such Policy." Plaintiff's acknowledgement establishes her consent to the arbitration policy. *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 130.

Plaintiff does not dispute that the Federal Arbitration Act (FAA) applies to the arbitration policy at issue. To avoid the enforceability of the arbitration policy, plaintiff must establish that there are legal or equitable grounds to revoke the agreements. Here, plaintiff asserts that the policy cannot be enforced due to unconscionability. "If the court as a matter of law finds the

contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Civ. Code § 1670.5(a); *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114. To invalidate an arbitration agreement based on unconscionability, both elements of procedural and substantive unconscionability must be present. *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 114.

Procedural unconscionability concerns the manner in which the contract was negotiated, and the parties' circumstances at that time. *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329. For the purpose of this analysis, the court examines factors of oppression, or the absence of a meaningful choice on the part of the weaker party, or surprise. The failure to attach a copy of the American Arbitration Association (AAA) rules does not render the policy procedurally unconscionable. *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676; *Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 737. However, there is some evidence of procedural unconscionability in this case, as the arbitration policy was presented to plaintiff on a "take it or leave it" basis.

The court next turns to the question of whether substantive unconscionability is present. Substantive unconscionability focuses on the terms of the agreement and whether those terms are "overly harsh or one-sided." *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910-911. Plaintiff argues that the arbitration policy is substantively unconscionable because it provides that arbitration will take place in Dallas, Texas, it is silent on who will bear the cost of the arbitration, and it provides for an award of attorneys' fees to the prevailing party.

Pursuant to Labor Code section 925, the provision of the arbitration policy which requires plaintiff to adjudicate her claims outside of California is voidable. Lab. Code § 925(b). Thus, according to this statute, and as already conceded by defendant, the matter shall be adjudicated in California. Further, as the agreement is silent regarding who will bear the arbitration forum costs, the employer must bear such costs. *Armendariz v. Foundation Health Psychcare Svcs., Inc., supra,* 24 Cal.4th at 113.

Section 7.7 of the arbitration policy states that the prevailing party "shall be entitled to recover from the other party all arbitration fees and reasonable attorneys' fees incurred by the party, as provided for by law." This provision is contrary to FEHA. See Gov. Code § 12965(b). The court finds that Section 7.7 may be properly severed from the arbitration policy. *See Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1477-1478.

Based on and subject to the foregoing, defendant's petition to compel arbitration is granted. Defendant shall bear the costs of the arbitration, which will take place in California. Section 7.7 of the arbitration policy is severed, and shall not be enforced. This action shall be stayed pending completion of the arbitration. **The case management conference set January 14, 2020, is hereby vacated. The court sets an order to show cause re: status of arbitration for August 25, 2020, at 11:30 a.m. in Department 40.**

15. S-CV-0043813 Ambrose, Steven vs. City of Lincoln, et al

Defendant's motion to strike is continued to January 10, 2020, at 8:30 a.m. in Department 31.

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