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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NORMAN THIEL,

Plaintiff and Respondent,

v.

MKA REAL ESTATE QUALIFIED  
FUND I, LLC,

Defendant and Appellant.

A131683

(Marin County  
Super. Ct. No. CIV1004972)

**I.**

**INTRODUCTION**

Defendant MKA Real Estate Qualified Fund I, LLC (MKA) appeals from the denial of its motion to compel arbitration of plaintiff Norman Thiel’s (Thiel) claims against it for investment mismanagement. MKA broadly claims the trial court erred in: (1) not considering its supplemental documents and declarations submitted prior to oral argument on the motion; (2) denying the motion based on the unsupported finding that Thiel had not agreed to arbitrate; and (3) denying the motion based on the sua sponte alternative finding that the litigation involved third parties who were not signatories to the arbitration agreement, and there existed a possibility of conflicting rulings on common issues of law or fact. (Code Civ. Proc., § 1281.2, subd. (c) (section 1281.2(c).) We affirm.

## II.

### FACTUAL AND PROCEDURAL HISTORIES

#### A. The First Amended Complaint

Thiel filed his original complaint against MKA and others on September 20, 2010, in Marin County Superior Court. That complaint was superseded by a first amended complaint (FAC) filed less than two months later on November 3, 2010. The FAC began by announcing Thiel's intention to seek redress via the lawsuit for the "fraudulent, illegal, and negligent securities, investment, and real estate sales practices of Defendants."

In addition to MKA, the FAC named as codefendants the following persons and entities:

1. Jeffrey Guidi (Guidi), a Marin County investment advisor;
2. Gary Armitage (Armitage), a Marin County investment advisor;
3. James Koenig (Koenig), a Marin County investment advisor and securities broker;
4. ePlanning Securities Inc. (ePlanning), an investment advising and securities brokerage firm;
5. Oakdale Heights Bakersfield LP (Oakdale), a real estate developer selling securities;
6. Sunset Bay LLC (Sunset Bay), a real estate developer selling securities; and
7. Centaurus Financial, Inc. (Centaurus).

Thiel also named as defendants several entities under which it was alleged that Guidi, Armitage, and Koenig did business. The FAC alleged that each defendant was the "agent, servant, employee, and/or co-conspirator of . . . each other."

On information and belief, the FAC generally alleged that each and all of the defendants engaged in a joint enterprise for the financing of real estate developments through the gathering of funds from retirees and unsophisticated investors into high risk investments. The investors were located by means of public lectures on investing put on by Guidi and Armitage, who induced Thiel to invest in risky developments offered by

MKA and the other defendants, while MKA and these individuals and entities collected large fees and commissions.

More specifically, the FAC alleges that Thiel was 72 years old at the time of filing of the FAC, while his spouse, Gae Thiel, was 71 years old. In or slightly before 2002, they attended a seminar put on by Guidi and Armitage in Marin County, the result of which Thiel was persuaded to move \$400,000 from a low risk investment he held into high risk ventures sponsored by defendants Oakdale and Sunset Bay. By 2007, Thiel was able to recover his principal, and “a reasonable return for its use.”

Thereafter in 2007, Thiel was persuaded by Guidi and Armitage to invest \$200,000 in MKA based upon a series of fraudulent misrepresentations and material concealments, and at a time when Thiel was in failing health. In addition to Guidi and Armitage, the FAC alleged that MKA itself failed to make certain disclosures to Thiel, including its relationship with Koenig, who had a criminal record for his participation in a “Ponzi scheme,” and that MKA was raising money “for Ponzi schemes.” As a result of defendant’s actions, Thiel asserts that he lost the entire value of his investment.

Paragraph 31 of the FAC alleges the following explicit misrepresentations by these codefendants:

“a. completing a fraudulent statement to MKA that Mr. Thiel’s net worth totaled \$1,067,000, which they knew was false;

“b. exhorting Mr. Thiel to sign that false statement while he was in a debilitated condition;

“c. completing a fraudulent statement to MKA that Mr. Thiel had been provided and had read a prospectus for MKA, a copy of MKA’s Operating Agreement, and a copy of MKA’s Private Placement Memorandum (‘PPM’), all of which they knew had never been provided to or read by Mr. Thiel;

“d. exhorting Mr. Thiel to sign that false statement while he was in a debilitated condition;

“e. withholding MKA’s Operating Agreement and PPM from Mr. Thiel even though both were readily available to Mr. Guidi, Mr. Armitage, AGA, and ePlanning as MKA’s agents;

“f. falsely representing to Mr. Thiel that MKA was a ‘sterling investment;’

“g. falsely representing to Mr. Thiel that MKA was a rare opportunity to get high returns with low risk;

“h. representing to Mr. Thiel that MKA had an ‘outstanding track record;’

“i. falsely representing to Mr. Thiel that investing in MKA would keep Mr. Thiel’s capital ‘safe’ and ‘secure;’

“j. falsely representing that MKA would pay Mr. Thiel 12 [percent] per annum regularly;

“k. falsely representing to Mr. Thiel that investing in MKA was a wise and appropriate investment for a retired person in his circumstances;

“l. concealing from Mr. Thiel all the terms of MKA’s PPM, including its statements that: (1) an investment in MKA was suitable only for investors who could bear the risk of losing their entire investment; (2) interests in MKA could not be sold, until after he was irrevocably committed to an ‘investment’ in MKA;

“m. failing to advise Mr. Thiel that his \$200,000 ‘investment’ was in a fractional interest for which there was no market;

“n. failing to advise Mr. Thiel that MKA was in serious financial trouble and not able to service its obligations to existing investors;

“o. failing to advise Mr. Thiel that two of the properties forming the basis of his investment were already in foreclosure;

“p. failing to advise Mr. Thiel that MKA needed additional ‘investors,’ such as Mr. Thiel, so that it could pay overdue obligations to existing investors;

“q. failing to advise Mr. Thiel that MKA would have the right to recall interest payments after it had made them to him by deducting them from his capital contribution;

“r. failing to inform Mr. Thiel that his ‘investment’ in MKA would be subject to being ‘frozen’ by MKA;

“s. failing to inform Mr. Thiel that his ‘investment’ in MKA would likely be frozen due to the pending foreclosure sales of the properties that secured it and due to serious deterioration in the real estate market; and

“t. on information and belief, MKA participated in those fraudulent and illegal acts by using Mr. Guidi, Mr. Armitage, ePlanning, and AGA as its agents to sell its units even though it knew they were in the business of defrauding investors and/or encouraging investors to make investments they should not make and/or providing ‘investors’ for Ponzi schemes.”

Paragraph 66 of the FAC included a negligence cause of action against all defendants. As to MKA, this cause of action alleged that MKA breached a duty of care owed to Thiel by the following acts or omissions:

“a. Marketing its units of ownership through agents whose business was largely the support of a known Ponzi-scheme felon in implementing his current Ponzi-scheme enterprises;

“b. Marketing its units of ownership through agents whose business was largely influenced and controlled by a known Ponzi-scheme felon in implementing his current Ponzi-scheme enterprises;

“c. Relying on such agents to determine whether purchasers were actually ‘Accredited Investors’ as defined in Rule 501(a) of Regulation D (‘Regulation D’) promulgated by the United States Securities and Exchange Commission;

“d. Accepting purchases of units of ownership without adequately ascertaining that the purchasers were ‘Accredited Investors’ as so defined;

“e. Not directly informing purchasers of units of ownership of the true risks of the purchases they were making;

“f. Not taking direct, reasonable, or realistic steps to disclose the true risks of purchasing of a unit of MKA to Mr. Thiel;

“g. Not taking reasonable or realistic steps to make sure that Mr. Thiel had received a copy of MKA’s Operating Agreement;

“h. Failing to inform Mr. Thiel that at least two of the properties owned by MKA were in foreclosure; and

“i. Failing to inform Mr. Thiel that, on information and belief, MKA was seeking new investors to pay obligations owed to existing investors.”

In addition to the fraud and negligence causes of action referenced above, the FAC also relied on the allegations made against the respective parties in asserting claims for breach of fiduciary duty against Guidi, Armitage, and their business entities (First Cause of Action), rescission against all defendants (Fourth Cause of Action), negligence per se against all defendants (Fifth Cause of Action), violation of Corporations Code section 25401 (Sixth Cause of Action), and elder abuse (Seventh Cause of Action) against Guidi, Armitage, and their business entities.

### **B. MKA’s Motion to Compel Arbitration**

MKA’s first appearance was made by filing a motion to compel arbitration, and to stay the action. Its motion was based on an arbitration clause contained in a “Third Amended and Restated Operating Agreement for Qualified Fund” (Third Amendment), which was issued by MKA on January 1, 2008, six months after Thiel made his investment in MKA. The motion was supported by the declaration of Brian Wagoner (Wagoner), executive vice-president of finance of MKA Capital Group Advisors, the managing firm of MKA, who authenticated documents indicating that, in March 2008, Thiel approved of the changes in the Third Amendment, which included a newly added arbitration clause. A document titled “Consent to Amended and Restated Operating Agreement” (Consent) was attached as Exhibit C to Wagoner’s declaration, and purported to bear the signature of Thiel. Although the body of the document stated that the changes to the operating agreement are “appended” to the Consent, they were not attached to Exhibit C.

The motion was originally set to be heard by the trial court on March 16, 2011.<sup>1</sup> Thiel filed an opposition to the motion supported by the declarations of Thiel and his

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<sup>1</sup> All further dates are in the calendar year 2011, unless otherwise indicated.

spouse, who was with him when the investment was made. In his declaration, Thiel stated that he was never shown a copy of the original operating agreement or an arbitration agreement, and that he never agreed to arbitrate any potential claims against MKA. As to the Third Amendment, Thiel stated that he asked Guidi for a copy of that document after receiving notice that MKA intended to amend the original operating agreement, but that he was never provided a copy. He then hired an attorney who tried without success to obtain a copy directly from MKA.

Mrs. Thiel was with her husband the day the investment was made in 2007, and only the couple and Guidi were present. She confirmed that during the course of the meeting, Guidi gave her husband several documents to sign but that “[t]here were not attachments to the few pages of papers that Norman signed. No one mentioned arbitration.”

The opposition was accompanied by several objections to Wagoner’s declaration for lack of personal knowledge, and an objection to his statement that Thiel agreed to the amendments as an impermissible conclusion of law.

A reply memorandum and response to Thiel’s objections to the Wagoner declaration were subsequently filed by MKA on March 8. No further supporting documents accompanied the reply brief, nor did MKA seek leave to file any supplemental papers in support of the motion.

A tentative ruling was posted by the trial court on March 15. That tentative ruling expressing the intention to deny MKA’s motion to compel arbitration on two separate grounds. First, it sustained Thiel’s objection to the Wagoner declaration on the basis that Wagoner’s statement that Thiel had agreed to the amendments to the operating agreement was “conclusory.” Thus, the tentative ruling concluded that MKA had failed to sustain its burden of proof on this issue. In addition, the tentative ruling noted that the case involved third parties not signatories to the arbitration agreement. It concluded that an arbitration between Thiel and MKA without these parties “could lead to conflicting rulings on common issues of law or fact,” citing section 1281.2(c).

Counsel for MKA appeared the following day for oral argument on the motion, but failed to advise Thiel’s counsel or the court of her intention to contest the tentative ruling.<sup>2</sup> After she became aware of this requirement, counsel requested the court to “continue the hearing so that I can contact opposing counsel so that we can make oral argument on the motion to compel arbitration.” After reminding counsel of the need to be familiar with the court’s local rules,<sup>3</sup> the trial judge agreed “in the interests of justice” to continue the motion for one week, until March 23, and counsel could then notify opposing counsel of her desire to argue the motion.

Two days later, without obtaining leave of court, MKA’s counsel filed a supplemental declaration of Michael Abraham, chief executive officer of MKA Capital Group Advisors, the managing firm of MKA, and a supplemental declaration of Wagoner. Attached to both declarations were numerous additional documents to those already filed in connection with the motion. Together the materials filed on March 18 totaled approximately 175 pages.

Thiel filed objections to the supplemental materials on March 21, challenging their timeliness. At the commencement of the hearing on March 23, the trial court advised counsel that it was sustaining Thiel’s objections to “the late filed papers after the 10th.” Counsel for MKA then argued the merits of the motion with regard to both grounds stated in the court’s earlier posted tentative ruling. As to the alternative ground based on section 1281.2(c), MKA’s counsel did not claim that this was an improper basis for

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<sup>2</sup> Local Rule 1.6 of the Uniform Local Rules of the Marin County Superior Court (Local Rule 1.6), states: “B. Oral Argument. If a party wants to present oral argument or request modification of the tentative ruling, he/she *must contact the court at (415) 444-7046 and all opposing counsel or parties by 4:00 p.m. of the court day preceding the scheduled hearing and briefly identify the issues to be argued.* Contact with opposing counsel’s office shall be deemed adequate notice that argument is being requested (i.e., it is not necessary to speak with counsel directly). Unless both the Court and opposing counsel have been notified of a request to present oral argument, no oral argument will be permitted unless the Court otherwise directs.” (<<http://www.marincourt.org/data/PDFs/ULRules.pdf>> [as of Nov. 9, 2012], italics added.)

<sup>3</sup> MKA’s counsel was from Southern California.

denying the motion because it was raised sua sponte by the court. Counsel did not ask for additional time to brief the issue, nor did counsel request leave to submit additional documents. Ultimately the court confirmed it would “stay with the tentative ruling in this matter,” and MKA’s motion to compel arbitration was denied.

### **III.**

#### **DISCUSSION**

##### **A. MKA’s Supplemental Declarations and Exhibits**

We first briefly address MKA’s claim that the trial court erred in sustaining Thiel’s objection to the timeliness of the 175 pages of supplemental reply materials it filed on March 18, without leave of court, in support of its motion to compel arbitration.

Code of Civil Procedure section 1005, subdivision (b) governs the time for filing papers in connection with civil law and motion matters. It provides that “all reply papers” must be filed by the moving party “at least five court days before the hearing.”

MKA filed its original reply brief, without any additional supporting materials, on March 8, six court days before the original March 16 hearing date, and within the five court days specified in Code of Civil Procedure section 1005, subdivision (b). However, when counsel appeared on March 16, in violation of Local Rule 1.6B, counsel appealed to the court to continue the hearing on the motion so counsel could argue the case. No request was made for leave to file any supplemental papers, nor did counsel indicate an intention to do so without leave of court.

Assuming without deciding that MKA had a right to file supplemental materials in reply based on the continuance, those filings would have been required to be filed five court days before the continued hearing date. Because the hearing was continued to March 23, that deadline became March 17. Therefore, the court was fully justified in sustaining Thiel’s objection to consideration of those materials because they were not filed on time. Accordingly, we reject MKA’s contention on appeal that it was error for the trial court not to have considered its supplemental reply materials.

## **B. The Trial Court’s Finding that Thiel Did Not Agree to Arbitrate**

“A party to an arbitration agreement may petition the court to compel other parties to arbitrate a dispute that is covered by their agreement. (Code Civ. Proc., § 1281.2; *Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633.) The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence. (*Segal v. Silberstein, supra*, at p. 633.)” (*Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 15, fn. omitted (*Jones*).)

“There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71-72 . . . (*NORCAL*).) If the court’s order is based on a decision of fact, then we adopt a substantial evidence standard. (See, e.g., *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416 [finding substantial evidence that parties had in fact reached agreement to arbitrate and thus court order compelling arbitration was affirmed]; see also *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653 . . . .) Alternatively, if the court’s denial rests solely on a decision of law, then a de novo standard of review is employed. (See, e.g., *NORCAL, supra*, at pp. 71-72, [ordering parties to arbitrate after independently coming to legal conclusion that parties’ dispute was covered by arbitration agreement]; see also *Metalclad Corp. v. Ventana Environmental Organization Partnership* (2003) 109 Cal.App.4th 1705, 1716 . . . .)” (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.) “We also must presume the court found every fact and drew every permissible inference necessary to support its judgment or order, and we must defer to the court’s determination of credibility of the witnesses and weight of the evidence in resolving such disputed facts. [Citation.]” (*Jones, supra*, 195 Cal.App.4th at p. 12.)

In this case, the evidence was indeed disputed as to whether Thiel agreed to arbitrate his potential claims against MKA. While there were portions of Wagoner’s declaration to which objections were not sustained, and exhibits that ostensibly showed Thiel acknowledged having received and consented to the Third Amendment, there was evidence indicating otherwise. Specifically, Thiel himself denied having received the

Third Amendment in 2008. In fact, he noted that he specifically asked Guidi for a copy of that document after receiving notice that MKA intended to amend the original operating agreement, but he was never provide with it. He then hired an attorney who tried unsuccessfully to obtain a copy directly from MKA. We note too that Exhibit C to Wagoner’s declaration, which is the Consent, did not have the Third Amendment appended to it.

Given the conflicting evidence and contradictory inferences which could be drawn, and applying the standard of review as it relates to factual determinations, we conclude there is substantial evidence supporting the trial court’s finding that Thiel had not agreed to arbitrate potential claims against MKA. In reaching this conclusion we are mindful that MKA has raised certain issues on appeal that it contends should affect our evaluation of the evidence. Specifically, it asserts that Thiel’s declaration conflicts with the written documents, and thus violates the parol evidence rule. MKA also argues that despite Thiel’s denials, he is bound by the consent to arbitrate which was agreed to by his attorney-in-fact on his behalf.

Neither argument was made in the trial court. An appellate court generally will not consider a matter presented for the first time on appeal (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143 (*Franz*)), and a failure to raise an issue or argument in the trial court will result in it being forfeited on appeal (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226 (*Kaufman & Broad*); *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381 [failure to raise issue in trial court forfeits the point on appeal]). Moreover, “[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial. [Citation.]” (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.) That is clearly the case here. These arguments, therefore, have been forfeited.

### **C. The Denial of the Motion Based on section 1281.2(c)**

MKA next contends that the trial court committed prejudicial error in denying its motion to compel arbitration on the alternative ground that there existed related claims against third parties which raised the possibility of conflicting findings of fact or law in the event the claims against MKA were arbitrated, and those against the codefendants were not. It claims both procedural and substantive errors, arguing that: (1) this ground for decision was raised by the trial court sua sponte without giving MKA an adequate opportunity to brief or make an evidentiary showing that section 1281.2(c) was inapplicable; (2) there were no “third parties” because Thiel alleged the codefendants were agents of MKA and thus, entitled to assert the arbitration agreement themselves; (3) Thiel is equitably estopped from invoking section 1281.2(c) because his claims against the co-defendants all relate to those made against MKA which he agreed to arbitrate; and (4) there is no possibility of conflicting rulings of law or fact if the claims against MKA are arbitrated and those against the remaining codefendants are litigated.

As to MKA’s procedural argument challenging the court’s right to make a sua sponte ruling based on an alternative ground for denying the motion, this objection was raised for the first time on appeal. Therefore, like a host of other issues raised MKA for the first time on appeal, that contention has been forfeited. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 351 [failure to raise issue in trial court and opening brief “doubly waive[s]” argument].)

Also, the authority relied on by MKA to support this contention would be unavailing, absent forfeiture, for two reasons. First, Government Code section 68081,

which requires the court to allow a party to address a dispositive issue not raised by the parties, applied only to the appellate courts, not trial courts in the first instance.<sup>4</sup>

Second, the single case relied on by MKA, *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59 (*Juge*), actually undercuts its procedural argument. In that case, the trial court granted summary judgment on a ground not raised by the parties to the motion. First, the court held that the trial court had the “inherent power” to grant summary judgment on a ground not raised by the parties. (*Id.* at p. 70.) However, the court stated that before doing so, the court must give the parties an opportunity to address the issue. (*Ibid.*)

Nevertheless, based on the record, the reviewing court found no error occurred: “We imply no view on whether due process requires notification of and an opportunity to respond to the ‘new’ ground of law prior to the trial court’s ruling on the summary judgment motion. Even if that were the rule, there was no infringement of due process in this case because the record reveals the following: although defendant did not expressly argue summary judgment should be granted because the essential element of causation was negated, the point was advanced, albeit obliquely, in the papers submitted to the court; the trial court gave plaintiff notice that the court intended to grant the motion on the ground defendant had negated the element of causation; and plaintiff had an opportunity to identify triable issues of fact material to said ground but was unable to do so.” (*Juge, supra*, 12 Cal.App.4th at p. 71.)

Similarly, in this case the original tentative ruling issued on March 15 included section 1281.2(c), as a ground to deny the motion. Despite the failure of MKA to comply with local rules of court concerning contesting the tentative ruling, the trial court gave

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<sup>4</sup> That section provides in full: “Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.” (Gov. Code, § 68081.)

counsel a one-week continuance of the hearing “in the interest of justice.” At the hearing held on March 23, counsel for MKA did, in fact, address this alternative ground on the merits in her argument to the court, including citing a case discussing section 1281.2(c). At no point did MKA ask for an additional opportunity to brief the issue nor did counsel make a request to submit evidence showing there were issues of fact. The issue of inadequate notice was therefore waived. (*Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1287 [claim that trial court had improperly granted motion on grounds which were not stated in moving papers and without providing adequate opportunity to respond was waived for purposes of appeal where there was no request made for a continuance or request for permission to file a supplemental brief.]

As to MKA’s second point—that there were no “third parties” because all of the codefendants were alleged to be the agents of MKA and thus, entitled to assert the arbitration agreement themselves—this argument also fails for two separate reasons. Once again, the issue is raised for the first time on appeal. It is forfeited for that reason alone. (*Franz, supra*, 31 Cal.3d at p. 143); *Kaufman & Broad, supra*, 136 Cal.App.4th at p. 226.)

Moreover, the fact that the FAC pleaded agency between the codefendants would not otherwise be dispositive of the issue in this case, even if it had been timely raised. As the trial court pointed out in its ruling, not one of the nonsignatories named as codefendants and agents in the FAC sought to invoke the arbitration clause in this case. Under these circumstances, the exception to section 1281.2(c), allowing nonsignatory agents to assert an otherwise enforceable arbitration clause,<sup>5</sup> is simply inapplicable. Indeed, each and every case cited by MKA in its appellate briefs hold only that the

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<sup>5</sup> All of the authorities relied on by MKA holding an exception exists to the discretionary stay or denial of arbitration under section 1281.2(c), are premised on the finding that a valid, enforceable arbitration agreement existed between the claimant and the party/principal. Here, the trial court properly determined that Thiel had not agreed to arbitrate any potential claims against MKA arising out of his investment in that entity. Therefore, we recognize that reaching the merits of this alternative ground for denying the motion is arguably dicta.

alleged nonsignatory agent may invoke the clause. None support the corollary principle argued by MKA that section 1281.2(c) cannot be used as a basis for denying a motion to compel brought by the principal who signed the agreement where no alleged agents seek to take advantage of the agreement.

For example, in *Thomas v. Westlake* (2012) 204 Cal.App.4th 605 (*Thomas*), the plaintiff investor had sued multiple parties for investment mismanagement, including several nonsignatories to an arbitration agreement who were sued as the agents of one of the parties to the agreement. The court held that the alleged agent could enforce the agreement, as an exception to section 1281.2(c), thereby preventing a denial of the agent's motion to compel. (*Id.* at pp. 614-615.)<sup>6</sup> Similarly, in *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406 (*Dryer*), our Supreme Court held that agents who were sued along with a professional football team were also entitled to arbitrate the claims against them: "If, as the complaint alleges, the individual defendants, though not signatories, were acting as agents for the Rams, then they are entitled to the benefit of the arbitration provisions. (*Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1004 . . . .)" (*Dryer*, at p. 418.) See also *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511 [nonsignatory agent entitled to invoke arbitration agreement signed by claimant and alleged principal]; *Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696 [no discretion to stay or deny arbitration under section 1281.2(c) where doctrine of equitable estoppel invoked by alleged "third part[ies]"]; *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399 [nonsignatory owner and management company of the health facility sued were not "third parties" to patient's arbitration agreement with the health facility, where all three defendants were related entities represented by the same counsel, all three defendants intended to participate in

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<sup>6</sup> Unlike this case, there was no question in *Thomas* as to whether the arbitration agreement was enforceable by the signatory/principal who signed the agreement. (*Thomas*, at pp. 613-614.)

arbitration, and patient's claims against all three entities were based on the same facts and were inherently inseparable].)<sup>7</sup>

Furthermore, it would be manifestly unfair, and defeat the very purpose of this exception to allow a signatory/principal to force a third party, nonsignatory defendant into arbitration simply because agency was pleaded by the plaintiff. Such a rule would only encourage game playing among the parties based on the perceived relative strengths and weaknesses of going to arbitration in a given case.

This brings us to MKA's penultimate contention: that the trial court abused its discretion in denying the motion to compel under section 1281.2(c) because there existed no possibility of conflicting rulings on questions of law or fact if the claims against MKA were arbitrated while those against the remaining codefendants were litigated. This argument centers around the contention that Thiel's claims against MKA "boil[] down" to allegations about misfeasance in its "internal management and operations" (e.g., "how the fund was run"), while those against the codefendants relate to their respective direct contacts with Thiel and misrepresentations and concealments of fact made during those contacts. For this reason, MKA argues, the parties are situated differently, and there is little chance of inconsistent rulings on common issues of law or fact.

While it is possible that an arbitration with MKA could result in rulings that are entirely consistent with those made in the litigation against the codefendants, there also exists a substantial risk those rulings could be inconsistent. Not only do the claims of wrongdoing (both misrepresentations and failures to disclose) against MKA and its codefendants greatly overlap, but MKA and the codefendants are alleged to have engaged in a conspiracy to mislead and defraud Thiel.

Moreover, MKA ignores the import of the agency allegations tying the codefendants to their principal MKA. Given those allegations, any proven misfeasance, including fraud, would be directly imputed to MKA. "If the principal places the agent

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<sup>7</sup> In a related vein, MKA's equitable estoppel argument, which was not raised below, has been forfeited. (*Franz, supra*, 31 Cal.3d at p. 143); *Kaufman & Broad, supra*, 136 Cal.App.4th at p. 226.)

in a position to defraud, and the third person relies upon his apparent authority to make the representations, the principal is liable even though the agent is acting for his own purposes. [Citation.] The theory is that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him. It is immaterial that the principal receives no benefits from the transaction.' [Citation.]" (*Alhino v. Starr* (1980) 112 Cal.App.3d 158, 174, italics omitted.)

Given these allegations of agency and conspiracy, the arbitration of claims against MKA would necessarily require presenting evidence and determining the culpability of the codefendants as well as that of MKA. It is then entirely possible that an arbitrator could exonerate the codefendants from fault, thereby relieving MKA of derivative liability, while the later litigation results in a finding of liability against the codefendants. Therefore, applying de novo review standard of review to this issue, we conclude that there exists a possibility of conflicting rulings on common issues of law and fact, within the meaning of section 1281.2(c), warranting the denial of MKA's motion to compel arbitration.<sup>8</sup> (*Thomas, supra*, 204 Cal.App.4th at p. 613.)

MKA next contends that the trial court abused its discretion in denying the motion to compel arbitration under section 1281.2(c), because it erroneously believed it was required to do so as a matter of law, or alternatively, that it failed to consider other

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<sup>8</sup> MKA engages in an almost Talmudic parsing of the claims and allegations in the FAC in an effort to convince us that there is no possibility of conflicting rulings if the claims against it were arbitrated. However, the analysis need not be so complicated as suggested by our Supreme Court in *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 350 ["in the contractual arbitration proceeding, the arbitrator might conclude that the [plaintiffs] were not legally entitled to damages in any amount from the unidentified, and effectively uninsured, motorist, and therefore could not obtain anything from [plaintiffs' insurer]. In the pending action, however, the superior court might conclude that the [plaintiffs] were indeed legally entitled to damages in some amount from the unidentified, and effectively uninsured, motorist, and therefore could obtain such sum from [plaintiffs' insurer]"].)

procedural options available under the statute short of a straight denial of the motion, citing most recently Division Five’s decision in *Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679 (*Metis*).

As to the first point, there is absolutely nothing in the record to suggest that the trial court denied the motion to compel because it erroneously concluded as a matter of law that it was required to do so. Surely, MKA cites to nothing the trial court stated or wrote in its order denying the motion that would support this utterly speculative contention.

The tentative ruling, which was confirmed at the conclusion of the March 23 hearing, stated: “In addition, the present case involved third-party defendants who are being sued based on the same transaction or series of related transactions and who either are not parties to the 2008 Operating Agreement and/or are not parties to the present motion to compel, and arbitration between plaintiff and MKA in the absence of these third parties could lead to conflicting rulings on common issues of law or fact. (Code Civ. Proc. § 1281.2(c); First Amended Complaint, ¶s 17, 28.)” This exact language was used in the formal order denying MKA’s motion.

Section 1281.2(c), gives the trial court several options to consider when it concludes that “[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . .” These options include: “the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.” (§ 1281.2(c).)

Here, in denying the motion to compel arbitration, the trial court plainly exercised its discretion under section 1281.2(c)(1), in light of the interconnected factual and legal

claims made in the FAC against the various codefendants. It considered the fact that none of the other codefendants joined MKA's motion to compel arbitration, or sought to invoke the agreement themselves. MKA has failed to make a credible showing that the trial court misunderstood that it had discretion to stay the litigation as an alternative to simply denying the motion under section 1281.2(c), or that it denied the motion under the mistaken belief that it was required to do so. In the absence of such evidence, “we apply the general rule “that a trial court is presumed to have been aware of and followed the applicable law” . . . .” (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 181, citing *People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)

Nor do we accept MKA's final assertion that the trial court failed to make a reasoned consideration of the other available options under section 1281.2(c), besides simply denying the motion. In this regard, *Metis* is distinguishable. In that case, the trial court denied a motion to compel arbitration under section 1281.2(c), citing the possibility of conflicting rulings on law or fact if part of the case proceeded to arbitration while the remainder was litigated. In reversing that decision, our colleagues in Division Five were puzzled by the absence of any “idea” as to what common issues of law or fact existed in the various claims because neither the court's order, nor the briefs in the trial court, nor even the parties' briefs on appeal expounded on this issue. (*Metis, supra*, 200 Cal.App.4th at pp. 691-692.) Thus, the appellate panel found it impossible to determine on what basis the court concluded that a denial of the motion was preferable, particularly in light of the request by one of the parties to the trial court to stay the nonarbitrated claims, and in light of an apparent inconsistency between the tentative ruling and final order. (*Id.* at pp. 693 & fn. 12.)

Unlike the record in *Metis*, there is nothing opaque about the facts or claims alleged in the FAC that impedes our discerning the trial court's rationale in opting to deny the motion to arbitrate. As we have already noted, the interwoven facts and allegations, including claims of conspiracy and agency among the numerous defendants, made the option of simply staying the litigation imprudent. While the claims in the FAC overlap to some extent, there are causes of action asserted against the codefendants which

are not asserted against MKA. Therefore, even if MKA were successful in an arbitration, it would not necessarily end the litigation against the codefendants.<sup>9</sup>

Also, it is without doubt that any arbitration would include the presentation of evidence not only from officers, managers and employees of MKA, but also from the codefendants. If the arbitration did not result in findings binding these codefendants relative to Thiel's claims against them, that same evidence would be necessary in the subsequent litigation; a tremendous and unnecessary waste of time and resources.

Accordingly, we find no merit to MKA's contention that the trial court erred in not simply staying the litigation rather than denying its motion outright.<sup>10</sup>

**IV.**  
**DISPOSITION**

The order denying MKA's motion to compel arbitration is affirmed. Costs on appeal are awarded to Thiel.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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BASKIN, J.\*

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<sup>9</sup> Our Supreme Court noted in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797, that for the doctrine of res judicata to apply, the prior arbitration must be the same as in the present litigation; the prior proceeding must result in a final judgment on the merits; and the parties must be the same, or in privity, as those in the prior proceeding.

<sup>10</sup> In light of our conclusion that the trial court did not err in denying MKA's motion to compel arbitration, we need not, and do not, address Thiel's alternative argument that the arbitration agreement is procedurally and substantively unconscionable.

\* Judge of the Contra Costa County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.