UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHERIDA JOHNSON, et al.,

Plaintiffs,

v.

NISSAN NORTH AMERICA, INC.,

Defendant.

Case No. 17-cv-00517-WHO

ORDER DENYING MOTION TO COMPEL ARBITRATION, STAY PROCEEDINGS, AND STRIKE COLORADO CLASS ALLEGATIONS

Re: Dkt. No. 96

INTRODUCTION

Plaintiffs are purchasers of Nissan North America, Inc. ("Nissan") vehicles with allegedly defective panoramic sunroofs. They bring a multi-state consumer fraud class action raising several theories of liability. Nissan moves to compel the individual arbitration of plaintiff Linda Spry's claims, which she brings on behalf of the Colorado putative class. Nissan also moves to stay the proceedings pending arbitration and to strike the Colorado class allegations if Spry's claims are resolved through arbitration. Spry disputes whether Nissan, a non-signatory to the contract, can compel arbitration and whether the arbitration agreement covers the disputes raised in Spry's class action lawsuit. Because Nissan is not a third party beneficiary of the agreement and equitable estoppel does not apply, the motion to compel arbitration is DENIED.

BACKGROUND[1]

Nissan sold customers several models of its vehicles with allegedly defective panoramic

[1] The facts have been thoroughly summarized in my prior Orders regarding Nissan's motions to dismiss, and are incorporated by reference in this Order. *See* Order Granting in Part and Denying in Part Motion to Dismiss at 1-3 (Dkt. No. 55); Order Granting in Part and Denying in Part Motion to Dismiss at 1-4 (Dkt. No. 77); Order Denying Nissan's Motion to Dismiss the Third Amended Complaint at 1-2 (Dkt. No. 91).

sunroofs and a multi-state class action ensued. Spry purchased one such vehicle, a 2012 Nissan Murano, in Centennial, Colorado on February 16, 2013. *See* Third Amended Complaint ("TAC") ¶ 131 (Dkt. No. 86). When her vehicle's sunroof spontaneously shattered on October 11, 2016, Nissan refused to repair it pursuant to an extended warranty. *Id*. ¶¶ 136-137. Spry is the only party asserting claims on behalf of a putative Colorado class.

During discovery, on May 10, 2018, Spry produced documents related to her purchase of her 2012 Nissan Murano under the name Linda Snyder. *See* Chang Decl. ¶ 5. The documents included an arbitration agreement between Spry and the Dealership, signed on February 16, 2013. *See* Chang Decl. ¶ 5, Ex. D. This was the first instance Nissan confirmed Spry's purchase and learned that she previously used the name Linda Snyder, because she did not allege her vehicle identification number or the name associated with the purchase in the complaint.

The arbitration agreement states in part:

Arbitration Agreement

> This Arbitration Agreement ("Agreement"), applies to Customer(s) ("you") who is/are in the process of: (1) purchasing or leasing a vehicle(s) including any negotiations or application(s) for credit or other dealings or interactions with the Dealership (hereinafter including its employees, agents, successors, assigns, subsidiaries, parents and affiliates); (2) servicing any vehicle(s) with the Dealership; or (3) reviewing, negotiating or executing any documents or agreements during the course of interactions with the Dealership (collectively, "Customer(s)/Dealership Dealings"). You and the Dealership agree that arbitration will be the sole method of resolving any claim, dispute, or controversy (collectively, "Claims") that either Party has arising from Customer(s)/Dealership Dealings. Such Claims include, but are not limited to, the following: (1) Claims in contract, tort, regulatory, statutory, equitable, or otherwise; (2) Claims relating to any representations, promises, undertakings, warranties, covenants or service; (3) Claims regarding the interpretation, scope, or validity of this Agreement, or arbitrability of any issue; (4) Claims between you and Dealership; and (5) Claims arising out of or relating to your application for credit, this Agreement and/or any and all documents executed, presented or negotiated during Customer(s)/Dealership Dealings, or any resulting transaction, service, or relationship, including that with the Dealership, or any relationship with third parties who do not sign this Agreement that arises out of the Customer(s)/Dealership Dealings.
>
> . . .

> By entering into this agreement, you give up your right to participate as a class representative or class member on any claim you may have against Dealership including any right to class arbitration or consolidation of individual arbitrations.
>
> . . .
>
> This Agreement is subject to the Federal Arbitration Act (9 U.S.C. 1 et seq.). Any portion of this Agreement that is unenforceable shall be severed, and the remaining provisions shall be enforced.

Chang Decl. Ex. D.

On June 6, 2018, Nissan answered the TAC and asserted its right to individually arbitrate Spry's claims under her valid arbitration agreement. *See* Answer to TAC at 44 (Dkt. No. 93). Nissan requested Spry arbitrate her claims but she refused. *See* Chang Decl. ¶ 7. On August 8, 2018, Nissan filed the present motion to compel arbitration, stay Spry's claims, and strike the Colorado class allegations. *See* Motion to Compel Arbitration (Dkt. No. 96).

LEGAL STANDARD

I. MOTION TO COMPEL ARBITRATION

The Federal Arbitration Act ("FAA") governs the motion to compel arbitration. 9 U.S.C. §§ 1 et seq. Under the FAA, a district court determines: (i) whether a valid agreement to arbitrate exists and, if it does, (ii) whether the agreement encompasses the dispute at issue. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). "To evaluate the validity of an arbitration agreement, federal courts should apply ordinary state-law principles that govern the formation of contracts." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (internal quotation marks and citation omitted). If the court is satisfied "that the making of the arbitration agreement or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999).

II. MOTION TO STAY

Under § 3 of the FAA, if any suit or proceeding is brought in a court of the Unites States upon any issue that is referable to arbitration under such an agreement, "the court shall…stay the

trial of the action." 9 U.S.C. § 3; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Where plaintiffs assert both arbitrable and non-arbitrable claims, district courts have "discretion whether to proceed with the nonarbitrable claims before or after the arbitration and [have] ... authority to stay proceedings in the interest of saving time and effort for itself and litigants." *Nitsch v. DreamWorks Animation SKG Inc.*, 100 F. Supp. 3d 851, 870 (N.D. Cal. 2015) (internal quotation marks and citations omitted); *see also Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979). A stay is not a matter of right, even if irreparable injury might otherwise result[, but] is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (internal quotation marks and citations omitted).

DISCUSSION

I. THIRD PARTY BENEFICIARY

In order for Nissan to enforce an arbitration agreement to which it is a non-signatory, it first must establish that it is a third party beneficiary of the contract. The parties do not dispute that the arbitration agreement at issue is governed by the FAA, permitting a non-signatory to invoke arbitration "if the relevant state contract law allows the litigant to enforce the agreement." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013) (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009)). Therefore, Nissan can enforce the contract if it satisfies the requirements of the relevant Colorado law.

A basic rule of contract law recognized in Colorado is that "a person not a party to an express contract may bring an action on such contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claim is a direct and not merely an incidental benefit of the contract." *E.B. Roberts Construction Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985); *see also Parrish Chiropractic Centers, P.C. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1056 (Colo. 1994) (en banc) (expressing the same rule). Stated differently, a third party can enforce an agreement "if the claimant is a member of the limited class that was intended to benefit from the contract." *Smith v. TCI Commc'ns, Inc.*, 981 P.2d 690, 693 (Colo. App. 1999). "While the intent to benefit the nonparty need not be expressly recited in the contract, the intent

must be apparent from the terms of the agreement, the surrounding circumstances, or both." *Parrish*, 874 P.2d at 1056. As opposed to direct beneficiaries, "an incidental beneficiary is one who is neither a promisee nor one to whom the promise is to be rendered but who is benefitted by the undertakings of the contracting parties." *Fourth & Main Co. v. Joslin Dry Goods Co.*, 648 P.2d 178 (Colo. App. 1982).

Nissan contends that it is third party beneficiary based on the plain language of the agreement, while Spry disagrees that any intent to include Nissan is evident either expressly in the agreement or impliedly through Nissan's conduct.[2] Before analyzing the arbitration agreement, Spry cites six cases and makes a blanket assertion that "the weight of authority" shows manufacturers are not third-party beneficiaries. Oppo. at 7 (Dkt. No. 97). However, none of the cases that plaintiff relies on apply Colorado law and none of them offer a holding so plainly against vehicle manufacturers. *See, e.g. Kramer*, 705 F.3d at 1128 (applying relevant state contract law to Toyota's ability to compel arbitration as a non-signatory rather than a bright-line rule against vehicle manufacturers).

Nissan relies on these provisions of the arbitration agreement:

> *You and the Dealership* agree that arbitration will be the sole method of resolving any claim, dispute, or controversy (collectively, "Claims") that *either Party* has arising from Customer(s)/Dealership Dealings [including] . . . (5) Claims arising out of . . . *any relationship with third parties* who do not sign this Agreement that arises out of the Customer(s)/Dealership Dealings."

Chang Decl. Ex. D (emphasis added). It contends that by the express terms of the agreement, Claim (5)'s broad inclusion of "any relationship with third parties," intended to encompass Nissan as a third party beneficiary. However, any third party relationship must arise out of the "Customer(s)/Dealership Dealings," which is defined as follows:

> (1) purchasing or leasing a vehicle(s) including any negotiations or

[2] Spry also argues in the alternative, in a footnote, that Nissan waived its right to compel arbitration. She does not meet her burden of proving that Nissan had existing knowledge to compel arbitration, acted inconsistent with that knowledge, or that Spry would be prejudiced by the delay. *See Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016); *see also City & Cty. of Denver v. Dist. Court In & For City & Cty. of Denver*, 939 P.2d 1353, 1369 (Colo. 1997) (en banc) (adopting a similar set of six considerations for waiver under Colorado law).

> application(s) for credit or other dealings or interactions with the Dealership (hereinafter including its employees, agents, successors, assigns, subsidiaries, parents and affiliates); (2) servicing any vehicle(s) with the Dealership; or (3) reviewing, negotiating or executing any documents or agreements during the course of interactions with the Dealership (collectively, "Customer(s)/Dealership Dealings").[3]

Chang Decl. Ex. D. It is not at all clear how Nissan's relationship with Spry satisfies this contractual requirement.

The parties agree there is no Colorado precedent that analyzes similar language that limits the agreement to the signatories, "You and the Dealership," while also referencing "any relationship with third parties" defined by the types of claims raised rather than articulated parties. At the hearing of this motion, Nissan proposed its best case was *Smith v. TCI Commc'ns, Inc.*, reciting the point of law that a party need not be expressly named to gather an agreement's intent to incorporate it as a third party beneficiary. 981 P.2d 690, 693 (Colo. App. 1999). That is true, but critically the court there found that the plaintiff was not a third party beneficiary because it was not "a member of the limited class that was intended to benefit from the contract." *Id*.

The limited class of beneficiaries in Spry's arbitration agreement is third parties relating to "Customer(s)/Dealership Dealings," each of which is limited further by interactions "with the Dealership." Chang Decl. Ex. D. The agreement then defines Dealership as "hereinafter including its employees, agents, successors, assigns, subsidiaries, parents and affiliates;" notably excluding any reference to manufacturers like Nissan. Spry's claims no doubt arise from a defective sunroof in her Nissan Murano, and because she purchased the car from the Dealership it is not surprising that she includes allegations of her interactions with the Dealership in the complaint. But the arbitration agreement does not exhibit any intent to incorporate vehicle defects broadly, sunroof defects specifically, or any dealings with the manufacturer that are not included in the scope of "Customer(s)/Dealership Dealings." Spry's interactions with Nissan, which she distinguishes from the Dealership in her complaint, would occur separately from the purchase,

[3] In her Opposition, Spry defines Customer(s)/Dealership Dealings only as the third item, though a plain reading of the text supports interpreting the dealings as including all three items that are listed before "collectively, Customer(s)/Dealership Dealings."

leasing, servicing, or contract negotiations that she engaged in "with the Dealership" as defined in the agreement.

In addition to the explicit language of the agreement that is void of any intent to include Nissan, the surrounding circumstances of the agreement suggest Nissan was not an intended third party beneficiary. Courts applying Colorado law consider the ability of the drafter to designate third party beneficiaries – and the significance of a failure to do so – because "intent must be apparent from the terms of the agreement, the *surrounding circumstances, or both*." *Parrish*, 874 P.2d at 1056; *see also TCI Commc'ns, Inc.*, 981 P.2d at 693 (emphasis added). When a party who executed a contract or document could easily have designated a third party beneficiary but failed to do so, it is indicative of a lack of intent. *See, e.g., LPG Holdings, Inc. v. Casino Am., Inc.*, 232 F.3d 901 (10th Cir. 2000) ("the parties who executed the loan modification documents could have designated LPG as a third party beneficiary, but did not."). Nissan would have been an obvious party to designate if the Dealership intended to include it.

Moreover, broad language in contracts is not necessarily indicative of any intent to directly benefit a third party, and can suggest a lack of intent based on the potential number of third parties left unspecified. For example, in *Parrish*, an en banc Colorado Supreme Court rejected the argument that a policy was intended to benefit a particular third party health care provider because "Parrish was only one of many health care providers from which Progressive's insureds could have chosen for treatment of injuries resulting from automobile accidents covered by that policy." 874 P.2d at 1056.

Here, the Dealership could have easily included Nissan as a third party beneficiary, but it did not. The plain language of the contract suggests intent to include a limited class of third parties who are involved in disputes arising from the purchase, leasing, servicing, or contract negotiations with the Dealership. Spry's claims against Nissan are distinct from the limited dealings defined in "Customer(s)/Dealership Dealings," and Nissan is not included in the subsequent limiting language "with the Dealership." Chang Decl. Ex. D. Nissan does not argue that it is one of the Dealership's "employees, agents, successors, assigns, subsidiaries, parents and affiliates," so there is no indication its actions are intertwined with the Dealership's or were

intended to be covered by the agreement. The single broad reference to "any third party" illustrates the Dealership's lack of intention to benefit the manufacturer specifically, as opposed to a significantly more limited class of other third parties who are involved in the Customer(s)/Dealership Dealings defined in the agreement. Nissan would at best be an incidental beneficiary of the agreement and is not entitled to enforce its terms.

II. EQUITABLE ESTOPPEL

An alternative ground Nissan seeks to compel arbitration is under principles of equitable estoppel. *See Amisil Holdings Ltd. v. Clarium Capital Management*, 622 F.Supp.2d 825 (N.D. Cal. 2007). In *Amisil*, the court found "where a lawsuit against non-signatories is inherently bound up with claims against a signatory, the court should compel arbitration in order to avoid denying the signatory the benefit of the arbitration clause, and in order to avoid duplicative litigation which undermines the efficiency of arbitration." *Id.* at 840; *see also Hawkins v. KPMG LLP*, 423 F.Supp.2d 1038, 1050 (N.D. Cal. 2006) ("application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."). Similarly, Colorado law recognizes that estoppel can be asserted where a signatory to a contract asserts a claim arising from a contract against a non-signatory, such as in this case. *See Meister v. Stout*, 353 P.3d 916, 920 (Colo. App. 2015).[4] Estoppel is appropriate where: (i) the misconduct of the non-signatory is intertwined with duties arising from the underlying contract; or (ii) a signatory must rely on the terms of an agreement with the arbitration provisions to make claims against the non-signatory. *Id*. at 921.

Nissan contends the misconduct alleged is indistinguishable from the Dealership's conduct. *See, e.g.*, TAC, ¶¶ 131-132 (stating that Spry purchased the vehicle from Dealership and

[4] More specifically, the Colorado Supreme Court has not yet addressed when equitable estoppel might apply to compel arbitration in this circumstance, but courts predict it would likely adopt the decision in *Meister*. *See, e.g., Mantooth v. Bavaria Inn Rest., Inc.*, No. 17-CV-1150-WJM-MEH, 2018 WL 2241130, at *10 (D. Colo. May 16, 2018) ("In the absence of a decision from the Colorado Supreme Court, this Court must attempt to predict what the state's highest court would do.") (internal citation and quotations omitted).

that Dealership did not mention the sunroof defect); ¶197 (alleging "Nissan sold" the class vehicles to "Plaintiff and Class Member"), ¶303(a) (alleging Spry "and the Colorado Class Members had and continue to have sufficient direct dealings with Nissan and/or its authorized dealers, franchisees, representatives, and agents to establish any required privity of contract…"). Spry's response is that she sufficiently differentiates between Nissan and the Dealership and their misconduct is not intertwined. I agree and find equitable estoppel does not apply.

Spry's claims do not allege "substantially interdependent and concerted misconduct" against Nissan as a non-signatory to the arbitration agreement and the Dealership as a signatory but non-party to this lawsuit. *Meister*, 353 P.3d at 921. The alleged conduct involving the Dealership in the TAC is not conflated indistinguishably with Nissan, and plaintiffs do not refer to the Dealership and Nissan collectively at any point in the 111 page complaint. *See Mantooth*, 2018 WL 2241130, at *10 (finding equitable estoppel applied because the claims referred to defendants collectively and equated their conduct). In fact, Spry distinguishes their conduct when she discusses her interactions with Nissan to utilize her extended warranty, as opposed to when she went to the Dealership for repairs to her sunroof. *See* TAC ¶¶ 135-138. As Nissan asserts, it is correct that my Order denying Nissan's motion to dismiss relied on Spry's allegations involving interactions with the Dealership to meet her burden at the pleading stage. However, this is different than the issue here whether the Dealership and Nissan's misconduct are intertwined with respect to the duties arising from the contract and arbitration agreement.

Spry need not rely on the terms of her agreement to make her claims against Nissan. *See Meister*, 353 P.3d at 921. She may have interacted with the Dealership and purchased the vehicle from them, but her contract with the Dealership does not "form the legal basis" of her claims addressed specifically to Nissan's representations as the manufacturer. *Peck v. Encana Oil & Gas, Inc.*, 224 F. Supp. 3d 1181, 1184 (D. Colo. 2016). For instance, the Colorado Consumer Protection Act claim, Count 10, provides a private right of action for plaintiffs injured by a "deceptive trade practice" for which a contract or agreement is not necessary. *NetQuote, Inc. v. Byrd*, 504 F. Supp. 2d 1126, 1134 (D. Colo. 2007); Colo. Rev. Stat. § 6–1–113. Spry's Magnuson-Moss Warranty Act claim, and her claims alleging unjust enrichment and breaches of

express and implied warranties, also depend on the representations that Nissan purportedly made to consumers, not the terms of a contract with the Dealership. Because Spry is not seeking to "simultaneously invoke the duties and obligations" of Nissan under an agreement, "while seeking to avoid arbitration," the equitable estoppel principle does not apply. *Kramer*, 705 F.3d at 1134.

CONCLUSION

For the foregoing reasons, Nissan's motion to compel arbitration is DENIED and its motion to stay Spry's claims and strike the Colorado class allegations is DENIED as MOOT.

IT IS SO ORDERED.

Dated: September 14, 2018

William H. Orrick
United States District Judge