**Tentative Rulings for December 10, 2024**
**Department 403**

**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)**

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**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.***

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

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 403

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(20) **Tentative Ruling**

Re: ***Broms v. Fresno-Bullard Park I Owners Assoc.***
Superior Court Case No. 23CECG02424

Hearing Date: December 10, 2024 (Dept. 403)

Motion: Motion to Seal
By Cross-Defendants HCP CRS2 Fresno CA, LP and Fresno Surgery Center LP dba Fresno Surgical Hospital for Summary Judgment, or Alternatively Summary Adjudication

**Tentative Ruling:**

To grant the motion to seal and sign the proposed order.

To deny summary judgment. To grant summary adjudication of the fourth cause of action of the First Amended Cross-Complaint ("FACC") in favor of cross-defendants. To deny summary adjudication of the fifth cause of action.

**Explanation:**

**Motion for Summary Judgment/Adjudication**

Plaintiff's personal injury complaint alleges causes of action for premises liability and negligence against Fresno-Bullard Park I Owners' Association ("The Association"). The Association has filed a cross-complaint against the owner of the property, HCP CRS2 Fresno CA, LP ("HCP"), which leased the property to Fresno Surgery Center LP dba Fresno Surgical Hospital ("FSC"). Broms alleges injuries arising from a fall she had while walking on an outside walkway near Fresno Surgical Hospital on 1/25/2023.

The operative relevant pleading is the FACC, which alleges that a 1984 Declaration of Restrictions was entered into by The Association and HCP, such that owners had the sole duty to maintain their buildings and lot. (FACC ¶ 8.) In 1994, HCP opted out of global insurance supplied by the Owners' Association, opting to maintain their own insurance. (FACC ¶ 9.) In 2011, the property involved in the lawsuit was deeded to HCP and "Cross-Defendant poured the subject walkway, which was no longer owned by Cross-Defendant." (FACC ¶ 10.) In 2011, FSC and HCP entered into a lease, where FSC would operate and maintain the property, including the sidewalks. (FACC ¶ 11.) In 2013, FSC confirmed it would provide its own liability insurance coverage. (FACC ¶ 12.) After plaintiff's fall in January 2023, FSC marked the concrete where plaintiff tripped, and the Owners' Association employed a grinding service to smooth out the fall area. (FACC ¶ 13.)

Based on these facts, the FACC alleges cause of action for: 4. Breach of written contract, and 5. Declaratory relief. Causes of action one through three were dismissed by way of demurrer. Though the FACC is vague in this regard, it appears that the

agreement or contract that The Association alleges was breached by the owner and hospital is the Declaration of Restrictions of Fresno-Bullard Park I ("the Declaration").

FSC and HCP ("movants") move for summary judgment on the fourth and fifth causes of action, contending that only The Association, not movants, had a duty to maintain or repair the subject walkway.

Movants position depends solely on the Declaration. The Association relies on certain portions of the Declaration. Section 8(b) of the contract provides "Each owner shall maintain, repair and replace as and when necessary, all parts of his building lot **for which such duties are not expressly delegated to the Association**." (Emphasis added.) And section 10(a) provides, "**Except as provided to the contrary in Section 8(a)**, each owner shall have the sole duty to maintain the buildings and other portions of his lot in a neat and clean condition and in good order and repair to satisfy the uniform standards of upkeep established by the Association from time to time." (Emphasis added.)

The Declaration provides that it runs with the land, and it has encumbered the subject property since 1984. The Declaration states that "the Common Area and Public Areas shall be maintained by the Association to assure a uniform standard of care and appearance." And in section 8(a), the Declaration states that The Association shall be responsible for and have the exclusive right, authority and duty for maintenance and repair of outside pedestrian walkways. It does not limit this obligation to those walkways in existence at the time the Declaration was executed.

Inasmuch as the Declaration runs with the land, and the sidewalk owned and controlled by movants is situated on the land covered by the Declaration, the Declaration imposes on The Association the responsibility of maintaining the sidewalk. The Association does not show that subsequent changes in ownership and improvements on the land, such as pouring the sidewalk at issue, alters this provision. Numerous amendments to the Declaration have been made over the years, but this provision was never amended.

In the fourth cause of action The Association alleges that cross-defendants/movants breached "a written contract which states that Cross-Defendant would maintain and repair walkways used to access its building." (FACC ¶¶ 29, 30.) Because The Association has identified no contract to which it is a party that imposes on movants this duty, the court intends to grant the motion as to the fourth cause of action.

The fifth cause of action for declaratory relief seeks a declaration regarding "whether Cross-Defendants owe a duty to defend Cross-Complainant, and/or the percentage of responsibility it bears for the alleged injuries and damages, if any, sustained by Plaintiff." The Association "contends that if Plaintiff suffered or sustained any loss, injury or damage, the same was directly, legally and/or proximately caused and contributed to by the primary, active, sole and direct responsibility, conduct and negligence of Cross-Defendants and each of them." (FACC ¶ 31[1].)

[1] The second ¶ 31 – after ¶ 34 the numbering restarts at 31.

As to the fifth cause of action, the motion is brought "on the grounds that the declaratory relief cause of action requires the court to declare:

> (A) that on the fourth cause of action for breach of contract, cross-defendants did not breach the declaration since they had no duty to maintain or repair the subject walkway.
>
> (B) that on the fifth cause of action for declaratory relief for a finding that the cross defendants did not breach the declaration
>
> (C) that the cross complainant did breach the declaration by failing to perform its duties to maintain and repair the outside walkway where plaintiff fell."

(Notice of Motion.)

Movants argue, "with respect to the Fifth Cause of Action for Declaratory Relief, cross defendants produced evidence establishing that they did not breach The Declaration, and that the Association did breach The Declaration by failing to perform their exclusive duty to maintain and repair the outside walkways, including the one where the plaintiff fell." In their motion movants do not adequately address the issues raised in the fifth cause of action. The court in ruling on the motion for summary judgment or adjudication is limited to the issues raised in the pleading at issue.[2] The fifth cause of action does not explicitly seek any declaration regarding the Declaration, or to determine whether any party breached the Declaration. Moving parties cannot simply make up their own issues for declaratory relief and seek summary judgment or adjudication of those issues.

Movants do assert that "[n]either The Owner nor The Hospital have a duty to defend or indemnify the Association, since, from the time The Declaration was recorded, The Association assumed the exclusive right, authority and duties for maintenance and repair of outside walkways in the Public Areas in any Building Lot." But movants don't specifically address the fact that they assumed control over the sidewalk for an extensive period of time. The evidence shows that HCP owned the property on which the sidewalk was located; that cross-defendants poured the sidewalk; that HCP declined The Association's global insurance that would provide coverage for the entire property, instead opting to obtain liability coverage for the property occupied by its tenant. FSC's lease explicitly requires it to maintain the sidewalks of the Lease Property. While the lease also provides that it is subject to any "covenants, condition and restrictions and other matters which affect the Leased Property …," this provision of the lease does not explicitly reference the 1984 Declaration. Moreover, cross-defendants exercised control over the sidewalk after the accident by marking the site and placing cones. The hospital had

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[2] "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Orange Cnty. Air Pollution Control Dist. v. Superior Court* (1972) 27 Cal.App.3d 109, 113.) "The purpose of the motion for summary judgment is to determine whether issues presented by the pleadings actually are triable issues." (*Craig v. Earl* (1961) 194 Cal.App.2d 652, 655, emphasis added.) Evidence in connection with a summary judgment motion "must be directed to the issues raised in the pleadings." (*Id.*) The burden of a defendant moving for summary adjudication only requires that he or she negate the plaintiff's theories of liability as alleged in the complaint; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings. (*Hutton v. Fidelity National Tile Co.* (2013) 213 Cal.App.4th 486, 493.)

video cameras pointing towards the sidewalks and would take care of anything needed to be done outside the facility. And after The Association ground down high spots on the sidewalks after the accident, cross-defendants were billed for their portion of the work.

Even though pursuant to the 1984 Declaration The Association had responsibility for maintaining common areas and public areas, which would encompass the sidewalk, cross-defendants did not in fact act as though The Association had responsibility for this maintenance. Cross-defendants had ownership and exercised control of the accident location apparently at all times. This at least creates a triable issue of fact as to whether cross-defendants had proximately caused or contributed to plaintiff's injury. Accordingly, the court intends to deny the motion as to the fifth cause of action.

That does not mean The Association bears no responsibility, as the Declaration does impose a maintenance obligation as to the public and common areas. It is a general principle that where an owner gives up possession to another party, they likewise give up the ability to directly and promptly control the conditions existing on that property. (*Leakes v. Shamoun* (1986) 187 Cal.App.3d 772, 776.) But in this case the Declaration did give The Association the right and obligation to exercise control over the sidewalk pursuant to the Declaration.

**Objections and Procedural Issues**

The Association's Objections to Movants' Evidence

The Association objects to various portions of the Curtis Declaration. Its objections, however, do not comply with Cal. Rules of Court, rule 3.1354(b), in that they do not quote or set forth the objectionable statement or material. The court would also overrule the objections on the merits.

Movants' Objections to The Association's Evidence

Movants filed objections to The Association's separate statement, complaining first that its references to the Johnson Declaration do not support the statements made in response to various UMF. The court has read the declaration and considered it for what it says, regardless of how it is characterized in the separate statement. This is not a ground for objection. Movants also complain that the citations to the Johnson Declaration only generally reference the declaration, without referencing page and line numbers as required by Cal. Rules of Court, rule 3.1350(d)(3). However, the declaration is so short that the neither the court nor movants are hindered in their analysis of the declaration by the failure to cite to specific line numbers. Moreover, evidentiary objections can only be made to the underlying evidence, not the facts contained within the separate statement or the separate statement's description of the evidence. (See Cal. Rules of Court, Rule 3.1352, 3.1354.) These objections should be disregarded.

Movants also submit three objections to evidence – the Bethke and Johnson Declarations. These objections are overruled.

Movants' Assertion of Untimeliness

Movants contend in their reply brief that the opposition papers were filed late because they were not filed nine court days before the hearing pursuant to Code of Civil Procedure section 1005(b) and Cal. Rules of Court, rule 3.1300.

Movants are mistaken about the timing requirements for filing summary judgment opposition papers. Opposition papers are due 14 calendar days before the hearing date, not the nine court days applicable to most motions. (Code Civ. Proc., § 437c, subd. (b)(2).) With a 12/10/2024 hearing date, the opposition papers were timely filed.

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: JS on 12/6/2024 .**
(Judge's initials) (Date)

(36)

**Tentative Ruling**

Re: ***Trujillo-Ruiz v. Hyundai Motor America***
Superior Court Case No. 24CECG02363

Hearing Date: December 10, 2024 (Dept. 403)

Motion: by Defendant to Compel Arbitration

**Tentative Ruling:**

To deny.

**Explanation:**

Plaintiff Angelina Trujillo-Ruiz filed the present action regarding the purchase of a 2022 Hyundai Tucson, 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, 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.

Defendant Hyundai Motor America moves to compel arbitration pursuant to Plaintiff's agreement to do so in the Owner's Handbook and Warranty Information manual ("the Manual"); and in the Connected Services Agreement ("CSA") associated with enrollment in Hyundai's Bluelink services.

In moving to compel arbitration, defendant must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. The party opposing the motion must then prove by a preponderance of evidence that a ground for denial of the motion exists (e.g., fraud, unconscionability, etc.) (*Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *Hotels Nevada v. L.A. Pacific Ctr., Inc.* (2006) 144 Cal.App.4th 754, 758; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230.)

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.)

Owner's Manual

Defendant submits that there is an arbitration provision housed in the Manual. A copy of a document titled "Owner's Handbook and Warranty Information" is attached as Exhibit 3 to the declaration of Ali Ameripour, counsel for defendant. Plaintiff objects for a lack of foundation. The objection is sustained. Nothing in counsel's declaration provides foundation to tie Exhibit 3 to the plaintiff.

Even had the document been admissible, 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.) 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 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.)

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 she ever signed any agreement under the Manual. (Ruiz Decl., ¶ 6.) Plaintiff further declared that she had no notice from either the non-party seller nor Defendant that there was any agreement to arbitrate in the Manual, and that her failure to opt out constituted an agreement. (*Id.*, ¶¶ 4-5.) Plaintiff did not expressly assent to any agreement in the handbook or act in a manner in which her failure to opt out was intended to accept the arbitration 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].) Even if there had been some indication of assent, 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.

Bluelink Connected Services Agreement

Defendant asserts the plaintiff agreed to arbitrate her warranty claims when she enrolled in the Hyundai Bluelink service and electronically acknowledged the Connected Services Agreement. As evidence of plaintiff's agreement, Vijay Rao, Director of Connected Ops & Owner Apps/Web for defendant, attests to plaintiff having enrolled her vehicle in Bluelink services and the requirement that customers agree to the CSA or "Terms & Conditions" upon enrollment. (Rao Decl., ¶¶ 4-5.) Rao includes an example screen capture for activating Bluelink services and a copy of the CSA in effect on July 3, 2021. (*Id*., ¶ 6, Ex. 1 and 2.) The text of the CSA is available to review by clicking the hyperlink connected to the phrase "Terms & Conditions." (*Id*., ¶ 6.) Plaintiff objects to Mr. Rao's attestation of plaintiff having enrolled her vehicle in Bluelink services due to the lack of foundation for his knowledge. The objection is sustained.

Even if there was admissible evidence of plaintiff's electronic assent to arbitration pursuant to the CSA, the degree of both procedural and substantive unconscionability of the agreement require the court to find the CSA so unconscionable as to be unenforceable.

*Unconscionability*

The doctrine of unconscionability has " 'both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results." (*Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83, 114.) To invalidate an arbitration agreement, the court must find both procedural and substantive unconscionability. (*Id*. at p. 122; *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1533; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.)

Plaintiff contends that the arbitration provision is procedurally unconscionable as a contract of adhesion. A contract of adhesion is oppressive as a matter of law. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 711.) Thus, there is some level of procedural unconscionability.

Additionally, the CSA buries the agreement to arbitrate all disputes regarding the vehicle generally within an agreement otherwise limited to clauses related to the services provided in the Bluelink service. A user agreeing to terms and conditions when enrolling in the Bluelink service may anticipate arbitration with regard to disputes related to that service but Hyundai has hidden an agreement to arbitrate all disputes regarding "your vehicle" generally within the terms and conditions. This supports finding a higher degree of procedural unconscionability.

" ' "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.]' " (*Tiri v. Luck Chances, Inc*. (2014) 226 Cal.App.4th 231, 243–244.) "Both, however, need not be present to the same degree. A sliding scale is applied so that ' " 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' " ' "

(*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 178.) "The party opposing arbitration has the burden of proving unconscionability." (*Tiri*, *supra,* at p. 244.)

Plaintiff contends the contract is substantively unconscionable based on multiple "one-sided" clauses within the CSA. The application of the arbitration agreement to claims, like warranty claims, that can realistically only be brought by a consumer is substantively unconscionable. (See, *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1540-1541.) The arbitration provision allows for "both you and Hyundai" to recover attorney' fees from the other party to the same extend as "you," the consumer, would in court. (CSA, ¶15(C).) This allows for the arbitrator to award attorney fees to Hyundai should it prevail in the warranty claim, contrary to Song-Beverly only allowing for an award of fees to a prevailing buyer and limiting a prevailing seller to costs. (Civ. Code §1794, subd. (b) and (d).) The provision exposes Plaintiff to fees she would not otherwise be liable for and is substantively unconscionable. The CSA expressly prohibits the consumer from bringing claims more than one year after the claim arises. (CSA, ¶ 15(B).) This reduction in the limitations period for a consumer to bring claims against Hyundai from four years to one is substantively unconscionable. (*Fisher v. MoneyGram International, Inc*. (2021) 66 Cal. App.5th 1084, 1105.)

The collection of provisions highlighted by plaintiff demonstrate a significant degree of substantive unconscionability in addition to the high level of procedural unconscionability. As a result, the purported agreement to arbitrate all claims related to her vehicle with in the CSA is unenforceable.

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: JS on 12/6/2024.**
(Judge's initials) (Date)