TENTATIVE RULINGS

DEPT C28

Judge Thomas S. McConville

April 22, 2024 at 9:00 a.m.

Court Reporters: Official court reporters (i.e., court reporters employed by the Court) are **NOT** typically provided for law and motion matters in this department. If a party desires a record of a law and motion proceeding, it will be the party's responsibility to provide a court reporter. Parties must comply with the Court's policy on the use of privately retained court reporters which can be found at:

- Civil Court Reporter Pooling; and

- For additional information, please see the court's website at Court Reporter Interpreter Services for additional information regarding the availability of court reporters.

Tentative rulings: The court endeavors to post tentative rulings on the court's website in the morning, prior to the afternoon hearing. However, ongoing proceedings such as jury trials may prevent posting by that time. Tentative rulings may not be posted in every case. Please do not call the department for tentative rulings if tentative rulings have not been posted. The court will not entertain a request to continue a hearing or the filing of further documents once a tentative ruling has been posted.

Submitting on tentative rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the Courtroom Clerk or Courtroom Attendant by calling (657) 622-5228. Please do not call the department unless all parties submit on the tentative ruling. If all sides submit on the tentative ruling and so advise the court, the tentative ruling shall become the court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the court's signature if appropriate under Cal. R. Ct. 3.1312.

Non-appearances: If nobody appears for the hearing and the court has not been notified that all parties submit on the tentative ruling, the court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling. The Court also might make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

Appearances: Department C28 conducts non-evidentiary proceedings, such as law and motion hearings, remotely by Zoom videoconference pursuant to Code of Civil Procedure section 367.75 and Orange County Local Rule 375. Any party or attorney, however, may appear in person by coming to Department C28 at the Central Justice Center, located at 700 Civic Center Drive West in Santa Ana, California. All counsel and self-represented parties appearing in-person must check in with the courtroom clerk or courtroom attendant before the designated hearing time.

All counsel and self-represented parties appearing remotely must check-in online through the court's civil video appearance website at **https://www.occourts.org/media-relations/civil.html** before the designated hearing time. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Participants will initially be directed to a virtual waiting room pending the start of their specific video hearing. Check-in instructions and instructional video are available at **https://www.occourts.org/media-relations/aci.html**. The Court's "Appearance Procedures and Information--Civil Unlimited and Complex" and "Guidelines for Remote Appearances" also are available at **https://www.occourts.org/media-relations/aci.html**. Those procedures and guidelines will be strictly enforced.

Public Access: The courtroom remains open for all evidentiary and non-evidentiary proceedings. Members of the media or public may obtain access to law and motion hearings in this department by either coming to the department at the designated hearing time or contacting the courtroom clerk at (657) 622-5228 to obtain login information. For remote appearances by the media or public, please contact the courtroom clerk 24 hours in advance so as not to interrupt the hearings.

Arguments: The court will allow arguments on the pending motions, but those arguments must not repeat arguments previously made in each parties' applicable briefs.

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and Orange County Superior Court rule 180.

#	Case Name	Tentative
50.	Robinson v. Airbahn Inc. 2021-01212245	Defendant Airbahn's Demurrer to Plaintiffs' Third Amended Complaint ("3rdAC") concerning allegations by Plaintiff Reynolds is SUSTAINED without leave to amend. This is the fourth time the court is considering whether plaintiff Reynolds has adequately pleaded his causes of action for whistleblower retaliation and wrongful termination. The three prior orders sustained the demurrers. Those orders noted what has again failed to be addressed by Plaintiff Reynolds (including in the opposition to this demurrer): facts demonstrating a causal link between the protected activity and an adverse employment action. Reynolds efforts to align his resignation with Plaintiff Robinson's termination (3rdAC para. 64) to create Reynolds' adverse employment action fails. And Reynolds' categorizing the types of activity that amount to adverse employment action -- short of termination or demotion continue to be inadequate. As articulated in the 3rdAC, in the 2+ months of his employment, plaintiff Reynolds offered criticism of the flight safety plan; secured a change to the proposed use of the SITA system; received a promotion; observed reluctance of his employer to embrace each of his safety ideas; saw his boss Robinson get terminated and others suffer workplace challenges; and within a few days following Robinson's termination, Reynolds resigned. The 3rdAC continues to speculate about what might happen to plaintiff Reynolds in the wake of Robinson's termination. Speculation does not constitute support for a causal link between protected activity and an adverse employment action. And the facts averred in the 3rdAC do not support a finding of adverse employment action. For the same reasons Reynolds' whistleblower retaliation claim fails, his wrongful termination claim fails. Reynolds avers he was forced to resign (that is, constructively discharged) for all the same activities described in the preceding paragraph. Those same

		activities remain speculative whether viewed through the lens of retaliation or wrongful termination. The 3rd AC insufficiently pleads that Reynolds was constructively terminated in violation of public policy. Plaintiff Reynolds' opposition failed to address the element of causation in both causes of action and failed to suggest how the pleading could be further amended to successfully state a cause of action. Plaintiff has the burden of proving that there is a reasonable possibility that the defect can be cured by amendment. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The court has afforded plaintiff Reynolds four opportunities to successfully allege a cause of action, and the court finds that further leave to amend would be futile. Thus, the demurrer is sustained without leave to amend. Defendant shall give notice.
51.	Williams v. Allegis Group, Inc. 2023-01330124	Defendants Allegis Group, Inc.'s, and Aerotek, Inc.'s Motion to Compel Arbitration and Stay Action is GRANTED. (See Code Civ. Proc. § 1281.2.) Defendants met their initial burden to show: (1) The existence of written agreement to arbitrate; (2) A demand to arbitrate and refusal by the party opposing arbitration; and (3) Proof that the arbitration agreement covers the dispute at issue. (See *Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633.) Plaintiff argues that the arbitration agreement is both procedurally and substantively unconscionable. (See *Armendariz v. Foundation Heath Psychcare Services, Inc*. (2000) 24 Cal 4th 83). Unconscionability is a contract defense used to invalidate arbitration agreements without contravening the Federal Arbitration Act or California law. (See *OTO, LLC v. Kho* (2019) 8 Cal.5th 111, 125.) The evidence does reflect some level of procedural unconscionability. For example, the emails submitted

		to plaintiff contained numerous documents. Decl. of Williams, para 7-8. While defendants evidence states that a prospective employee could take time to review the documents, and decline to sign the arbitration agreement, there is no evidence that plaintiff was advised of such. Decl. of Cometa-Fasanello. See *Hasty v. American Automobile Association of Northern California, Nevada & Utah* (2023) 98 Cal.App.5th 1041. However, even assuming that the arbitration agreement was procedurally unconscionable, the court cannot find that it is substantively unconscionable, which is a necessary finding to avoid enforcement of the agreement. See *Armendariz*, 24 Cal. 4th at 99. Here, defendants have shown that the arbitration agreement satisfies each of the criteria identified in *Armendariz* relating to substantive unconscionability. The court orders this matter stayed, and for all parties to proceed with arbitration. Defendants' request for judicial notice is denied. Plaintiff's request for judicial notice is granted. The court declines to consider the declaration in reply. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38.) The court sets this matter for an arbitration review hearing on December 13, 2024 at 9:00 a.m. in Department C28. The parties are ordered to file with the court a joint statement of the status of arbitration five days before the scheduled review hearing. Defendants shall give notice.
52.	Aurora Solutions, LLC v. Burrell 2020-01172379	The applications by attorneys Edward T. Kang, Kandis L. Kovalsky and Sofia J. Calabrese to be admitted pro hac vice on behalf of defendants National Payment Systems, LLC dba Boom Commerce and Eventus Holdings, LLC are GRANTED. Moving Parties shall give notice.

53.	Hernandez v. Intimate Inns of California, Inc. 2018-01040154	The unopposed motion of James Orlando to be relieved as counsel of record for Defendants Intimate Inns of California, Inc. and Kevin Tarvin is GRANTED. Service on Defendants and counsel of the other Parties was proper, and all required forms were filed pursuant to California Rules of Court, Rule 3.1362. The order will take effect once moving attorney files proof of service of this Order on Defendants Intimate Inns of California, Inc. and Kevin Tarvin. Moving attorney shall give notice.
54.	Weinstock Manion v. Kaneko 2020-01153485	The motion by Plaintiff / Judgment Creditor Weinstock Manion, a Law Corporation, for an assignment order is GRANTED. (Code Civ. Proc., § 708.510.) Judgment Debtor Sabine Kaneko is ordered to assign to moving party any rights to payment arising from the lawsuit entitled *Erika Kaneko v. Toshio Masui*, et. al., Los Angeles Superior Court Case SC025245, up to the amount of the judgment, i.e. $43,428.01. Moving party shall give notice.
55.	Zaharias v. United Airlines, Inc. 2021-01200049	Plaintiff Louis Zaharias' motion to stay this action pending the appeal of this court's decision granting summary judgment as to defendant United Airlines is DENIED. C.C.P. § 916(a) provides: Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including the enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order. In *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, the court explained that the automatic stay "... prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect

		it." *Id.* at 189, citing *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629. Whether a matter is embraced in and/or affected by an appeal is subject to various tests including: (1) whether the matter seeks to enforce, vacate or modify the appealed judgment or order, (2) whether the matter would substantially interfere with the appellate court's ability to conduct the appeal, or (3) whether the matter would affect the effectiveness of the appeal if the possible outcomes of the appeal and the actual or possible results of the proceeding are irreconcilable. *Id.* at 189-190. The key factor in such a determination is whether post-judgment or post-order proceedings on the matter would affect the "effectiveness of the appeal." *Id*. The decision on the appeal from the grant of summary judgment as to defendant United Airlines won't affect the "effectiveness of the appeal" with regard to the determination of defendant County of Orange's liability to plaintiff. See also *Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564. Moving party shall give notice.
56.	Hot Pepper, Inc. v. mMax Communications, Inc. 2022-01250772	Attorney Jack M. McNeily's application to appear as counsel pro hac vice for cross-defendants XiaoLaJiao (Hong Kong) Technology Co., Ltd., Yuan Ning Sun, and Hot Pepper Mobile Inc. is GRANTED. Moving party shall give notice.
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59.	Simply Crystal Clean, LLC v. 24 Hour Fitness, USA, LLC 2022-01255731	Defendant 24 Hour Fitness, USA, LLC's (24 Hour) motion for summary judgment is GRANTED. <u>1st & 2nd causes of action for breach of contract, common counts</u>. 24 Hour has met its initial burden to show that as alleged against this defendant, the first and second causes of action for breach of contract and

		common counts have no merit. (See Code Civ. Proc., § 437c, subds. (a), (p)(2) [burden]; *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-851 (*Aguilar*) [burden].) 24 Hour has demonstrated it was not a party to the contract at issue. (See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 [elements of breach of contract include, inter alia, existence of a contract]; *Korchemny v. Piterman* (2021) 68 Cal.App.5th 1032, 1048 (*Korchemny*) [a common count used in the alternative to seek the same recovery demanded in a claim for breach of contract falls with the breach of contract claim]; SSMF #s 1-5; see also Piro Decl. ¶¶ 3, 5-7, Ex. A; Ciochon Decl. ¶ 2, Ex. A [plaintiff's response to form interrogatory 50.1]; Compl. ¶¶ 7, 9-11 [subject contract].) Plaintiff Simply Crystal Clean, LLC (plaintiff) has failed to meet its shifted burden to demonstrate a triable issue of material fact. (See Code Civ. Proc., § 437c, subd. (p)(2) [burden]; *Aguilar*, *supra*, 25 Cal.4th at pp. 849-850 [same].) Plaintiff attempts to create a triable issue by claiming that 24 Hour was "in a partnership" with USB, and that USB and/or Facility Cleaning International, Inc. (FCI) were 24 Hour's agents, but the evidence it cites does not support these assertions. (See Pl. Resp. to SSMF #s 1, 3, 5 [evidence cited].) Plaintiff's evidence does not demonstrate the existence of a "partnership" between 24 Hour and USB/FCI that might render 24 Hour a party to the subject contract or liable for USB/FCI's breach of the same. It also fails to show that Bobby Bode (Bode), who negotiated the subject contract on behalf of USB/FCI, was an actual/ostensible agent of 24 Hour at any time. (See Civ. Code, §§ 2298 ["An agency is either actual or ostensible."], 2299 ["An agency is actual when the agent is really employed by the principal."], 2300 ["An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him"].) Further, plaintiff's own evidence shows that USB/FCI made certain written

		representations to plaintiff's principal, Bita Safari, specifically stating the parties to the subject contract were plaintiff and USB, and identifying 24 Hour only as USB's "customer." (See Safari Decl. ¶¶ 3-4, Ex. A.) Plaintiff also attempts to create a triable issue by claiming it was never a subcontractor. (See Pl. Resp. to SSMF #2.) This assertion fails because plaintiff's own evidence and discovery responses show plaintiff agreed to clean the facilities pursuant to a "subcontract" agreement with USB/FCI. (See Ciochon Decl. ¶ 2, Ex. A [plaintiff's response to form interrogatory 50.1]; see also Safari Decl. ¶¶ 2-4, Ex. A [USB subcontract agreement].) Next, plaintiff claims there was an implied-in-fact contract between plaintiff and 24 Hour (Pl. Resp. to SSMF #3), but, again, the evidence plaintiff cites in support of the assertion fails to substantiate this. An implied-in-fact contract is based on the manifest conduct of the parties. (Civ. Code, § 1621.) Like an express contract, an implied-in-fact contract requires mutual consent as to its material terms, i.e., an ascertained agreement. (*Allied Anesthesia Medical Group, Inc. v. Inland Empire Health Plan* (2022) 80 Cal.App.5th 794, 808-809 (*Allied Anesthesia*).) None of the evidence plaintiff cites suggests 24 Hour manifested any conduct showing it agreed to pay plaintiff for its services, much less at rate alleged in the complaint. (See Pl. Resp. to SSMF #3 [evidenced cited]; Compl. ¶¶ 9-14 [subject contract]; see also *Allied Anesthesia, supra,* 80 Cal.App.5th at p. 810 [a claim for breach of an implied-in-fact contract requires plaintiffs to plead and prove the agreed-upon rate].) Rather, the evidence shows 24 Hour agreed to pay *USB* for the subject services, whether USB provided the services itself or through a subcontractor (Piro Decl. ¶¶ 3, 5-6, Ex. A); and that it is *USB* that retained and agreed to pay plaintiff for those services (Safari Decl. ¶¶ 2-4, Exs. A-B). The manifest conduct of the parties only tends to confirm this arrangement, i.e., that it was USB, and not 24 Hour, who agreed to

		pay plaintiff for its services. The evidence shows plaintiff billed USB and/or FCI for its services, and that all payments plaintiff received for its services were made by USB and/or FCI. (See Safari Decl. ¶ 12, Ex. E [Safari email to Bode at FCI/USB, discussing plaintiff's billing for FCI/USB's account, explaining discrepancies in the billing, asking Bode to tell Tyra Lynn at FCI "not to make any changes to the monthly billing amount or payment day without advanced discussion"]; Plummer Decl. at Ex. I [Bode Depo. 41:20-42:4, 67:21-68:11]; Ciochon Decl. at Exs. C [Safari Depo. 25:4-8, 101:16-102:7, 129:4-25] & E [Ex. O to Safari Depo.].) Nothing suggests plaintiff ever invoiced 24 Hour for its services or that 24 Hour ever paid plaintiff for the same, even though plaintiff provided the services on a weekly/monthly basis for nearly two years. (See Safari Decl. ¶¶ 8, 11-12 & Ex. F [plaintiff provided the services from 6/1/20 to 4/1/22].) Finally, plaintiff also contends that 24 Hour remains liable for breach of contract as a "co-conspirator." (Opp. at p. 12.) This argument fails because there is no cause of action for conspiracy to commit a breach of contract. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511; *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1291-1292.) Where, as here, a common count is used in the alternative to seek the same recovery demanded in an unmeritorious claim for breach of contract, it falls with the breach of contract claim. (*Korchemny, supra,* 68 Cal.App.5th at p. 1048; compare Compl. ¶¶ 9, 13-14 [seeking a total of $429,953.93 in damages], with *id.* ¶¶ 17-20 [same].) <u>3rd cause of action for fraud</u>. 24 Hour has met its initial burden to show that the third cause of action for fraud has no merit. (See *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255 [elements]; SSMF #4; Ciochon Decl. ¶ 4, Ex. C [Safari Depo. 119:21-25].)

		Plaintiff has failed to meet its shifted burden to demonstrate a triable issue of material fact. Plaintiff attempts to create a triable issue by reiterating the same partnership and agency assertions discussed above, but, again, none of the evidence plaintiff cites substantiates these assertions. (See Pl. Resp, to SSMF #s 4-5 [evidence cited].) Plaintiff's evidence fails to show the existence of a "partnership" between 24 Hour and USB/FCI by which 24 Hour might be liable for USB/FCI's misrepresentations. It also fails to show USB/FCI represented the cleanable square footages of the facilities as 24 Hour's agents or on its behalf. It also fails to demonstrate Bode was an actual/ostensible agent of 24 Hour at any time. (See Civ. Code, §§ 2298-2300.) Further, the alleged misrepresentations at issue under this cause of action concern the *cleanable* square footage of the facilities. (See Compl. ¶¶ 7, 21-29.) Plaintiff's evidence shows that it is USB/FCI that made those alleged misrepresentations. Specifically, the evidence shows that 24 Hour provided the *general* square footage of the facilities to USB/FCI, and that it is USB who then took those numbers, applied a blind 40% across-the-board reduction, and then together with FCI, represented to plaintiff that the remaining 60% represented the *cleanable* square footage of the facilities. (Plummer Decl. at Ex. I [Bode Depo. 15:14-17:11, 42:5-12, 47:3-49:1, 67:21-68:11 (some deposition pages out of order)]; see *id.* at Ex. G [24 Hour's square footage numbers]; Safari Decl. ¶ 3, Exs. A-B [USB/FCI's *cleanable* square footage numbers calculated at "60%" of the total square feet of the facilities]; see also Ciochon Decl. ¶ 4, Ex. C [Safari Depo. 119:21-25]; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 12 [declarations contradicting deposition testimony insufficient to demonstrate triable issue]; *Vulk v. State Farm General Insurance Company* (2021) 69 Cal.App.5th 243, 258 [admissions or concessions made during the course of discovery govern and control over contradictory declarations].) Nothing shows 24 Hour made any representations regarding the cleanable square footages of the facilities to plaintiff or anyone else. **<u>Motion to Compel Further Responses</u>**

		Plaintiff's motion to compel further responses to its first set of requests for production is DENIED AS MOOT. The motion is moot in light of 24 Hour's verified supplemental responses to the subject discovery served as of 2/12/24 (Kao Decl. ¶ 7, Ex. D), and the ruling on 24 Hour's motion for summary judgment above. The parties' respective requests for sanctions are DENIED. (See Code Civ. Proc., § 2031.310, subd. (h).) Plaintiff's request for sanctions is denied because it failed to engage in a reasonable, good faith attempt to meet and confer before bringing this motion. (See Code Civ. Proc., §§ 2031.310, subd. (b)(2), 2016.040; *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1294 [" 'the statute requires that there be a serious effort at negotiation and informal resolution' "]; see also Kao Decl. ¶¶ 3-7, Exs. B-C.) 24 Hour's request for sanction is denied because it should not have taken three and half months to finally produce the basic information sought by the subject demands, particularly when its supplemental responses to nearly half of them state the requested documents "have never existed." (See Kao Decl. at Ex. D.) 24 Hour shall give notice of all of the above.
60.	Lepe v. Jette 2023-01315896	Defendants Lisa Heather Jette and Joseph Uribe's unopposed motion for summary judgment, or alternatively, summary adjudication, in favor of defendant Joseph Uribe is GRANTED. (Code Civ. Proc., § 437c [authorizing motion].) A defendant seeking summary judgment or adjudication bears the initial burden of persuasion by a preponderance of the evidence to negate the plaintiff's claim(s). It may do this by demonstrating the claim has no merit, that plaintiff cannot prove an element of the claim, or that it has a complete defense entitling it

		to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-851 (*Aguilar*).) If the defendant fails to meet this initial burden, the plaintiff need not oppose the motion and the motion must be denied. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.) If the defendant meets its initial burden, however, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 850-851; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 72.) The moving party's papers are to be strictly construed, while the opposing party's papers are to be liberally construed. (*Committee to Save Beverly Highland Homes Ass'n v. Beverly Highland* (2001) 92 Cal.App.4th 1247, 1260.) A court may not make credibility determinations or weigh the evidence on a motion for summary judgment or adjudication, and all evidentiary conflicts are to be resolved against the moving party. (*McCabe v. American Honda Motor Corp.* (2002) 100 Cal.App.4th 1111, 1119.) Defendant Uribe has established that Uribe owed no duty to plaintiffs; therefore, the motion is GRANTED as to the 1st cause of action (negligence); the 3rd cause of action (negligent infliction of emotional distress) and the 4th cause of action (negligent entrustment). The undisputed material facts establish that defendant Uribe is a stranger to the accident, as well as to the car involved in the accident. (Code Civ. Proc., § 437c, subd. (p)(2) [burden]; Moving Parties' Separate Statement, Fact Nos. 6, 8, 10, 11, 13-15.) Therefore, defendant Uribe owed no duty to plaintiffs. Plaintiffs have not opposed the motion and have not met their shifted burden of presenting evidence

		sufficient to demonstrate a triable issue of material fact on this point. As it relates to the second cause of action (negligence per se), that motion is GRANTED. The court finds that the 2nd cause of action permissibly alleges an alternative basis for negligence, but that defendant Uribe has satisfied his burden to establish that negligence cannot be shown as duty is lacking under any theory. To the extent the moving defendants were seeking summary judgment / adjudication is denied as to defendant Jette, as the only relief sought pertains to defendant Uribe. (See notice of motion at 2:2-3.) Moving party shall give notice.
61.		