Case No. S279969

IN THE SUPREME COURT OF CALIFORNIA

FORD MOTOR WARRANTY CASES.

MARTHA OCHOA, et al.

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY,

Defendant and Appellant.
[And four other cases.]

OPENING BRIEF ON THE MERITS

After a Decision of the Court of Appeal,
Second Appellate District, Case No. B312261

Appeal from an Order of the Superior Court of Los Angeles County
JCCP No. 4856 (The Honorable Amy Hogue)

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ISSUE PRESENTED

Do manufacturers' express or implied warranties that accompany a vehicle at the time of sale constitute obligations arising from the sale contract, permitting manufacturers to enforce an arbitration agreement in the contract pursuant to equitable estoppel?

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in these cases is whether an automobile manufacturer can compel arbitration of warranty disputes under an arbitration agreement in a sale contract when the manufacturer was not a signatory to the contract. The answer to that question lies in the established body of law allowing nonsignatories to enforce contract provisions when they are sued under theories based on legal obligations arising from the contract. A plaintiff who raises claims against a defendant based on obligations imposed by the contract is equitably estopped from evading other provisions contained within the contract.

The scope of sale contracts is fundamental to this answer, and the answer is provided by California's Uniform Commercial Code ("Commercial Code"), which governs warranties and sale contracts. Under that Code, a contract is defined to include all legal obligations that result from a sale. (Cal. U. Com. Code § 1201, subd. (12) [defining "contract" as "the total legal obligation that results from the parties' agreement as determined by this code and as supplemented by any other applicable laws."].) Those obligations include all express and implied warranties that accompany the sale. (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 ["a sale is ordinarily an essential element of any warranty, express or implied"].)

Plaintiffs' claims against Ford here involve the following legal obligations imposed by the contracts they signed when buying Ford vehicles: 1) Ford's obligation to conform the vehicles to express or implied warranties; and 2) Plaintiffs' obligation to arbitrate claims based on those warranties. Pursuant to the doctrine of equitable estoppel, Plaintiffs cannot seek the benefit of the first without being subject to the second. (*Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, 495–496, review den. Nov. 24, 2020, S264619 (*Felisilda*) [applying equitable estoppel because "the sales contract was the source of the warranties at the heart of this case"].)

The Court of Appeal here held otherwise, holding that Ford's warranty obligations "arise independently" of the sale contracts, relieving plaintiffs of their own obligations under the contracts. (Opinion, p. 12.)

Felisilda is correct; the Opinion in this case is not.

For decades, this Court has consistently agreed that warranties in general are part of the "basis of the bargain" under the Commercial Code. (E.g., *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 (*Hauter*).) That is no less true with respect to automobile-manufacturers' warranties subject to both the Commercial Code and the Song-Beverly Consumer Warranty Act ("Song-Beverly Act"). For example, this Court has held that in enacting the Song-Beverly Act in 1970, "the Legislature apparently conceived of a[

manufacturer's] express warranty as being part of the purchase of a consumer product, and a representation of the fitness of that product that has particular meaning for consumers." (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1258 (*Gavaldon*).)

To maintain that consistency and ensure equal treatment of arbitration with other contractual rights, this Court should reverse the Opinion and hold that manufacturers' express or implied warranties that accompany a vehicle at the time of sale constitute obligations arising from the sale contract, and that buyers who assert warranty claims dependent on the contract are equitably estopped to deny the warrantor's corollary rights under the contract.

STATEMENT OF THE CASE

A. Statutory Background Governing Automobile Sales and Warranties.

The Uniform Sales Act (the "Sales Act," former Civ. Code §§ 1721–1800) "was adopted in California in 1931, superseding various provisions of the old Field Code. The [Sales] Act served as the basis of California sales law until it was superseded by the Uniform Commercial Code in 1965." (4 Witkin, Summary of Cal. Law (11th Ed. 2023) Sales, § 5.)

Given that sales-based warranties are generally contractual in nature, recovery under pre-Commercial Code warranties required establishing the normal requirements of contract,

including consideration and privity. (See, e.g., *Southern Cal. Enterprises v. D.N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 760 [manufacturer's warranty induced customer to buy carpet from seller, contributing to manufacturer's profit, so the warranty "was a valid contract based on a good and sufficient consideration" even though the manufacturer was not a party to the sale contract].) Consideration for a warranty accompanying a sale was tied to the underlying sale, while *post-sale* warranties, by contrast, had no effect unless there was additional consideration provided. (*Ibid.*; *William A. Davis Co. v. Bertrand Seed Co.* (1928) 94 Cal.App. 281, 288.)

Under the Sales Act, an express-warranty claim required privity or an exception to privity in addition to consideration. (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695.) California recognized an exception to privity for express warranties by manufacturers not in direct privity with the purchaser where "the purchaser of a product relied on representations made by the manufacturer in labels or advertising material." (*Id.* at pp. 696–697.)

The Commercial Code presented substantial changes to warranty law, including imposing a requirement that a manufacturer's statement become "part of the basis of the bargain" to constitute an express warranty. (*Hauter*, *supra*, 14 Cal.3d at p. 115.) The "basis of the bargain" requirement removed the

requirement of separate consideration, even as to warranties made after a sale. (See Cal. U. Com. Code § 2313, Cal. Code cmt. 3.) And as to the privity requirement, a broad exception applies where a manufacturer's express warranty is included as part of a sale contract. (*Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 14 (*Seely*) ["Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required"].)

In 1970, California enacted the Song-Beverly Act to address certain warranties, including in the automobile industry. (*Cummins, Inc. v. Superior Ct.* (2005) 36 Cal.4th 478, 484.) The Song-Beverly Act does not require direct contractual privity. (See, e.g., *Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1333, fn. 11 (*Mega RV*).)

But the Song-Beverly Act does not exist in a vacuum; it "supplements, rather than supersedes, the provisions of the California Uniform Commercial Code." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989.) The provisions, definitions, and principles under the Commercial Code apply unless they conflict with the Song-Beverly Act. (Civ. Code § 1790.3.)

As discussed below, this statutory framework—the Commercial Code as supplemented by the Song-Beverly Act—establish certain fundamental principles regarding the scope and

definition of sales, contracts, implied warranties, and express warranties relevant to the issue presented for review.

B. Case-Specific Factual and Procedural Background

Ford Motor Company is the defendant in the five cases below, which are included actions in Judicial Council Coordinated Proceeding ("JCCP") No. 4856. The plaintiffs and respondents in the five actions are: 1) Alfredo Brito; 2) Matthew Davidson-Codjoe; 3) Martha Ochoa; 4) Rochelle and Adriana Perez; and 5) Michele Salcido. (Opinion, p. 1.)

Each plaintiff bought a Ford-manufactured vehicle not from Ford, but from various selling dealers who owned the vehicles. (Opinion, p. 2.) To do so, the plaintiffs signed form sale contracts with the dealers titled "**RETAIL INSTALLMENT SALE CONTRACT—SIMPLE FINANCE CHARGE (WITH ARBITRATION PROVISION).**" (*Ibid.*) As the title indicates, each contract includes a provision that requires arbitration of claims between the customer and the dealer or its agents arising out of the purchase or condition of the vehicle, the sale contract, or any resulting relationship including "any such relationship with third parties who did not sign this contract." (*Id.* at p. 4.)

Plaintiffs sued Ford for breach of warranty, among other claims, alleging they experienced unrepaired problems with the transmissions in their vehicles, but they did not expressly name

the signatory dealers as defendants. (Opinion, p. 4.) These five actions, among others, were coordinated in JCCP No. 4856. (*Ibid.*)

Ford moved to compel arbitration based on the provision in the sale contracts as a nonsignatory under several theories, including equitable estoppel. (Opinion, pp. 4–5.) The trial court denied Ford's motion to compel, Ford timely appealed, and the Court of Appeal affirmed. (*Id.*, pp. 5, 24.)

In addressing nonsignatory enforcement under the equitable-estoppel doctrine, the Court of Appeal applied the test "[a]s recently explained in *Felisilda*" that "allows a nonsignatory defendant to 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." (Opinion, p. 7 [cleaned up].) *Felisilda* held that the Song-Beverly Act warranty claim against a manufacturer-defendant was subject to a sale contract's arbitration provision, recognizing that "the sales contract was the source of the warranties at the heart of this case." (*Felisilda*, *supra*, 53 Cal.App.5th at p. 496.)

The Opinion here disagreed that the sale contracts were the source of the manufacturer's warranties, instead holding that manufacturer vehicle warranties that accompany the sale of motor vehicles do so "without regard to the terms of the sale contract between the purchaser and the dealer" and thus "are *independent*

of the sale contract." (Opinion, pp. 10, 11–13, emphasis added.)

The Opinion recognized that most of the plaintiffs attached the sale contracts to their complaints, but noted that the plaintiffs challenged only performance under the manufacturer warranty that accompanies the sale, without challenging other terms relating to financing, for example. (*Id.*, pp. 11–12.)

STANDARD OF REVIEW

In the absence of conflicting extrinsic evidence, the extent to which a nonsignatory can enforce an arbitration clause is a question of law, which this Court reviews de novo. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 (2019) ["'Where, as here, the evidence is not in conflict, we review the trial court's denial of arbitration de novo.' [Citation.]"); *Felisilda, supra,* 53 Cal.App.5th at p. 495.) Although "equitable estoppel is generally a question of fact, it is a question of law when the facts are undisputed and only one reasonable conclusion can be drawn from them." (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708.) Here, as the Opinion recognized in applying de novo review, "[t]he parties did not dispute the sale contracts' terms or authenticity. The trial court did not resolve factual issues when it denied [Ford's] motion to compel." (Opinion, p. 5.) Therefore, review here is de novo.

LEGAL DISCUSSION

I. Nonsignatory Enforcement of Arbitration Agreements Is Governed by the Same Principles as Nonsignatory Enforcement of Other Contract Terms.

The Opinion correctly held "that the sale contracts are governed by the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.)." (Opinion, p. 5.) This Court has recognized that the FAA was enacted in response to "centuries of judicial hostility to arbitration agreements…. [Citation.]" (*Broughton v. Cigna Healthplans of Cal.* (1999) 21 Cal.4th 1066, 1074; see also *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339; *Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [138 S. Ct. 1612, 1621].) To counter this hostility, the FAA requires courts to place arbitration agreements on equal footing with all other contracts. (*Kindred Nursing Centers Limited Partnership v. Clark* (2017) 581 U.S. 246, 248, 251.)

As a result, state law governing when a nonsignatory can enforce sale-contract terms pursuant to equitable estoppel apply where the question is enforceability of an arbitration clause, so long as that law "arose to govern issues concerning … enforceability of contracts generally. [Citations.]" (*Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 630–631.)

Shortly after the Opinion here, a different panel of the same division of the Court of Appeal recognized the effect of the FAA's

equal-treatment principle in countering judicial hostility to arbitration in another opinion involving a different form arbitration contract used by car dealerships, holding: "When 'California courts would not interpret contracts other than arbitration contracts the same way,' that selective judicial hostility to arbitration is preempted." (*Fuentes v. Empire Nissan, Inc.* (2023) 90 Cal.App.5th 919, 927, quoting *DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 55.) The majority in *Fuentes* applied this principle to reverse a trial court's denial of a motion to compel arbitration. (*Fuentes*, at pp. 929–930, 936.)[1]

II. Contracting Parties Are Equitably Estopped to Deny a Nonsignatory's Enforcement of Terms Where the Contracting Party's Claims Against the Nonsignatory Are Intertwined With the Asserted Contract Obligations.

Under one application of equitable estoppel, nonsignatories may enforce contract terms in response to claims by a contracting party where the claims are "intimately founded in and intertwined" with the underlying contract obligations. (*Felisilda*, *supra*, 53 Cal.App.5th at pp. 495–496; Opinion, p. 7 [citing *Felisilda*].) Generally, "[i]n determining whether the plaintiffs' claim is founded on or intimately connected with the sales

[1] The dissenting justice in *Fuentes*—who would have affirmed the order denying arbitration—was the only justice on that panel also involved in the Opinion below. (*Id.* at p. 936.)

contract, [courts] examine the facts of the operative complaint." (*Felisilda*, *supra*, 53 Cal.App.5th at p. 496.)

The "linchpin" of equitable estoppel is equity—fairness. (*Pacific Fertility Cases* (2022) 85 Cal.App.5th 887, 893 (*Pacific Fertility*).) It prevents a signatory from seeking, on the one hand, "to hold the non-signatory liable pursuant to duties imposed by the agreement" while at the same time shrugging off burdens that are concomitant with those duties. (*Ibid*.) This doctrine is a reflection of long-standing equitable principles, which the Legislature embodies in Civil Code section 3521, preventing a party from accepting the benefit of a contract but avoiding its burdens. (See also *Albers v. Los Angeles County* (1965) 62 Cal.2d 250, 265 [noting that Civil Code section 1589—which provides that accepting the benefit of a transaction may be equivalent to consent to all obligations arising from it—"makes applicable to contracts the equitable rule of Civil Code section 3521"].)

Equitable estoppel cannot be avoided by carefully circumscribed and strategic pleadings or arguments; courts must look to the substance of the claims. (*Franklin v. Community Regional Medical Center* (9th Cir. 2021) 998 F.3d 867, 875, quoting *Copp v. Millen* (1938) 11 Cal.2d 122, 128 ["Equity always looks to the substance, and not to the form ...."].)

Felisilda drew on those principles, noting: "The fundamental point is that a party is not entitled to make use of [a contract

containing an arbitration clause] as long as it worked to [his or] her advantage, then attempt to avoid its application in defining the forum in which [his or] her dispute ... should be resolved." (*Felisilda*, *supra*, 53 Cal.App.5th at p. 496 [relying on *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 84, which in turn relied on Civil Code section 3521].)

The court in *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1719, similarly relied on Civil Code section 3521 when it developed the formulation for applying equitable estoppel in California to questions of arbitrability. (See *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1288 [noting that *Metalclad*'s formulation of equitable estoppel in the arbitration context is consistent with California's concerns for equity and a notion of estoppel "familiar to California law"].)

Given the uniform holding regarding the appropriate test for equitable estoppel to permit a nonsignatory's enforcement of contract provisions, the holdings of the Court of Appeal differ only on the question of whether a manufacturer's express and implied warranty obligations are imposed by and/or are part of the sale contracts; if so, manufacturers sued on warranty claims arising out of the sale of a car would be entitled to enforce the arbitration agreements in those contracts.

III. As Applied Here, the Law on Nonsignatory Enforcement Entitles Ford to Enforce the Arbitration Clause in the Sale Contract.

Felisilda got it right: "the sales contract was the source of the warranties at the heart of this case." (*Felisilda*, *supra*, 53 Cal.App.5th at p. 496.) That holding is consistent with California law in numerous non-arbitration contexts; the Opinion's analysis and holding that those warranties are "independent" of the sale contracts is not.

A. The Opinion affirming denial of Ford's motion to compel arbitration is inconsistent with essential elements of Plaintiffs' warranty claims under the Song-Beverly Act and the Commercial Code.

The necessary predicate to the Opinion here is the characterization of Ford's warranties as arising *"independently of"* the sale contracts. (Opinion, p. 12, original italics.) The Song-Beverly Act itself, which plaintiffs invoke as a basis for their claims, cannot be squared with that assumption. The Act applies only to a specific subset of express warranties, defined as "[a] written statement *arising out of a sale* to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there

is a failure in utility or performance." (Civ. Code § 1791.2, subd. (a), italics added.)

Similarly, under the Commercial Code, "[a]n implied warranty that goods are 'fit for the ordinary purposes for which such goods are used' arises from a contract of sale." (*Brown v. Superior Ct.* (1988) 44 Cal.3d 1049, 1071 (*Brown*), citing Cal. U. Com. Code § 2314, subd. (2)(c).) The Opinion's predicate notion that warranties exist "independently" of the sale contract thus fails, so the conclusion that a nonsignatory warrantor cannot enforce contract terms in defense against warranty claims by the buyer also fails.[2]

The Opinion did not address this inconsistency, and other courts following it brushed aside the Song-Beverly Act's "express warranty" definition, apparently based on some unexplained (and nonexistent) distinction between a "sale" and a "sale contract." (See *Yeh v. Superior Ct.* (2023) 95 Cal.App.5th 264 [313 Cal.Rptr.3d 288, 298] (*Yeh*) ["Based upon a plain reading of the language of the statute, an express warranty arises out of a sale

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[2] Plaintiffs have argued in various cases that warranties must be independent of the sale contract, positing that otherwise manufacturers would gain the right to bring *affirmative claims against buyers* for breach of contract terms such as the obligation to make lease payments. The point is silly. The lease payments are not made to warrantors, who have no interest in enforcing payment terms, but warranty obligations are owed by warrantors, who have every interest in enforcing terms—such as the arbitration clause—that refer to claims asserting a warranted defect in the vehicle that is the subject of the sale contract.

rather than the underlying contracts."]; *Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958, 970 (*Montemayor*) [recharacterizing the express warranty as being given "as a result of the sale" rather than "arising out of" the sale and stating "[b]ut that does not mean Ford's obligation to provide a non-defective vehicle under its separate express warranty is in any way founded on an obligation imposed by the sales contract or is intertwined with those obligations."].)

Simply put, there is no material distinction between a "sale" and a "sale contract." For over a century and in multiple contexts, California law has recognized that *all* sales are contracts. (See *Van Allen v. Francis* (1899) 123 Cal. 474, 479 ["A sale is a contract by which, for a pecuniary consideration called a price, one transfers to another an interest in property. … Sale is a word of precise legal import. *It means at all times a contract between parties to give and to pass rights of property for money*, which the buyer pays or promises to pay the seller for the thing bought and sold. [Citation.]"] [cleaned up; italics added]; *Yick Sung v. Herman* (1906) 2 Cal.App. 633, 635 ["A sale is a contract by which, for a consideration, one transfers to another property or an interest therein."].)

Even when there is no written contract other than the sales receipt for the purchase of goods, any warranty on those goods is inextricably linked to the contractual event accomplished by the

sale. (*A&M Produce Co. v. FMC Corp*. (1982) 135 Cal.App.3d 473, 495 (*A&M Produce Co.*) ["The fact that a warranty is not stated in the written memorandum does not mean it is not part of the contract. ... The parties' 'total legal obligation' [under Commercial Code definition of "contract"] may be a composite of written terms, oral expression and responsibilities implied by law."]; Cal. U. Com. Code § 1201, subd. (12) [defining "contract" as "the total legal obligation that results from the parties' agreement as determined by this code and as supplemented by any other applicable laws."].) If a thief *steals* goods, for example, no warranty obligation arises.

This long-standing principle is consistent with the Commercial Code and other California statutes. (*Rich v. State Bd. of Optometry* (1965) 235 Cal.App.2d 591, 606 (*Rich*) ["A sale is a contract by which, for a consideration, one transfers to another property or an interest therein" and this "definition coincides with the common law definition of sale … and is substantially the same as used in Commercial Code section 2106, and in other statutes in this state."] [cleaned up]; *Cal-Metal Corp. v. State Bd. of Equalization* (1984) 161 Cal.App.3d 759, 764 [same]; Cal. U. Com. Code, § 2106, subd. (1) [stating the term "'[c]ontract for sale' includes both a present sale of goods and a contract to sell goods at a future time" and that "a 'present sale' means a sale which is accomplished by the making of the contract."].) The Song-Beverly Act does not define "sale" or "sale contract" and thus necessarily

imports the definitions for those words from the Commercial Code. (Civ. Code § 1790.3.)

Treatises and non-California courts interpreting the Uniform Commercial Code confirm that warranties are intertwined with, and not independent of, sale contracts. (See, e.g., 4 Witkin, Summary of Cal. Law (11th Ed. 2023) Sales, § 98 ["a warranty is considered contractual in its nature, and is a part of the contract of sale."]; Warren & Rowe, *The Effect of Warranty Disclaimers on Revocation of Acceptance Under the Uniform Commercial Code* (1986) 37 Ala. L.Rev. 307, 326, 327 (hereafter Warren & Rowe) (["[Total] obligations [under UCC § 1-201 definition of 'contract'] include the total mix of terms, conditions and warranties which form the bargain of the parties. *Nowhere in the UCC is the term limited to express and implied warranties made by the seller* [fn. omitted]" and "The total mix forming the basis of the bargain between Dealer and Buyer includes the protection afforded by an express limited warranty given by Manufacturer and passed on by Dealer."] [italics added]; *Badilla v. Wal-Mart Stores East Inc.* (N.M. 2015) 357 P.3d 936, 946 ["[L]egal obligations [under UCC § 1201(b)(12)] include any warranties made about the goods."]; *Volkswagen of America, Inc. v. Novak* (Miss. 1982) 418 So.2d 801, 804 [rejecting argument that Commercial Code remedy unavailable from non-selling manufacturer because "the retailers sales contract accompanied by

the manufacturer's warranty, are so closely linked both in time of delivery and subject matter, that they blended into a single unit at the time of sale."]; *Fode v. Capital RV Center, Inc.* (N.D. 1998) 575 N.W.2d 682, 687 [same].)

By de-linking the sale contract and the warranties for the narrow purpose of denying nonsignatory rights, the Opinion allows plaintiffs to simultaneously argue that Ford's warranty obligations "arise out of" and "result from" the sale to assert warranty claims against Ford under the Song-Beverly Act, while taking the inconsistent position that they do not "arise out of" the sale for purposes of equitable-estoppel enforcement of the arbitration agreements. This inconsistency is precluded under the FAA's equal-treatment principle and by the principles of fairness underlying the equitable estoppel doctrine.

In contrast, *Felisilda*'s holding that the sale contracts are the source of the manufacturers' warranties allows for consistent interpretation and application of the statutory framework governing Plaintiffs' warranty claims. For this reason, this Court should reverse the Opinion.

B. The Opinion is inconsistent with the fact that Plaintiffs sued to hold Ford liable on warranty duties imposed by the sale contracts

To reach the conclusion that Plaintiffs' claims "are not founded in the sale contracts" and thus cannot trigger application

of equitable estoppel, the Opinion engages in an analysis that is directly inconsistent with California law regarding equitable estoppel, warranties, and sale contracts. By doing so, the Opinion necessarily applies California law "unequally" to deny Ford arbitration-enforcement rights.

1. Plaintiffs must rely on the sale contracts to impose liability on Ford for their warranty claims.

"When a plaintiff brings a claim which *relies on contract terms* against a defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement. [Citations.]" (*JSM Tuscany, LLC v. Superior Ct.* (2011) 193 Cal.App.4th 1222, 1239, original italics.) To pursue and prevail on claims for breach of any warranty under the Song-Beverly Act, Plaintiffs necessarily had to rely on the terms of the sale contracts to establish they were *owed* warranty duties under that Act.

For example, to prevail under the Song-Beverly Act, plaintiffs must establish the parties to the sale contract: that the plaintiff was the "buyer" and that the seller was a "retail seller." (*Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 917 (*Dagher*).)

Similarly, plaintiffs must rely on the sale contract to establish what they purchased (*i.e.,* a "new motor vehicle"),[3] who manufactured and sold it to establish who owed implied-warranty obligations under the Act, how the sale contract described the vehicle to determine whether it "pass[e]d without objection in the trade," and who made an express-warranty statement (if any) arising out of that sale contract. (*Id.*, at p. 920 [explaining definition of "new motor vehicle" under the Song-Beverly Act]; Civ. Code §§ 1791, subd. (j) [defining "manufacturer"], 1791.1, subd.(a) [defining "implied warranty of merchantability"], 1791.2 [defining "express warranty"], 1792 [unless disclaimed, every retail consumer sale is accompanied "by the manufacturer's and the retail seller's implied warranty"].)

Plaintiffs must also read the sale contract and the express warranty together to establish the duration of any implied warranty. (Civ. Code § 1791.1, subd. (c) [duration of implied warranty "shall be coextensive in duration with an express warranty which accompanies the consumer goods," "but in no

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[3] For example, the sale contracts for two of the plaintiffs state that they purchased their Ford vehicles "used;" this Court is addressing whether the Song-Beverly Act applies to such vehicles at all. (See AA 18, 27; *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, review granted July 13, 2022, S274625.) But the merits of Plaintiffs' Song-Beverly claims is irrelevant to the estoppel analysis: "[e]stoppel is not dependent on the potential merits of a claim but depends on the manner in which a claim is raised or not raised." (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1189.)

event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale…"].)

And to establish entitlement to remedies for breach of express or implied warranties under the Act, plaintiffs must establish what they agreed to pay under the sale contract and that they were harmed. (See, e.g., *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 192 ["Section 1794, subdivision (b) [of the Song-Beverly Act] clearly equates the compensatory damages for a failure to replace or refund with those available to a buyer for a seller's breach of a contract for sale of goods (in addition, of course, to replacement or refund."]; Civ. Code § 1793.2, subd. (d)(2) [restitution calculation for breach of express warranty based on certain amounts paid by buyer as part of sale]; *Simgel Co., Inc. v. Jaguar Land Rover North America, LLC* (2020) 55 Cal.App.5th 305, 315–316 [implied-warranty measures of damages based on price paid].)

The Opinion's equitable-estoppel analysis here describes Plaintiffs' express and implied warranty claims (and other claims not relevant here) and allegations. It recognizes that "[m]ost of the plaintiffs attached their sale contracts as an exhibit to their complaint" to support various allegations regarding what they purchased (*i.e.,* a Ford vehicle) and when. (Opinion, pp. 11–12; AA 119, 128–130, 134, 162–163, 166, 187–188, 191, 196–198 [record of Plaintiffs' complaints attaching sale contracts].) It also recognizes

that "sale contracts were accompanied by implied warranties under" the Song-Beverly Act, but nevertheless concludes that "[n]ot one of the plaintiffs sued on any express contractual language in the sale contracts." (Opinion, pp. 11–12.)

Even if the equitable-estoppel analysis were properly limited to the four corners of the sale contracts, that conclusion would be both incorrect and inconsistent with numerous aspects of the foregoing California law requiring Plaintiffs to rely on the terms of the sale contracts. Equitable estoppel precludes Plaintiffs from avoiding their obligations to arbitrate because Plaintiffs were required to rely on the terms of the sale contracts to establish their claims against Ford.

2. California law considers warranties accompanying a sale as terms of the sale contracts whether or not they are directly written into those contracts.

Further, the Opinion's focus on the "express contractual language in the sale contracts" unduly limits the equitable-estoppel analysis. As discussed, equitable estoppel applies when a signatory (here, Plaintiffs) seeks "to hold the non-signatory liable pursuant to duties imposed by the agreement…." (*Pacific Fertility*, *supra*, 85 Cal.App.5th at p. 893.) Ford's warranty obligations are imposed by and become part of the sale contracts, even where those

warranties are not expressly written into the text of those contracts.

California has long recognized that "[t]he promise which the law implies as an element of the contract is as much a part of the instrument as if it were written out." (*Nomellini Const. Co. v. Harris* (1969) 272 Cal.App.2d 352, 361, cleaned up; *Voth v. Wasco Public Util. Dist.* (1976) 56 Cal.App.3d 353, 358 [same]; *Hauter*, *supra*, 14 Cal.3d at p. 117 ["Into every mercantile contract of sale the law inserts a warranty that the goods sold are merchantable."]; *Snyder v. Holt Mfg. Co.* (1901) 134 Cal. 324, 328 [where warranties imposed by statute apply, "they enter into and form a part of the contract of sale" by the defendant-manufacturer]; *American Seedless Raisin Co. v. Joshua Hendy Iron Works* (1928) 94 Cal.App. 289, 291 ["it is the established rule in this state that these warranties implied by law may be deemed incorporated in the contract"].)

In the context of warranties that arise from a sale, California law has long treated both express and implied warranties as terms of the sale contracts. "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1200 (*Jones*) [cleaned up; citations omitted]; *Brown*, *supra*, 44 Cal.3d at p. 1071 ["An implied warranty that goods are 'fit for the ordinary purposes for which such goods are used' arises from a

contract of sale", citing Cal. U. Com. Code § 2314, subd. (2)(c)]; *Dagher*, *supra*, 238 Cal.App.4th at p. 928 [in action involving warranty claims against manufacturer, describing an express warranty as "a contractual promise from the seller that the goods conform to the promise."].) A warranty is "as much one of the elements of sale and as much a part of the contract of sale as any other portion of the contract and is not a mere collateral undertaking. [Citations.]" (*A.A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 153 (*A.A. Baxter*); see also Cal. U. Com. Code § 2314 ["a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind"].)

Here, a manufacturer's implied warranty is a promise and a statement about the quality of a vehicle implied by law into the sale contracts; similarly, the manufacturer's express warranty promising to repair a vehicle is a statement passed along and sold by the dealer in the same manner that the dealer sells the vehicle. (*Hauter*, *supra* 14 Cal.3d at p. 117; *Daugherty v. American Honda Motor Co.* (2006) 144 Cal.App.4th 824, 830 ["The law governing express warranties is clear. A warranty is a contractual promise from the seller that the goods conform to the promise," discussing scope of vehicle manufacturers' express warranty].) The Opinion's limited analysis—focusing only on the express terms—is inconsistent with these longstanding principles.

C. The Opinion's distinction between sellers' warranties and Ford's warranties provides no basis for denying nonsignatory enforcement of terms in contracts that are the foundation for asserting claims under both types of warranties.

To avoid this weight of authority, the Opinion relies on a purported distinction between sellers' warranties and manufacturers' warranties that accompany a vehicle at the time of sale. (Opinion, pp. 12–13.) Plaintiffs argue the same, contending that these cases and the Commercial Code apply only to sellers' express warranties. (See, e.g., Answer to Pet. for Review at pp. 17–20.) The Opinion and Plaintiffs' arguments are inconsistent with California law.

This Court has long recognized that warranties accompanying the sale of a product are "ordinarily indispensable to the sale," and are "part of the purchase of a consumer product, and a representation of the fitness of that product that has particular meaning for consumers." (*Gavaldon*, *supra*, 32 Cal.4th at p. 1258; *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 379 (*Pollard*); see also, e.g., *Durfee v. Rod Baxter Imports, Inc.* (Minn. 1977) 262 N.W.2d 349, 357 ["The existence and comprehensiveness of a warranty undoubtedly are significant factors in a consumer's decision to purchase a particular

automobile."]; *Seekings v. Jimmy GMC of Tucson, Inc.* (Ariz. 1981) 638 P.2d 210, 216–217 [reasoning that purchase of new motor home from dealer came with implied representation that the motor home would be warranted by the manufacturer and repaired by dealer; "[t]his [ ] was an allocation of the risks for which the parties freely bargained" and dealer "would not have received the price it did" otherwise].)

These authorities do not draw a distinction between manufacturer and seller warranties. The underlying premise of these holdings is that warranties are incorporated into sale contracts because they identify what is being promised and sold in those contracts. (*Brown*, *supra*, 44 Cal.3d at p. 1071 ["An action for breach of express warranty requires that the seller of goods conform to his promises concerning them"].) For example, an implied warranty of merchantability lies if a vehicle does not "[c]onform to the promises or affirmations of fact made on the container or label," without reference to whether those promises are made by the manufacturer or the seller. (Civ. Code § 1791.1, subd. (a)(4).) Similarly, the Commercial Code recognizes that "'[t]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.'" (*A.A. Baxter*, *supra*, 10 Cal.App.3d at p. 153, fn. 1, quoting Cal. U. Com. Code § 2313, U.C.C. cmt. 4; see also *Jones*, *supra*, 198 Cal.App.4th at p. 1200 ["[a] warranty is a contractual term concerning some aspect

of the sale, such as title to the goods, or their quality or quantity"]); *Felisilda*, *supra*, 53 Cal.App.5th at p. 496; *Windham at Carmel Mountain Ranch Assn v. Superior Ct.* (2003) 109 Cal.App.4th 1162, 1168.)

In other words, warranties are contractual terms describing what the buyer has purchased in a sale contract and include all warranty obligations resulting from that contract. (Cal. U. Com. Code § 1201, subd. (12) [defining "contract" as "the total legal obligation that results from the parties' agreement as determined by this code and as supplemented by any other applicable laws"]; *A&M Produce Co.*, *supra*, 135 Cal.App.3d at p. 495 ["The fact that a warranty is not stated in the written memorandum does not mean it is not part of the contract," citing Commercial Code definition of "contract"]; *Reyes v. Beneficial State Bank* (2022) 76 Cal.App.5th 596, 618–620 (*Reyes*) ["Claims for breach of an express warranty are based on the parties' agreement and sound in contract," citing *Hauter*, *supra*, 14 Cal.3d at p. 117]; Warren & Rowe, *supra*, 37 Ala.L.Rev. at p. 325 ["No one would argue that th[e manufacturer's] warranty is not an essential, integral, and material part of the contractual bargain between the dealer and the buyer. [Fn. omitted.]"].)

In arguing that the Commercial Code applies only to warranties based on statements by sellers, not manufacturers, plaintiffs say that Commercial Code section 2313 refers to the

creation of "[e]xpress warranties by the seller" based exclusively on an "affirmation of fact or promise made by the seller." But that cannot be true, else non-seller manufacturers would never be liable for section 2313 express-warranty claims by California consumers.

To the contrary, this Court and others have repeatedly affirmed such liability where a manufacturer's warranties were communicated and delivered as part of the sale, often rejecting arguments that such liability is limited to sellers. In *Hauter*, for example, this Court affirmed the liability of both the manufacturer and the seller for a Commercial Code express-warranty claim. (*Hauter*, *supra*, 14 Cal.3d at p. 108 & fn. 1; see also, e.g., *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, 225, review granted July 13, 2022, S274625 ["the beneficiary of a transferrable express warranty can sue a manufacturer for breach of an express warranty to repair defects under the California Uniform Commercial Code"]; *Dagher*, *supra*, 238 Cal.App.4th at p. 928 ["In our case, both Plaintiff and Ford acknowledge that some express warranty claims are viable in this action, whether under the Commercial Code or Magnuson-Moss."]; *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1325, 1332–1333 [rejecting argument that non-seller warrantor's repair warranty was not included in Commercial Code section 2313 definition of express warranty]; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13,

22 ["It is clear that statements made by a manufacturer or retailer in an advertising brochure which is disseminated to the consuming public in order to induce sales can create express warranties. [Citations.]"]; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 957 ["when a consumer relies on representations made by a manufacturer in labels or advertising material, recovery is allowable on the theory of express warranty…. [Citation.]"].)

Provisions of the Song-Beverly Act also preclude efforts to disentangle manufacturers' and sellers' warranty obligations. For example, the existence and duration of sellers' implied-warranty obligations are tied to manufacturers' express warranties accompanying the sale and sellers have obligations to give effect to those express warranties. (See, e.g., Civ. Code § 1791.1, subd. (c) [the duration of sellers' implied warranty of merchantability "shall be coextensive in duration with an express warranty which accompanies the consumer goods"]; *id.* at § 1793 ["a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods."]; *id.* at §§ 1793.3, 1793.5 [recognizing obligations imposed on retail sellers "in giving effect to the express warranties that accompany such manufacturer's consumer goods."].)

Plaintiff-purchasers have argued to their benefit, and California courts have consistently agreed, that the Commercial

Code's express-warranty provisions apply to manufacturers' warranties, like Ford's here. Both equitable estoppel and the FAA's equal-treatment principle preclude a contrary interpretation that avoids nonsignatory manufacturers' enforcement of arbitration rights under a theory that only sellers' warranties are part of the sale contracts under the Commercial Code.

D. The Opinion's holding that the sale contracts "contain[ ] no warranty terms" is both incorrect and inconsistent with California law.

The Opinion's holding relies on its characterization of the effect of the following provision in each of the sale contracts here:

> If you do not get a written warranty, and the Seller does not enter into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.
>
> This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide. If the Seller has sold you a certified used vehicle, the warranty of merchantability is not disclaimed.

(Opinion, pp. 12–13; see, e.g., AA 20 [complete provision in form contract].) This provision is part of the form sale contracts similarly referenced in each of the appellate opinions addressing this issue. (See *Montemayor*, *supra*, 92 Cal.App.5th at p. 962;

Kielar v. Superior Court (2023) 94 Cal.App.5th 614, 620; *Yeh*, *supra*, 95 Cal.App.5th 264 [313 Cal.Rptr.3d at p. 299].)[4]

The Opinion characterizes this provision to mean the sale contracts include "no warranty, nor any assurance regarding the quality of the vehicle sold, nor any promise of repairs or other remedies in the event problems arise." (Opinion, p. 12; *id.*, pp. 3, 13 [describing the sale contracts as not containing any terms of warranty].) It interprets the provision's effect as "disclaim[ing] any warranty on the part of the dealers, while acknowledging no effect on 'any warranties covering the vehicle that the vehicle manufacturer may provide.'" (*Id.*, p. 12.)

The Opinion's interpretation of this warranty disclaimer provision is both erroneous and inconsistent with California law. The fact that contracting parties can disclaim implied warranties in sale contracts reinforces the conclusion that such warranties are necessarily terms of the contract. Under the Song-Beverly Act, "every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable," which can be disclaimed "only when a consumer good is on an 'as is' or 'with all

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[4] The same disclaimer is contained in sale contracts addressed in the unpublished opinions addressing this issue, which Ford cites here only to establish the prevalence of this provision, and not for precedential purposes. (*Lanier v. Ford Motor Co.* (Apr. 26, 2023) No. B315114, 2023 WL 3086443, *3 (unpublished); *Aguilar*, *supra*, 2018 WL 3407575, *5.)

faults' sale." (*Hartnett v. W. Recreational Vehicles, Inc.* (C.D. Cal. Mar. 18, 2009) No. 8:08-cv-00492, 2009 WL 10672795, at pp. *1, 3 (*Hartnett*), citing Cal. Civ. Code §§ 1792, 1792.3).) Thus, the warranty disclaimer actually illustrates that Plaintiffs' warranty claims are intimately founded in and intertwined with the sale contracts.

At any rate, the provision applies as a warranty disclaimer only under circumstances not present here. It states that there would be no sellers' express or implied warranties, but only if the Plaintiffs did "not get a written warranty, and the Seller does not enter into a service contract within 90 days from the date of this contract." But Plaintiffs did receive a written warranty—from Ford. (Opinion, p. 12; AA 93–94, 106–107, 152, 178, 190 [substantively identical allegations by each plaintiff that "express warranties accompanied the sale of the Vehicle to Plaintiff by which Ford undertook to preserve or maintain the utility or performance of Plaintiff's Vehicle or provide compensation if there was a failure in such utility or performance."].) Thus, the provision establishes that Ford's warranty is intertwined with the warranty obligations purchasers expected to accompany the sale under the express terms of the sale contracts.

Further, if the Opinion's interpretation of the warranty-disclaimer were consistent outside the arbitration context, that provision would disavow sellers' implied and express warranty

obligations in every sale governed by these form contracts. But that is not the case. Plaintiffs repeatedly file suit against both manufacturers and selling dealers for breach of both implied and express warranties. But as far as Ford is aware, no California court has ever interpreted the disclaimer provision as negating the sellers' warranty obligations where a purchaser had received a manufacturer's written warranty. (See, e.g., *Felisilda*, *supra*, 53 Cal.App.5th at p. 491 [plaintiffs filed suit against both the seller and manufacturer based on express warranty obligations]; *Montemayor*, *supra*, 92 Cal.App.5th at p. 963 [plaintiffs filed suit against both seller and manufacturer "for breach of the implied warranty of merchantability"]; *Aguilar v. Kia Motors America, Inc.* (2018) No. B284143, 2018 WL 3407575, at *5 ["Plaintiffs sued both the dealership and defendant for breach of express and implied warranties…."] (unpublished);[5] *Hartnett*, *supra*, 2009 WL 10672795, at pp. *1, 3 [rejecting dealer-defendant's argument that an identical provision disclaimed any implied warranty by the dealer because the sale was not made "as-is"].)

In sum, the warranty provisions in the sale contracts confirm that manufacturers' warranties accompanying the sale of a vehicle are intertwined with the sale contracts to the same extent

[5] As above, Ford cites *Aguilar* not in support of any legal principle or precedent, but merely as evidence of the claims asserted by plaintiffs there.

as the signatory-dealers' warranty obligations implied in and imposed by the contracts.

E. The Opinion's arbitration-specific holding improperly departs from California authority equating statutory warranty claims with breach-of-sale-contract claims in non-arbitration contexts, in violation of the FAA's equal-treatment principle.

The Opinion's characterization of Plaintiffs' warranty claims as "statutory" rather than "contractual" to eliminate Ford's arbitration-enforcement rights is inconsistent with California law in the non-arbitration context. As one court recently held in a case asserting violations of repair obligations in a warranty that accompanied a sale contract, "[t]hat plaintiffs styled their causes of action as violations of the CLRA [Consumers Legal Remedies Act] and Song-Beverly does not alter the fact that the primary right at issue was contractual in nature," and "the fact the California Legislature has seen fit to provide consumers with additional remedies for certain contractual claims does not alter the nature of the action." (*Reyes*, *supra*, 76 Cal.App.5th at pp. 619–620; see also, e.g., *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 989 (*Robinson Helicopter*) ["'The law of contractual warranty governs damage to the product itself'"], quoting *Jimenez v. Superior Ct.* (2002) 29 Cal.4th 473, 482–483

(*Jimenez*); *Routh v. Quinn* (1942) 20 Cal. 2d 488, 492 (*Routh*) [describing "the existence of warranties in the sale of property, which, of course, are contractual in nature"].)

In *Reyes*, plaintiffs sought attorneys' fees under Civil Code section 1717, arguing their lawsuit "was an 'action on a contract,'" specifically a retail installment sale contract for purchase of a vehicle, which contained a one-sided attorney-fee provision. (*Reyes*, 76 Cal.App.5th at pp. 603, 616–617.) The court agreed, holding that the express and implied warranty, CLRA, and Song-Beverly claims were based on the vehicle sale contract and entitled plaintiffs to attorney fees for those claims. (*Ibid.*)

Other California courts have also equated warranty claims under the Song-Beverly Act with breaches of the sale contracts to the benefit of consumer-plaintiffs outside of the arbitration context, particularly when identifying the applicable statute of limitations. If such claims were purely statutory in nature, the general three-year statute of limitations contained in Code of Civil Procedure section 338(a) would apply. Instead, California courts give plaintiffs pursuing such claims a longer four-year statute of limitations pursuant to the statute of limitations in the Commercial Code that applies to actions "for *breach of any contract for sale*." (Cal. U. Com. Code § 2725, subd. (1) [emphasis added]; see, e.g., *Krieger v. Nick Alexander Imports* (1991) 234 Cal.App.3d 205, 214–215; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 642

[applying section 2725 as statute of limitations for Song-Beverly Act warranty claims because it "governs breach of warranty claims arising from the sale of goods"].) In doing so, California courts have recognized that a claim for breach of the sale contract can be "based solely on a breach of warranty." (*Cardinal Health 301, Inc. v. Tyco Elecs. Corp.* (2008) 169 Cal.App.4th 116, 134–35.)

Similarly, if Song-Beverly warranty claims were purely statutory and "independent" of any contract, plaintiff-purchasers would be barred from seeking discretionary prejudgment interest under Civil Code section 3287(b), which only applies to a "cause of action in contract…." But California purchaser-plaintiffs often seek such interest when pursuing Song-Beverly claims against non-seller manufacturers, and California courts have recognized trial courts have discretion to award such interest. (See, e.g., *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 46; *Nuguid v. Mercedes-Benz USA, LLC* (S.D. Cal. Nov. 17, 2021) No. 3:21-cv-00435, 2021 WL 5356240, *7 [recognizing plaintiff sought prejudgment interest pursuant to Civil Code section 3287(b)].)

The above cases recognizing the contractual nature of warranty claims are not outliers; this Court has recognized the same for decades. (See, e.g., *Robinson Helicopter*, *supra*, 34 Cal.4th at p. 989; *Jimenez*, *supra*, 29 Cal.4th at p. 483; *Routh*, *supra*, 20 Cal. 2d at p. 492.)

In short, purchaser-plaintiffs outside the arbitration context have repeatedly sought and obtained benefits from California courts by interpreting "statutory" warranty claims as founded in the obligations of sale contracts. By holding otherwise, the Opinion violates both the FAA's equal-treatment principle and the related doctrines underlying equitable estoppel.

F. *Greenman* and *Cavanaugh* Do Not Support the Holding that Ford's Sale-Based Warranties are Independent of the Sale Contracts.

Against the weight of decades of California law discussed above, the Opinion incorrectly relies on brief, out-of-context statements in two cases from 1963 to hold that manufacturers' warranties are untethered to sale contracts. (Opinion, pp. 12–13, citing *Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 60 (*Greenman*); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Cavanaugh* (1963) 217 Cal.App.2d 492, 514 (*Cavanaugh*).)

Neither case involved the issues, governing law, or types of warranties presented here. (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["It is axiomatic that cases are not authority for propositions not considered."].) These cases did not involve arbitration provisions in sale contracts nor the test for nonsignatory enforcement of such provisions. Both cases involved "warranties" from the 1950s and involved the now-superseded

Sales Act rather than the Commercial Code and Song-Beverly Act at issue here. They did not hold that manufacturers' express warranties are *always* independent of a sale contract. They did not even involve the type of manufacturers' warranties here—ones that accompany the sale of a consumer good—and whether such warranties constitute terms of the sale contract.

Reading those opinions in their full context and in contrast with the consistent California warranty law discussed above explains why the Opinion's reliance on snippets from two 60-year-old cases for the fundamental basis of their holding was erroneous and inconsistent with California law.

1. *Greenman* contains no relevant holding regarding the relationship between warranties and the contracts out of which they arise.

Greenman involved a tool manufacturer's liability for a personal-injury claim by a plaintiff who did not purchase the tool but received it as a gift from his wife in 1955. (*Greenman*, *supra*, 59 Cal.2d at p. 59.) The claim against the manufacturer had proceeded solely on theories of negligence and express warranty, not on any implied warranty. (*Id.*) This Court examined whether an injured plaintiff under those circumstances was required to give timely notice of breach of warranty under a now-repealed provision (Civ. Code § 1769) of the Sales Act. (*Id.* at pp. 59–61.) Answering

that question in the negative, this Court merely noted that "section 1769 deals with the rights of the parties to a contract of sale or a sale," but "does not provide that notice must be given of the breach of a warranty that arises independently of a contract of sale between the parties" where "*such warranties are not imposed by the sales act, but are the product of common-law decisions that have recognized them in a variety of situations.*" (*Id.* at p. 61 ["the notice requirement of section 1769 … is not an appropriate one for the court to adopt *in actions by injured consumers against manufacturers with whom they have not dealt.*"] [italics added].)

Greenman's key holding was that injured consumers' remedies for defective products should not "depend upon the intricacies of the law of sales," so this Court "abandon[ed] the fiction of warranty in favor of strict liability in tort." (*Seely*, *supra*, 63 Cal.2d at p. 15.) It was in this context—far afield from the Song-Beverly Act claims here—that this Court held the manufacturer's liability "is not one governed by the law of contract warranties but by the law of strict liability in tort." (*Greenman*, *supra*, 59 Cal.2d at p. 63.) But this Court effectively *reinforced* the "rules defining and governing warranties that were developed to meet the needs of commercial transactions," holding only that those rules "cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed." (*Ibid.*)

The context of *Greenman* stands in stark contrast to the cases here for several additional reasons. First, it did not address manufacturers' implied warranties at all, so does not stand against the consistent California law holding that such warranties arise out of and form part of sale contracts. (See, e.g., *Brown*, *supra*, 44 Cal.3d at p. 1071; *Hauter*, *supra* 14 Cal.3d at p. 117.)

Second, *Greenman*'s brief statement about the independence of an express warranty in a brochure read by a non-purchasing, injured plaintiff is irrelevant to economic-injury claims based on a manufacturer's express warranty that accompanies a sale. Shortly after *Greenman*, this Court continued to apply the Sales Act to the latter context. (*Seely*, *supra*, 63 Cal.2d at pp. 14–16 [distinguishing *Greenman* and applying Sales Act to express-warranty liability of manufacturer who was not a party to the sale contract].)

Third, *Greenman* did not address the substantial changes and developments in warranty law after adoption of the Commercial Code discussed above. This includes the Commercial Code's requirement that a manufacturer's statement become "part of the basis of the bargain" to constitute an express warranty. (*Hauter*, *supra*, 14 Cal.3d at p. 115.) Nor did *Greenman* address the Commercial Code's broad definition of a "contract" to include all legal obligations that result from a sale. (Cal. U. Com. Code § 1201, subd. (12).) Similarly, *Greenman* did not address the Song-

Beverly Act's requirement that an "express warranty" arise out of the sale. (Civ. Code § 1791.2, subd. (a).) Nor did it address, as this Court and the Legislature later recognized, that manufacturers' warranties accompanying the sale of a product are "ordinarily indispensable to the sale," and are "part of the purchase of a consumer product, and a representation of the fitness of that product that has particular meaning for consumers." (*Gavaldon*, *supra*, 32 Cal.4th at p. 1258; *Pollard*, *supra*, 12 Cal.3d at p. 379; see also *Krieger*, *supra*, 234 Cal.App.3d at p. 217 [in claim against selling dealer, holding manufacturers' express warranty "sufficient to raise a genuine issue as to the existence of an express warranty as defined by" Commercial Code section 2313, citing *Seely*, *supra*, 63 Cal.2d at p. 13].)

Given the above, *Greenman* does not support the Opinion's characterization of Ford's express and implied warranties as "independent" of the sale contracts.

2. *Cavanaugh* is likewise irrelevant.

To the extent *Cavanaugh* relied on *Greenman* and pre-Commercial Code law, the Opinion's reliance on *Cavanaugh* is flawed for the same reasons stated above. (*Cavanaugh*, *supra*, 217 Cal.App.2d at p. 514 [citing *Greenman*].)

Cavanaugh is also irrelevant because its context bears no relationship to those here. The issue in *Cavanaugh* concerned the warranty rights of a plaintiff who suffered economic losses arising

out of a contract between that plaintiff and an installer to supply a heating system that utilized defective pipes. (*Cavanaugh*, *supra*, 217 Cal.App.2d at p. 496–499, 504.) The pipes were manufactured by a defendant who was not a party to the installation contract between the plaintiff and installer; the warranty provisions of the Sales Act did not apply to that contract because it "was a contract for labor and material rather than a contract to sell." (*Ibid.*) But there was a contract of sale between the manufacturer and the installer. (*Id.* at p. 514.)

In this context, the court in *Cavanaugh* stated "the express warranty herein involved was not part of a contract of sale between the manufacturer and the plaintiff," as the Opinion quotes, but that was because plaintiff was not party to *any* sale contract. (*Ibid.*) In contrast, here, as discussed above, the express warranties at issue here did arise out of a sale contract with Plaintiffs and the warranties accompanied by that contract *are* governed by the Commercial Code.

The court in *Cavanaugh* recognized that the Sales Act *did* apply to the sale contract and warranties between the manufacturer and installer, holding the installer could not recover from the manufacturer "because he gave no notice of any breach as required by law." (*Id.* at p. 509.) *Cavanaugh* then turned to whether the non-purchasing plaintiff could claim the benefits of the manufacturer's express warranty based on an exception to the

traditional rules of privity. (*Id.* at pp. 513–514.) In so doing, it implicitly reaffirmed that manufacturers' warranties arise out of a sale contract by finding that the claim could proceed only if a privity exception existed. *Cavanaugh* recognized such an exception under the pre-Commercial Code law of warranty. (*Ibid.*; see also 4 Witkin, Summary of Cal. Law (11th Ed. 2023) Sales, § 100 ["An express warranty may sometimes be made by a manufacturer directly to the buyer, although the goods are actually sold by someone other than the manufacturer."].) *Cavanaugh* did not hold that a sale contract was not required for an express warranty to arise at all, only that "the concept of privity should not be so narrowly construed that … defendant is thereby insulated from responsibility for damage caused to the plaintiff by the inaccuracy of any representation made by it which was in the nature of a warranty." (*Cavanaugh*, *supra*, 217 Cal.App.2d at p. 514.)

Cavanaugh's privity analysis does not support Plaintiffs' argument or the Opinion's characterization that manufacturers' warranties exist in a vacuum, untethered from any sale contracts. It recognized such a warranty *is* connected to a sale contract, but simply relaxes privity requirements in certain circumstances. That privity analysis, as discussed above, is particularly irrelevant to the Song-Beverly Act claims here, because that Act imposes liability for a manufacturer's express warranties accompanying a

sale contract without requiring privity. (See, e.g., *Mega RV*, *supra*, 225 Cal.App.4th at p. 1333, fn. 11.)

* * *

As discussed, plaintiff-purchasers in California have received substantial benefits from the developments in warranty law following both *Greenman* and *Cavanaugh*. (See *ante* Sections III.C, E. [extended statute of limitations, availability of Commercial Code claims against both seller and manufacturer, liability for attorneys' fees under the sale contracts for such claims; availability of prejudgment interest].) If, as Plaintiffs and the Opinion would have it, non-seller manufacturers' warranties are independent of the sale contracts and not subject to the Commercial Code, those benefits would not be available. It is this lack of consistency between those benefits, and Plaintiffs' arguments and the Opinion's analysis in the arbitration context, that make Ford's arbitration enforcement equitable and the Opinion's denial of those rights a violation of the FAA's equal-treatment principle.

CONCLUSION

The Court should reverse and hold that manufacturers' express and implied warranties that accompany a vehicle at the time of sale constitute obligations arising from the sale contract, permitting manufacturers to enforce an arbitration agreement in the contract pursuant to equitable estoppel.

Dated: October 17, 2023

Respectfully submitted,
SHOOK, HARDY & BACON L.L.P.

/s/ Andrew L. Chang
Andrew L. Chang

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FORD MOTOR COMPANY

CERTIFICATE OF COMPLIANCE

I certify that, apart from those portions that may be excluded by rule, the text of this brief contains 9,785 words as counted by Microsoft Word, the program used to create it.

October 17, 2023 *<u>/s/ Andrew L. Chang</u>*
Andrew L. Chang

Case No. S279969

IN THE SUPREME COURT OF CALIFORNIA

FORD MOTOR WARRANTY CASES.

MARTHA OCHOA, et al.

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY,

Defendant and Appellant.
[And four other cases.]

PROOF OF SERVICE

After a Decision of the Court of Appeal,
Second Appellate District, Case No. B312261

Appeal from an Order of the Superior Court of Los Angeles County
JCCP No. 4856 (The Honorable Amy Hogue)

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October 17, 2023

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PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed in the County of San Francisco, State of California. My business address is 555 Mission Street, Suite 2300, San Francisco, California 94105, my facsimile number is (415) 391-0281. On the date shown below, I served the following document(s):

- **OPENING BRIEF ON THE MERITS**

on the interested parties named herein and in the manner indicated below:

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Executed on October 17, 2023, at San Francisco, California.

Christopher J. Martinez

STATE OF CALIFORNIA
Supreme Court of California

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