IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Law and Motion Calendar
HONORABLE SUSAN GREENBERG
Department 3

400 County Center, Redwood City
Courtroom 2B

Wednesday, October 17, 2018

NOTICE TO ALL COUNSEL

Until further order of the Court, no endorsed-filed "courtesy copy" of pleadings is required to be provided to the Law and Motion Department.

IF YOU *INTEND TO APPEAR* ON ANY CASE ON THIS CALENDAR, YOU MUST DO THE FOLLOWING:

1. **YOU MUST CALL (650) 261-5019 BEFORE 4:00 P.M. TO INFORM THE COURT OF YOUR INTENT TO APPEAR.**
2. **You must give notice before 4:00 P.M. to all parties of your intent to appear pursuant to California Rules of Court 3.1308(a)(1).**

Failure to do both items 1 and 2 will result in no oral presentation.

Notifying CourtCall with your intent to appear is not an alternative to notifying the court.

All Counsel are reminded to comply with California Rule of Court 3.1110. The Court will expect all exhibits to be tabbed accordingly.

Case	Title / Nature of Case

9:00
LINE: 1
16-CIV-00108 PATRICIA JUNG VS. OCWEN LOAN SERVICING, LLC, ET AL.

PATRICIA JUNG	EUNJI CHO
OCWEN LOAN SERVICING, LLC	PETER L. ISOLA

MOTION FOR SUMMARY JUDGMENT
TENTATIVE RULING:

The Motion of Defendants Ocwen Loan Servicing, LLC and Christiana Trust ("Defendants") for Summary Judgment, or Alternatively, for Summary Adjudication, is ruled on as follows:

(1) The Motion to the First Cause of Action for Declaratory Relief is GRANTED.

An action for declaratory relief is authorized when an actual controversy relating to the legal rights and duties of the respective parties under a written instrument or contract exists. (C.C.P. § 1060.) Here, Defendants establish that there is no actual controversy regarding the language in the note. (See Defendants' Undisputed Material Facts nos. 1-45.) Section 1 of the note provides that the principal balance would never exceed 115% of the original principal balance of $648,000.00, which is $745,200.00. (See Defendants' Undisputed Material Fact no. 12.) Defendant establishes that Plaintiff's principal balance never exceed more than $743,102.07. (See Decl. of Derrick Raleigh, ¶ 15.) Because Plaintiff made no payments after November 2011 though, interest began to accrue on the unpaid principal balance of $743,102.07, as well as Plaintiff incurred late charges and other fees and expenses related to her default. (*Id.* at ¶ 16.)

In opposition, Plaintiff fails to show that the note should be interpreted otherwise.
Where a contract is in writing, the parties' intention is determined from the writing alone, if possible. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 979, citing Civil Code § 1636.) The contract words are to be understood in their ordinary and popular sense. (Civil Code § 1644.) If a dispute arises over the meaning of the contract language, the first question is whether the language is reasonably susceptible to the interpretation urged by a party. (*Cedar-Sinai, supra* at 979.) If not, the case is over. (*Ibid.*) If the court decides the language is reasonably susceptible to the interpretation urged though, the court then moves to the second question: what did the parties intend the language to mean?" (*Id.* at 979-980.) Whether the contract is reasonably susceptible to one party's interpretation can be determined from the language of the contract itself or from extrinsic evidence of the parties' intent. (*Id.* at 980.) It is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation. (*Ibid.*) "The parties' undisclosed intent or understanding is irrelevant to contract interpretation." (*Ibid.*)

Plaintiff claims that an actual controversy exists regarding interpretation of the parties' rights and

duties pursuant to the promissory note ("note"). It is undisputed that the principal balance would never exceed 115% of the original principal balance of $648,000.00, or $745,200.00. (See Plaintiff's Response to Material Fact no. 12.) Instead, Plaintiff relies on Section 3(E), which also provides that for each month Plaintiff's monthly payments are less than the interest portion, the Note Holder will subtract the amount of the monthly payment from the amount of the interest portion and add the difference to Plaintiff's unpaid Principal. (See Plaintiff's Exh. A.) Plaintiff asserts that any failure to make a monthly payment is the equivalent of paying less than the interest portion, and thus Plaintiff could never owe more than $745,200 for the Principal Balance, including both principal and interest. Thus, Plaintiff's position is that Defendants were not permitted to separately collect any interest once Plaintiff's principal balance reached 115% of the original principal balance, or $745,200. Therefore, Plaintiff claims that an actual controversy exists as to whether Defendant was allowed to withhold approximately $120,000.00 in interest from surplus proceeds of the sale of the property.

Plaintiff's interpretation of the note is not reasonably susceptible though. Such an interpretation has already been rejected. (See *Diamos v. Fay Servicing, LLC* (N.D. Cal., Dec. 14, 2016, No. 16-CV-05164-DMR) 2016 WL 7230896.) In *Diamos*, the note limited the principal balance to 115% of the amount originally borrowed, and also contained a similar Section 3(E) to the Section 3(E) in this case. (*Id.* at *1, *3.) The Diamos plaintiff argued too, that interest could only be added to the unpaid principal balance until it reached 115% of the amount originally borrowed. The Diamos plaintiff argued that "the limit on the unpaid principal balance…includes both the principal balance as well as interest." (*Id.* at *4.) The court rejected plaintiff's interpretation, finding that section 3(E) provides for only one limited instance in which interest became capitalized into unpaid principal balance. "It does not state that interest accrued by any other means, including interest accrued due to the borrower's default, is added to the principal balance of the loan." (*Id.* at *4.)

Similarly here, the note separates the Payments portion (Section 3(E)) from the default provisions in Section 7. If Plaintiff failed to pay the full amount of each Minimum Payment on the date it is due, then Plaintiff will be in default. (See Plaintiff's Exh. A, Section 7(B).) If Plaintiff is in default, then the Note Holder may send a written notice that if Plaintiff does not pay the Minimum Payment by a certain date, the Note Holder may require Plaintiff to pay immediately the full amount of Principal that has not been paid "***and all the interest that Plaintiff owes***." (*Id.*, Section 7(C) (emphasis added.) The objective intent from the note as a whole supports that Defendants were permitted to recover the interest on the unpaid Principal following Plaintiff's default. Moreover, to adopt Plaintiff's interpretation means that no interest would have accrued from Plaintiff's default in 2011 until sale of the property in 2016. Plaintiff's position is untenable.

(2) The Motion to the Second Cause of Action for Violation of the Rosenthal Fair Debt Collection Practices Act, Civil Code sec. 1788, et seq., is GRANTED. Defendant establishes that it did not make any misleading statements in the March 9, 2016 and March 24, 2016 payoff quotes. (See Defendants' Undisputed Material Facts nos. 12, 15-35.) In opposition, Plaintiff fails to present any evidence to raise a triable issue of material fact as to any misleading statements by Defendants in these payoff quotes. Plaintiff only disputes whether Defendants were permitted to recover separate interest in the payoff quotes based on Section 3(E) of the note. (See

Plaintiff's Response to Material Facts nos. 12, 15-35.) As discussed above in the First Cause of Action though, Plaintiff's interpretation of the note fails.

(3) The Motion to the Third Cause of Action for Conversion is GRANTED.
To establish a cause of action for conversion, a plaintiff must show: (1) the plaintiff's ownership or right to possession of the property, (2) the defendant's conversion by a wrongful act or disposition of property rights, and (3) damages. (Finton Const., Inc. v. Bidna & Keys, APLC (2015) 238 Cal.App.4th 200, 213.)
Defendants proffer sufficient evidence to support that Plaintiff cannot establish any of the elements of this claim. (See Defendants' Undisputed Material Facts nos. 1-45.) Plaintiff fails to provide any evidence in opposition to raise a triable issue of material fact as to these elements. Plaintiff's conversion claim is once again premised on the same allegation that Defendants wrongfully withheld interest of approximately $120,000 from the surplus proceeds based on Section 3(E) of the note. As discussed above, Plaintiff's interpretation fails.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00

LINE: 2

17-CIV-04589 CHARLOTTE PAYTON, ET AL. VS. WYKA CORP

CHARLOTTE PAYTON PRO/PER
WYKA CORP

PETITION TO CONFIRM ARBITRATION AWARD
TENTATIVE RULING:

The hearing on the petition to confirm the arbitration award is continued to November 14, 2018 at 9:00 AM on the Presiding Judge's Master Calendar.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00

LINE: 3

17-CLJ-03514 JONATHAN D. COBB, SR. VS. EMMA VIOLA ATWATER

JONATHAN D COBB, SR.	PRO/PER
EMMA VIOLA ATWATER	PETER N. BREWER

MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING:

The motion for summary judgment is continued to November 28, 2018 at 9 am in the Law and Motion Department on the Court's own motion.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00
LINE: 4
18-CIV-00160 BERNARDO SALAZAR VS. TAQUERIA LA MORENA, ET AL.

BERNARDO SALAZAR	GREGORY C. CATTERMOLE
TAQUERIA LA MORENA	JEROME P. BELLOTTI

MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS
TENTATIVE RULING:

The motion to compel arbitration and stay proceedings is granted.

The Federal Arbitration Act (FAA) "applies to any contract evidencing a transaction involving commerce that contains an arbitration provision." The Declaration of Tavana does not sufficiently demonstrate that Plaintiff's employment involves interstate commerce. The Court concludes that the FAA does not apply to the Arbitration Agreement. The Court grants the motion under Code of Civil Procedure sections 1280 et seq.

It is undisputed that an Agreement to Arbitrate exists and was signed by both parties. The Court grants the motion to compel arbitration because Plaintiff fails to show that the agreement is procedurally and substantively unconscionable.

A. The Agreement Is not Procedurally Unconscionable.

Plaintiff argues that the Agreement was one of adhesion, but adhesion alone is insufficient to invalidate an arbitration agreement. (*Lane v. Francis Capital Mgmt. LLC* (2014) 224 Cal. App. 4th 676, 689; *Graham v. Scissor–Tail, Inc*. (1981) 28 Cal.3d 807, 819.) Plaintiff also argues that the Arbitration Agreement does not attach the rules of JAMS. Failure to include the arbitration rules could be a factor supporting a finding of procedural unconscionability where the failure would result in surprise to the party opposing arbitration. (*Lane, supra,* at 690.) However, the failure to attach a copy of the JAMS rules does not render the Agreement procedurally unconscionable, since the rules referenced in the agreement were easily accessible to the parties, such as being available on the internet. (*Id.* at 691.

Both procedural and substantive unconscionability must exist in order to deny a motion to compel arbitration. Plaintiff fails to establish that the Arbitration Agreement is procedurally unconscionable. Therefore, the motion is granted.

B. The Agreement Is not Substantively Unconscionable.

1. The Class Action Waiver Does not Render the Arbitration Agreement Unconscionable.

Class action waivers are not *per se* unenforceable. Regardless, even if the class action waiver is unenforceable, the court may sever that provision and enforce the remainder of the arbitration agreement. (*See Gentry v. Sup. Ct.* (2007) 42 Cal.4th 443.) The existence of a class-action waiver does not render the entire Arbitration Agreement substantively unconscionable.

2. The Waiver of Berman Hearings Does not Render the Arbitration Agreement Unconscionable.

Plaintiff argues that the language bars Berman hearings is unconscionable because waiver of right to a Berman hearing is unconscionable. That clause, however is only "to the greatest extent permitted by law." (See Agreement ¶ 5.) Rights to Berman hearings are not waivable. (*Sonic Calabasas-A v. Moreno* (2011) 51 Cal.4th 659, 684 ("*Sonic I*") The waiver of Berman hearings in Plaintiff's Arbitration Agreement is not enforceable, since that waiver is only "to the greatest extent permitted by law." Here, "the greatest extent permitted by law" does not permit the Berman waiver. Since the waiver of Berman hearings is not enforceable, it is not unconscionable.

Sonic I was partly reversed on the ground that the FAA preempts a state-law rule categorically requiring arbitration to be preceded by a Berman hearing. (*Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1142 (*Sonic II*).) However, since the FAA does not apply to this case, the preemption does not apply.

3. The JAMS Rules Do not Preclude Sufficient Discovery.

Plaintiff argues that the JAMS Rules fail to permit sufficient discovery and that discovery limitations far more generous than that of JAMS have been held to be unconscionable. (Opp. at 12 [*citing Baxter v. Genworth N. Am. Corp*., 16 Cal. App. 5th 713].) In *Baxter*, however, the Court noted that simply claiming insufficient discovery is not enough. Rather, it was necessary to make "a factual showing" that the discovery limitations would thwart the employee's ability to prove his or her particular claims. (*Baxter v. Genworth v. Am. Corp*. (2017) 16 Cal. App. 5th 713, 729.) The plaintiff in *Baxter* set forth the quantity of discovery she needed and the reasons for it. The Court concluded that the discovery limitations of the employee dispute resolution program were inadequate. Here, Plaintiff does not identify the type or quantity of discovery she desires to take.

Further, the discovery limitations in *Baxter* provided that the arbitrator could permit additional discovery, "for good and sufficient cause shown." The Court held that the requirement of showing "good and sufficient cause" for discovery was too vague and too stringent, compared with a mere "showing of need" for discovery, which was held to be not unduly stringent. (*See Dotson v. Amgen, Inc*. (2010) 181 Cal. App. 4th 975, 978 ["language permitting the arbitrator to expand discovery upon a showing of need removes any taint of 'unconscionability' from the agreement"].)

Here, the JAMS Rules permit the arbitrator to expand discovery upon showing of "reasonable need." (JAMS Rules, attached as Exhibit B to Moving Declaration of Wang at p.17.) The Court

concludes that requiring a showing of "reasonable need" for discovery is not unduly onerous.

Finally, the Code of Civil Procedure provides that the discovery provisions of the California Arbitration Act are incorporated into "every" arbitration agreement that pertains to personal injury. (Code of Civ. Proc. Sect. 1283.1, subd. (a).) Those provisions include "all of the same rights, remedies, and procedures . . . as if the subject matter of the arbitration were pending" in court. (Id. sect. 1283.05). A FEHA harassment claim is an "injury to ... a person" within the meaning of Code of Civil Procedure section 1283.1, subdivision (a). (*Bihun v. AT & T Information Systems, Inc*. (1993) 13 Cal.App.4th 976, 1005.) Four of Plaintiff's six causes of action are FEHA claims. The discovery provisions of section 1283.05 are available to Plaintiff.

4. The Agreement Does not Require Plaintiffs to Pay for Any Costs of Arbitration.

Finally, Plaintiff argues that the agreement does not expressly provide that Plaintiff shall not pay costs of arbitration. An arbitration agreement is not required to explicitly set forth the arbitration costs. (*Little v. Auto Stiegler, Inc*. (2003) 29 Cal. 4th 1064.)

C. The Action Is Stayed.

The motion to stay this action until completion of arbitration is granted.

D. Conclusion

The motion to compel arbitration and stay proceedings of the civil action is granted. If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

9:00
LINE: 5
18-CIV-03166 LUIS B. CABRERA VS. QUALITY LOAN SERVICE CORPORATION, ET AL.

LUIS B. CABRERA PRO/PER
QUALITY LOAN SERVICE CORPORATION

HEARING ON DEMURRER
TENTATIVE RULING:

Defendant's demurrer to Plaintiff's first amended complaint is SUSTAINED without leave to amend.

The claims asserted by Plaintiff against Defendant Quality Loan Service Corporation are barred by the doctrine of res judicata. That rule has been set forth as follows:

> "'The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.' " (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065, 71 Cal.Rptr.2d 77.) "[R]es judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897, 123 Cal.Rptr.2d 432, 51 P.3d 297.)
>
> "Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of action.... In California, a 'cause of action' is defined by the 'primary right' theory. 'The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.' . . . In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right.... '"If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it.... The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable...."'" (*Amin v.*

Khazindar (2003) 112 Cal.App.4th 582, 589–590, 5 Cal.Rptr.3d 224, citations omitted.)

"The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.' ... '[U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.... "... [A]n issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result...." ' " (*Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal.App.3d 177, 181–182, 257 Cal.Rptr. 37, citations & italics omitted.)

"'In California the phrase "cause of action" is often used indiscriminately ... to mean *counts* which state [according to different legal theories] the same cause of action....' ... But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.... '[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant.... Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though [the plaintiff] presents a different legal ground for relief." ...' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798, 108 Cal.Rptr.3d 806, 230 P.3d 342, citations omitted.)

Villacres v. ABM Indus. Inc., 189 Cal. App. 4th 562, 575–77, 117 Cal. Rptr. 3d 398, 408–10 (2010).

Plaintiff could have brought the claims asserted in this action in three previous lawsuits: CIV495541; 16CIV02094, and 17CIV02194. Plaintiff's claims stem from the same primary right or subject matter as the previous actions. Defendant Quality Loan Service Corporation is in privity with the defendants in the previous lawsuits because it is successor in interest to the deed of trust. *Rice v. Crow*, 81 Cal. App. 4th 725, 735, 97 Cal. Rptr. 2d 110, 117 (2000). Plaintiff received a judgment on the merits in CIV495541 when the defendants' demurrer to Plaintiff's

complaint was sustained for failure to allege facts sufficient to state a cause of action. As a result, Plaintiff's claims against Defendant Quality Loan Servicing Corporation in this action are barred by res judicata.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

9:00

LINE: 6

18-CIV-03168 NORMA CABRERA VS. QUALITY LOAN SERVICE CORPORATION, ET AL

NORMA CABRERA	PRO/PER
QUALITY LOAN SERVICE CORPORATION	MELISSA ROBBINS COUTTS

HEARING ON DEMURRER
TENTATIVE RULING:

Defendant's demurrer to Plaintiff's first amended complaint is SUSTAINED without leave to amend.

The claims asserted by Plaintiff against Defendant Quality Loan Service Corporation are barred by the doctrine of res judicata. That rule has been set forth as follows:

> "'The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.' " (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065, 71 Cal.Rptr.2d 77.) "[R]es judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897, 123 Cal.Rptr.2d 432, 51 P.3d 297.)
>
> "Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of action.... In California, a 'cause of action' is defined by the 'primary right' theory. 'The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.' . . . In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right.... '"If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it.... The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable...."'" (*Amin v.*

Khazindar (2003) 112 Cal.App.4th 582, 589–590, 5 Cal.Rptr.3d 224, citations omitted.)

"The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.' ... '[U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.... "... [A]n issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result...." ' " (*Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal.App.3d 177, 181–182, 257 Cal.Rptr. 37, citations & italics omitted.)

"'In California the phrase "cause of action" is often used indiscriminately ... to mean *counts* which state [according to different legal theories] the same cause of action....' ... But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.... '[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant.... Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though [the plaintiff] presents a different legal ground for relief." ...' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798, 108 Cal.Rptr.3d 806, 230 P.3d 342, citations omitted.)

Villacres v. ABM Indus. Inc., 189 Cal. App. 4th 562, 575–77, 117 Cal. Rptr. 3d 398, 408–10 (2010).

Luis Cabrera could have brought the claims asserted in this action in his three previous lawsuits: CIV495541; 16CIV02094, and 17CIV02194. Plaintiff is in privity with Luis Cabrera because she owns the subject property jointly with him. Plaintiff's claims stem from the same primary right or subject matter as the previous actions. Defendant Quality Loan Service Corporation is in privity with the defendants in the previous lawsuits because it is successor in interest to the deed of trust. *Rice v. Crow*, 81 Cal. App. 4th 725, 735, 97 Cal. Rptr. 2d 110, 117

(2000). Luis Cabrera received a judgment on the merits in CIV495541 when the defendants' demurrer to his complaint was sustained for failure to allege facts sufficient to state a cause of action. As a result, Plaintiff's claims against Defendant Quality Loan Servicing Corporation in this action are barred by res judicata.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

9:00
LINE: 7
18-CIV-03384 JAN KOEHLER VS. THOUGHT STREAM, LLC, ET AL.

JAN KOEHLER MARC C. LE CLEC
THOUGHT STREAM, LLC

MOTION TO COMPEL ARBITRATION AND TO STAY
TENTATIVE RULING:

The motion to compel arbitration and stay proceedings is granted.

The Federal Arbitration Act (FAA) "applies to any contract evidencing a transaction involving commerce that contains an arbitration provision." The Declaration of Tavana does not sufficiently demonstrate that Plaintiff's employment involves interstate commerce. The Court concludes that the FAA does not apply to the Arbitration Agreement. The Court grants the motion under Code of Civil Procedure sections 1280 et seq.

It is undisputed that an Agreement to Arbitrate exists and was signed by both parties. The Court grants the motion to compel arbitration because Plaintiff fails to show that the agreement is procedurally and substantively unconscionable.

A. The Agreement Is not Procedurally Unconscionable.

Plaintiff argues that the Agreement was one of adhesion, but adhesion alone is insufficient to invalidate an arbitration agreement. (*Lane v. Francis Capital Mgmt. LLC* (2014) 224 Cal. App. 4th 676, 689; *Graham v. Scissor–Tail, Inc*. (1981) 28 Cal.3d 807, 819.) Plaintiff also argues that the Arbitration Agreement does not attach the rules of JAMS. Failure to include the arbitration rules could be a factor supporting a finding of procedural unconscionability where the failure would result in surprise to the party opposing arbitration. (*Lane*, *supra*, at 690.) However, the failure to attach a copy of the JAMS rules does not render the Agreement procedurally unconscionable, since the rules referenced in the agreement were easily accessible to the parties, such as being available on the internet. (*Id.* at 691.

Both procedural and substantive unconscionability must exist in order to deny a motion to compel arbitration. Plaintiff fails to establish that the Arbitration Agreement is procedurally unconscionable. Therefore, the motion is granted.

B. The Agreement Is not Substantively Unconscionable.

1. The Class Action Waiver Does not Render the Arbitration Agreement Unconscionable.

Class action waivers are not *per se* unenforceable. Regardless, even if the class action waiver is unenforceable, the court may sever that provision and enforce the remainder of the arbitration agreement. (*See Gentry v. Sup. Ct.* (2007) 42 Cal.4th 443.) The existence of a class-action waiver does not render the entire Arbitration Agreement substantively unconscionable.

2. The Waiver of Berman Hearings Does not Render the Arbitration Agreement Unconscionable.

Plaintiff argues that the language bars Berman hearings is unconscionable because waiver of right to a Berman hearing is unconscionable. That clause, however is only "to the greatest extent permitted by law." (See Agreement ¶ 5.) Rights to Berman hearings are not waivable. (*Sonic Calabasas-A v. Moreno* (2011) 51 Cal.4th 659, 684 ("*Sonic I*") The waiver of Berman hearings in Plaintiff's Arbitration Agreement is not enforceable, since that waiver is only "to the greatest extent permitted by law." Here, "the greatest extent permitted by law" does not permit the Berman waiver. Since the waiver of Berman hearings is not enforceable, it is not unconscionable.

Sonic I was partly reversed on the ground that the FAA preempts a state-law rule categorically requiring arbitration to be preceded by a Berman hearing. (*Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1142 (*Sonic II*).) However, since the FAA does not apply to this case, the preemption does not apply.

3. The JAMS Rules Do not Preclude Sufficient Discovery.

Plaintiff argues that the JAMS Rules fail to permit sufficient discovery and that discovery limitations far more generous than that of JAMS have been held to be unconscionable. (Opp. at 12 [*citing Baxter v. Genworth N. Am. Corp*., 16 Cal. App. 5th 713].) In *Baxter*, however, the Court noted that simply claiming insufficient discovery is not enough. Rather, it was necessary to make "a factual showing" that the discovery limitations would thwart the employee's ability to prove his or her particular claims. (*Baxter v. Genworth v. Am. Corp*. (2017) 16 Cal. App. 5th 713, 729.) The plaintiff in *Baxter* set forth the quantity of discovery she needed and the reasons for it. The Court concluded that the discovery limitations of the employee dispute resolution program were inadequate. Here, Plaintiff does not identify the type or quantity of discovery she desires to take.

Further, the discovery limitations in *Baxter* provided that the arbitrator could permit additional discovery, "for good and sufficient cause shown." The Court held that the requirement of showing "good and sufficient cause" for discovery was too vague and too stringent, compared with a mere "showing of need" for discovery, which was held to be not unduly stringent. (*See Dotson v. Amgen, Inc*. (2010) 181 Cal. App. 4th 975, 978 ["language permitting the arbitrator to expand discovery upon a showing of need removes any taint of 'unconscionability' from the agreement"].)

Here, the JAMS Rules permit the arbitrator to expand discovery upon showing of "reasonable need." (JAMS Rules, attached as Exhibit B to Moving Declaration of Wang at p.17.) The Court

concludes that requiring a showing of "reasonable need" for discovery is not unduly onerous.

Finally, the Code of Civil Procedure provides that the discovery provisions of the California Arbitration Act are incorporated into "every" arbitration agreement that pertains to personal injury. (Code of Civ. Proc. Sect. 1283.1, subd. (a).) Those provisions include "all of the same rights, remedies, and procedures . . . as if the subject matter of the arbitration were pending" in court. (Id. sect. 1283.05). A FEHA harassment claim is an "injury to ... a person" within the meaning of Code of Civil Procedure section 1283.1, subdivision (a). (*Bihun v. AT & T Information Systems, Inc*. (1993) 13 Cal.App.4th 976, 1005.) Four of Plaintiff's six causes of action are FEHA claims. The discovery provisions of section 1283.05 are available to Plaintiff.

4. The Agreement Does not Require Plaintiffs to Pay for Any Costs of Arbitration.

Finally, Plaintiff argues that the agreement does not expressly provide that Plaintiff shall not pay costs of arbitration. An arbitration agreement is not required to explicitly set forth the arbitration costs. (*Little v. Auto Stiegler, Inc*. (2003) 29 Cal. 4th 1064.)

C. The Action Is Stayed.

The motion to stay this action until completion of arbitration is granted.

D. Conclusion

The motion to compel arbitration and stay proceedings of the civil action is granted. If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

9:00

LINE: 8

18-CIV-03664 MARIELA LIMA VS. KING STREET TRADING, LLC, ET AL.

MARIELA LIMA — ARLO URIARTE
KING STREET TRADING, LLC

MOTION TO COMPEL ARBITRATION AND TO STAY
TENTATIVE RULING:

The motion to compel arbitration is continued to November 14, 2018 at 9 am in the Law and Motion Department on the Court's own motion.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00
LINE: 9
CLJ537170 AMERICAN EXPRESS BANK VS. HUGO D FERRETTI, ET AL.

AMERICAN EXPRESS BANK, FSB	LINA M. MICHAEL
HUGO D. FERRETTI	PRO/PER

MOTION TO VACATE
TENTATIVE RULING:

Plaintiff AMERICAN EXPRESS BANK, FSB's Motion for Order Vacating Dismissal and Entering Judgment is DENIED WITHOUT PREJUDICE. Plaintiff's moving papers were improperly served on Defendant's prior counsel. On July 10, 2018, Defendant filed a Substitution of Attorney form indicating that he is now in pro per, and providing his correct mailing address. Accordingly, Plaintiff is directed to re-serve and re-file its motion.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

POSTED: 3:00 PM