Tentative Rulings for December 13, 2022
Department 3

To request oral argument, you must notify Judicial Secretary Amy Norton at (760) 904-5722 and inform all other counsel no later than 4:30 p.m.

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings (see Riverside Superior Court Local Rule 3316). Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at https://www.riverside.courts.ca.gov/OnlineServices/TentativeRulings/tentative-rulings.php. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department 3 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear telephonically, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

IN LIGHT OF THE CORONAVIRUS PANDEMIC; AND UNTIL FURTHER NOTICE, COUNSEL AND SELF-REPRESENTED PARTIES ARE ENCOURAGED TO APPEAR AT ANY LAW AND MOTION DEPARTMENT TELEPHONICALLY WHEN REQUESTING ORAL ARGUMENTS.

TELEPHONIC APPEARANCES: On the day of the hearing, call into one of the below listed phone numbers, and input the meeting number (followed by #):

- Call-in Numbers: 1-833-568-8864 (Toll Free), 1-669-254-5252, 1-669-216-1590, 1-551-285-1373 or 1-646-828-7666
- Meeting Number: 161 692 7358

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

For additional information and instructions on telephonic appearances, visit the court's website at https://www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php

Effective May 3, 2021, official court reporters will not be available in unlimited civil for any pretrial proceedings, law and motion matters, case management hearings, civil restraining orders, and civil petitions. (See General Administrative Order No. 2021-19-1)

1.

CVPS2202260	LOZANO VS LEDESMA & MEYER CONSTRUCTION CO., INC.	MOTION FOR ORDER TO DEEM MATTERS ADMITTED IN REQUESTS FOR ADMISSION BY LEDESMA & MEYER CONSTRUCTION CO., INC.
CVPS2202260	LOZANO VS LEDESMA & MEYER CONSTRUCTION CO., INC.	MOTION TO COMPEL BY LEDESMA & MEYER CONSTRUCTION CO., INC. FORM INTERROGATORIES
CVPS2202260	LOZANO VS LEDESMA & MEYER CONSTRUCTION CO., INC.	MOTION TO COMPEL BY LEDESMA & MEYER CONSTRUCTION CO., INC. FOR REQUESTS FOR PRODUCTION OF DOCUMENTS

Tentative Ruling:

The Court grants Defendant's unopposed motion for requests for admission, set one, propounded on Plaintiff, to be deemed admitted per CCP § 2033.280.

With respect to the form interrogatories and requests for production of documents, the Court grants Defendant's unopposed motions. Said responses are due, without objection, within 30 days.

As for sanctions, as the motions were straightforward and unopposed, the Court sanctions Plaintiff 3 hours of attorney time at $200.00, (1 hour per motion) per $60 filing fee for each motion, for a total of $780.00 ($260.00 per motion). Said sanctions to be paid within 60 days.

2.

CVRI2100419	DOE VS CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	MOTION FOR SUMMARY JUDGMENT ON 2ND AMENDED COMPLAINT FOR OTHER PERSONAL INJURY/PROPERTY DAMAGE/WRONGFUL DEATH TORT (OVER $25,000) OF JANE DOE

Tentative Ruling:

The Court denies the Motion for Summary Judgment as to Church of Jesus Christ of Latter-Day Saints.

Factual / Procedural Context:

Plaintiff alleges that she was subjected to years of rape and molestation by her stepfather, Defendant Richard Fitzgerald ("Fitzgerald"), beginning when she was five or six years old. Plaintiff's mother, Defendant Kathleen Bingley ("Bingley") knew the abuse was ongoing. Plaintiff alleges that she reported the abuse to bishops from Defendant The Church of Jesus Christ of Latter-day Saints (the "Church") as a teenager, but the Church did not report the abuse nor take action against Fitzgerald.

On January 28, 2021, Plaintiff filed her original Complaint against the Church, Fitzgerald, and Bingley, alleging multiple causes of action arising from her childhood sexual assault. On May 3, 2021, Plaintiff filed her First Amended Complaint, adding Defendant Corporation of the President of the San Diego California Stake – The Church of Jesus Christ of Latter-Day Saints (the "San

Diego Stake"). On September 3, 2021, Plaintiff filed her operative Second Amended Complaint ("SAC"),[1] alleging one cause of action for negligence – assumed duty against the Church and the San Diego Stake. The Court addresses the San Diego Stake separately below.

Plaintiff was born on December 15, 1981. (Def.'s Separate Statement of Undisputed Facts ["DSSUF"] 1.) Her stepfather, Fitzgerald, sexually abused Plaintiff beginning when she was five or six years old (in approximately 1987). (*Id.* at No. 2; Pl.'s Additional Undisputed Facts ["PAUF"] 20.) Her mother, Bingley, knew about the abuse and at times participated in the abuse. (DSSUF 3.) By the mid-1990s, the sexual abuse by her stepfather had lessened but had not stopped. (PAUF 23.)

Plaintiff first reported the abuse to Bishop Tyler Smithson. (DSSUF 6.) Bishop Smithson asked Plaintiff if the abuse was "happening now," which she confirmed, and he then told her that "he would make sure that that would stop" by having a conversation with her parents who had been waiting outside his office. (*Id.* at 7.) After the conversation with Bishop Smithson, he called Plaintiff's mother and stepfather into his office and asked Plaintiff to sit outside. (*Id.* at 8.) He held a private conversation with Plaintiff's parents and then invited Plaintiff back into the office and asked her to "hug and forgive" her stepfather. (*Id.*) Plaintiff left the meeting feeling confused because she "didn't know why Smithson didn't have [her] taken out of the house or [Fitzgerald] taken out of the house or why he didn't tell the police." (*Id.* at 12.)

Sometime after the meeting with Bishop Smithson, Plaintiff told Bishop Smithson's wife, Sister Smithson that she wanted to commit suicide. (*Id.* at 14.) Sister Smithson subsequently called her husband Bishop Smithson, who counseled Plaintiff not to commit suicide and told her that she was loved by the Church and by God. (*Id.* at 15.)

Plaintiff also told Bishop Rocky Snider that she was being abused by her stepfather. (*Id.* at 16.) In response, Bishop Snider told Plaintiff that she would go to prison if she reported the abuse to the police, that any such report would be hard on her family, and that if Fitzgerald went to jail, he would likely be raped in prison. (*Id.*) Plaintiff testified that, in words and in conduct, the bishops discouraged her from reporting the sexual abuse to the police or to anyone outside the Church. (PAUF 30.) Plaintiff felt as if she had no choice but to obey, and she did not report Fitzgerald to the police at that time. (*Id.* at 31.)

After the meeting with Bishop Smithson, Fitzgerald continued his sexual abuse of Plaintiff. (*Id.* at 32.) In fact, Plaintiff testified that the sexual abuse increased in frequency and became even more humiliating. (*Id.*) When the ongoing trauma from the sexual abuse became more intolerable, Plaintiff reported the abuse to her basketball coach, who then reported it to the police. (*Id.* at 35–36.) Fitzgerald was arrested, and the sexual abuse finally came to an end. (*Id.* at 37.)

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The Church now moves for summary judgment on the one cause of action for negligence – assumed duty alleged against it. The Church argues that (1) Plaintiff has failed to identify any specific undertaking by it or its agents to rescue her from peril; (2) the Church's general policies against child abuse are not an undertaking; (3) Plaintiff's testimony confirms that neither Bishop Smithson nor Bishop Snider undertook to "shield" her from her stepfather or to call the police; and (4) even if its failure to help could be called "undertakings," its alleged conduct did not increase the risk of harm to Plaintiff from her stepfather.

In opposition, Plaintiff argues that the motion should be denied because the Church acted upon its explicit promise to protect victims of sexual assault by engaging with Plaintiff and meeting with her family, but it failed to report Fitzgerald to the police, acting contrary to the public policy requiring clergy to report sexual abuse. She further argues that the Church "worsened her plight

[1] In the SAC, Plaintiff also alleges negligence and sexual abuse of minor against Bingley, and sexual abuse of minor and intentional infliction of emotional distress against Fitzgerald.

by making her forgive Fitzgerald, sending her home with her abuser," "preventing her from seeking protection from the police or others," and "silencing her."

Analysis:

1. Request for Judicial Notice

The Church asks the Court to take judicial notice of the Reporter's Transcript of Sentencing in People of the State of California v. Steven Robert Fitzgerald, recorded on November 13, 1997 in Department 31 of the Consolidated Superior/Municipal Courts of the State of California, County of Riverside, Western Branch, Case No. RIF077361. (Def.'s Request for Judicial Notice ["RJN"] Ex. 1.) The Court grants this request under Evidence Code § 452(d)(1).

2. Evidentiary Objections

Plaintiff objects to the following evidence submitted by Defendants in support of their motion for summary judgment: (1) Exhibit C, ¶ 5, (2) Exhibit D, ¶ 6, (3) Exhibit E, ¶ 7, and (4) ¶¶ 1–8, without indicating which exhibit she is referring to, all on the ground of relevance. Plaintiff argues that these paragraphs are not relevant as the Church has stated that it is not disputing Plaintiff's account of relevant events for purpose of this motion. The Court declines to rule on the objections as they are not material to its disposition of the motion. (CCP § 437c, subd. (q).)

The Church also made 10 objections to the paragraphs from Plaintiff's declaration. The Court sustain Nos. 1, 2 and 7; overrules Nos. 3, 4, 5, 6, and 8; and declines to rule Nos. 9 and 10.

3. Summary Judgment

Summary judgment is granted when a moving party establishes the right to entry of judgment on a particular cause of action as a matter of law. (CCP § 437c(c).) A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (*Id.* at § 437c(p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.)

Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) "The plaintiff may not rely upon the mere allegations or denials or his pleadings to show that a triable issue of material fact exists but, instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (*Id.* [internal quotations marks and quotation omitted].)

In California, a defendant moving for summary judgment need not "conclusively negate an element of the plaintiff's cause of action." (*Id.* at 853.) "All that the defendant need do is to show that one or more elements of the cause of action . . . cannot be established by the plaintiff." (*Id.*) The defendant, however, must present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain needed evidence. (*Id.* at 854.) In other words, the defendant must support the motion with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may be taken. (*Id.* at 855 [citing CCP § 437c(b)].)

In the SAC, the only cause of action alleged against the Church is for negligent undertaking. (SAC ¶¶ 34–41.)

A negligent undertaking theory of liability "subsumes" all the basic elements of a negligence action, including duty, breach of duty, proximate cause, and damages. (*Paz v. State of California* (2000) 22 Cal.4th 550, 559.) A negligent undertaking claim of liability requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection

of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) either (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 613–14.)

A. Whether the Church undertook to protect Plaintiff from the abuse

The Church first argues that it did not undertake any duty to protect Plaintiff from her stepfather's abuse. Specifically, the Church argues that its general policies against child abuse are not an undertaking, and that neither Bishop Smithson nor Bishop Snider undertook to "shield" Plaintiff from her stepfather or to call the police.

"The foundational requirement of [negligent undertaking] is that in order for liability to be imposed upon the actor, he must specifically have undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." (*Id.* at 614–15.) Whether the alleged actions would constitute an "undertaking" sufficient to give rise to an actionable duty of care is a legal question for the court. (*Id.* at 615.) In some cases, however, "there may be fact questions 'about precisely what it was that the defendant undertook to do.'" (*Id.*) "That is, while the precise nature and extent of an alleged duty is a question of law it depends on the nature and extent of the act undertaken, a question of fact." (*Id.* [internal quotation marks and quotation omitted].) "Thus, if the record can support competing inferences, . . . ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits, and summary judgment is precluded." (*Id.* [internal quotation marks and quotations omitted]; *see* CACI No. 450C [each element of the negligent undertaking theory of liability is resolved by the trier of fact].)

In *Bloomberg v. Interinsurance Exchange* (1984) 162 Cal.App.3d 571, a car broke down on the freeway and the two people in the car made arrangements to have the Automobile Club (AAA) send a tow truck for assistance. Unfortunately, the AAA driver was unable to locate the car, and an intoxicated driver struck the passenger of the stranded vehicle, killing him. The trial court ruled that as a matter of law AAA could not be held liable; the Court of Appeal reversed. (*Id.* at 574–75.) "Generally if the risk of injury might have been reasonably foreseen, a defendant is liable." (*Id.* at 576.) "A defendant who enters upon an affirmative course of conduct affecting the interest of another is regarded as assuming a duty to act, and will be liable for negligent acts or omissions." (*Id.* at 575.) The appellate court held that once AAA had agreed to render aid, it had assumed a duty to do so in a nonnegligent manner. (*Id.*) "To the extent that [the two people in the car] relied on respondent to come to their assistance and in so relying made no other arrangements for their rescue, to that extent respondent contributed to the risk of harm." (*Id.* at 576.) The court thus found that foreseeability of the risk—that a drunk driver would run into a stranded car—was a question of fact for the jury. (*Id.* at 577.)

Here, Plaintiff reported the sexual abuse to Bishop Smithson. Plaintiff believed that the only solution to the ongoing abuse was to report her stepfather to the local bishops from the Church, and she believed that the Church would protect her. (PAUF 24.) After confirming that the abuse was ongoing, Bishop Smithson told Plaintiff that he would "make sure" that the abuse would stop, and engaged in a private conversation with Plaintiff's parents. (DSSUF 7.) After the conversation, Bishop Smithson invited Plaintiff back into the room and asked Plaintiff to "hug and forgive" her stepfather. (*Id.* at 8.) Plaintiff was confused why Bishop Smithson did not take her out of her family home or take Fitzgerald out of the home, and why he did not report the abuse to the police. (*Id.* at 12.) Plaintiff also reported the abuse to Bishop Snider, who told her that she would go to prison if she reported the abuse to the police, that such report would be hard on her family, and that if Fitzgerald went to jail, he would likely be raped in prison. (*Id.* at 16.) Plaintiff felt as if she had no choice but to obey, and did not report the abuse to the police at that time. (PAUF 30–31.)

Based on the above, the Court finds there is a triable issue of fact as to whether the Church owed a duty to protect Plaintiff by engaging with Plaintiff and her family, and promising to ensure that the abuse would stop. A reasonable trier of fact might infer that the Church assumed a duty to protect Plaintiff from the sexual abuse by her stepfather, and that Plaintiff's injuries were the result of a lack of reasonable care exercised by the bishops (and ultimately the Church) under a negligent undertaking theory of liability.

B. Whether the Church's carelessness increased the risk of harm to Plaintiff, or Whether Plaintiff's harm was the result of her reliance on the undertaking

The Church next argues that, even if the bishops' failure to protect Plaintiff from the abuse could be called "undertakings," their alleged conduct did not "increase" the risk of harm from to Plaintiff from her stepfather, and Plaintiff suffered injury because her stepfather lived with her, not as a result of its undertaking.

"Under the negligent undertaking doctrine, 'a volunteer who, having no initial duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertaking if one of two conditions is met: either (a) the volunteer's failure to exercise such care increases the risk of harm to the other person, or (b) the other person reasonably relies upon the volunteer's undertaking and suffers injury as a result.'" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249.)

In *Conti v. Watchtower Bible & Tract Soc'y of N.Y.* (2015) 235 Cal.App.4th 1214, the court considered whether leaders in a church "increased the risk of harm" to a child in their congregation when they failed to monitor a known child molester. (*Id.* at 1231.) The plaintiff in that case alleged that congregation leaders "voluntarily undertook to watch [the perpetrator] and, if necessary, warn individual parents about him." (*Id.*) The Court of Appeal found that "any lack of due care by the [congregation leaders] in monitoring [the perpetrator's] interactions with children did not increase the risk of harm to the [victim], it only failed to reduce that risk." (*Id.*)

Relying on *Conti*, the Church argues that the bishops' alleged conduct did not "increase the risk of harm" from Plaintiff's stepfather, because they had no ability to control or monitor Fitzgerald's interactions with Plaintiff. But, unlike in *Conti*, Plaintiff's evidence shows that the Church's failure to act after engagement increased the risk of sexual abuse by sending Plaintiff home with Fitzgerald, causing Fitzgerald to increase the frequency of the abuse, and preventing Plaintiff from reporting Fitzgerald to the police for several months. (PAUF 30–32.) Thus, there is a question of fact as to whether the Church's carelessness actually increased the risk of harm to Plaintiff, as opposed to a mere failure to reduce that risk.

The Church further argues that Plaintiff did not rely on any rescue effort because, by her own account, there was none. It argues that Plaintiff did not rely on Bishop Smithson nor Bishop Snider to protect her. However, the Court finds that Plaintiff's evidence shows that the Church prevented Plaintiff from reporting the sexual abuse to the police or to anyone outside the Church, and Plaintiff felt as if she had no choice but to obey. (PAUF 30.) Plaintiff further testified that she respected the Church and believed that the Church would protect her, and that the only solution to the ongoing abuse by her stepfather was to report him to her local bishops from the Church. (*Id.* at 24.) Thus, the Court finds that there is a question of fact as to whether Plaintiff reasonably relied on the Church to protect her from the abuse, and in so relying, did not report the abuse to the police or anyone else, thereby being subject to further abuse; in other words, there are triable issues of fact whether the Church's action thus increased risk of harm to Plaintiff. (*Bloomberg*, *supra*, 162 Cal.App.3d at 576.)

In sum, the Church has failed to meet its initial burden to show that it is entitled to summary judgment on the negligent undertaking cause of action. Thus, the Court denies the Church's motion for summary judgment.

3.

CVRI2100419	DOE VS CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	MOTION FOR SUMMARY JUDGMENT ON 2ND AMENDED COMPLAINT FOR OTHER PERSONAL INJURY/PROPERTY DAMAGE/WRONGFUL DEATH TORT (OVER $25,000) OF JANE DOE BY CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CORPORATION OF THE PRESIDENT OF THE SAN DIEGO CALIFORNIA STAKE THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

Tentative Ruling:

The Court grants Defendant Corporation of the President of the San Diego California Stake of the Church of Jesus Christ of Latter-Day Saints (San Diego Stake) unopposed motion for summary judgment.

I. FACTUAL/PROCEDURAL CONTEXT

The facts alleged are more fully described in the motion involving Defendant The Church of Jesus Christ of Latter-Day Saints ("LDS").

For purposes of this motion, briefly stated: Plaintiff alleges that she was subjected to years of rape and molestation by her stepfather, Defendant Richard Fitzgerald ("Fitzgerald"), beginning when she was five or six years old. Plaintiff's mother, Defendant Kathleen Bingley ("Bingley") knew the abuse was ongoing. Plaintiff alleges that she reported the abuse to bishops from Defendant The Church of Jesus Christ of Latter-Day Saints as a teenager, but the Church did not report the abuse nor take action against Fitzgerald.

On September 3, 2021, Plaintiff filed her operative Second Amended Complaint ("SAC"), alleging one cause of action for negligence – assumed duty against Defendants The Church of Jesus Christ of Latter-Day Saints ("LDS") and the Corporation of the President of the San Diego California Stake – The Church of Jesus Christ of Latter-day Saints (the "San Diego Stake") (collectively, the "Church Defendants").

The San Diego Stake now moves for summary judgment on the ground that it has no connection whatsoever to this case. The San Diego Stake argues that Plaintiff and her parents, who perpetrated the abuse, were never members of the San Diego Stake; the bishops that Plaintiff allegedly reported the abuse to were never members of the San Diego Stake; and the San Diego Stake does not own any property where any abuse allegedly occurred. San Diego Stake argues that it has no connection to the facts alleged by Plaintiff, and therefore, it is entitled to summary judgment.

II. LEGAL ANALYSIS

Here, the undisputed evidence shows that Plaintiff and her parents, Fitzgerald and Bingley, were never members of the San Diego Stake (Defs.' Separate Statement of Undisputed Facts ["DSSUF"] No. 8); the bishops to whom Plaintiff allegedly reported the abuse, Tyler Smithson and Rocky Snider, were never members of the San Diego Stake (*Id.* at No. 9); and the San Diego Stake has never owned the Lake Elsinore church building where Plaintiff alleges her family attended and some of the abuse occurred (*Id.* at No. 7).

In the SAC, Plaintiff alleges that her parents attended services of The Church of Jesus Christ of Latter-day Saints at the "religious entity" known as "Corporation of the President of the San Diego

California Stake – The Church of Jesus Christ Latter-day Saints . . . located at 18220 Dexter Avenue, Lake Elsinore, CA." (DSSUF No. 3.) It is likely that the San Diego Stake was named as a defendant in this case due to a misreading of California property records regarding the ownership of the church property at 18229 Dexter Avenue, Lake Elsinore, CA. According to the public records, that church property is owned by the Corporation of the President of the **San Bernardino** Stake of the Church of Jesus Christ of Latter-day Saints, not the San Diego Stake. (*Id.* at No. 7 [emphasis added].) After this mistake was brought to Plaintiff's counsel's attention, he agreed to dismiss the San Diego Stake from this case, but has not done so. (Trepanier ¶ 2, Ex. E.)

Accordingly, the San Diego Stake's motion for summary judgment is granted as there are no facts that can connect the San Diego Stake to any element of a claim for negligent undertaking.

4.

CVRI2202677	PATTON VS REAL TIME STAFFING SERVICES, LLC.	MOTION TO COMPEL ARBITRATION BY REAL TIME STAFFING SERVICES, LLC.

Tentative Ruling:

The Court grants Defendant's motion to compel arbitration.

Factual/Procedural Context

Plaintiff Talila Patton ("Plaintiff") was fired by Defendant Real Time Staffing Service, LLC ("Real Time") on May 16. 2017. On April 25, 2022, Real Time assigned Plaintiff to Defendant GXO Logistics Inc. ("GXO") to work as a material handler at GXO's warehouse. On January 30, 2022, Plaintiff texted her GXO supervisor, Vanessa Perez, to request family medical leave to care for her mother who tested positive for COVID-19. Plaintiff was informed that a doctor's note was needed and that she was expected work if she was symptom-free. On February 3, 2022, Plaintiff tested positive. Plaintiff obtained a note from her doctor placing her on leave until February 7, 2022. Therefore, Plaintiff did not appear for her scheduled shifts on February 5 and 6. Plaintiff's next scheduled shift was on February 12. However, on February 11, Plaintiff was informed by Real Time that her assignment with GXO was closed due to attendance. Plaintiff has not received any other assignments from Real Time.

Plaintiff filed her Complaint on June 30, 2022. She asserts 12 causes of action for: (1) Retaliation in Violation of Labor Code §233; (2) Violation of the California Family Rights Act; (3) Retaliation in Violation of CFRA; (4) Disability Discrimination; (5) Failure to Accommodate; (6) Failure to Engage in the Interactive Process; (7) Retaliation in Violation of FEHA; (8) Failure to Prevent Discrimination and Retaliation; (9) Wrongful Termination in Violation of Public Policy; (10) Intentional Infliction of Emotional Distress; (11) Failure to Pay All Wages Due at Discharge; (12) Failure to Produce Personnel Records.

Real Time now moves to compel arbitration pursuant to a Mutual Agreement Regarding Arbitration and Class Claims ("Arbitration Agreement") signed by Plaintiff as part of her onboarding documents in October 2019. Real Time argues all of Plaintiffs claims are covered by the Arbitration Agreement. Real Time argues that the FAA applies because Real Time does business in interstate commerce. Real Time argues that Arbitration Agreement is not unconscionable and satisfies all the required factors for essential fairness. Real Time argues that its clients, including GXO, are third party beneficiaries who may also enforce the agreement. Real Time argues that there is sufficient evidence that Plaintiff signed the Arbitration Agreement based on her e-signature.

Plaintiff argues that the October 2019 onboarding documents, including the Arbitration Agreement, were superseded by a new Conditional Employment Offer signed in May 2020, which does not contain arbitration agreement. Plaintiff argues that her prior period of employment, to which the Arbitration Agreement applies, ended in December 2019. She argues that the claims asserted by the Complaint involve her employment after May 2020. Plaintiff argues that the 2019 Arbitration Agreement is void or voidable under Labor Code §432.6, which prohibits arbitration agreements in employment contracts and is not preempted by the FAA. Plaintiff argues that Real Time has not established that the FAA applies because her employment was based only in California. Plaintiff argues that neither Real Time nor GXO were parties to the Arbitration Agreement, and therefore these entities cannot enforce it. Plaintiff asserts that she has filed a motion to amend to add PAGA claims that are not arbitrable.

In its Reply, Real Time argues that Select Staffing, the signatory to the Arbitration Agreement is a DBA of Real Time. Real Time argues that the Conditional Offer was an online application, but not an employment offer or contract. Real Time argues that Plaintiff's employment with Real Time, which is a temp agency, never officially terminated, and therefore, no additional onboarding documents were signed and the 2019 Arbitration Agreement remained effective through 2022. Real Time argues that the FAA applies. Real Time argues that there are currently no PAGA claims and any such claims are improper under the Arbitration Agreement.

Analysis

Motion to Compel Arbitration:

Upon the motion of a party to an agreement to arbitrate, the court must grant the motion unless it finds: no written agreement to arbitrate exists; the right to compel arbitration has been waived; grounds exist for revocation of the agreement; or litigation is pending that may render the arbitration unnecessary or create conflicting rulings on common issues. (Cal. Code Civ. Proc. § 1281.2.) Arbitration of disputes is favored and "when there is doubt as to the meaning and construction of an agreement for mediation and/or arbitration, that doubt should be resolved in favor of those processes." (*Bono v. David* (2007) 147 Cal. App. 4th 1055, 1062.) The moving party bears the burden of proving the existence of a valid arbitration agreement, which can be met by attaching a copy of the agreement. (*Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, 842.) The burden then shifts to the opposing party to prove any defense such as unconscionability. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2015) 55 Cal.4th 223, 236.) "In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Rosenthal v. Great Western Finance Securities Corp.* (1996) 14 Cal 4th 394, 413-414.)

Existence of an Arbitration Agreement:

Real Time asserts that as part of her onboarding process, after applying for employment, Plaintiff signed a Mutual Agreement Regarding Arbitration and Class Claims on October 23, 2019. The Arbitration Agreement provides:

> "In the event there is any dispute between you and the Company relating to or arising out of the employment or the termination of your employment, whether such claims arise before or after the signing of this Agreement, which you and the Company are unable to resolve informally through direct discussion, regardless of the kind or type of dispute, you and the Company agree to submit all such claims or disputes to be resolved by final and binding arbitration, instead of going to court, in accordance with the procedural rules of the Federal Arbitration Act."

(Decl. of Sanchez, ¶5, Ex. A.) The Arbitration Agreement expressly states that it applies to claims for wrongful termination, as well as claims based on laws that prohibit discrimination, harassment and retaliation based on physical, mental or emotional impairment, disability, medical condition

or the Family and Medical Leave Act. As such, Plaintiffs claims are within the scope of the Arbitration Agreement.

However, Plaintiff claims that this Arbitration Agreement was no longer in effect at the relevant time in February 2022 because it was superseded by a new employment contract in May, 2020. Plaintiff signed a Conditional Offer of Employment (COE) on May 26, 2020. (Am. Decl. of Patton, Ex. 4.) Real Time asserts that the COE was part of the online job application process, which Plaintiff initiated without direction or instruction from Real Time. (Supp. Decl. of Sanchez, ¶10.) This description appears to be consistent with the language of the COE, which indicates that, in accepting the conditional offer or employment, the candidate is eligible for consideration for available positions and that the employment offer is subject to background checks, employment verification, interviews and job availability. (Plaint. Ex. 4.)

Overall, the Court finds that the COE does not appear to be a new employment contract procured by Real Time, which would override or supersede the existing contract executed in 2019. Ms. Sanchez asserts that, although Plaintiff's prior assignment ended on December 16, 2019, her employment with Real Time did not become inactive or terminate. (Supp. Dec. ¶¶ 7, 8.) Plaintiff has not produced any evidence that her employment was terminated in December 2019. Accordingly, Real Time has met its burden of establishing the existence of an Arbitration Agreement in effect during the relevant time periods.

The Federal Arbitration Act:

The Federal Arbitration Act (9 U.S.C. §§1 *et seq.*) generally governs arbitration in written contracts involving interstate commerce and authorizes enforcement of arbitration clauses unless grounds exist in law or equity for the revocation of any contract, similar to the California Arbitration Act. (9 U.S.C. §2; *Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205, 1213.) In situations governed by the FAA, conflicting state law is preempted. (*Southland v. Keating* (1984) 465 U.S. 1, 12; *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 477.) In the context of the FAA, "the term 'involving commerce' [is] the functional equivalent of the more familiar term 'affecting commerce' – words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." (*Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56.) This broad reach means the transaction at issue need not be actually "in commerce," and the individual transaction at issue need not have affected interstate commerce "if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.' [Citations]." (*Id.* at 56-57.) Interstate commerce is implicated where an employer conducts business activity in multiple states. (*Giuliano v. Inland Empire Personnel, Inc*. (2007) 149 Cal. App. 4th 1276, 1286-1287.)

Real Time asserts that it is a nationwide company that engages in interstate commerce. (Supp. Dec. of Sanchez, ¶3.) The Arbitration Agreement references states other than California. (Deft. Ex. A.) Because Real Time has demonstrated that it does business in multiple states, FAA applies to the Arbitration Agreement.

Labor Code §432.6:

Although Plaintiff does not claim that the Arbitration Agreement is unconscionable, she contends that it is void and unenforceable under Labor Code §432.6, effective January 1, 2020, pursuant to which, California employers are prohibited from requiring prospective and current employees to "waive any right, forum, or procedure" for violations of FEHA or the Labor Code. (Labor Code § 432.6(a); *Chamber of Commerce of United States v. Bonta* (9th Cir. 2021) 13 F.4th 771, 780-781.) Labor Code § 432.6 expressly excludes written arbitration agreements that are otherwise enforceable under the Federal Arbitration Act ("FAA"). (Labor Code § 432.6(f).) Plaintiff argues that under *Bonta*, the prohibition against arbitration agreements in employment contracts is not preempted by the FAA.

However, Plaintiff's argument fails for several reasons. First, section 432.6 applies to contracts for employment entered into, modified or extended on or after January 1, 2020. (Labor Code §432.6(h).) As stated above, Plaintiff signed the Arbitration Agreement as part of her employment contract on October 19, 2019. The COE signed as part of a self-directed online application did not modify the existing employment contract. Furthermore, the *Bonta* opinion cited by Plaintiff has been withdrawn for rehearing, leaving the holding in doubt. Finally, to the extent *Bonta* is still good law, Plaintiff misconstrues the holding. The Bonta court held that section 432.6 was not preempted by the FAA because, while the statute requires that employment arbitration agreements must be consensual, it does not make any otherwise enforceable arbitration agreement. (*Bonta, supra*, 13 F. 4th at 776.) Labor Code §432.6 applies only to pre-agreement requirements and is aimed entirely at conduct that takes place prior to the existence of the arbitration agreement. (Ibid.)

Here, Plaintiff voluntarily signed the Arbitration Agreement. The Agreement provides an option to accept or decline, which Plaintiff accepted. (Deft. Ex. A.) The Arbitration Agreement states that signing is voluntary and not a condition of employment. (Id.) Even if the Agreement was not sufficiently consensual and was somehow modified by the COE in May 2020, the Agreement is enforceable since section 432.6 does not affect enforceability.

Signatories to the Arbitration Agreement:

Plaintiff argues that Real Time cannot enforce the Arbitration Agreement because it was not a signatory. The general rule is that only a party to an arbitration agreement may enforce its terms. (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 837-38.) The Arbitration Agreement describes the "Company" as "EmployBridge, StaffingSolutions, ProLogistix, ProDrivers, ResourceMFG, Resource Accounting, Personnel One, MedicalSolutions, Select Staffing, RemX, Remedy Intelligent Staffing, Westaff, Vaughn Consulting Group, Decca Consulting, Resdin and all related entities." (Deft. Ex. A.) Product Owner, Jessica Sanchez, testified that Real Time is a subsidiary of EmployBridge. (Decl. of Sanchez, ¶1.) Real Time does business as Select Staffing. (Supp. Dec., ¶3.) Accordingly, it appears that Real Time, under its fictitious business name, is named as party in the Arbitration Agreement. Therefore, Real Time may enforce the contract.

PAGA Claims:

On November 30, 2022, the same date the Opposition to the present Motion was filed, Plaintiff filed a Motion for Leave to Amend to add a cause of action under the Private Attorney Generals Act (PAGA). Generally, PAGA claims are not subject arbitration. (See *Iskanian v. CLS Transportation Los Angeles* (2014) 59 Cal. 4th 348, 391; *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906, 1912-13.) However, there are currently no PAGA claims asserted in the operative pleading. To the extent Plaintiff is able to amend, the PAGA claims may be stayed pending arbitration.

As such, Plaintiff has not established any defense to the enforcement of the Arbitration Agreement. The Motion to Compel is thus granted.

5.

CVRI2202922	CEJA VS NISSAN NORTH AMERICA, INC.	MOTION TO COMPEL ARBITRATION AND MOTION TO STAY BY NISSAN NORTH AMERICA, INC.

Tentative Ruling:

The Court denies the motion to compel arbitration.

Factual / Procedural Context

Plaintiffs Jose Ceja and Eric Ceja ("Plaintiffs") filed the complaint ("Complaint") in this action on July 14, 2022 against defendant Nissan North America, Inc. ("NNA"). On July 1, 2017, Plaintiffs purchased a 2017 Nissan Altima (the "Vehicle"), which was backed by express warranties. (Complaint, ¶¶ 5-8.) Plaintiff alleges that the Vehicle was delivered with defects and nonconformities to warranty which NNA was unable to repair. (Complaint, ¶¶ 10-13, 18, 29-31.) The Complaint sets forth two causes of action: (1) Breach of Implied Warranty of Merchantability under the Song-Beverly Act; and (2) Breach of Express Warranty under the Song-Beverly.

* * *

NNA now moves to compel Plaintiffs to arbitrate their claims under the Retail Installment Sales Contract ("RISC"). NNA argues that although it is not a signatory to the RISC, it may invoke the RISC's arbitration provision under the doctrine of equitable estoppel because the claims against NNA are inextricably intertwined with the RISC. NNA further argues that it may invoke the arbitration provisions as a third-party beneficiary. Lastly, NNA argues that it has not waived its right to seek arbitration and that no grounds exist for revocation of the subject arbitration agreement.

In opposition, Plaintiffs first argue that NNA has not provided admissible evidence of any arbitration agreement. Plaintiffs then argue: (1) NNA was not a signatory to the RISC and has no standing to enforce its provisions as a third-party beneficiary; (2) equitable estoppel has no application and the authority upon which NNA relies – *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 – is distinguishable (and was incorrectly decided); and (3) the arbitration agreement is unconscionable.

Analysis

I. Standard

Upon the petition/motion of a party to an agreement to arbitrate, the court must grant a petition to compel arbitration unless it finds: no written agreement to arbitrate exists; the right to compel arbitration has been waived; grounds exist for revocation of the agreement; or litigation is pending that may render the arbitration unnecessary or create conflicting rulings on common issues. (CCP § 1281.2.) A proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract. (*Freeman v. State Farm Mutual Auto Insurance Co*. (1975) 14 Cal.3d 473, 479.) The petition/motion to compel must set forth the provisions of the written agreement and the arbitration clause verbatim, or such provisions must be attached and incorporated by reference. (CRC 3.1330; *see also Condee v. Longwood Mgmt. Corp*. (2001) 88 Cal.App.4th 215, 218-19.)

"In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability . . . . Parties may submit declarations when factual issues are tendered with a motion to compel arbitration." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) In the summary proceedings on a motion to compel arbitration, "the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

II. Requests for Judicial Notice

NNA's unopposed request that the court take judicial notice of the Complaint (Exhibit 1) in this action is granted. (Evid. Code § 452(d).) However, NNA's request that the court take judicial notice of the Notice of Entry of Dismissal and Proof of Service filed in the Sacramento Superior Court in the *Felisilda v. FCA US LLC* (Exhibit 2) is denied, as the document will not aid the court in resolution of the present motion. (See *Aquila v. Superior Court* (2007) 148 Cal.App.4th 556, 569 [only relevant material may be noticed].)

III. Evidentiary Objections

With their opposition, Plaintiffs include evidentiary objections to the Declaration of Nicholas S. Magueri II and the RISC attached to his declaration as an exhibit on the ground that Magueri lacks foundation for his testimony and the RISC amounts to inadmissible hearsay. The objections are overruled. While a petition/motion to compel arbitration must set forth the provisions of the written agreement and the arbitration clause verbatim or attach such provisions, the rule does not require the petitioner to authenticate the agreement or do anything more than allege its existence and attach a copy. (CRC 3.1330; *Condee, supra*, 88 Cal.App.4th at 218-19.) The burden then shifts to the opposing party to demonstrate the falsity of the purported agreement. (*Id.* at 218-19.) Here, NNA meets its initial burden, and Plaintiffs notably do not dispute that authenticity of the RISC included with the motion. Accordingly, Plaintiffs' evidentiary objections are overruled.

IV. The Motion is Denied

The arbitration provision of the RISC provides in relevant part:

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

(*See* Nicholas S. Magueri II, ¶¶ 4-6, Exhibit 3.) The only parties to the RISC are Plaintiff and the non-party dealer, Raceway Nissan. NNA is not and does not claim to be an employee, agent, successor or assign of the non-party dealer.

The general rule is that only a party to an arbitration agreement may enforce its terms; however, the law recognizes an exception where the non-party is a third-party beneficiary to the agreement. (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 837-38; *see also Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 17-18 [arbitration agreement may be enforced by nonsignatories when the nonsignatory is a third-party beneficiary of the agreement, and when a preexisting agency relationship makes it fair to allow the nonsignatory to impose the duty to arbitrate].) Under the doctrine of equitable estoppel, a party to an arbitration agreement may be required to arbitrate with a nonparty. (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1237.)

However, a nonsignatory may enforce an arbitration clause on grounds of equitable estoppel *only* when the claims against the nonsignatory are "dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG LLP* (2009) 173 Cal.App.4th 209, 217-18.) Thus, the doctrine applies in two circumstances: (1) when the signatory must depend on the written agreement providing for arbitration in asserting claims against the nonsignatory; or (2) when the signatory alleges "substantially interdependent and concerted misconduct" by the nonsignatory and a signatory and the alleged misconduct is "founded in or intimately connected with the obligations of the underlying agreement." (*Id*. at 218-19.) Neither circumstance exists in the present action, and NNA's reliance on *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 is misplaced.

In *Felisilda*, the plaintiff asserted a single cause of action for violation of the Song-Beverly Act against both the dealer and the manufacturer (FCA). (53 Cal.App.5th at 491.) The dealership defendant moved to compel arbitration of the entire action under the arbitration provision in the sales contract. (*Id .* at 489.) The trial court determined the claim against the dealer "was so intertwined with the claim against [the manufacturer] that the entirety of the matter was arbitrable under the sales contract." (*Id.* at 491.) Although the plaintiffs subsequently dismissed their claim

against the dealership, the matter against the manufacturer proceeded to arbitration, and the trial court thereafter confirmed the arbitrator's award. (*Id*. at 491-92.) The Court of Appeal confirmed and held that even though the manufacturer was not a party to the sales agreement, the plaintiffs could be compelled to arbitrate their statutory claim against the manufacturer under the doctrine of equitable estoppel:

> The 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 497.) The case has no application in the present action. In *Felisilda*, the complaint set forth a single cause of action for violation of the Song-Beverly Act against both the dealer and the manufacturer. (*Id.* at 491.) Moreover, the signatory defendant in *Felisilda* was not dismissed until after the motion had already been decided. (*Ibid*.) In the present case, however, the Complaint sets forth statutory claims against NNA. The dealer is not a party to this action. Moreover, the Complaint does not depend upon the RISC in asserting causes of action against the nonsignatory manufacturer, and NNA's alleged misconduct is not founded upon or connected with the obligations of the RISC. [2]

Further, NNA is not a third-party beneficiary of the RISC. Determining whether a contract was made for the benefit of a third person turns on the terms of the contract; thus, if the terms necessarily require one party to confer a benefit on another, then the contract and the parties to it intend to benefit that person. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1022; s*ee also* Civ. Code, § 1559.) Persons who are benefitted only incidentally or remotely are not third-party beneficiaries. (*Spinks*, *supra*, 171 Cal.App.4th at 1022.) Here, the language of the RISC does not support finding NNA to be third-party beneficiary:

> Any claim for dispute whether in contract or 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 court action.

The relationship between Plaintiff and NNA is not a "resulting transaction or relationship" arising out of Plaintiff's purchase of the Vehicle, and there is not otherwise anything in the language of the RISC to suggest that the non-party dealer sought to confer a benefit on NNA.

The motion is thus denied.

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[2] Notably, while not binding on this Court, federal courts considering *Felisilda*, have overwhelmingly refused to enforce an arbitration provision in a sales contract where only the manufacturer was a defendant. (*See*, *e.g.*, *Ngo v. BMW of N. Am., LLC* (9th Cir. 2022) 23 F.4th 942, 950; *Ruderman v. Rolls Royce Motor Cars, LLC* (C.D. Cal. 2021) 511 F.Supp.3d 1055, 1060; *Safley v. BMW of North America, LLC* (S.D. Cal. Feb. 5, 2021) No. 20-CV-00366-BAS-MDD, 2021 WL 409722 at *7-*8; *Nation v. BMW of North America, LLC* (C.D. Cal. Dec. 28, 2020) No. 2:20-CV-02709-JWH (MAAx) 2020 WL 7868103 at *4; *Messih v. Mercedes-Benz USA, LLC* (N.D. Cal., June 24, 2021) No. 21-CV-03032-WHO, 2021 WL 2588977, at *11; *Woo v. American Honda Motor Co., Inc.* (N.D. Cal., July 7, 2021) No. 19-CV-07042-MMC, 2021 WL 2826692, at *3, n 3.) *Glassburg v. Ford Motor Company* (C.D. Cal., Nov. 2, 2021) No. 2:21-CV-01333-ODW (MAAx), 2021 WL 5086358 at *3; *Lopez v. Mercedes-Benz USA, LLC* (C.D. Cal., June 24, 2021) No. CV 21-4114-JFW(AGRx), 2021 WL 4699207 at *3.)