Tentative Rulings for February 23, 2022
Department 502

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

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

19CECG04240 ***Arana v. K. Hovnanian at Valle Del Sol, LLC*** **is continued to Wednesday, March 16, 2022 at 3:30 p.m. in Dept. 502**

21CECG01048 **Maria *Manzo v. Shogy Ahmed* is continued to Thursday, March 17, 2022 at 3:30 p.m. in Dept. 502**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

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(20)

Tentative Ruling

Re: ***Greer v. FCA US, LLC***
Superior Court Case No. 20CECG03149

Hearing Date: February 23, 2022 (Dept. 502)

Motion: Defendant FCA US, LLC's Motion to Compel Arbitration and Stay Action

Tentative Ruling:

To deny the motion by FCS US, LLC. To take off calendar the motion by Fresno Chrysler Dodge Jeep Ram, in light of its dismissal.

Explanation:

On 6/29/13 plaintiffs purchased a 2013 Dodge Ram 1500 from Fresno Chrysler Dodge Jeep Ram ("Fresno Chrysler"), which vehicle was manufactured or distributed by defendant FCA US, LLC ("FCA"). As a part of that transaction, plaintiffs signed a Retail Installment Sales Contract ("RISC") which contained an arbitration clause.

Problems with the vehicle ensued, and this "lemon law" action was filed on 10/23/20, against both Fresno Chrysler and FCA. The operative pleading is the First Amended Complaint, alleging the following causes of action against FCA only:

(1) Violation of Subdivision (d) of Civil Code section 1793.2;
(2) Violation of Subdivision (b) of Civil Code section 1793.2;
(3) Violation of Subdivision (a)(3) of Civil Code section 1793.2;
(4) Breach of Express Written Warranty;
(5) Breach of the Implied Warranty of Merchantability; and
(6) Fraudulent Inducement — Concealment.

In the original complaint the fifth cause of action was asserted against Fresno Chrysler only. The FAC asserts no cause of action against Fresno Chrysler.

On 7/16/21 both Fresno Chrysler and FCA filed motions to compel arbitration, and FCA filed a joinder in Fresno Chrysler's motion. On 2/8/22, at the same time as filing the opposition, plaintiffs voluntarily dismissed Fresno Chrysler, leaving FCA as the sole defendant. Thus, Fresno Chrysler's motion should come off calendar.

Requests for Judicial Notice and Objections

Plaintiff filed a request for judicial notice of: (1) a recent published Ninth Circuit Court of Appeals decision; (2) numerous federal district court orders denying petitions to compel arbitration; and (3) two published California Court of Appeals decisions.

Defendant filed objections to all of these exhibits. Unpublished federal court opinions can be properly cited in a state court legal brief, therefore it is not improper to take judicial notice of them, for ease of reference. The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to unpublished decisions from the lower federal courts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 ["Citing unpublished federal opinions does not violate our rules."].) Like published decisions of the lower federal courts, unpublished decisions are not binding on state courts even on questions of federal law, but they are persuasive authority. (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.) Similarly, there is no reason not to take judicial notice of a published federal appeals court decision. As for defendant's objection to *a published state appellate court opinions*, the court is mystified as to why defendant would suppose these decisions could not be judicially noticed, again simply for ease of reference.

Plaintiff's counsel filed a declaration attaching FCA's Express Warranty Booklet. FCA correctly objects to paragraph 1 and exhibit 1 of the Law Declaration. The objection is sustained, as no foundation is laid for counsel's ability to authenticate the exhibit. The sustaining of the objection has no impact on the motion.

Applicable Law

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) However, there is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505) "Thus, in ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute." (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 541.)

FCA admits it is not a signatory to the arbitration agreement in question. (Mot., p. 8:28.) "Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it." (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) "The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142, internal quotes and citation omitted.) "However, both California and federal courts have recognized limited exceptions to this rule, allowing nonsignatories to an agreement containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement." (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352.) Here, FCA contends it may compel arbitration as a third party beneficiary of the contract or alternatively under the theory of equitable estoppel. (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 301, 306; *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 230.) These are considered in turn.

Pertinent Language of the Arbitration Agreement

As pertinent to the issue of standing to compel arbitration based on either equitable estoppel or as a third party beneficiary, the arbitration agreement included in the RISC plaintiff signed includes the following provisions.

On the front side of the RISC, in a separate box that plaintiffs signed, it states: "Agreement to Arbitrate. By signing below, you agree that, pursuant to the Arbitration Provision, on the reverse side of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate." (RISC, Tudzin Decl., Exhs. A and B.)

The RISC further provides in bold, capitalized letters, "YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION PROVISION ON THE REVERSE SIDE, BEFORE SIGNING BELOW." (RISC, Tudzin Decl., Exh. A.)

The first full paragraph of the arbitration agreement provides,

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

(RISC, Tudzin Decl., Exhs. A and B.)

The first page of the RISC indicates that the word "you" refers to "the Buyer" (i.e., plaintiffs), and the words "we" or "us" refers to the "Creditor – Seller" (i.e., FCA). (RISC, Tudzin Decl., Exhs. A and B, p. 1.)

Third-Party Beneficiary

Third-party beneficiaries are permitted to enforce arbitration clauses even if not named in the agreement. (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 856.) FCA contends that it can enforce the arbitration agreement as a third party beneficiary to the RISC. The arbitration agreement expressly states it applies to "any resulting transaction or relationship (*including any such relationship with third parties who do not sign this contract*) …"

"A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit." (*Jensen v. U-Haul Co. of California*, *supra,* 18 Cal.App.5th at p. 301, citing and quoting *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 602.) The intent to benefit that third party must appear from the terms of the contract. (*Ibid.*) The third party must show that the arbitration clause was "made expressly for his benefit." (*Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 552.) "A nonsignatory is entitled to bring an action to enforce a contract as a third party

beneficiary if the nonsignatory establishes that it was likely to benefit from the contract, that a motivating purpose of the contracting parties was to provide a benefit to the third party, and that permitting the third party to enforce the contract against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Hom v. Petrou* (2021) 67 Cal.App.5th 459, citing *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821.)

As applied to the facts here, the mere fact that the RISC contains a reference to "third parties" and that defendant is a "third party" does not show that the arbitration clause was expressly intended to benefit any particular third party, much less does it show that this provision was made expressly for FCA's benefit. There is nothing in the RISC indicating that the motivating purpose for the parties to the contract was to benefit FCA, or that allowing FCA to independently compel arbitration was within the parties' reasonable expectations at the time of contracting. The court cannot find FCA to be a third party beneficiary of the arbitration agreement.

FCA relies on a recent opinion out of the Third District Court of Appeal, *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 ("*Felisilda*") in arguing that it has standing to compel arbitration as a third-party beneficiary. In *Felisilda*, the motion to compel arbitration was filed by the dealership (Elk Grove Dodge), and included a request that its co-defendant, manufacturer FCA, US, LLC ("FCA") also be included as a party to the arbitration. (*Id.* at p. 498.) FCA filed a notice of nonopposition. (*Ibid.*) The trial court granted the motion. After the motion was granted, plaintiff dismissed Elk Grove Dodge. (*Id.* at p. 489.) FCA prevailed at arbitration, and the Felisildas appealed. The appellate court found that it was appropriate to compel arbitration based on the theory of equitable estoppel. (*Id.* at p. 497.) FCA argues that this case controls, and mandates that this court find that it has standing to compel arbitration.

However, there are important distinctions between the facts of that case and the one at bench. The motion there was by the dealership and not the manufacturer, which took no part in the motion beyond filing a notice of nonopposition. Also, the plaintiffs did not dismiss the dealership until *after* the motion to compel was granted, whereas here the court is ruling on the motion at a time when FCA is the only defendant. This makes a difference and limits the application of *Felisilda*. At best, *Felisilda* stands for the proposition that where a plaintiff buyer files a complaint against both the dealership and the manufacturer, the dealership can compel plaintiff to arbitrate the claims against both. This is actually consistent with the language of the arbitration agreement, since it provides that any claim or dispute "which arises out of or relates to your…purchase or condition of this vehicle…or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, <u>at your or our election</u> be resolved" by arbitration. As defined by the contract, the word "our" means Fresno Chrysler, not FCA. Thus, under the express language of the arbitration clause, arbitration could be compelled <u>on behalf of</u> a third party non-signatory, and there is nothing in this language authorizing it to be compelled <u>by</u> a third party non-signatory.

As the appellate court in *Felisilda* clearly stated, "It is the motion that determines the relief that may be granted by the trial court." (*Felisilda, supra,* 53 Cal.App.5th at p. 498.) The motion before the trial court, and thus, the issue considered on appeal, was whether the dealership's motion, asking for arbitration to also be compelled <u>on behalf of</u>

the nonsignatory manufacturer, was correctly granted. Therefore, the court had no cause to consider whether a nonsignatory manufacturer, as sole defendant, could successfully compel arbitration. That was not the posture of the case. As the court summed up its holding, since *the dealership's motion* argued that the claim against both defendants should be arbitrated, "the trial court had the prerogative to compel arbitration of the claim against FCA." (*Id.* at p. 499.) Also, the phrase "had the prerogative" suggests that the court of appeal was supporting the trial court's *use of discretion* in making its ruling, and was not finding that compelling arbitration was mandated under the equitable estoppel theory. In short, it is not clear how the Third District Court of Appeal would have ruled had the trial court ruling emanated from a motion brought by the sole defendant, the nonsignatory manufacturer, as here. This court will not extend *Felisilda* beyond its borders.

Another important distinction between *Felisilda* and the case at bench is that there the plaintiffs' complaint consisted of one combined cause of action against both defendants. (*Felisilda, supra,* 53 Cal.App.5th at p. 491.) No doubt that factor weighed heavily in the court's finding that plaintiffs' claims against the manufacturer were intertwined with their claims against the dealership, such that it was fair to require arbitration to proceed against both. Here, however, plaintiff was careful to state separate causes of action against each defendant. Plaintiffs have never asserted the same cause of action against both defendants. And, as discussed above, the claims against FCA do not "depend upon," nor are they "intimately found in" the contract plaintiff entered into with the now-dismissed defendant dealership.

When faced with essentially the same procedural posture, and same arbitration agreement, just last month the Ninth Circuit Court of Appeals similarly limited the holding of *Felisilda*, rejecting vehicle manufacturer BMW's third-party beneficiary and promissory estoppel arguments. (See *Ngo v. BMW of North America, LLC* (9th Cir. 2022) 23 F.4th 942.)

Equitable Estoppel

"The *sine qua non* for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 213-214.) Even if a plaintiff's claims touch matters relating to the arbitration agreement, the claims are not arbitrable unless the plaintiff relies on the agreement to establish its cause of action. (*Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th at p. 552.) "The reason for this equitable rule is plain: One should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract." (*DMS Services, LLC v. Superior Court, supra,* 205 Cal.App.4th at p. 1354.)

None of plaintiff's claims against FCA are intimately founded in the RISC. FCA relies heavily on the fact that plaintiff's claims concern the "condition or repair of the vehicle" and this term is mentioned in the RISC as a potential subject of a claim where arbitration could be compelled. However, clearly plaintiff's claims about the condition of his vehicle do not *depend upon* that language being in the RISC in order to bring them. If plaintiffs had paid cash for the vehicle, and thus would not have signed the RISC, they still could

bring claims under the Song-Beverly Act and under common law concerning the "condition of the vehicle." (See, *e.g., Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th p. 553 [finding no standing to compel arbitration based on equitable estoppel because "[e]ven if he had paid cash for the motorcycle, his complaint would be identical."].) It is accurate to say that plaintiffs' claim is intimately founded in "the condition of the vehicle," but the fact that this term can also be found in the RISC does not mean his claim is intimately founded *in that contract*. Therefore, it would not be accurate to say that plaintiffs' causes of action against FCA rely on the RISC, such that it would be equitable to find them estopped from avoiding its terms requiring arbitration.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 2/17/2022.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***VRIS, Inc. v. Lopez et al.***
Superior Court Case No. 20CECG03038

Hearing Date: February 23, 2022 (Dept. 502)

Motion: by plaintiffs to quash third-party subpoenas

Tentative Ruling:

To grant and quash the subpoenas issued on June 28, 2021 to Senior Market Sales; Atascadero Insurance Agency; Cal-Valley Insurance Services; Clovis Insurance Agency; Dalena-Benik Associates; DLL Insurance Agency; Gary McKeighan Insurance Agency; Jerry Baird Agency; Kelley-Naney Insurance Agency; KNPZ Insurance Services; Morrison Insurance Associates; Sarkhosh Insurance Agency; and Seabury Copeland & Anderson Insurance Company. To grant and quash the subpoenas issued on July 23, 2021 to Cuttone & Maestro CPA and Nunes & Nunes CPA.

Explanation:

Plaintiff brings suit against defendants, alleging that defendants became its employees on January 1, 2014, with an agreement to not receive income from outside sources; that plaintiff later discovered defendant Ralph Lopez had received commissions, in February 2016, on outside work for a competing insurance agency; that on August 11, 2020, defendant Ralph Lopez represented in writing that the February 2016 commission was the only commission he had received without plaintiff's knowledge; that on August 22, 2020, plaintiff discovered evidence of other commissions paid to defendant Ralph Lopez; that defendants had received commissions in excess of $63,000 over the period of 2017 to 2019; and that when confronted, defendants resigned. Plaintiff seeks recovery for breach of contract, breach of fiduciary duty, fraud, intentional interference with both prospective economic advantage and contractual relationships, declaratory relief, and unjust enrichment.

In or around July 2021, plaintiff issued 22 subpoenas on, roughly categorized, accountants; insurance agencies within California; and insurance agencies outside of California. Defendants timely filed motions to quash as to each of the 22 subpoenas, across six hearings. On December 14, 2021, the parties stipulated to withdraw 7 of the subpoenas from consideration.[1]

As to the remaining 15 subpoenas, each of which were served on nonparties, defendants seek to quash on four primary grounds. Namely, the subpoenas: (1) fail to provide notice to the consumer or employee as required by law; (2) are protected by

[1] Defendants filed a cross-complaint against plaintiff. Both the moving and opposition papers interchangeably refer to the parties as plaintiff and defendant, and cross-complainant and cross-defendant. For ease of reference, plaintiff/cross-defendant is referred to as plaintiff and defendants/cross-complainants are referred to as defendants.

defendants' right of privacy; (3) seek documents that fall under the tax return privilege; and (4) state overbroad categories.

13 of the 15 subpoenas, served on insurance agencies, seek identical categories:

1. All documents that constitute, discuss, refer or relate to any payments or transfers of assets to Ralph Lopez, Rebecca Lopez, or any entity owned or controlled by Ralph Lopez or Rebecca Lopez.
2. All documents that constitute, discuss, refer or relate to any contracts or agreements with Ralph Lopez, Rebecca Lopez, or any entity owned or controlled by Ralph Lopez or Rebecca Lopez.
3. All documents that constitute, discuss, refer or relate to any commissions paid to Ralph Lopez, Rebecca Lopez, or any entity owned or controlled by Ralph Lopez or Rebecca Lopez.
4. All documents that constitute, discuss, refer or relate to any correspondence, including electronic communication, with Ralph Lopez, Rebecca Lopez, or any entity owned or controlled by Ralph Lopez or Rebecca Lopez.

The remaining two subpoenas, served on Cuttone & Maestro CPA, and Nunes & Nunes CPA, are discussed separately, infra.

Notice to Consumer/Employee

Defendants allege that for the 13 non-CPA subpoenas, no notice to consumer or employee was concurrently served. As such, the subpoenas are invalid, and must be quashed.

Code of Civil Procedure section 1985.3, subdivision (b) governs over notices to consumer, and provides, in pertinent part:

> Prior to the date called for in the subpoena duces tecum for the production of personal records, the subpoenaing party shall serve or cause to be served on the consumer whose records are being sought a copy of the subpoena duces tecum… and of the notice described in subdivision (e)….

A consumer includes any individual. (Code Civ. Proc. § 1985.3, subd. (a)(2).) Personal records include any copy of books, documents, other writings or electronically stored information pertaining to a consumer and maintained by, among others, an insurance company. (*Id.*, § 1985.3, subd. (a)(1).) The notice described in subdivision (e) requires notification that: (1) records about the consumer are being sought from the witness named in the deposition; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court or serve a written objection; and (3) if the party who is seeking the records will not agree in writing to cancel or limit the deposition, an attorney should be consulted about the consumer's interest in protecting his or her rights of privacy. (*Id.*, § 1985.3, subd. (e).)

Here, plaintiff sought documents from 13 insurance companies: Senior Market Sales; Atascadero Insurance Agency; Cal-Valley Insurance Services; Clovis Insurance Agency; Dalena-Benik Associates; DLL Insurance Agency; Gary McKeighan Insurance

Agency; Jerry Baird Agency; Kelley-Naney Insurance Agency; KNPZ Insurance Services; Morrison Insurance Associates; Sarkhosh Insurance Agency; and Seabury Copeland & Anderson Insurance Company. Thus, plaintiff, in serving the 13 non-CPA subpoenas, must comply with Code of Civil Procedure section 1985.3 and serve notices to consumers.

As noted above, defendants submit evidence that 13 of the 15 subpoenas seek documents that refer to transactions between defendants and various insurance companies, subjecting the subpoenas to the notice requirement described under Code of Civil Procedure section 1985.3, subdivision (e).

Plaintiff argues that sufficient notice was provided to satisfy Code of Civil Procedure section 1985.3 because defendants are party to the action, and therefore knew of their rights and had counsel should they find cause to object. Plaintiff cites to no authority to support such a conclusion. Further, a plain reading of Code of Civil Procedure section 1985.3 reveals no exception where the consumer is party to the action. Rather, Code of Civil Procedure section 1985.3 specifically references that where the consumer is party to the action, the required notice may be served on his or her attorney of record. (Code Civ. Proc. § 1985.3, subd. (b)(1).) In other words, consumers who are party to the action must still be served with such notice.[2]

No evidence was presented demonstrating compliance with Code of Civil Procedure section 1985.3. Failure to comply with Code of Civil Procedure section 1985.3 shall be sufficient basis for the witness to refuse to produce the personal records sought. (Code Civ. Proc. § 1985.3, subd. (k).) Such outcome is self-executing, even without a motion to quash. (Code Civ. Proc. § 1987.1, subd. (c).) Therefore, the court grants the motions to quash as to the entirety of the subpoenas issued on June 28, 2021 to Senior Market Sales; Atascadero Insurance Agency; Cal-Valley Insurance Services; Clovis Insurance Agency; Dalena-Benik Associates; DLL Insurance Agency; Gary McKeighan Insurance Agency; Jerry Baird Agency; Kelley-Naney Insurance Agency; KNPZ Insurance Services; Morrison Insurance Associates; Sarkhosh Insurance Agency; and Seabury Copeland & Anderson Insurance Company, for failure to serve notices to consumer, and where appropriate, to employees.

The CPA Subpoenas

Defendants further move to quash subpoenas served on Cuttone & Maestro CPA, and Nunes & Nunes CPA. On these remaining two subpoenas, notices to consumer were provided. On these two subpoenas, 22 categories of documents were sought for production for a period between January 2012 and the present, summarized as: any payments or transfer of assets to defendants other than from plaintiff; engagement letters with defendants; commissions paid to defendants; correspondences with defendants; defendants' business association formation documents; obligations of a CPA to disclose conflicts of interest; Form 1099s issued to defendants; working papers used to calculate

[2] The result is the same under Code of Civil Procedure section 1985.6, regarding notices to an employee on production of employment records. Thus to the extent that the documents of the 13 of 15 subpoenas served on insurance companies might reflect employment records, the result is the same. (*See generally* Code Civ. Proc. § 1985.6.)

taxable income; and payments to defendants from any insurance carrier or agents, managing general underwriters and agents, or retail brokers or agents.

Defendants raise several objections. Defendants object that the CPA subpoenas seek documents to which the respective CPA firms are not the custodian of record; that such documents are protected by the tax return privilege and rights of privacy; and that in any event the document categories are overbroad and irrelevant.

Custodian of Record

Evidence Code section 1560 requires, among other things, that when a deposition subpoena served on a business in which the business is not a party to the action, and the subpoena requires the production of all or any part of the business's records, a compliant response requires the concurrent service of an affidavit. (Evid. Code § 1560.) The affiant of such affidavit, in addition to the required statement of due authorization as custodian of record to certify such records, must be able to affirm the records' preparation by the personnel of the business in the ordinary course of business, and the identity of the records. (*Id.*, § 1561, subd. (a).)

As defendants argue, where a deponent is unable to attest to a category of documents sought because the deponent did not prepare or generate the documents, such category of documents are unavailable for production under a nonparty deposition subpoena for business records. (*Cooley v. Super. Ct.* (2006) 140 Cal.App.4th 1039, 1045.) Though defendants make no specific arguments as to each of the 22 categories of documents as to why the deponent is not custodian of record for such categories, defendants submit their declarations that documents responsive to the requests are confidential financial information that was provided to the deponent for the purposes of preparing tax returns. (*E.g.*, Declaration of Ralph Lopez in Support of Motion to Quash Deposition Subpoena for Production of Documents Served on Nunes & Nunes, CPA, Inc. by Cross-Defendants, ¶ 4.) Defendants further declared that neither deponent issued a Form 1099. (*E.g.*, *id.*, ¶ 5.) Plaintiff's opposition, which was an omnibus opposition across all fifteen subpoenas, is silent on this issue, and no evidence to controvert defendants' declarations was submitted.

Based on the above, the court grants the motions to quash the entirety of the subpoenas issued on July 23, 2021 to Cuttone & Maestro CPA, and Nunes & Nunes CPA, as the categories of documents sought were not prepared or generated by the CPA deponents, such that the deponents cannot competently testify as to the identity of such documents. As the motions are granted due to the custodian of records issue, the court does not address the tax return and privacy privilege, or objections.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 2/22/2022.
(Judge's initials) (Date)