Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-051359 07/23/2020

HONORABLE THEODORE CAMPAGNOLO

CLERK OF THE COURT
G. Chavez
Deputy

CYNTHIA POWERS

v.

BMW NORTH AMERICA L L C

UNDER ADVISEMENT RULING

The Court heard oral arguments by videoconference on July 17, 2020 in regard to Defendant's Motion to Dismiss and to Compel Arbitration or, Alternatively, Motion to Stay Pending Resolution of Claims in Arbitration. The Court took the matter under advisement at the conclusion of the hearing. The Court has reviewed and considered Defendant's Motion to Dismiss and to Compel Arbitration or, Alternatively, Motion to Stay Pending Resolution of Claims in Arbitration; Plaintiff's Amended Response in Opposition thereto; Defendant's Reply; Defendant's Motion to Dismiss Amended Complaint and to Compel Arbitration or, Alternatively, Motion to Stay Pending Resolution of Claims in Arbitration; Plaintiff's Response thereto; Defendant's Reply in Support of the Motion to Dismiss Amended Complaint; the Complaint; the Amended Complaint; the exhibits attached to the foregoing pleadings; the relevant filings; the oral arguments; and the applicable law.

Defendant BMW North America, LLC (Defendant) stated that it filed its Motion to Dismiss the Amended Complaint out of an abundance of caution due to Plaintiff filing her Amended Complaint during the lodging period of the original Motion to Dismiss. The Amended Complaint is substantively the same as the original Complaint, and contains the same causes of action. The arguments in the pleadings related to the Motion to Dismiss the Amended Complaint are virtually the same as those made in the original Motion to Dismiss. For this reason,

Defendant requested that the Court consider the arguments in both Motions in ruling on the viability of the Complaint and the Amended Complaint. There being no objection from Plaintiff, the Court will do so.

Factual Background

On August 31, 2018, Plaintiff signed a Motor Vehicle Lease Agreement (the Agreement) with Chapman BMW I-10 in Chandler, Arizona. BMW I-10 (the Dealership) is a retail dealership that sells BMW vehicles to consumers. Under the Agreement, Plaintiff leased a 2018 BMW M550i from the Dealership for a term of 30 months (the Lease). BMW Financial Services, LLC (BMW FS) was listed in the Agreement as the assignee to administer the lease. Defendant was not a signatory to the lease, and there was nothing in the lease that referred to Defendant. There was no evidence that the lease was ever assigned to Defendant.

Section 16 of the Agreement, entitled "Warranties," [Exhibit 1 to Defendant's Statement of Facts] provided that the Dealership did not provide a lessor's warranty. Section 16 also provided in capital, bolded letters that the Dealership:

> **(1) MAKES NO WARRANTIES OR REPRESENTATIONS, EITHER EXPRESS OR IMPLIED, AS TO THE VEHICLE OR ANY OF ITS PARTS OR ACCESSORIES AND (2) MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS OF THE VEHICLE FOR ANY PARTICULAR PURPOSE. I [PLAINTIFF] ACKNOWLEDGE THAT I AM LEASING THE VEHICLE FROM THE [DEALERSHIP] "AS IS."**

Section 38 of the Agreement entitled "Arbitration Clause" provided, in pertinent part, as follows:

> **NOTICE**: Either [the Dealership] or [Plaintiff] may choose to have any dispute between us decided by arbitration and not in a court or by jury trial….
>
> ***
>
> **"Claim"** broadly means any claim, dispute or controversy, whether in contract, tort, statute or otherwise, whether preexisting, present or future between [Plaintiff] and [the Dealership] or [the Dealership's] employees, officers, directors, affiliates, successors or assigns, or between [Plaintiff] and any third parties if [Plaintiff] assert[s] a Claim against such Third Parties in connection with a Claim [Plaintiff] assert[s] against [the Dealership], which arises out of or relates to [Plaintiff's] credit application, the lease, purchase or condition of the

> Vehicle, this Lease or any resulting transaction or relationship (including any such relationship with Third Parties who do not sign this Lease). Any Claim shall, at [the Dealership's] or [Plaintiff's] election, be resolved by neutral, binding arbitration and not by a court action.

Section 38 further provided that if either party elects to proceed under arbitration, with limited exceptions not involved here, arbitration shall be binding under the rules of the Federal Arbitration Act (FAA), 9 U.S.C. §1, *et seq.*

Defendant, as the "Warrantor," provided a "New Vehicle Limited Warranty" (sometimes hereinafter referred to as the "Warranty") that provided certain warranties for 2018 BMW vehicles, which would include Plaintiff's vehicle. [Exhibit A to Plaintiff's Statement of Facts]. The Warranty was a separate document from the Lease, and was not signed by Plaintiff.

The Complaint alleged that Plaintiff's vehicle suffered numerous problems that could not be corrected after several attempts to have the problems repaired.

Procedural Background

On February 12, 2020, Plaintiff filed his Complaint against Defendant, asserting causes of action of breach of warranty under the Magnuson-Moss Warranty Act and breach of common law warranty. The Complaint did not name the Dealership or BMW FS as a Defendant, and did not assert any claims against the Dealership or BMW FS.

Defendant filed its first Motion to Dismiss and to Compel Arbitration on April 16, 2020. Both parties did not dispute that the Agreement requires the Court to determine the arbitrability of the claims. Defendant argued that this case must be sent to arbitration for the following independent or alternative reasons:

1. The Agreement clearly provided that the dispute between Plaintiff and Defendant is subject to arbitration;

2. Defendant is a third-party beneficiary of the Agreement; and/or

3. Defendant may enforce the arbitration clause in the Agreement under the doctrine of equitable estoppel.

The parties have fully briefed the issues, and have presented their oral arguments to the Court. The Court will address Defendant's claims in the order listed above.

Legal Discussion

1. Does the Agreement Provide a Contractual Basis for Arbitration Between Plaintiff and Defendant?

Case law is replete that the law favors arbitration. First, the law recognizes the ability of parties to contractually determine how they wish to resolve disputes. Second, arbitration has been seen to be an "inexpensive and speedy final disposition" of controversies. *Smitty's Super-Valu, Inc. v Pasqualetti,* 22 Ariz. App. 178, 181 (1974). It is for this reason that contractual clauses calling for arbitration are to be "construed liberally." *City of Cottonwood v Fann,* 179 Ariz. 185, 189 (1994).

However, the mere mention of the term "arbitration" in an agreement does not end the inquiry. "Although it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate." *Sun Valley Ranch 308 Ltd. Partnership ex rel. Englewood Properties, Inc. v. Robson*, 231 Ariz. 287, ¶10 (App. 2012), *quoting Southern California Edison Co. v. Peabody W. Coal Co*., 194 Ariz. 47, 51, ¶ 11 (1999). The general policy favoring enforcement of arbitration provisions is insufficient by itself to allow an arbitration provision to be enforced by a non-signatory. *Kim v. BMW of North America, LLC,* 408 F. Supp. 3d 1155, 1158 (C.D. Cal. 2019). There must be some legal basis before a court can find that a non-signatory to an agreement has a right to invoke an arbitration clause on its behalf. *Id.*

The scope of an arbitration agreement is governed by federal substantive law. *Kramer v. Toyota Motor Corp.,* 705 F.3d 1122, 1126 (9th Cir. 2013). Under the FAA, a party moving to compel arbitration must show: (1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue. *Kim v. BMW of North America, LLC,* 408 F. Supp. 3d at, 1157 [citation omitted]. Courts must enforce the parties' agreement to arbitrate threshold issues regarding the arbitrability of the dispute, but only if there is "clear and unmistakable evidence" that the parties so agreed. *Id.* Even though federal substantive law applies, 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).

In this case, there is no dispute that Defendant did not sign the Agreement. Whether a non-signatory is covered by an arbitration agreement is resolved by the court as a matter of law. *Duenas v. Life Care Centers of America, Inc.,* 236 Ariz. 130, ¶23 (App. 2014). Defendant bears the burden of establishing that there is a valid agreement to arbitrate. *Escareno v. Kindred Nursing Centers West, L.L.C.*, 239 Ariz. 126, ¶7 (App. 2016). If established, the burden of proof then shifts to Plaintiff. *Id*.

Kramer v. Toyota Motor Corp., cited above, has no precedential value. This Court realizes that the wording of the arbitration provision in *Kramer* was different from this case, and that the Ninth Circuit was applying California law. Nonetheless, this Court finds that the reasoning in Kramer has persuasive value.

In *Kramer*, the arbitration provision was part of the lease agreement between the vehicle buyers and a number of Toyota dealerships. Toyota Motor Corporation, who was sued for breach of warranty, claimed that it could invoke the arbitration provision in the dealerships' agreements.

. The Ninth Circuit held that the Toyota Motor Corporation had not shown that it was a party to the agreements, and did not otherwise possess the right to compel arbitration. *Kramer v. Toyota Motor Corp.*, 705 F.3d at 1126. *See also Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (holding that even though there may have been an attenuated relation between an equity loan with a lender and an insurance policy to pay the loan, the arbitration agreement was premised on a disagreement between the lender, and in the absence of an agreement to include the insurer, the arbitration provision did not apply to the insurer).

Both parties cited the Court to numerous rulings and orders from the United States District Courts, largely from California. Except for the *Kim* case, cited above, and *Jurosky v. BMW of North America*, 2020 WL 1024899 (S.D. Cal. Feb. 27, 2020), the Court found none of those cases to have persuasive value in this case, either because the facts were different, Defendant (BMW North America) was not the only defendant in the particular case, the arbitration clauses were different, and/or the rulings conflicted with other rulings on the same type of arbitration clauses. Additionally, two of the cases upon which Defendant heavily relied were unreported slip opinions that did not even have a Westlaw reference number.

The Court finds that *Kim* and *Jurosky*, neither of which were slip opinions, were persuasive, pursuant to Rule 111 (c) and (d) of the Rules of the Supreme Court, because they pertained to the identical arbitration provisions, similar facts, and the same defendant in this case. Both cases found that BMW North America (Defendant herein), as a non-signatory to the dealership's contract, was not entitled to compel the cases to arbitration.

The Court has closely reviewed the Agreement, and has especially reviewed and analyzed the arbitration clause. The Court finds that the arbitration provisions in Section 38 of the Agreement do not contain clear and unmistakable evidence that Defendant was included as a non-signing third party. A close reading of Section 38 does not include Defendant within its ambit. Defendant is not an employee, officer, director, successor or assign to the Lease. The terms of the arbitration provision in Section 38 are expressly limited to Plaintiff and the Dealership, as well as BMW FS in its capacity as the contractual assignee.

However, Defendant argued that it was included in Section 38 as an "affiliate," or as a third party who did not sign the Agreement. The language in Section 38 is a masterwork of "legalese." Once it is parsed, however, it is simple to understand.

A. Defendant is not an Affiliate under Section 38

It goes without saying that Defendant and BMW FS are separate corporations, and the act of one is not imputed to the other, nor is one responsible for the other's acts or obligations. *Bischofshausen, Vasbinder, and Luckie v. D.W. Jaquays Mining and Equipment Contractors Co.*, 145 Ariz. 204, 209 (App. 1985).

Defendant's argument that it was included in the Agreement as an affiliate is not supported by the facts, or by the terms of the Agreement.

First of all, Defendant presented no summary judgment evidence that it was an affiliate of anybody in this case. Instead, Defendant relied solely upon a few unreported California Federal District Court cases (at least two of which were nothing more than slip opinions) involving this Defendant that found that BMW North America (Defendant herein) was an affiliate of BMW FS, and was, therefore, entitled to compel arbitration under a similar type of lease agreement. The Court finds that the reasoning in those cases was not persuasive. Both the factual applications, and the legal conclusions in those cases were not only debatable, but were questionable. Even so, in at least two of those cases, BMW North America had made some type of showing that it was affiliated with BMW FS. No such showing was made here, despite Defendant having had the opportunity to do so.

Second, even if the Court chose to rely upon those unpersuasive California District Court cases to presume that Defendant is an affiliate of BMW FS, it would be to no avail. In order to be included within the term "affiliates" in Section 38, Defendant would have to be an affiliate of the Dealership, not BMW FS. Whether or not Defendant may be an affiliate of BMW FS is irrelevant. BMW FS is a non-signing party to the Agreement, because it is a contractual assignee. Section 38 does not define "affiliates" as "affiliates of assignees," or, for that matter, "affiliates of employees, successors, etc."

If the Court accepted Defendant's "affiliate" argument, there would be virtually no end to who could be included in the Agreement, which would clearly not be the intent of the parties to the Agreement. Under the case law discussed above, an arbitration clause must clearly provide that a party has a right to compel arbitration. Section 38 is not ambiguous. Even if it was, it must be construed against the drafter, *MT Builders, L.L.C. v. Fisher Roofing, Inc*., 219 Ariz. 297, 302 (App. 2008), as well as any non-signing third-party seeking to avail itself of the terms of the contract. Even in the most liberal interpretation, Defendant does not fall within the class of

"affiliates," as listed in Section 38.

B. Defendant is not a "Third Party Who Did Not Sign the Lease" under Section 38

Section 38 provides that non-signing third parties may be entitled to compel arbitration, but in order to invoke that right, the following must occur:

1. Plaintiff must have asserted a claim against Defendant that was connected to a claim that was filed by Plaintiff against the Dealership (or BMW FS); and

2. The claim against Defendant must arise out of or relate to the Agreement, the purchase or condition of the vehicle, or any resulting transaction or relationship.

The undisputable language allowing third-party inclusion required that the Dealership had to be named as a co-defendant with Defendant, before Defendant could claim a right to arbitration. It is clear that Section 38 is a contract solely between Plaintiff and the Dealership. Because of that, the Dealership (or possibly its assignee BMW FS) had to be a party to the lawsuit to invoke the contractual right to arbitration of a third-party co-defendant, to-wit: Defendant. Because neither the Dealership nor BMW FS is a party to the lawsuit, Defendant as a third party who has been sued alone has no right to invoke the arbitration provision between Plaintiff and the Dealership.

Because Defendant did not sign the Agreement, because Defendant was not an "affiliate" under Section 38, because the Dealership was not joined as a party, and because Defendant had no independent right to arbitration under the Agreement, Defendant had no contractual right to arbitration under the Agreement.

2. Is Defendant a Third-Party Beneficiary of the Agreement?

Defendant argued that even if it did not have a contractual right to arbitration, it should be able to invoke the arbitration provisions in the Agreement, because it claimed to be a third-party beneficiary of the Agreement.

For a person to recover as a third-party beneficiary in Arizona, the contracting parties must have intended to directly benefit that person, and must have indicated that intention in the contract itself. *Sherman v. First American Title Insurance Co*., 201 Ariz. 564, 567, ¶ 6 (App. 2002). "It is not enough that the contract may operate to a third-party's benefit, but it must appear that the parties intended to recognize the third-party as the primary party in interest and as privy to the promise." *Id*. [citation omitted].

Some of the cases cited by Defendant on this issue came from foreign jurisdictions in which the applicable State law did not require an intent to directly benefit the third-party. Arizona does not follow that "liberal view of the Restatement," but instead has adopted the rule that the intent must be indicated in the contract itself, and that the contemplated benefit must be intentional and direct. *Irwin v. Murphey*, 81 Ariz. 148, 152-3 (1956).

There does not have to be only one intended beneficiary. "It is sufficient for third-party status to show that the beneficiary is a member of a class of beneficiaries intended by the parties." *Nahom v. Blue Cross and Blue Shield of Arizona, Inc.*, 180 Ariz. 548, 553 (App. 1994). The decision on whether a party is a third-party beneficiary is one of contractual construction, and is, therefore, a question of law for the court. *Basurto v. Utah Construction & Mining Co.*, 15 Ariz. App. 35, 39 (1971).

In this case, there is no indication in the Agreement that Defendant is an intended beneficiary, either solely or as a member of an intended class of beneficiaries. There is not even an indication that Defendant would get any benefit out of the Agreement, direct or otherwise.

In fact, the only mention of warranties in the Agreement pertains to the Dealership. In the Agreement, Plaintiff and the Dealership agreed that the Dealership was providing no warranties, and that the lease of the car was "as is." Therefore, there is absolutely no indication that a third-party entity that may provide a warranty was a beneficiary of the Agreement. As made clear in the Agreement's disclaimer, the Dealership's concern was not to be sued for a breach of warranty. Thus, the only party in the Agreement with a direct benefit was the Dealership, or possibly BMW FS in its capacity as an assignee. Defendant was neither a signatory nor a party, and it would receive no direct benefit from the Agreement.

The fact that Defendant provided a limited warranty separate and apart from the Agreement does not convert Defendant into a third-party beneficiary of the Agreement. Once a dealership pays a manufacturer for a vehicle, the manufacturer no longer has a claim to the vehicle. *Seekings v. Jimmy GMC of Tucson, Inc*., 130 Ariz. 596, 600 (1981). Therefore, the Dealership had no reason to protect the manufacturer or the latter's limited warranty.

Defendant has failed to show any indication in the Agreement that the parties intended to recognize Defendant as the primary party in interest, and "as privy to the promise." *Sherman v. First American Title Insurance Co*., 201 Ariz. 564 at ¶ 6.

3. Does the Doctrine of Equitable Estoppel Apply?

Lastly, Defendant argued that the doctrine of equitable estoppel should preclude Plaintiff from disputing that Defendant has a right to invoke the arbitration provision in the Agreement.

Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that the contract imposes. *Mundi v. Union Security Life Insurance Co*., 555 F.3d 1042, 1045 (9th Cir. 2009). There are two types of equitable estoppel in the arbitration context. In the first type, a non-signatory may be held to an arbitration clause where the non-signatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement. *Id*. at 1046 [citation omitted]. In the second type, a signatory may be required to arbitrate a claim brought by a non-signatory "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." *Id*. [citation omitted]. *Accord, Sun Valley Ranch 308 Ltd. Partnership ex rel. Englewood Properties, Inc*., 231 Ariz. 287, ¶¶37, 38 (App. 2012)

For the first type of equitable estoppel, Defendant relied on *Schoneberger v. Oelze*, 208 Ariz. 591, ¶14 (App. 2004), for the proposition that the Court looks at the events occurring after the contract's execution to determine if a non-signatory can assert equitable estopped. In *Schoneberger*, the Court of Appeals stated that in the arbitration context, a non-signatory to an agreement requiring arbitration may be estopped from avoiding arbitration if that party is claiming or has received direct benefits from the contract. *Id*. This is exactly the same theory as the first type listed in the *Mundi* case above, and this Court takes no issue with the description of the doctrine.

Defendant goes on to quote *Schoneberger's* distinction that "[u]nder third-party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot [that a court must examine] under equitable estoppel is much later in time than the snapshot for third-party beneficiary analysis." *Id*. at ¶14, n.6.

Defendant then argued that, in determining whether equitable estoppel existed, the Court should consider the actions of Plaintiff after the contract was executed, to-wit:

> Plaintiff agreed to arbitrate any claims arising out of the Lease Agreement, garnered the benefit of that Agreement, and then filed suit in this Court. Plaintiff's conduct after execution of the contract thus consists of seeking remedies against BMW NA under the Lease Agreement while failing to honor the arbitration

clause of that same agreement.

Defendant's Motion to Dismiss at 8; Defendant's Motion to Dismiss Amended Complaint at 9.

The Court believes that Defendant has misinterpreted both *Mundi* and *Schoneberger* to arrive at its contention. Under those cases, the Courts looked only to the acts of the non-signatory after the execution of the contract, when the non-signatory was trying to avoid being sent to arbitration by a signatory. Neither case suggested that the after-the-fact acts of the signatory have any relevance when the non-signatory is trying to force the signatory to arbitration. This makes perfect sense, because if a non-signatory has done something after the contract was signed to obtain some benefit from the contract, the non-signatory should not then be allowed to avoid the arbitration provisions of that contract. It makes no sense to apply this after-the-fact rule to the signatory. The signatory is only bound to abide by the contractual arbitration provisions with those in privy with the signatory. Plaintiff had no privity of contract with Defendant.

The fact that a plaintiff later seeks damages against a non-signatory for a claim outside of the contract does not mean that she has taken some action to obtain a benefit under the contract against the non-signatory. That action does not invoke a claim or defense of equitable estoppel by a non-signatory.

Even if equitable estoppel applied to Plaintiff's after-the-fact activities, which it does not, the Court will dissect Defendant's argument to show how it would still not apply. First, it is true that Plaintiff agreed to arbitrate claims under the Agreement, but those contractual claims do not include Defendant. Second, Plaintiff did garner the benefit of leasing a vehicle from the Dealership for a term of months, but Defendant received no benefit from those lease payments. It had already been paid for the sale of the vehicle to the Dealership. Third, Plaintiff did file a lawsuit against Defendant, but it was for causes of action that were not included in the arbitration provisions of the Agreement.

In its pleadings and during oral arguments, Defendant contended that the second type of equitable estoppel listed in *Mundi* and *Sun Valley Ranch, supra,* also applied. Defendant strenuously argued that *Sun Valley Ranch* provided clear support for its position in this case. A full reading of *Sun Valley Ranch* does not support Defendant's claim. In that case, the Court found that there was equitable estoppel based on a close relationship. That relationship was based upon the fact that while the non-signing party had not signed the agreement, entities controlled by him were signatories, and the plaintiff contended that the non-signing party was the alter ego of the entities that signed the agreement. *Id*. at ¶¶35-9.

In this case, no such close relationship was shown by Defendant. Defendant presented no evidence that it had a close relationship with Plaintiff and/or the Dealership, such that equitable estoppel should be applied. Defendant's unsupported, and irrelevant, claim that it is an affiliate of BMW FS, and the fact that it sold the vehicle to the Dealership do not support a finding of a close relationship.

The Court finds that Defendant has no right to compel arbitration under either theory of equitable estoppel.

4. Defendant's Warranty Does Not Require Arbitration

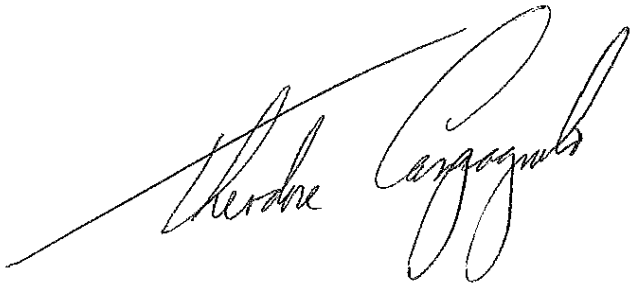
Although it did not appear that Defendant was contending that its Limited Warranty, mentioned earlier, required arbitration, the Court will briefly discuss the issue out of an abundance of caution. As mentioned in the factual background section above, Defendant provided a separate warranty to purchasers of BMW vehicles that was not signed by Plaintiff. The only reference to arbitration in the Warranty pertained to the BBB Auto Line program. Page 35 of the Warranty states that a vehicle owner must participate in mediation or arbitration under the BBB Auto Line before he or she can assert any rights under the Magnuson-Moss Warranty Act (MMWA).

However, there are two obstacles that negate the necessity for Plaintiff to seek arbitration or mediation under the Warranty. First, the District Court of Arizona has found that the BBB Auto Line program failed to meet the substantive requirements of 16 C.F.R §703, promulgated by the Federal Trade Commission pursuant to the MMWA, and, therefore, an Arizona consumer is not required to pursue arbitration or mediation before filing a lawsuit under the MMWA. *Muller v. Winnebago Industries, Inc*., 318 F. Supp. 2d 844, 848-9 (D. Ariz. 2004). Second, even if the BBB Auto Line provisions were in compliance with the federal regulations, the Warranty provides that the Auto Line program only applies in certain States, in which Arizona is not included.

IT IS ORDERED that Defendant's Motion to Dismiss and to Compel Arbitration or, Alternatively, Motion to Stay Pending Resolution of Claims in Arbitration is denied.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Amended Complaint and to Compel Arbitration or, Alternatively, Motion to Stay Pending Resolution of Claims in Arbitration is denied.

IT IS FURTHER ORDERED that Defendant shall file an Answer to the Amended Complaint no later than August 17, 2020, and that the parties shall comply with Rule 16(b) and (c) thereafter.



HON. THEODORE CAMPAGNOLO
JUDGE OF THE SUPERIOR COURT