**Tentative Rulings for August 29, 2024**
**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)**

---

**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.***

**24CECG03221** ***Kevin Draughon v. Synthetic Grass Showroom, Inc.*** **(Dept. 503)**

---

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

**23CECG05231** ***Kaelyn Moralez v. Fresno Community Hospital and Medical Center*** **is continued to Tuesday, September 10, 2024, 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

(34)

**Tentative Ruling**

Re: ***All Pure Pool Service of Central California, Inc. v. Williams, et al.***
Superior Court Case No. 21CECG01502

Hearing Date: August 29, 2024 (Dept. 503)

Motion: by Defendants for Leave to File Cross-Complaint

**Tentative Ruling:**

To grant Defendants Tavarez L. Williams, Phillip A. Roman, and Tactical Splash Bros., LLC's motion for leave to file a cross-complaint. Defendants shall file their proposed cross-complaint within 10 days of the clerk's service of the minute order.

**Explanation:**

Leave to file a cross-complaint is to be liberally granted:

> The legislative mandate is clear. A policy of liberal construction of [Code of Civil Procedure] section 426.50 to avoid forfeiture of causes of action is imposed on the trial court. A motion to file a cross-complaint at any time during the course of the action must be granted unless bad faith of the moving party is demonstrated where forfeiture would otherwise result. Factors such as oversight, inadvertence, neglect, mistake or other cause, are insufficient grounds to deny the motion unless accompanied by bad faith.

(*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98–99; see Code Civ. Proc. §426.50; see *Bewley v. Riggs* (1968) 262 Cal.App.2d 188, 190 [law abhors multiplicity of actions; intent of Legislature in enacting counterclaim statutes was to settle all claims between parties in one action].)

The compulsory cross-complaint statute was designed to prevent a multiplicity of actions and achieve resolution in single lawsuit of all disputes arising out of common matters. (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 965; see §426.30(a) [cross-complaint compulsory if defendant's claims are related to subject matter of complaint; where not raised by cross-complaint, defendant barred from asserting in later action].) Causes of action arise out of the "same transaction or occurrence" if the factual or legal issues are logically related, they do not need to be identical. (*ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd*. (2016) 5 Cal.App.5th 69, 82-83.)

In the case at bench, the claims in the cross-complaint arise out of the same nucleus of facts alleged in the complaint. Specifically, plaintiff All Pure Pool Service of Central California, Inc. ("Pure Pool") is alleging causes of action premised on the alleged misappropriation of trade secrets by its former employees, defendants Williams and Roman, who have formed a competing pool service business, Tactical Splash Bros., LLC.

The cross-complaint alleges causes of action premised on the alleged unlawful enforcement of non-competition agreements by Pure Pool against its former employees. Both the complaint and cross-complaint allege the other business is interfering with its respective contracts to service their customers.

It does not appear that the cross-complaint is being filed in bad faith or that allowing the cross-complaint would cause any undue delay. The cross-complaint seeks to enforce regulations of non-competition agreements that only became effective as of January 2024 and it does not appear that the scope of discovery is significantly widened. The parties stipulated to close discovery as of April 5, 2024 and defendants at that time intended to seek leave to file the cross-complaint. Presumably all parties understood that there would be no further discovery upon the filing of the cross-complaint, consistent with the stipulation.

Plaintiff Pure Pool has asserted objections to attestations of Mr. Ashley regarding the merits of the cross-complaint as hearsay, improper legal conclusions, and inadmissible opinion. The objections are sustained but have no bearing on the outcome of this motion.

The court intends to grant defendants' motion for leave to file the cross-complaint.

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 8/26/24.**
(Judge's initials) (Date)

(36)

**Tentative Ruling**

Re: ***Sihota v. Sahota, et al.***
Superior Court Case No. 21CECG02900

Hearing Date: August 29, 2024 (Dept. 503)

Motion: by Defendants to Set Aside Default Judgment

**Tentative Ruling:**

To deny defendants' motion to set aside default. (Code Civ. Proc., § 473, subd. (b).)

The court, on its own motion: (1) strikes the Notice of Striking of Filed Documents, filed on November 6, 2023, and the portion of the 1st Corrected Trial Readiness Minutes ordering the Answer filed on November 4, 2021 stricken; and (2) corrects the clerical errors in the judgment and amends the judgment nunc pro tunc to remove the terms "default" and "default prove-up" from the caption and body of the judgment.

**Explanation:**

Defendants move to set aside their default and default judgments pursuant to Code of Civil Procedure section 473, subdivision (b).[1]

*Relief Pursuant to Code of Civil Procedure section 473, subdivision (b)*

The trial court has broad discretion to vacate the judgment and/or the clerk's entry of default that preceded it. However, that discretion can be exercised only if the moving party establishes a proper ground for relief, by the proper procedure, and within the statutory time limits. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) The court is empowered to relieve a party "upon any terms as may be just … from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief … shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (Code Civ. Proc., § 473, subd. (b).) The outside time limit for seeking relief under Code of Civil Procedure, section 473, subd. (b) is six months. This limit is jurisdictional in the sense that the court has no power to grant relief after this time regardless of whether an attorney affidavit of fault is filed or how reasonable the excuse for the delay. (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 928.)

[1] As explained in the second section of this ruling, the judgment entered in this case was not, in actuality, a default judgment and default was not entered in this case. Nonetheless, the merits of the motion to set aside the judgment are considered below.

Here, while the notice of entry of judgment was filed on December 27, 2023, the judgment was entered against defendants on December 11, 2023. The court calculates six-months following Monday, December 11, 2023 to be Tuesday, June 11, 2024. The instant motion was filed on June 28, 2024, which is more than six months from December 11, 2023. Since the instant motion was filed more than six months from the date the judgment was entered, the motion is untimely. Thus, defendants are not entitled to relief under Code of Civil Procedure section 473, subdivision (b).

And even if defendants were entitled to such relief, defendants have not shown that their neglect in participating in the suit was excusable. Early in the proceedings, defendants obtained counsel and filed their answer to plaintiff's complaint. Defendants indicate that they asked their attorney if the proceedings could be "paused" due to circumstances that was going on in their lives. Defendants' attorney advised them that this could not be done. Even so, defendants failed to heed this advice. (Sahota Decl., filed June 28, 2024, ¶ 9.)

Although defendants contend that they never received any notices after counsel withdrew from the matter and that they were ignorant of the need to keep the court informed of any address change, defendants concede that they were properly on notice of the commencement of the proceedings. (*Ibid.*) Also, the orders granting counsel's motions to withdraw, entered on June 22, 2022, were served upon defendants on June 27, 2022. (See the Proofs of Service filed on June 27, 2022.) These orders informed defendants of the following upcoming hearings in the action: Mandatory Settlement Conference on August 24, 2023, Trial Readiness on September 15, 2023, and Jury Trial on September 18, 2023. (See the Orders Granting Counsel Craig C.O. Waters' Motions to be Relieved as Counsel, filed on June 22, 2022, Items 7-9.) These orders contained warnings about self-representation and the consequences of not appearing at a hearing—"**action may be taken against you. You may lose your case.**" (*Id*., at Item 11.) These orders further notified defendants of their "**duty to keep the court informed at all times of the client's current address.**" (*Id*., at Item 12.) These warnings are in bolded text. A reasonable person who was aware that an action had been filed against them would not turn a blind eye to the action just because she did not receive any further notices regarding that action, *especially* after she had recently moved without notifying the court of her new address.

Moreover, the record reflects that on November 6, 2023, the clerk of the court provided notice of the December 11, 2023 hearing by mail to their then address of record with the court. (See the Clerk's Certificate of Mailing attached to the Minute Order, filed on November 6, 2023.)

"Code of Civil Procedure section 1013, subdivision (a) dealing with service by mail, provides that the mail is to be addressed at the address last given by the addressee on any document which he has filed in the cause. Our Supreme Court in *Reynolds v. Reynolds* (1943) 21 Cal.2d 580, 584, held that it was the burden of a defendant to either keep an attorney of record or to make arrangements with the clerk for notice of proceedings. . . . The person to be served under the provisions of both sections 1013, subdivision (a) and 594 subdivisions (a) and (b) of the Code of Civil Procedure, has the burden of notifying the court of any change of address; the failure to do so does not

enable him to claim improper notice. [Citation.]" (*Westervelt v. Robertson* (1981) 122 Cal.App.3d Supp. 1, 8, citations omitted.)

"The fact that the defendants had no lawyer representing them and were appearing in propria persona does not entitle them to any different treatment in regard to their duty to notify the court when they change their address. 'A lay person, who is not indigent, and who exercises the privilege of trying his own case must expect and receive the same treatment as if represented by an attorney no different, no better, no worse.' [Citation.] " (*Ibid*., citations omitted.)

Accordingly, the motion to set aside the judgment is denied.

*Distinction between Default Judgment and Uncontested Trial*

"The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed…" (Code Civ. Proc., § 473, subd. (d).) The court notes that while the terms "default judgment" appear on the judgment entered, the underlying judgment herein was not a default judgment, but was one entered pursuant to Code of Civil Procedure section 594.

> In superior courts either party may bring an issue to trial or to a hearing, and, in the absence of the adverse party, unless the court, for good cause, otherwise directs, may proceed with the case and take a dismissal of the action, or a verdict, or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof shall first be made to the satisfaction of the court that the adverse party has had 15 days' notice of such trial or five days' notice of the trial in an unlawful detainer action as specified in subdivision (b). If the adverse party has served notice of trial upon the party seeking the dismissal, verdict, or judgment at least five days prior to the trial, the adverse party shall be deemed to have had notice.

(Code Civ. Proc., § 594, subd. (a).)

"[T]he court ha[s] no power to order the entry of [defendants'] default when they fail[] to appear for trial. [Citations.]" (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862.) " 'Section 585 of the Code of Civil Procedure does not authorize the entry of any default in cases where an answer is on file, whether the defendant does or does not appear at the time the action is called for hearing. [Citations.] Where the defendant who has answered fails to appear for trial "the plaintiff's sole remedy is to move the court to proceed with the trial and introduce whatever testimony there may be to sustain the plaintiff's cause of action." [Citation.] In such case a plaintiff is entitled to proceed under the provisions of Code of Civil Procedure, section 594, subdivision 1, and he may do so in the absence of the defendant provided the defendant has been given at least [fifteen] days['] notice of the trial. Section 594 does not authorize the entry of the default in the event the defendant fails to appear, and a hearing held pursuant to that section under such circumstances is uncontested as distinguished from a default hearing." (*Id.*, at p. 863, internal citations and footnotes omitted.)

In other words, "…where a defendant who has answered the complaint receives proper notice of trial but does not appear, the plaintiff may proceed with his case and take judgment. This is what occurred in the case at bench. The hearing was one which was 'uncontested'; it was not a default hearing [Citation.], and the judgment was not a default judgment." (*Merrifield v. Edmonds* (1983) 146 Cal.App.3d 336, 341, citation omitted.)

Here, defendants filed their answer through counsel on November 4, 2021. Following the defendants' failure to appear for trial readiness on September 15, 2023, the court vacated the jury trial set on September 18, 2023, re-set the trial readiness for November 3, 2023, struck the defendants' answer, and scheduled a default prove-up hearing on November 6, 2023. (See the 1st Corrected Trial Readiness Minutes, filed November 6, 2023.) On November 3, 2024, defendants again failed to appear for trial readiness, and a default hearing was set for November 6, 2023. (Trial Readiness Minutes, filed on November 3, 2023.) On November 6, 2023, defendants failed to appear, and the court "continued [the matter] to **December 11, 2023** at **9:00 a.m.** Dept **403** for **Court Trial**…" (Minute Order, filed November 6, 2023, emphasis in original.) On December 11, 2023, defendants failed to appear and the court proceeded with an uncontested hearing. (See the Civil Court Trial Minutes – Day 1 – First Corrected.) Judgment was entered against defendants that same day.

While the court mistakenly struck the defendants' answer, scheduled a default prove-up hearing, and entered a judgment labelled as a default judgment, the record reflects that an uncontested hearing, and not a default hearing, was held on December 11, 2023 was an uncontested hearing. (See the Civil Court Trial Minutes – Day 1 – First Corrected.) This is further evidenced by the fact that defaults were never entered against defendants. Thus, the judgment was not a default judgment.

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 8/28/24.**
(Judge's initials) (Date)

(27)

**Tentative Ruling**

Re: ***Maria Arellano Bravo v. Fresno Police Department***
Superior Court Case No. 24CECG01110

Hearing Date: August 29, 2024 (Dept. 503)

Motion: By Petitioner for Relief from the Government Claims Statute

**Tentative Ruling:**

To deny, without prejudice.

**Explanation:**

Petitioner seeks relief under the provisions of section 946.6 Government Code (Petition, at p. 4:15-28), however, subdivision (d) of that section specifically requires service on the subject public entity. According to the court's record, petitioner has not filed a proof of service regarding this proceeding or hearing. For that reason alone, the petition is insufficient.

In addition, the petition also contains significant inconsistencies, which, if nothing else, create unnecessary confusion and uncertainty. (See e.g. the alleged date of accrual (Pet. ¶ 3) differs from the date of accrual in the claim forms; and the Petition p. 4, ln. 17 seeks relief against Castroville Community Services District.)

Therefore, the petition is denied, without prejudice.

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 8/28/24.**
(Judge's initials) (Date)

(37)

**Tentative Ruling**

Re: ***Carlie Cummings v. Costco Wholesale Corporation***
Superior Court Case No. 23CECG02612

Hearing Date: August 29, 2024 (Dept. 503)

Motion: By Defendant Costco Wholesale Corporation for Summary Judgment

**Tentative Ruling:**

To deny. (Code Civ. Proc., § 437c.)

**Explanation:**

This motion arises out of a claim for negligence based on a slip and fall. On September 16, 2021, plaintiff was shopping at defendant's store in Fresno when she slipped on a strawberry in one of the aisles. Defendant Costco argues that it did not have notice of the strawberry's existence on the floor.

Evidentiary Objections

The court is not ruling on plaintiff's evidentiary objections. California Rules of Court, rule 3.1354 requires a party to file evidentiary objections separately from other papers and instructs that the objections are to be noted, but are not to be argued in the separate statement. (Cal. Rules of Ct., rule 3.1354(b).) The party submitting objections must also submit a proposed order. (Cal. Rules of Ct., rule 3.1354(c).) Plaintiff failed to file a proposed order, failed to number the objections, and presented arguments in the separate statement. The court may refuse to rule on the improperly formatted objections. (*Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 8-9.) Additionally, the court has not considered the arguments presented within the separate statement with regards to the evidentiary objections.

The court overrules each of defendant's evidentiary objections. Particularly for evidentiary objections numbers 3-9, and 11, the court would note that these objections are not to the evidence, but rather to plaintiff's interpretation of the evidence.

Merits

*Burden on Summary Judgment*

"'Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713, quoting Code Civ. Proc. § 437c(c).) Summary judgment is properly directed toward the entire complaint and not portions thereof. (see *Barnick v. Longs Drug Stores, Inc*. (1988) 203 Cal.App.3d 377, 384; *Khan v. Shiley, Inc*. (1990) 217 Cal.App.3d 848, 858-859.)

"It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion." (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74; see also *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1132 ["On a motion for summary judgment or summary adjudication, the pleadings delimit the scope of the issues . . .."].)

The ultimate burden of persuasion rests on defendant, as the moving party. The initial burden of production is on defendant to show by a preponderance of the evidence, that it is more likely than not that a given element cannot be established or that a given defense can be established. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

If defendant carries this initial burden of production, the burden of production shifts to plaintiff to show that a triable issue of material fact exists. Plaintiff does this if she can show, by a preponderance of the evidence, that it is more likely than not that a given element can be established or that a given defense cannot be established. (*Aguilar*, *supra*, 25 Cal.4th at 850, 852.)

In determining whether plaintiff has met her burden of production, the court must evaluate the plaintiff's evidence independently. That is, the court may not weigh the plaintiff's evidence or inferences against the defendant's, as if the court were sitting as a trier of fact. If the plaintiff meets her burden, then the court must deny summary judgment, even if defendant has presented conflicting evidence. If the plaintiff meets her burden, a reasonable trier of fact could find for plaintiff and a triable issue of fact does exist for the jury to consider. (*Aguilar, supra,* 25 Cal.4th at 856-857.)

In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

*Notice*

In order to show negligence, a plaintiff must show a duty of care, breach of that duty, and that the breach was a proximate cause of the plaintiff's injury. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) Store owners are not insurers of the safety of their patrons. (*Ortega v. Kmart Corp., supra*, 26 Cal.4th at p. 1205.) The store's actual or constructive knowledge of the hazard is needed to establish liability. (*Id*. at p. 1206.) Actual notice exists where the hazard is either created by or observed by defendant's employee. (*Hatfield v. Levy Bros*. (1941) 18 Cal.2d 798, 806.) For constructive notice, the question is whether the hazard existed for a sufficient period of time to charge the store with notice of it. (*Ortega v. Kmart Corp., supra*, 26 Cal.4th at p. 1207.) Plaintiffs have the burden of producing evidence that a hazardous condition existed for a sufficient amount of time to put the store on constructive notice. (*Id*. at p. 1212.) A "failure to inspect the premises within a reasonable time prior to the accident [gives] rise to an inference that the defective condition lasted long enough to have been discovered and remedied." (*Id*. at p. 1211.)

Defendant asserts that its employees did not have actual notice of the strawberry on the floor. As evidence, defendant presents a Floor Walk Sheet from the date and approximate time of the incident, plaintiff's lack of knowledge of how the strawberry came to be on the floor, the lack of any reported hazards by either employees or customers, testimony regarding training for identifying and removing hazards, and the policy of conducting hourly sweeps of the store. (UMF Nos. 8-13.) Plaintiff counters that there are triable issues of fact on this issue because defendant's employee made statements implying he observed the hazard prior to plaintiff's slip and video footage plaintiff interprets as this same employee looking in the direction of where the strawberry was in the aisle. (UMF No. 12, PSS Nos. 1-3, 6.) Plaintiff has presented a triable issue of fact as to whether defendant's employee directly observed the strawberry before plaintiff slipped.

Defendant also asserts that it did not have constructive notice of the strawberry on the floor. As evidence, defendant presents the same evidence as described above. Plaintiff counters that there are triable issues of fact on this issue because the video footage shows that during a floor sweep the employee does not walk down each aisle visible in the video footage, there is no evidence of whether a sweep occurred in the hour prior to the incident, and no shoppers are observed with strawberries in the video footage. (UMF Nos. 10, 12, PSS Nos. 4-6, 8-11.) Plaintiff has presented triable issues of fact regarding whether the floor sweeps were actually conducted hourly by defendant's employees on the date of the incident.

Plaintiff has presented triable issues of fact as to both actual and constructive notice. As such, the motion for summary judgment is denied.

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 8/28/24.**
(Judge's initials) (Date)

(35)

**Tentative Ruling**

| | |
|---|---|
| Re: | ***Esqueda v. Hyundai Motor America***<br>Superior Court Case No. 23CECG01671 |
| Hearing Date: | August 29, 2024 (Dept. 503) |
| Motion: | By Defendant Hyundai Motor America to Compel Arbitration, and Request for Stay |

**Tentative Ruling:**

To deny the motion to compel arbitration in its entirety, and request for stay.

**Explanation:**

Plaintiff Martin Esqueda ("Plaintiff") filed the present action regarding the purchase of a 2020 Hyundai Elantra, which Plaintiff alleges came with manufacturer warranties. Problems with the vehicle ensued which form the basis of the instant complaint for damages. Plaintiff brought three causes of action against defendant Hyundai Motor America ("Defendant"), for breach of express warranties afforded through the Song-Beverly Act; breach of implied warranties afforded through the Song-Beverly Act, and violation of section 1793.2 of the Civil Code.[1] The agreement is a retail installment sales contract ("RISC") made between Plaintiff and a non-party, Lithia Hyundai of Fresno.

Defendant submits again for consideration that arbitration is warranted due to Plaintiff's agreement to do so in the Owner's Handbook and Warranty Information manual ("the Manual"); and in the RISC with a non-party, under the theory of equitable estoppel.

Compel Arbitration

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 Ca1.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.)

Defendant is not a signatory to either arbitration agreement in question. (*See* Mayo Decl., ¶ 2, Ex. A.) 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.) Strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration

[1] Plaintiff's Objections to the Declaration of James P. Mayo are overruled in their entirety.

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.) 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.)

Owner's Manual

Defendant submits that there is an arbitration provision housed in the Manual. Plaintiff admits to having received a copy of the Manual. (Mayo Decl., ¶ 7, Ex. E, Response to Request for Admission No. 5.) The Manual appears to have provisions pertaining to California vehicles only. (Mayo Decl., ¶ 3, Ex. B, pp. 13-14.)

As Plaintiff notes in opposition, nothing in the Manual suggests that a contract was created. Among other things, essential to a contract are: parties capable of contracting; and their consent. (Civ. Code § 1550.) Nowhere in the Manual is there any indication of who "you and we" are, in the statement "you and we each agree that any claim or disputes between us…". (*See* Mayo Decl., ¶ 3, Ex. B, p. 13.) Neither is there, anywhere in the Manual, any indication that the ill-defined parties to these writings manifested any assent to be bound by the terms therein.

Terms of a contract are ordinarily to be determined by an external, not an internal standard; the outward manifestation or expression of assent is the controlling factor. (*Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 992.) Where an offeree does not know that a proposal has been made to him, this objective standard does not apply. (*Id.* at p. 993.) An offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious. (*Ibid.*) This principle of knowing consent applies with particular force to provisions for arbitration; if a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto. (*Id.* at pp. 993-994.)

Plaintiff expressly rejects that he ever signed any agreement under the Manual. (Esqueda Decl., ¶¶ 6-7.) Plaintiff further declared that he had no notice from either the non-party seller nor Defendant that there was any agreement to arbitrate in the Manual, and that his failure to opt out constituted an agreement. (*Id.*, ¶ 6.) On reply, Defendant does not refute Plaintiff's statements, focusing instead on unconscionability. Unconscionability presupposes the existence of a valid agreement.

Based on the above, the court finds that the Manual is not an enforceable written agreement to arbitrate. (*Windsor Mills, Inc. v. Collins & Aikman Corp.*, *supra*, 25 Cal.App.3d at pp. 993-994 [finding that where a plaintiff was not advised of the arbitration provision and had no knowledge of the provision until after the demand for arbitration, there is no agreement to arbitrate, regardless of outward manifestations of apparent assent by acceptance of the object of the contract].) The parties to this purported agreement are not defined, nor is there any indication of assent by any

purported party to be bound by the terms therein. Even if there had been, because of the nature of the agreement is for arbitration, the party sought to be compelled to arbitration must have demonstrated knowledge or expectation of the provision. All of these factors are absent as to the Manual. Accordingly, the motion is denied as to the Manual.

Pertinent Language of the RISC

Defendant renews its prior argument regarding the doctrine of equitable estoppel to preclude Plaintiff from honoring the arbitration provision in the RISC.

As pertinent to the issue of standing to compel arbitration based on either equitable estoppel, the arbitration provision included in the agreement Plaintiff signed reads as follows:

> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
>
> […]
>
> Any claim or dispute, whether in contract, tort, statute or otherwise… 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. (Mayo Decl., ¶ 2, Ex. A.)

The first page of the five-page agreement indicates that the word "you" refers to "the Buyer" (i.e., Plaintiff), and the words "we" or "us" refers to the "Seller – Creditor" (i.e., Lithia Hyundai of Fresno.). (Mayo Decl., ¶ 2, Ex. A.) Defendant is neither of these parties and cannot be said to have "express" authority to compel arbitration under the plain language of the arbitration agreement.

Governing Law

The arbitration provision provides that "[a]ny arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration." (Mayo Decl., ¶ 2, Ex. A.) Even where an arbitration provision falls under the purview of the Federal Arbitration Act, "[b]ecause the California procedure for deciding motions to compel serves to further, rather than defeat, full and uniform effectuation of the federal law's objectives, the California law, rather than section 4 of the [United States Arbitration Act], is to be followed in California courts." (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 410; *see also Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 632 [holding that "a litigant who was not party to the relevant arbitration agreement may invoke [a stay pending arbitration] if the relevant state contract law allows him to enforce the agreement."][emphasis added])

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.* (2018) 26 Cal.App.5th 541, 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, supra,* 205 Cal.App.4th at p. 1354.)

Defendant argues that the claims for warranties are premised on, and arise out of the RISC that houses the arbitration agreement. Specifically, Defendant argues that had there not been a purchase agreement, Defendant would not have issued any of the warranties upon which Plaintiff now relies. In other words, Plaintiff's complaint presumes the existence of the underlying installment contract between Plaintiff and Lithia Hyundai of Fresno that houses the arbitration provision. However, a plain reading of the installment contract reveals that, as to warranties:

> **If you do not get a written warranty, and the Seller does not enter into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.**
>
> This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide. If the Seller has sold you a certified used vehicle, the warranty of merchantability is not disclaimed. (Mayo Decl., ¶ 2, Ex. A [emphasis original].)

In other words, the RISC distinguishes and separates the manufacturer warranties from its terms. It does not follow that Plaintiff's complaint, arising out of manufacturer warranties, presumes the presence of the RISC.

State decisions are split as to how to treat Defendant's relationship with Plaintiff under the RISC. Defendant relies on *Felisilda v. FCA US LLC*, in arguing that it, as a non-signatory to the arbitration agreement may still compel arbitration under equitable estoppel. (*Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, 498 ["*Felisilda*"].) 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. (*Ibid*.) 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.) Defendant argues that this case controls,

and mandates that this court find that it has standing to compel arbitration pursuant to the purchase agreement which is virtually identical to the one in *Felisilda*.

On the other hand, Plaintiff relies on *In re Ford Motor Warranty Cases*, which stands for the opposite conclusion to *Felisilda*, and adopts the reasoning set forth in a federal opinion, *Ngo v. BMW of North America, LLC* ("*Ngo*"). (*In re Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1337.)[2] *Ngo* held that Song-Beverly Act claims are not intertwined with the terms of the purchase agreement. (*Ngo v. BMW of North America, LLC* (9th Cir. 2022) 23 F.4th 942, 947.) The *Ngo* court rejected the manufacturer's argument that the warranties and the purchase agreement were intertwined because no warranties would have issued absent the purchase. (*Ibid*.) The *Ngo* court stated that, "under California law, warranties from a manufacturer that is not a party to the sales contract are 'not part of [the] contract of sale.'" (*Id.* at p. 949, *citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh* (1963) 217 Cal.App.2d 492, 514.)

Where there is a conflict of appellate decisions, the trial court can and must make a choice between the conflicting decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.)

This court follows *In re Ford Motor Warranty Cases* and finds that the *Ngo* holding on this issue as persuasive because the reasoning relies on California law and is analytically sound. A careful review of the complaint reveals no claims being made under the RISC, only under those warranties related to the Song-Beverly Act codified under Civil Code section 1790 et seq. Consistent with California law, the terms of the purchase agreement make a clear separation between it and manufacturer warranties. (Mayo Decl., ¶ 2, Ex. A; *In re Ford Motor Warranty Cases*, *supra*, 89 Cal.App.5th at p. 1334.)

The court distinguishes the present case from *Felisilda*. The motion in *Felisilda* was by the dealership and not the manufacturer, which took no part in the motion beyond filing a notice of nonopposition. Here, the dealership is not the party seeking to compel arbitration or even a party to this action. This is a significant 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. (Ameripour Decl., ¶ 4, Ex. 2 [emphasis added].) As defined by the contract, the word "our" means Lithia Hyundai of Clovis, not Defendant. Thus, under the express language of the arbitration clause, arbitration could be compelled on behalf of a third party non-signatory, and there is nothing in this language authorizing it to be compelled by a third

[2] On July 19, 2023, the California Supreme Court granted review of *In re Ford Motor Warranty Cases*. Pending review, the California Supreme Court has authorized that *In re Ford Motor Warranty Cases* may continue to be cited, not only for its persuasive value, but also for the purpose of allowing trial courts to exercise discretion to choose between conflicts of law. (*In re Ford Motor Warranty Cases*, review granted July 19, 2023, S279969.)

party non-signatory. (*In re Ford Motor Warranty Cases*, *supra*, 89 Cal.App.5th at pp. 1334-1335.) Accordingly, the court finds that Plaintiff is not estopped from resisting arbitration of his claims against Defendant.

For the reasons above, the motion as to compelling arbitration based on the RISC is denied, as is the request for stay.[3]

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 8/28/24.**
(Judge's initials) (Date)

[3] Plaintiff's Request for Judicial Notice is granted only to the extent that such opinions exist.