No.

IN THE
Supreme Court of the United States

TOYOTA MOTOR CORPORATION and
TOYOTA MOTOR SALES, U.S.A., INC.,

Petitioners,

v.

MICHAEL CHOI, ALEXSANDRA DEL REAL, AND
MICHAEL SCHOLTEN, on behalf of themselves
and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The parties to a contract agreed to arbitrate any claim or dispute arising out of the contract, including disputes over the arbitrability of the claim itself. Plaintiffs sued a non-signatory to the contract, and that non-signatory defendant sought to compel arbitration to determine whether the plaintiffs' claims are arbitrable.

The question presented in this case is whether the non-signatory defendant can compel arbitration of the arbitrability of the plaintiffs' claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Toyota Motor Corporation has no parent corporation and that no other publicly held corporation owns 10% or more of its stock. Toyota Motor Sales, U.S.A., Inc. is a wholly owned subsidiary of Toyota Motor North America, Inc., which is directly or indirectly a wholly owned subsidiary of Toyota Motor Corporation.

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JURISDICTION

The judgment of the court of appeals was entered on January 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are reproduced in the Appendix (at 125a–127a).

STATEMENT

This case presents an important and recurring question concerning the role of a district court under the Federal Arbitration Act (FAA). This Court has held that courts *must* order arbitration of disputes that have been delegated to an arbitrator—even disagreements concerning the arbitrability of the dispute itself. *See*, *e.g.*, *Rent-A-Center, W., Inc.* v. *Jackson*, 130 S. Ct. 2772, 2778–79 (2010). Yet the Ninth Circuit's holding requires that courts, not arbitrators, must determine certain arbitrability disputes involving non-signatories to an agreement, even when the agreement clearly and unmistakably delegates *all* arbitrability issues to an arbitrator.

The Ninth Circuit's refusal to order arbitration directly conflicts with the decisions of two other circuits, both of which require arbitration of such arbitrability disputes. *See Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205, 209–11 (2d Cir. 2005); *Apollo*

Computer, Inc. v. *Berg*, 886 F.2d 469, 472–74 (1st Cir. 1989). It also contravenes this Court's decisions regarding the limited role of courts under the FAA, and undermines the strong federal policy in favor of arbitration. *See AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745–46, 1748–49 (2011).

1. Plaintiffs purchased Toyota vehicles from various Toyota dealerships. Pet. App. 111a–112a, 116a–117a, 120a–121a. These purchases were not made from Toyota directly, because Toyota is barred by the law of every state from selling vehicles directly to consumers. Pet. App. 3a–4a; *see* Cal. Veh. Code § 11713.3 (with only temporary exceptions, "[i]t is unlawful … for a manufacturer, … directly or indirectly … [t]o compete with a dealer[,] … own[] or operat[e] a dealership … [or] sell[] motor vehicles at retail"); Tex. Occ. Code § 2301.476.

Plaintiffs allege that the anti-lock brake system (ABS) in their vehicles is defective. Pet. App. 4a, 32a. Plaintiffs do not contend that the alleged defect ever caused them any physical injury; rather, they claim that they paid too much for their vehicles as a result of the defect. Pet. App. 98a, 104a, 106a.

Despite a highly successful recall campaign, in which Toyota updated the braking system software to resolve the issue with the ABS (Pet. App. 6a), plaintiffs filed this action against Toyota (not its dealerships) under California's false advertising and unfair competition laws alleging that Toyota did not disclose the alleged defect on a timely basis, but instead falsely advertised the vehicles as safe and reliable. Pet. App. 4a, 27a; *see* Cal. Civ. Code § 1750 *et seq*.; Cal. Bus. & Prof. Code §§ 17200, 17500 *et seq*. Plaintiffs also assert claims for breach of the implied warranty of merchantability and breach of contract.

To remedy their claims, plaintiffs seek, among other forms of relief, to *rescind* their purchase agreements, even though Toyota is not a signatory to those agreements. Pet. App. 109a.

2. In connection with their vehicle purchases, plaintiffs entered into written purchase agreements with the dealerships. The purchase agreements contain an arbitration clause, which states:

> Any claim or dispute, whether in contract, tort, statute or otherwise (including the [i]nterpretation and scope of this Arbitration Clause, 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.

Pet. App. 112a–113a, 117a–118a.[1] The purchase agreements also provide that any claim or dispute must be arbitrated on an individual, rather than classwide, basis. Pet. App. 112a–114a, 117a–119a, 121a–124a. Under this Court's precedents, there is no question that these arbitration agreements are

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[1] Another iteration of the purchase agreement provides: "This Arbitration Clause applies, regardless of whether the claims or disputes arise in contract, tort, statute or otherwise. It also applies to any claim or dispute about the interpretation and scope of this Arbitration Clause. It also applies to any claim or dispute about whether a claim or dispute should be determined by arbitration." Pet. App. 121a–122a.

valid and enforceable. *See Concepcion*, 131 S. Ct. at 1750–53.

3. Toyota moved to compel arbitration pursuant to the arbitration agreements in plaintiffs' purchase agreements. Although Toyota was not a signatory to the purchase agreements, Toyota argued that it could compel arbitration under the doctrine of equitable estoppel, which "'precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Mundi* v. *Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (citation omitted); *accord Am. Bankers Ins. Grp., Inc.* v. *Long*, 453 F.3d 623, 627 (4th Cir. 2006); *Hughes Masonry Co.* v. *Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981).

And because the purchase agreements reserve all questions regarding the "arbitrability of the claims" or "whether a claim or dispute should be determined by arbitration" to the *arbitrator*, Toyota moved to compel arbitration of the question whether plaintiffs were equitably estopped from circumventing the arbitration agreements in their purchase agreements. Pet. App. 112a, 117a, 122a.

4. The district court denied Toyota's motion to compel arbitration, holding that Toyota lacked "standing to compel arbitration because it [wa]s not a signatory or party to the arbitration agreements." Pet. App. 27a.

The Ninth Circuit affirmed, concluding that "[t]he strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." Pet. App. 9a. As a result, "the contractual right to compel arbitration 'may not be invoked by one who is not a party to the agreement

and does not otherwise possess the right to compel arbitration.'" *Id*.

As applied to plaintiffs, the Ninth Circuit held that "the arbitration agreements do not contain clear and unmistakable evidence that Plaintiffs and Toyota agreed to arbitrate arbitrability." Pet. App. 10a–11a. Even though the agreements specifically applied to disputes involving "any [transaction or] relationship with third parties who do not sign this contract" (Pet. App. 113a, 117a), the court held that plaintiffs "agreed to arbitrate arbitrability in a dispute [only] with the Dealerships," because "the terms of the arbitration clauses are expressly limited to Plaintiffs and the Dealerships." Pet. App. 10a–11a.[2]

REASONS FOR GRANTING THE PETITION

Congress enacted the Federal Arbitration Act "[t]o overcome judicial resistance to arbitration[.]" *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *accord Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the Act "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts: 'A written provision ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

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[2] On the merits of the arbitrability issue, the Ninth Circuit held that plaintiffs were not equitably estopped from avoiding arbitration. Pet. App. 12a–24a. Although plaintiffs' "claim 'sounds in contract,'" and is therefore interconnected with the purchase agreements, the court found that "the claim relies on Plaintiffs' status as third-party beneficiaries to contracts between Toyota and the Dealerships—i.e., service duties the Dealerships owe to Plaintiffs on behalf of Toyota—not the Purchase Agreements." Pet. App. 19a.

law or in equity for the revocation of any contract.'" *Buckeye*, 546 U.S. at 443–44 (quoting 9 U.S.C. § 2).

Consistent with Congress's intent to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," sections 3 and 4 of the FAA limited courts' role to a "summary" hearing on a motion to compel. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983), *superseded by statute on other grounds*, 9 U.S.C. § 16(b)(1). And where, as here, the arbitration agreement calls for an arbitrator to decide threshold questions of arbitrability, courts have an even more limited role—they must simply enforce the delegation provision and compel the arbitration of any threshold arbitrability questions. *See*, *e.g.*, *Rent-A-Center*, 130 S. Ct. at 1778–79; *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (most arbitrability questions "are for the arbitrators to decide").

The issue in this case—whether plaintiffs are equitably estopped from avoiding arbitration of a dispute arising out of a contract containing an arbitration agreement—is a prototypical threshold question of "arbitrability." *Howsam*, 537 U.S. at 83–85; *see Rent-A-Center*, 130 S. Ct. at 2777 ("whether the parties have agreed to arbitrate" is a classic "'gateway' question[] of 'arbitrability'"); *Contec*, 398 F.3d at 209–10 (equitable estoppel is a "question of arbitrability"). The Ninth Circuit nevertheless refused to compel arbitration of this arbitrability dispute simply because Toyota is not a signatory to the arbitration agreement.

That decision conflicts with decisions by the First and Second Circuits, contravenes this Court's decisions interpreting the FAA, and undermines the

strong federal policy in favor of arbitration. The issue implicates the balance of authority between courts and arbitrators on a broad array of issues involving non-signatories. This Court should grant review to resolve this important and recurring inter-circuit conflict.

I. THE NINTH CIRCUIT'S REFUSAL TO COMPEL ARBITRATION CONFLICTS WITH TWO OTHER CIRCUITS

The Ninth Circuit's decision that Toyota, as a non-signatory to the purchase agreements, is categorically barred from enforcing the arbitration agreement squarely conflicts with the decisions of the First and Second Circuits. By refusing to enforce the clear and unmistakable terms of the arbitration agreement, the court of appeals went far beyond its proper role and expanded the issues that courts must address before compelling arbitration.

The First Circuit held in *Apollo* that the question whether non-signatory defendants could compel arbitration was for the arbitrator to decide because "the parties contracted to submit issues of arbitrability to the arbitrator." 886 F.2d at 472. Even though the party moving to compel arbitration was not a signatory to the agreement, the contract's language controlled, and all arbitrability issues were reserved for the arbitrator. *Id.* at 473.

The court explained that in the written arbitration agreement, the signatory parties "agreed that all disputes arising out of or in connection with their contract would be settled by binding arbitration," including disputes about "the existence and validity of a *prima facie* agreement to arbitrate." *Apollo*, 886 F.2d at 473. Thus, the signatory plaintiff opposing arbitration "agreed to be bound" by an agreement

that "clearly and unmistakably allowed the arbitrator to determine her own jurisdiction," meaning that the arbitrator alone "should decide whether a valid arbitration agreement exists" between the signatory plaintiff and non-signatory defendants. *Id.* at 473–74.

Likewise, the Second Circuit in *Contec*, in expressly adopting the First Circuit's analysis, held that under the FAA, "neither we nor the district court must reach the question whether [the signatory] is estopped from avoiding arbitration with [the non-signatory] because … arbitration of the issue of arbitrability is appropriate." 398 F.3d at 209–10. Even though the party moving to compel arbitration was not a signatory to the arbitration agreement, the Second Circuit held that the non-signatory could enforce the arbitrability provision in the agreement, thus reserving for the arbitrator the question whether the defendant could properly compel arbitration of the plaintiff's claims. *Id.* at 208–09.

The court began by asking whether there was "*clear and unmistakable evidence* from the arbitration agreement" that the signatory "intended that the question of arbitrability shall be decided by the arbitrator." *Contec*, 398 F.3d at 208–09 (citing *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995)). Finding that the agreement delegated all questions regarding the "existence, scope, or validity" of the arbitration agreement to the arbitrator, the court rejected the signatory's argument that it could not "be compelled to arbitrate with a stranger to the [a]greement because the contractual language is effective only between the contracting parties." *Id.* at 209.

The Second Circuit further explained that controlling federal policy embodied in the FAA requires enforcement of agreements according to their terms. *Contec*, 398 F.3d at 208. And where the signatory "'agreed to be bound' by provisions that 'clearly and unmistakably allow the arbitrator to determine her own jurisdiction' over an agreement to arbitrate 'whose continued existence and validity is being questioned,'" the signatory could not simply "disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability." *Id.* at 211.[3] The court concluded that the arbitrator alone must decide the arbitrability issue, "even if, in the end, an arbitrator were to determine that the dispute itself is

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[3] Recognizing that "just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with *any* non-signatory," the First and Second Circuits made preliminary "relational sufficiency" findings to determine "whether the parties have a sufficient relationship to each other and to the rights created under the agreement" before compelling arbitration of arbitrability issues involving non-signatories. *Contec*, 398 F.3d at 209 (emphasis added); *see Apollo*, 886 F.2d at 473. Both courts made clear, however, that the *merits* of the arbitrability question must be decided by the arbitrator, pursuant to the parties' delegation provisions. *Contec*, 398 F.3d at 209 ("a sufficient relationship existed between Contec [and the signatory] to compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable"); *Apollo*, 886 F.2d at 473–74 ("The arbitrator should decide whether a valid arbitration agreement exists between [the parties]. Consequently, without expressing any opinion on the merits of the issues raised by Apollo, we affirm."). Plaintiffs have never disputed that Toyota and its dealers have a sufficient relationship to satisfy this standard; indeed, they rely on that relationship in asserting claims for breach of warranty against Toyota. *See* Pet. App. 107a–108a.

not arbitrable because [the non-signatory] cannot claim rights under the [contract]." *Id*. at 209.[4]

The Ninth Circuit's holding that Toyota, as a non-signatory to the arbitration agreement, is categorically barred from enforcing the delegation clause against a signatory to the agreement squarely conflicts with these decisions of the First and Second Circuits.

There is no dispute here that plaintiffs' valid agreements require arbitration of not only their underlying claims, but also disputes over the arbitrability of those claims. Pet. App. 112a, 117a, 122a. The Ninth Circuit held, however, that in order for Toyota

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[4] Numerous district courts have similarly compelled arbitration of arbitrability issues such as equitable estoppel—including when requested by a non-signatory to the agreement. *See*, *e.g.*, *Lismore* v. *Société Générale Energy Corp.*, 2012 WL 3577833, at *5–6 (S.D.N.Y. Aug. 17, 2012) (because the agreement "delegates to arbitrators the decision on arbitrability …. [the court] need not 'reach the question' of whether the plaintiff was 'estopped from avoiding arbitration' with a defendant who was not a signatory to the agreement"); *Laguna* v. *Coverall N. Am., Inc.*, 2011 WL 3176469, at *7 (S.D. Cal. July 26, 2011) ("where the arbitration agreement reserves questions of arbitrability for the arbitrator, the issue as to whether a non-signatory to the arbitration agreement can compel arbitration is a question regarding the validity of the arbitration agreement that is reserved for the arbitrator"); *Washington* v. *William Morris Endeavor Entm't, LLC*, 2011 WL 3251504, at *8–9 (S.D.N.Y. July 20, 2011) ("I need not reach the issue of whether plaintiff is estopped from avoiding arbitration … because, pursuant to the Delegation Provision, this is a matter for the arbitrator"); *Jones* v. *Regions Bank*, 719 F. Supp. 2d 711, 717 (S.D. Miss. 2010) (because the signatory "did 'unmistakably intend' to delegate resolution of arbitrability issues to the arbitrator …. '[t]he resolution of these plausible [estoppel] arguments is left for the arbitrator'").

to enforce the delegation provision in the arbitration agreement, Toyota must be a *signatory* to the contract.[5]

The Ninth Circuit's decision stands in stark contrast to *Apollo* and *Contec*, and creates a clear circuit split on the nature of the court's role in enforcing a clearly valid arbitration agreement. In the First and Second Circuits, the court's inquiry is limited to adjudicating whether the *agreements* indicate a clear and unmistakable intent to delegate questions of arbitrability to the arbitrator—even if the dispute involves a non-signatory. *Contec*, 398 F.3d at 208–09; *Apollo*, 886 F.2d at 473–74. In the Ninth Circuit, however, even where an agreement unmistakably delegates arbitrability questions such as equitable estoppel to an arbitrator, a party seeking to compel arbitration must prove not only that the arbitrability issue has been so delegated, but that the moving party signed the agreement.

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[5] The Ninth Circuit is not alone—other courts have similarly refused to enforce agreements that clearly delegate arbitrability issues to the arbitrator. *See*, *e.g.*, *Meena Enters., Inc.* v. *Mail Boxes Etc., Inc.*, 2012 WL 4863695, at *3 n.4 (D. Md. Oct. 11, 2012) ("although the Franchise Agreements decree that 'claims regarding the validity, scope, and enforceability' of the arbitration clauses themselves must be decided *via* arbitration, threshold issues of contract formation—including equitable estoppel—are properly subject to judicial determination"); *Soto* v. *Am. Honda Motor Co.*, 2012 WL 4746969, at *3 (N.D. Cal. Oct. 3, 2012) ("[T]he [contract] grants the arbitrator the authority to decide the threshold issues of … 'the arbitrability of the claim or dispute.' … However, the threshold issue of whether the delegation clause is even applicable to a certain party must be decided by the Court."); *QPro Inc.* v. *RTD Quality Servs. USA, Inc.*, 761 F. Supp. 2d 492, 497–98 (S.D. Tex. 2011) (same).

The Federal Arbitration Act was enacted to provide *uniform* federal standards that should be applied consistently regardless of where a lawsuit is filed. In the absence of clear guidance from this Court, the Ninth circuit's decision will exacerbate the inconsistencies in the decisions of lower courts regarding whether a court or an arbitrator must decide arbitrability issues such as equitable estoppel. *Compare*, *e.g.*, *Cole* v. *John Wiley & Sons, Inc.*, 2012 WL 3133520, at *14 (S.D.N.Y. Aug. 1, 2012) (holding that the issue of equitable estoppel "should be considered arbitrable"); *William Morris*, 2011 WL 3251504, at *8 (holding that equitable estoppel "is a matter for the arbitrator"); *Laguna*, 2011 WL 3176469, at *7 (holding that equitable estoppel "is a question … reserved for the arbitrator"), *with*, *e.g.*, *Soto*, 2012 WL 4746969, at *3 (holding that equitable estoppel "must be decided by the Court"); *Gray* v. *Suttell & Assocs.*, 2012 WL 1951657, at *2 (E.D. Wash. Mar. 19, 2012) (holding that equitable estoppel "is a question for this Court to decide"); *Meena Enters.*, 2012 WL 4863695, at *3 n.4 (holding that equitable estoppel is "properly subject to judicial determination"); *QPro*, 761 F. Supp. 2d at 497(holding that equitable estoppel is "a matter for the court to decide"); *Ramasamy* v. *Essar Global, Ltd.*, 825 F. Supp. 2d 466, 469 (S.D.N.Y. 2011) (holding that equitable estoppel "is for the Court to determine").

This clear conflict among the lower courts warrants this Court's review.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S INTERPRETATION OF THE FAA

The Ninth Circuit's approach also contravenes this Court's decisions regarding the limited role the Federal Arbitration Act reserves for district courts

and conflicts with this Court's decisions allowing parties to delegate the arbitrability of their claims to an arbitrator.

Section 4 of the FAA provides that a court "shall" order arbitration of a dispute "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Generally, this requires a court to satisfy itself of two things: that the arbitration agreement is valid and that the parties' dispute falls within its scope. *See Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010). And even these threshold determinations may be delegated to an arbitrator. *See Rent-A-Center*, 130 S. Ct. at 2777 ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy"); *accord Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 452 (2003).

The decision below, which requires a complex threshold determination by a court, undermines "Congress' clear intent … to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. The FAA "call[s] for an expeditious and summary hearing, with only restricted inquiry into factual issues." *Id*. at 22–23. Yet the Ninth Circuit's approach insists that a court make the threshold determination regarding whether a party is equitably estopped from avoiding arbitration.

Such a determination is neither expeditious nor summary, but instead involves numerous complicated factual inquiries. The district court exhausted ten pages of its 25-page opinion analyzing the equitable

estoppel issue in this case, which included inquiries into the operative documents at issue in plaintiffs' claims, which claims are "intertwined" with the purchase agreements, which claims "rely … on duties that flow from the Toyota dealerships to the buyer," whether plaintiffs' implied warranty claims hinge on their status as "third-party beneficiaries … of Toyota's implied warranties," and whether there was substantial interrelated and concerted misconduct among Toyota and its dealers, such as "any collusion … to conceal information from the Plaintiffs." Pet. App. 45a–53a. The Ninth Circuit's opinion—following the same analysis and resolving these (and more) disputed issues between the parties—also demonstrates that this was not a "summary" inquiry. *See Moses H. Cone*, 460 U.S. at 22–23.

The parties are now well into their second year of litigation on this threshold arbitrability question. The Ninth Circuit's rule therefore reintroduces "the costliness and delays of litigation" that the FAA sought to avoid. *Concepcion*, 131 S. Ct. at 1749 (quoting H.R. Rep. No. 68-96, at 2 (1924)).

These missed opportunities for efficient arbitration are particularly severe here, because the arbitration agreements include class action waivers. Pet. App. 112a–114a, 117a–119a, 121a–124a. *Concepcion* confirmed that class action waivers are both enforceable and consistent with the FAA's goals of supporting "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 131 S. Ct. at 1748–49, 1751–52. Plaintiffs' claims here—which involve no physical injuries and seek recovery for purely economic loss—are perfectly suited for resolution on an individual basis through the arbitration mechanism plaintiffs agreed to in their purchase agreements.

The Ninth Circuit's decision thus allows plaintiffs an end run around this Court's decision in *Concepcion*. The Court there specifically rejected the "'great variety' of 'devices and formulas'" that courts had used to prevent arbitration. 131 S. Ct. at 1747. The Ninth Circuit's bar on arbitration of arbitrability issues related to non-signatories is precisely such a "device," and warrants this Court's review.

III. THE COURT SHOULD GRANT REVIEW TO RESOLVE THIS IMPORTANT AND RECURRING QUESTION

The circuit conflict over the enforcement of delegation provisions in arbitration agreements by non-signatories is an important and recurring question. This issue arises in virtually every industry under a wide variety of circumstances.

As this Court has recognized, traditional principles of state law allow a contract to be enforced by non-signatories to the contract through, among other things, "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009) (citation omitted). The equitable estoppel doctrine at issue here is invoked to compel arbitration of disputes between, for example, licensors and sub-licensees (*see PRM Energy Sys., Inc.* v. *Primenergy, L.L.C.*, 592 F.3d 830, 833–36 (8th Cir. 2010)); customers and contractors or sub-contractors (*see Hughes Masonry*, 659 F.2d at 837–38); borrowers and loan servicers (*see Sherer* v. *Green Tree Servicing LLC*, 548 F.3d 379, 380–82 (5th Cir. 2008) (per curiam)); and clients and their attorneys, accountants, or financial advisers, *Carlisle*, 556 U.S. at 626–27.

Enforcement of agreements to arbitrate by non-signatories is particularly common in regulated industries where manufacturers are either prohibited or substantially limited in their ability to contract with consumers. State franchise and dealership laws prohibit direct sales to consumers by, for instance, auto manufacturers (*see*, *e.g.*, Cal. Veh. Code § 11713.3)[6] and wine producers, *see* Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-*Granholm *Developments in Wine Direct Shipping and Their Implications for Competition*, 75 Antitrust L.J. 505 (2008) (noting that in the wake of *Granholm* v. *Heald*, 544 U.S. 460 (2005), many States have placed new restrictions on direct wine sales).

The Ninth Circuit's decision raises substantial concerns for these and other situations in which nonparties seek to enforce arbitration agreements, such as when a receiver or bankruptcy trustee attempts to enforce a contract on behalf of the debtor who signed the contract (*see Javitch* v. *First Union Sec., Inc.*, 315 F.3d 619, 625–29 (6th Cir. 2003)); when a contract signatory seeks to pierce the corporate veil and sue a non-signatory (*see Bridas S.A.P.I.C.* v. *Gov't of Turkm.*, 345 F.3d 347, 359–60 (5th Cir. 2003)); and when a corporate successor attempts to enforce a contract it has assumed, *see Contec*, 398 F.3d at 207. The Ninth Circuit's rule would effectively preclude any of the non-signatories in these situations from arbitrating even the arbitrability

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[6] *See also*, *e.g.*, Ariz. Rev. Stat. Ann. § 28-4460; Mich. Comp. Laws § 445.1574; N.J. Stat. Ann. § 56:10-27; N.C. Gen. Stat. § 20-305; Or. Rev. Stat. § 650.130; 63 Pa. Stat. Ann. § 818.12; Tex. Occ. Code § 2301.476; Utah Code Ann. § 13-14-201; Wyo. Stat. Ann. § 31-16-108.

of the claims, simply because they did not sign the arbitration agreement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 10, 2013

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA KRAMER, *Plaintiff,* and ALEXSANDRA DEL REAL; MICHAEL CHOI; MICHAEL SCHOLTEN, Individually and on Behalf of All Others Similarly Situated; LU LI, *Plaintiffs-Appellees,* v. TOYOTA MOTOR CORPORATION, a Japanese corporation / a foreign corporation, DBA Toyota Motor North America, Inc.; TOYOTA MOTOR SALES, U.S.A., INC., a California corporation / a foreign corporation, *Defendants-Appellants.*	No. 12-55050 D.C. No. 8:10-ml-02172-CJC-RNB OPINION

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted
October 11, 2012—Pasadena, California

Filed January 30, 2013

Before: Andrew J. Kleinfeld and M. Margaret McKeown, Circuit Judges, and Gordon J. Quist, Senior District Judge.*

Opinion by Judge Quist

SUMMARY**

Arbitration

The panel affirmed the district court's order denying a motion to compel arbitration.

The panel held that Toyota Motor Corporation and Toyota Motor Sales, U.S.A., Inc. may not compel plaintiffs to arbitrate their claims. The panel also held the district court had the authority to decide whether Toyota, a nonsignatory to several purchase agreements with arbitration provisions between plaintiffs and various Toyota dealerships, may compel arbitration. Finally, the panel could discern no reason that the plaintiffs should be equitably estopped from avoiding arbitration in this case.

COUNSEL

Theodore J. Boutrous Jr.; William E. Thomson; Blaine H. Evanson; Brandon J. Stoker, Gibson, Dunn & Crutcher LLP, Los Angeles, California; Michael L. Mallow; Denise A. Smith-Mars; Rachel A. Rappaport, Loeb & Loeb LLP, Los Angeles, California, for De-

* The Honorable Gordon J. Quist, United States District Court for the Western District of Michigan, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

fendants-Appellants.

Vahn Alexander; Christopher B. Hayes, Faruqi & Faruqi, LLP, Los Angeles, California; Marc L. Godino, Glancy Binkow & Goldberg LLP, Los Angeles, California, for Plaintiffs-Appellees.

OPINION

QUIST, District Judge:

Toyota Motor Corporation and Toyota Motor Sales, U.S.A., Inc. (collectively "Toyota" or "Defendants") seek review of the district court's denial of their motion to compel arbitration. The district court held that Toyota, a nonsignatory to several agreements with arbitration provisions between Plaintiffs and various Toyota dealerships (hereinafter "Dealerships"), could not compel Plaintiffs to arbitrate with Toyota. The district court also found that Toyota had waived any right to compel arbitration by vigorously litigating this action in district court for nearly two years.

We have jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(C), which provides for immediate interlocutory appeal of a district court's denial of a motion to compel arbitration. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000). For the reasons set forth below, we affirm the district court's order denying Toyota's motion to compel arbitration.

BACKGROUND

Plaintiffs are owners of Model Year 2010 Toyota Prius vehicles who purchased their new vehicles between June 2009 and February 2010 from Toyota dealerships in California, Texas, and Maryland. Plaintiffs bring this putative class action on behalf of themselves and others similarly situated who pur-

chased or leased a Model Year 2010 Toyota Prius or Model Year 2010 Lexus HS 250h (collectively "Class Vehicles") in the United States. Plaintiffs allege that they experienced defects in their antilock brake systems (ABS), resulting in increased stopping distances. Plaintiffs further allege that Toyota had notice of the defect as early as July 2009 but failed to disclose the defect and continued to manufacture and sell vehicles with defective ABS. Plaintiffs assert claims for violation of California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*; unfair competition, Cal. Bus. & Prof. Code § 17200 *et seq.*; false advertising, Cal. Bus. & Prof. Code § 17500 *et seq.*; breach of the implied warranty of merchantability, Cal. Com. Code § 2314; and common law breach of contract.

Plaintiffs purchased their vehicles on credit by entering into either a "Retail Installment Sale Contract" or "Purchase Agreement" with their respective dealerships. The agreements (hereinafter "Purchase Agreement(s)") set forth the terms of the sales, including information regarding the purchase price, financing, insurance, warranties disclaimed by the dealer, warranties of buyer, and rescission rights. The Purchase Agreements also contained similarly worded arbitration provisions.[1] For example, the agreement entered by Plaintiff Michael Scholten states,

> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND US DECIDED BY ARBITRATION,

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[1] Toyota did not move the district court to compel arbitration of Plaintiff Jessica Kramer's claim because Kramer did not sign an agreement with an arbitration provision.

> RATHER THAN IN COURT OR BY JURY TRIAL.
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> 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLAIM YOU MAY HAVE AGAINST US. YOU WILL GIVE UP ANY RIGHT TO CLASS ARBITRATION AND TO ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
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> . . .
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> If either you or we elect, any claims or disputes arising out of this transaction, or relating to it, will be determined by binding arbitration and not by court action. This includes all claims and disputes arising out of, or relating to: the vehicle, your credit application, this contract, the sale or financing of the vehicle, and any collection activities.
>
> . . .
>
> This Arbitration Clause applies, regardless of whether the claims or disputes arise in contract, tort, statute or otherwise. It also applies to any claim or dispute about the interpretation and scope of this Arbitration Clause. It also applies to any claim or dispute about whether a claim or dispute should be determined by arbitration.
>
> Any claim or dispute is to be arbitrated by a single arbitrator who will arbitrate only your own claims and not the claims of a class of persons. You expressly waive any right you may have to arbitrate a class action.

Likewise, the arbitration clauses in the other Pur-

chase Agreements employ the language "you" and "we" or "buyer" and "dealer" to identify who may elect arbitration. Toyota is not a signatory to any of the Purchase Agreements.

PROCEDURAL HISTORY

On February 4, 2010, the National Highway Traffic Safety Administration announced a formal investigation into allegations that Model Year 2010 Toyota Prius hybrid vehicles experienced momentary loss of braking capability.[2] On February 8, 2010, Toyota voluntarily recalled the Class Vehicles to update the ABS software. Between February 8 and February 19, 2010, Plaintiffs filed separate class action lawsuits in several federal district courts. On April 9, 2010, the United States Judicial Panel on Multidistrict Litigation (JPML) issued a Transfer Order in *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation* (MDL 2151), pursuant to which the JPML transferred several actions to the Central District of California. On July 28, 2010, the present actions were consolidated by stipulation pursuant to 28 U.S.C. § 1407, and on November 22, 2010, the district court approved a negotiated protective order governing discovery.

On April 26, 2011, Plaintiffs filed the operative First Amended Complaint. The following day, the United States Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131

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[2] *See* Press Release, Nat'l Highway Traffic Safety Admin., Department of Transportation Addresses Toyota Safety Issues (Feb. 4, 2010), http://www.nhtsa.gov/PR/DOT-22-10. Plaintiffs' First Amended Complaint alleges NHTSA announced its investigation on February 3, 2010.

S. Ct. 1740 (2011), which abrogated *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), and held enforceable class action waivers in certain arbitration agreements. *Discover Bank* had previously held class action arbitration provisions unconscionable and unenforceable in consumer contracts of adhesion under certain circumstances. 36 Cal. 4th at 153.

On June 16, 2011, Toyota moved to dismiss Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6), which the district court denied on September 12, 2011. The following day, Toyota informed Plaintiffs' counsel that Toyota intended to move to compel arbitration. On September 27, 2011, Toyota answered the First Amended Complaint, asserting arbitration as one affirmative defense. On October 10, 2011, Toyota moved to compel arbitration. The district court denied Toyota's motion on December 20, 2011, finding Toyota had waived any right to arbitrate by vigorously litigating the action, participating in discovery, and negotiating protective orders for nearly two years. The court also found that Toyota, as a nonsignatory to the Purchase Agreements between Plaintiffs and Dealerships, could not compel arbitration, and equitable estoppel did not require arbitration.

DISCUSSION

I.

A.

Toyota first argues that the district court erred by deciding whether Toyota had a right to compel arbitration, contending that the Purchase Agreements commit that question to an arbitrator.

We review *de novo* district court decisions about the arbitrability of claims. *Momot v. Mastro*, 652

F.3d 982, 986 (9th Cir. 2011). With limited exceptions, the Federal Arbitration Act (FAA) governs the enforceability of arbitration agreements in contracts involving interstate commerce. *See* 9 U.S.C. § 1 *et seq*. The FAA states that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2. The FAA reflects both a "liberal federal policy favoring arbitration," *Concepcion*, __ U.S. __, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and the "fundamental principle that arbitration is a matter of contract," *id.* (quoting *Rent-A-Center, West, Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772, 2776 (2010)).

The scope of an arbitration agreement is governed by federal substantive law. *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994). "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) (quoting *Moses H. Cone*, 460 U.S. at 24-25).

Nevertheless, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). "Because arbitration is fundamentally a matter of contract, the cen-

tral or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Momot*, 652 F.3d at 986 (internal quotation marks and citation omitted). Generally, the contractual right to compel arbitration "may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v. Co-op Banking Grp.*, 4 F.3d 742, 744 (9th Cir. 1993). Accordingly, "[t]he strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009) (citation omitted).

B.

The first issue for review is whether the district court had authority to decide whether Toyota, a nonsignatory to the Purchase Agreements, can compel Plaintiffs to arbitrate. The district court addressed the issue in a footnote,

> While parties may agree to explicit provisions enabling the arbitrator to decide issues of the applicability and scope of an arbitration agreement, these provisions are part of the agreement and only apply to signatories. Toyota cannot invoke the right to the benefits of the Purchase Agreement because it was not a party to the agreement; thus, the threshold issue of whether Toyota, as a nonsignatory, may compel Plaintiffs to submit to arbitration under the Purchase Agreements must be decided by this Court. *Britton*, 4 F.3d at 744; *Comedy Club*, 553 F.3d at 1287. None of the cases cited by Toyota in support of its position . . . counsels otherwise, as they

are inapposite to nonsignatories.

Toyota argues that because the Purchase Agreements expressly provide that the arbitrator shall decide issues of interpretation, scope, and applicability of the arbitration provision, the arbitrator should decide the issue of whether a nonsignatory may compel Plaintiffs to arbitrate.

"It is well settled in both commercial and labor cases that whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an "'issue for judicial determination.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, __ U.S. __, 130 S. Ct. 2847, 2855 (2010) (citations omitted). "It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." *Id.* at 2855-56 (citations omitted). As explained in *First Options of Chicago, Inc. v. Kaplan*, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986)); *see also Granite Rock*, 130 S. Ct. at 2856 n.5. "In this manner the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular meritsrelated dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption." *First Options*, 514 U.S. at 944-45 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)) (emphasis in original).

Here, the arbitration agreements do not contain clear and unmistakable evidence that Plaintiffs and

Toyota agreed to arbitrate arbitrability. While Plaintiffs may have agreed to arbitrate arbitrability in a dispute with the Dealerships, the terms of the arbitration clauses are expressly limited to Plaintiffs and the Dealerships. For example, Scholten's arbitration clause states that "[e]ither you or we may choose to have any dispute between you and us decided by arbitration." The language of the contracts thus evidences Plaintiffs' intent to arbitrate arbitrability with the Dealerships and no one else. The Dealerships are not a party to this action.[3] *See Momot*, 652 F.3d at 987. Given the absence of clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability with nonsignatories, the district court had the authority to decide whether the instant dispute is arbitrable. *See United Bhd. of Carpenters and Joiners of Am. v. Desert Palace, Inc.*, 94 F.3d 1308, 1310 (9th Cir. 1996).

This court addressed a similar issue in *Mundi v. Union Security Life Insurance Co.*, 555 F.3d 1042 (9th Cir. 2009). In *Mundi*, the arbitration provision defined a dispute as a disagreement between the two contract signatories—Wells Fargo and the borrower. *Id.* at 1045. The court found that the nonsignatory-defendant could not compel arbitration because the arbitration agreement, by its terms, did not apply to the nonsignatory.

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[3] The scope of the arbitration provisions in the Purchase Agreements does extend to assignees. The Scholten Purchase Agreement, for example, encompasses disputes between "you" [Plaintiffs] and "anyone to whom we [Dealerships] transfer this contract, whether or not they sign this contract" or "our [Dealerships'] employees and agents." Toyota does not, however, contend that it is a transferee, employee, or agent of the Dealerships.

> The arbitration agreement is premised on a disagreement between Wells Fargo and the borrower. In the absence of such a disagreement, the arbitration provision does not apply. Thus, any disagreement between the borrower and a third party, such as [the defendant], is simply not within the scope of the arbitration agreement, even if it is related in some attenuated way to . . . the arbitration provision.

Id.

As applied to this case, it makes no difference that Plaintiffs and Toyota disagree over the arbitrability of the arbitration agreement, as opposed to whether the entire dispute may be arbitrated. "[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943 (emphasis in original). The parties to this litigation did not agree to arbitrate arbitrability; Plaintiffs only agreed to arbitrate arbitrability—or any other dispute—with the Dealerships because the arbitration clause is limited to claims between "you and us"—i.e. Plaintiffs and the Dealerships. In the absence of a disagreement between Plaintiffs and the Dealerships, the agreement to arbitrate arbitrability does not apply. Therefore, a disagreement between Plaintiffs and Toyota "is simply not within the scope of the arbitration agreement." *Mundi*, 555 F.3d at 1045.

II.

A.

Toyota also argues that it may compel arbitration even though it is a nonsignatory to the Purchase Agreements because Plaintiffs are equitably es-

topped from avoiding arbitration.

"Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (internal quotation marks and citation omitted). In the arbitration context, this principle has generated various lines of cases. *See Mundi*, 555 F.3d at 1046. This case involves "a nonsignatory seeking to compel a signatory to arbitrate its claims against the nonsignatory." *Id.*

The United States Supreme Court has held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009). We therefore look to California contract law to determine whether Toyota, as a nonsignatory, can compel arbitration.[4]

Where a nonsignatory seeks to enforce an arbitration clause, the doctrine of equitable estoppel applies in two circumstances: (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are "intimately founded in and intertwined with" the underlying contract, *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 221 (2009) (quoting *Metalclad Corp. v. Ventana Envtl. Org. P'ship*, 109 Cal. App. 4th 1705, 1713 (2003)), and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and "the allegations of interdepend-

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[4] No party has asked us to apply any state law other than California.

ent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement." *Goldman*, 173 Cal. App. 4th at 219. Toyota argues that this case presents both circumstances.

1.

In *Jones v. Jacobson*, the California Court of Appeal addressed the first possibility. 195 Cal. App. 4th 1, 20 (2011). When a signatory relies on the terms of a written agreement,

> [u]nder [the doctrine of equitable estoppel], a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are *intimately founded in and intertwined with the underlying contract* obligations. [. . .] This requirement comports with, and indeed derives from, the very purposes of the doctrine: to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of the same agreement.

195 Cal. App. 4th 1, 20 (2011) (internal quotations omitted) (emphasis added) (citing *Boucher v. Alliance Title Co.*, 127 Cal. App. 4th 262, 271-72 (2005); *JSM Tuscany, LLC v. Superior Court*, 193 Cal. App. 4th 1222, 1237 (2011); *Goldman*, 173 Cal. App. 4th at 221). "[E]quitable estoppel applies only if the plaintiffs' claims against the nonsignatory are dependent upon, or inextricably bound up with, the obligations imposed by the contract plaintiff has signed with the signatory defendant." *Goldman*, 173 Cal. App. 4th at 229-30. "[M]erely 'mak[ing] reference to' an agree-

ment with an arbitration clause is not enough. Equitable estoppel applies 'when the signatory to a written agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the nonsignatory.'" *Id.* at 218 (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). To determine whether the plaintiffs' claims relied on the written agreement, the *Goldman* court looked to whether the claims that the nonsignatory sought to arbitrate were "'intimately founded in and intertwined with the underlying contract obligations.'" *Id.* at 221 (quoting *Metalclad*, 109 Cal. App. 4th at 1713).

In *Goldman*, investors brought consolidated claims against their accountants, attorneys, and investment advisors for, among other things, breach of fiduciary duty and fraud related to a fraudulent tax avoidance scheme. *Id.* at 213. As one step in the scheme, the advisors assisted the investors in forming limited liability companies with standard operating agreements containing broad arbitration provisions. *Id.* The accountants and attorneys, who were not parties to the operating agreements, sought to compel arbitration, relying on the doctrine of equitable estoppel. *Id.* at 216. The court affirmed a lower court's denial of the motion to compel arbitration, finding that the claims were "unrelated to any of the obligations in the operating agreements, which were merely a procedural and collateral step in the creation of the fraudulent tax shelters." *Id.* at 218. The court observed that the complaints did not "rely on or use any terms or obligations of the operating agreements as a foundation for their claims" and did not even mention the agreements. *Id.* Thus, the court held the doctrine of equitable estoppel was inapplicable. *Id.*

Similarly, in *Mundi*, the widow of an insured borrower brought a claim against an insurer for refusing to pay a benefit under a life insurance policy to a third-party lender after the borrower's death.[5] 555 F.3d at 1044. Although the insurance policy did not contain an arbitration provision, the insurer sought to compel arbitration on the basis of equitable estoppel because a loan agreement between the borrower and the third-party lender—designated as the creditor-beneficiary of the policy—contained an arbitration clause. *Id.* The court held that the breach of insurance policy claim was not "intertwined" with the loan agreement and the claim did not "arise out of" or "relate directly to" the loan agreement. *Id.* at 1047 (internal quotations and alterations omitted).

Toyota broadly asserts that Plaintiffs' claims are

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[5] We note some confusion as to whether *Mundi*, 555 F.3d 1042, remains good law. *See, e.g.*, *In re Apple iPhone Antitrust Litig.*, 874 F. Supp. 2d 889, 895-98 (N.D. Cal. 2012). In *Arthur Anderson*, 556 U.S. 624, the United States Supreme Court clarified that a litigant who is not party to an arbitration agreement may invoke arbitration if the relevant state contract law allows the litigant to enforce the agreement. *Id.* at 632. After careful review, we conclude that *Mundi* remains good law. Although the court in *Mundi* cited federal equitable estoppel cases, rather than looking directly to applicable state law, the court applied the same substantive law on equitable estoppel that a California court would have applied. Like the California courts in *Jones* and *Goldman*, the *Mundi* court held that in order for a nonsignatory to compel a signatory to arbitrate, the signatory's claims must be "intertwined with," "arise out of," or "relate directly to" the contract providing for arbitration. 555 F.3d at 1047. As one court noted, "the mere fact that the court in *Mundi* referred to other federal court opinions in formulating its holding regarding equitable estoppel does not mean that *Mundi* was stating 'federal common law.'" *In re Apple*, 874 F. Supp. 2d at 897.

intertwined with the Purchase Agreements because they rely upon the existence of Plaintiffs' vehicle purchase transactions. In addition, Toyota argues that Plaintiffs' claims are intertwined in two specific ways: (1) Plaintiffs' prayer for relief seeks "revocation of acceptance," and (2) Plaintiffs rely on the "price term" of the Purchase Agreements in support of their prayer for damages for diminution of the purchase price. We take each of these arguments in turn.

a. Vehicle Purchases

Toyota's overarching argument is that Plaintiffs' claims are intertwined with the Purchase Agreements because Plaintiffs' claims rely on the existence of Plaintiffs' vehicle purchase transactions.

In Count I, Plaintiffs allege that Toyota violated California consumer protection law. Plaintiffs allege the violation arose from Toyota's unfair or deceptive practices, including failure to disclose and actively concealing the risk of the loss of brake control. Plaintiffs also allege material representations involving the characteristics, uses, benefits, and qualities of Toyota vehicles. For purposes of this claim, we discern no reliance by Plaintiffs on the Purchase Agreements. Toyota's arguments regarding Plaintiffs' requested relief aside, Toyota does not specifically argue this claim is intertwined with the Purchase Agreements.

In Count II, Plaintiffs allege Toyota violated California unfair competition law by repeated fraudulent misrepresentations and omissions regarding the safety of Plaintiffs' vehicles. This claim is not "intimately founded in" the Purchase Agreements, *Jones*, 195 Cal. App. 4th at 20, nor does it reference or rely upon the existence of the Purchase Agreements,

Goldman, 173 Cal. App. 4th at 221.

In Count III, Plaintiffs allege violation of California false advertising law. For example, Plaintiffs allege Toyota disseminated false or misleading statements about vehicle safety through Toyota's advertising, marketing, and other publications. Similarly, Count III is not intimately founded in, nor does it reference or rely upon, the Purchase Agreements.

In Count IV, Plaintiffs allege breach of the implied warranty of merchantability because the brake defect rendered the vehicles unfit for their ordinary purposes. Toyota contends that the implied warranty arose by operation of the Purchase Agreements and is therefore intertwined with the Purchase Agreements. We disagree. The Purchase Agreements expressly differentiate dealer warranties from manufacturer warranties. For example, the Scholten Purchase Agreement states, "[t]his provision does not affect any warranties covering the vehicle that the manufacturer or supplier may provide." The Li Purchase Agreement further reads, "[t]he Dealer is not a party to the manufacturer's warranty, in the case of a new motor vehicle or chassis, the printed new manufacturer's new vehicle warranty delivered to Purchaser with such vehicle or chassis shall apply." Thus, Plaintiffs' implied warranty claim against Toyota arises independently from the Purchase Agreements, rather than intimately relying on them.

Finally, in Count V, Plaintiffs plead breach of contract in the alternative, "to the extent Toyota's repair or adjustment commitment is deemed not to be a warranty under California's Commercial Code." Plaintiffs allege the breach arises from Toyota's failure to adequately repair Plaintiffs' vehicles. Toyota

argues Plaintiffs' claim relies upon the Purchase Agreement, including privity of contract between Plaintiffs and Toyota. However, Plaintiffs' breach of contract claim does not rely on the Purchase Agreement. Although the claim "sounds in contract," as Toyota emphasizes, the claim relies on Plaintiffs' status as third-party beneficiaries to contracts between Toyota and the Dealerships—i.e. service duties the Dealerships owe to Plaintiffs on behalf of Toyota—not the Purchase Agreements. We agree with the district court's conclusion that, in portraying Plaintiffs' breach of contract claim as a breach of the Purchase Agreement, Toyota misrepresents Plaintiffs' breach of contract claim. Plaintiffs plead breach of contract in the alternative to the implied warranty claim, and the claim arises from the same actions underlying the warranty claim—Toyota's representations about its commitment to repairs and safety—not any promise in the Purchase Agreements. We thus find that Count V is not intertwined with the Purchase Agreements.

b. Revocation of Acceptance

Toyota also contends that Plaintiffs' claims are intertwined because Plaintiffs seek "revocation of acceptance" as one form of relief. Toyota reads this relief as "revocation of acceptance of the Purchase Agreement," as opposed to revocation of acceptance of the sale itself.

Looking to California contract law, the correct analysis is whether Plaintiffs would have a *claim* independent of the existence of the Purchase Agreement (equitable estoppel applies "when the signatory must rely on the terms of the written agreement *in asserting its claims* against the nonsignatory," *Goldman*, 173 Cal. App. 4th at 222 (emphasis add-

ed), or "when the *causes of action* against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations," *Jones*, 195 Cal. App. 4th at 20 (emphasis added)), not whether the court must look to the Purchase Agreement to ascertain the requested relief. The emphasis of the case law is unmistakably on the claim itself, not the relief. Despite Toyota's focus on Plaintiffs' relief, Toyota offers no cases to support Toyota's proposed application.

Here, Plaintiffs' claims are premised on California consumer law, unfair competition, false advertising, breach of the implied warranty of merchantability, and breach of contract. In order for Toyota's equitable estoppel argument to succeed, Plaintiffs' claims themselves must intimately rely on the existence of the Purchase Agreements, not merely reference them. Toyota is correct that Plaintiffs' claims presume a transaction involving a purchase of a Class Vehicle. The claims do not, however, rely upon the existence of a Purchase Agreement. For illustration, a consumer who purchased a vehicle with cash instead of credit would still state a claim for which relief could be granted, absent a Purchase Agreement. In this regard, the facts resemble the facts of *Goldman* and *Mundi*, in which Plaintiffs' claims arose independently of the terms of the agreements containing arbitration provisions. Moreover, we note that Plaintiffs' First Amended Complaint never actually references the Purchase Agreement, either in the prayer for relief or otherwise.

c. Price Term

Toyota similarly argues that Plaintiffs rely on the "price term" of the Purchase Agreements because Plaintiffs request damages for diminution of value of

their vehicles ("restitution" or "restitutionary disgorgement"). Again, we disagree. Under California law, mere reference to a term of the Purchase Agreements is not enough. *See Goldman*, 173 Cal. App. 4th at 218. Moreover, we note that Plaintiffs' Complaint does not reference the Purchase Agreements or a specific price term. For purposes of their prayer for relief, Plaintiffs merely rely on the fact that they exchanged value for their vehicles, and that, due to the alleged ABS defect, the value of their vehicles has decreased.

We therefore find, as did the district court, that Toyota erroneously equates Plaintiffs' purchase of the Class Vehicles and the existence of Purchase Agreements between Plaintiffs and the Dealerships with interrelatedness between Plaintiffs' claims and the obligations of the Purchase Agreements. Plaintiffs do not seek to enforce or challenge the terms, duties, or obligations of the Purchase Agreements. In fact, according to Plaintiffs' First Amended Complaint, the only operative documents are Toyota's marketing materials and express written warranties, which provide the basis of the false advertising claim.

2.

Toyota next argues that Plaintiffs must arbitrate their claims because Plaintiffs allege collusion and interdependent misconduct between Toyota and the Dealerships. The doctrine of equitable estoppel applies where a signatory raises allegations of substantially interdependent and concerted misconduct by both a nonsignatory and a signatory. *Goldman*, 173 Cal. App. 4th at 222 & n.7 (citing *MS Dealer*, 177

F.3d at 947).[6] California state contract law does not allow a nonsignatory to enforce an arbitration agreement based upon a mere allegation of collusion or interdependent misconduct between a signatory and nonsignatory.

> In *any* case applying equitable estoppel to compel arbitration despite the lack of an agreement to arbitrate, a nonsignatory may compel arbitration only when the claims against the nonsignatory are founded in and inextricably bound up with *the obligations imposed by the agreement containing the arbitration clause*. In other words, allegations of substantially interdependent and concerted misconduct by signatories and nonsignatories, standing alone, are not enough: the allegations of interdependent misconduct must be founded in or intimately connected with the obligations of the underlying agreement.

Goldman, 173 Cal. App. 4th at 219 (emphasis in original).[7]

Toyota argues, "[P]laintiffs claim that Toyota and the signatory dealers 'engaged in a pattern of denial and concealment' of the alleged defect that caused

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[6] We note that although *MS Dealer*, 177 F.3d 942, is a federal case and *Arthur Andersen* instructs this court to apply California state law, the California Court of Appeal in *Goldman*, 173 Cal. App. 4th 209, adopted the *MS Dealer* equitable estoppel analysis as California state law.

[7] It is noteworthy that many California equitable estoppel cases omit any mention of the concerted misconduct line of equitable estoppel cases, suggesting the doctrine's principal application is where plaintiffs' claims are intertwined with agreements containing arbitration provisions.

[P]laintiffs' injuries." Plaintiffs deny that they allege collusion between Toyota and the Dealerships.

We find unconvincing Toyota's claim that a pattern of denial or concealment by both Toyota and the dealers amounts to allegations of collusion or interdependent misconduct for purposes of equitable estoppel. As the district court noted, the sparse portions of the First Amended Complaint that Toyota cites to support its argument do not amount to collusion. Moreover, even if Toyota were correct that Plaintiffs allege a pattern of concealment between Toyota and the dealerships, these allegations are not connected to the Purchase Agreements. Rather, like the other allegations in the First Amended Complaint, the allegations of collusion are not "inextricably bound up with the obligations imposed by the agreement containing the arbitration clause." *Goldman*, 173 Cal. App. 4th at 219. Therefore, Plaintiffs' allegations alone cannot trigger equitable estoppel under California contract law. *See id.*

B.

Regarding equity, we briefly note that this case is distinguishable from other cases in which equitable estoppel has been applied. California courts have explicitly noted that parties should only be estopped if their "'own conduct renders assertion of those rights contrary to equity.'" *Goldman*, 173 Cal. App. 4th at 221 (quoting *Metalclad*, 109 Cal. App. 4th at 1713). The "linchpin" for equitable estoppel is fairness. *Id.* at 220. The facts of *Metalclad*, 109 Cal. App. 4th 1705, provide a useful contrast to this case. *Metalclad*, a California company, entered into an oral agreement with Ventana to sell *Metalclad*'s subsidiary, Econsa. *Id.* at 1709. *Metalclad* followed up on the agreement by entering into a written agree-

ment with Geologic, a Ventana subsidiary, for the sale of Econsa. *Id*. The written agreement included a broad arbitration clause. *Id.* at 1710. *Metalclad* later brought claims including breach of contract and fraud against Ventana and others. *Id.* When *Metalclad* sought to avoid arbitration, Ventana argued that *Metalclad* should be equitably estopped because *Metalclad* sought to both enforce the agreement and repudiate the arbitration provision. *Id.* at 1713. The court agreed, holding that the claims were "intimately founded in and intertwined with" the underlying contract, and it would be unfair to allow *Metalclad* to avoid provisions in the same agreement it sought to enforce. *See id.* at 1717. "Another maxim of jurisprudence is relevant here . . . 'He who takes the benefit must bear the burden.'" *Id.* at 1718-19.

By contrast, in this case, Plaintiffs do not seek to simultaneously invoke the duties and obligations of Toyota under the Purchase Agreement, as it has none, while seeking to avoid arbitration. Thus, the inequities that the doctrine of equitable estoppel is designed to address are not present.

III.

Finally, Toyota argues that the district court erred in finding that Toyota waived any right it may have had to compel arbitration. Because we find that Toyota has no right to compel arbitration in the present case, we need not consider the issue of waiver.

CONCLUSION

We conclude that Toyota may not compel Plaintiffs to arbitrate their claims. The district court had the authority to decide whether Toyota, a nonsigna-

tory to the Purchase Agreements, may compel arbitration. Further, we discern no reason that the Plaintiffs should be equitably estopped from avoiding arbitration in this case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

IN RE TOYOTA MOTOR CORP. HYBRID BRAKE MARKETING, SALES, PRACTICES and PRODUCTS LIABILITY LITIGATION	)	**Case No.: 8:10-ML-02172-CJC(RNBx)**
	)	**ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION OF THE DEL REAL, CHOI, SCHOLTEN, AND LI PLAINTIFFS' CLAIMS**

I. INTRODUCTION AND BACKGROUND

Plaintiffs Michael Scholten, Jessica M. Kramer, Alexsandra Del Real, Lu Li, and Michael Choi (collectively, "Plaintiffs") brought this putative class action against Defendants Toyota Motor Corporation and Toyota Motor Sales U.S.A., Inc. (collectively, "Toyota" or "Defendants") on behalf of themselves and others similarly situated who purchased or leased a Model Year 2010 Toyota Prius (the "Prius") or a Model Year 2010 Lexus HS 250h (the "Lexus")

(collectively, the "Class Vehicles") in the United States. In the operative First Consolidated Amended Class Action Complaint ("FAC"), Plaintiffs allege that a defect in the anti-lock brake system (the "ABS") of the Class Vehicles caused the ABS to improperly engage when it is not needed, resulting in increased stopping time and distance. Plaintiffs further allege that Toyota had notice of the defect as early as July 2009 but nevertheless failed to disclose the defect on a timely basis, continued to manufacture and sell the Class Vehicles, and advertised the Class Vehicles as safe and reliable. In February 2010, Toyota voluntarily recalled the Class Vehicles and offered to install a software update to remedy the braking defect. Despite the recall, Plaintiffs allege that the braking defect has not been cured, and they have suffered ensuing monetary and property damages. Plaintiffs assert five causes of action against Toyota under California law for (1) violations of the Consumer Legal Remedies Act ("CLRA"), (2) violations of the Unfair Competition Law ("UCL"), (3) violations of the False Advertising Law ("FAL"), (4) breach of Implied Warranty of Merchantability, and (5) common law breach of contract.

Toyota now moves to compel arbitration of the claims of Plaintiffs Alexsandra Del Real, Michael Choi, Michael Scholten, and Lu Li, pursuant to an arbitration provision contained in the purchase agreements executed by them and certain Toyota authorized dealerships in California, Texas, and Maryland. The Court DENIES Toyota's motion. Toyota has no standing to compel arbitration because it is not a signatory or party to the arbitration agreements, and even if Toyota had any right to arbitrate any of Plaintiffs' claims, Toyota waived that right by actively litigating and defending against those claims

in federal court for almost two years.

A. Purchase Agreements

Plaintiffs Alexsandra Del Real and Michael Choi are residents of California. (FAC ¶¶ 20, 22.) On June 12, 2009, Ms. Real entered into a "Retail Installment Sale Contract" with John Elway's Crown Toyota, located at 1201 Kettering Drive, Ontario, California, to purchase a new 2010 Toyota Prius. (Mallow Decl. in Supp. Defs.' Mot. to Compel ["Mallow Decl."] (¶ 2 & Exh. A ["Del Real Agreement"].) On July 31, 2009, Mr. Choi entered into a "Retail Installment Sale Contract" with Longo Toyota, located at 3534 North Peck Road in El Monte, California, to purchase a new 2010 Toyota Prius. (*Id.* ¶ 3 & Exh. B ["Choi Agreement"].) Plaintiff Michael Scholten is a resident of Texas. (FAC ¶ 18.) On November 10, 2009, Mr. Scholten executed a "Purchase Agreement" with Toyota of Richardson, located at 1221 North Central Expressway in Richardson, Texas, to purchase a new 2010 Toyota Prius. (Mallow Decl. ¶ 4 & Exh. C ["Scholten Agreement"].) Plaintiff Lu Li is a resident and citizen of North Carolina. (FAC ¶ 21.) On January 17, 2010, Ms. Li executed a purchase agreement with 355 Toyota, located at 15625 Frederick Road in Rockville, Maryland, to purchase a new 2010 Toyota Prius. (Mallow Decl. ¶ 5, Exh. D ["Li Agreement"].)

The Del Real, Choi, Scholten, and Li purchase agreements (collectively, the "Purchase Agreements") were produced by the Toyota dealerships and Toyota Financial Services in discovery and redacted copies were submitted as exhibits by Toyota. (*Id.* ¶¶ 2-5.) The Purchase Agreements set forth the terms of the sale of Plaintiffs' vehicles, including information regarding the purchase price, financing, insurance,

warranties disclaimed by the seller, the warranties of buyer, and rescission rights. The Del Real and Choi Agreements further include an arbitration provision that provides in relevant part:

> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
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> 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
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> …
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> Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successor 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. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbi-

> trator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. . . . The arbitrator shall apply governing substantive law in making an award. . . . Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not any state law concerning arbitration.

(Del Real Agrmt., at 4; Choi Agrmt., at 2.) The Scholten Agreement similarly states:

> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND US DECIDED BY ARBITRATION, RATHER THAN IN COURT OR BY JURY TRIAL.
>
> 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLAIM YOU MAY HAVE AGAINST US. YOU WILL GIVE UP ANY RIGHT TO CLASS ARBITRATION AND TO ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
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> . . .
>
> If either you or we elect, any claims or disputes arising out of this transaction, or relating to it, will be determined by binding arbitration and not by court action. This includes all claims and disputes arising out of, or relating to: the vehicle, your credit application, this contract, the sale or financing of the vehicle, and any collection activities.
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> . . .

> This Arbitration Clause applies, regardless of whether the claims or disputes arise in contract, tort, statute or otherwise. It also applies to any claim or dispute about the interpretation and scope of this Arbitration Clause. It also applies to any claim or dispute about whether a claim or dispute about whether a claim or dispute should be determined by arbitration.
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> Any claim or dispute is to be arbitrated by a single arbitrator who will arbitrate only your own claims and not the claims of a class of persons. You expressly waive any right you may have to arbitrate a class action. . . . The arbitrator will apply governing substantive law in making an award. . . . Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not any state law concerning arbitration.

(Scholten Agrmt., at 2.) The Li Agreement likewise states in relevant part:

> Buyer(s) (also referred to as "You") and Dealer agree that if any Dispute arises, the Dispute will be resolved by binding arbitration . . . The arbitrator shall apply the substantive law of the state of Maryland and the arbitration shall take place in the county in which Dealer is located. . . . You agree that class wide arbitration of a Dispute may not be undertaken and that no claim arising from a Dispute (known or unknown) may be adjudicated in or be the basis for compensation as a result of any class action proceeding. . . . The parties understand that they are waiv-

> ing their rights to jury trial and class consideration of all claims and disputes between them not specifically exempted from arbitration in this Agreement. . . . A Dispute is any question as to whether something must be mediated and the terms and procedures of the mediation, as well as any allegation concerning a violation of a sale or federal statute that may be the subject of mediation, any monetary claim, whether contract, tort, or other, arising from the negotiation of and terms of the Buyers' Order, any service contract or insurance product, or any retail installment sale contract or lease. . . .

(Li Agrmt., at 1, 2.) Toyota was not a signatory to any of the agreements.

B. Procedural History

On February 3, 2010, the NHTSA opened a formal investigation related to braking problems with the Prius vehicles after receiving consumer complaints that they were experiencing momentary loss of braking during brake applications while traveling over an uneven road surface such as a pothole or bump in the road. (FAC ¶ 55.) On February 8, 2010, Toyota announced that it would conduct a voluntary recall of the Class Vehicles to update the ABS software in response to consumer complaints. (*Id.* ¶¶ 11, 59-60.) Only Prius vehicles produced since May 2009 and all Lexus HS 250h vehicles were subject to the recall.[1]

Shortly thereafter between February 8 and Feb-

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[1] The facts regarding the NHTSA's investigation and Toyota's recall are taken from the Court's September 12, 2011 Order. (Ct. Order, Dkt. No. 129, Sept. 12, 2011, at 4-5.)

ruary 19, 2010, Plaintiffs Del Real, Choi, Li, and Kramer filed separate class actions in this district while Plaintiff Scholten filed suit in the Northern District of Texas.[2] On April 9, 2010, the Judicial Panel for Multidistrict Litigation ("JPML") issued a Transfer Order in *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation* (MDL 2151), pursuant to which the JPML transferred certain actions to Judge James V. Selna of the Central District of California. (*See* Dkt. No. 18 [CMC Stip. No. 2], at 3.) On April 15, 2010, Plaintiffs Del Real, Choi, and Kramer filed a motion for transfer of actions to the Central District of California pursuant to 28 U.S.C. § 1407 for coordinated pretrial proceedings, requesting that the JPML transfer for coordination eight actions related to the braking system in certain Toyota and Lexus hybrid vehicles to this Court. (*Id.*; Dkt. No. 1 [Transfer Order], at 1.) On April 30, 2010, Judge Selna issued an order remanding the *Choi* action to this Court and forwarded the *Creighton*, *Del Real*, *Li*, and *Kramer* matters to this Court for consideration

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[2] Plaintiff Choi filed a class action on February 8, 2010 in *Choi v. Toyota Motors Sales, U.S.A., Inc., et al.* (Case No. 8:10-cv-00154) with this Court; Plaintiff Del Real filed her action on February 12, 2010 in *Del Real v. Toyota Motor Sales, U.S.A., Inc., et al.* (Case No. 2:10-cv-00173); Plaintiff Li filed suit on February 19, 2010 in *Li v. Toyota N. Am., et al.* (Case No. 2:10-cv-01248); Plaintiff Scholten filed suit on February 12, 2010 in *Scholten v. Toyota Motor Corp., et. al.* (Case No. 3:10-cv-00295) (transferred to Case No. 8:10-cv-01255); and Plaintiff Kramer filed suit on February 16, 2010 in *Kramer v. Toyota Motor Corp., Inc., et al.* (Case No. 2:10-cv-01154). Plaintiffs Lisa Creighton and Miriam Ramirez also filed a class action complaint concerning non-recall Toyota vehicles with this Court on February 8, 2010 in *Creighton v. Toyota Motor Corp., et al.* (Case No. 2:10-cv-00946).

because none of the cases involved unintended acceleration.[3] In addition to the *Choi* matter, the Court accepted the four other related cases. All five matters concern allegations of braking defects in certain Toyota vehicles.

On May 26, 2010, the Court ordered the parties in the *Choi* action to appear for a status conference on June 21, 2010.[4] On June 18, 2010, Toyota filed a status report in anticipation of the June 21, 2010 status conference, listing the four other related cases, providing a broad overview of Toyota's defenses, and stating anticipated pleadings and motions.[5] Toyota did not list arbitration as a defense or as an anticipated motion. On June 21, 2010, the Court held a status conference and directed counsel to meet and confer and to prepare a briefing and hearing schedule and proposed case management order.[6] On July 27, 2010, Plaintiffs and Toyota filed a stipulation regarding (1) consolidation of related actions and (2) appointment of liaison counsel and co-lead counsel.[7] The stipulation stated that the cases of Plaintiffs Del Real, Choi, Li, and Kramer should be consolidated pursuant to the Federal Rule of Civil Procedure 42 because they involve common questions of law and fact; that the cases should be consolidated and maintained under one master file; and that Plaintiffs would file a consolidated complaint.[8] On

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[3] *See* Ct. Order, Dkt. No. 14, Apr. 30, 2010 in Case No. 8:10-cv-00154.

[4] Dkt. No. 16 in Case No. 8:10-cv-00154.

[5] Dkt. No. 18 in Case No. 8:10-cv-00154.

[6] Dkt. No. 20 in Case No. 8:10-cv-00154.

[7] Dkt. No. 23 in Case No. 8:10-cv-00154.

[8] *Id.*

the same date, Toyota and Plaintiffs Choi, Del Real, Li, and Kramer filed a joint case management statement related to Plaintiffs' claims, Toyota's broad defenses, anticipated pleadings, discovery, protective order, discovery, and mediation.[9] On July 28, 2010, the Court adopted the parties' July 27, 2010 stipulation.[10] On July 29, 2010, the Court granted the parties' joint case management stipulation and continued the scheduled July 30, 2010 status conference until further notice.[11]

In response to the Del Real, Choi, and Kramer Plaintiffs' motion for coordination, on August 17, 2010, the JPML ordered transfer and centralization of the *Creighton, Choi, Del Real, Li, Kramer*, and *Scholten* matters, along with three other cases, in this Court, pursuant to 28 U.S.C. § 1407, because these actions shared factual questions arising out of allegations of the same defect in the braking system of Toyota hybrid vehicles. (Dkt. No. 1 [JPML Transfer Order].) A total of eight cases were transferred for consolidation or coordination under litigation *In re: Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices and Products Liability Litigation* (MDL No. 2172). (*Id.*) The *Del Real, Choi, Li, Scholten*, and *Kramer* matters concerning Toyota 2010 Prius/Lexus Hybrid vehicles were then consolidated into one action. Because the *Creighton* case concerns non-recall Toyota class vehicles, the matter has been coordinated with the instant MDL action for discov-

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9 Dkt. No. 24 in Case No. 8:10-cv-00154.

10 Ct. Order, Dkt. No. 25, July 28, 2010 in Case No. 8:10-cv-00154.

11 Ct. Order, Dkt. No. 27, July 29, 2010 in Case No. 8:10-cv-00154.

ery and pretrial purposes but has proceeded separately from the consolidated actions.[12] The MDL parties then negotiated a protective order governing discovery in this action, which was approved by the Court on November 22, 2010. (Ct. Order, Dkt. No. 11, Nov. 22, 2010.)

In March 2011, Plaintiffs served a draft of the First Consolidated Amended Class Action Complaint on Toyota. (Dkt. No. 118 [CMC Stipulation No. 2], at 6.) Thirty days later, on April 26, 2011, Plaintiffs filed the operative FAC. (Dkt. No. 89.) Between service of the draft and filing of the FAC, the parties met and conferred on Toyota's possible challenges to the FAC in an attempt to eliminate the need for unnecessary motion practice. (Dkt. No. 118 [CMC Stip. No. 2], at 6.) A day after Plaintiffs filed their FAC, on April 27, 2011, the Supreme Court issued *AT&T Mobility LLC v. Concepcion*, __ U.S. __ , 131 S. Ct. 1740 (2011), which interpreted class action waivers in certain arbitration agreements to be enforceable. In doing so, the Supreme Court overturned *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (2005), holding class action arbitration waivers in contracts of adhesion involving disputes over small amounts of money to be unconscionable, on the basis that it was inconsistent with the purpose of the Federal Arbitration Act ("FAA"). *Concepcion*, 131 S. Ct. at 1748, 1750-51. The Supreme Court reasoned that requiring class arbitration is inconsistent with the FAA because (1) class arbitration sacrifices the informality characteristic of arbitral proceedings,

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[12] Although the *Creighton* matter have proceeded separately from the consolidated MDL matters, the Court has required the parties from the *Creighton* action to submit all filings under both Case Nos. 2:10-cv-00946 and 10-ml-02172.

thereby rending arbitration slower and more costly; (2) class arbitration requires procedural formality to the extent not envisioned by Congress when it passed the FAA, and (3) class arbitration greatly increases risks to defendants in high-stakes class proceedings because errors would not be subject to appellate review. *Id.* at 1751-52.

On June 16, 2011, Toyota moved to dismiss Plaintiffs' claims pursuant to the Federal Rule of Civil Procedure 12(b)(6) and alternatively moved to strike portions of the FAC under Federal Rule of Civil Procedure 12(f). (Dkt. No. 108.) The briefing and hearing schedule for Toyota's motion to dismiss was modified, pursuant to the parties' stipulation and Court Order. (Dkt. No. 116; Ct. Order, Dkt. No. 117, July 26, 2011.) On July 28, 2011, the parties filed their second case management stipulation, (Dkt. No. 118), which the Court subsequently entered as an order binding on the parties on August 10, 2011. (Ct. Order, Dkt. No. 119, Aug. 10, 2011.) The second CMC stipulation reiterated Plaintiffs' claims and Toyota's defenses; provided a revised, detailed schedule of discovery and Plaintiffs' motion for class certification; and stated that the parties agreed that Hon. Judge Tevrizian (Ret.) would mediate the dispute between the parties. (*Id.*) Specifically, Toyota asserted the following defenses: (1) that the alleged braking defect was a drivability or feel issue and that Plaintiffs did not allege that the purported defect made their vehicles incapable of stopping or properly slowing down; (2) that even if there was a braking defect, the recall moots Plaintiffs' claims; (3) and that Plaintiffs are not entitled to damages because they received the benefit of the bargain under Toyota's warranties, which provided for "repairs and adjustments needed to correct defects in materials or

workmanship." (Dkt. No. 118 [CMC Stip. No. 2], at 5.) Toyota did not raise arbitration as a possible defense or as an anticipated motion in the second CMC stipulation. The parties' stipulation also outlined a detailed discovery schedule related to coordination of discovery, discovery referee, initial disclosures (to occur no later than 45 days after the Court rules on Toyota's motion to dismiss the FAC), electronically stored information, document production (which the parties may propound for at least 30 days after the Court rules on Toyota's motion to dismiss the FAC), depositions, expert depositions, interrogatories, and expert reports and discovery. (*Id.* at 6-9.)

On September 12, 2011, the Court denied Toyota's motion to dismiss in its entirety and granted in limited part Toyota's motion to strike portions of the FAC. (Ct. Order, Dkt. No. 129, Sept. 12, 2011.) The next day, Toyota informed Plaintiffs' counsel that Toyota intended to move to compel arbitration. (Godino Decl. in Supp. Pls.' Opp., Exh. A, at n.17.) Shortly thereafter, on September 16, 2011, Toyota served a third-party subpoena on various Toyota dealerships and Toyota Financial Services, requesting documents relating to Plaintiffs Del Real, Choi, Scholten, and Li. (Mallow Decl. ¶¶ 2-5.) The Purchase Agreements were produced in response to Toyota's subpoena. (Id. ¶¶ 2-5 & Exhs. A-D.) On September 27, 2011, Toyota answered the FAC, asserting arbitration as its ninth affirmative defense. (Dkt. No. 130.)

C. Motion to Compel Arbitration

On October 10, 2011, Toyota moved to compel arbitration of Plaintiffs' claims. (Dkt. No. 133.) Toyota also concurrently moved to compel arbitration of the claims of Amelia Nash and Marciano and Mir-

iam Ramirez in the *Creighton* matter.[13] Plaintiffs in this action filed their opposition on November 14, 2011. (Dkt. No. 143.) Toyota submitted reply papers on November 21, 2011. (Dkt. No. 165.) Counsel for the parties presented oral arguments on December 5, 2011. (Dkt. No. 172.) On December 13, 2011, the Court denied Toyota's motion to compel arbitration of the claims of Amelia Nash and Marciano and Miriam Ramirez in the *Creighton* action because Toyota was not a signatory or party to the arbitration agreements at issue and because it waived any right to arbitration by vigorously litigating the action, participating in discovery and meet and confer discussions, and negotiating and seeking protective orders for nearly two years. (Ct. Order, Dkt. No. 151, Dec. 13, 2011.)

In this action, Toyota seeks to compel arbitration on largely the same arguments as those proffered in the *Creighton* matter. Toyota argues that it is now asserting its right to compel Plaintiffs to arbitrate their individual claims under the Purchase Agreements following the April 2011 Supreme Court decision in *AT&T Mobility LLC v. Concepcion*. (Defs.' Mem. in Supp. Mot. to Compel, at 2, 20-22.) Although Toyota acknowledges that it is not a signatory to the Purchase Agreements, Toyota nevertheless argues that it has the right to compel Plaintiffs to arbitrate their claims based on the principle of equitable estoppel, as Plaintiffs' claims presume the existence of and therefore arise out of the Purchase Agreements and because Plaintiffs raise allegations of substantially interdependent and concerted misconduct by Toyota and its authorized dealers. (*Id.* at 10-

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[13] See Dkt. No. 132 in Case No. 2:10-cv-00946.

19.) Toyota further argues that it has not waived its right to arbitration because before *Concepcion*, class action waivers — as contained in the arbitration provisions under the Purchase Agreements — were deemed unconscionable. (*Id.* at 20-22.) Toyota argues it has not acted inconsistently with a known existing right to arbitration because it asserted arbitration as an affirmative defense in its September 27, 2011 answer to the FAC. (*Id.* at 22-23.) Toyota finally argues that Plaintiffs will not suffer prejudice if the Court grants its motion to compel arbitration because, other than its motion to dismiss the FAC, there has been no essential movement in this case. (*Id.* at 23.)

Plaintiffs contend that that the *Discover Bank* rule does apply to the instant action and that Toyota has waived any right to compel arbitration of their claims, as Toyota chose to litigate the action both before and after *Concepcion* was issued. (Pls.' Opp. to Mot. to Compel, at 3-10.) Plaintiffs also argue they have been prejudiced by Toyota's delay because they will need to relitigate the action in arbitration and because Toyota will be unfairly allowed a "second bite at the apple" to challenge their claims in a different forum. (*Id.* at 10-11.) Plaintiffs further contend that, as a nonsignatory to the Purchase Agreements, Toyota does not have a right to enforce the arbitration provision, and that the principle of equitable estoppel does not apply because none of the claims in the FAC rely on the terms in the Purchase Agreements and because they do not assert claims against the dealerships. (*Id.* at 11-17.) Plaintiffs finally argue that Toyota's motion to compel should be denied because the Purchase Agreements are both procedurally and substantively unconscionable and therefore unenforceable. (*Id.* at 17-23.)

II. LEGAL STANDARD

A. Motion to Compel Arbitration Generally

The Federal Arbitration Act governs the enforceability of arbitration agreements in contracts involving interstate commerce. *See* 9 U.S.C. § 1, *et seq.*; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-26 (1991). The FAA provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract." 9 U.S.C. § 2. The FAA reflects both a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745; *see also Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (holding that the FAA not only places arbitration agreements on equal footing with other contracts, but also establishes a federal policy in favor of arbitration).

District courts shall stay further proceedings and order arbitration if: (1) a valid agreement to arbitrate exists, and the (2) the agreement encompasses the dispute at issue. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *see also* 9 U.S.C. § 2. The first issue of determining the validity of an arbitration agreement is a question of contract interpretation and thus governed by state law. *Circuit City Stores*, 279 F.3d at 892. The FAA only "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *AT&T*, 131 S. Ct. at 1746 (quoting 9 U.S.C.

§ 2). "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 1747. But "when a doctrine normally thought to be generally applicable, such as duress or . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration," the inquiry becomes more complex. *Id.* Under California law, courts may refuse to enforce a contract where, at the time of its formation, it was unconscionable, or may limit the application of any unconscionable clause. Cal. Civ. Code § 1670.5(a). A finding of unconscionability has both a procedural and substantive component. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000). While procedural unconscionability focuses on the element of "'oppression' or 'surprise' due to unequal bargaining power," substantive unconscionability centers on "'overly harsh,' or 'one-sided' results.'" *Id.*

The second issue as to the scope of an arbitration agreement is governed by federal substantive law. *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). The FAA establishes that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Chiron Corp.*, 207 F.3d at 1131 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Nevertheless, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Tracer Research Corp.*, 42 F.3d at 1294 (quoting

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

B. Nonsignatories to Arbitration Agreement

Generally, the right to compel arbitration derives from a contractual right, and "[t]hat contractual right may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993); *see also Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009) ("The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement . . . ." (citation and quotes omitted)). However, as an exception to this general rule, a nonparty to an arbitration agreement may compel a signatory to an arbitration agreement to arbitrate claims under certain legal principles governed by federal substantive law, including under the theory of equitable estoppel. *See Corner v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001) ("The FAA creates a body of federal substantive law of arbitrability, enforceable in both state and federal courts and pre-empting any state laws or policies to the contrary." (citations and quotes omitted)); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaguen GMBH*, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (explaining that federal substantive law governs the question of whether a nonsignatory to an arbitration agreement can compel a signatory to arbitration).

A nonsignatory may apply the principle of equitable estoppel to compel arbitration of claims asserted by a party to an arbitration agreement in two

types of contexts. First, "a signatory may be required to arbitrate a claim brought by a nonsignatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045-46 (9th Cir. 2009) (citations and quotes omitted); *see also Comer*, 436 F.3d at 1101. Second, equitable estoppel applies when the signatory of an arbitration agreement raises allegations of "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Hawkins v. KPMG LLP*, 423 F. Supp. 2d 1038, 1050 (N.D. Cal. 2006) (citation and quotes omitted); *see also Mundi*, 555 F.3d at 1047 (holding that equitable estoppel did not apply because the plaintiffs' claims were not intertwined with the contract providing for arbitration and because "there were no allegations of collusion or misconduct" between the nonsignatory and signatory). The purpose of equitable estoppel is to "preclude a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Mundi*, 555 F.3d at 1045.

III. DISCUSSION

A. Nonsignatories to Arbitration Agreement[14]

Toyota argues that Plaintiffs must arbitrate their claims against Toyota because all of their claims fall within the scope of the broadly-worded arbitration provisions. (Defs.' Mem. in Supp. Mot. to Compel, at 9-10.) However, Toyota ignores the plain and clear wording of the arbitration provision in the Purchase Agreements. None of the arbitration provisions state that nonsignatory third parties, such as Toyota, may elect to arbitrate claims under the Purchase Agreements. For example, the Del Real and Choi Agreements state:

> Any claim or dispute, whether in contract, tort, statute or otherwise . . . between you and us or our employees, agents, successor or

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[14] As a threshold matter, Toyota argues that the arbitrator, rather than this Court, should decide the issue of whether a nonsignatory such as Toyota may compel Plaintiffs to arbitrate their claims because the Purchase Agreements expressly provide that the arbitrator should decide issues of interpretation, scope, and applicability of the arbitration provision. (Defs.' Mem. in Supp. Mot. to Compel, at 7-9.) The Court disagrees. While parties may agree to explicit provisions enabling the arbitrator to decide issues of the applicability and scope of an arbitration agreement, these provisions are part of the agreement and only apply to signatories. Toyota cannot invoke the right to the benefits of the Purchase Agreement because it was not a party to the agreement; thus, the threshold issue of whether Toyota, as a nonsignatory, may compel Plaintiffs to submit to arbitration under the Purchase Agreements must be decided by this Court. *Britton*, 4 F.3d at 744; *Comedy Club*, 553 F.3d at 1287. None of the cases cited by Toyota in support of its position, (Defs.' Mem. in Supp. Mot. to Compel, at 7-8), counsels otherwise, as they are inapposite to nonsignatories.

> assigns, which arise out of or relate 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.

(Del Real Agrmt., at 4, Choi Agrmt., at 2 (emphasis added).) Here, the plain language of the provision is clear that the signatories — the Del Real and Choi Plaintiffs and the Toyota dealerships — may invoke their right to arbitrate any claims arising under the Purchase Agreements. But the provision does not state that nonsignatory third parties, such as Toyota, may elect to arbitrate claims under the Purchase Agreements. The Toyota dealerships have never been parties to this action. Thus, Toyota cannot compel arbitration of Plaintiffs' claims under the arbitration provision in the Purchase Agreements.

Contrary to Toyota's presentation of the issue, the proper question for the Court is not whether Plaintiffs' claims fall within the scope of the Purchase Agreements, but whether the parties here are subject to the arbitration provision contained in the agreements. On this issue, Toyota contends that the principle of equitable estoppel applies to enable Toyota to move to compel arbitration of Plaintiffs' claims (1) because each of the claims presumes the purchase of a Toyota vehicle and existence of a retail contract and thus arise out of and relate directly to the Purchase Agreements, and (2) because Plaintiffs have raised allegations of substantially interdependent and concerted misconduct by Toyota and its authorized dealerships. (Defs.' Mem. in Supp. Mot. to Compel, at 10-19.)

1. Claims Not Intertwined with the Purchase Agreements

Toyota argues that Plaintiffs' claims for violation of the CLRA, UCL, and FAL, breach of the implied warranty of merchantability claim, and breach of contract claim depend on the purchase of Toyota vehicles and presume the existence of the Purchase Agreements. (Defs.' Mem. in Supp. Mot. to Compel, at 13-17.) Toyota suggests that this somehow shows that the claims "arise out of" or "relate directly to" the terms and conditions in the Purchase Agreements. (*Id*. at 17-18.) Toyota, however, misses the essential element of the test articulated by the Ninth Circuit and other courts of appeal. Under the theory of equitable estoppel, a nonsignatory may be bound to an arbitration agreement where (i) there is a close relationship between the entities involved and (ii) the claims are intertwined with the underlying contractual obligation. *Mundi*, 555 F.3d at 1045-46. At issue here is not whether there is a close relationship between Toyota and its dealerships, but whether Plaintiffs' claims are intertwined with the terms and conditions in the Purchase Agreements. "[E]quitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement [and] the signatory's claims arise out of and relate directly to the written agreement . . . arbitration is appropriate." *Hawkins*, 423 F. Supp. 2d at 1050 (citation omitted); *see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) (recognizing that several courts of appeal have applied the principle of equita-

ble estoppel to bind a nonsignatory to an arbitration agreement because of "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations" (citation and quotes omitted)).

While it is true that Plaintiffs purchased a Toyota vehicle and executed purchase agreements — and the existence of these facts are relevant to the application of the estoppel principle — the core test of estoppel is whether the plaintiffs' claims are "intertwined" with the contractual obligations contained in the underlying agreement. *See Mundi*, 555 F.3d at 1046 (citing *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354,361 (2d. Cir. 2008) (examining cases in which nonsignatories were permitted to compel a signatory to arbitrate based on estoppel and reasoning that it was "essential in all of these cases that the subject matter of the dispute was intertwined with the contract providing for arbitration")). Even in *Agnew v. Honda Motor Co., Ltd.* — the case to which Toyota heavily analogies this action — applies the rule from the Seventh Circuit that equitable estoppel applies if the plaintiff's claims "rely on the terms of her purchase agreement with the dealership," rather than the mere purchase of the vehicles. No. 1:08-cv-01433, 2009 WL 1813783, *4 (S.D. Ind. May 20, 2009) (granting nonsignatories' motion to compel arbitration of plaintiff's claims where, *inter alia*, plaintiff alleged wrongdoings uniformly against defendants, including against the signatory car dealer, and the nonsignatories' duties arose out of the plaintiff's purchase agreement with the dealer).

Toyota here mistakenly equates the mere pur-

chase of the vehicles and the mere fact that Plaintiffs executed a purchase agreement with the interrelatedness between Plaintiffs' claims and the obligations in the Purchase Agreements. The extent of the obligations in the Purchase Agreements concern Plaintiffs' financing and insurance obligations. The Purchase Agreements also include provisions regarding the parties' right to rescission and the Toyota dealerships' disclaimer of warranties, which state that "the Seller will make no warranties, express or implied, on the vehicles, and there will be no implied warranties of merchantability or of fitness for a particular purpose." (Del Real Agrmt., at 3; Choi Agrmt., at 2; *see also* Scholten Agrmt, at 1 (stating that "the dealer makes no warranties on its own behalf, express or implied, on the vehicles, and there will be no implied warranties of merchantability or fitness for a particular purpose"); Li Agrmt., at 2 ("The Dealer is not a party to the manufacturer's warranty. . . .")). Plaintiffs do not seek to enforce or challenge these terms in the Purchase Agreements or any duty owed by the Toyota dealerships. The operative documents at issue are not the Purchase Agreements, but Toyota's marketing materials and express warranties containing the purported false representations regarding the safety of its braking system. Simply put, Plaintiffs' claims do not rely on the content of the Purchase Agreements for their success. Nor does Toyota cite to any portion of the Purchase Agreements that Plaintiffs rely upon in asserting their claims.

Instead, Plaintiffs allege that the Model Year 2010 Prius and Model Year 2010 Lexus HS 250h vehicles all contain the same defect in the anti-lock brake system that creates an unreasonably safety risk to consumers. (FAC ¶¶ 1, 59-64, 67.) Plaintiffs allege that Toyota knew about the alleged braking

defect and the dangers it posed to both drivers and pedestrians as early as July 2009 through hundreds of consumer complaints filed with Toyota and the NHTSA. (*Id.* ¶¶ 5-6, 10, 52-55.) Despite knowledge of the defect, Plaintiffs allege that Toyota failed to disclose the defect to consumers and instead covertly implemented a software update as a "running production change" in early 2010 to remedy the braking problem by "improving the ABS system's response time, as well as the system's overall sensitivity to tire slippage for all future Prius vehicles." (*Id.* ¶¶ 8, 56-58.) From 2009 to 2010, Plaintiffs allege that while Toyota knew about the braking defect in the Class Vehicles, Toyota nevertheless utilized misleading advertisements that promoted the safety and reliability of the Class Vehicles, via various media sources as well as through the vehicles' warranty and service guides. (*Id.* ¶¶ 1-2, 27-44.) The Class Vehicles also included express written warranties which covered repairs and adjustments needed to correct any defects in materials or workmanship of any parts supplied by Toyota. (*Id.* ¶¶ 45-51.) Plaintiffs allege that they had seen Toyota advertisements that promoted the safety of the vehicles without any mention of the vehicles' defects; that Plaintiffs relied on this information in purchasing their defective vehicles; and that Plaintiffs would not have purchased the vehicles had they known about the defects. (*Id.* ¶¶ 14, 18-22.) Plaintiffs further allege that because of the defect, which has not been cured, the value of their vehicles has decreased below the standard depreciation value. (*Id.* ¶¶ 74-77.) Based on these allegations, Plaintiffs assert (1) violation of the CLRA, Cal. Civ. Code § 1750, *et seq.*, (2) violation of the UCL, Cal. Bus. & Prof. Code § 17200, *et seq.*, (3) violation of the FAL, Cal. Bus. & Prof. Code § 17500, *et*

seq., (4) breach of the implied warranty of merchantability, Cal. Com. Code § 2314, (5) and, as an alternative to their breach of implied warranty claim, breach of contract.

The only claim that may possibly be somehow entangled with the Purchase Agreements is the claim for breach of implied warranty under Cal. Com. Code § 2314, which provides that "a warranty that the goods shall be merchantable is implied in a contract and for their sale if the seller is a merchant with respect to good of that kind. . . . Goods to be merchantable must be . . . fit for the ordinary purposes for which such goods are used." Cal. Com. Code § 2314(2)(c). However, in the FAC, Plaintiffs' implied warranty claim does not rely on any terms in the Purchase Agreement or duties that flow from the Toyota dealerships to the buyer. Rather, the implied warranty claim hinges on Plaintiffs' status as third-party beneficiaries of contracts between Toyota and its dealer and as third-party beneficiaries of Toyota's implied warranties. (FAC ¶ 131.) The Purchase Agreements in fact explicitly differentiates the warranties provided by the manufacturer from those provided by the dealerships. (*See* Del Real Agrmt., at 3 ("This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide."); Choi Agrmt., at 2 (same); Scholten Agrmt., at 1 ("This provision does not affect any warranties covering the vehicle that the manufacturer or supplier may provide."); Li Agrmt., at 2 ("The Dealer is not a party to the manufacturer's warranty.")). Toyota analogizes to *Agnew*, but in that case the court found that the complaint did not differentiate among the car dealership and manufacturer and that the manufacturer's duties arose under the retail contract, such that the "the claims for breach of express

and implied warranties necessarily assume[d] that the warranties were provided as part of the [dealer's] sale" to the plaintiff. 2009 WL 1813783, at *4. In contrast, the FAC as well as the Purchase Agreements clearly distinguish between the duties and warranties of Toyota from those of the dealerships.[15]

2. Not Substantially Interdependent and Concerted Misconduct

Under the second prong of the equitable estoppel test, the estoppel principle may also apply to permit a nonsignatory to enforce an arbitration agreement against a signatory where the signatory alleges "substantially interdependent and concerted misconduct," *Hawkins*, 423 F. Supp. 2d at 1050, or "collusion" between the opposing nonsignatory and a party to the arbitration agreement. *Mundi*, 555 F.3d at 1047. Toyota argues that this test is satisfied because portions of the FAC allege that Toyota and its author-

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[15] Toyota further argues that Plaintiffs' breach of contract claim presumes the existence of and arises out of and relates directly to the Purchase Agreements because Plaintiffs allege (in the FAC) that they entered into a contract to either purchase or lease their vehicles from Toyota and because Plaintiffs assert (in their opposition to Toyota's motion to dismiss) that Toyota sold vehicles without disclosing the braking defect. (Defs.' Mem. in Supp. Mot. to Compel, at 17, citing FAC ¶¶ 18, 20-22 and Pls.' Opp. to Mot. to Dismiss, at 14.) Toyota here misrepresents Plaintiffs' breach of contract claim, which is pled in the alternative, where and if Toyota's repair or adjustment commitment is deemed not to be a warranty under California's Commercial Code. (FAC ¶ 134.) As a preliminary matter, Toyota cites no legal authority for the proposition that a claim pled in the alternative can be arbitrated. At any rate, the estoppel principle does not apply to Plaintiffs' breach of contract claim because Plaintiffs' is premised on Toyota's purported breaches of its express warranties, not on any breach of the terms of the Purchase Agreements.

ized dealerships were engaged in interdependent and concerted misconduct. (Defs.' Mem. in Supp. Mot. to Compel, at 18-19, citing FAC ¶¶ 25-26.) Toyota's argument is simply unsupported by the two cited paragraphs or by any other portions of the FAC. Plaintiffs allege that Toyota sold its vehicles through a network of dealers who are its agents and that Toyota vehicles were also leased to customers via local dealers through Toyota Financial Services. (FAC ¶ 25.) Plaintiffs further allege that Toyota and their subsidiaries and agents, are collectively referred to as "Defendants," "Toyota," or the Company. (*Id.* ¶ 26.) Aside from the fact that the Toyota dealerships are not named defendants in this suit, the allegation that Toyota dealerships are simply agents — without more — is insufficient to suggest any collusion between Toyota and its authorized dealerships to conceal information from the Plaintiffs, let alone substantial interrelated and concerted misconduct.[16] Second, as a discussed above, none of the claims in the FAC depend on allegations of an interdependent and concerted misconduct by Toyota and its dealerships; rather, they rely on purported wrongdoings by Toyota. Consequently, Toyota has no basis under the second prong of the estoppel test to compel arbitration.

C. Waiver

Even if the principle of equitable estoppel applied here, Toyota may not compel arbitration of Plaintiffs' claims on the independent ground that it waived its right to do so. Although the FAA favors the en-

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16 Moreover, the Scholten Agreement expressly disclaims that the dealership is the agent of the manufacturer. (*See* Scholten Agrmt., at 2 ("We are not the Manufacturer's agent.").)

forcement of private arbitration agreements, 9 U.S.C. § 2, the court may refuse to enforce an arbitration agreement on the ground that the party seeking enforcement has waived such right. *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758-59 (9th Cir. 1988). "A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Hoffman Const. Co. of Or. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992) (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)); *see also Britton*, 916 F.2d at 1412. Plaintiffs have satisfied all three requirements for waiver.

First, Toyota had knowledge of its right to compel arbitration. Toyota suggests that any attempt to compel arbitration prior to *Concepcion* would have been futile given that class action waivers were generally unenforceable under California law. (Defs.' Mem. in Supp. Mot. to Compel, at 20-22.) However, Toyota's skepticism of its right to arbitrate before *Concepcion* is belied by Toyota's assertion of arbitration as its tenth affirmative defense in its February 23, 2011 answer to the FAC in the related *Creighton* matter, (Dkt. No. 44), two months *before* the Supreme Court issued its decision in *Concepcion* on April 27, 2011. Toyota surely would not have asserted arbitration as an affirmative defense unless it truly believed that it had some legal basis to arbitrate Plaintiffs' claims. In any event, while *Concepcion* may have strengthened Toyota's chances for compelling arbitration, it does not mean that Toyota lacked knowledge of its potential right to pursue arbitration prior to that decision. And contrary to Toyota's sug-

gestion, it does not have a right to reset the clock for arbitration based on changing subsequent law, as no party has a right to unfairly play a game of "wait and see" and not assert its legal rights until and unless the law becomes more favorable to its position.[17] The Court thus agrees with the California appellate court's recent observation that a party "cannot proverbially 'have its cake and eat it too.'" *Roberts v. El Cajon Motors, Inc.*, 200 Cal. App. 4th 832, 846 n.10 (2011). If Toyota wanted to arbitrate the dispute involving Plaintiffs, "it should have promptly invoked arbitration regardless of the validity of the waiver provision in the arbitration provision" even before *Concepcion* was issued. *Id*. (rejecting the defendant's argument that it delayed in moving to compel arbitration because it was uncertain about the state of

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[17] The Court further finds that arbitration under the Purchase Agreements was not *per se* foreclosed before Concepcion was issued. Concepcion specifically overturned *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (2005), holding class action arbitration waivers in contracts of adhesion involving disputes over small amounts of money to be unconscionable. *Concepcion*, 131 S. Ct. at 1748, 1750-51. The Supreme Court held that the *Discover Bank* rule, to the extent that it allowed for and mandated the availability of class arbitration, was inconsistent with the FAA, which was designed to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. *Id.* As Plaintiffs point out, however, the instant action does not concern a dispute involving small sums of money, but involve damages related to expensive cars worth thousands of dollars. (Pls.' Opp. to Mot. to Compel, at 3-6.) Toyota has not demonstrated that the *Discover Bank* rule would have necessarily rendered its effort to arbitrate the Del Real and Choi Plaintiffs' claims under the Purchase Agreements futile. Furthermore, the Scholten and Li Agreements implicate substantive law from Texas and Maryland, respectively, where California's *Discover Bank* rule does not apply.

the law regarding enforceability of the class action waiver in the arbitration provision at issue).

Second, Toyota has acted inconsistently with any right it might have had to arbitrate Plaintiffs' claims. Toyota argues that it has not acted inconsistently with a known existing right to compel arbitration because it moved to compel arbitration after *Concepcion* and asserted arbitration as an affirmative defense in its September 27, 2011 answer to the FAC. (Defs.' Mem. in Supp. Mot. to Compel, at 22.) As discussed above, however, Toyota's assertion of arbitration as an affirmative defense in the related *Creighton* matter undercuts its first argument that it did not have a known existing right to arbitration before *Concepcion*. Furthermore, the record shows that both before and after *Concepcion*, Toyota has acted inconsistently with any known right to arbitration.

Since February 2010, Toyota has vigorously litigated this action for nearly two years. Toyota attended meet and confer conferences with Plaintiffs; navigated the consolidation and coordination of the actions in the MDL action; negotiated and filed a protective order; submitted multiple case management statements and stipulations regarding the course of discovery, anticipated pleadings, and mediation; and filed a motion to dismiss the FAC. Even after the *Concepcion* opinion was issued in April 2011, Toyota continued to litigate the action for six months and gave no indication to this Court, to Magistrate Judge Block, or to Plaintiffs that it intended to assert any right to arbitrate Plaintiffs' claims. Instead of moving to compel arbitration promptly after *Concepcion*, Toyota filed a motion to dismiss all of Plaintiffs' individual and class claims or, in the alternative, to strike portions of the FAC, on June 16,

2011. (Dkt. No. 108.) A month later, Toyota filed its joint case management on July 28, 2011, which reiterated Toyota's defenses and outlined a detailed discovery schedule. (Dkt. No. 118.) Toyota notably did not state arbitration as a defense or that it would move to compel arbitration. (*Id.* at 5.) In terms of discovery, pursuant to the case management schedule, the parties have served initial disclosures and propounded requests for production of documents, to which Toyota has responded; Toyota has issued third party subpoenas; and the parties have discussed and proposed method and production protocol for electronically stored information. (Dkt. No. 118 [CMC Stip. No. 2], at 7-8; Pls.' Opp. to Mot. to Compel, at 7.) The record abundantly shows that Toyota substantially invoked the litigation machinery. It was only after the Court denied Toyota's motion to dismiss in its entirety that Toyota — the very next day — notified Plaintiffs' counsel of its intention to move to arbitrate Plaintiffs' claims and serve discovery requests on certain Toyota dealerships to obtain information related to Plaintiffs' purchases.

In effect, Toyota hedged its bet on a certain litigation strategy in this Court, tested its chances in having Plaintiffs' claims dismissed, and after having failed, now attempts to change course and try its hand in another forum. The Court disapproves of such forum shopping, as the Court is not a wading pool in which a party may test the waters before a swim. *See Gonsalves v. Infosys Technology, Ltd.*, No. C 3:09-04112, 2010 WL 3118861, *4 n.3 (N.D. Cal. Aug. 5, 2010) (noting that the defendant filed its motion to compel arbitration the day after the court denied its motion to dismiss and stating that the court "will not permit defendant to use a motion to compel arbitration as a means of forum shopping" (citation

and quotes omitted)); *Christensen v. Dewor Devs.*, 33 Cal. 3d 778, 784 (1983) ("The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." (citation and quotes omitted)).

Toyota's actions before and after *Concepcion* further distinguish the instant action from the facts in *Fisher v. A.G. Becker Paribas Inc.*, to which Toyota analogizes this case. (*See* Defs.' Mem. in Supp. Mot. to Compel, at 22-23.) In *Fisher*, the Ninth Circuit determined that the defendant stock brokerage firm did not act inconsistently with its right to arbitrate claims under an arbitration agreement involving alleged federal securities law violations and common law because it was entitled to rely on the intertwining doctrine and Ninth Circuit precedent holding that arbitration should be denied where common law claims are intertwined with securities law violations. *Fisher*, 791 F.2d at 693, 694-97. The Supreme Court later rejected the intertwining doctrine in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), after the parties in *Fisher* had been litigating the action for three and a half years and engaging in extensive discovery. *Id.* at 693, 697. Toyota argues that, as in *Fisher*, the Supreme Court's decision in *Concepcion* constitutes changing intervening law that shows that it did not act inconsistently with an existing right to arbitrate its claims. (Defs.' Mem. in Supp. Mot. to Compel, at 22.) However, in *Fisher*, the defendant's actions before and after Byrd were consistent with its position. The defendant in that case, unlike Toyota, did not acknowledge its right to compel arbitration by asserting arbitration as an affirmative defense. Nor is there any suggestion that the *Fisher* defendant continued to vigorously litigate the action

and wait months after the intervening Supreme Court decision was issued.[18]

Third, Plaintiffs have been prejudiced by Toyota's delay. For nearly two years, Plaintiffs expended substantial resources, time, and effort in litigating this action and being committed to a litigation strategy in federal court. Plaintiffs undoubtedly would have utilized a different strategy had they known that the case would proceed to arbitration. *See Hoffman Constr. Co.*, 969 F.2d at 799 (finding that the "the subjection of [plaintiff] to the litigation process . . . the discovery process, the expense of litigation" resulted in apparent prejudice); *Plows v. Rockwell Collins, Inc.*, Case No. SACV 10-01936, 2011 U.S. Dist. LEXIS 88781, *9 (C.D. Cal. Aug. 9, 2011) (concluding that defendant waived right to arbitration because, inter alia, plaintiff "presumably . . . made different choices concerning the litigation strategy of the case than he would have made if he

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[18] Toyota also relies on *Villegas v. US Bancorp*, No. C 10-1762, 2011 WL 2679610 (N.D. Cal. June 20, 2011) and *Estrella v. Freedom Fin.*, No. C 09-03156, 2011 WL 2633643 (N.D. Cal. July 5, 2011) in support of the proposition that before Concepcion, the failure to move to compel arbitration cannot be deemed to be inconsistent with an existing right to compel arbitration under an arbitration agreement containing a class-action waiver clause. (*See* Defs.' Mem. in Supp. Mot. to Compel, at 21-23.) However, there was no question in those cases that Concepcion would apply, and there was no indication in either of those cases that the defendants asserted arbitration as an affirmative defense before *Concepcion*. Further, there is no indication that the *Villegas* and *Estrella* defendants, even after Concepcion, continued to diligently litigate the action, meet and confer regarding discovery, and negotiate protective orders. Rather, both the defendants in *Villegas* and *Estrella* promptly moved to compel arbitration shortly after *Concepcion* was issued.

had known that the case was going to proceed in arbitration").[19] Nor is it the case that, unlike the plaintiffs in *Fisher*, the Plaintiffs here will be able to utilize discovery for the litigation of nonarbitrable claims in federal court, as Toyota argues that all of Plaintiffs' individual claims should be submitted to arbitration. *See Fisher*, 791 F.2d at 697 (finding no prejudice resulting from extensive discovery because, inter alia, discovery would be available for trial in federal court of the nonarbitrable claim). It is simply too late for Toyota now to tell Plaintiffs that it is putting an end to litigation in federal court, switching to another forum, and starting the case over again in arbitration after being unable to dismiss Plaintiffs' claims.

IV. CONCLUSION

For the foregoing reasons, Toyota's motion to compel arbitration of the Del Real, Choi, Scholten, and Li Plaintiffs' claims is DENIED.

DATED:
December 20, 2011

s/ Cormac J. Carney

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

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[19] Because the Court finds that the principle of equitable estoppel does not apply to permit Toyota to arbitrate claims against Plaintiffs and because Toyota has also waived its right to arbitration, the Court does not reach Plaintiffs' argument that the arbitration provision in the Purchase Agreements are procedurally and substantively unconscionable.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

IN RE: TOYOTA MOTOR CORP. HYBRID BRAKE MARKETING, SALES PRACTICES and PRODUCTS LIABILITY LITIGATION	Case No.: 8:10-ML-02172-CJC-RNB **FIRST CONSOLIDATED AMENDED CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiffs, by their undersigned attorneys, on behalf of themselves and the class they seek to represent, for their First Consolidated Amended Class Action Complaint (the "Complaint"), allege the following upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters.

NATURE OF THE ACTION

1. This is a case about false promises and corporate irresponsibility. In press releases, sales literature, brochures and other consumer-oriented communications, Toyota (as defined below) uniformly promoted the "safety" of all its vehicles, specifically those that are the subject of this action, the Model

Year 2010 Toyota Prius (the "Prius") and the Model Year 2010 Lexus HS 250h (the "Lexus").

2. Toyota placed advertisements about the safety and reliability of the Defective Vehicles (as defined below), on television, radio, magazines, billboards, brochures made available at dealerships and the internet for the purpose of influencing potential purchasers and lessees to purchase or lease their cars and successfully so influenced Plaintiffs and the members of the Class (as defined below).

3. However, the brake system found in the Prius and Lexus is subject to a dangerous design and/or manufacturing defect that causes stopping distances to increase relative to driver expectations during application of the brakes on rough or slick road surfaces (the "Defect"). The Defect rendered the Prius and Lexus (the "Defective Vehicles") unsafe from the moment they rolled off the factory floor by increasing the likelihood of a crash. Moreover, the Defect has not been cured for some as of the filing of this Complaint.

4. The brake system found in the Defective Vehicles is also found in two other Toyota models: the Toyota Prius Plug-in and the Toyota Sai. These models are also subject to the Defect, but were not marketed or sold in the United States and are not part of this action.

5. Toyota received notice of the Defect soon after the Defective Vehicles were released for sale to the public, based on hundreds of consumer complaints Toyota received directly from consumers and also based on consumer complaints Toyota received through the National Highway Transportation Safety Administration ("NHTSA"), which is an agency of the Executive Branch of the U.S. Government that

receives consumer complaints regarding motor vehicles in connection with its charge to write and enforce safety standards for motor vehicles. These complaints were made long before the February 8, 2011 Recall (defined below), and provided specific and consistent descriptions of the Defect. Among those hundreds of complaints were dozens of reports of crashes, confirming the dangerous nature of the Defect.

6. In fact, Toyota received notice of the Defect as early as July 2009, if not earlier, through its own network of dealers based on reports specifically and consistently indicating an issue with the brake system in the Defective Vehicles. Those reports, and the investigations that followed, were sufficiently detailed to permit Toyota to duplicate the Defect and determine that the anti-lock brake system's software programming was permitting an unintended change in braking force.

7. Despite the fact that Toyota understood the Defect and its dangerous nature based on consumer complaints and information reported by dealers, it failed to timely disclose to consumers that the braking system was defective and certainly not what a reasonable consumer would have expected due to the increased likelihood of a crash.

8. Toyota instead introduced a "software update" as a "running production change" for the Prius in January 2010 which was purportedly designed, according to a February 4, 2010 press release issued by TMS (defined below) in Torrance, to correct the problem by "improving the ABS system's response time, as well as the system's overall sensitivity to tire slippage." All Prius vehicles manufactured after the production change supposedly received upgraded

software. It is important to note that although the Prius and Lexus have the same braking system components, the "software tuning" of the two systems was slightly different and, thus, the "software update" for the Prius could not be used to update the Lexus. Production of the Prius began in April 2009 and sales began in May 2009.

9. The "running production change" was carried out in secret. No announcements of any kind were made to the NHTSA or to consumers, including purchasers and/or lessors of Prius vehicles manufactured prior to the production change.

10. Toyota continued to conceal the Defect in the weeks following the production change. For example, Toyota released a press release on February 3, 2010, acknowledging that the company had received reports of a problem with the Prius brake system, but saying it had not confirmed those reports and its investigation of the issue was still incomplete. In truth, the Defect had been duplicated, confirmed and reported to Toyota at least as early as July 2009 by Toyota dealers. Further, the "software update" introduced during the production change evidences that Toyota had confirmed reports of the Defect and concluded its investigation as early as January 2010. It is likely that Toyota did so even earlier than January 2010 because designing and testing the "software update" prior to the production change likely required weeks, if not months, to complete.

11. Toyota finally admitted the existence of the Defect on or about February 8, 2010. At that time, Toyota announced separate recalls in the United States, Japan and Europe of more than 437,000 hybrid vehicles worldwide. The recall announced in the United States affected approximately 133,000 Prius

vehicles manufactured prior to the "running production change" and 14,500 Lexus vehicles (the "Recall"). The recall announced in Japan affected approximately 233,000 hybrid vehicles, including the Prius and Lexus, as well as the Model Year 2010 Toyota Sai and Model Year 2010 Toyota Prius Plug-in Hybrid, hybrid vehicles marketed and sold primarily in Japan. Toyota also announced that it would stop production and sales of the Lexus and other vehicles subject to the Defect for which a software update had not yet been developed to remedy the Defect, as had been for the Prius. Updates for those vehicles were supposedly completed on or around February 17, 2010.

12. In late February 2010, owners and lessees of the Defective Vehicles were informed that they were entitled to bring their vehicles to Toyota dealers to receive the "software update," among other services, free of charge.

13. However, there are Prius drivers, including Plaintiff Kramer, who report that they continue to experience the Defect despite having received the "software update" and the Defective Vehicles remain subject to the Defect.

14. Plaintiffs and Class members would not have purchased or leased the Defective Vehicles if they had been aware of the Defect. Further, as a result of the Defect, the present and future values of the Defective Vehicles have diminished beyond normal depreciation for these vehicles. Moreover, since the cause of the Defect is still at issue given that the software update was not successful for everyone who received it, Plaintiffs and Class members should be entitled, among other things, to an extension of their warranty coverage concerning the entire brake sys-

tem in the Defective Vehicles.

15. Plaintiffs assert claims under California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.; California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, et seq.; Breach of Implied Warranty of Merchantability, Cal. Com. Code § 2314; and *Common Law Breach of Contract*.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d) because minimal diversity exists, there are more than 100 class members nationwide, and the amount in controversy exceeds $5,000,000, exclusive of interest and costs.

17. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a), because Defendants do business in this District and events giving rise to Plaintiffs' claims occurred in this District, as is more fully set forth below.

THE PARTIES

A. Plaintiffs

18. Plaintiff Michael Scholten ("Scholten") is a resident of Texas. On October 23, 2009, Plaintiff Scholten purchased a 2010 Toyota Prius from Toyota of Richardson, 1221 North Central Expressway, Richardson, Texas 75080. Plaintiff Scholten experienced the Defect and, in fact, crashed his Prius soon after his purchase in 2009 because of the Defect. He had the car towed back to the dealer immediately after the accident and told the dealer he wished to return the car. The dealer would not accept a return of the car and would only permit Mr. Scholten to trade it in for another 2010 Prius at a substantial out of

pocket loss to Mr. Scholten. Mr. Scholten made several calls to Toyota's Customer Experience Center to attempt to negotiate with Toyota directly, but could not get a live person on the line and received no assistance from Toyota. At the time of the crash, he was unaware of the Defect as it had not yet been disclosed by Toyota. After learning of the Defect in 2010, Plaintiff Scholten brought the second Prius back to Toyota of Richardson for the installation of the software update in the summer of 2010. Prior to purchasing his Prius, Plaintiff Scholten saw or heard television, radio, magazine and Internet ads and dealership brochures that all consistently and prominently featured the safety and reliability of the Prius on which he relied. Mr. Scholten's decision to purchase his Prius was influenced by the promises therein and he would not have purchased his Prius had he known that it was subject to the Defect.

19. Plaintiff Jessica M. Kramer ("Kramer") is a resident of California. On October 23, 2009, Plaintiff Kramer purchased a Prius from Toyota Scion of Hollywood, 6000 Hollywood Boulevard, Hollywood, California. Plaintiff Kramer experienced the Defect on multiple occasions prior to the Recall and brought her Prius back to Toyota Scion of Hollywood for installation of the software update. However, she has continued to experience the Defect since the February 9, 2010 installation of the update. Prior to purchasing her Prius, Plaintiff Kramer saw television, magazine, billboard and internet advertisements, heard radio advertisements and saw brochures at the dealership where she purchased her vehicle, that failed to reveal the Defect and which featured safety of the Prius as a consistent theme. She relied on this information and her purchase decision was influenced by this information and she would not have

purchased her vehicle if she had been aware of the Defect. In fact, once she became aware of the Defect, Ms. Kramer specifically requested that she be provided with another vehicle that is not defective, but her request was denied by the dealership.

20. Plaintiff Alexsandra Del Real ("Del Real") is a resident of California. Plaintiff Del Real purchased her 2010 Toyota Prius on June 12, 2009 from John Elway's Crown Toyota, 1201 Kettering Drive, Ontario, California 91761. On February 20, 2010, Plaintiff Del Real brought her Prius to Toyota of Pasadena, 3600 E. Foothill Boulevard, Pasadena, California 91107 to have the software update installed. Prior to purchasing her vehicle, Plaintiff Del Real saw or heard advertisements for the Prius on television, in magazines and on the Internet that failed to reveal the Defect and in which safety of the Prius was a consistent theme. Plaintiff Del Real relied on this information and her decision to purchase her Prius was influenced by those advertisements and she would not have purchased her Prius had she been aware of the Defect.

21. Plaintiff Lu Li ("Li") is a resident and citizen of North Carolina. In January 2010, Plaintiff Li purchased a 2010 Toyota Prius from 355 Toyota, 15625 Frederick Road, Rockville, Maryland, Plaintiff Li experienced the Defect while operating her vehicle under normal driving conditions. Plaintiff Li brought her Prius to 355 Toyota for installation of the software update in February 2010. Prior to purchasing her Prius, Plaintiff Li saw or heard television, radio, magazine and Internet advertisements and read dealership brochures about the Prius that failed to reveal the Defect and which featured safety as a consistent theme. She relied on this information and her purchase decision was influenced by this infor-

mation and she would not have purchased her vehicle if she had been aware of the Defect. Immediately after her purchase, Plaintiff Li saw the value of her Prius drop and, after asking 355 Toyota what it could do about that, it said it would not do anything.

22. Plaintiff Michael Choi ("Choi") is a resident of California. In August 2009, Plaintiff Choi purchased a 2010 Toyota Prius from Longo Toyota, 3534 N. Peck Road, El Monte, California 91731. Plaintiff Choi experienced the Defect prior to having the software update installed by Penske Toyota, 9136 E. Firestone Boulevard, Downey, California 90241. Prior to purchasing his Prius, Plaintiff Choi saw or heard television and magazine ads and dealership brochures regarding the Prius that failed to reveal the Defect and featured safety as a consistent theme. Plaintiff Choi's decision to purchase his Prius was influenced, in part, by those ads, and had he been aware of the Defect, he would not have purchased his vehicle.

B. Defendants

23. Defendant Toyota Motor Corporation ("TMC") is and was, at all relevant times, a Japanese limited liability, joint-stock company which operates through numerous subsidiaries and affiliated companies. Its principal executive office is located at 1 Toyota-cho, Toyota City, Aichi Prefecture 471-8571, Japan. Its automotive operations include the design, manufacture, assembly and sale of passenger cars, minivans and commercial vehicles. TMC's financial services business consists primarily of providing financing to dealers and their customers for the purchase or lease of Toyota vehicles. Its financial services also provide retail leasing through the purchase of lease contracts originated by Toyota dealers.

North America is one of Toyota's primary automobile markets. In the United States, Toyota vehicles are marketed through distributors and through these distributors, Toyota maintains networks of dealers.

24. Toyota Motor Sales, U.S.A., Inc. ("TMS") is a California corporation and a citizen of the state of California. The unlawful conduct complained of herein emanates from California with TMS's principal place of business being located in Torrance. TMS is located in this District at 19001 South Western Avenue, Torrance, California. It is a wholly owned subsidiary of TMC and is responsible for the manufacture, distribution, marketing, sales and servicing of, Toyota automobiles and trucks in the United States including the Defective Vehicles. TMS distributes and is the warrantor for Toyota, Lexus and Scion vehicles through its network of dealers. A significant portion of Defendants' operations are located and conducted in California, including the Toyota and Lexus Sales and Service Office, Toyota Financial Services Offices, manufacturing facilities, and a Design Center. California is a Toyota Supplier State. The Toyota personnel responsible for managing Toyota's customer service division are located at TMS. Key decisions at issue herein were made by TMS officers in Torrance and its executives responsible for communications with customers and sales administration are located there. Decisions related to the preparation and distribution of the materially false and misleading marketing materials concerning the Defective Vehicles, which omitted any reference to the Defect, were made by executive officers at TMS in Torrance.

25. TMS and TMC sell Toyota and Lexus vehicles through a network of dealers who are the agents of TMS and TMC. These vehicles are also leased to

customers via local dealers through Toyota Financial Services ("TFS"). TFS is an umbrella brand name used to market TMC. The leases are prepared on the letterhead of TFS and designate Toyota Motor Credit Corporation (a California corporation and wholly owned subsidiary of TMC), as the assignee of the lease, and state that the lessor assigns to Toyota Motor Credit Corporation "all rights, title and interest in the lease and in the vehicle . . . with all powers to Toyota Motor Credit Corporation to collect and discharge all obligations related to this lease, any guaranty and this assignment." Toyota Motor Credit Corporation provides retail and wholesale financing leasing and vehicle protection plans, as well as other services, to Toyota and Lexus dealers who lease the Defective Vehicles.

26. At all relevant times, TMC has owned and controlled TMS and thereby conducted business in the United States. These defendants and their subsidiaries and agents, are collectively referred to as "Defendants," "Toyota," or the Company.

BACKGROUND

A. Toyota's Marketing Campaign Promises Safety and Leads to Consumer Trust in the Toyota Brand

27. Providing its customers with safe vehicles is Toyota's "one mission", according to an advertisement published to Toyota's website on February 10, 2010, quoting Jim Lentz, President and Chief Operating Officer of TMS:

> More than 70 years ago, Toyota was founded with one mission in mind — to provide our customers with the *safest, most reliable vehi-*

cles in the world.[1]

28. Toyota also acknowledges in the Warranty & Maintenance Guide for the Prius that quality and reliability are "key factors" consumers consider in deciding whether to buy Toyota vehicles and how important access to transportation is to their daily routines. For example, Defendants state in pertinent part:

> We realize that your confidence in the *quality and reliability of our products was a key factor in your decision to buy a Toyota*. We also know how disruptive the loss of transportation can be to your daily routine.

29. Toyota's success over the years is due, in part, to matching its marketing message to the key factors consumers consider in purchasing automobiles – the promise of safety and reliability.

30. Toyota's marketing of its "Star Safety System" illustrates the extent to which the Company's marketing is trained on delivering this message. Standard on all Toyota vehicles as of 2009, including the Defective Vehicles, the Star Safety System is comprised of five component systems, each of which depends on normal braking functionality. Toyota describes the system on its website as follows:

> Anti-Lock Braking System (ABS)
>
> Prevents brakes from locking up by "pulsing" brake pressure to each wheel to help you stay in control in emergency braking situations.
>
> Brake Assist
>
> Detects sudden or "panic" braking and adds

---

[1] At all times, emphasis is added unless otherwise indicated.

> the full pressure needed to help prevent a collision. . . Brake Assist is designed to help the driver take full advantage of the benefits of ABS.
>
> Electronic Brake-Force Distribution
>
> Redistributes brake force to help keep the rear wheels from locking up during sudden braking situations.
>
> Traction Control
>
> Helps maintain traction on wet, icy, loose or uneven surfaces by applying brake force to the spinning wheel(s).
>
> Vehicle Stability Control
>
> Helps prevent slips and loss of traction by reducing engine power and applying the brake force to the wheels that need it.

(Toyota Safety Features - Star Safety System, http://www.toyota.com/safety/star-safetv-system/). Similar statements regarding Brake Assist and Vehicle Stability Control are made in the sales brochure for the Lexus.

31. The Star Safety System was the subject of Toyota television commercials as early as January 4, 2009 which stated, in relevant part:

> Toyota's exclusive Star Safety System comes standard on every Toyota. So it's ok to be overprotective. We are Toyota Safety.

32. Bob Carter, a Toyota Division group vice president and general manager, was quoted in a June 9, 2010 press release issued by TMS in Torrance explaining that "Toyota customers tell us they want to know more about the Toyota safety story, and the Star Safety System is just one of the features

that reassure them about the safety and quality of our vehicles."

33. However, the Star Safety System is only a marketing invention that exists solely to communicate Toyota's promise of safety.

34. According to a June 29, 2010 *New York Times* article entitled "What's So Special About Toyota's Star Safety System?", the accident-prevention features were all invented by other companies long before Toyota announced the Star Safety System and, although the publicity push for the Star Safety System occurred soon after the spate of recalls that plagued Toyota beginning at the close of 2009, it was conceived of and implemented and marketed prior to that time:

> *So the Star Safety System is really a marketing invention, used only in the United States. It is a package of standard accident prevention features, all of them invented by other companies years, if not decades, ago.*
>
> "Toyota Motor Sales is not aware of any Toyota patents on the five safety technologies, but we were innovative in combining these systems economically in non-luxury vehicles," said Bob Zeinstra, Toyota's manager for advertising and strategic planning in the United States.
>
> It's not hard to guess why Toyota is making such a push on safety, considering the company's recent recalls over unintended acceleration. But in fact, Toyota's recall troubles actually delayed the onset of the Star System ad blitz.
>
> *"The decision to install the Star Safety System on every Toyota was made in 2008 and*

> *was implemented in late 2009* with the major change of the Yaris," Mr. Zeinstra said. "It was our intention to begin publicizing this industry-leading level of standard safety systems in early 2010. We were delayed a few months due to the recall publicity."

35. In fact, TMS issued a press release on January 12, 2009, from Torrance announcing the Prius and identifying the Star Safety System as one of the vehicle's "Safety Enhancements," and describing each element of the Star Safety System identified in paragraph 30 above. The January 12, 2009 press release stated that the Prius brand has been "[c]elebrated as the benchmark for cars of the future." In fact, Defendants promised that "[t]he midsize third-generation 2010 Prius will offer even better mileage ratings, enhanced performance, and innovative design features."

36. The January 12, 2009, release focused on Toyota's decade of experience building hybrid vehicles as a major selling point:

> *From the beginning, Toyota's full-hybrid system was developed in-house and has become a driving force behind advanced vehicle technology*. The company's exclusive Hybrid Synergy Drive System was introduced in 2004 on the second-generation Prius. Since then, more than 670,000 have been sold in the U.S.
>
> *In designing the new, third-generation Prius, Toyota engineers combined a careful refinement of existing systems with an aggressive measure of new technology necessary for the future of automobiles*.

37. The "careful refinement of existing systems"

by Toyota engineers and addition of an "aggressive measure of new technology" combined, according to the January 12, 2009 release, to make the Prius safer, is described as follows:

> *The next-generation Prius is built on a new platform, which enables improved handling stability, quieter operation, and collision safety.* The suspension consists of front struts and a rear intermediate beam design, as before, but handling stability is advanced by improving the stabilizer layout, higher caster angle and tuning the bushing characteristics. Disc brakes are now used on all four corners, replacing the front disc/rear drum brakes in the current model.

38. The January 12, 2009 announcement of the Prius also articulated Toyota's *promise* of safety:

> The new Prius was designed to *comply with class-top level collision safety performance* in each global region of sale, and *to accommodate increasingly strict safety requirements* in the future.

39. On May 11, 2009, shortly before it became available for purchase, Toyota revealed the marketing campaign for the Prius: "*Harmony between Man, Nature and Machine*." Like the initial announcement on January 12, 2009, a central theme of the marketing campaign was the promise of safety:

> This fully integrated marketing effort explains how consumers can get virtually everything they want for themselves in a car — *advanced technology, extra power, space, safety and 50 miles per gallon* — all while providing what nature craves most: fewer smog-forming emissions. The campaign em-

> phasizes that, for the first time, a car company has struck a balance between the needs of man and nature — by building the third-generation Prius.

40. Toyota also made an exceptional effort, as the May 11, 2009, press release issued by TMS in Torrance explains, to ensure that its safety message reached potential customers by utilizing digital advertising channels, in addition to traditional modes of advertising:

> The third-generation Prius campaign reaches consumers where they live with real-world installations, deep social networking and digital programs, and traditional media including television commercials that employ a visual technique never before seen in the U.S.

In addition to traditional TV, print and outdoor advertising elements, the May 11, 2009 release explains that Toyota's campaign included installing in a half-dozen large cities across the United States, "[o]versized solar flower sculptures . . . placed in highly interactive areas such as public parks" and "[s]olar ventilation bus shelters [to] demonstrate how solar panels on Prius' available Solar Roof are designed to help cool the parked vehicle." Toyota installed "floralscapes," which were "living billboards made of flowers" and an advertising first, alongside select California highways. The campaign also employed the Internet and mobile technology to communicate the company's message, with homepage "takeovers," a mobile website, mobile advertising, banner advertising, site sponsorship, custom programs, and an "unprecedented foray into social networking" that included programs on Facebook, Twitter and HowStuffWorks.

41. As with the Prius, Toyota promised Lexus owners a car of unparalleled safety and quality. In the Lexus Warranty and Services Guide, Toyota states that it is "committed to providing [Lexus owners] with an ownership experience that is second to none" and "wish[es] [Lexus owners] many years of ***safe*** and pleasurable driving.

42. Prior to the Lexus becoming available for purchase, Jon Bucci, TMS Vice President, Advanced Technology Department, announced on March 23, 2009, that Toyota was "proud to . . . advance our relationships with our Lexus customers by providing them the *features they need to feel safer and more secure while on the road*."

43. Moreover, the Lexus brochure says, "You'd prefer not to think about accidents, which is entirely understandable. Fortunately, we've done enough obsessing for the both of us." The brochure goes on to describe a broad range of safety features standard in the Lexus, which are subdivided into categories of adaptive safety, active safety and passive safety. Under the heading "Active Safety," Toyota lists the various components of the defective brake system, including the components of the Star Safety System:

Vehicle Stability Control (VSC)
Traction Control (TRAC)
Four-wheel power-assisted disc brakes
Electronic Controlled Braking (ECB)
Four-sensor, four-channel Anti-lock Braking System (ABS)
Brake Assist
Electronic Brakeforce Distribution (EBD)

44. Toyota's advertising of the Defective Vehicles was misleading because it failed to disclose that the Defective Vehicles are subject to the Defect.

B. Defendants' Written Warranties

45. In addition to the warranties of safety contained in Toyota's advertising of the Defective Vehicles, the vehicles are also covered by express written warranties that state that every one of its vehicles is built to "exceptional" standards:

> Every Toyota Car, Truck and SUV is *built to exceptional standards.* And that's not idle boasting.

(Warranty Information — Toyota Owners, http://www.toyotaownersonline.com/warranty/)

46. The Defective Vehicles are covered by similar "Basic Warranties" that cover "repairs and adjustments."

47. The Basic Warranty for the Prius is found in the Prius Warranty & Maintenance Guide and states, in relevant part, the following:

> **Basic Warranty**
>
> This warranty covers repairs and adjustments needed to correct defects in materials or workmanship of any part supplied by Toyota . . . Coverage is for 36 months or 36,000 miles, whichever occurs first, with the exception of wheel alignment and wheel balancing, which are covered for 12 months or 20,000 miles, whichever occurs first.

48. The Basic Warranty for the Lexus is found in the Lexus Warranty and Services Guide and states, in relevant part, the following:

> **Basic Warranty**
>
> This warranty covers repairs and adjustments needed to correct defects in materials or workmanship of any part supplied by Lex-

> us. . . Coverage is for 48 months or 50,000 miles, whichever occurs first, with the exception of wheel alignment and wheel balancing, which are covered for 12 months or 20,000 miles, whichever occurs first.

49. The Prius Warranty & Maintenance Guide contains additional General Warranty terms that include, in relevant part, the following:

> **Who Is the Warrantor**
>
> The warrantor for these limited warranties is Toyota Motor Sales, U.S.A., Inc. ("Toyota"), 19001 South Western Avenue, Torrance, California 90509-2991, a California corporation.
>
> **Which Vehicles Are Covered**
>
> These warranties apply to all 2010 model year Prius vehicles distributed by Toyota that are originally sold by an authorized dealer in the United States and normally operated or touring in the United States, U.S. territories or Canada. Warranty coverage is automatically transferred at no cost to subsequent vehicle owners.
>
> **Multiple Warranty Conditions**
>
> This booklet contains warranty terms and conditions that may vary depending on the part covered. A warranty for specific parts or systems, such as the Powertrain Warranty or Emission Performance Warranty, is governed by the coverage set forth in that warranty as well as the General Warranty Provisions.
>
> **When Warranty Begins**
>
> The warranty period begins on the vehicle's in-service date, which is the first date the vehicle is either delivered to an ultimate pur-

chaser, leased, or used as a company car or demonstrator.

Repairs Made at No Charge

Repairs and adjustments covered by these warranties are made at no charge for parts and labor.

Parts Replacement

Any needed parts replacement will be made using new or remanufactured parts. The decision whether a part should be repaired or replaced will be made by the servicing Toyota dealership and/or Toyota. Parts scheduled to be replaced as required maintenance are warranted until their first replacement only.

. . .

Your Rights Under State Law

These warranties give you specific legal rights. You may also have other rights that vary from state to state.

50. The Lexus Warranty and Services Guide also contains additional General Warranty terms that include, in relevant part, the following:

Who Is the Warrantor

The warrantor for these limited warranties is Lexus, a division of Toyota Motor Sales, U.S.A., Inc., 19001 South Western Avenue, Torrance, California 90509-2991, a California corporation.

Which Vehicles Are Covered

These warranties apply to 2010 model-year Lexus HS 250h vehicles registered and normally operated in the United States, U.S. territories and Canada. Warranty coverage

is automatically transferred at no cost to subsequent vehicle owners.

Multiple Warranty Conditions

This booklet contains warranty terms and conditions that may vary depending on the part covered. A warranty for specific parts or systems, such as the Powertrain Warranty or Emission Performance Warranty, is governed by the coverage set forth in that warranty as well as the General Warranty Provisions.

When Warranty Begins

The warranty period begins on the vehicle's in-service date, which is the first date the vehicle is either delivered to an ultimate purchaser, leased, or used as a company car or demonstrator.

Repairs Made at No Charge

Repairs and adjustments covered by these warranties are made at no charge for parts and labor.

Parts Replacement

Any needed parts replacement will be made using new or remanufactured parts. The decision whether a part should be repaired or replaced will be made by the servicing Lexus dealership and/or Lexus. Parts scheduled to be replaced as required maintenance are warranted until their first replacement only.

Note: Lexus remanufactured parts meet or exceed all factory standards for safety, quality and reliability.

. . .

Your Rights Under State Law

These warranties give you specific legal rights. You may also have other rights that vary from state to state.

51. In order to obtain warranty service in the United States, owners and lessees are required by the terms of the Defective Vehicles' respective warranty guides to "to take [their] vehicle to an authorized [Toyota/Lexus] dealership."

C. Toyota Received Complaints and Investigated the Prius and Lexus in 2009

52. As noted above, Toyota had notice of the Defect and the risk it posed to drivers and their passengers, as well as pedestrians and other drivers on the roads as early as July 2009, when Toyota received its first complaints from consumers regarding the dangerous braking problem in the Prius.

53. According to data released by the NHTSA on or about July 12, 2010, the NHTSA and Toyota had received hundreds of complaints concerning the Prius braking system, as well as dozens of reports of crashes and injuries:

FAILURE REPORT SUMMARY			
	ODI[2]	**Manufacturer**	**Total**
Complaints:	1,235	192	1,427
Crashes/Fires:	38	24	62
Injury Incidents:	4	7	11
Number of Injuries	4	8	12
Fatality Incidents	0	0	0

2 NHTSA Office of Defects Investigation ("ODI").

54. According to a February 9, 2010 article published by CNN concerning the Prius, "[t]he fact that there have been so many problem reports with relatively few of the affected 2010 models on the road suggest the problem is far more common than Toyota's other problem with sticking accelerators, which triggered a recall of 8.1 million vehicles."

55. The numerous consumer complaints regarding the Defect led the NHTSA to open a formal investigation into the matter, which the NHTSA ODI announced on February 3, 2010:

> The Office of Defects Investigation (ODI} has received 124 reports from consumers alleging a momentary reduction in braking performance while traveling over an uneven road surface, a pothole or a bump and applying the brakes. ODI has had contact with some consumers and conducted pre-investigatory field work. Some consumers describe the condition as a brief lag in braking capability or a brief surge while braking. *Four of the reports allege crashes occurred. Two of these reports allege 2 minor injuries occurred as a result of the crashes*.
>
> A Preliminary Evaluation has been opened to assess the scope, frequency and potential safety consequences of the alleged defect in the subject vehicles.

56. Despite actual knowledge of the Defect, Toyota refused to acknowledge the risk to owners, lessees and the public at large. In response to news that the NHTSA opened a formal investigation, Toyota said commenting on the situation would be "premature":

> In certain 2010 model year Prius vehicles, Toyota has received reports that some cus-

> tomers have experienced inconsistent brake feel when the vehicle is driven over potholes, bumps or slippery road surfaces.
>
> *Toyota is currently in the process of confirming these reports and investigating the vehicle driving conditions under which the reported phenomenon occurs. It would be premature to comment until the investigation has been completed*.

57. However, Toyota *first received reports concerning the Defect from its dealers at least as early as July 2009*. In fact, Toyota acknowledged in filings with the NHTSA that Defendants *received complaints regarding the Prius braking problem at least as early as August 2009* and had implemented a "running production change" to "remedy" the problem long before the NHTSA opened its investigation:

> **August 2009:** *Toyota received a field technical report from the Japan market concerning the brake performance of a Toyota Prius*. Toyota investigated the vehicle and a recovered part, however it was not confirmed that there was any abnormality.
>
> **October 2009 — January 2010:** Toyota received another field technical report from the U.S. market on a Prius which indicated issues with the VSC/brake performance. Duplication testing confirmed that the braking force after ABS actuation was reduced compared with the braking force before ABS actuation, when the brakes were applied on bumpy surfaces. After a detailed investigation, Toyota determined that the ABS system's software programming was permitting this change in braking force. *Although this*

> *system was operating as intended, Toyota made a running production change in January 2010 to improve the ABS system's response time*.
>
> **February 2010:** After further investigation, Toyota learned that many drivers have experienced the phenomenon, particularly in the winter, where it was confirmed that drivers may maintain a fixed brake pedal stroke in winter driving. Under this condition, vehicle stopping distance may increase, relative to the customers' expectations for a given pedal force. Therefore, Toyota decided to conduct a voluntary safety recall of all vehicles with the subject ABS ECUs within the affected range. The same action will also be conducted in Japan, Canada, Australia, Europe and other countries.

58. "Field technical reports," such as those that Toyota received from the American and Japanese markets that described the nature of the Defect, are non-public documents. Likewise, the "running production change" Toyota conducted to implement a "software update" to correct the Defect on the Prius was carried out *without* any announcement or other indication to consumers or the NHTSA.

D. The Prius and Lexus Are Subject to a Dangerous Defect

59. Toyota announced the Recall of the Defective Vehicles on February 8, 2010. Toyota attributed the need for the Recall to improper programming of the anti-lock brake system ("ABS") electronic control unit ("ECU") in the vehicles. When the ABS ECU is activated at the same moment a separate electronic controller is switching from the regenerative braking

system, which is used to recharge the vehicle's batteries, to the traditional hydraulic braking system, which provides greater stopping power, the result is a temporary loss of braking power.

60. Approximately 148,549 vehicles are affected by the Recall in the United States, including 133,459 Prius and 15,090 Lexus vehicles. All of the vehicles affected by the Recall in the United States were made during the following production periods and have a vehicle identification number ("VW") in the following ranges:

Make/Car Line	**VIN**		**Production Period**
	VDS	VIS	
Prius	KN36U	A5000001 - A5000074	4/20/2009 - 1/27/2010
	KN3DU	A0001044 - A0124257	
		A1000088 - A1157301	
		A5000002 - A5118198	
Lexus	BB1BA	A2000101 - A2028744	1/29/2009 - 2/8/2010

61. Toyota's February 8, 2010, announcement of the Recall, which was issued by TMS nationally as a press release, materially understates the consequence of the Defect as merely "inconsistent brake feel":

> The ABS, in normal operation, engages and disengages rapidly (many times per second) as the control system senses and reacts to tire slippage. Some 2010 model year Prius and 2010 HS 250h owners have reported experiencing inconsistent brake feel during slow and steady application of brakes on

> rough or slick road surfaces when the ABS is activated in an effort to maintain tire traction.

62. However, in February 2010 letters TMS sent directly to Prius and Lexus owners and dealerships, Toyota was more candid. Defendants acknowledged that "stopping distances may be increased," which implicates serious safety concerns:

> Although the ABS (Antilock Brake System) is operating as designed, customers are perceiving inconsistent brake feel after ABS actuation during slow and steady application of the brakes on rough or slick road surfaces, and *stopping distances may be increased compared with the customers' expectation for a given pedal force*.

Defendants also confirmed in no uncertain terms that the defect "raise[s] the likelihood of a crash":

> [Toyota] has received complaints of inconsistent brake feel during slow and steady application of brakes on rough or slick road surfaces when the anti-lock brake system (ABS) is activated in an effort to maintain tire traction. The system, in normal operation, engages and disengages rapidly (many times per second) as the control system senses and reacts to the tire slippage. *If the same brake pedal force is applied under these conditions, in the worst case, this may lead to an increase of vehicle stopping distance and thus raise the likelihood of a crash.*

63. On February 17, 2010, Akio Toyoda, President of Toyota, said that "safety standards" and "technical benchmarks" were ***not*** the reason for the Recall, but rather Toyota's priority was only "to pro-

vide customer reassurance":

> *Safety standards and technical benchmarks usually form the basis for decision-making on recalls. But in the case of the Prius and the other models, our highest priority was to provide customer reassurance*. This prompted us to decide on a recall in a very short time. This emphasis on customer reassurance will continue to be a centerpiece of our actions.

64. Remarkably, even today, Defendants continue to tell their customers that the Prius and Lexus are safe to drive, even if the defective ABS ECU has not been updated. Toyota advises drivers of Recalled Vehicles in a frequently asked questions ("FAQ") post made available on Toyota's website by TMS, which first appeared on February 8, 2010, and which is accessible today, that their vehicles are still safe despite the Defect "because pressing hard on the brake pedal will stop the vehicle":

> 7. What should 2010 Prius and Lexus HS 250h customers do if they experience this braking issue?
>
> If a Prius or Lexus HS 250h owner were to experience this condition, pressing hard on the brake pedal will stop the vehicle safely.
>
> 8. Are these vehicles safe to drive until they get their update?
>
> The vehicles are safe to drive because pressing hard on the brake pedal will stop the vehicle.

Of course, "pressing hard on the brake" after the driver has already been subjected to a surprise lack of braking power and unanticipated change in braking distance hardly addresses the issue.

65. In contrast, the NHTSA concluded that the Defect "*could be fatal for pedestrians*," according to an internal memorandum reprinted on December 24, 2009, by the Detroit Free Press:

> It appears that when you hit a bump, the regenerative braking (front wheels only) cuts out, and there is a short delay until the friction braking kicks in. This results in loss of braking, which is experienced as acceleration (due to sudden end of deceleration from braking). Net impact is still a loss of braking/increase in stopping distance. *This could be fatal for pedestrians—it happens when approaching stop lights if you hit a pothole*.

66. In fact, Toyota and the NHTSA have received and publicly disclosed *dozens* of actual accidents and injuries by Prius drivers as a result of experiencing the Defect.

67. The loss of braking power presents a threat to the safety of drivers and their passengers, as well as pedestrians and the occupants of other vehicles on the road. It is a serious and fundamental failure of safety, because it has the effect of neutralizing the vehicle's other safety mechanisms, including every component of Toyota's Star Safety System.

68. Furthermore, owners and lessors of the Defective Vehicles have reported that the "software update" installed by Toyota has failed to remedy the Defect. For example, plaintiff Kramer has had the software updated installed on her Prius, but continues to experience the loss of braking power associated with the Defect. Ms. Kramer is not alone as other Class members have continued to experience the Defect after receiving the software update. For example, members of a forum hosted by PriusChat.com,

an independent Toyota Prius enthusiast website, report that they continue to experience the Defect even after receiving the "software update."

69. As one forum member posted on March 14, 2010 under the name "bruce farrel":

> *I had the ECU update to correct the braking problem done this weekend. But tonight I experienced the braking problem again.* Is anyone else continuing to have this problem after the recall work was completed?

70. In a post on March 15, 2010, user "bruce farrel" followed up with additional detail:

> Before the upgrade I experienced the brake problem 4 times (after 1st 3 I did some research and found the 100 complaints at NHTSA). First time was going over a small icy patch, 2nd and 3rd on speed bumps in a parking lot on wet pavement. Speed was slow and braking was moderate (regen engaged I assume). 4th time was on snow covered road. I could make the condition occur at will. Car slowed nicely then brakes just released and car just cruised until more pressure was applied and friction brakes engaged).
>
> *After the fix I was driving at about 20 mph on wet pavement, in the rain and slowing when I hit a bump and the brakes released again. It doesn't feel all that terrible but I am afraid it will happen one day at an intersection and I'll end up in cross traffic*.

71. On April 30, 2010, another user posting under the user name "robjohn" posted that he too continued to experience the Defect:

> Sorry I haven't tuned in for a while and missed the poll. *I had the problem, got the fix and notice no improvement*.

72. On May 2, 2010, a user posting under the user name "nittanycheeseboy" also posted that he continued to experience the Defect:

> Expereinced [sic] the braking problem once before the update . . . got it . . . experienced the exact same probalem [sic] at the exact same location last week. *Didn't solve anything*.

73. Thus, for Kramer and other Class members that continue to experience the Defect, Toyota has failed to remedy this fundamental safety problem.

E. Plaintiffs would not have Purchased the Defective Vehicles had They Known About the Defect and the Present and Future Values of the Defective Vehicles have Declined

74. It is indisputable that a car purchased or leased under the reasonable assumption that it is "safe" as advertised is worth more than a car subject to a dangerous defect that increases the likelihood of a crash. The purchasers and lessees of the Defective Vehicles would not have purchased their vehicles had they known about the Defect. They purchased the Defective Vehicles believing they were safe and defect-free, when that was not the case. The present and future values of the Defective Vehicles have diminished at a greater rate than standard depreciation as a result of the Defect. Furthermore, the inability to remedy the Defect has decreased the present and future value of the Defective Vehicles.

75. On February 10, 2010, Kelley Blue Book issued a press release entitled "Toyota Brand Consid-

eration, Vehicle Interest, Values Continue to Decline" that describes this shift and the effect on the value of the Prius:

> According to the latest Kelley Blue Book Market Intelligence data, Toyota consideration and interest has dropped even further in the past week as the company continues to issue massive recall announcements. The latest kbb.com study results show 27 percent of those who said they were considering a Toyota prior to the recall now say they no longer are considering the brand for their next vehicle purchase, an increase of six percent from the 21 percent who indicated they had defected from Toyota the prior week (immediately following the initial recall announcement).
>
> In addition, now 28 percent of those who said they were considering a Scion and 23 percent of those who said they were considering a Lexus prior to the Toyota recalls, now say they are no longer considering those brands.
>
> Now nearly half (49 percent) of the car shoppers who have defected from Toyota say they are not sure if they will consider the brand again, even once Toyota's problems are resolved.
>
> *Kelley Blue Book updates its famous Blue Book Values on a weekly basis, and the values continue to fall for Toyota models affected by the recall announcements. On February 5, 2010, company analysts initially decreased the used-car values of recalled Toyotas by 1 - 3 percent in response to the slowing demand for Toyota models in the marketplace follow-*

ing the consumer recall. This coming Friday, February 12, Kelley Blue Book will once again adjust values for these vehicles downward by an additional 1.5 percent on concerns around the growing supply of unsold Toyotas on both dealer lots and at auctions. The latest announcements about new 2010 Priuses and late-model 2009-2010 Corollas also have affected not just used-car values, but also new-car (transaction) values. After the latest Prius recall news, consumers can pick up a brand-new 2010 Prius closer to dealer invoice price than its suggested retail price, a difference of $1,000 - $1,500.

Kelley Blue Book Values Summary for Toyota

- All Used Recalled Toyota Models: Used-car values declined 1-3 percent (depending on the model) on February 5, 2010, and will drop an additional 1.5 percent on Friday, February 12, 2010
- New 2010 Prius: New Car Blue Book® Value (transaction price) will drop by $1,000 - $1,500 on February 12, 2010
- Used Prius, 2009 and older models: Used-car value dropped 1.5 percent on February 5, 2010, and will drop an additional 1.5 percent on February 12, 2010
- Used Corolla, 2009 and older models: Used-car values dropped 1.5 percent on February 5, 2010, and will drop an additional 1.5 percent on February 12, 2010

"We are seeing a softening of both used Toyota values and the New Car Blue Book values of new Toyotas this week," said Juan Flores,

> director of vehicle valuation, Kelley Blue Book. "The softening of values is a product of weakened consumer demand, and the realization that Toyota is going to have to offer lower prices to get some consumers to consider Toyota vehicles again."

76. Toward the end of 2010, Kelley Blue analysts reported that the residual value for the Prius declined 5% from 2010 to 2011. Additionally, Prius new car sales significantly decreased in 2010 as compared to 2009.

77. As a result of the Defect and Toyota's conduct alleged herein, Plaintiffs and the Class have suffered, and continue to suffer, injuries to which they are entitled to immediate legal recourse.

CLASS ACTION ALLEGATIONS

78. Plaintiffs bring this action as a class action pursuant to *Federal Rule of Civil Procedure* ("F.R.C.P.") Rule 23(a), (b)(2) and (b)(3), on behalf of themselves and the following class (the "Class"):

> All individuals or entities who purchased or leased a Model Year 2010 Toyota Prius or Model Year 2010 Lexus HS 250h in the United States.

79. Excluded from the Class are Defendants, their employees, officers, directors, legal representatives, heirs, successors and wholly or partly owned subsidiaries or affiliated companies.

80. Pursuant to F.R.C.P. Rule 23(a)(1), the Class is so numerous that joinder of all members is impracticable. Due to the nature of the trade and commerce involved, the members of the Class are geographically dispersed throughout the United States and joinder of all Class members would be impracticable.

While the exact number of Class members is unknown to Plaintiffs at this time, Plaintiffs believe that there are nearly 150,000 members of the Class.

81. Pursuant to F.R.C.P. Rule 23(a)(3), Plaintiffs' claims are typical of the claims of the other members of the Class. Plaintiffs and other Class members received the same standardized warranties and nondisclosures with respect to the Defective Vehicles which misrepresented the safety of the Defective Vehicles. Defendants' misrepresentations were made pursuant to a standardized policy and procedure implemented by Toyota. Plaintiffs and the Class members would not have purchased or leased the Defective Vehicles if they had known they were subject to the Defect. Plaintiffs and the members of the Class have all sustained injury because they purchased or leased unsafe vehicles and because the value of those vehicles have diminished.

82. Pursuant to F.R.C.P. Rule 23(a)(4) and (g)(1), Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action and consumer fraud litigation.

83. Pursuant to F.R.C.P. Rule 23(b)(2), Toyota has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

84. Pursuant to F.R.C.P. Rule 23(a)(2) and (b)(3), common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members thereof. Among the common questions of law and fact are as follows:

a. Whether Toyota had knowledge of the

Defect prior to its issuance of the Recall;

b. Whether Toyota concealed the Defect;

c. Whether Toyota misrepresented the safety of the Defective Vehicles;

d. Whether Toyota's misrepresentations and omissions regarding the safety of the Defective Vehicles were likely to deceive a reasonable person in violation of the CLRA;

e. Whether Toyota violated the unlawful prong of the UCL by its violation of the CLRA;

f. Whether Toyota's misrepresentations and omissions regarding the safety of the Defective Vehicles were likely to deceive a reasonable person in violation of the fraudulent prong of the UCL;

g. Whether Toyota's business practices, including the manufacture and sale of vehicles with a brake defect that Defendants have failed to adequately investigate, disclose and remedy, offend established public policy and cause harm to consumers that greatly outweighs any benefits associated with those practices;

h. Whether Toyota's misrepresentations and omissions regarding the safety of the Defective Vehicles were likely to deceive a reasonable person in violation of the FAL;

i. Whether Toyota breached the implied warranty of merchantability because the Defective Vehicles were not fit for their ordinary purpose due to the Defect;

j. Whether Plaintiffs and Class members are entitled to damages, restitution, restitutionary disgorgement, equitable relief, and/or other relief; and

k. The amount and nature of such relief to be awarded to Plaintiffs and the Class.

85. Pursuant to F.RC.P. Rule 23(b)(3), a class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all Class members is impracticable. The prosecution of separate actions by individual members of the Class would impose heavy burdens upon the Court and the parties, and would create a risk of inconsistent or varying adjudications of the questions of law and fact. A class action would achieve substantial economies of time, effort and expense, and would assure uniformity of decision as to persons similarly situated without sacrificing procedural fairness.

86. Plaintiffs and the Class members purchased or leased the Defective Vehicles in transactions in which Toyota failed to disclose and misrepresented material facts related to a vehicle's essential purpose – safe transportation. As a result, no Plaintiff or Class member received the benefit of their bargain and/or overpaid for their vehicles, and/or made lease payments that were too high.

COUNT I
VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT
(Cal. Civ. Code § 1750, *et seq*.)

87. Plaintiffs repeat and reallege the allegations of the preceding paragraphs, as if fully set forth herein.

88. At all relevant times, the Defective Vehicles constituted "goods," as that term is defined in California *Civil Code* § 1761(a).

89. Defendants are "persons" under California Civil Code § 1761(c).

90. Plaintiffs are "consumers," as defined by California *Civil Code* § 1761(d), who purchased or leased one or more Defective Vehicles.

91. At all relevant times, Plaintiffs' purchases of the Defective Vehicles constituted a "transaction," as that term is defined in California *Civil Code* § 1761(e).

92. Plaintiffs attach herewith affidavits by Plaintiffs that show venue in this District is proper, to the extent such affidavits are required by California *Civil Code* § 1780(d).

93. Defendants participated in unfair or deceptive acts or practices that violated the CLRA, California *Civil Code* § 1750, *et seq.*, as described above and below. Defendants are each directly liable for these violations of law. TMC is also liable for TMS's violations of the CLRA because TMS acts as TMC's general agent in the United States for purposes of sales and marketing.

94. By failing to disclose and actively concealing the dangerous risk of loss of braking control in the Defective Vehicles, Defendants engaged in deceptive business practices prohibited by the CLRA, including, but not limited to: (1) representing that the Defective Vehicles have characteristics, uses, benefits, and qualities which they do not have; (2) representing that the Defective Vehicles are of a particular standard, quality, and grade when they are not; (3) advertising the Defective Vehicles with the intent not to sell them as advertised; (4) representing that a transaction involving the Defective Vehicles confers or involves rights, remedies, and obligations which it does not; and (5) representing that the subject of a transaction involving the Defective Vehicles has been supplied in accordance with a previous representa-

tion when it has not.

95. As alleged above, Defendants made numerous material statements about the safety of the Defective Vehicles that were misleading. Each of these statements contributed to the deceptive context of Defendants' unlawful advertising and representations as a whole.

96. Defendants knew that the Defective Vehicles were subject to the Defect and not suitable for their intended use. Defendants nevertheless failed to warn Plaintiffs about the inherent dangers despite having a duty to do so.

97. Defendants owed Plaintiffs a duty to disclose the defective nature of the Defective Vehicles, because they possessed exclusive knowledge of the Defect rendering the Defective Vehicles inherently more dangerous and unreliable than other vehicles.

98. The Defective Vehicles pose an unreasonable risk of death or serious bodily injury to Plaintiffs, passengers, other motorists, pedestrians, and the public at large, because they are subject to the Defect.

99. Whether or not a vehicle will brake when it is supposed to is a fact that a reasonable consumer would consider important in selecting a vehicle to purchase or lease. When Plaintiffs purchased or leased Defective Vehicles, they reasonably expected the vehicles would brake when and how they were supposed to.

100. Defendants' unfair or deceptive acts or practices were likely to, and did in fact, deceive reasonable consumers, including Plaintiffs, about the true safety of the Defective Vehicles.

101. As a result of their violations of the CLRA

detailed above, Defendants caused actual damage to Plaintiffs and, if not stopped, will continue to harm Plaintiffs. Plaintiffs and the Class members currently own or lease, or within the applicable time period owned or leased, Defective Vehicles that are subject to the Defect and inherently unsafe. The Defect and resulting increase in the likelihood of a crash have caused the value of the Defective Vehicles to decline.

102. Plaintiffs risk irreparable injury as a result of Defendants' acts and omissions in violation of the CLRA, and these violations present a continuing risk to Plaintiffs as well as the general public.

103. Notice was sent to Defendants in compliance with California *Civil Code* § 1782 by Plaintiff Kramer on February 11, 2010 and February 25, 2011. Over thirty days have since passed without Defendants taking, or agreeing to take, the appropriate corrective measures.

104. Pursuant to California *Civil Code* § 1780(a), Plaintiffs seek monetary relief against Defendants measured as the greater of (a) actual damages in an amount to be determined at trial and (b) statutory damages for each Plaintiff and each member of the Class Plaintiffs seek to represent.

105. Pursuant to California *Civil Code* § 1780(b), Plaintiffs seek an additional award against Defendants of up to $5,000 for each Class member who qualifies as a "senior citizen" or "disabled person" under the CLRA. Defendants knew or should have known that their conduct was directed to one or more members of the Class who are senior citizens or disabled persons. Defendants' conduct caused one or more of these senior citizens or disabled persons to suffer a substantial loss of property set aside for retirement or for personal or family care

and maintenance, or assets essential to the health or welfare of the senior citizen or disabled person. Class members who are senior citizens or disabled persons are substantially more vulnerable to Defendants' conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and each of them actually suffered substantial physical, emotional, or economic damage resulting from Defendants' conduct.

106. Plaintiffs also seek punitive damages against Defendants because each carried out despicable conduct with willful and conscious disregard of the rights and safety of others, subjecting Plaintiffs and Class members to cruel and unjust hardship as a result. Defendants intentionally and willfully misrepresented the safety and reliability of the Defective Vehicles, deceived Plaintiffs on critical matters concerning personal safety and the safety of others, and concealed material facts that only they knew, all to avoid the expense and public relations nightmare of correcting the Defect in the vehicles they repeatedly promised were safe. Defendants' unlawful conduct constitutes malice, oppression, and fraud warranting punitive damages.

107. The purported repairs instituted by Toyota in connection with the Recall have not been adequate. In fact, as alleged above, Plaintiff Kramer and other Class members report that the Defective Vehicles are still defective.

108. Plaintiffs further seek an Order enjoining Defendants' unfair or deceptive acts or practices, restitution, punitive damages, costs of Court, attorney's fees under California *Civil Code* § 1780(e), and any other just and proper relief available under the CLRA.

COUNT II
VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW
(CAL. BUS. & PROF. CODE § 17200, *et seq.*)

109. Plaintiffs repeat and reallege the allegations of the preceding paragraphs, as if fully set forth herein.

110. California *Business and Professions Code* § 17200, *et seq.*, prohibits any "unlawful, unfair, or fraudulent business act or practices." Defendants have engaged in unlawful, fraudulent, and unfair business acts and practices in violation of the UCL.

111. Defendants have violated the unlawful prong of § 17200 by their violations of the CLRA, California *Civil Code* § 1750, *et seq.*, as set forth in Count l by the acts and practices set forth in this Complaint.

112. Defendants have violated the fraudulent prong of § 17200 because the misrepresentations and omissions regarding the safety of the Defective Vehicles as set forth in this Complaint, were likely to deceive a reasonable consumer, and the information would be material to a reasonable consumer.

113. Defendants have violated the unfair prong of § 17200 because the acts and practices set forth herein, including the manufacture and sale or lease of vehicles subject to the Defect, and Defendants' failure to adequately investigate and disclose the Defect and remedy offend established public policy, and because the harm they cause to consumers greatly outweighs any benefits associated with those practices.

114. Defendants' conduct has also impaired competition within the automotive vehicles market and has prevented Plaintiffs and Class members

from making fully informed decisions about whether to purchase or lease the Defective Vehicles.

115. Plaintiffs have suffered an injury in fact, including the loss of money or property, as a result of Defendants' unfair, unlawful and/or deceptive practices. As set forth above, in purchasing or leasing their vehicles, Plaintiffs relied on Defendants' misrepresentations and/or omissions with respect to the safety of the Defective Vehicles. Toyota's representations turned out to be untrue because the Defective Vehicles were subject to the Defect, which increased the likelihood of a crash. Had Plaintiffs and Class members known this, they would not have purchased or leased their Defective Vehicles and/or paid as much for these vehicles.

116. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in the State of California and nationwide.

117. Plaintiffs request that this Court enter such orders or judgments as may be necessary to enjoin Defendants from continuing their unfair, unlawful, and/or deceptive practices and to restore to Plaintiffs and members of the Class any money Toyota acquired by unfair competition, including restitution and/or restitutionary disgorgement, as provided in California *Business & Professions Code* § 17203 and California *Civil Code* § 3345, and for such other relief set forth below.

COUNT III
VIOLATION OF THE CALIFORNIA FALSE ADVERTISING LAW
(CAL. BUS. & PROF. CODE § 17500, *et seq*.)

118. Plaintiffs repeat and reallege the allegations of the preceding paragraphs, as if fully set forth herein.

119. California *Business and Professions Code* § 17500 states: "It is unlawful for any . . . corporation . . . with intent directly or indirectly to dispose of real or personal property . . . to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated . . . from this state before the public in any state, in any newspaper or other publication, or any advertising device, . . . or in any other manner or means whatever, including over the Internet, any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

120. Defendants caused to be made or disseminated through California and the United States, through advertising, marketing and other publications, statements that were untrue or misleading, and which were known, or which by the exercise of reasonable care should have been known to Defendants, to be untrue and misleading to Plaintiffs and members of the Class.

121. Defendants have violated § 17500 because the misrepresentations and omissions regarding the safety and reliability of the Defective Vehicles as set forth herein were material and likely to deceive a reasonable consumer.

122. Plaintiffs and members of the Class have suffered injury in fact, including the loss of money or

property, as a result of Defendants' unfair, unlawful and/or deceptive practices. In purchasing or leasing their vehicles, Plaintiffs relied on the misrepresentations and/or omissions of Toyota with respect to the safety and reliability of the Defective Vehicles. Toyota's representations turned out not to be true because the Defective Vehicles were subject to the Defect, which increased the likelihood of a crash. Had Plaintiffs and Class members known this, they would not have purchased or leased their Defective Vehicles.

123. Plaintiffs overpaid for their Defective Vehicles and did not receive the benefit of their bargain. One way to measure this overpayment, or lost benefit of the bargain, at the moment of purchase, is by the value consumers place on the vehicles now that the truth has been exposed. Both prices for new Defective Vehicles and prices for used Defective Vehicles have declined as a result of Defendants' misconduct. This decline in value measures the overpayment, or lost benefit of the bargain, at the time of Plaintiffs' purchases.

124. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in the State of California and nationwide.

125. Plaintiffs request that this Court enter such orders or judgments as may be necessary to enjoin Defendants from continuing their unfair, unlawful, and/or deceptive practices and to restore to Plaintiffs and members of the Class any money Toyota acquired by unfair competition, including restitution and/or restitutionary disgorgement, and for such

other relief set forth below.

COUNT IV
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY
(CAL. COM. CODE § 2314)

126. Plaintiffs repeat and reallege the allegations of the preceding paragraphs, as if fully set forth herein.

127. Toyota is and was at all relevant times a merchant with respect to motor vehicles under California *Commercial Code* § 2104.

128. A warranty that the Defective Vehicles were in merchantable condition was implied by law in the instant transactions, pursuant to California *Commercial Code* § 2314.

129. The subject vehicles, when sold and at all times thereafter, were not in merchantable condition and are not fit for the ordinary purpose for which cars are used. Specifically, the Defective Vehicles are inherently defective in that there is a safety defect in the braking system that increases stopping distance relative to driver expectations in certain circumstances.

130. Toyota was provided notice of these issues by numerous complaints filed against it, including the instant action, and by numerous individual letters and communications sent by Plaintiffs and members of the Class before or within a reasonable amount of time after Toyota issued the Recall and the allegations of the Defect became public.

131. Plaintiffs and Class members have had sufficient direct dealings with either Defendants or their agents (dealerships/lessors) to establish privity of contract between Plaintiffs and the Class mem-

bers. Notwithstanding this, privity is not required in this case because Plaintiffs and Class members are intended third-party beneficiaries of contracts between Toyota and its dealers/lessors. Specifically, they are the intended beneficiaries of Toyota's implied warranties. The dealers/lessors were not intended to be the ultimate consumers of the Defective Vehicles and have no rights under the warranty agreements provided with the Defective Vehicles. The warranty agreements were designed for and intended to benefit the ultimate consumers only. Finally, privity is also not required because Plaintiffs' and Class members' Defective Vehicles are dangerous instrumentalities due to the aforementioned defects and nonconformities.

132. As a direct and proximate result of Toyota's breach of warranties of merchantability, Plaintiffs and the Class have been damaged in an amount to be proven at trial.

COUNT V
BREACH OF CONTRACT

133. Plaintiffs repeat and reallege the allegations of the preceding paragraphs, as if fully set forth herein.

134. To the extent Toyota's repair or adjust commitment is deemed not to be a warranty under California's *Commercial Code*, Plaintiffs plead in the alternative under common law warranty and contract law. Toyota limited the remedies available to Plaintiffs and the Class to just repairs and adjustments needed to correct defects in materials or workmanship of any part supplied by Toyota and/or warranted the quality or nature of those services to Plaintiffs.

135. Toyota breathed this warranty or contract

obligation by failing to repair the Defective Vehicles evidencing the Defect, including those that were recalled, or to replace them.

136. As a direct and proximate result of Defendants' breach of contract or common law warranty, Plaintiffs and the Class have been damaged in an amount to be proven at trial, which shall include, but is not limited to, all compensatory damages, incidental and consequential damages, and other damages allowed by law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs on behalf of themselves, and on behalf of the proposed Class, pray as follows:

A. For an Order certifying this action as a class action, appointing Plaintiffs as representatives of the Class and appointing their attorneys as counsel for the Class;

B. Injunctive relief, restitution, statutory, and punitive damages under the CLRA;

C. Restitution or restitutionary disgorgement as provided in Cal. Bus. & Prof. Code § 17203 and Cal. Civ. Code. § 3343;

D. Injunctive relief, restitution and appropriate relief under Cal. Bus. & Prof. Code § 17500;

E. Appropriate damages for breach of implied warranty;

F. Revocation of acceptance;

G. Punitive damages;

H. Attorneys' fees and expenses, including costs for experts;

I. An injunction ordering Toyota to implement an effective remedy for the Defect; and

J. Such other and further relief that the Court deems appropriate and just under the circumstances.

JURY TRIAL DEMAND

Plaintiffs, individually and on behalf of all others similarly situated, demand a trial by jury.

Dated: April 26, 2011

GLANCY BINKOW & GOLDBERG LLP
By: s/

Michael Goldberg
Marc Godino
1801 Avenue of the Stars
Suite 311
Los Angeles, CA 90067
Phone: (310) 201-9150
Fax: (310) 201-9160

Liaison counsel

* * *

APPENDIX D

Excerpts of Michael Choi Purchase Agreement

* * *

Buyer Name and Address (Including County and Zip Code)	Co-Buyer Name and Address (Including County and Zip Code)	Creditor-Seller (Name
MICHAEL KYE-WON CHOI		SLS: ASKARI, HASSAN LONGO TOYOTA 3534 N PECK RD EL MONTE CA 91731-2318

You, the Buyer (and Co-Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Creditor-Seller (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below. We will figure your finance charge on a daily basis. The Truth-in-Lending Disclosures below are part of this contract.

New Used	Year	Make and Model	Odometer	Vehicle Identification Number	Primary Use For Which Purchased
NEW	2010	TOYOTA PRIUS	7		XX personal, family or household

* * *

YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON

THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT.

s/	07/31/2009
Buyer Signature	Date

* * *

ARBITRATION CLAUSE

PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.

2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.

3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, 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. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arbforum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be

reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unen-

forceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.

* * *

APPENDIX E

Excerpts of Alexsandra Del Real
Purchase Agreement

* * *

Buyer Name and Address (Including County and Zip Code) ALEXSANDRA DEL REAL		Creditor-Seller (Name and Address) CROWN TOYOTA 1201 KETTERING DR ONTARIO, CA 91761

* * *

New Used	Year	Make and Model
NEW	2010	PRIUS TOYOTA

* * *

YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT.

s/	06/12/09
Buyer Signature	Date

* * *

ARBITRATION CLAUSE

PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.

2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.

3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, 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. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arbforum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties,

except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.

* * *

APPENDIX F

Excerpts of Michael Scholten Purchase Agreement

DEALERSHIP:	TOYOTA OF RICHARDSON	ADDRESS:	1221 N. CENTRAL EXPWY
CITY, STATE:	RICHARDSON, TX 75080	PHONE:	972-238-4400

Salesperson 1	Salesperson 2	Date Sold	Date Delivered
SKOLNICK, JEFF		11/10/2009	11/10/2009
Purchaser's Name	Co-Buyer's Name		
MICHAEL SCHOLTEN			

* * *

Buyer agrees that this Agreement includes all of the terms and conditions on all pages of this Agreement. Buyer agrees that this Agreement cancels and suspends any prior agreement and as of the date below comprises with any retain installment sales agreement or lease, and the Conditional Delivery Agreement, the complete and exclusive statement of the terms of the agreement relating to the subject matters covered by this Agreement. Buyer by signing this Agreement certifies that he/she is of legal age or older and acknowledges that he/she has read its terms and has received a true copy of this Agreement.

If Buyer is buying the Vehicle for cash (this includes a Buyer arranging Buyer's own financing from a

party other than dealer), this Agreement shall become final and binding when it is signed by Dealer's authorized representative.

If Buyer is buying the Vehicle in a credit sale transaction with Dealer evidenced by a signed retail installment sales agreement, this Agreement only becomes binding when a retail installment sales agreement has been fully executed by both Buyer and Seller.

BUYER HAS READ THE OTHER SIDE OF THIS AGREEMENT, INCLUDING THE ARBITRATION CLAUSE, AND AGREES TO ALL TERMS AND CONDITIONS IN THIS AGREEMENT.

BUYER SIGNS	s/	DATE	11/10/2009	s/
CO-BUYER SIGNS	s/	DATE	11/10/2009	MANAGER'S APPROVAL (Must Be Accepted by Authorized Representative of the Dealer)
			DATE	11/10/2009

* * *

12. ARBITRATION CLAUSE

This Arbitration Clause significantly affects your rights in any dispute with us. Please read the Arbitration Clause carefully before you sign this Agreement.

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND US

DECIDED BY ARBITRATION, RATHER THAN IN COURT OR BY JURY TRIAL.

2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLAIM YOU MAY HAVE AGAINST US. YOU WILL GIVE UP ANY RIGHT TO CLASS ARBITRATION AND TO ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.

3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT. OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

If either you or we elect, any claims or disputes arising out of this transaction, or relating to it, will be determined by binding arbitration and not by court action. This includes all claims and disputes arising out of, or relating to: the vehicle, your credit application, this contract, the sale or financing of the vehicle, and any collection activities.

This Arbitration Clause applies to any claims or disputes between you and anyone to whom we transfer this contract, whether or not they sign this contract. It also applies to our employees and agents, whether or not they sign this contract.

This Arbitration Clause applies, regardless of whether the claims or disputes arise in contract, tort, statute or otherwise. It also applies to any claim or dispute about the interpretation and scope of this Arbitration Clause. It also applies to any claim or dispute about whether a claim or dispute should be determined by arbitration.

Any claim or dispute is to be arbitrated by a single arbitrator who will arbitrate only your own claims

and not the claims of a class of persons. You expressly waive any right you may have to arbitrate a class action.

You may choose one of the following arbitration organizations and its applicable rules: the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose if we agree to that organization. You may get a copy of the rules of any of these organizations by contacting it or visiting its website.

The arbitrators will be attorneys or retired judges. They will be selected under the rules of the arbitration organization. The arbitrator will apply governing substantive law in making an award.

The arbitration hearing will be conducted in the federal district where you live, unless the seller of the vehicle is a party to the claim or dispute. If the seller is a party, then the hearing will be held where the contract was signed. We will advance your arbitration costs up to a total limit of $1,500 for filing fee, administration fee, service fee, case management fee, and arbitrator or hearing fee. The arbitrator can decide to require you to reimburse these costs.

Each party will be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this clause, this clause will control.

The arbitrator's award will be final and binding on all parties, except that if the arbitrator's award for a party is $0 or against a party exceeds $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-

arbitrator panel. The appealing party requesting new arbitration shall be responsible for its filing fee and other arbitration costs, but the arbitrators may decide who pays how much.

Any arbitration under this Arbitration Clause will be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

You and we keep our rights to self-help remedies, such as repossession. You and we also keep the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless the action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award.

This Arbitration Clause will survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder will remain enforceable.

If you notify us by certified mail at P.O. Box 16460, Phoenix, AZ 85011, within 30 days of the date of this Order that you elect not to be bound by the terms of this Arbitration Clause, this Arbitration Clause will not apply.

APPENDIX G

9 U.S.C. § 2 provides:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3 provides:

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4 provides:

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith 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. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue,

and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.