PROPOSED TENTATIVE

On February 21, 2024, plaintiff Daisy Barajas (plaintiff) filed a complaint against defendants Primus Auditing Operations (dba Primus Auditing Ops) (Primus) and Employbridge LLC (dba Select Staffing) (Employbridge) (collectively, defendants), for eight (8) causes of action, as follows: 1) pregnancy discrimination in violation of the Fair Employment and Housing Act (FEHA); 2) sex and general discrimination in violation of FEHA; 2) retaliation in violation of FEHA; 4) failure to prevent discrimination, retaliation, and harassment in violation of FEHA; 5) failure to accommodate in violation of FEHA; 6) failure to engage in the interactive process; 7) retaliation in violation of Labor Code section 246.5; and 8) the tort of wrongful termination in violation of public policy. Briefly, according to the operative pleading, defendants were plaintiff's joint employers, with each exercising control over her wages, hours, and/or working conditions. It appears Employbridge was a staffing agency, which is how plaintiff obtained the temporary position with Primus. Plaintiff began working for defendants as an administrative assistant on June 29, 2023; in July 2023, plaintiff discovered she was pregnant, and informed her supervisor, Zenia Perales, in late July 2023; she informed Ms. Perales of her need to attend several medical appointments associated with the pregnancy, necessitating an "adjustment to her work schedule." On August 21, 2023, plaintiff began to experience severe nausea, and after informing Employbridge of her condition and specifically expressing concerns about work, Employbridge the next day informed her that Primus had terminated her assignment, "given a false and pretextual reason related to the supposed elimination of her position and stating she was not a good fit." Plaintiff on information and belief believes she was wrongfully terminated due to her pregnancy, need for accommodations, and need for protected time off. Both defendants have filed separate answers.

There are two matters before the court. The first is a motion to compel arbitration filed by Employbridge. Primus has filed a notice of joinder and joinder to the motion (i.e., it has not filed its own brief). Defendants contend plaintiff electronically signed a valid and enforceable arbitration agreement that covers the disputes advanced in this lawsuit, per Code of Civil Procedure section 1281.2; that the employment agreement as part an employment contract complies with the five part test articulated in *Amerandiz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83; and the agreement is neither procedurally nor substantively unconscionable. On December 5, 2024, plaintiff filed opposition, raising nine (9) separate evidentiary objections to the three declarations submitted by Employbridge. Plaintiff argues initially that there was no valid arbitration agreement because it was never presented to her; alternatively, plaintiff contends that the arbitration agreement fails to comply with *Armendariz,* and in any event if both procedurally and substantively unconscionable, and thus unenforceable, and severance does not cure the problem because the agreement is permeated with unconscionability. Finally, plaintiff contends that the arbitration agreement violates the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" (EFAA), enacted by Congress

for acts after March 3, 2022, which amends the Federal Arbitration Act (FAA) and precludes enforcement of predispute arbitration agreements in which there is "sexual harassment dispute." (See, e.g., *Kader v. Southern California Medical Center, Inc.* (2024) 99 Cal.App.4th 214, 222-2225.) According to plaintiff, "plaintiff always intended to use acts of harassment in support of her discrimination claims;" indeed, according to plaintiff, granting the motion would be premature because the presence of the "sexual harassment" claims changes the viability of the motion to compel arbitration. Defendant filed a reply on December 11, 2024, including a response to plaintiff's evidentiary objections, as well as its own evidentiary objections to plaintiff's declaration.

The second matter on calendar is plaintiff's motion for leave to file a first amended complaint, which was filed on October 31, 2024 (i.e., after the motion to compel arbitration was filed but before hearing), in which plaintiff seeks permission to add a ninth cause of action for pregnancy harassment and a tenth cause of action for sexual harassment, both in violation of FEHA, against both defendants. Employbridge filed opposition on November 19, 2024, and plaintiff filed a reply on November 25, 2024. All briefing has been reviewed.

The parties do not suggest to the court in their briefing in what order the court should address these two motions. As it appears the presence of any new causes of action in the first amended complaint may impact the outcome of the motion to compel arbitration, the court will determine the merits of plaintiff's motion for leave to file a first amended complaint first, and if appropriate, the merits of defendants' motion to compel arbitration. The court will finish with a summary of its conclusions.

A) Motion for Leave to File a First Amended Complaint

1) Summary of Parties' Arguments

Plaintiff asks the court for leave to file a first amended pleading. Plaintiff has filed a declaration as required by California Rules of Court, rule 3.1324,[1] an amended pleaded, and a "redlined" version of the proposed changes. Plaintiff makes some cosmetic changes to the original pleadings, by changing the descriptions of parties (¶ 4); by adding more clarity to the factual allegations (¶¶ 17 to 25); and by adding more detail to the first (¶¶ 26 to 27), second (¶¶ 19 and 36); third (¶¶ 43 and 45); fifth (¶¶ 57 to 60); sixth (¶¶ 66 to 69); seventh (heading); and eighth (heading and ¶ 86) causes of action. Significantly, plaintiff adds two new causes of action arising from the same set of operative facts – a ninth cause of action for pregnancy harassment in

[1] A declaration (usually by counsel for the moving party) must specify: 1) the purpose and *effect* of the proposed amendments; 2) why the proposed amendments are *necessary and proper; 3)* when the facts giving rise to the proposed amendment were *discovered;* and 4) the reasons why the request for amendment was not made earlier, (Cal. Rules Court, rule 3.1324(b).)

violation of FEHA against all defendants and a tenth cause of action for sexual harassment in violation of FEHA against all defendants. Plaintiff also adds supervisor Zenia Perales as a party.

Plaintiff contends there is "good cause" to allow the amendments because 1) they are based on the same set of operative facts, against the same defendants (with one additional defendant, Zenia Perales, who was named in the original pleading and is now potentially personally liable; and 2) plaintiff failed to set out the two harassment causes of action in the original operative pleading by accident or mistake. Plaintiff explains that she "should have added these claims to begin with, but by mistake or accident, neglected to do so. Upon learning of the inadvertent and/or inexcusable neglect in failing to allege this additional cause[s] of action in the original complaint, Plaintiff's counsel immediately undertook to amend the pleading." Attorney Troy Candiotti (plaintiff's counsel) does not actually explain in his declaration why he failed to include the two causes of action in the original complaint; he does explain that on September 26, 2024, he emailed counsel for a stipulation to allow a first amended pleading to add the new causes of action, but received no response. The original complaint was filed on February 21, 2024; the motion to compel arbitration was filed on October 1, 2024; the motion for leave to file a first amended complaint was filed on October 31, 2024.

Defendant Employbridge opposes the motion. It argues initially that the only reason plaintiff is seeking to add the two new causes of action "more than eight months after filing suit" is to "involve the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" (EFAA), and it is "gamesmanship, pure and simple." "Regardless [opines defendant], because Plaintiff's proposed harassment claims are not sexual harassment claims, she must still arbitrate all of claims against defendants." And in any event, according to defendant, plaintiff "has not satisfied either the statutory criteria for granting leave to add the new harassment claims," because she has failed to explain 1) why she did not bring the claims earlier (i.e., plaintiff has not proffered any excuse for waiting more than eight months to seek to add the new harassment claims; 2) plaintiff's declaration from attorney Troy Candiotti is insufficient, failing to address the critical requirements; and 3) defendant will be substantially prejudiced by granting the request. Further, defendant asks the court to deny the request to file the first amended pleading because 1) both causes of action are inadequately pleaded as a factual matter; and 2) plaintiff has failed to plead that she exhausted her administrative remedies as to the sexual harassment claim with the California Civil Rights Department (CRD).

In reply, plaintiff emphasizes the strong California policy favoring amendments; defendants' claimed prejudice is insufficient to preclude a grant of the motion; it has exhausted all administrative remedies; and that any challenge to the sufficiency of the allegations is premature, and should be determined by demurrer to the first amended complaint.

2) Legal Background

Code of Civil Procedures section 473, subdivision (a)(1) provides in relevant part that a court "may, in furtherance of justice, and on any terms as may be proper, may allow any pleading or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party, or mistake in any other respect; and may, upon like terms, engage the time for an answer or demurrer. The court make likewise, in its discretion, after notice to the adverse party, allow upon any terms as may be just, an amendment to any pleading . . . in other particulars . . . ." The trial court has wide discretion in allowing an amendment to a pleading. (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872-873; see also Code Civ. Proc., § 576 ["any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order"].) Amended pleadings may set forth new causes of action. (Weil & Brown, Cal.Prac. Guide: Civil Procedure Before Trial (The Rutter Group 2024) ¶ 6:640 ["amended pleadings may set forth entirely different claims, add new parties, seek a different or greater remedy, etc."].) Courts, however, are very clear that the trial court should exercise its discretion liberally to permit amendment of the pleadings, (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.) In fact, the policy favoring amendment is so strong that denial of leave to amend can rarely be justified. "If the motion to amend is timely made and the granting of the motion will not prejudice the opposition party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530; see also *Jaimez v. DAIOHS USA, Inc*. (2010) 181 Cal.App.4th 1286, 1308.) Even if there has been delay in the filing of the request for leave to amend, it is an abuse of discretion to deny leave if the other party has not been prejudiced or misled. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564–565; see *Atkinson v. Elk Corp*. (2003) 109 Cal.App.4th 739, 761 [courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to an including trial, and this policy should be applied only where no prejudice is shown to the adverse party]; *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487 [same].)

That being said, as noted in *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613, where there is a "*a long deferred presentation* of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court's denial of the amendment. [Citation.]' [Citation.] 'The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.' " (*Id*. at p. 613; *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175 [reviewing courts are "less likely to find an abuse of discretion where ... the proposed amendment is " " 'offered after long unexplained delay ... or where there is a lack of diligence".) Prejudice to the nonmoving party exists where the amendment would result in a delay of trial, along with a loss of critical evidence, added costs of

preparation, and an increased burden of discovery. (*Magpali, supra*, 48 Cal.App.4th at pp. 486-488.)

Ordinarily, a court will ***not*** consider the validity of the proposed amended pleading in deciding whether to grant leave to amend, for grounds for demurrer or motion to strike are premature. Generally, after leave to amend is granted, the opposing party will have the opportunity to attack the validity of the amended pleading.(See *Kittredge Sports Co. v. Sup.Ct. (Marker, U.S.A.)* (1989) 213 CA3d 1045, 1048; *Atkinson, supra,* 109 Cal.App.4th 739, 760 ["the better course of action would have been to allow [plaintiff] to amend the complaint and then let the parties test its legal sufficiency in other appropriate proceedings"].) Nevertheless, the court has discretion to deny leave to amend where a proposed amendment fails to state a valid cause of action or defense. (See C*alifornia Cas. Gen. Ins. Co. v. Sup.Ct. (Gorgei)* (1985) 173 Cal.App.3d 274, 280-281,disapproved on other grounds by *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 407.) Such denial is "most appropriate" where the pleading is deficient as a matter of law and the defect could not be cured by further appropriate amendment. (*California Cas. Gen. Ins. Co., supra,* (1985) 173 Cal.App.3d 274, 281; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 4th 217, 230 [proposed amendment barred by statute of limitations and no basis for "relation back"].) On the other hand, where the sufficiency of the proposed amendment is a novel question almost certain to be tested in an appellate court, the preferable practice is to *permit* the amendment and allow the parties to test its legal sufficiency by demurrer or other appropriate motion. That way, if the demurrer or other challenge is upheld, the appellate court will know on what ground the amendment was rejected. (*Ibid.*)

3) Merits

As an initial matter, the court will not address the merits of defendants' claim that plaintiff has engaged in "gamesmanship" given plaintiff's attempt to preclude defendant(s)' motion to compel arbitration under the under EFAA. Case law makes it abundantly clear that a court abuses its discretion in denying leave to amend when plaintiff can arguably raise a meritorious defense or cause of action in an amended pleading, so long as the requirements for an amended pleading can be satisfied.

Second, the court will ***not*** entertain defendants' challenges to plaintiff's request to file a first amended pleading by examining whether the new causes of action have been adequately pleaded, or whether plaintiff has adequately alleged exhaustion of administrative remedies. As noted above, the general rule is that courts should not engage in such an inquiry unless it appears from the face of the complaint, as a matter of law, that there is defect, and it is clear that the defects cannot be cured by amendment. As amendments arguably can be made to cure any defect alleged here; accordingly, the better practice is to allow the amendment and permit a

demurrer and/or motion to strike.[2] (*Atkinson, supra*, 109 Cal.App.4th at p. 761 ["it is irrelevant that new legal theories are introduced as long as the proposed amendments 'relate to the same general set of facts.' [Citation.]"].)

On the merits, plaintiff's showing, in the court's view, seems a tad threadbare, at least as to the reason provided for the delay (i.e., , eight months between the filing of the original complaint and the motion for relief to file). It is not based on new facts obtained through discovery, or because new facts have otherwise come to light. Plaintiff's counsel seems to explain the delay based on his own neglect, although Mr. Candiotti's declaration is less candid about details. The memorandum of points and authorities is starker – on page 7, counsel admits he "should have added these claims to begin with, but by ***mistake or accident, neglected*** to do so. Upon learning of the inadvertent/and/or excusable neglect in failing to allege th[ese] additional causes of action in the original Complaint," plaintiff's counsel "immediately undertook effort[s] to amend the pleading." (Emphasis added.) There is no reason to discount the fact plaintiff acted reasonably when he learned of the omission, but there counsel offers no explanation before the timeframe.

While this explanation may not be fully developed, it is nevertheless some type of explanation. Further, while there has been a delay, the court does not find the eight-month delay itself inordinate or to otherwise constitute a "long deferred presentation" under the circumstances, for a trial date not yet been scheduled, and minimal discovery (if any) has occurred. (See, e.g., *Miles v. City of Los Angeles* (2020) 56 Cal.App.5th 728, 739 [plaintiff waited four and half years into litigation to request leave to amend, and only after trial court issued a tentative indicating it would grant summary judgment against plaintiff].) The liberal policy for amendment thus is applicable, meaning the court will require a showing of prejudice to defendant in order to preclude grant of plaintiff's motion. (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150. 1159 [it is "prejudice to the other party," not prejudice to the moving party, that is to be weighed in this determination].)

Prejudice has not been demonstrated. Prejudice exists where the proposed amendment would require delaying the trial, resulting in added costs of preparation and increased discovery burdens. (*Miles, supra,* 56 Cal.App.5th at p. 739.) As noted, a trial date has not been set. Further, there appears to be no added costs to discovery or increased discovery burdens, as discovery apparently has not really commenced in earnest. Defendant in fact does not discuss any of these factors – it claims prejudice based on the fact the lawsuit is only about discrimination, not harassment, and they are "entirely different concepts." This argument seems akin to ones rejected by our appellate courts to the effect that plaintiff should not be permitted to raise harassment through an insufficient pleading, thereby depriving defendant of a windfall.

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[2] This is not fatal to defendant's motion to compel arbitration. If plaintiff cannot state a cause of action for sexual harassment – either because there are insufficient facts to do so or because plaintiff cannot allege exhaustion of administrative remedies, meaning the court will sustain a demurrer without leave to amend, plaintiff may be able to renew the motion to compel arbitration, a point developed later in this order.

(*Landis v. Superior Court* (1965) 232 Cal.App.2d 548, 557 ["it seems unreasonable to deny a party the right to amend where the only apparent hardship to the defendants is that they will have to defend"].) The effect of the proposed amendment, if allowed, will be to permit the parties to litigate fully all issues concerning the nature, extent, and conduct of the parties during plaintiff's employment. The proposed amendment does nothing more than sharpen the issues. That is no reason to deny the request to file the first amended pleading.

The court grants plaintiff's motion for leave to file a first amended complaint, and deems the first amended complaint filed as of today.

B) <u>Motion to Compel Arbitration</u>

As noted above, Employbridge, joined by Primus, has filed a motion to compel arbitration. It is not disputed that the arbitration agreement is governed by the Federal Arbitration Act (FAA) as made clear by the language of the arbitration agreement at issue. (See Exh. 1, attached to Jessica Sanchez's declaration, on page 1.) Further, when this motion was filed, there were only eight causes of action advanced in the original complaint; now, following the court's grant of plaintiff's motion for leave to file a first amended complaint, as discussed above, there are ten – and most notably, a new claim for sexual harassment. The motion to compel arbitration was filed on October 1, 2024, while the plaintiff's motion for leave to file a first amended complaint was filed on October 31, 2024. The impact of the EFAA awkwardly traverses both motions.

As a result, the parties, as well as the court have not had a meaningful opportunity to assess the merits of the motion to compel, given the new amended pleading, and notably, the import of the EFAA. Significantly, the parties do not address the most significant points of law in the wake of the EFAA, namely what has been (and what needs to be) pleaded,[3] and/or whether the sexual harassment contention renders the arbitration agreement *unenforceable as a whole or*

[3] Defendant's reply, filed on December 11, 2024, provides a good example of the problem. Defendant in its reply claims that it established the existence of a valid arbitration agreement; contends plaintiff has failed to establish both procedural and substantive unconscionability; and *then*, starting on page 9, for a page and a half, contends the EFAA does not apply to plaintiff's "discrimination claims," arguing that the first amended pleading "makes conclusory allegations of sex/general harassment," and "does not allege any facts that could withstand a demurrer on those claims," meaning the EFAA does not apply. It is defendant's burden in the motion to compel arbitration, based on the first amended pleading with the new causes of action, per Code of Civil Procedure section 1281.2, to show the arbitration agreement covers the disputes at issue. At the same time to say the EFAA does not apply simply because a demurrer is available to challenge a sexual harassment cause of action fails to acknowledge, and in fact overlooks the possibility, that the alleged defect may be cured through an amendment, meaning if this can be accomplished, then presumably the EFAA ***<u>would apply.</u>*** Defendant's argument is simply too thin to have real meaning in the present context. The allegations of the operative pleading must be examined and developed through demurrer before defendant and the court can realistically determine whether the EFAA precludes arbitration – or whether it does not. All parties should start from the same point before raising the issue of arbitration, something the court's proposed solution offers. The court cannot simply pick and choose the relevant legal principles from two separate motions, in the hope of determining appropriate standards. The inquiry must be self-contained and focused, not disparate, and far-flung as currently reflected in the two motions before the court.

in part, as the sexual harassment claims arose and thus accrued after March 3, 2022, the EFAA's effective date (i.e., plaintiff was employed between June and August 2023). (*Doe v. Second Street Corp*. (2024) 105 Cal.App.5th 552, 559.) In fact, recent published California appellate court case authority has concluded that if sexual harassment has been alleged in an operative pleading, ***all*** causes of action are subject to the EFAA – not just sexual harassment – if those causes of action are related to that dispute. (*Id*. at p. 575.) That is, "by its plain language, then, the statute applies to the entire case, not merely to the sexual assault or sexual harassment claims alleged a part of the case. . . . Here, although not all of plaintiff's cause of action arise out of the sexual harassment allegations, the 'case' unquestionably 'relates' to 'the sexual harassment dispute' because all of the causes of action are asserted by the same plaintiff, against the same defendants, and arise out of plaintiff's employment by the hotel. Accordingly, the arbitration agreement is unenforceable as to each cause of action alleged in plaintiff's FAC." (*Id*. at p. 577.) The court cannot meaningfully address the merits of the arbitration motion, including any objections to evidence, without affording all parties a full opportunity, *within the four corners of the motion to compel arbitration* (notably given defendants' burden pursuant to Code of Civil Procedure section 1281.2 to prove an arbitrable controversy) to address the applicability of the EFAA in the present context. The awkward conflation of two motions does not allow the court to adequately identify the relevant principles and assess the appropriate questions.[4]

With this conclusion the court directs the parties to discuss the issue at the December 18, 2024 hearing. In the court's view, the best course of action, following the granting of plaintiff's motion for a request to file a first amended complaint, is to deny defendants' motion to compel arbitration ***without prejudice, and start anew.*** This resolution affords defendant flexibility in determining how to proceed, meaning it has an opportunity to file a demurer to the first amended pleading, thereby challenging the viability and efficacy of the sexual harassment cause of action (and others), and if successful, then renewing its motion to compel arbitration; or instead to forego any challenge at all and permit this court to resolve the matter itself; or perhaps something in-between. The timing of the two motions on calendar today has prevented the parties from presenting, and thus the court from meaningfully addressing, the relevant principles that frame the motion to compel arbitration, with notable emphasis on the import and impact of the EFAA. Denial without prejudice is the best resolution under the circumstances presented.

The parties are directed to appear in person or by Zoom to discuss these issues.

[4] Defendant proposes in reply that the court should conduct an evidentiary hearing to determine the merits of the motion to compel arbitration. This proposal does not solve the problem engendered by the adequacy of the new allegations in the new amended pleading, which seems a potential critical point of contention.

Summary:

- The court grants plaintiff's motion for leave to file a new amended pleading, adding two (2) new causes of action for pregnancy harassment and sexual harassment. The court deems the first amended pleading filed as of today.

- The court cannot resolve the merits of defendants' motion to compel arbitration, given the awkward sequence and timing of the two motions on calendar today; the sexual harassment cause of action in the new operative pleading; and, most notably, the now obvious specter of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), which modified the Federal Arbitration Act to preclude enforcement of predispute arbitration agreements when a sexual harassment cause of action is alleged, as it ***now*** is. The court is therefore inclined simply to deny the motion to compel arbitration *without prejudice* and let defendant start anew; this affords defendant(s) the widest latitude in determining the best course of action in pursuing a motion to compel arbitration in light of these changed circumstances, either by filing a demurrer to the new first amended complaint (challenging the viability of the sexual harassment cause of action) and (if successful) then filing a motion to compel arbitration; or to forego the endeavor entirely and file an answer; or something in-between. For the record, the court will likely not find a waiver of defendants' future right to file a renewed motion to compel arbitration, if desired, so long as defendants' efforts are reasonable under the circumstances.

- The parties are directed to appear in person or via Zoom to discuss these matters. The parties can discuss how long they foresee the path of any new motion following the court's determination today.