Tentative Rulings for May 2, 2023
Department 503

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

**** THIS COURT IS PRESENTLY IN JURY TRIAL. IF YOU ARE REQUESTING ARGUMENT ON ONE OF THE BELOW TENTATIVES, YOU MUST REQUEST SAME TIMELY PURSUANT TO THE CRC AND LOCAL RULES. ALL HEARINGS, THIS WEEK, WILL BE HELD THURSDAY MAY 4TH AT 3:30 P.M.**

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section.

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

19CECG03941 ***Lennice Muhammad v. Tylar Property Management Company et al.*** **is continued to Wednesday, May 31, 2023, at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(37) **Tentative Ruling**

Re: ***Tetianna Green v. County of Fresno***
Court Case No. 21CECG02131

Hearing Date: May 2, 2023 (Dept. 503)

Motion: Petition to Compromise Minors' Claims for Kennedie Green and Raine Manivong

Tentative Ruling:

To grant. The Court intends to sign the proposed orders as to both minors. No appearances necessary.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 4/27/23 .
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Camarillo v. Topete, et al.***
Superior Court Case No. 19CECG02252

Hearing Date: May 2, 2023 (Dept. 503)

Motion: Plaintiff's Application for Default Judgment

Tentative Ruling:

To deny the application for default judgment, without prejudice.

Explanation:

Plaintiff has now filed a new request to enter default judgment and new supporting documents and evidence in an effort to support her requested damages. However, her new documentation does not support the requested damages of over $4.7 million. Plaintiff has shown that she suffered special medical damages of over $314,000, but she only seeks about $39,000, apparently based on the amount that her insurance company paid for her medical costs. Yet she also admits that her insurance company only has a lien of $3,166.14 for medical costs, so it is unclear why she seeks over $39,000 for medical costs.

Plaintiff also seeks lost earnings to date of $82,944, plus another $642,816 in future earnings. She has provided evidence to support her claim for lost earnings for the past four years since the accident, but does not explain how she calculated the future earnings damages. However, it appears that this number is based on the assumption that she would have worked for another 31 years but for the accident. (642,816 / 20,726 per year = 31 years.) Yet she does not state how old she is now, or why she believes she would have worked another 31 years. Therefore, she has not provided sufficient evidence to support her claim for lost future earnings.

More importantly, plaintiff has not provided sufficient evidence to support her request for $4 million in general damages against Porfirio Topete. She does state that she suffered severe injuries, including a traumatic brain injury that has caused her serious and life-changing harm. Plaintiff has submitted evidence that she suffered a complete loss of earning capacity, as well as substantial pain and suffering. She was hospitalized for about two weeks, suffered traumatic brain injury and other major injuries, and continues to suffer from memory loss, dizziness, stress, and depression. She cannot go back to work after the accident, and does not believe that she will be able to work anytime in the foreseeable future. She also has trouble taking care of her young children or even visiting with family.

Thus, plaintiff does appear to be entitled to a substantial award of general damages based on the severe harm she suffered. However, it is not clear how she arrived at the $4 million amount for her general damages. Notably, she only sought $200,000 in her prior motion for default judgment, which relied on essentially the same evidence. (See Request for Court Judgment filed on November 16, 2021.) It is not clear why plaintiff

previously believed that she was only entitled to $200,000 in general damages but she now requests 20 times as much based on the same evidence.

It is also problematic that plaintiff obtained the default against Porfirio based on a much lower amount of claimed damages, and yet she now seeks over $4.7 million in damages without setting aside the old default and obtaining a new default against him. The original statement of damages and default application only listed damages of $617,763.73. (See Request to Enter Default of Porfirio Topete entered July 23, 2020.) Plaintiff later served Porfirio with a new statement of damages that stated that she now sought $7.3 million in damages. However, the original default has not been set aside, so Porfirio never had a chance to reconsider whether he wanted to file his answer or otherwise respond to plaintiff's complaint based on the larger amount of damages she now seeks. Thus, it would be a denial of due process to enter a default judgment against him based on the higher damages plaintiff is now seeking. (*Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 319 [holding that the purpose of serving the defendant with a statement of damages is to give him "one last clear chance" to respond to the complaint before entering his default, and that failure to serve a statement of damages before the default was entered was a denial of due process that rendered the ensuing judgment void].)

Here, defendant was served with the amended statement of damages that included the larger requested damages on March 21, 2022. However, he had no way to respond to the complaint at that time, since his default had already been entered on July 23, 2020. Nor could he move to set aside the default, as it had been more than six months since he was defaulted. (Code Civ. Proc. § 473, subd. (b).) Therefore, the service of the amended statement of damages does not permit plaintiff to seek a larger amount than she sought when she originally defaulted Porfirio. Unless plaintiff sets aside the default against Porfirio and gives him a chance to respond to the complaint, she is limited to the lower amount of damages she sought in the original statement of damages.

Finally, plaintiff's request for court costs of $416.90 lacks evidentiary support. She seeks $205.20 in costs for filing fees, $64.17 for service of process fees, and "other costs" of $147.23. (See Request to Enter Default, Item 7, Memo of Costs, filed February 23, 2023.) However, it is not clear what the "other costs" are. Since Porfirio was defaulted fairly early in the litigation, plaintiff should not have had to incur many costs to prosecute her claims against him. Also, while plaintiff did file a motion to deem requests for admissions admitted against Porfirio, that motion was denied because Porfirio had already been defaulted. As a result, the motion did not have to be brought, and plaintiff should not be able to recover any costs related to the motion. Consequently, to the extent that plaintiff is seeking costs that were not necessary for the prosecution of the case against Porfirio, the request for costs may be excessive. However, it is difficult to determine which costs plaintiff is actually seeking here, as her counsel has not submitted any evidence regarding the requested costs.

Consequently, the court intends to deny the request to enter default judgment without prejudice for lack of sufficient evidence supporting the requested damages and costs.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 4/27/23.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***H&G Ohanyan's, LLC v. Central Valley Energy Solutions***
Superior Court Case No. 21CECG01261

Hearing Date: May 2, 2023 (Dept. 503)

Motion: Default Prove-Up

Tentative Ruling:

To deny without prejudice, unless plaintiff calls for a hearing and presents substantiating evidence of the total amount of damages sought, $333,000.

Explanation:

This is a continuation from the April 11, 2023 hearing. There, the court indicated that there was insufficient evidence to prove up the amount of damages demanded, $333,000. Plaintiff has since filed a declaration by Vice President Hayik Garabetyan, again indicating that he paid $335,000 to defendant, but only attaches copies of five checks made to defendant totaling $306,000. Plaintiff asserts that for reasons unknown, the bank is unable to provide the final check of $29,000. Notably, the fifth check dated for January 31, 2020 specifies that it was the "*Final Payment for Solar Project*." (Garabetyan Decl., Exh 2.) As such, plaintiff has only substantiated $306,000 in damages, and the court cannot grant default judgment in an amount greater than the amount proven.

Plaintiff may call for a hearing and present further evidence of the difference—for example, by providing redacted bank statements showing payment to defendant. Alternatively, in the event that plaintiff discovers $306,000 is the total amount paid to defendant, plaintiff may indicate so at the hearing and submit a corrected proposed judgment accordingly.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/1/23.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Maria Camacho-Flores v. Hyundai Motor America***
Superior Court Case No. 22CECG03130

Hearing Date: May 2, 2023 (Dept. 503)

Motion: By Defendant Hyundai Motor America to Compel Arbitration

Tentative Ruling:

To deny.

Explanation:

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) However, there is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505) "Thus, in ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute." (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 541.)

The party moving to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of an arbitration agreement. (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 18; *Lane v. Francis Capital Management* LLC (2014) 224 Cal.App.4th 676, 683.) In order to determine whether an arbitration agreement exists, the court may also need to assess the parties to any such agreement. (*Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 592.) After the moving party establishes the existence of an arbitration agreement between the parties, then the burden shifts to the opposing party to show that the agreement is otherwise unenforceable. (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219.) Here, no opposition was filed, but Hyundai Motor America ("HMA") bears the initial burden of demonstrating an arbitration agreement exists between HMA and plaintiff.

HMA is not a signatory to the arbitration agreement in question. (See Ameripour Decl., Exh. 2.) "Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it." (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) "The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142, internal quotes and citation omitted.) "However, both California and federal courts have recognized limited exceptions to this rule, allowing nonsignatories to an agreement containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement." (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352.) Here, HMA contends it may compel arbitration

as a third party beneficiary of the contract or alternatively under the theory of equitable estoppel. (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 301, 306; *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 230.) These are considered in turn.

Pertinent Language of the Arbitration Agreement

As pertinent to the issue of standing to compel arbitration based on either equitable estoppel or as a third party beneficiary, the arbitration agreement included in the Retail Installment Sales Contract ("RISC") plaintiff signed includes the following provisions.

On the front side of the RISC, in a separate box that plaintiff signed, it states: "Agreement to Arbitrate: By signing below, you agree that, pursuant to the Arbitration Provision on the reverse side of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate." (RISC, Ameripour Decl., Exh. 2.)

The RISC further provides in bold, capitalized letters, "YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION PROVISION ON THE REVERSE SIDE, BEFORE SIGNING BELOW." (*Ibid*.)

The first full paragraph of the arbitration agreement provides,

> Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action,

(*Ibid*.)

The first page of the RISC indicates that the word "you" refers to "the Buyer" (i.e., plaintiff), and the words "we" or "us" refers to the "Seller – Creditor". (Ibid., p. 1.) The Seller-Creditor is Lithia Hyundai of Fresno. (*Ibid*.)

Third-Party Beneficiary

Third-party beneficiaries are permitted to enforce arbitration clauses even if not named in the agreement. (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 856.) HMA contends that it can enforce the arbitration agreement as a third party beneficiary to the RISC. The arbitration agreement expressly states it applies to "any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) …"

"A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit." (*Jensen v. U-Haul Co. of California*, *supra,* 18

Cal.App.5th at p. 301, citing and quoting *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 602.) The intent to benefit that third party must appear from the terms of the contract. (*Ibid.*) The third party must show that the arbitration clause was "made expressly for his benefit." (*Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 552.) "A nonsignatory is entitled to bring an action to enforce a contract as a third party beneficiary if the nonsignatory establishes that it was likely to benefit from the contract, that a motivating purpose of the contracting parties was to provide a benefit to the third party, and that permitting the third party to enforce the contract against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Hom v. Petrou* (2021) 67 Cal.App.5th 459, citing *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821.)

As applied to the facts here, the mere fact that the RISC contains a reference to "third parties" and that HMA is a "third party" does not show that the arbitration clause was expressly intended to benefit any particular third party, much less does it show that this provision was made expressly for HMA's benefit. There is nothing in the RISC indicating that the motivating purpose for the parties to the contract was to benefit manufacturer HMA, or that allowing HMA to independently compel arbitration was within the parties' reasonable expectations at the time of contracting. The court cannot find HMA to be a third party beneficiary of the arbitration agreement.

HMA relies on a recent opinion out of the Third District Court of Appeal, *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 ("*Felisilda*") in arguing that it has standing to compel arbitration as a third-party beneficiary. In *Felisilda*, the motion to compel arbitration was filed by the dealership (Elk Grove Dodge), and included a request that its co-defendant, manufacturer FCA, US, LLC ("FCA") also be included as a party to the arbitration. (*Id.* at p. 498.) FCA filed a notice of nonopposition. (*Ibid.*) The trial court granted the motion. After the motion was granted, plaintiff dismissed Elk Grove Dodge. (*Id.* at p. 489.) FCA prevailed at arbitration, and the Felisildas appealed. The appellate court found that it was appropriate to compel arbitration based on the theory of equitable estoppel. (*Id.* at p. 497.) HMA argues that this case controls, and mandates that this court find that it has standing to compel arbitration pursuant to the RISC which is virtually identical to the one in *Felisilda*.

However, there are important distinctions between the facts of that case and the one at bench. The motion there was by the dealership and not the manufacturer, which took no part in the motion beyond filing a notice of nonopposition. Also, the plaintiffs did not dismiss the dealership until *after* the motion to compel was granted. Here, however, the dealership was never a party to this action. HMA is and always has been the only defendant in this action. This makes a difference and limits the application of *Felisilda*. At best, *Felisilda* stands for the proposition that where a plaintiff buyer files a complaint against both the dealership and the manufacturer, the dealership can compel plaintiff to arbitrate the claims against both. This is consistent with the language of the arbitration agreement, since it provides that any claim or dispute "which arises out of or relates to your … purchase or condition of this vehicle … or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election be resolved" by arbitration. As defined by the contract, the word "our" means Lithia Hyundai of Fresno, not HMA. Thus, under the express language of the arbitration clause, arbitration could be compelled <u>*on behalf of*</u> a third party non-

signatory, and there is nothing in this language authorizing it to be compelled *by* a third party non-signatory.

As the appellate court in *Felisilda* clearly stated, "It is the motion that determines the relief that may be granted by the trial court." (*Felisilda, supra,* 53 Cal.App.5th at p. 498.) The motion before the trial court, and thus, the issue considered on appeal, was whether the dealership's motion, asking for arbitration to also be compelled *on behalf of* the nonsignatory manufacturer, was correctly granted. Therefore, the court had no cause to consider whether a nonsignatory manufacturer, as sole defendant, could successfully compel arbitration. That was not the posture of the case. As the court summed up its holding, since *the dealership's motion* argued that the claim against both defendants should be arbitrated, "the trial court had the prerogative to compel arbitration of the claim against FCA." (*Id.* at p. 499.) Also, the phrase "had the prerogative" suggests that the court of appeal was supporting the trial court's *use of discretion* in making its ruling, and was not finding that compelling arbitration was mandated under the equitable estoppel theory. In short, it is not clear how the Third District Court of Appeal would have ruled had the trial court ruling emanated from a motion brought by the sole defendant, the nonsignatory manufacturer, as here. This court will not extend *Felisilda* beyond its borders.

Another important distinction between *Felisilda* and the case at bench is that there the plaintiffs' complaint consisted of one combined cause of action against both defendants. (*Felisilda, supra,* 53 Cal.App.5th at p. 491.) No doubt that factor weighed heavily in the court's finding that the plaintiffs' claims against the manufacturer were intertwined with their claims against the dealership, such that it was fair to require arbitration to proceed against both. Here, however, not only did plaintiff never commingle causes of action against dealership and manufacturer, the dealership has never been a part of this action. Plaintiff has never asserted the same cause of action against both dealership and manufacturer. And, as discussed above, the claims against HMA do not "depend upon," nor are they "intimately found in" the contract plaintiff entered into with the non-party dealership.

When faced with the same procedural posture (complaint only named manufacturer as defendant), and same arbitration agreement, in January of 2022, the Ninth Circuit Court of Appeals similarly limited the holding of *Felisilda*, rejecting vehicle manufacturer BMW's third-party beneficiary and promissory estoppel arguments. (See *Ngo v. BMW of North America, LLC* (9th Cir. 2022) 23 F.4th 942.) More recently, the Second District Court of Appeals disagreed with *Felisilda's* analysis and with its interpretation of the contract and like *Ngo v. BMW*, rejected Ford's third-party beneficiary, estoppel, and agency arguments. (See *Ford Motor Warranty Cases* (April 4, 2023, B312261) ___Cal.Rptr.3d ___ [2023 WL 2768484].)

Equitable Estoppel

"The *sine qua non* for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 213-214.) Even if a plaintiff's claims touch matters relating

to the arbitration agreement, the claims are not arbitrable unless the plaintiff relies on the agreement to establish its cause of action. (*Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th at p. 552.) "The reason for this equitable rule is plain: One should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract." (*DMS Services, LLC v. Superior Court, supra,* 205 Cal.App.4th at p. 1354.)

None of plaintiff's claims against HMA are intimately founded in the RISC. HMA relies on the fact that plaintiff's claims concern the "condition … of the vehicle," which term is mentioned in the RISC as a potential subject of a claim where arbitration could be compelled. However, clearly plaintiff's claims about the condition of her vehicle do not *depend upon* that language being in the RISC in order to bring them. If plaintiff had paid cash for the vehicle, and thus would not have signed the RISC, she still could bring claims under the Song-Beverly Act and under common law concerning the "condition of the vehicle." (See, *e.g., Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th p. 553 [finding no standing to compel arbitration based on equitable estoppel because "[e]ven if he had paid cash for the motorcycle, his complaint would be identical."].) It is accurate to say that plaintiff's claim is intimately founded in "the condition of the vehicle," but the fact that this term can also be found in the RISC does not mean her claim is intimately founded *in that contract*. Therefore, it would not be accurate to say that plaintiff's causes of action against HMA rely on the RISC, such that it would be equitable to find her estopped from avoiding its terms requiring arbitration.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 5/1/23.
(Judge's initials) (Date)