TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, June 5, 2024 at 3:00 p.m.
Courtroom 18 –Hon. Rene A. Chouteau for Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. SCV-273792, Arterberry v. Cardinal Newman High School

Defendants' demurrer to Plaintiff's First Amended Complaint ("FAC") in its entirety based on subject matter jurisdiction is OVERRULED. Defendants' demurrer to the Seventh and Eighth Causes of Action of the FAC based on failure to state a claim is SUSTAINED. Leave to amend is GRANTED. Defendants' request for judicial notice is GRANTED. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

I. Standards on Demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) Complaints are read as a whole, in context and are liberally

construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also, *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also, *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

II. The Court Has Subject Matter Jurisdiction.

Defendants demur to the entire First Amended Complaint on the basis that the Court does not have subject matter jurisdiction because Defendant Cardinal Newman High School (CNHS) is a religious organization. Therefore, Defendants argue that the Court does not have jurisdiction to scrutinize disciplinary decisions made by the organization. The cases cited by Defendants in support of their arguments are not persuasive. Rather, to rule that religious organizations are immune from the Court's scrutiny of such a decision when the decision is alleged to be motivated by discrimination would be contrary to clear authority providing that religious organizations are not immune from the law or the strong public policy against discrimination.

The Court notes first that the religious doctrine that is purportedly the basis upon which CNHS decided to expel Plaintiff is not called under question in these proceedings. Neither the Court nor, ultimately, the trier of fact need scrutinize the religious doctrine itself to determine whether discrimination motivated the disciplinary decision. (See *DeMarco v. Holy Cross High School* (1993) 4 F.3d 166, 170-171 [in determining whether the purpose behind a putative decision is a pretext, "a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable. Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged…action."].) Rather, what need be determined is the high school's true motivation behind making the decision to expel Plaintiff from the school. Such scrutiny would not infringe upon the defendants' religious rights. Even if it did, the infringement would be slight in comparison to the infringement on governmental interests if discrimination occurred.

"The Supreme Court's early church dispute cases embraced 'a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" (*Puri v. Khalsa* (9th Cir. 2017) 844 F.3d 1152, 1163.) "This deferential doctrine recognizes that 'First Amendment values are plainly jeopardized when church [disputes are] made to turn on the resolution by civil courts of controversies over religious doctrine and practice.'" (*Ibid*.) "This does not

mean, however, that civil courts have no role in disputes involving religious organizations." (*Id*. at 1164.) "Unlike the ministerial exception, which completely bars judicial inquiry into protected employment decisions, the ecclesiastical abstention doctrine is a qualified limitation, requiring only that courts decide disputes involving religious organizations 'without resolving underlying controversies over religious doctrine.'" (*Ibid*.) "…[W]e are unaware of any authority or reason precluding courts from deciding…church disputes by application of purely secular legal rules, so long as the dispute does not fall within the ministerial exception and can be decided 'without resolving underlying controversies over religious doctrine.'" (*Id*. at 1165.)

Here, as similarly occurred in *Bollar v. California Province of the Society of Jesus* (9th Cir. 1999) 196 F.3d 940, Defendants do not argue that there is a religious justification for their alleged discrimination. Rather, discrimination is inconsistent with their religious values and beliefs, as evidenced by the Student Parent Handbook, page 4. (Exhibit B to the FAC.) Accordingly, as in *Bollar*, "There is thus no danger that, by allowing this suit to proceed, we will thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine." (*Id*. at 947.)

Furthermore, "'…[N]ot all burdens on religion are unconstitutional....The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" (*Bob Jones Univ. v. United States* (1983) 461 U.S. 574, 603.) "On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct." (*Ibid*.) "…[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education." (*Ibid*.) Defendants' argument suggests that any burden on religion is unconstitutional and grounds for dismissal of the plaintiff's case. This is not so. Defendants have not provided argument establishing that the governmental interest in eradicating racial discrimination is outweighed by any potential burden on their religious interests. This Court finds that there need not be any burden on Defendant's religious interests in this matter. Even if there were some burden, it would be slight in comparison to the overriding public interest involved. The demurrer to the entirety of the First Amended Complaint is overruled.

III. Plaintiff Has Failed to State a Claim in the Seventh and Eighth Causes of Action.

Plaintiff's Seventh Cause of Action is brought under 42 USC § 2000d, which provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Eighth Cause of Action is brought under California Education Code § 200 et seq., which provides the same regarding financial assistance from

the State. Plaintiff alleges that Defendant CNHS receives financial assistance from the federal and state governments by being tax exempt.

The term "receiving Federal financial assistance" "contemplates the transfer of funds from the federal government to an entity." (*Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n* (4th Cir. 2024) 96 F.4th 707, 712.) "So 'receiving' federal financial assistance includes direct assistance or assistance through an intermediary…" (*Ibid*.) "Do organizations with tax exempt status "receiv[e] Federal financial assistance"…Incorporating the plain meaning of that phrase, does tax exempt status constitute accepting federal financial aid, help, or support? We think not." (*Id*. at 714.) "Tax exemption is not 'Federal financial assistance.'" (*Ibid*.) The *Beuttner-Hartsoe* case decided this in the context of interpreting Title IX of the Education Amendments of 1972. However, this court finds no reason to distinguish the Court's analysis of the language of Title IX from the identical language in Title VI.

Plaintiff cited a number of federal circuit court cases to show a split of authority on this question. However, each of the cases cited preceded *Buettner-Hartsoe* and were decided by a circuit court. *Beuttner-Hartsoe* was decided by a federal court of appeal.

Neither party has cited a California case interpreting California Education Code § 200, et seq. However, this Court finds the *Beuttner-Hartsoe* case to be instructive on the issue because Education Code § 201(g) provides that it is the Legislature's intent for the chapter to be consistent with, in pertinent part, Title VI of the federal Civil Rights Action of 1964 and Title IX of the Education Amendments of 1972.

Accordingly, receiving tax exempt status does not constitute receiving government financial aid. Plaintiff has failed to allege that Defendant CNHS received federal or state financial aid. The demurrer to the 7th & 8th causes of action is sustained. Leave to amend is granted.

2. SCV-270299, Martinez v. Ford Motor Company

Plaintiff's motion for judicial notice is **GRANTED.** The motion is **DENIED AS MOOT** with respect to Hansel Ford Lincoln, and **DENIED** with respect to Ford Motor Co. Plaintiff's counsel shall prepare a written order consistent with this ruling and compliant with California Rules of Court, rule 3.1312.

I. Background

On November 21, 2018, Veronica Martinez ("Plaintiff") leased a Ford F-150 truck (the "Vehicle") from Hansel Ford Lincoln ("Hansel"). She subsequently purchased the same truck on November 4, 2021. On February 25, 2022, Plaintiff filed this lawsuit against Hansel and manufacturer

Ford Motor Co. ("Ford"), alleging that Hansel was unable to repair defects in the truck after a reasonable number of attempts, and seeking reimbursement of the cost of the vehicle pursuant to the Song-Beverly Act, among other remedies.

Plaintiff purchased the Vehicle under a Retail Installment Sale Contract ("RISC"), which contains an arbitration provision under which either party may choose to have any dispute arising under the contract resolved by binding neutral arbitration. On January 20, 2023, Ford and Hansel both moved to enforce the arbitration provision, stay the lawsuit, and submit the matter to arbitration. No opposition was filed, and the motion was granted on May 24, 2023.

On March 11, 2024, the parties filed a joint stipulation to vacate the May 24, 2023 order and put the matter back on calendar in order to "allow[] Plaintiff sufficient time to oppose, such that any decision may be made on the merits." Plaintiff filed opposition on May 22, 2024. At the same time, Plaintiff dismissed Hansel from the action, leaving only Ford as a defendant. This matter therefore comes on calendar for Ford's motion to compel arbitration.

Ford's reply memorandum was due on May 29. (CCP § 1005(b) [five court days before June 5 hearing].) As of May 31, no reply has been filed.

II. Judicial notice

Plaintiff's motion for judicial notice is GRANTED pursuant to Evid. Code § 452(c). The Court notes in passing that there is no need for litigants to request judicial notice of published cases.

III. The arbitration provision of the RISC

The parties to the RISC are Plaintiff, who is identified on the first page as "Buyer" or "You," and Hansel Ford, identified on the first page as "Seller-Creditor," "we," or "us." (Sandhu Dec., Exh. C.) It is undisputed that Ford is not a party to the RISC.

The final page of the RISC is headed "ARBITRATION PROVISION" and provides, inter alia, that any claim or dispute "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." (Emphasis supplied.) In light of the definitions quoted in the previous paragraph, there is no question that the italicized passage means "at Plaintiff's or Hansel's election."

Hansel is no longer a party to this litigation and is therefore not in a position to elect arbitration. The question before the Court is whether Ford, a non-signatory to the RISC, can enforce the arbitration provision.

IV. Analysis

Ford offers three rationales for doing so:

- The holding of *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 ("*Felisilda*").
- Ford is a third-party beneficiary of the RISC.
- Plaintiff has conceded that Ford and Hansel had an agency relationship.

Each is addressed in detail below.

A. *Felisilda*

The Felisildas purchased a Dodge Caravan from a dealer, Elk Grove Dodge, under a sales agreement containing an arbitration provision identical to the one at issue here. When the vehicle had mechanical problems that the dealer was unable to fix, the Felisildas asked them to repurchase or replace it, and the dealer refused. The Felisildas then sued both the dealer and the vehicle's manufacturer, FCA (formerly Chrysler Group), under the Song-Beverly Act. The dealer moved to order the entire matter to arbitration, including the Felisildas' claims against FCA, even though FCA was not a signatory to the sales contract. FCA did not oppose the motion, and the trial court granted it. The Felisildas then dismissed the dealer from the action. The arbitrator found in favor of FLC. The Felisildas appealed, arguing (inter alia) that the trial court had erred in ordering them to arbitrate their claims against FCA because FCA was not a signatory to the sales contract that contained the arbitration provision.

The reviewing court disagreed, holding that under the doctrine of equitable estoppel, a non-signatory to an arbitration agreement could compel arbitration "when the claims against the non-signatory are founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause." (*Felisilda, supra,* 53 Cal.App.5th at p. 496, quoting *Goldman v. KPMG* (2009) 173 Cal.App.4th 209, 219.) The court found that "[t]he Felisildas' claim against FCA directly relates to the condition of the vehicle that they allege to have violated warranties they received as a consequence of the sales contract. Because the Felisildas expressly agreed to arbitrate claims arising out of the condition of the vehicle – even against third party nonsignatories to the sales contract – they are estopped from refusing to arbitrate their claim against FCA." (*Id.* at p. 497.)

Ford urges the Court to follow *Felisilda*. The Court declines to do so for the following reasons.

1. *Felisilda* addressed a different situation.

To begin with, *Felisilda* addressed the question of whether a non-signatory to an arbitration agreement (FCA) could participate in arbitration properly compelled by a signatory (Elk Grove

Dodge). That is, at the time the *Fesilda* trial court granted the motion to compel arbitration, one of the movants was unquestionably entitled to do so. Therefore, the question was not whether the arbitration could be compelled; the only question was which claims could be arbitrated.

That is not the situation here as of May 22, when Plaintiff dismissed Hansel from the action. The instant motion is now simply a single litigant, Ford, seeking to compel arbitration under a contract to which it is not a party. That is distinctly different from the situation in *Felisilda.*

2. The warranty claims here are explicitly based on a different agreement from the one containing the arbitration provision.

Notably, the Felisildas' complaint alleged that "express warranties accompanied the sale of the vehicle to [them] by which FCA . . . undertook to preserve or maintain the utility or performance of [their] vehicle." (*Felisilda, supra,* 53 Cal.App.5th at p. 496.) Based on that, the *Felisilda* court found that "the sales contract was the source of the warranties at the heart of this case." (*Ibid.*) That finding was at the core of the court's conclusion that "the claims against the non-signatory [manufacturer were] founded in and inextricably bound up with the obligations imposed by the agreement [with the dealer] containing the arbitration clause." (*Ibid*.)

Here, in contrast, Plaintiff's complaint does not allege that the warranties "accompanied the sale of the vehicle." Rather, it alleges that they had an independent source: "On or about November 23, 2018, Plaintiff entered into a warranty contract with Defendant FMC regarding a 2018 Ford F-150 vehicle . . . ." (Complaint, ¶ 10.) The complaint states that "a true and correct copy of the warranty contract is attached hereto as Exhibit A" (¶ 11), but no exhibit is attached, presumably as the result of a clerical error. However, the "warranty contract" to which the complaint alludes was presumably entered into between Plaintiff and Ford in connection with Plaintiff's initial lease of the Vehicle on November 21, 2018. (Sandhu Dec., Exh. B.) Thus, it was a different agreement from the RISC, which was not entered into until Plaintiff purchased the Vehicle on November 4, 2021. (That is borne out by the "11/04/2021 3:29 pm" timestamp at the bottom right corner of each page of the RISC. (Sandhu Dec., Exh. C.))

Therefore, one significant distinction between the instant case and *Felisilda* is that there, the court found that the warranties underlying the Felisildas' causes of action were contained in the same sales contract that contained the arbitration provision. Here, the claims against the manufacturer all relate to breach of the warranties provided by the November 23, 2018 "warranty contract," and therefore cannot be "bound up" with the obligations imposed by the November 4, 2021 RISC. That, too, is a very different situation than the one addressed by *Felisilda.*

3. *Felisilda*'s status as good law is, at a minimum, open to question.

Ford's primary argument is that *Felisilda* "is binding on this court and should be followed." Ford avers that *Felisilda* "has not been overturned by any California court and Plaintiff cannot cite to any California Court of Appeal[] decision which . . . repudiated *Felisilda*." (MPA, p. 10.) The Court recognizes that that was true on January 20, 2023, when Ford filed the instant motion.

However, it is not true anymore. A significant number of California courts have emphatically repudiated *Felisilda* since then, beginning with *Ford Motor Warranty Cases* (Apr. 4, 2023) 89 Cal.App.5th 1324 ("*Ford Motor*"). *Ford Motor* is the consolidation of five separate Court of Appeal cases: *Ochoa v. Ford* (no. B312261), *Brito v. Ford* (no. B312360), *Perez v. Ford* (no. B312356), *Davidson-Codjoe v. Ford* (no. B312350), and *Salcido v. Ford* (no. B312345). The consolidated case is presently pending review in the California Supreme Court (no. S279969). The Court of Appeal case remains citable as persuasive authority. (Cal. Rules of Court, Rule 8.1115(e)(1).) By order of the Supreme Court, it is also citable "for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict." (Cal. Rules of Court, Rule 8.1115(e)(3); see docket in case no. S279969.)

The issue to be resolved by the Supreme Court is "Do manufacturers' express or implied warranties that accompany a vehicle at the time of sale constitute obligations arising from the sale contract, permitting manufacturers to enforce an arbitration agreement in the contract pursuant to equitable estoppel?" (Docket, case no. S279969.) Again, it is worth noting again that "accompany . . . at the time of sale" does not exactly describe the situation here: Plaintiff is suing Ford for violations of warranties that arose from a warranty contract predating the sale contract by three years. But significantly, *Ford Motor* soundly rejects *Felisilda*'s rationale for finding that the warranty violations were "founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause":

> "The plaintiffs' breach of warranty claims against FCA in *Felisilda* were not based on their sale contracts with the dealers. We disagree with *Felisilda* that 'the sales contract was the source of [the manufacturer's] warranties at the heart of this case.' [Citation.] As we discuss further below, manufacturer vehicle warranties that accompany the sale of motor vehicles without regard to the terms of the sale contract between the purchaser and the dealer are independent of the sale contract."

(*Ford Motor*, *supra*, 89 Cal.App.5th at p. 1334.) Under the *Ford Motor* analysis, therefore, the fact that Plaintiff's warranties had been in place for three years before the agreement containing the arbitration provision was entered into is a distinction without a difference. Even if the warranties had been established contemporaneously with the RISC, they would still not have been "inextricably bound up with" it, or indeed connected with it at all.

Ford Motor also rejects *Felisilda*'s interpretation of the arbitration agreement's provision that disputes relating to "any . . . relationship (including any such relationship with third parties who do not sign this contract)" may be arbitrated "at your or our election." Unlike the *Felisilda* court, the *Ford Motor* court did not "read this . . . language as consent by the purchaser to arbitrate claims with third party nonsignatories." (*Ford Motor*, *supra*, 89 Cal.App.5th at p. 1334.) Rather, the court "read it as a further delineation of the *subject matter* of claims the purchasers and dealers agreed to arbitrate." (*Id.* at pp. 1334-1335, original emphasis.) That is, the dealer may elect to arbitrate a claim by the purchaser related to a third-party transaction, for example a third-party extended warranty, but the passage "says nothing of binding the purchaser to arbitrate with the universe of unnamed third parties." (*Id.* at p. 1335.)

At least three Court of Appeal cases published after *Ford Motor* have taken similar positions. (*Montemayor v. Ford* (June 26, 2023) 92 Cal.App.5th 958, 961 ["Ford cannot enforce the arbitration provision . . . because the Montemayors' claim against ford are founded on Ford's express warranty for the vehicle, not any obligation imposed on Ford by the sales contract"]; *Kielar v. Superior Court* (Aug. 16, 2023) 94 Cal.App.5th 614, 620 ["We join *Ford Motor* and *Montemayor* in disagreeing with [*Felisilda*] and concluding equitable estoppel does not apply in this situation"]; *Yeh v. Superior Court* (Sep. 6, 2023) 95 Cal.App.5th 264, 272 ["As we explain, we agree with the conclusions reached by *Ford Warranty*, *Montemayor*, and *Kielar* and hold that [the manufacturer] cannot compel arbitration with petitioners"].) All three cases are currently pending Supreme Court review, in "grant and hold" status behind *Ford Motor*. All three remain citable as persuasive authority under Cal. Rules of Court, Rule 8.1115(e)(1).

Kielar is an opinion of the Third District Court of Appeal, the same court that published *Felisilda*, though the work of a different panel. It is therefore questionable whether there actually is a split in authority on this issue, since the Third District now appears to agree with the Second (*Ford Motor, Montemayor*) and First (*Yeh*) that *Felisilda* was wrongly decided. However, even supposing that *Felisilda* on one side and *Ford Motor, Montemayor, Kielar*, and *Yeh* on the other represent a split in authority, the Supreme Court has authorized citation to *Ford Motor* for the proposition that due to that split, trial courts may "exercise discretion . . . to choose between sides." This Court exercises that

discretion to follow *Ford Motor, Montemayor, Kielar,* and *Yeh* and hold that because Ford is a non-signatory to the contract containing the arbitration provision, it is not able to enforce that provision.

B. Third-party beneficiary

The third-party beneficiary rule is set forth in Civ. Code § 1559: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." The key to this is "made expressly." "It has frequently been held that where a contract incidentally benefits a third person, but is not expressly made for his benefit, he cannot recover thereon." (*Mottashed v. Central & Pacific Imp. Corp.* (1935) 8 Cal.App.2d 256, 260.)

Ford Motor rejects Ford's third-party beneficiary theory: "FMC was not a third party beneficiary of those [sale] agreements as there is no basis to conclude the plaintiffs and their dealers entered into them with the intention of benefitting FMC." (*Ford Motor, supra,* 89 Cal.App.4th at p. 1329.) There is no such basis here either.

C. Agency

Ford argues that "Plaintiff is invoking agency principles to bring her claim against Ford," based on the allegation in the complaint that "Defendant FMC *and its representatives in this state* have been unable to service of repair the Vehicle to conform to the applicable express warranties." (Complaint, ¶ 26, emphasis supplied.) Ford cites to *Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614-615 for the proposition that "a plaintiff's allegation of an agency relationship among defendants is sufficient to allow the alleged agents to invoke the benefit of an arbitration agreement executed by their principal even though the agents are not parties to the agreement." Plaintiff's opposition memorandum does not address this argument.

In the first place, the complaint does not allege that Ford is an agent. If anything, it alleges that Ford is a principal. "Representatives" clearly refers to authorized repair facilities. If there is any agency here, the repair facilities are agents of Ford, not the other way around. Therefore, this situation involves, at best, an attempt by a principal to invoke the benefit of an arbitration agreement executed by its agent, which is not the subject matter of *Thomas.*

More importantly, every complaint that alleges a violation of the Song-Beverly Act will inevitably contain language similar to the passage identified by Ford, because it is an element of the cause of action: "if *the manufacturer or its representative in this state* does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer." (Civ. Code § 1793.2(d), emphasis supplied; see also CACI no. 3201.) Plaintiff was not "invoking agency principles"; Plaintiff was alleging what she needed to allege in

order to state a cause of action. The statute requires a plaintiff to seek repairs from "the manufacturer or its representative" before filing a lawsuit under the Song-Beverly Act. If, as Ford posits, a plaintiff who mentions having done so is ipso facto suing the manufacturer under an agency theory, and if that entitles the manufacturer to enforce arbitration agreements entered into by its representative, then all of the analysis in *Felisilda*, *Ford Motor*, *Montemayor, Kielar, Yeh*, and other related cases was unnecessary, because manufacturers would *always* be able to enforce the arbitration agreements, because the complaints would *always* allege what Civ. Code § 1793.2(d) requires them to allege in order to withstand demurrer.

The Court finds this argument unpersuasive.

V. Conclusion

The motion is DENIED with respect to Ford. The motion is DENIED AS MOOT with respect to Hansel since it is no longer a party to this case.

3. SCV-272327, Porter v. Nationstar Mortgage LLC

Defendant Nationstar Mortgage LLC (hereafter "Nationstar" or "Defendant")'s motion for summary judgment is GRANTED. Defendant's request for judicial notice is GRANTED. Plaintiffs' objections to Defendant's evidence and request for judicial notice are OVERRULED. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Due to the granting of this summary judgment motion, Plaintiffs' motion to compel further responses that is scheduled to be heard on June 26, 2024 is moot. Thus, it is ordered dropped from calendar.

Standards on Summary Judgment:

A party moving for summary judgment must show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (CCP § 437c(c).) A party moving for summary adjudication of a cause of action must prove that the cause of action has no merit and summary adjudication may only be granted if it completely disposes of the cause of action. (CCP § 437c(f)(1).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (CCP § 437c(p)(2).) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts

exists as to the cause of action or a defense thereto." (*Ibid*.)

Analysis:

I. Defendant Has Shown the Lack of Triable Issue of Material Fact; Plaintiffs Have Not Met the Shifted Burden.

Plaintiffs allege violations of the California Homeowner Bill of Rights (HBOR) (Civil Code § 2923.4 et seq.) in their Complaint. Plaintiffs first allege that Defendant Nationstar violated Civil Code § 2923.55, subdivisions "(2) and (c)." (Complaint, ¶ 26.) Based on the direct citation of the statute in the Complaint, it is clear that Plaintiffs meant to allege a violation of subdivision *(b)(2)* and (c). Plaintiffs allege this code section was violated when Defendant recorded the NOD without contacting Plaintiffs in person or by telephone to assess their financial situation and explore options to avoid foreclosure. It is also alleged that Defendant failed to include a valid declaration that the mortgage servicer has contacted the borrower with the NOD. Plaintiffs also allege that Defendants violated the statute by failing to notify or correspond with Plaintiffs in writing concerning their options regarding the NOD and default. However, Civil Code § 2923.55 does not require Defendants to communicate in writing for this purpose. Only subdivision (b)(1) requires a writing be sent including information regarding servicemember protection under the federal Servicemembers Civil Relief Act and regarding the documents of which the borrower may request copies. These include the promissory note, the deed of trust or mortgage, the mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose, and the borrower's payment history since the borrower was last less than 60 days past due). Plaintiffs did not allege Defendant violated that particular subsection.

Plaintiffs also allege that Defendant violated Civil Code § 2923.7(b)(5), which requires that the single point of contact (SPOC) established by the mortgage servicer be responsible for "Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary." Plaintiffs allege that the SPOC designated by Defendant did not have access to individuals with the ability and authority to stop foreclosure proceedings when necessary.

Plaintiffs further allege a violation of Business and Professions Code section 17200, et seq. based on the alleged violations of the Civil Code and seek a declaration of the Court of the rights and duties of the parties with respect to ownership of the property.

"…[T]he HBOR's purpose [is] to ensure that borrowers have a meaningful opportunity to obtain loss-mitigation options." (*Billesbach v. Specialized Loan Servicing LLC* (2021) 63 Cal.App.5th 830, 846.) "„„[T]he HBOR creates no liability for a technical violation that does not thwart its purposes." (*Id*. at 845.) "In order to ensure compliance with the statutory requirements, borrowers may bring actions for injunctive relief 'to enjoin a *material* violation' of certain provisions of the HBOR,

including a *material* violation of former section 2923.55, before a trustees deed upon sale has been recorded." (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1120. Emphasis added.)

If the borrower had an opportunity to discuss his financial situation and foreclosure alternatives with the lender, then the purpose of the statute is met, and any violation by the lender in failing to initiate contact was not material. (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1124.) An example of an actionable material violation is failing to afford the borrower with the statutorily mandated time to appeal after the mortgage servicer denies a loan modification. (*Berman v. HSBC Bank USA, N.A.* (2017) 11 Cal.App.5th 465, 472.)

Furthermore, Civil Code § 2924.12(c) provides, "A mortgage servicer…shall not be liable for any violation that it has corrected and remedied prior to the recordation of the trustee's deed upon sale…" Technical noncompliance with HBOR is not material, even when uncured, absent any meaningful harm to the borrower. (*Billesbach*, *supra*, at 846.)

A. Civil Code § 2923.55

i. Subdivision (b)(2)

Civil Code § 2923.55(a) provides, in pertinent part, that a mortgage servicer shall not record a notice of default (NOD) until 30 days has passed after the initial contact is made as required by subdivision (b)(2). Subdivision (b)(2) provides,

> A mortgage servicer shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgage servicer shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgage servicer shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

As stated above, Plaintiffs allege that such contact did not happen. Defendants have provided evidence that Defendants contacted Plaintiffs numerous times in the years preceding the recordation of the NOD both by telephone and in writing inviting Plaintiffs to contact Nationstar to discuss foreclosure alternatives. There is also evidence that Defendant contacted Plaintiffs a couple weeks after recording the NOD in further attempt to have such discussion. The evidence reflects that Defendant was successful in making contact with Plaintiffs, discussing their financial situation and foreclosure

alternatives, and advised Plaintiffs of their right to request a follow up meeting within 14 days, and provided Plaintiffs with the toll free HUD number for receiving counseling.

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CONTACT MADE CA SB 1137/AB 278

Assessed borrower's financial situation and explored options to avoid foreclosure. Advised the borrower of their right to request a follow up meeting within 14 days. Provided the borrower with toll free HUD number to reach a HUD certified counseling agency. 1-800-569-4387.

(Winchester Decl., Exhibit 9, p. 46.) There is also evidence that Plaintiffs' counsel was in contact with Nationstar several times in 2022, which was subsequent to Nationstar initiating its attempts at discussing foreclosure alternatives with the Plaintiffs. Furthermore, Plaintiffs attempted to apply for a loan modification, which was unsuccessful due to their failure to complete the application. Plaintiffs' argument that the subject of those conversations cannot be ascertained from the documentary evidence provided by Defendant is unpersuasive.

The evidence provided by Defendant shows that Defendants complied with the HBOR. Any technical noncompliance alleged by Plaintiffs is immaterial. Defendants attempted contact with Plaintiffs several times prior to recording the NOD. The contact which was ultimately successful occurred after recordation of the NOD; however, such contact would have been sufficient to remedy any technical noncompliance which may have occurred prior to recordation. There was no actual harm to Plaintiffs resulting from any technical noncompliance.

The burden of proof on this motion shifted to Plaintiffs. The Court notes that the only evidence provided in opposition is the declaration of Plaintiff Ken Porter, which is unsupported by any documentary evidence. The declaration states that the Promissory Note, Deed of Trust and the NOD are attached as Exhibits A-C. However, there are no attachments to the declaration and no separately filed index of exhibits. The Court notes that, even if these documents were attached to the declaration, they would be insufficient to raise a triable issue of fact because they would not provide evidence regarding the defendant's actions prior to or after the recordation of the NOD.

ii. Subdivision (c)

Civil Code § 2923.55(c) provides, "A notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of "borrower" pursuant to subdivision (c) of Section 2920.5." Defendants filed a Declaration of Compliance with the NOD. (Winchester Decl., Exhibit 11.) This is sufficient evidence to show that the subdivision was complied with. In so far as Plaintiffs are arguing

that the wrong box was checked on the form because Defendants did not make successful contact with Plaintiffs until after recordation of the NOD, such argument is unavailing. Such a technical error is immaterial.

B. Civil Code § 2923.7

As explained above, Plaintiffs allege that the SPOC designated by Defendant did not have access to individuals with the ability and authority to stop foreclosure proceedings when necessary, in violation of Civil Code § 2923.7(b)(5).

The Complaint contains only conclusory allegations to this effect. There are no facts supporting this allegation. In fact, the complaint alleges that the alleged violative recordation of the NOD is the evidence that the SPOC did not have access to individuals with the ability and authority to stop foreclosure proceedings if necessary. This is not sufficient to state a valid claim for violation of this code section. Furthermore, the Court notes that Plaintiffs have not alleged that their SPOC was unable to stop their foreclosure. They are simply alleging that the NOD was recorded because the SPOC did not have access to the correct individuals.

Defendant has shown that there exists no genuine issue of material fact regarding the SPOC's access to the proper individuals to stop the foreclosure. Plaintiffs have not provided any evidence to raise a triable issue of material fact.

C. Business and Professions Code § 17200, et seq.

Plaintiffs allege that the violations alleged in the first two causes of action constitute unfair business practices. Thus, this cause of action is derivative of the first two causes of action alleged. Since the Court finds that there exist no triable issues of material fact as to the first two causes of action, adjudication of this cause of action in the Defendant's favor is also appropriate.

D. Declaratory Relief

This cause of action is similarly derivative of the other causes of action raised. Plaintiffs allege that the NOD was illegally recorded on their home, so Defendants do not have the power to effectuate a sale. Therefore, Plaintiffs request a declaration regarding the rights and duties of the parties with respect to ownership of the property. However, Defendants have shown that there exists no triable issue of material fact regarding their alleged violations of the HBOR. Therefore, there is nothing to suggest that the recordation of the NOD was illegal. Plaintiffs have failed to meet the shifted burden of showing a triable issue of material fact regarding the parties' rights and duties with respect to ownership of the property.

4. SCV-273883, Isaacs v. Nationstar Mortgage LLC

Defendant Catamount Properties 2018, LLC (Catamount)'s unopposed demurrer to the First Amended Complaint is SUSTAINED **without** leave to amend. Counsel for Catamount shall submit a written order consistent with this tentative ruling. Due to the lack of opposition, compliance with Rule 3.1312 is excused.

Analysis:

I. Standards on Demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) Complaints are read as a whole, in context and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also, *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also, *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) However, "Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law." (*Lawrence v. Bank of Am.* (1985) 163 Cal.App.3d 431, 436.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Goodman, supra*, at 349.)

II. Plaintiff Has Failed to State a Claim Against this Defendant.

The Court previously sustained Catamount's demurrer to the complaint on the basis that Plaintiff had failed to state a valid cause of action against Catamount. The Court granted leave to amend in order for Plaintiff to attempt to state a valid claim. The Court incorporates its February 23, 2024 Minute Order into this ruling. The parties are directed to this minute order for a detailed analysis of the sufficiency of the allegations in the complaint against this defendant. Plaintiff has filed an amended complaint, but has still failed to state a cause of action against this defendant for the same reasons outlined in the Court's February 23, 2024 minute order. The demurrer to the First Amended Complaint is sustained. By failing to oppose this motion, Plaintiff has failed to establish how the

defects in the pleading can be cured by amendment. As such, leave to amend is denied.

5. MCV-262630, Looney v. Parker & Anatree, LLC

Plaintiff's unopposed motion to compel answers to post judgment discovery is GRANTED. Plaintiff's request for monetary sanctions is granted in the amount of $60.00. Defendant is ordered to pay Plaintiff $60.00 within 30 days of service of the Court's order on this motion. Defendant is also ordered to respond to Plaintiff's discovery requests within 30 days of service of the order on this motion. Because Defendant failed to timely respond to Plaintiff's discovery requests, objections to such discovery are waived. (CCP § 2031.300.) Plaintiff shall submit a written order to the Court consistent with this tentative ruling. Due to the lack of opposition, in compliance with Rule 3.1312 is excused.