In the

Court of Appeal

of the

State of California

SECOND APPELLATE DISTRICT
DIVISION FOUR

B286417

R. JOSE ARZOLA,

Plaintiff and Appellant,

v.

FCA US LLC,

Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE MEL RED RECANA · CASE NO. BC571654

BRIEF OF RESPONDENT

JENNIFER A. KUENSTER, ESQ. (104607)
NIXON PEABODY LLP
One Embarcadero Center, Suite 1800
San Francisco, California 94111-3600
(415) 984-8200 Telephone
jkuenster@nixonpeabody.com

DAVID H. TENNANT, ESQ. (132568)
LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, New York 14618
(585) 708-9338 Telephone
david.tennant@appellatezealot.com

Attorneys for Respondent FCA US LLC

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

Court of Appeal

of the

State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: B286417

Case Name: Arzola v. FCA US LLC

☑ There are no interested entities or parties to list in this Certificate per California Rules of Court, 8.208

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
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10.	

/s/ David H. Tennant

Signature of Attorney/Party Submitting Form

David H. Tennant, Esq.

Printed Name

LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, New York 14618

Address

Party Represented: FCA US LLC - Respondent

State Bar No.: 132568

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INTRODUCTION

Plaintiff-Appellant challenges the trial court's confirmation of the "take nothing" arbitration award entered against him in his lemon law action under California's Song-Beverly Consumer Warranty Act (Song-Beverly). Plaintiff initially brought the action against both the car dealer and the vehicle manufacturer but dismissed the dealer when the matter was ordered to arbitration. This left the car manufacturer, Defendant-Respondent Fiat Chrysler Automobiles USA LLC (FCA US), as the lone defendant in the arbitration.[1] After hearing witnesses and receiving briefs, the arbitrator concluded that plaintiff had failed to prove his 2012 Dodge minivan was a "lemon."

Having struck out in arbitration, plaintiff now asks this Court to provide him with a second bite at the apple in court. He wants to re-present exactly the same evidence—the vehicle's repair history—to a jury in the hope of securing a more favorable result.

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[1] Plaintiff dismissed the dealer that sold the vehicle (West Covina Nissan; hereafter "the Dealer") after being ordered to arbitrate the case against both the Dealer and the manufacturer (FCA US). The arbitration provision is set forth in the Retail Installment Sales Contract (RISC) between plaintiff and the Dealer. The effect of plaintiff's strategic dismissal of the Dealer—designed to separate FCA US from the arbitration agreement—is the principal focus of this brief.

Plaintiff raises two grounds on appeal to support his request to un-do the arbitration award, both of which go to the trial court's authority to compel plaintiff to arbitrate his claim against FCA US. Neither of these arguments was raised below. Neither constitutes a non-waivable argument. Accordingly, this Court should deem these unpreserved arguments waived or forfeited. Even if preserved, plaintiff's arguments lack merit.

Plaintiff's main contention (unpreserved) is that FCA US was not a party to the arbitration agreement between plaintiff and the Dealer, and that FCA US did not satisfy any of the recognized grounds for allowing a nonsignatory to enforce an arbitration agreement. Plaintiff additionally claims that the trial court lacked jurisdiction to entertain the Dealer's motion to compel arbitration. He argues the Dealer's motion papers failed to give proper notice that the motion applied to FCA US, and that FCA US's filing of a statement of "non-opposition" did not constitute legally sufficient consent to arbitration. Plaintiff contends these alleged shortcomings in the content and form of the motion papers (all unpreserved) somehow stripped the trial court of jurisdiction to decide the Dealer's motion to compel arbitration both as to the Dealer and FCA US.

1. Waiver/Forfeiture

Plaintiff did not present any of these arguments to the trial court. Plaintiff's opposition to the Dealer's motion to compel arbitration instead consisted of a broadside attack on the enforceability of the arbitration provision, claiming it was procedurally and substantively unconscionable and therefore unenforceable. Plaintiff also discussed a federal district court decision (*Soto v. American Honda Motor Co.* (N.D.Cal. 2012) 946 F.Supp.2d 949) which, plaintiff contends, supports finding the at-issue arbitration provision does not reach his Song-Beverly claim. Plaintiff argued below that the holding in *Soto*, if applied, would preclude defendants from forcing plaintiff to arbitrate his lemon law claim whether against the Dealer (which signed the arbitration agreement) or FCA US (which did not). Plaintiff drew no distinction between the Dealer and FCA US. His opposition treated the Dealer and FCA US as a single unit, as does plaintiff's complaint which alleges each is the agent of the other. In this way, plaintiff presented the trial court with an all or nothing choice: Either the three parties would proceed to arbitration (if the court granted the Dealer's motion) or they would continue to litigate in court (if the court denied that motion).

At no time did plaintiff separately challenge FCA US's right, as a nonsignatory, to independently force plaintiff to arbitrate his claim—an issue that would be reached only if the Dealer were not

in the case. The record was never developed in the trial court as to FCA US's ability to enforce the arbitration agreement on its own based on third-party beneficiary status, principles of equitable estoppel, agency, or otherwise.[2]

The trial court granted the motion to compel and directed the entire case to arbitration.

Seven months later, plaintiff chose to dismiss the Dealer but took no steps to have the trial court re-assess the enforceability of the arbitration agreement in light of the new party configuration, despite the trial court having jurisdiction to entertain such a request.

Because plaintiff never asked the trial court to determine if FCA US could enforce the arbitration agreement against plaintiff in the absence of the Dealer, plaintiff presented no facts or law on that point. The trial court never addressed whether grounds might exist to enable FCA US to independently enforce the arbitration agreement against plaintiff.

Nor did plaintiff take any other steps to challenge the trial court order granting the Dealer's motion to compel arbitration. Plaintiff did not file a writ seeking review of the trial court order, and there is no evidence that plaintiff raised in the arbitration

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[2] As discussed, *infra*, California and Federal law recognize six different bases for nonsignatories to benefit from arbitration agreements they did not sign.

proceeding his argument that he had never agreed to arbitrate his claim against FCA US. (RA 4-10.) Instead, plaintiff availed himself of every opportunity during the arbitration to put on evidence and argue for full relief under the lemon law. (RA 4-10.) He should not be heard now to complain that he did not have a full and fair opportunity to present his case to the arbitrator. Nor should he be allowed to present the same evidence concerning his vehicle's repair history to a jury in the hope of securing a more favorable result. Had plaintiff prevailed in arbitration he would have been happy with his decision to not go back to the trial court after dismissing the Dealer.

Plaintiff's argument on appeal that he should never have been required to arbitrate the lemon law claim against FCA US in the first place, represents an out-of-time, unpreserved, and cynical "Heads I win, tails you lose" proposition.

Likewise, plaintiff's novel claim that the Dealer's motion to compel was procedurally deficient with respect to FCA US—so as to deprive the trial court of jurisdiction—was never presented to the trial court. Such superficial and technical criticisms as to the form of the Dealer's motion papers fail to raise a legitimate question about the court's fundamental subject matter jurisdiction and are waived because they were not presented below.

2. Merits

Even if plaintiff preserved his arguments, his contentions lack merit. As to the ability of a nonsignatory like FCA US to enforce an arbitration clause against an unwilling plaintiff, California law recognizes that equitable estoppel principles may allow a car maker to benefit from the arbitration agreement between the car dealer and car buyer, as set forth in *Mance v. Mercedes-Benz USA* (N.D.Cal.2012) 901 F.Supp.2d 1147, cited by the Dealer in its moving papers and discussed *infra*.

The Dealer's motion papers, and FCA US's statement of non-opposition, provided adequate notice to plaintiff and gave the trial court the legal foundation upon which to order the entire matter into arbitration.

Thus, plaintiff has not met his burden to demonstrate any errors by the trial court, much less substantial errors that warrant overturning the arbitration award and directing plaintiff and FCA US to engage in a duplicative trial de novo of this lemon law claim.

STATEMENT OF THE CASE

Plaintiff purchased a used 2012 Dodge Caravan from the Dealer in 2012. The transaction was governed by a Retail Installment Sales Contract ("RISC") provided by the Dealer and signed by plaintiff. (Appellant's Appendix in Lieu of Clerk's Transcript ("I AA") 32-37.) The RISC is attached as an Exhibit to plaintiff's complaint and provides the basis for his consumer

warranty claim. (I AA 8-17.) The RISC expressly informed plaintiff that:

> By signing below, you agree that, pursuant to the Arbitration Provision on the reverse of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate.

(I AA 34.) The Arbitration Provision provided that either party could "CHOOSE TO HAVE ANY DISPUTE BETWEEN [them] DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL." (I AA 37.) It further stated that:

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

(I AA 37.)[3]

[3] The Complaint incorrectly refers to a "lease" agreement. The document attached to the Complaint is a Retail Installment Sales Contract (1 AA 13-17). The copy of the RISC attached to the Complaint omits the arbitration provision.

When purchased, the minivan had 25,071 miles on it. (I RA 5.) A year and a half later plaintiff filed his lemon law action against the Dealer and FCA US, the manufacturer of the vehicle. (I AA 7-12.) The complaint contains a single cause of action alleging both defendants violated the Song-Beverly Consumer Warranty Act (Civ.Code, §§ 1790-1795.8) in relation to the sale of the vehicle. (I AA 10-11.) The complaint weaves the car purchase agreement into the Song-Beverly cause of action:

> 15. The [sale] agreement of the vehicle to Plaintiff was accompanied by an implied warranty that the vehicle was merchantable. The [sale] of the vehicle to Plaintiff was also accompanied by an implied warranty of fitness. The [sale] contract is attached and incorporated by its reference as Exhibit 1.
>
> (I AA 10.)

Thus, the purchase of the used minivan from the Dealer provides the basis for the statutory warranty claim against both defendants regarding the allegedly defective condition of the vehicle. In fact, in setting out his Song-Beverly cause of action, plaintiff drew no distinction between the Dealer and FCA US,

often referring to them collectively as "Defendant."[4] Indeed, plaintiff expressly alleged they were agents of each other.[5]

The Dealer moved to compel arbitration under the express terms of the arbitration provision contained in the RISC signed by

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[4] See Complaint (I AA 10-11):

> 18. Defendant wrongfully denied warranty coverage for certain nonconformities.
>
> 19. Defendant was unable to conform Plaintiff's vehicle to the applicable express and implied warranties after a reasonable number of repair attempts.
>
> 20. Defendant was unable to conform Plaintiff's vehicle to the applicable express and implied warranties after a reasonable amount of time.

The Prayer for Relief is no different: "WHEREFORE, Plaintiff prays for judgment against Defendant, as follows . . . ." (I AA 11.)

[5] Plaintiff's complaint treats the Dealer and FCA US as one and the same. (See Complaint paragraph 7:

> Each Defendant whether actually or fictitiously named herein, was the principal, agent (actual or ostensible), or employee of each other Defendant and in acting as such principal or within the course and scope of such employment or agency, took some part in the acts or omissions hereinafter set forth by reason of which each Defendant is liable to Plaintiff for the relief prayed for herein.

(1 AA 9.)) An agency relationship could exist between a dealer and a manufacturer, as one manufacturer expressly alleged but did not prove. (See *Mance v. Mercedes Benz USA* (N.D. Cal. 2012) 901 F.Supp.2d 1147, 1155 fn. 6.)

both parties. (I AA 18-30.) The Dealer also requested a stay of the lawsuit pending completion of the arbitration process. (I AA 29-30.) In its motion papers, the Dealer urged the trial court to refer the entire matter to arbitration, including as to the nonsignatory FCA US. (I AA 27-29.) The Dealer argued that California law recognizes that a court, in its discretion, may order even an unwilling nonsignatory to arbitration where the "claims against another party rely upon, make reference to or are intertwined with claims against another that are covered by an arbitration agreement . . . ." (I AA 28.) FCA US contemporaneously filed a Notice of Non-Opposition to Dealer's Motion to Compel Arbitration and Stay Proceedings. (I AA 42-44.)

Plaintiff opposed the Dealer's motion arguing that the arbitration provision was procedurally and substantively unconscionable and therefore unenforceable. (I AA 50-57.) Plaintiff further argued that his Song-Beverly claim against both the Dealer and FCA US fell outside the scope of the arbitration provision. (I AA 57-59; 1 AA 58 ["in order to properly determine whether [the Dealer] can compel arbitration of Plaintiff's Song-Beverly claim against both [the Dealer] and FCA [US], the Court must necessarily determine whether the parties *intended* to contract and include Plaintiff's potential Song-Beverly claim within the arbitration provision at issue"].) Plaintiff did not contend that FCA US, as a nonsignatory, had to demonstrate an

independent right to compel arbitration; nor did plaintiff argue that FCA US was unable to make the requisite showing. Plaintiff likewise did not challenge the form of the Dealer's motion papers or the adequacy of FCA US's statement of non-opposition to establish its consent to participate in the arbitration.

In reply, the Dealer argued that the arbitration provision was not unconscionable under the holding of the California Supreme Court decision, Sanchez *v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, and was therefore fully enforceable. (I AA 66-73.) The Dealer further contended that, given FCA US's notice of non-opposition to the Dealer's motion to compel arbitration, the trial court had the discretion to order plaintiff to arbitrate his claim against both defendants. (I AA 73-74.)

In his surreply, plaintiff focused on the *Sanchez* decision's standards for unconscionability in arbitration contracts.[6] (I AA 109-113.) The surreply made no mention of the arbitrability of plaintiff's Song-Beverly claim under the RISC, or raised any of the arguments presented now on appeal.

Prior to the hearing on the motion, the trial court issued a tentative ruling that addressed plaintiff's unconscionability arguments, with the court ultimately finding that plaintiff had

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[6] The *Sanchez* court upheld the validity of an arbitration provision in an automobile purchase contract that was less favorable to the purchaser than the provision at issue here. (*Sanchez, supra*, 61 Cal.4th at pp. 908-922.)

failed to establish the unconscionability of the arbitration provision contained in the RISC, rendering it fully enforceable. (I AA 119-126.) As to the scope of the arbitration clause, the trial court pointed to the following language in the RISC:

> Any claim or dispute [. . .] between you and us [. . .] which arises out of or relates to your credit application, purchase or **condition of this vehicle**, this contract or any resulting transaction or relationship (**including any such relationship with third parties who do not sign this contract**) shall [. . .] be resolved by neutral binding arbitration [. . .].

(I AA 121-122 (emphasis original).) The trial court further reasoned that:

> An express warranty by the manufacturer for the car being [sold] clearly arises under the Clause. Furthermore, under Plaintiff's own allegations in the Complaint, express and implied warranties accompanied the [sale]. [record cite omitted] Therefore, Plaintiff cannot contend that [the Dealer] did not have the related warranties in mind in the arbitration provision of the [Record cite omitted].
>
> (I AA 122.)

The trial court's tentative ruling provided the framework for the subsequent hearing on the motion. Plaintiff continued to press his contention that the agreement, as a whole, was unenforceable because it was procedurally and substantively unconscionable. Plaintiff said nothing about FCA US's status as a nonsignatory to the arbitration agreement or raised any objection to FCA US's

consenting to participate in the arbitration by filing a statement of "non-opposition." (Reporter's Transcript ("RT").) The trial court adhered to its written tentative ruling noting that Federal and California decisional law disposed of plaintiff's unconscionability arguments. The court granted the Dealer's motion to compel arbitration, directing the entire matter to be sent to arbitration, and stayed the action pending in the trial court. (I AA 126.)

Nearly seven months later plaintiff dismissed the Dealer from this action. (I AA 131.) Despite dismissing the Dealer, plaintiff took no steps to return the matter to the trial court to argue that arbitration should not proceed with just FCA US, a nonsignatory. Significantly, for the purpose of evaluating whether plaintiff waved or forfeited the arguments he now raises on appeal, he did not file a motion for reconsideration or ask the trial court to sua sponte vacate its arbitration ruling to allow this new development to be addressed by the trial court before proceeding to arbitration. The trial court remained in a position to entertain such requests notwithstanding the stay of litigation and expiration of the time to formally move for reconsideration. (See *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 237-239 [California law "provides ample flexibility to accommodate the need to revisit interim rulings sua sponte whenever and for whatever reasons a trial judge deems appropriate"].)

Nor did plaintiff file a writ to seek review of the trial court's arbitration order, which remained an option. (See *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1518 [granting writ of mandate, setting aside order compelling arbitration, and directing that defendants' petition to compel arbitration be denied]; *DMS Servs., Inc. v. Superior Court of Los Angeles County* (2012) 205 Cal.App.4th 1346 [granting writ of mandate as to nonsignatory claims]; cf. *Young v. RemX, Inc.* (2016) 2 Cal.App.5th 630 [denying writ where record did not clearly show the employment matters ordered to be arbitrated fell outside the scope of arbitration]; see generally *Kinecta Alt. Fin. Solutions, Inc. v. Superior Court of L.A. Cnty.* (2012) 205 Cal.App.4th 506, 513 ["An order granting a motion to compel arbitration is not appealable. An appeal from the latter order lies only from the ultimate judgment confirming the arbitration award. Nonetheless immediate review of an order granting a motion to compel arbitration may be obtained by a petition for writ of mandate"].)

Some seven months later—without having taken any steps to raise the arguments now presented on appeal—plaintiff proceeded to arbitrate the Song-Beverly claim with the remaining defendant, FCA US. Following a hearing, the JAMS arbitrator issued an award in favor of FCA US, and required each party to bear its own costs and fees. (RA 9-10.) The decision of the arbitrator includes a detailed review of the minivan's repair

history. (RA 5-7.)[7] The arbitrator concluded that plaintiff had failed to prove that the car in question "had a defect covered by an express warranty that substantially impaired the use, value, or safety of the vehicle, and that the manufacturer or its dealer was unable to repair the defect within a reasonable number of attempts." (RA 9-10.) Ultimately, the arbitrator concluded that plaintiff's vehicle was not a "lemon" within the meaning of the statute. (RA 9.)

On September 29, 2017, the trial court entered an order confirming the arbitration award. (I AA 135-137.) On November 20, 2017, plaintiff filed his notice of appeal. (I AA 141-143.)

STANDARD OF REVIEW

Plaintiff contends de novo review applies because he raises only pure questions of law. (Appellants' Opening Brief (AOB) 14.) This is not a complete or correct statement. Whether a nonsignatory to an arbitration agreement can benefit from the agreement and compel a signatory to arbitrate (or vice versa, whether a signatory can compel a nonsignatory to arbitrate), constitutes a mixed question of fact and law. (See *Avery v.*

[7] The arbitrator expressly noted that there were two subsequent purchasers of the vehicle at issue and that warranty records indicated that neither made any request for repairs for over two years following the repairs requested and received by plaintiff. (RA 9.)

Integrated Healthcare Holdings, Inc. (2013) 218 Cal.App.4th 50, 60.) While legal issues are reviewed de novo, any underlying factual findings are reviewed for substantial evidence. (*Id.*; *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 226 fn. 9 [California courts apply de novo review "absent conflicting evidence"].) Factual disputes in this context may arise from ambiguous language in the arbitration agreement and the need to resort to extrinsic evidence to derive the parties' intent. In addition, the parties may find themselves disputing the relationships among the parties, including whether or not an agency relationship exists between a signatory and nonsignatory. (See generally *Metalclad v. Ventana Envir. Orgn. Part* (2003) 109 Cal.App.4th 1705, 1716 [noting de novo review would not apply if parties present extrinsic evidence concerning the interpretation of the arbitration clause or dispute the relationship among the various entities, but finding no conflicting evidence on whether nonparty should be bound by the arbitration agreement].) The application of equitable estoppel principles in compelling arbitration by (or against) nonsignatories is "fact specific" (*Goldman*, *supra*, 173 Cal.App.4th at p. 235) and "each case turns on its facts." (*Id.* at p. 229.) Disputed factual findings are reviewed under the deferential "substantial evidence" standard. (*Avery*, *supra*, 218 Cal.App.4th at p. 60.)

Moreover, "the principles of appellate review require[] appellants to affirmatively demonstrate error to overcome the presumptions in favor of the trial court's ruling: `All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.'" (*Premier Medical v. California Ins.* (2008) 163 Cal.App.4th 550, 564 [quoting *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564].)

ARGUMENT

I. PLAINTIFF HAS NOT RAISED A LEGITIMATE QUESTION ABOUT THE TRIAL COURT'S AUTHORITY TO GRANT THE DEALER'S MOTION TO COMPEL ARBITRATION AND ORDER THE ENTIRE MATTER TO ARBITRATION.

a. Plaintiff has not challenged the trial court's subject matter jurisdiction, nor could he.

Plaintiff argues for the first time on appeal that the trial court lacked "jurisdiction" to grant the relief requested in the Dealer's motion to compel arbitration. (AOB 9, 14-17.) Plaintiff does not identify or describe the supposedly missing jurisdiction. He does not say whether the trial court lacked fundamental subject matter jurisdiction over the dispute, or might simply be said to have exceeded the authority conferred on it. (See *People v American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660-661[drawing a distinction between "an entire absence of power to

hear or determine the case" which constitutes an "absence of authority over the subject matter or the parties" as opposed to when a court "acts contrary to the authority thus conferred"]); *Law Office of Herzog v. Law Offices of Fredrics* (1998) 61 Cal.App.4th 672, 679-80.) These distinctions are important. A defect in subject matter jurisdiction is nonwaivable and can be raised at any time even in a collateral attack. (*American Contractors*, *supra*, 33 Cal.4th at p. 660.) In contrast, when a court acts in excess of the jurisdiction conferred on it, that error is subject to the normal rules of waiver and forfeiture; such objections must be timely raised or will be deemed waived. (*Law Office of Herzog*, *supra*, 61 Cal.App.4th at p. 680.)

The trial court here clearly had subject matter jurisdiction to address the Dealer's motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (which expressly applies under the RISC) and the California Arbitration Act, Cal. Civ. Code §§ 1280 *et seq*. These same provisions also gave the trial court subject matter jurisdiction over the application of the arbitration agreement to FCA US, as a nonsignatory to that agreement. (See *Harris v. Superior Court* (1986) 188 Cal.App.3d 475; *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209.) The trial court could have resolved the question of whether or not FCA US possessed the right to compel plaintiff to arbitrate, *if that issue had been raised by plaintiff*. Plaintiff did not raise it and so it was

never addressed. The trial court certainly had the lesser included authority to direct the entire matter into arbitration based on (a) the enforceable agreement between plaintiff and the Dealer, and (b) FCA US's consent to participate in that compelled proceeding. (See *Zakarian v. Bekov* (2002) 98 Cal.App.4th 316, 325 [permitting willing nonsignatory to consent to arbitration over the signatory's objection].)

b. Plaintiff's procedural objections are not preserved.

Plaintiff's procedural challenges to the trial court's jurisdiction are directed to the form and content of the Dealer's moving papers as well as FCA US's statement of non-opposition to it. These objections were never made below and are not preserved. In his opposing papers, and in oral argument at the hearing, plaintiff never expressed any concerns about the form or content of the Dealer's notice of motion, the nature of the relief it requested, or the sufficiency of the non-opposition (consent) filed by FCA US. (RT.) All of the features of the moving papers that plaintiff criticizes for the first time on appeal—calling it a "fatal procedural error" (AOB 9)—were immediately apparent on the face of those papers when plaintiff received them. If plaintiff had any legitimate concerns about FCA US "improperly piggybacking" on the Dealer's motion to compel arbitration and not making its own motion, it was incumbent on plaintiff to state those objections in

writing and raise them at the hearing before the arbitration was ordered—not two years later after the arbitration had occurred. Such procedural objections are waived if not raised. (*Law Office of Herzog*, *supra*, 61 Cal.App.4th at p. 680; *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288 [a party who appears and contests a motion in the trial court cannot object on appeal that he had no notice of the motion, or that the notice was insufficient or defective].)

c. Plaintiff's procedural objections are without merit in any event.

Even if plaintiff's challenges to the form and content of the motion papers were not waived or forfeited, they are devoid of merit. Plaintiff never explains why the Dealer's reference to FCA US in its papers failed to give notice of its application to FCA US, or why FCA US's statement of non-opposition is not legally and factually equivalent to consent. Simply saying the statement of non-opposition is not a statement of consent does not make it so. Such *ipse dixit* pronouncements fail to carry plaintiff's burden, as the appellant, to demonstrate error. Plaintiff does not cite any legal authority or facts that support his assertion.[8] The parties

[8] The cases and single court rule plaintiff cites (AOB 15-16) set out standard requirements for noticed motion practice. Plaintiff fails to articulate any deficiency in the notice provided by the Dealer's motion or any other legal shortcoming in the motion papers or FCA US's non-opposition—much less something so disastrously wrong with the papers that it would deprive the court of its jurisdiction.

understood at the time (when the Dealer moved to compel arbitration) that FCA US was willing to consent to arbitrate the dispute. Such consents are common. (See, e.g., *Harris, supra,* 188 Cal.App.3d at p. 477 [nonsignatory holding company consented to arbitration]; *Zakarian, supra*, 98 Cal.App.4th at pp. 323-25.) The parties' disagreement below was over the enforceability and scope of the agreement, not who had the right to compel arbitration or participate in it if ordered by the court.

II. PLAINTIFF SHOULD NOT BE RELIEVED FROM THE USUAL PRESERVATION RULE WHICH REQUIRES AN APPELLANT TO RAISE ARGUMENTS BELOW OR BE FOUND TO HAVE WAIVED OR FORFEITED THEM ON APPEAL.

a. Plaintiff does not properly raise the argument that he should be freed from the preservation rule.

Plaintiff drops a footnote to say he should not be held to have waived any objections to the Dealer's motion. (AOB 14 fn. 3). This brief mention of the doctrines of waiver and forfeiture is ironic. California courts are free to disregard arguments raised only in a footnote in the appellant's opening brief. (See *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237 fn. 7 [generally such conduct will not preserve an issue for review]; Cal. Rules of Court, Rule 8.204, subd. (a)(1)(B)]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-85 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to

authority, we treat the point as waived"]; *Holmes v. Petrovich Development Co., LLC*, (2011) 191 Cal.App.4th 1047, 1073 ["It is the appellants' burden to establish error with reasoned argument and citations to authority"](citing *Badie*).) Plaintiff's failure to set out the argument under a separate argument heading, supported by authority, as required by the Rules of Court and decisional law, speaks volumes about the lack of substance to his argument. In any event, plaintiff's claim that he is raising only pure questions of law rests on a misreading of the law as well as a misstatement of the facts.

b. Plaintiff does not fall within the limited exception to the preservation rule.

Plaintiff's footnote cites a single California Supreme Court case from 1959 that addressed appellate review after a trial and affirmed the trial outcome on a legal theory not raised during the trial but evident from the undisputed record evidence. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; see *Mansuori v. Superior Court* (2010) 181 Cal.App.4th 633, 639 ["An appellate court may allow an appellant to assert a new theory of the case on appeal where the facts were clearly put at issue at trial and are undisputed on appeal"].) The general rule, of course, is to the contrary:

> The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new

> theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.'
>
> *(Mansouri* at p. 639 [quoting *Taggert*, *supra* at p. 742].)

The court's analysis in *Taggart* is similar to the reasoning employed by appellate courts when reviewing the record to see if the result obtained in the trial court, albeit stated on incorrect grounds, might be affirmed on another basis shown in the record. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["On appeal, a judgment of the trial court is presumed to be correct. [Citation omitted.] Accordingly, if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning"].) These decisions respect the time, energy and money expended by the parties (and the courts) in resolving disputes through litigation.

Plaintiff's actions, in contrast, do a disservice to the fair and efficient resolution of his lemon law claim and should be held to disqualify him from benefitting from this precedent. The rationale underlying these cases—to avoid reversals where possible so as to preserve litigated outcomes—supports withholding the waiver exception from plaintiff and allowing the arbitration decision to stand. Permitting plaintiff to raise all of these new arguments for the first time on appeal would reward him for engaging in gamesmanship (sandbagging) that wasted resources and would deprive the parties of the result of a fully and fairly conducted

arbitration. Plaintiff never should have dismissed the Dealer if he was not also going to return to the trial court to adjudicate FCA US's independent right, as a nonsignatory, to benefit from the arbitration agreement. By proceeding to arbitration on this half-baked record, plaintiff has demonstrated a willingness to employ a "Heads I win, tails you lose" strategy at the expense of fairness and efficiency. Plaintiff should not be rewarded by any special treatment on appeal. The general waiver/forfeiture rule should be applied to plaintiff without qualification.

Moreover, an exception to waiver/forfeit exists only when the record is sufficiently developed to frame the legal issue and no factual issues are in dispute. (*Mansouri*, *supra*, 181 Cal.App.4th at p. 639.) That is not the case here. Plaintiff played fast and loose in dismissing the Dealer and, as a result, no record was made as to FCA US's ability to benefit from the arbitration agreement. Whether or not FCA US could benefit from the Dealer's arbitration agreement is not a narrow legal question, but rather, a mixed question of fact and law that may require consideration of a host of case-specific facts that may in turn be disputed. (See *Metalclad*, *supra*, 109 Cal.App.4th at p. 1716.) Among the matters that the parties here would need to address is the meaning of "third parties who do not sign this contract" in the arbitration provision, which is not defined. Did the parties contemplate resolving disputes with the vehicle manufacturer; and if not, who else did they intend to

bring within that designation of beneficiaries? That inquiry would entail extrinsic evidence. In addition, the record might need to be developed as to a possible agency relationship between the Dealer and FCA US as expressly alleged by plaintiff in his complaint. (I AA 9.) At the very least, the court would have to consider if plaintiff should be estopped from contesting FCA US's right to arbitrate the Song-Beverly claim based on plaintiff's pleading of an agency relationship. More generally, the record would need to be developed with respect to the facts that underly the application of equitable estoppel, especially as that doctrine applies to the tripartite relationship between a car purchaser, dealer and manufacturer. All of this record evidence would have been developed in the normal course in the trial court—if plaintiff had sought further review of the arbitration order after dismissing the Dealer. The undeveloped state of the factual record resulting from plaintiff's failure to move for reconsideration precludes his arguments from being treated as pure questions of law subject to the waiver exception.

III. PLAINTIFF WAIVED OR FORFEITED THE ARGUMENT THAT HE NEVER AGREED TO ARBITRATE THE SONG- BEVERLY CLAIM AGAINST FCA US.

Plaintiff argues that FCA US is "improperly piggybacking off an arbitration agreement to which it indisputably is not a party"; calls FCA US's non-opposition to the Dealer's motion an "illegal

tactic"; and contends that FCA US should have itself moved to compel arbitration and independently demonstrate its right, as a nonsignatory, to compel plaintiff to arbitrate the Song-Beverly claim against it—as if FCA US had been the lone defendant and moving party in the trial court. (AOB 9, 17-40). These arguments were not raised below and are not properly reached here for the first time as plaintiff thinly claims. (See AOB 14 fn. 3.) Plaintiff's opposition to the Dealer's motion to compel treated the Dealer and FCA US as a single unit as to whom the arbitration agreement would be enforced or not. The arbitration agreement, he contended, was altogether unenforceable, or if enforceable, did not cover plaintiff's Song-Beverly claim. Plaintiff drew no distinction between the Dealer and FCA US in making these arguments. Plaintiff never once asked the trial court to individually evaluate FCA US's ability to compel arbitration as a nonsignatory or challenged FCA US's right to participate in it by consent. Plaintiff thus has waived or forfeited each and every argument asserted in this appeal.

Plaintiff's current contention that he "*never* agreed to submit the disputes against manufacturer FCA US to arbitration" amounts to "Heads I win, tails you lose" gamesmanship. (See, *The Cadle Company v. World Wide, Inc*. (2006) 144 Cal.App.4th 504, 511 ["[a party] may not simply sit by in silence, take his chances on a favorable judgment and then, after an adverse judgment,

complain on appeal. In short, a party may not play a game of 'Heads I win Tails you lose' with the trial court"] [quoting *Tyler v. Norton* (1973) 34 Cal.App.3d 717, 722]; see also *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328 ["The forfeiture rule exists to avoid the waste of scarce dispute resolution resources, and to thwart game-playing litigants who would conceal an ace up their sleeves for use in the event of an adverse outcome"]; *ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 906 [plaintiff forfeited its illegality argument by failing to raise it before arbitration].) This type of gamesmanship should be rejected out of hand and all unpreserved arguments deemed waived or forfeited.

Plaintiff should have raised his arguments in the trial court *before* the matter proceeded to arbitration. That would have avoided wasting resources of the parties, two courts and an arbitrator. Plaintiff was obligated to seek review in the trial court after dismissing the Dealer. Plaintiff easily could have requested the trial court to reconsider its arbitration order based on the change in parties. Such a request would have enabled the trial court to develop the factual record and hear argument on FCA US's ability to benefit from the arbitration agreement in the absence of the Dealer, whether based on equitable estoppel principles, a potential agency relationship with the Dealer (as plaintiff alleged in his complaint), third-party beneficiary status, or otherwise.

Returning to the trial court then and there (in 2015) would have provided the added advantage of allowing an immediate appeal if the court changed its ruling and denied FCA US's motion to compel arbitration. Of course, FCA US might not have pressed for arbitration in the absence of the Dealer and decided it was simpler to resolve the case in court. But either way, FCA US would have been able to make an informed decision and chart a course that would have avoided trying the Song-Beverly claim in two different forums with potentially conflicting outcomes. But all of these possibilities for greater efficiency were foreclosed by plaintiff's actions in not seeking prompt trial court review after dismissing the Dealer from the case and instead proceeding to arbitration.[9]

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[9] Plaintiff could have sought relief by mandamus. (See *Suh*, *supra*, 181 Cal.App.4th at p. 1518.) It was incumbent on plaintiff to take action if he really believed he had not waived his right to a jury trial. (AOB 34-36.) (See also *Cadle*, *supra*, 144 Cal.App.4th at p. 511 ["If [defendant] believed his right to a jury had been denied, he should have stated his objections on the record, requested postjudgment relief from the trial court, or promptly sought appellate review by writ of mandate"] [citing *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363-364].) Of course, every time a litigant is compelled to arbitrate a dispute, the option of a jury trial is lost. (See *Badie*, *supra*, 67 Cal.App.4th at p. 804 ["waiver of the right to a jury trial is inherent in the decision to resolve disputes in a non-judicial forum"].) And because the arbitration agreement in the RISC clearly states, in all caps, that plaintiff agrees: "TO HAVE ANY DISPUTE BETWEEN [them] DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL" (I AA 37), plaintiff waived his right to a jury trial. (*Id.*) See also

A cynic might think plaintiff made a conscious choice to avoid going back to the trial court for an answer, believing it was preferable to leave that issue open as a possible ground for appeal ("ace up the sleeve") if the arbitration decision proved unfavorable. (See *ECC Capital Corp.*, *supra*, 9 Cal.App.5th at p. 907 [quoting *Moncharsh v. Heily Blase* (1992) 3 Cal.4th 1, 30 ["we cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator's award"].) Whether it was an intentional stratagem by plaintiff or a fumbled opportunity by his counsel, plaintiff's failure to seek review in the trial court after dismissing the Dealer guaranteed that any arguments relating to FCA US's ability to independently benefit from the arbitration agreement were never raised and the record never developed. (See *ECC Capital Corp*, supra, 9 Cal.App.5th at p. 907 ["procedural gamesmanship . . . deprived [defendant] of the opportunity 'during the evidentiary portion of this arbitration to make a record on th[e] issue . . .'"].)

Rewarding parties for such sharp practices would cause a substantial waste of resources by litigants and adjudicatory bodies (trial courts, appellate courts, and arbitration tribunals), and undermine incentives for parties to behave reasonably and

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Sanchez, *supra*, 61 Cal.4th 899 [affirming enforceability of nearly identical arbitration provision in automobile purchase context].)

responsibly to avoid unnecessary costs. After dismissing the Dealer, plaintiff could have (and should have) requested the trial court to reconsider its arbitration order. He chose not to. The consequences of that choice are properly imposed on plaintiff by a straightforward application of the preservation rule. Having failed to raise any of these arguments below, he should not be permitted to do so here.

IV. EVEN IF PLAINTIFF HAD PRESERVED HIS ARGUMENTS, THE BETTER VIEW OF THE EVOLVING CASE LAW IS THAT A VEHICLE MANUFACTURER CAN ENFORCE THE ARBITRATION PROVISION CONTAINED IN A DEALER CONTRACT, OR AT THE VERY LEAST, HAS THE RIGHT TO CONSENT TO ARBITRATION INSTIGATED BY THE DEALER.

Anyone buying a new or used car from a dealership knows that car dealers and car makers are closely aligned in business and share a great deal in common. This includes dealer financing, manufacturer rebates, and other incentives to attract buyers, with authorized dealers and car makers sharing the costs of such coordinated economic activity. Whenever a sale is made, the car buyer, dealer and manufacturer make up a tripartite relationship governed by a sales contract and manufacturer warranties. Given these practical realities, it should come as no surprise that arbitration agreements contained in contracts governing car sales specifically acknowledge the right of either party (buyer and

dealer) to arbitrate disputes with third parties relating to the condition of the vehicle. The car manufacturer who provides warranties that attach to the vehicle is one such third-party. Indeed, the car maker issuing warranties would be the first (and perhaps only) third party to spring to anyone's mind.

While California law firmly recognizes the right of nonsignatories to compel arbitration with signatories,[10] state courts in California have not had occasion to analyze whether a car manufacturer, as a nonsignatory, can compel a car buyer to arbitrate warranty claims relating to the condition of car based on the sales contract signed by the buyer and one of its authorized dealers. Two federal court decisions, *Kramer v Toyota Motor Corp*. (9th Cir. 2013) 703 F.3d 1122, and *Soto v. American Honda Motor Co*. (N.D.Cal. 2012) 946 F.Supp.2d 949, conclude that the nonsignatory car manufacturer cannot benefit from the arbitration agreement between its dealer and the car buyer. These two courts read the standard RISC arbitration clause very narrowly, largely divorced from the realities of the car-buying market. Their cabined

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[10] See, e.g. *Goldman*, *supra*, 173 Cal.App.3d at pp. 221-231 (surveying California law); *Crawford Prof. Drugs, Inc. v. CVS Caremark Corp.* (5th Cir. 2014) 748 F.3d 249, 260; see generally *Suh, supra,* 181 Cal.App.4th at p. 1513 ["there are six theories by which a nonsignatory may be bound to arbitrate: '(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary'" (quoting Oehmke, Commercial Arbitration (3d ed. 2006 update) § 41.57, pp. 41-195].)

reading of the arbitration provision—which includes refusing to read "third parties who do not sign this contract" to include manufacturers who issue warranties as a direct result of the consumer buying a car from an authorized dealer—entails a highly legalistic approach that could be mistaken for outright hostility to consumer arbitration clauses. The decisions of these two federal courts effectively dismantle the tripartite relationship that arises both as a matter of fact and law from the execution of the RISC, even though such commercial relationships, under California law, properly inform the enforceability of arbitration clauses by nonsignatories. (See *Goldman*, *supra*, 173 Cal.App.4th at pp. 231-232.)

We think the far better view—and one that resonates with California decisional law[11]—is to recognize the practical realities

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[11] E.g. *Metalclad*, *supra,* 109 Cal.App.4th at pp. 1713-1719; *Goldman, supra*, 173 Cal.App.4th at pp. 217-219; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287 ["statutory claims in [plaintiff's causes of action] also rely upon, make reference to, presume the existence of, and are intertwined with the Agreement"]; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 269 ["a signatory to a [sic] agreement containing an arbitration clause may be compelled to arbitrate its claims against a nonsignatory when the relevant causes of action rely on and presume the existence of the contract"]; *id.* at 272 ["By relying on contract terms in a claim against a nonsignatory defendant, even if not exclusively, a plaintiff may be equitably estopped from repudiating the arbitration clause . . ."]; *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 833 [holding

under which car sales take place and allow nonsignatory car makers to benefit from the arbitration agreement contained in the sales contract. (See *Mance v. Mercedes Benz* (N.D.Cal. 2012) 901 F.Supp.2d 1147, 1166 [granting Mercedes' standalone motion to compel car buyer to arbitrate Song-Beverly claim].) This result squares with the real-world tripartite relationship for car purchases and recognizes that the contract of sale, in the form of the standard RISC, is the legal document that gives rise to the manufacturer's warranty obligations. (*Id.* at 1157 ["Mercedes-Benz should be allowed to compel [car buyer] to arbitrate . . . because his claim 'makes reference to or presumes the existence of' the underlying contract" and "Mercedes-Benz's duty to comply with its warranty arose only when [the buyer] bought the car"].) In the specific and recurring context of automobile sales, no warranty rights exist—there is nothing for Song-Beverly to protect—unless and until the car buyer signs the purchase agreement. (*Id.*) "In other words, [the buyer's] claim for breach of warranty is premised on, and arises out of, the contract." (*Id.*) The court in *Mance* concluded that "[i]n such a situation, it would not be fair to allow [the car buyer] to rely upon his signing the contract to buy the car

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that equitable estoppel applies when signatory sues nonsignatories for claims that are "'based on the same facts and are inherently inseparable' from arbitrable claims against signatory defendants"].)

and get the warranty but to prevent Mercedes-Benz from attempting to enforce the contract's arbitration clause." (*Id.*)[12]

This reading gives meaning to the broad language found in the arbitration clause that covers "any claim or dispute . . . arising out of or relates to . . . the condition of this vehicle" and, as noted above, specifically refers to the right to elect to arbitrate disputes with "third parties who do not sign this contract" where those third parties have a relationship to the vehicle as a result of the sale. The trial court in the instant case, in granting the Dealer's motion to compel arbitration reached the same conclusion noting that "Plaintiff's argument that the Song-Beverly Claim does not arise under the [sale contract] is not well taken . . ." because the manufacturer's warranty "arises under the Clause." (I AA 121-122.) Moreover, plaintiff's own allegations (contained in the

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[12] Because the dealer was not sued in *Mance*, the court there had no occasion to consider whether any claims against the nonsignatory manufacturer were "inherently bound up" with the claims against the signatory dealer. Such "binding up" logically occurs any time a car buyer brings a Song-Beverly single-count complaint against both the dealer and the manufacturer without drawing any distinctions between them, especially when the buyer alleges each is the agent of the other—as happened here. The court in *Mance* looked to the RISC as the wellspring of the warranty obligations and enforced the arbitration agreement against the car buyer on that basis. It did so without any of the additional supporting facts present in this case. Accordingly, FCA US stood in a stronger position than Mercedes-Benz to bring its own motion to compel, if it had ever been required to do so.

complaint) state that these "warranties accompanied the [sale]," such that "Plaintiff cannot contend that [the Dealer] did not have the related warranties in mind in the arbitration provision of the [sale contract]." (I AA 122.) In this way, "by the manner in which he crafted his claims in the litigation, [plaintiff] subjected himself to the arbitration of those claims." (See *Rowe*, *supra*, 153 Cal.App.4th at p. 1288; Complaint ¶ 15 (I AA 10).)

A recent decision from the Fifth Circuit, *Crawford, supra*, 748 F.3d at p. 260, applied "California's test for arbitration by estoppel," and in doing so adopted a practical approach much like that taken by the court in *Mance*. The Fifth Circuit looked to the underlying contract (a so-called Provider Agreement) that contained the arbitration clause. The court concluded that the California test was satisfied because the plaintiffs' "claims against the nonsignatory [Defendants] are founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause." (*Id.* at 260 [citing *Goldman*, *supra*, at pp. 213-214].) The court in *Crawford* addressed trade secret misappropriation claims brought by several pharmacies that participated in a provider network operated by the defendants. Plaintiffs claimed the defendants "misused patient and prescription information" sent through the network, including using the information to compete against plaintiffs. In granting the defendants' motion to compel arbitration, the court observed

that the allegedly misappropriated information "would not have been provided but for the Plaintiffs' participation in the Defendants' . . . network pursuant to the Provider Agreement." *Id*. The Provider Agreement established permissible uses of the information by defendants and otherwise ordered the relationship between plaintiffs and defendants.

Crawford and *Mance* apply "the California test" in a straight-forward, common sense way that understands the commercial realities and respects the parties' written agreement to arbitrate, rather than fighting the agreement every step of the away as the courts do in *Kramer* and *Soto*.

Of course, this discussion is academic because plaintiff never positioned the case to make FCA US bring its own motion to compel. By suing the Dealer, plaintiff opened himself to arbitration. By dismissing the Dealer only after the trial court granted the Dealer's motion to compel arbitration—and then not requesting the trial court to revisit its arbitration order—plaintiff guaranteed the matter would proceed to arbitration based only on the Dealer's motion as a signatory to the arbitration agreement. Plaintiff's conduct should be seen as acquiescing to the arbitration—waiving or forfeiting any challenge to the trial court's arbitration order. Plaintiff should not be allowed to un-do the past three years of judicial proceedings and pretend that he did not sue the Dealer and had in fact forced FCA US to bring a standalone

motion to compel arbitration. The record is to the contrary and precludes consideration of plaintiff's long-waived/forfeited right to challenge the trial court's decision to compel arbitration.

As the parties actually stood before the trial court in 2015, the Dealer had every right to bring its motion to compel arbitration, and FCA US had every right to consent to participate in that arbitration. (See *Zakarian, supra*, 98 Cal.App.4th at p. 325 ["[w]e are not forcing an unwilling nonsignatory to submit to arbitration" but rather allowing a nonsignatory to consent to arbitration over the signatory's objection].)

CONCLUSION

Plaintiff created the problems of which he now complains. As master of his own complaint and litigation strategy, plaintiff had every opportunity to structure his lawsuit to make FCA US the lone defendant and only movant for purposes of compelling arbitration. Had he done so, this case would have come to this Court (if at all) in a very different posture with a fully developed record as to FCA US's right to compel arbitration as a nonsignatory. The undeveloped record in the trial court here—as to whether principles of estoppel, agency, third-party beneficiary status (or otherwise) could support a standalone motion by FCA US—is directly attributable to plaintiff's failure to go back to the trial court for a ruling after dismissing the Dealer.

This Court should hold plaintiff to his various elections and not relieve him of his choices just because he got a bad result in arbitration and would like a "do-over."

The judgment should be affirmed.

Dated: October 8, 2018

LAW OFFICE OF DAVID TENNANT PLLC

By: s/ David H. Tennant
David H. Tennant

NIXON PEABODY LLP

Jennifer A. Kuenster, Esq.

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Brief of Respondent is produced using 13-point or greater Roman type, including footnotes, and contains 8,710 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 8, 2018

LAW OFFICE OF DAVID TENNANT PLLC

By: s/ David H. Tennant
David H. Tennant

NIXON PEABODY LLP

Jennifer A. Kuenster, Esq.

Attorneys for Respondent

State of California)
County of Los Angeles)
)

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

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SERVICE LIST

Hallen D. Rosner, Esq. ROSNER, BARRY & BABBITTT, LLP 10085 Carroll Canyon Road, Suite 100 San Diego, California 92131 hal@rbblawgroup.com *Attorney for Appellant,* *R. Jose Arzola*	Michelle A. Cook, Esq. ROSNER, BARRY & BABBITTT, LLP 10085 Carroll Canyon Road, Suite 100 San Diego, California 92131 michelle@rbblawgroup.com *Attorney for Appellant,* *R. Jose Arzopla*
Steve B. Mikhov, Esq. KNIGHT LAW GROUP LLP 1801 Century Park East, Suite 2300 Los Angeles, California 90067 *Attorney for Appellant,* *R. Jose Arzola*	Sepehr Daghighian, Esq. LAW OFFICES OF SEPEHR DAGHIGHIAN, P. C. 433 North Camden Drive, Suite 400 Beverly Hills, California 90210 sepehr@daghighian.com *Attorney for Appellant,* *R. Jose Arzola*