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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

R. E., et al.,
Plaintiffs,
v.
PACIFIC FERTILITY CENTER, et al.,
Defendants.

Case No.18-cv-01586-JSC

**ORDER RE: MOTION TO COMPEL
ARBITRATION**

RE: DKT. NO. 52

Plaintiffs filed this putative class action against Pacific Fertility Center (“Pacific Fertility”), Prelude Fertility, Inc. (“Prelude”), and Chart Industries (“Chart”), following notification that the liquid nitrogen levels in a cryopreservation tank storing their eggs and embryos had dropped to an unsafe level for an undetermined period of time potentially damaging the eggs and embryos. Pacific Fertility filed a motion to compel arbitration, in which Prelude and Chart joined. (Dkt. Nos. 52, 56, 67.) At the hearing on November 9, 2018, Plaintiffs requested and were granted leave to file an amended complaint and the Court ordered the parties to submit supplemental briefing on the motion to compel arbitration. (Dkt. No. 133.) Plaintiffs thereafter filed their First Amended Complaint which added Pacific Fertility MSO, LLC, a Prelude subsidiary, as a defendant¹ (Dkt. No. 143), and the parties supplemented their briefing on the motion to compel arbitration. Having had the benefit of oral argument on November 9, 2018 and March 12, 2019, the Court GRANTS Pacific Fertility’s motion to compel arbitration, but DENIES Prelude, Pacific Fertility MSO, and Chart’s request to compel arbitration. The Court also declines to stay proceedings in this Court pending the arbitration.

¹ All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 11, 19, 23, 26, 65, 150.)

BACKGROUND

Pacific Fertility markets and sells egg and embryo cryopreservation services. (Dkt. No. 174-3, First Amended Consolidated Amended Class Action Complaint (“FAC”) at ¶ 1.) Cryopreservation involves preservation of tissue using cooling techniques. (*Id.* at ¶ 1.) Plaintiffs engaged Pacific Fertility’s services to cryopreserve their eggs and embryos between 2010 and 2016. (*Id.* at ¶ 4.)

When Plaintiffs signed up with Pacific Fertility they executed two different agreements relevant to the present motions. First, A.B., E.F., G.H., I.J., and K.L. signed a medical malpractice arbitration agreement.² Article 1 of the agreement states:

It is understood that any dispute as to medical malpractice, that is, as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings.

(Dkt. No. 51-3 at 5, 9, 13, 17, 21, 29.³) Article 2.b. Treatment Covered states: “Patient understands and agrees that any dispute of the sort described in Article 1 between Provider and Patient will be subject to compulsory, binding arbitration.” (*Id.*) Further, immediately above each Plaintiff’s signature the following appears:

NOTICE; BY SIGNING THIS CONTRACT, YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

Patient’s Name (Please Print): _____
Dated: _____ Signed: _____

(*Id.*)
Second, Plaintiffs signed a Cryopreservation and Storage Informed Consent Agreement

² All Plaintiffs signed arbitration agreements containing the same language.
³ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 which includes two dispute resolution provisions.⁴ The relevant provisions state:

2 Dispute Resolution: Medical Claims. It is understood that any dispute as to medical malpractice, that is, as to
3 whether any medical services rendered under this contract were unnecessary or unauthorized or were
4 improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided
5 in a separate arbitration agreement signed by the parties.

6 Dispute Resolution: Other Claims. Any other disputes relating to this agreement which cannot be resolved by
7 the parties in good faith discussions shall be submitted to mediation in the County of San Francisco, California,
8 administered by a person mutually agreeable to the parties or if there is no mutual agreement, at the request of
9 either party the matter shall be submitted to the American Arbitration Association ("AAA") for mediation.
10 Mediation before an AAA mediator shall proceed and continue until such time as the matter is either resolved or
11 the mediator finds or the parties agree that mediation should not continue. The parties shall share equally the
12 costs of any mediation, and each party shall bear its or her own costs in connection therewith. If the parties
13 cannot resolve the dispute through the mediation process detailed above, the matter shall be settled by binding
14 arbitration in San Francisco, California, in accordance with the then-current rules of the AAA, and judgment
15 upon the award entered by the arbitrators may be entered in any Court having jurisdiction hereof. Any and all
16 claims brought forth subject to mediation and/or arbitration pursuant to this Agreement may only be brought in
17 a party's individual capacity, and not as a plaintiff or class member in any purported class or representative
18 proceeding in any forum. Any claim as to whether this Agreement should be subject to arbitration or the
19 enforceability of any provision of this Section 13 shall be resolved by arbitration conducted in accordance with
20 this Section. The prevailing party in any arbitration under this Section, or in any court proceeding brought to
21 enforce an arbitration award after it is rendered by the arbitrator, shall be entitled to its costs, including
22 reasonable attorneys' fees. Said arbitration shall be conducted in the English language and the award rendered
23 in the United States dollars. Service of the Petition to Confirm the Award of the Arbitrator shall be complete on
24 personal delivery or the deposit of the Petition and notice in the United States Mail. Should one party either
25 dismiss or abandon the claim or counterclaim before hearing thereon, the other party shall be deemed the
26 "prevailing party" pursuant to this Agreement. Should both parties receive judgment or award on their
27 respective claims, the arbitrator shall determine which of the parties shall be deemed the "prevailing party" for
28 purposes of this Agreement.

(Dkt. Nos. 51-4 at 23-24 (Ex. B: Informed Consent for In Vitro Fertilization); 56-57 (Ex. D:
Informed Consent for Oocyte Stimulation, Egg Harvesting, Cryopreservation and Storage); 86-87
(Ex. F: Informed Consent for Oocyte Stimulation, Egg Harvesting, Cryopreservation and Storage);
116 (Ex. H: Informed Consent and Agreement to Perform Egg Cryopreservation); 146-147 (Ex. J:
Informed Consent for Oocyte Stimulation, Egg Harvesting, Cryopreservation and Storage); 175-
176 (Ex. K: Informed Consent for Oocyte Stimulation, Egg Harvesting, Cryopreservation and
Storage); 204-205 (Ex. L: Informed Consent for Oocyte Stimulation, Egg Harvesting,
Cryopreservation and Storage).)⁵

⁴ Because all Plaintiffs signed agreements containing the same language, for ease of reference the Court refers to these agreements collectively as "the Informed Consent Agreement."

⁵ In the parties' initial papers there had been a dispute as to whether Defendants could compel arbitration as to Plaintiffs C.D. and O.P.—the partners of A.B. and M.N., respectively—because they did not sign the medical malpractice arbitration agreement. However, Plaintiffs O.P. and M.N. have since dismissed their claims and Plaintiff C.D. signed the Informed Consent Agreement that includes the at-issue arbitration provision, so there is no dispute that the arbitrability of C.D.'s

1 In 2017, unbeknownst to Plaintiffs, Prelude took over operation of Pacific Fertility’s egg
2 and embryo storage facilities through its operating subsidiary Pacific MSO. (Dkt. No. 174-3 at ¶
3 5.) Prelude operates a national network of egg and embryo long-term freezer storage facilities.
4 (*Id.*)

5 On March 4, 2018, Prelude “discovered that the liquid nitrogen levels in a tank known as
6 ‘Tank 4’ had dropped to an unsafe level for an undetermined period of time, destroying or
7 jeopardizing the eggs and embryos stored in the tank, including those belonging to Plaintiffs.” (*Id.*
8 at ¶ 6.) Plaintiffs were notified of this incident via an email on March 11, 2018, which stated that
9 a “preliminary analysis” suggested some of the eggs and embryos in the tank may have been
10 destroyed. (*Id. at* ¶ 7.) A month later, Pacific Fertility again emailed Plaintiffs, advising them
11 that an investigation had shown the incident resulted from “a failure of the tank’s vacuum seal.”
12 (*Id. at* ¶ 8.) Shortly thereafter, Chart—who manufactured the at-issue tank, Tank 4—recalled
13 several of its cryopreservation tanks, citing “reports of a vacuum leak or failure that could
14 compromise the product.” (*Id. at* ¶ 8.) “Pacific Fertility and Prelude have informed Plaintiffs that
15 it is not possible to know whether their eggs or embryos are viable until they are warmed, and
16 even then, the full extent of the damage cannot be known without attempting a pregnancy.” (*Id. at*
17 ¶ 10.)

18 Following receipt of the March 11 email, Plaintiff S.M. filed this putative class action
19 against Pacific Fertility and Prelude alleging various state law claims. (Dkt. No. 1.) Ten days
20 later, Plaintiff filed an amended class action complaint substituting in a new plaintiff—R.E.—and
21 adding an additional claim. (Dkt. No. 7.)

22 The parties then stipulated to consolidate this action with two other actions pending in the
23 Northern District of California: *Bauer, et al. v. Pacific Fertility Center, et al.*, No. 3:18-cv-01634
24 (N.D. Cal. filed Mar. 15, 2018) and *A.B., et al. v. Pacific Fertility Center, et al.*, No. 3:18-cv-
25 02298 (N.D. Cal. Filed April 17, 2018). (Dkt. No. 17.) Plaintiffs A.B., C.D., E.F., G.H., I.J.,
26 K.L., M.N., and O.P then filed a Consolidated Amended Class Action Complaint which added
27

28 _____ claims rises and falls on the same analysis as for the other plaintiffs.

1 Chart as a defendant and again pled various state law claims. (Dkt. No. 44.)

2 A month later, Pacific Fertility filed a motion to compel arbitration in which Prelude and
3 Chart joined. (Dkt. Nos. 52, 56, 67.) The motion to compel arbitration first came before the Court
4 for a hearing on November 9, 2018. At that hearing, Plaintiffs requested leave to amend their
5 complaint to reflect information learned through discovery. The Court granted Plaintiffs' request
6 and ordered the parties to file supplemental briefing related to the motion to compel arbitration.
7 (Dkt. No. 133.) Plaintiffs thereafter filed the First Amended Consolidated Complaint which added
8 Pacific MSO, Prelude's subsidiary, as a defendant and pled the following 11 claims for relief: (1)
9 negligence and/or gross negligence as to Prelude and Pacific MSO; (2) negligent failure to recall
10 as to Chart; (3) bailment as to Prelude and Pacific MSO; (4) premise liability as to Prelude and
11 Pacific MSO; (5) violation of the UCL as to all Defendants; (6) violation of California's
12 Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 et seq. as to Pacific Fertility,
13 Prelude, and Pacific MSO; (7) fraudulent concealment as to Pacific Fertility, Prelude, and Pacific
14 MSO; (8) strict products liability-failure to warn as to Chart; (9) strict products liability-
15 manufacturing defect as to Chart; (10) strict products liability-design defect-consumer
16 expectations test as to Chart; and (11) strict products liability-design defect-risk utility test as to
17 Chart. (Dkt. No. 174-3, First Amended Consolidated Class Action Complaint ("FAC").)

18 Plaintiffs M.N. and O.P. thereafter voluntarily dismissed their claims. (Dkt. No. 163.)

19 The parties then filed two joint requests to amend the briefing schedule on the arbitration
20 motion which the Court granted. (Dkt. Nos. 149, 162.) Following completion of the briefing, the
21 Court heard renewed argument on March 12, 2019.

22 LEGAL FRAMEWORK

23 Federal law governs interpretation of the agreements to arbitrate because the agreements
24 evidence transactions involving interstate commerce. *See Turtle Ridge Media Group, Inc. v.*
25 *Pacific Bell Directory*, 140 Cal. App. 4th 828, 832 (2006); *see also* 9 U.S.C. § 2. The Federal
26 Arbitration Act ("FAA"), 9 U.S.C. §§ 2-16, provides that arbitration agreements "shall be valid,
27 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation
28 of any contract." Under the FAA, "arbitration agreements [are] on an equal footing with other

1 contracts,” and therefore courts are required to enforce arbitration agreements according to their
2 terms. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010). The court must direct parties
3 to proceed to arbitration should it determine: (1) that a valid arbitration agreement exists, and (2)
4 that the agreement encompasses the dispute at issue. *Kilgore v. KeyBank, Nat’l Ass’n*, 718 F.3d
5 1052, 1058 (9th Cir. 2013).

6 DISCUSSION

7 Defendants move to compel arbitration of Plaintiffs’ claims on the grounds that the claims
8 fall squarely within the agreement requiring arbitration of medical malpractice claims and, if not
9 that agreement, then within the “other disputes” arbitration provision of the Informed Consent
10 Agreement. Although not parties to the Arbitration Agreement or the Informed Consent
11 Agreement, Chart, Prelude, and Pacific MSO contend that they, too, can force Plaintiffs into
12 arbitration based on either of two theories: equitable estoppel or as third-party beneficiaries.⁶

13 I. Plaintiffs’ Claims Against Pacific Fertility are Subject to Arbitration

14 Pacific Fertility insists that Plaintiffs’ claims against it fall within the medical malpractice
15 arbitration agreement and the arbitration provisions of the Informed Consent Agreement. Because
16 Plaintiffs do not dispute that their claims against Pacific Fertility fall within the “Dispute
17 Resolution: Other Claims” provision in the Informed Consent Agreement (hereinafter referred to
18 as the “Arbitration Agreement”) (Dkt. No. 51-4 at 23-24), the Court need not determine whether
19 Plaintiffs’ claims would also fall under the medical malpractice arbitration provisions.

20 II. Prelude and Chart Cannot Invoke the Arbitration Agreement

21 The contractual right to compel arbitration “may not be invoked by one who is not a party
22 to the agreement and does not otherwise possess the right to compel arbitration.” *Britton v. Co-op*
23 *Banking Grp.*, 4 F.3d 742, 744 (9th Cir. 1993). Accordingly, “[t]he strong public policy in favor
24 of arbitration does not extend to those who are not parties to an arbitration agreement.” *Comedy*
25 *Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009) (internal citation omitted).

26 Prelude and Chart advance overlapping theories in support of their argument that despite
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28 ⁶ Prelude and Pacific MSO filed their motion jointly and the Court thus refers to them collectively
as “Prelude.”

1 their status as non-signatories to the Informed Consent Agreement containing the Arbitration
2 Agreement, they otherwise possess the same right as Pacific Fertility to compel arbitration. First,
3 they argue that equitable estoppel compels arbitration of their claims. Second, Prelude insists that
4 even if equitable estoppel does not apply, it is entitled to compel arbitration as a third-party
5 beneficiary of Plaintiffs’ Informed Consent Agreement with Pacific Fertility.

6 **A. Equitable Estoppel**

7 “The United States Supreme Court has held that a litigant who is not a party to an
8 arbitration agreement may invoke arbitration under the FAA if the relevant state contract law
9 allows the litigant to enforce the agreement.” *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122,
10 1128 (9th Cir. 2013). The question, then, is whether under California contract law the non-
11 signatory defendants may compel Plaintiffs to arbitration based on equitable estoppel. *Murphy v.*
12 *DirectTV, Inc.*, 724 F.3d 1218, 1229 (9th Cir. 2013). “Because generally only signatories to an
13 arbitration agreement are obligated to submit to binding arbitration, equitable estoppel of third
14 parties in this context is narrowly confined.” *Id.* (citing *Mundi v. Union Sec. Life Ins. Co.*, 555
15 F.3d 1042, 1046 (9th Cir.2009)). Under California law:

16 Where a nonsignatory seeks to enforce an arbitration clause, the
17 doctrine of equitable estoppel applies in two circumstances: (1)
18 when a signatory must rely on the terms of the written agreement in
19 asserting its claims against the nonsignatory or the claims are
20 intimately founded in and intertwined with the underlying contract,
21 and (2) when the signatory alleges substantially interdependent and
22 concerted misconduct by the nonsignatory and another signatory and
23 the allegations of interdependent misconduct are founded in or
24 intimately connected with the obligations of the underlying
25 agreement.

26 *Kramer*, 705 F.3d at 1129 (quoting *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 219, 221
27 (2009) (internal alteration and quotation marks omitted).

28 **1) Chart Cannot Invoke Equitable Estoppel**

Plaintiffs plead claims for negligent failure to recall, violation of the UCL, and products
liability against Chart. (FAC ¶¶ 202-208, 226-32, 269-295.) Chart insists that because each of
these claims is “intimately founded in and intertwined with” Plaintiffs’ Informed Consent
Agreement with Pacific Fertility and because Plaintiffs allege that Chart engaged in

1 interdependent misconduct with Pacific Fertility, Chart has satisfied both prongs of the equitable
2 estoppel test.

3 **a) Reliance on the underlying contract**

4 To determine whether a plaintiff’s claims rely on an arbitration agreement, the court must
5 “look[] to whether the claims that the nonsignatory sought to arbitrate were ‘intimately founded in
6 and intertwined with the underlying contract obligations.’” *Kramer*, 705 F.3d at 1129 (quoting
7 *Goldman*, 173 Cal. App. 4th at 221). “This requirement comports with, and indeed derives from,
8 the very purposes of the doctrine: to prevent a party from using the terms or obligations of an
9 agreement as the basis for his claims against a nonsignatory, while at the same time refusing to
10 arbitrate with the nonsignatory under another clause of that same agreement.” *Goldman*, 173 Cal.
11 App. 4th at 221.

12 Chart maintains that “each of Plaintiffs’ claims presumes the existence of a contract for the
13 storage of eggs, and Plaintiffs rely upon those contracts in asserting their claims.” (Dkt. No. 124
14 at 3: 15-16.) In particular, Chart argues that the cryopreservation and egg storage at the heart of
15 Plaintiffs’ claims against Chart are “inherently intertwined with, and integral to, the services that
16 [Pacific Fertility] provided.” (*Id.* at 3:11-14.) In its supplemental brief, Chart asserts—without
17 explanation—that “Plaintiffs would not have received any services from PFC—and would not
18 have had their eggs and embryos stored in the subject tank (“Tank 4”)—unless they had executed
19 the contracts containing their respective agreements to arbitrate.” (Dkt. No. 159 at 10:16-18.)
20 And in its supplemental reply, Chart goes so far as to say that “Plaintiffs could not have asserted
21 claims against Chart had they not executed their respective agreements.” (Dkt. No. 166 at 4:2-3.)

22 It is not enough that Plaintiffs’ complaint references the existence of a contract between
23 Plaintiffs and Pacific Fertility. “[M]erely ‘mak[ing] reference to’ an agreement with an arbitration
24 clause is not enough. Equitable estoppel applies ‘when the signatory to a written agreement
25 containing an arbitration clause “must rely on the terms of the written agreement in asserting [its]
26 claims” against the nonsignatory.’” *Goldman*, 173 Cal. App. 4th at 218 (quoting *MS Dealer Serv.*
27 *Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). That is, the claims must allege a violation
28 of a “duty, obligation, term or condition” imposed by the Informed Consent Agreement. *See In re*

1 *Henson*, 869 F.3d 1052, 1060 (9th Cir. 2017). Chart does not--because it cannot--argue that the
2 claims against it arise from a duty, obligation, term or condition imposed by the Informed Consent
3 Agreement. Even absent the Agreement, Plaintiffs could plead their negligent failure to recall
4 claim against Chart based on Chart's duty to exercise reasonable care in the storage of their eggs
5 and embryos—a duty which arises independent of any contract. *See, e.g., Williams v. Beechnut*
6 *Nutrition Corp.*, 185 Cal. App. 3d 135, 141 (1986) (“A manufacturer/seller of a product is under a
7 duty to exercise reasonable care in its design so that it can be safely used as intended by its
8 buyer/consumer.”). Likewise, Plaintiffs’ UCL consumer protection claim regarding Chart’s
9 alleged failure “to adequately maintain, inspect, monitor, and/or test their liquid nitrogen storage
10 tanks, including through a functional electronic tank monitoring system capable of detecting a rise
11 in temperature or a drop in liquid nitrogen levels and promptly alerting staff to the immediate
12 problem” does not rely on Plaintiffs’ agreements with Pacific Fertility. (Dkt. No. 174-3, FAC at ¶
13 228.a.) The same is true for Plaintiffs’ product liability claims which are pled only against Chart
14 and in no way reference the agreements with Pacific Fertility. As in *Henson*, Plaintiffs’ “claims
15 against [Chart] are not based on the [Informed Consent] Agreement. [Plaintiffs’] complaint is
16 replete with allegations of wrongdoing against [Chart] that have nothing to do with the [Informed
17 Consent] Agreement.” *Id.* at 1061.

18 Chart is arguing, in effect, that but-for Plaintiffs’ written agreement with Pacific Fertility,
19 Pacific Fertility would never have stored Plaintiffs’ eggs and embryos, and thus no claim against
20 Chart would have arisen. This factual but-for argument, however, is contrary to the law as it
21 ignores that the duty allegedly violated must arise from the agreement containing the arbitration
22 clause. In *Kramer*, for example, the plaintiffs brought suit against Toyota under various California
23 consumer protection laws based on alleged misrepresentations regarding their vehicles’ braking
24 system. Toyota sought to compel arbitration based on arbitration clauses within the purchase
25 agreements the plaintiffs had signed with the third-party dealers, arguing that the plaintiffs’ claims
26 were intertwined with the purchase agreements. 705 F.3d at 1130. In rejecting Toyota’s
27 arguments, the Ninth Circuit concluded that the plaintiffs’ claims “merely reference[d]” the
28 agreements and did not “intimately rely on the existence” of the agreements. *Id.* at 1132. It was

1 not enough that the plaintiffs’ “claims presume a transaction involving a purchase of a Class
2 Vehicle” given that the claims did not “rely upon the existence of a Purchase Agreement.” *Id.* By
3 way of illustration, the court noted that a plaintiff who had purchased a vehicle in cash without a
4 purchase agreement would still be able to state a claim for relief under the consumer protection
5 statutes against Toyota; therefore, the plaintiffs’ claims “arose independently of the terms of the
6 agreements containing arbitration provisions.” *Id.* at 1132;⁷ *see also Henson*, 869 F.3d at 1069
7 (stating that in *Kramer* the Ninth Circuit “expressly rejected Toyota’s argument that the plaintiffs’
8 claims were necessarily based on the Purchase Agreements merely because the lawsuit was
9 predicated on the bare fact that a vehicle purchase occurred”).

10 Similarly, in *Ratimany v. T-Mobile*, the plaintiffs would not have had claims against
11 Subway for encouraging T-Mobile to spam message its customers with Subway sandwich deals
12 but-for the plaintiffs’ agreements with T-Mobile, agreements that included arbitration provisions.
13 717 F. App’x 752 (9th Cir. April 5, 2018). The Ninth Circuit quickly dispatched Subway’s
14 equitable estoppel attempt to enforce T-Mobile’s arbitration agreement against the plaintiffs
15 because the plaintiffs’ claims against Subway did not arise from a violation of any duty,
16 obligation, term or condition imposed by the plaintiffs’ agreements with T-Mobile. *Id.* at 753. So
17 too here. So long as Plaintiffs’ eggs and embryos were stored in a Chart tank, regardless of how
18 that came to be, they would still be able to state claims against Chart for negligent failure to recall,
19 violation of the UCL, and product liability. At the very least Chart has not identified any legal
20 authority that would preclude such claims absent Plaintiffs’ agreements with Pacific Fertility.

21 Chart’s reliance on *Mance v. Mercedes-Benz USA*, CV 11-03717 LB, 2012 WL 4497369
22 (N.D. Cal. Sept. 28, 2012), is unpersuasive. The *Mance* court reasoned that because the plaintiff’s
23 claims made reference to or presumed the existence of an underlying contract, Mercedes-Benz’s
24 duty to comply with the warranty arose when the plaintiff bought the car; therefore, had the
25 plaintiff not signed the contract he would not have received the warranty, and thus the warranty

26
27 ⁷ The Ninth Circuit was not suggesting, as Defendants imply, that if the plaintiffs had been
28 required to sign a purchase agreement to buy a Toyota that the result would be different. The
example of the cash purchaser merely illustrated how Toyota’s legal duty arose independent of the
agreement containing the arbitration clause.

1 claim arose out of the contract. *Id.* at 1157. This reasoning, however, has since been rejected by
2 the Ninth Circuit. *See Kramer*, 705 F.3d at 1132; *Henson*, 869 F.3d at 1061; *Ratimany*, 717 F.
3 App’x at 753. Chart has not met its burden of demonstrating that Plaintiffs’ claims against it arise
4 from or are otherwise intertwined with Plaintiffs’ agreements with Pacific Fertility.

5 **b) Substantial interdependence founded in underlying agreement**

6 Under the second prong, the doctrine of equitable estoppel applies “when the signatory
7 alleges substantially interdependent and concerted misconduct by the nonsignatory and another
8 signatory and the allegations of interdependent misconduct [are] founded in or intimately
9 connected with the obligations of the underlying agreement.” *Kramer*, 705 F.3d at 1128-29 (citing
10 *Goldman*, 173 Cal. App. 4th at 219, n. 4).

11 [M]ere allegations of collusive behavior between signatories and
12 nonsignatories to a contract are not enough to compel arbitration
13 between parties who have not agreed to arbitrate: those allegations
14 of collusive behavior must also establish that the plaintiff’s claims
15 against the nonsignatory are intimately founded in and intertwined
with the obligations imposed by the contract containing the
arbitration clause. It is the relationship of the claims, not merely the
collusive behavior of the signatory and nonsignatory parties, that is
key.

16 *Goldman*, 173 Cal. App. 4th at 223 (internal alteration and quotation marks omitted).

17 Chart insists that this circumstance is likewise satisfied because “Plaintiffs’ claims raise
18 questions as to the interplay of the performance, operation, and maintenance of the subject tank,
19 which inquiries turn upon the actions and omissions of all the named Defendants” and that the
20 “alleged interdependent misconduct” with respect to the eggs and embryos is “undeniably
21 connected with the obligations of the underlying agreements.” (Dkt. No. 124 at 5:20-24.) Thus,
22 “to adjudicate Plaintiffs’ claims against Chart, the Court or an arbitrator will be required to
23 determine whether the [Pacific Fertility] Defendants properly used and maintain the tank.” (Dkt.
24 No. 159 at 11:26-28.)

25 Chart’s argument fails because Plaintiffs’ claims against Chart are neither founded in nor
26 intimately connected with the obligations of the underlying agreements. Even if the Court
27 accepted Chart’s characterization that Plaintiffs have pled that Defendants’ collective mishandling
28 of Plaintiffs’ eggs and embryos gives rise to their claims, allegations of collusive behavior

1 standing alone are not enough. “Even where a plaintiff alleges collusion, “[t]he *sine qua non* for
2 allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the
3 claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up
4 with the contractual obligations of the agreement containing the arbitration clause.” 724 F.3d at
5 1232 (quoting *Goldman*, 173 Cal. App. 4th at 213-14). Indeed, “no principle of law—and
6 certainly not the doctrine of equitable estoppel—allows us to decide that a plaintiff who did not
7 agree to arbitrate with a defendant must do so simply because he alleges a conspiracy, and without
8 regard to whether his conduct ‘renders assertion of [his right to a judicial forum] contrary to
9 equity.’” *Goldman*, 173 Cal. App. 4th at 234 (quoting *Metalclad Corp. v. Ventana Envtl.*
10 *Organizational P’ship*, 109 Cal. App. 4th 1705, 1713 (2003)) (noting that “[w]hile . . . federal
11 policy favors arbitration, that policy simply does not apply to parties who have not agreed to
12 arbitrate.”); *see also Kramer*, 705 F.3d at 1133 (“even if Toyota were correct that Plaintiffs allege
13 a pattern of concealment between Toyota and the dealerships, these allegations are not connected
14 to the Purchase Agreements.”).

15 ***

16 Because Plaintiffs’ claims against Chart are not “dependent on or inextricably bound up”
17 or “intimately connected” with the obligations under their agreements with Pacific Fertility,
18 equitable estoppel does not apply. Accordingly, Chart’s motion to compel arbitration is DENIED.

19 **2) Equitable Estoppel as to Prelude**

20 As a threshold matter, the Court must address Prelude’s attempt to shift the burden to
21 Plaintiffs to demonstrate that equitable estoppel does not apply. (Dkt. No. 160 at 15 (stating that
22 Plaintiffs must meet a “high standard” to avoid arbitration pursuant to equitable estoppel).)
23 Prelude bears the burden of demonstrating that equitable estoppel applies. *See In re Carrier IQ,*
24 *Inc. Consumer Privacy Litig.*, No. C-12-MD-2330 EMC, 2014 WL 1338474, at *4 (N.D. Cal.
25 Mar. 28, 2014) (“Defendants have the burden of establishing equitable estoppel.”); *Crestline*
26 *Mobile Homes Mfg. Co. v. Pac. Fin. Corp.*, 54 Cal.2d 773, 778 (1960) (stating that under
27 California law the party relying on equitable estoppel doctrine has burden to show it applies); *see*
28 *also Rajagopalan v. Noteworld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (explaining that the

1 liberal federal policy regarding scope of arbitration does not apply to the question “whether a
2 particular party is bound by the arbitration agreement”).

3 **a) Reliance on the underlying contract**

4 Again, to determine whether Plaintiffs’ claims rely on the written agreement, the Court
5 “look[s] to whether the claims that the nonsignatory sought to arbitrate were ‘intimately founded
6 in and intertwined with the underlying contract obligations.’” *Kramer*, 705 F.3d at 1129 (quoting
7 *Goldman*, 173 Cal. App. 4th at 221). In its initial moving papers, Prelude insisted that “Plaintiffs’
8 suit is inextricably ‘intertwined’ with their agreements to arbitrate, and the [Complaint] alleges
9 that [Pacific Fertility] and Prelude both acted together to violate obligations that arise from those
10 agreements.” (Dkt. No. 122-4 at 5:9-11.) In its supplemental brief, Prelude maintains that
11 because the FAC repeatedly refers to the services and associated payment obligations in the
12 Informed Consent Agreement, as well as the parties’ duties and obligations under that Agreement,
13 Plaintiffs’ claims are intertwined with the Agreement.

14 Plaintiffs plead claims for negligence/gross negligence, bailment, premises liability,
15 violation of the UCL and CLRA, and fraudulent concealment against Prelude. (FAC at ¶¶ 185-
16 201, 209-268.) According to the FAC, Prelude—which owns and runs a national network of
17 fertility clinics and egg and embryo storage facilities—took over Pacific Fertility’s egg and
18 embryo storage operation in 2017. (FAC at ¶ 5.) Neither Pacific Fertility nor Prelude advised
19 Plaintiffs of this transaction or the change in storage management. Plaintiffs’ claims against
20 Prelude are thus not based on their contracts with Pacific Fertility, but rather, arise from Prelude’s
21 role as the owner and operator of the facility where the cryopreservation of their eggs and embryos
22 occurred. Indeed, it was Pacific Fertility—not Plaintiffs—who contracted to “delegate[] the
23 authority to provide certain non-clinical services in support of [Pacific Fertility’s] tissue storage
24 operation.” (Dkt. No. 56-1 at ¶ 2 (Hertzberg Decl.)) Plaintiffs’ claims against Prelude can hardly
25 rest on their contracts with Pacific Fertility when Plaintiffs (a) had no relationship with Prelude,
26 (b) were unaware that Prelude had taken over the tissue storage operation, and (c) Pacific Fertility
27 did not have a relationship with Prelude at the time Plaintiffs entered into the agreements.

28 The authority cited by Prelude in its moving papers does not suggest otherwise. In *Letizia*

1 v. *Prudential Bache Sec., Inc.*, the Ninth Circuit held that the customers’ claims against individual
2 brokerage firm employees were subject to arbitration based on the customer agreement between
3 the brokerage firm and the customers. 802 F.2d 1185, 1188 (9th Cir. 1986). In reaching this
4 conclusion, the Ninth Circuit noted that “[a]ll of the individual defendants’ allegedly wrongful
5 acts related to their handling of [plaintiff’s] securities account.” *Id.* Here, in contrast, Plaintiffs’
6 claims do not arise from Prelude’s handling of their embryos and eggs under the contract, but
7 rather from Prelude’s duty—independent of any contractual obligation—to exercise reasonable
8 care in the handling of the eggs and embryos stored in their facility; that is, as with Plaintiffs’
9 claims against Chart, even if Plaintiffs had no agreement with Pacific Fertility, as a legal matter
10 they could still plead the claims made here against Prelude. *See Kramer*, 705 F.3d at 1132.

11 For the same reason, Prelude’s reliance on *Uptown Drug Co., Inc. v. CVS Caremark Corp.*,
12 962 F. Supp. 2d 1172 (N.D. Cal. 2013), is misplaced. There, the court held that defendants CVS
13 Caremark, CVS Pharmacy, and Caremark Rx could enforce an arbitration clause to which they
14 were not a party because the plaintiff’s claims were predicated on misappropriation of customer
15 information and “the question of whether Caremark was to any extent barred from disclosing or
16 using Uptown’s customer data must be answered by looking at the terms of the Caremark Provider
17 Agreement, because that contract explicitly governs the collection and use of such information and
18 because it provides the underlying basis for Uptown’s disclosure of such information.” *Id.* at
19 1185. Here, in contrast, the Court need not look to the Informed Consent Agreement to adjudicate
20 the claims against Prelude for negligence/gross negligence, bailment, premise liability, violation
21 of the UCL and CLRA, and fraudulent concealment—these claims are independent of Pacific
22 Fertility’s contractual obligations regarding tissue storage.⁸

23 Prelude’s reliance on *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999), is
24 likewise misplaced. There, although the plaintiff’s claims were not based on the agreement
25

26 ⁸ Prelude’s reliance on *Coast Plaza Doctors Hosp. v. Blue Cross of California*, 83 Cal. App. 4th
27 677, 684 (2000), as modified (Sept. 7, 2000), is even less availing as it does not even discuss
28 equitable estoppel and instead addresses whether an arbitration clause could be enforced against a
party even if that party had terminated the parties’ service agreement containing the arbitration
clause prior to filing suit.

1 containing the arbitration clause, they were based on a fee charged under a service contract that
2 was incorporated by reference into the agreement containing the arbitration clause. The plaintiff
3 sued MS Dealer—a nonsignatory to either agreement—who was obligated to provide services
4 under the service contract. *Id.* at 948. The court concluded that the plaintiff’s claims were
5 “intimately founded in and intertwined with the obligations imposed by” the agreement containing
6 the arbitration agreement because “her fraud and conspiracy claims depend[ed] entirely upon her
7 contractual obligation to pay \$990.00 for the service contract” and her obligation to “pay the
8 \$990.00 charge arose under the [agreement containing the arbitration clause].” *Id.*

9 Plaintiffs do not need to rely on the Informed Consent Agreement in asserting their claims
10 against Prelude, and as such, Plaintiffs’ claims are not “dependent on or inextricably bound up
11 with the” obligations of their agreements with Plaintiffs’ Informed Consent Agreement with
12 Pacific Fertility.

13 **b) Substantial interdependence founded in underlying agreement**

14 In the alternative, Prelude insists that Plaintiffs’ claims against it are based on Pacific
15 Fertility’s “own conduct before September 2017 and on the service relationships that Prelude and
16 Pacific MSO have with [Pacific Fertility]” because “[t]he FAC alleges that Prelude and Pacific
17 MSO ‘exercised control over the [Pacific Fertility] egg and embryo storage operation at the time
18 of the Tank 4 incident. At the time of the incident, the employees responsible for performing
19 regular monitoring and maintenance of Tank 4 were employees of Prelude or Pacific MSO,
20 LLC.’” (Dkt. No. 160 at 18:3-8 (quoting FAC at ¶ 30).) In addition, Prelude contends that
21 because Plaintiffs have included allegations that Pacific Fertility and Prelude failed to disclose that
22 Prelude had taken over the tissue storage operation and that there were inadequate processes in
23 place to protect Plaintiffs’ tissue, this too shows that the claims are based on “substantially
24 interdependent” misconduct. *See Kramer*, 705 F.3d at 1128-29.

25 Again, even if the Court agreed that these allegations show substantially interdependent
26 conduct—which they do not—Prelude still would not have met its burden to show that equitable
27 estoppel applies under the second prong because, as discussed above, it has not demonstrated that
28 Plaintiffs’ claims against it are intimately connected with the Informed Consent Agreement. *See*

1 *Kramer*, 705 F.3d at 1132–33 (“California state contract law does not allow a nonsignatory to
2 enforce an arbitration agreement based upon a mere allegation of collusion or interdependent
3 misconduct between a signatory and nonsignatory.”).

4 ***

5 At oral argument Prelude asserted that its “best case” for equitable estoppel is the district
6 court decision in *Tamsco Properties, LLC v. Langemeir*, No. 09-03086 GEB-EFB, 2013 WL
7 246782 (E.D. Cal. Jan. 22, 2013). *Tamsco*, however, involved a defendant attempting to enforce
8 its own arbitration agreement against non-signatory plaintiffs. The plaintiff LLCs’ agents had
9 signed the arbitration agreement. *Id.* at *5. The district court compelled the plaintiff LLCs to
10 arbitrate their claims and the Ninth Circuit affirmed on the grounds that the plaintiff LLCs were
11 bound by their agents’ agreement to arbitrate on the plaintiffs’ behalf. 597 F. App’x 428 (9th Cir.
12 March 13, 2015). Here, it is undisputed that Pacific Fertility was not Prelude’s agent: there was
13 no relationship between Pacific Fertility and Prelude at the time Plaintiffs entered into the
14 Informed Consent Agreement. The Tissue Transfer Agreement governing Pacific Fertility’s
15 transfer of the tissue storage responsibilities to Prelude emphasizes that Prelude is an independent
16 contractor and not Pacific Fertility’s agent. (Dkt. No. 108-7 at ¶ 6.) *Tamsco* does not apply.

17 Because Plaintiffs do not allege “substantially interdependent and concerted misconduct by
18 the nonsignatory and another signatory and, even if they did, such allegations are not “founded in
19 or intimately connected with the obligations of the [Informed Consent Agreement],” *Goldman*,
20 173 Cal. App. 4th at 219, equitable estoppel does not apply.

21 **B. Prelude is Not an Intended Third-Party Beneficiary**

22 Next, Prelude argues that it is entitled to invoke the Arbitration Agreement under a third-
23 party beneficiary theory.⁹ “In California, ‘exceptions in which an arbitration agreement may be

24 _____
25 ⁹ In its initial motion to compel arbitration, Prelude contended that it was a third-party beneficiary
26 of Plaintiffs’ contract with Pacific Fertility because it was acting as Pacific Fertility’s agent.
27 However, given that the contracts between Pacific Fertility and Prelude disavow any such
28 relationship, Prelude appears to have abandoned this argument. (Dkt. No. 108-7 at 4, ¶ 6 (Ex. 5:
Pacific Fertility and Prelude’s Sept. 13, 2017 Tissue Storage Management Services Agreement);
see also Dkt. No. 108-9 at 4, ¶ 6 (Ex. 7: Pacific Fertility and Prelude’s Sept. 13, 2017 Initial
Embryo Storage Management Services Agreement); Dkt. No. 108-5 at 21, Art. 13.1(a) (Ex. 1:
Pacific Fertility and Prelude’s Sept. 13, 2017 Management Services Agreement)). *See Murphy v.*

1 enforced by or against nonsignatories include where a nonsignatory is a third party beneficiary of
2 the agreement.” *Murphy*, 724 F.3d at 1233 (quoting *Nguyen v. Tran*, 157 Cal. App. 4th 1032,
3 (2007)). ““The mere fact that a contract results in benefits to a third party does not render that
4 party a third party beneficiary; rather, the parties to the contract must have expressly intended that
5 the third party would benefit.” *Id.* at 1234 (quoting *Matthau v. Super. Ct.*, 151 Cal. App. 4th 593,
6 602 (2007)).

7 Prelude argues three different bases for allowing it to compel arbitration of Plaintiffs’
8 claims against it as a third-party beneficiary: (1) as a successor-in-interest; (2) as an assignee; or
9 (3) as designated staff. Prelude bears the burden of proving their third-party beneficiary status.
10 *Jones v. Jacobson*, 195 Cal. App. 4th 1, 15 (2011), as modified (June 1, 2011) (“[W]hen a
11 nonsignatory seeks to enforce an arbitration agreement/provision against a signatory . . . the
12 nonsignatory bears the burden to establish he or she is a party to the arbitration
13 agreement/provision covering the dispute.” (emphasis removed)). As discussed below, Prelude
14 has failed to establish that any of these bases affords it third-party beneficiary status.

15 **1) Prelude is not a Successor-in-Interest**

16 Prelude insists that it is a successor-in-interest because the Tissue Storage Management
17 Services Agreement and Initial Embryo Storage Management Services Agreement describe how
18 Prelude succeeded Pacific Fertility “in the provision of various services in support of PFC’s tissue
19 operation.” (Dkt. No. 160 at 21:24-26.) It relies upon the Hertzberg declaration, but that only
20 attests that “by agreement between Prelude and PFC, Prelude is delegated the authority to provide
21 certain non-clinical services in support of PFC’s tissue storage operation.” (Dkt. No. 56-1 at ¶ 2.)
22 A successor-in-interest is “[o]ne who follows another in ownership or control of property . . . In
23 case of corporations, the term ‘successor in interest’ ordinarily indicates statutory successor as, for
24 instance, when corporation changes its name but retains same property.” *California Concrete Co.*

25
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27

DirecTV, Inc., 724 F.3d 1218, 1233 (9th Cir. 2013) (to determine the agency relationship the court
28 looked to whether “the record contains any *evidence* that is probative of the nature of the
arrangement between the two companies” and found that what evidence there was suggested “that
an agency relationship was expressly disavowed by DirecTV and Best Buy in the [parties’]
“Independent Retailer Agreement.”) (emphasis added).

1 *v. Beverly Hills Sav. & Loan Ass'n*, 213 Cal. App. 3d 207 (1989) (internal quotation marks and
2 citation omitted). That Prelude succeeded Pacific Fertility in the “provision of various services”
3 falls well below this showing. Further, Prelude fails to cite any case that suggests that an
4 independent contractor to whom a company outsources certain responsibilities is a successor-in-
5 interest and thus a third-party beneficiary of a contract entered into long before the outsourcing
6 occurred absent some language in the contract providing such status. This omission is
7 unsurprising as a third-party beneficiary may only enforce a contract made for *its* benefit. *See*
8 *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524 (2002) (internal citation omitted). That is, “[a]
9 putative third party’s rights under a contract are predicated upon the contracting parties’ intent to
10 benefit” it. *Id.* (internal citation and quotation marks omitted). Pacific Fertility’s subsequent
11 outsourcing of its tissue storage services to Prelude does not evidence an intent to have Prelude
12 benefit from a contract Pacific Fertility entered into with Plaintiffs years earlier.

13 On reply, Prelude advances another successor-in-interest theory: that Prelude is a “mere
14 continuation” of Pacific Fertility’s tissue storage operation. (Dkt. No. 168-4 at 14:9-26.) Prelude
15 offers no reason why it could not have advanced this argument in one of its many prior briefs and
16 the Court is tempted to reject it on this basis alone. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th
17 Cir. 2007) (holding that the court “need not consider arguments raised for the first time in a reply
18 brief.”). However, the Court will briefly address it on the merits as it fails on that basis regardless.

19 Under the “mere continuation” theory of successorship, a purchasing corporation is a mere
20 continuation of the seller and thus assumes the seller’s liabilities. *See Cleveland v. Johnson*, 209
21 Cal. App. 4th 1315, 1327 (2012). “California decisions holding that a corporation acquiring the
22 assets of another corporation is the latter’s mere continuation and therefore liable for its debts have
23 imposed such liability only upon a showing of one or both of the following factual elements: (1)
24 no adequate consideration was given for the predecessor corporation’s assets and made available
25 for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors,
26 or stockholders of both corporations.” *Ray v. Alad Corp.*, 19 Cal. 3d 22, 29 (1977).

27 Prelude relies on the Declaration of Alden Romney, Chief Executive Officer of Pacific
28 MSO, who attests that “PFC distributed, assigned, transferred, and delivered PFC’s various assets

1 involved in cryostorage...to Pacific MSO” and that the same individuals who exclusively owned
2 Pacific Fertility now hold a less than 20% collective ownership interest in Pacific MSO. (Dkt. No.
3 168-6 at ¶¶ 2-4.) Notwithstanding the careful wording of the declaration that Pacific Fertility
4 transferred “various assets involved in cryostorage,” the Tissue Storage Management Services
5 Agreement between Pacific Fertility and Prelude belies any such transfer which could give rise to
6 liability under a mere continuation theory:

7
8 (b) Upon written notice to PFC, Prelude may initiate all actions necessary to
9 transition the Tissue Storage Operation, and any or all assets of the Tissue Operation, to the ownership of
10 Prelude or any affiliate of Prelude, provided that Prelude will (i) assume all liabilities incurred following
11 the effective date of such transition and hold PFC harmless from any liabilities associated with the Tissue
12 Storage Operation incurred following the effective date of such transition; (ii) be responsible for obtaining
13 all required licenses, permits and consents for the transfer of ownership of the Tissue Storage Operation;
14 and (iii) obtain the prior written consent for the transfer from all persons who have agreements with PFC
15 for storage of frozen tissues in the Tissue Storage Operation that require such consent. The above
16 requirements will also apply to any decision by Prelude to move the Tissue Storage Operation to another
17 location, regardless of whether the relocation will require a change of ownership of the Tissue Storage
18 Operation.

19 (Dkt. No. 108-7 at 5, ¶ 8(b).) There is no evidence, however, that any transfer of assets in
20 accordance with the Tissue Storage Management Agreement occurred. For example, there is no
21 evidence that Plaintiffs were provided with the required notice, nor is there evidence of notice
22 having been presented to any other Pacific Fertility clients. Further, the “mere continuation”
23 theory cited by Prelude holds defendants liable for the debts of the corporation to which it is a
24 “mere continuation”; hence the requirement of no adequate consideration for the transfer of assets.
25 That requirement does not make any sense in the context of allowing the “mere continuation”
26 corporation to enforce an arbitration agreement to which it is not a party. This Court declines to
27 be the first court to apply the mere continuation theory of successor-in-interest standing to permit
28 a non-signatory to enforce an arbitration agreement, especially under the minimal showing made
here.

2) Prelude and Pacific MSO are not Assignees

Next, Prelude argues that it is an assignee to Pacific Fertility’s rights under the Informed
Consent Agreement. In general, an “assignment must describe the subject matter of the
assignment with sufficient particularity to identify the rights assigned.” *Mission Valley E., Inc. v.*

1 *Cty. of Kern*, 120 Cal. App. 3d 89, 96–97 (1981). “For an assignment to be effective, it is
2 essential that the owner of the right to be transferred manifest an intention to transfer the right, and
3 the burden of proving an assignment lies with the party asserting the rights thereunder.” *Cobb v.*
4 *San Francisco Residential Rent Stabilization & Arbitration Bd.*, 98 Cal. App. 4th 345, 352–53
5 (2002), as modified (May 9, 2002).

6 Prelude has not met its burden of showing that Pacific Fertility assigned Prelude its rights
7 under the Informed Consent Agreement. Prelude’s conclusory assertion that “[t]he Tissue Storage
8 Management Services Agreement and Initial Embryo Storage Management Services Agreement
9 show that PFC transferred the provision of certain services to Prelude, to be performed by
10 Prelude’s qualified subsidiary Pacific MSO” fails to demonstrate that Pacific Fertility assigned its
11 rights under the Informed Consent Agreement to Prelude. Critically, Prelude fails to identify a
12 *contractual* provision which assigns it any of Pacific Fertility’s rights.

13 Rather than identifying assigning contractual language, on reply Prelude instead quotes
14 from the complaint allegations which discuss the parties’ obligations under their agreement. (Dkt.
15 No. 168-4 at 15-16 (quoting FAC ¶¶ 68, 69).) None of those allegations, however, identify
16 contractual language assigning Pacific Fertility’s rights under the Informed Consent Agreement to
17 Prelude, and in any event, Prelude has not identified any such contractual provisions. “[T]o prove
18 an effective assignment, the assignee must come forth with evidence that the assignor meant to
19 assign rights and obligations under the contracts.” *Britton v. Co-op Banking Grp.*, 4 F.3d at 746.
20 Prelude has failed to do so.

21 **3) Prelude is not an Intended Beneficiary as Designated Staff**

22 Finally, Prelude insists that in the Informed Consent Agreement Plaintiffs authorized
23 “designated staff” to perform cryopreservation and storage services and because the same staff
24 that provided those services for Pacific Fertility now provide those services for Prelude, this
25 “designated staff” is an intended beneficiary of the Informed Consent Agreement.

26 “The test for determining whether a contract was made for the benefit of a third person is
27 whether an intent to benefit a third person appears from the terms of the contract.” *Jensen v. U-*
28 *Haul Co. of California*, 18 Cal. App. 5th 295, 301 (2017), review denied (Feb. 21, 2018) (internal

1 citation and quotation marks omitted). Prelude insists that the reference to designated staff in the
2 Informed Consent Agreement “shows an intent to benefit the embryologists who worked on
3 freezing and storing Plaintiffs’ eggs and embryos.” (Dkt. No. 168-4 at 16:25-26.) But Prelude
4 fails to explain how mere reference to this “designated staff” evidences an “express intent to
5 confer the benefit.” *Jensen*, 18 Cal. App. 5th at 302. Indeed, the “mere fact that a contract results
6 in benefits to a third party does not render that party a ‘third party beneficiary.’” *Id.* (internal
7 citation and quotation marks omitted). In *Suh v. Superior Court*, the court held that hospital and
8 medical group defendants could not compel non-signatory doctors to arbitrate their claims because
9 at the time the arbitration agreement was signed, the doctors were no longer receiving work at the
10 hospital and there was no evidence that the doctors received benefits under the agreement. 181
11 Cal. App. 4th 1504, 1513-14 (2010). So too here—there is no evidence that these “designated
12 staff” members received any benefit under the agreements.

13 Further, the evidence, and, in particular, the agreement between Pacific Fertility and
14 Prelude, undermines any argument that Pacific Fertility intended to confer a benefit on this
15 “designated staff.” To the contrary, the agreement states in relevant part that “Prelude will, at
16 Prelude’s own expense, employ or engage the services of those employees, subcontractors,
17 partners or agents, as Prelude deems necessary to perform the Services (collectively, the
18 “Personnel”). The Personnel will not be employees of PFC, and Prelude will be solely responsible
19 for the performance of the Services by the Personnel.” (Dkt. No. 108-7 at 4, ¶ 5; *see also* Dkt. No.
20 108-7 at 4, ¶ 6; Dkt. No. 108-9 at 4, ¶ 6.)

21 ***

22 Prelude has failed to establish a basis by which it could compel arbitration of Plaintiffs’
23 claims against it pursuant to Plaintiffs’ Informed Consent Agreement with Pacific Fertility. Its
24 motion to compel arbitration is therefore denied.

25 **III. Should the Court Decline to Compel Plaintiffs to Arbitration Against Pacific**
26 **Fertility?**

27 While Plaintiffs concede that their claims against Pacific Fertility fall under the “Other
28 Claims” arbitration provision, they nonetheless posit that the Court has discretion to decline to

1 compel Plaintiffs to arbitrate their claims against Pacific Fertility. In particular, Plaintiffs urge that
2 under the California Arbitration Act, Cal. Code Civ. P. 1281.2(c), (d), when “[a] party to the
3 arbitration agreement is also a party to a pending court action . . . with a third party[.]” and that
4 action “aris[es] out of the same transaction or series of related transactions and there is a
5 possibility of conflicting rulings on a common issue of law or fact[.]” the Court may, among other
6 case management options, “refuse to enforce the arbitration agreement and . . . order intervention
7 or joinder of all parties in a single action or special proceeding” or “stay arbitration pending the
8 outcome of the court action[.]” (Dkt. No. 165 at 23:27-24:4 (quoting Cal. Code Civ. P. §§
9 1281.2(c), (d)).) Plaintiffs argue that because Chart and Prelude are parties to this action but not
10 parties to the arbitration provision or otherwise permitted to compel arbitration, the Court should
11 exercise its discretion under the California Arbitration Act and retain the claims against Pacific
12 Fertility along with all the other claims.

13 The FAA does not permit a court to decline to enforce a valid arbitration provision, even if
14 some claims arising from the same transaction or occurrence cannot be compelled to arbitration.
15 9 U.S.C. § 4. Under such circumstances the FAA “requires piecemeal resolution when necessary
16 to give effect to an arbitration agreement.” *Moses S. Cone Hospital v. Mercury Constr.*, 460 U.S.
17 1, 20 (1983) (emphasis removed). “Nevertheless, parties may agree that the FAA will not govern
18 their arbitration even if the contract involves interstate commerce.” *Mastick v. TD Ameritrade,*
19 *Inc.*, 209 Cal. App. 4th 1258, 1263 (2012). Thus, if Plaintiffs and Pacific Fertility agreed that
20 California law controls the Arbitration Agreement, then California Civil Code section 1281.2(c)
21 applies, and this Court has discretion to decline to compel Plaintiffs to arbitrate their claims
22 against Pacific Fertility. *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior*
23 *Univ.*, 489 U.S. 468, 477 (1989).

24 Plaintiffs contend that the general choice-of-law provision in the Informed Consent
25 Agreement dictates that California law applies to the Arbitration Agreement. The choice-of-law
26 provision, which is in a different section of the Informed Consent Agreement than the dispute
27 resolution section, states that “[t]he provisions of this Agreement shall be interpreted under, and
28 performance of the parties hereto shall be governed by, the laws of the Status of California without

1 regard to California conflict of law provisions.” (Dkt. No. 51-4 at 22.)

2 In *Mount Diablo Med. Ctr. v. Health Net of California, Inc.*, a case involving a motion to
3 compel arbitration, the court held that courts should “look first to the language of the contract to
4 determine what portions of state law the parties intended to incorporate, and then, if any ambiguity
5 exists, to determine whether the provision in question conflicts with the objectives of the FAA.”
6 *Mount Diablo*, 101 Cal. App. 4th at 714. There, the choice-of-law provision stated that “[t]he
7 validity, construction, interpretation and enforcement of this Agreement” shall be governed by
8 California law. *Id.* at 722. The court held that “[t]he explicit reference to *enforcement* reasonably
9 includes such matters as whether proceedings to enforce the agreement shall occur in court or
10 before an arbitrator.” *Id.* (emphasis added) (noting that California Code of Civil Procedure
11 1281.2 is captioned “Enforcement of Arbitration Agreements”). In so doing, the court specifically
12 distinguished choice-of-law provisions that provide only that the contract shall be “governed by”
13 California law and the cases holding that such language does not evidence an intent to have
14 California law supplant the FAA. *Id.* at 723. Indeed, *Cronus Investments, Inc. v. Concierge*
15 *Servs.*, and *Defrees v. Kirkland*, upon which Plaintiffs rely, both involved choice-of-law
16 provisions that referenced “enforcement.” *Cronus*, 35 Cal. 4th 376, 381 (2005) (choice-of-law
17 provision stated that the agreement “shall be construed and *enforced* in accordance with and
18 governed by the laws of the State of California”) (emphasis added); *Defrees*, No. 11-4272 GAF,
19 2012 WL 12883971 at *5 (C.D. Cal. Jan. 17, 2012) (choice of law provision states “that the
20 agreement should be enforced pursuant to California law”).

21 The Informed Consent Agreement’s choice-of-law provision, in contrast, contains no
22 reference to enforcement. (Dkt. No. 51-4 at 22.) The Court acknowledges that in *Mastick* the
23 California Court of Appeals held that a choice-of-law provision providing that the agreement
24 would be “governed by” California law was sufficient to invoke the California Arbitration Act.
25 209 Cal. App. 4th 1258, 1265 (2012). But *Mastick* did not acknowledge, let alone distinguish
26 *Mount Diablo*, and the court’s reasoning relied largely on the choice-of-law provision in *Cronus*
27 as merely providing that the agreement would be governed by California law. *Id.* at 1264. The
28 *Cronus* agreement, however, provided that it would be “enforced” in accordance with California

1 law. 35 Cal. 4th at 381. The Court thus declines to follow *Mastick* and instead follows *Mount*
2 *Diablo*, which explains that under California law, a choice-of-law provision that states that the
3 agreement shall be governed by California law does not evince an intent to incorporate the
4 California Arbitration Act. *See Golden v. O’Melveny & Meyers LLP*, No. 14-8725 CAS, 2016
5 WL 4168853, at *15 (C.D. Cal. Aug. 3, 2016) (addressing a “governed by” choice-of-law
6 provision and noting that “[n]othing in the clause evinces particular intent to incorporate state
7 arbitration rules; rather, they resemble the clauses in *Mount Diablo* and other cases that merely
8 include language ‘to the effect that the agreement would be governed by the law of a particular
9 jurisdiction, without reference to enforcement.’”) (quoting *Mount Diablo*, 101 Cal. App. 4th at
10 723)).

11 Accordingly, the Court concludes that the Informed Consent Agreement’s choice-of-law
12 provision does not incorporate the California Arbitration Act and thus California Code of Civil
13 Procedure Section 1281.2 does not apply. As the FAA controls, the Court lacks discretion to
14 decline to enforce the Informed Consent Agreement’s Arbitration Agreement. Because Plaintiffs
15 do not dispute that the “Other Claims” Arbitration Agreement encompasses their claims against
16 Pacific Fertility, the Court GRANTS Pacific Fertility’s motion to compel arbitration.

17 **IV. Should Proceedings in This Court be Stayed?**

18 Having denied Chart and Prelude’s motions to compel arbitration, the Court must
19 determine whether the claims as to them should be stayed pending arbitration of the claims against
20 Pacific Fertility.

21 “[I]f a court finds that the plaintiff asserts both arbitrable and nonarbitrable claims, district
22 courts have ‘discretion whether to proceed with the nonarbitrable claims before or after the
23 arbitration and [have] . . . authority to stay proceedings in the interest of saving time and effort for
24 itself and litigants.’” *Jenkins v. Sterling Jewelers, Inc.*, No. 17-1999 MMA, 2018 WL 922386, at
25 *7 (S.D. Cal. Feb. 16, 2018) (quoting *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal.
26 1984)); *see also Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979)
27 (holding that the defendant “was not entitled to a stay pursuant to section 3 of the Arbitration Act”
28 on a nonarbitrable claim, but noting that “sound reasons may exist” for the district court to stay the

1 action based on its inherent authority to control its docket).

2 Courts generally focus on three factors when determining whether to exercise their
3 discretion to stay non-arbitrable claims: “(1) the economy and efficiency that result from avoiding
4 duplication of effort; (2) how suited the dispute is to the arbitration process; and (3) the
5 interdependence of the arbitrable claims and the non-arbitrable claims.” *Gray v. Conseco, Inc.*,
6 No. SA CV 00-322DOC(EEX), 2000 WL 1480273, at *8 (C.D. Cal. Sept. 29, 2000) (citing *U.S.*
7 *for Use & Benefit of Newton v. Neumann Caribbean Int’l, Ltd.*, 750 F.2d 1422, 1427 (9th Cir.
8 1985); *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1477 (9th Cir. 1984), overruled
9 on other grounds by *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994)); *see also*
10 *United Commc’ns Hub, Inc. v. Qwest Commc’ns, Inc.*, 46 F. App’x 412, 415 (9th Cir. 2002)
11 (“Expanding the stay, so as to encompass all of the nonarbitrable claims in the case, is [only]
12 appropriate where the arbitrable claims predominate, or where the outcome of the nonarbitrable
13 claims will depend upon the arbitrator’s decision.”).

14 Defendants insist that a stay is in the interests of judicial economy and is warranted
15 because there are common questions of law and fact amongst the claims against Defendants and
16 proceeding with arbitration and litigation in this Court simultaneously could lead to inconsistent
17 results.

18 **A. No Stay as to Chart**

19 Plaintiffs plead claims for negligent failure to recall, violation of the UCL, and products
20 liability against Chart. (FAC ¶¶ 202-208, 226-32, 269-295.) Only the UCL claim is pled as to the
21 other defendants as well, although the allegations as to Chart within the UCL claim are
22 specifically related to Chart’s failures as to the design, manufacturing, warnings, and recall of
23 Tank 4. (*Id.* at ¶ 229.) Chart nonetheless contends that Plaintiffs’ claims against it are intertwined
24 with those against the other defendants because they all arise out of the fertility services that
25 Pacific Fertility provided and involve a common set of facts and the interplay of the acts and
26 omissions of the various defendants.

27 In particular, Chart argues that Plaintiffs’ failure to warn claim raises the question of
28 whether the tank was used or misused by Defendants in an intended or reasonably foreseeable

1 way, whether any other Defendants had a duty to warn Plaintiffs, whether Plaintiffs received
2 warnings from Defendants or anyone else, and questions of comparative fault and negligence.
3 Chart also insists that the adequacy of Tank 4 should be decided by the arbitrator in the first
4 instance because it is relevant to the UCL claim. Finally, Chart contends that because Pacific
5 Fertility will be required to participate in Plaintiffs’ claims against Chart, allowing the claims
6 against Chart to proceed would allow Plaintiffs to circumvent their agreement to arbitrate their
7 claims against Pacific Fertility.

8 Plaintiffs counter that there is “zero” overlap in their claims against Chart and those against
9 Pacific Fertility. Indeed, the only overlapping claim—for violation of the UCL—is based on
10 different factual obligations and duties. Plaintiffs allege that Pacific Fertility failed to disclose
11 whether adequate safeguards and procedures existed for storage of their tissue, whereas they allege
12 that Chart failed to disclose or warn that its product was defective. (*Compare* FAC ¶ 228 *with* ¶
13 229.) The arbitrator will thus not be required to determine whether Tank 4 was defective to
14 adjudicate Plaintiffs’ UCL, CLRA, and fraudulent concealment claims against Pacific Fertility.

15 Chart’s lament that Pacific Fertility will nonetheless be involved in the litigation here as a
16 witness or because the defendants make cross-claims against it is not Chart’s concern. If Pacific
17 Fertility did not want to litigate in two forums at the same time it did not have to move to compel
18 arbitration. But it chose to do so.

19 Plaintiffs’ claims against Chart are not interdependent on the claims against Pacific
20 Fertility and judicial economy would not be served by staying litigation of the claims against
21 Chart until Plaintiffs’ claims against Pacific Fertility are arbitrated.

22 **B. No Stay as to Prelude**

23 Prelude also insists that the claims against Pacific Fertility and those against it overlap
24 substantially—likewise emphasizing that Plaintiffs make UCL claims against all of the
25 defendants. In particular, they identify complaint allegations that Pacific Fertility and Prelude
26 allegedly fraudulently failed to disclose and actively concealed that the processes and systems in
27 place were not adequate to safeguard Plaintiffs’ tissue, and that control of the tissue storage was
28 transferred to Prelude and Pacific MSO. (Dkt. No. 169 at 18:24-27 (citing FAC ¶ 233).) Prelude

1 also maintains that because Pacific Fertility was responsible for the storage until September 2017
2 and even after that date continued to control the policies and procedures, the UCL claims are
3 inherently inseparable.

4 While a closer question than whether to stay the claims against Chart, a stay is likewise
5 inappropriate as to the claims against Prelude. At the time of the incident, Pacific Fertility had
6 transferred its tissue storage responsibilities to Prelude. (Dkt. No. 174-3, FAC at ¶¶ 5, 9.) Thus,
7 Plaintiffs’ allegations of failure to disclose against Prelude relate to different and later omissions
8 than the failure to disclose claims against Pacific Fertility. (*Compare* FAC ¶ 248 *with* ¶ 252.) As
9 with Plaintiffs’ claims against Chart, their claims against Prelude and Pacific Fertility are not
10 interdependent such that judicial economy would be served staying the claims as to Prelude while
11 the claims against Pacific Fertility are arbitrated.

12 Nor is the Court persuaded by Prelude’s argument that the class nature of Plaintiffs’ claims
13 warrants a stay, relying on *In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig.*, 298
14 F. Supp. 3d 1285, 1304 (N.D. Cal. 2018) (noting that “stay of all claims is particularly warranted
15 in the class-action context because the complaint admits that common questions of fact and law
16 predominate”). Defendants’ argument conflates common questions of law and fact predominating
17 on a particular claim against a particular defendant with common claims and allegations *among*
18 *the defendants*. That Plaintiffs have pled that there are common questions of law and fact
19 predominating each claim against each defendant to support class treatment is not the same as
20 alleging that common questions of liability among the defendants predominate. *See Broomfield v.*
21 *Craft Brew All., Inc.*, No. 17-CV-01027-BLF, 2018 WL 4952519, at *9 (N.D. Cal. Sept. 25, 2018)
22 (noting that the court is required to “assess the predominance of common questions on a claim by
23 claim basis.”).

24 Accordingly, the Court exercises its discretion to deny Prelude’s motion to stay pending
25 arbitration of Plaintiffs’ claims against Pacific Fertility.

26 **CONCLUSION**

27 For the reasons explained above, Pacific Fertility’s motion to compel arbitration is
28 GRANTED. Prelude and Chart’s joinder in that motion and request to compel arbitration of all

1 claims against them is DENIED. Chart and Prelude’s motion to stay pending arbitration is also
2 DENIED.

3 The Court will hold a case management conference with the parties on April 25, 2019 at
4 1:30 p.m. in Courtroom F, 450 Golden Gate Ave., San Francisco, California. A Joint Case
5 Management Conference Statement is due April 18, 2019.

6 This Order disposes of Docket No. 52.

7 **IT IS SO ORDERED.**

8 Dated: March 25, 2019

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11 JACQUELINE SCOTT CORLEY
12 United States Magistrate Judge
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