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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF LOS ANGELES**

11 DYLAN YEISER-FODNESS, an
12 individual,

13 Plaintiff,

14 v.

15 MASTER DOG TRAINING, a
16 California corporation; 5 STAR K-9
17 ACADEMY, INC., a California
18 corporation; EKATERINA KOROTUN,
19 an individual; and DOES 1 through
20 25, inclusive,

21 Defendants.

Case No.: 22STCV21852

*[Assigned for All Purposes to the Hon.
Armen Tamzarian, Dept. 52]*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANTS' UNTIMELY FILED
AND SERVED MOTION TO COMPEL
ARBITRATION AND TO STAY OR
DISMISS PROCEEDINGS**

*[Filed Concurrently with Declaration of
Young W. Ryu]*

Date: April 12, 2023

Time: 9:00 a.m.

Place: Dept. 52

Complaint Filed: July 6, 2022

Trial Date: February 7, 2024

25 Plaintiff Dylan Yeiser-Fodness ("Plaintiff") respectfully submits the below
26 Opposition to Defendant Master Dog Training's ("Defendant") Motion to Compel
27 Arbitration and To Stay or Dismiss Proceedings:
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

II. BRIEF STATEMENT OF FACTS AND PERTINENT PROCEDURAL HISTORY 3

III. LEGAL STANDARD FOR ENFORCEMENT OF ARBITRATION AGREEMENTS 5

IV. ARGUMENT 6

 A. Defendants’ Motion was Untimely Filed and Served 6

 B. Even if Timely, Defendants Failed to Establish That There Is an Enforceable Arbitration Agreement Because the Purported Agreement Does Not Apply to Plaintiff’s Employment by Defendants..... 7

 C. Even if the Agreement Applied, It Should Not Be Enforced Because It Is Unconscionable 8

 1. The Agreement is Procedurally Unconscionable Because Its Terms Are Contradictory 9

 2. The Agreement is Substantively Unconscionable Because It Fails to Satisfy *Armendariz*..... 10

 D. An Order Compelling Arbitration Must Stay and Not Dismiss the Court Action 11

V. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Aanderud v. Superior Court (2017) 13 Cal.App.5th 880..... 4

Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83.. 6, 8

ASP Props. Grp., L.P. v. Fard, Inc. (2005) 133 Cal.App.4th 1257..... 5

Badie v. Bank of Am. (1998) 67 Cal.App.4th 779..... 4

Discover Bank v. Superior Court (2005) 36 Cal.4th 148 6

Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951 4

Eng’rs & Architects Assn. v. Cmty. Dev. Dept. (1994) 30 Cal.App.4th 644..... 4

Global Packaging, Inc. v. Superior Court (2011) 196 Cal.App.4th 1623..... 4

Penilla v. Westmont Corp, 3 Cal. App. 5th 205..... 6, 7

Ramos v. Superior Court (2018) 28 Cal.App.5th 1042 5

Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394 4

Tiri v. Lucky Chances, Inc. (2014) 226 Cal.App.4th 231..... 4

Statutes

Civ. Code, § 1639..... 5

Civ. Code, § 1652..... 7

Civ. Code, § 1653..... 7

Civ. Code, § 1654..... 7, 8

Civ. Code, § 1670.5..... 6

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 **I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

4 This motion is yet another example of Defendants’ disregard for the rules of
5 civil procedure and the Court’s time. Not only did Defendants serve their motion *12*
6 *days late*, but they attempted to conceal these facts from the Court by falsely claiming,
7 under penalty of perjury, that service was completed 8 days earlier. But even the date
8 on which Defendants’ falsely claim that they mailed their notice is *still* four days after
9 their statutory deadline. This is a pattern of behavior—as the Court will recall,
10 Defendants failed to respond to discovery for six months, until ordered by this Court;
11 they dragged out even basic procedures such as sharing e-service lists; and they
12 falsely claimed that they had never received notice of the entries of default against
13 them. Defendants’ continuous, shameless disregard for the authority of this Court
14 should not be tolerated.

15 Defendants’ motion is also substantively spurious. While admitting that the
16 purported arbitration agreement is facially and explicitly unrelated to Plaintiff’s
17 employment by Defendants, Defendants nevertheless attempt to shoehorn it into
18 relevance. But such attempts are untenable in the face of the contract’s own terms,
19 as described in more detail below. And, even if the agreement did apply, its terms are
20 directly contradictory and fatally vague.

21 In short, Defendants are attempting to mislead this Court and play games to
22 avoid litigation on the merits. Their motion is both procedurally and substantively
23 defective, and we respectfully ask the Court to deny it with prejudice for the reasons
24 articulated below.

25 **II. BRIEF STATEMENT OF FACTS AND PERTINENT PROCEDURAL**
26 **HISTORY**

27 Prior to being wrongfully terminated by Defendants after he complained about
28 not receiving his wages, Plaintiff worked for Defendants as a dog trainer for two (2)

1 years, from approximately October 2, 2020, until April 24, 2022. On October 8, 2020,
2 Plaintiff was asked to sign the document attached to Defendants' Motion as Exhibit
3 01. Defendants did not fully explain to Plaintiff what purpose the document was
4 meant to serve, and no such purpose was ever made clear. While it purports to
5 establish a teacher-student relationship, no such relationship was ever established.
6 Nor did the document serve as an employment contract, as it did not establish or
7 govern any of the terms of Plaintiff's employment by Defendants. Plaintiff signed the
8 document at Defendants' insistence. Throughout Plaintiff's employment, the
9 document was never again referenced.

10 On July 6, 2022, Plaintiff filed his complaint ("the Complaint") alleging eight
11 (8) causes of action: (1) Violation of Labor Code § 226 (Failure to Provide Complete
12 And Accurate Itemized Statements); (2) Violation of Labor Code § 1194, Et Seq.
13 (Failure to Pay Overtime and Double Time Compensation); (3) Violation of Labor
14 Code § 1198.5 (Failure to Permit Inspection or Copying of Personnel File); (4)
15 Violation of Labor Code §§ 226.7, 512, 558, and 1198 (Failure to Provide Rest and
16 Meal Breaks); (5) Violation of Labor Code §§ 201-203 (Failure to Pay All
17 Compensation Owed Upon Termination); (6) Retaliation in Violation of Cal. Labor
18 Code § 98.6; (7) Tortious Wrongful Termination in Violation of Public Policy; and (8)
19 Violations of Cal. B&P Code §§ 17200, Et Seq.

20 Entries of Default were granted against Defendants 5 Star K-9 Academy, Inc.,
21 and Ekaterina Korotun on October 3, 2022. Despite their default status, Defendants
22 filed an Answer to Plaintiff's Complaint on October 11, 2022. On October 14, 2022,
23 while still in default, Defendants filed their first Motion to Compel Arbitration and
24 To Stay or Dismiss Proceedings. Plaintiff filed his opposition this motion on
25 November 14, 2022.

26 On November 30, 2022, the Court struck Defendants' Answer and denied the
27 Motion to Compel Arbitration without prejudice due to Defendants' default status.
28 The defaults were subsequently vacated on January 16, 2023, and Defendants filed

1 the instant Motion to Compel Arbitration (“the Motion”) on March 21, 2023. Such
2 filing was untimely, as described in more detail below.

3 Moreover, the instant motion represents Defendants’ proverbial “second bite
4 at the apple.” With the benefit of receiving Plaintiff’s opposition to the original
5 motion, Defendants’ retooled the original motion.

6 **III. LEGAL STANDARD FOR ENFORCEMENT OF ARBITRATION**
7 **AGREEMENT**

8 A petition to compel arbitration is a suit in equity seeking specific performance
9 of a contract. (*Eng’rs & Architects Assn. v. Cmty. Dev. Dept.* (1994) 30 Cal.App.4th
10 644, 653.) The party seeking to compel arbitration bears the burden of proving by a
11 preponderance of the evidence the existence of an agreement to arbitrate. (*Rosenthal*
12 *v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Tiri v. Lucky*
13 *Chances, Inc.* (2014) 226 Cal.App.4th 231, 240.) Only if an agreement has been
14 proved does the burden shift to the party opposing arbitration to demonstrate a
15 defense to the enforcement of the agreement. (*Engalla v. Permanente Medical Group,*
16 *Inc.* (1997) 15 Cal.4th 951, 972.) There is no public policy that favors the arbitration
17 of disputes the parties did not agree to arbitrate. (*Aanderud v. Superior Court* (2017)
18 13 Cal.App.5th 880, 890.)

19 California principles of contract interpretation apply to whether the parties
20 objectively intended to submit to arbitration. (*Aanderud v. Superior Court* (2017) 13
21 Cal.App.5th 880, 890.) “The initial step in determining whether there is an
22 enforceable ADR agreement between [Plaintiff and Defendant] involves applying
23 ordinary state law principles that govern the formation and interpretation of
24 contracts in order to ascertain whether the parties have agreed to some alternative
25 form of dispute resolution. Under both federal and California state law, arbitration
26 is a matter of contract between the parties.” (*Badie v. Bank of Am.* (1998) 67
27 Cal.App.4th 779, 787-788.) Both the U.S. Supreme Court and the California Supreme
28

1 Court state that the policy favoring arbitration is predicated on a policy of enforcing
2 the parties' intent.

3 By "intent" the courts are referring to objectively viewed, expressed intent.
4 "Under California law, contracts are interpreted by an objective standard; the words
5 of the contract control, not one party's subjective intentions." (*Global Packaging, Inc.*
6 *v. Superior Court* (2011) 196 Cal.App.4th 1623, 1634.) The objective standard relies
7 in the first instance on the contract language. (Civ. Code § 1639) and that is how we
8 ascertain the parties' intent. (*ASP Props. Grp., L.P. v. Fard, Inc.* (2005) 133
9 Cal.App.4th 1257, 1269.)

10 "The doctrine of unconscionability 'refers to' and absence of meaningful choice
11 on the part of one of the parties together with contract terms which are unreasonably
12 favorable to the other party." (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042,
13 1063.) There is both a procedural and substantive aspect of unconscionability; the
14 former focuses on "oppression" or "surprise" due to unequal bargaining power, the
15 latter on "overly harsh" or "one-sided" results. (*Id.*)

16 "Both procedural and substantive unconscionability must be present for the
17 court to refuse to enforce a contract under the doctrine of unconscionability although
18 'they need not be present in the same degree.'" (*Id.*) Essentially, the court applies a
19 sliding scale to the determination: "[T]he more substantively oppressive the contract
20 term, the less evidence of procedural unconscionability is required to come to the
21 conclusion that the term is unenforceable, and vice versa." (*Id.*)

22 **IV. ARGUMENT**

23 In sum, Plaintiff respectfully requests the Court to deny Defendants' Motion
24 in its entirety for the reasons articulated below.

25 **A. Defendants' Motion Was Untimely Filed and Served**

26 Defendants scheduled this motion to be heard on April 12, 2023. Therefore,
27 pursuant to California Code of Civil Procedure section 1005(b), they were required to
28 file their motion no later than 16 court days before that date, or March 20, 2023.

1 However, Defendants did not file their motion until March 21, 2023. The motion was
2 thus untimely filed.

3 Moreover, because Defendants served notice of their motion by mail, section
4 1005(b) also requires that notice of such motion be served upon Plaintiff at least 16
5 court days plus 5 calendar days before the hearing date, or on or before March 15,
6 2023. Yet Defendants' own proof of service claims that they did not mail said notice
7 until March 19, 2023—and even this is not true. As shown by Exhibit A, Defendants
8 did not mail their notice until March 27—*12 days after* their statutory deadline—and
9 Plaintiff did not receive the motion until March 28—*one day* before the opposition
10 was due.

11 In combination with the retooled motion, the untimely service suggests
12 gamesmanship, and has prejudiced Plaintiff's ability to prepare his Opposition.

13 Defendants' motion is therefore untimely filed and served, and should be
14 denied on that basis.

15 **B. Even if Timely, Defendants Failed to Establish That There Is an**
16 **Enforceable Arbitration Agreement Because the Purported**
17 **Agreement Does Not Apply to Plaintiff's Employment by**
18 **Defendants.**

19 By its own terms, the purported arbitration agreement presented by
20 Defendants ("the Agreement") has no application to Plaintiff's claims in this case
21 because it does not govern his employment by Defendants. Not only is the Agreement
22 titled "*Agreement for Training Services*" (emphasis added), but part 3, subpart C,
23 specifies that "[the] Agreement states all the terms and conditions that apply *to all*
24 *training services* provided by the Academy." (Emphasis added.) If that were not
25 enough, part 8, subpart B, titled "No Employee Relationship," unequivocally states
26 that "Student is not and will not be deemed to be an employee of Academy."

27 Defendants appear to claim that although the contract was not an employment
28 agreement, and did not create any relationship in which Plaintiff was employed by

1 Defendants, it is still enforceable in this action because it was a “collateral
2 agreement” incorporated by reference contained in a separate employment contract.
3 (Def’s Motion at 12:1-8.) Yet Defendants do not point to any other contract which
4 either creates the relevant employment relationship or incorporates the Agreement
5 by reference, and Plaintiff is aware of none. In fact, Defendants even agree that the
6 Agreement “does not create any employee-employer relationship,” and “it was the
7 defendant who was hired by this agreement as a trainer on the basis of independent
8 [sic] contractor relationship.” (Def’s Motion at 12:25-27.) It is therefore unclear why
9 this Agreement applies to Plaintiff’s claims in this case.

10 Plaintiff’s claims in this case arise out of his employment *by* Defendants as a
11 dog trainer. Even if the Agreement *did* govern a relationship in which Plaintiff
12 sought educational services from Defendants, such a student-educator relationship is
13 not at issue in this case. Plaintiff’s causes of action are for various violations of the
14 labor code, as well as the wrongful termination of his employment by Defendants. As
15 the Agreement does not create or govern any employee relationship, but rather that
16 between student and teacher, it is impossible that Plaintiff’s employment claims
17 could “arise out of” its terms.

18 Even if Defendants *intended* this contract to serve as an employment
19 agreement applicable to this case, such a construction is untenable. Ordinarily, the
20 objective intent of the contracting parties is a legal question determined solely by
21 reference to the contract’s terms. When a contract is reduced to writing, the intention
22 of the parties is to be ascertained from the writing alone. (Civ. Code § 1639.) The
23 language of a contract is to govern its interpretation. (Civ. Code § 1638.) Here, the
24 plain terms of the contract expressly *deny* that it is intended to create or govern any
25 employment relationship. Thus, Defendants’ mere *intention* that it do the opposite
26 cannot transform its application.

27 The Court should accordingly deny Defendants’ motion because Defendants
28 have failed to establish that there is any enforceable arbitration agreement.

1 **C. Even If the Agreement Applied, It Should Not Be Enforced**
2 **Because It Is Unconscionable.**

3 Under California law, a court may refuse to enforce any contract, including an
4 arbitration agreement, because the contract is unconscionable. (Civ. Code § 1670.5.)
5 A contractual clause is unenforceable if it is both procedurally and substantively
6 unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000)
7 24 Cal.4th 83.) The question of whether an arbitration agreement contains an
8 unconscionable provision and is therefore unenforceable is one that is exclusively
9 reserved for the Court. (*See Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.)
10 Courts use a “sliding scale” approach in assessing procedural and substantive
11 unconscionability. (*Armendariz, supra*, 24 Cal.4th at 114.) “[T]he more substantively
12 oppressive the contract term, the less evidence of procedural unconscionability is
13 required to come to the conclusion that the term is unenforceable, and vice versa.”
14 (*See id.*)

15 **1. The Arbitration Agreement is Procedurally**
16 **Unconscionable Because Its Terms Are Contradictory.**

17 Even assuming, *arguendo*, the Agreement applied, the terms of the Agreement
18 are directly contradictory, and therefore procedurally unconscionable. (*Penilla v.*
19 *Westmont Corp.*, 3 Cal. App. 5th 205, 216 (2016) [“confusing and sometimes
20 contradictory” agreement held procedurally unconscionable].) Term E, titled
21 “Governing Law; Venue,” states that “[t]he parties consent and submit to the
22 jurisdiction of and venue in the courts of Los Angeles County, California,” in settling
23 any disputes arising “under, out of or in connection with” the Agreement. (Def’s
24 Motion, Ex. 01 at 3.) But Term J, titled “Dispute Resolution and Arbitration clause
25 [sic],” states that any dispute arising “out of or [which] is related to this contract . . .
26 shall be resolved by neutral, binding arbitration and *not by a court action.*” (*Id.* at 4
27 [emphasis added].) Thus, taken together, these terms require that the signatory agree
28

1 to the impossible requirement that they simultaneously settle any disputes through
2 the California courts, but “not by a court action.”

3 Where a contract contains contradictory or repugnant terms, it “must be
4 reconciled, if possible, by such an interpretation as will give some effect to the
5 repugnant clauses, subordinate to the general intent and purpose of the whole
6 contract.” (Civ. Code, § 1652.) But “[w]ords in a contract which are wholly inconsistent
7 . . . are to be rejected” and “[i]n cases of uncertainty . . . the language of a contract
8 should be interpreted most strongly against the party who caused the uncertainty to
9 exist.” (Civ. Code, §§ 1653 & 1654.)

10 The language here is irreconcilable. If Plaintiff complied with Term E by
11 submitting his dispute to the jurisdiction of the courts of Los Angeles County, he
12 would thereby violate Term J, which requires that such disputes are “not [resolved]
13 by a court action.” Conversely, compliance with Term J would require that Plaintiff
14 submit his disputes to the jurisdiction of a neutral arbitrator, and not the county
15 courts, therefore violating Term E (except insofar as he may “see[k] injunctive relief
16 in a judicial form”).

17 As these terms are mutually repugnant, the Court must attempt to reconcile
18 them. (Civ. Code, § 1652.) But because reconciliation of both terms is impossible, the
19 remaining uncertainty should be interpreted most strongly against Defendants, as
20 the party who caused the uncertainty to exist. (Civ. Code, § 1654.) Therefore, even if
21 the Agreement applied to this case, the Court should resolve the ambiguity by either
22 rejecting the repugnant terms, or holding the Agreement unconscionable.

23 **1. The Arbitration Agreement is Substantively**
24 **Unconscionable Because It Fails to Satisfy**
25 **Armendariz.**

26 In *Armendariz*, the California Supreme Court held that claims may be subject
27 to mandatory arbitration but only if the arbitration agreement meets the following
28 minimum requirements: 1) there is a neutral arbitrator; 2) the remedies available are

1 not to be limited; 3) the parties are given the opportunity to conduct adequate
2 discovery; 4) the arbitrator is required to issue a written arbitration award setting
3 forth the essential finding and conclusions on which the arbitrator based the award;
4 and 5) the employee is not required to bear any type of expense the employee would
5 not be required to bear if the action were brought in court. (See *Armendariz* 24
6 Cal.4th at 111.) The Court held that these minimum requirements must be met to
7 ensure that the arbitration agreement is not unconscionable and fundamentally
8 unfair. (*Id.* at 117.)

9 Here, the Agreement fails this five factor test. The Agreement states that
10 arbitration will be held before “a single arbitrator . . . in accordance with the American
11 Arbitration Association’s National Rules.” While this appears to satisfy the
12 requirement for neutral arbitrators by incorporation of the AAA rules for arbitrator
13 selection, it does not clearly indicate whether the AAA rules are to apply only to the
14 selection of the arbitrator, or to the governance of the proceedings generally. As the
15 rest of the Agreement is entirely silent as to the remedies available, the opportunity
16 for discovery, the requirement of a written award, and the allocation of costs, serious
17 ambiguity remains as to whether any of these factors is satisfied. That uncertainty
18 should be interpreted most strongly against Defendants, as the party who caused the
19 uncertainty to exist. (Civ. Code, § 1654.) Therefore, the Court should resolve the
20 ambiguity against Defendants, and find the Agreement substantively
21 unconscionable.

22 **D. Order Compelling Arbitration Must Stay Not Dismiss Court**
23 **Action**

24 Assuming arguendo the Court grants Defendants’ Motion, contrary to
25 Defendants’ request, the Court **should not dismiss** Plaintiff’s action. Rather,
26 pursuant to Section 1281.4 of the Code of Civil procedure, the Court should impose a
27 stay on Plaintiff’s action “until an arbitration is had in accordance with the order to
28 arbitrate.”

1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court deny
3 Defendants' Motion in its entirety with prejudice. Defendants should not be permitted
4 a "third bite at the apple." In the alternative, Plaintiff respectfully requests that the
5 Court impose a stay on Plaintiff's action until an arbitration is completed in
6 accordance with the order to arbitrate.

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8 Respectfully submitted,

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Dated: March 29, 2023

LOYR, APC

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Young W. Ryu, Esq.
Joshua Park, Esq.
Kee Seok Mah, Esq.
Attorneys for Plaintiff DYLAN YEISER-
FODNESS

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PROOF OF SERVICE

I am over 18 years old and not a party to this action. My business address is 1055 West 7th Street, Suite 2290, Los Angeles, California 90017.

On March 29, 2023, I served the following document in a sealed envelope on the interested party as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF’S OPPOSITION TO DEFENDANTS’ UNTIMELY FILED AND SERVED MOTION TO COMPEL ARBITRATION AND TO STAY OR DISMISS PROCEEDINGS

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Anaheim CA 92808

Attorney for Defendants


BY U.S. MAIL:

I enclosed the foregoing document in a sealed envelope to the interest parties at the address listed above and deposited the sealed envelope for collection and mailing following my firm’s ordinary business practices. I am readily familiar with my firm’s business practices for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit.

BY ELECTRONIC SERVICE:

My electronic service address is martha.gutierrez@loywr.com. Per the parties’ agreement, through their respective counsel, to accept electronic service and pursuant to California Code of Civil Procedure section 1010.6, I served the foregoing document on the interested party at the electronic service addresses (e-mail addresses) listed above and did not receive Notice of Failure

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 29, 2023, in Los Angeles, California.



Martha Gutierrez