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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STEPHEN PILLMAN, Plaintiff and Appellant, v. WHITTLEY ARMS ASSOCIATION, Defendant and Respondent.	B284967 (Los Angeles County Super. Ct. No. NC043448)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Cliff Dean Schneider for Plaintiff and Appellant.

The Napoles Law Firm and Steven R. Napoles for Defendant and Respondent.

Plaintiff Stephen Pillman appeals from a judgment awarding defendant Whittley Arms Association (WAA) $145,003.05 in mortgage and assessments owed on Pillman's two residential units in the Whittley Arms condominium complex in Avalon, California.[1] The trial court entered the judgment in 2017 after granting WAA's motion to enforce a 2012 settlement agreement that resolved litigation over Pillman's interest in the condominium units and his share of the mortgage and assessments. In 2012 the court had entered an order incorporating the settlement agreement, but the order provided for both entry of judgment and dismissal of the action with prejudice. The court's 2012 order was silent as to whether the court was retaining jurisdiction, but the attached settlement agreement stated, "This settlement may be enforced pursuant to California Code of Civil Procedure section 664.6."[2] (Italics omitted.)

Pillman contends the trial court lacked jurisdiction in 2017 to enforce the settlement agreement because he never signed the document, and therefore there was no request to retain jurisdiction "in a writing signed by the parties outside the presence of the court or orally before the court," as required by section 664.6. Pillman also asserts the settlement agreement is unenforceable because it omits material terms governing the

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[1] We use the term "mortgage" to describe Pillman's payment obligations on his residential units, as do the parties, although technically Pillman was obligated to make payments on an installment note executed by the Whittley Arms Cooperative to purchase the land on which the building complex was located.

[2] All further undesignated statutory references are to the Code of Civil Procedure.

allocation of the mortgage and assessments to his units and the trial court's order granting the motion to enforce the settlement agreement is not supported by substantial evidence.

Although Pillman is correct he did not sign the settlement agreement, the trial court in its 2012 order confirmed an arbitrator's award adopting the agreement, finding the settlement agreement was "deemed signed and fully executed" by Pillman. The court based its finding on Pillman's signing of a stipulation for settlement reached at the mediation, which contained the same material terms and requested the trial court retain jurisdiction. The stipulation was submitted to the trial court prior to the dismissal as an exhibit to the petition to confirm the arbitration award or enforce the settlement agreement. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Litigation*

This dispute arises out of Pillman's objections to conversion of the 19-unit cooperative complex on Santa Catalina Island in which he was a shareholder into a condominium project.[3] In 1970 the Whittley Arms Cooperative, Inc. (WAC), purchased the building and began operating Whittley Arms as a cooperative on land leased from the Santa Catalina Island Company. In 1993 Pillman purchased the stock associated with unit 6 of the

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[3] The factual summary is based on the allegations of Pillman's verified first amended complaint and WAA's motion to enforce the parties' settlement agreement, unless otherwise indicated.

Whittley Arms; in 2003 Pillman and his wife purchased the stock associated with unit 13.

In 2005 WAC borrowed $1,242,500 to purchase the land from the Santa Catalina Island Company, and it allocated the mortgage obligations to the cooperative members. The mortgage terms were stated in an installment note executed by WAC that allocated a pay-off balance of $54,995.04 to unit 6 and $66,593.03 to unit 13.

In 2008 a majority of the cooperative shareholders voted, over Pillman's vigorous opposition, to convert the Whittley Arms into condominiums. In March 2010 WAC recorded a declaration of covenants, conditions, and restrictions (CC&R's) that governed the condominium project and included an allocation of shared costs and other assessments. The allocation formula differed from the formula for carrying costs that previously governed the cooperative. In April 2010 WAA was formed as the homeowner's association and successor to WAC, which was dissolved in May 2010. Prior to dissolution, WAC recorded grant deeds to the residents of each of the 19 units in the complex, with the exception of Pillman's two units. WAC deeded units 6 and 13 to WAA because Pillman refused to pay the assessments and conversion fees.

On March 4, 2010 Pillman filed this action against WAC and WAA.[4] In the operative first amended complaint, Pillman asserted 12 causes of action challenging the condominium conversion, alleging WAC unlawfully transferred units 6 and 13 to WAA, and the formula for allocation of assessments under the

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[4] Although WAC was dissolved in May 2010, it continued to appear in the lawsuit until 2015.

condominium CC&R's unfairly burdened Pillman's smaller units relative to the formula that had previously applied to the cooperative.

B. *The Mediation and Stipulation for Settlement*

On August 17, 2011 the parties mediated their dispute before retired Judge Charles Rubin. The mediation was successful and resulted in the parties that day entering into a written "Settlement Agreement/Stipulation" (Stipulation). The Stipulation was comprised of two pages of standard terms on a form provided by the dispute resolution service (the ARC form) and a two-page "Attachment to Settlement Agreement" in which the parties set forth the specific settlement terms.[5] According to WAC's lawyer, Pillman's lawyer drafted the two-page attachment. The Stipulation was signed by Pillman and Hilda Trainor, as the president of WAA and WAC, as well as their attorneys.

The Stipulation provided in the attached terms, among other things, WAC would pay $65,000 to Pillman; "record deeds to [u]nit 6 to Pillman and [u]nit 13 to Pillman and [his wife]"; and waive "[a]ny and all alleged past due assessments, fees, carrying charges, late fees, or any charges of any nature," such that "the balance due for [a]partment[s] 6 and 13 will be [z]ero." The agreement also provided, "It is understood that on 09/01/2011 PILLMAN will be assessed a carrying charge and mortgage

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[5] The preprinted portion of the Stipulation incorporated the attachment by stating, "It is hereby agreed and stipulated that above entitled matter is settled on the following terms and conditions and that this agreement is enforceable," after which was handwritten, "Additional terms are attached."

payment for September 2011 and forward. [¶] . . . Pillman agrees that PILLMAN shall pay his portion of the assessments and mortgage levied on or after 09/01/2011. The current assessment shall be charged pursuant to the current CC&R recorded as document number 20100269646 in the Los Angeles County Record[er]'s Office."

The Stipulation stated in standard language on the ARC form that the parties' settlement was enforceable by the court pursuant to section 664.6: "4. This settlement may be enforced pursuant to California Code of Civil Procedure section 664.6. The parties agree that on failure to comply with the terms of this settlement, a party may apply ex parte for entry of judgment on 48 hours notice to opposing counsel(s) [and shall be entitled to reasonable attorney's fees required to enforce the terms of this settlement.] The parties further agree that this settlement agreement may be introduced into evidence in any subsequent proceeding to enforce its terms. *The parties wish the court to retain jurisdiction to enforce the terms of this agreement, and* [*hereby expressly request in writing that the court retain jurisdiction, and the parties will notify the court of such request*] [the parties will each execute a request in writing that the court retain jurisdiction; this written request will be prepared by counsel for _Δs_, sent for signature of the parties, and submitted to the court by such counsel on or before the date of _____]." (Brackets in original; italics added.)

The attached terms of the Stipulation anticipated the preparation of a long-form settlement agreement: "Counsel for __Δs__ will prepare a (release/settlement agreement) by 8/26." The document provided further, "If any dispute regarding the drafting of the formal settlement agreement develops, the Parties

agree to submit any such dispute to Judge Rubin for binding arbitration."

C. *The Settlement Agreement and Arbitration*

Following the mediation and execution of the Stipulation, counsel for WAA and WAC prepared a formal seven-page long-form settlement agreement elaborating on the details of the settlement, entitled "Settlement Agreement and Mutual Release" (Settlement Agreement). But Pillman refused to sign the document, contending he had not agreed the assessment allocation prescribed by the condominium CC&R's would apply to his units. WAA and WAC responded Pillman was effectively trying to avoid his side of the bargain and moved to compel arbitration pursuant to the parties' agreement to arbitrate "any dispute regarding the drafting of the formal settlement agreement." On March 23, 2012 the trial court granted the motion to compel the arbitration.[6]

On or about May 30, 2012, the arbitrator issued a "Final Amended Award of Arbitrator," stating, "The above referenced matter was heard for binding arbitration on April 19, 2012 by the Honorable Charles G. Rubin (Ret.), Arbitrator. Plaintiff, Stephen H. Pillman appeared in Pro Per. Defendants, [WAC and WAA] [were] represented by Barry J. Reagan, Esq., with other counsel and parties present. [¶] Pursuant to stipulation of all parties and counsel, the attached Settlement Agreement attached [*sic*] hereto, and fully incorporated herein, is the Final Amended Award of Arbitrator in this matter." The unsigned Settlement

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[6] Judge Roy L. Paul presided over the motion to compel arbitration and subsequent motions filed through 2012.

Agreement was attached as an exhibit to the arbitrator's award. The Settlement Agreement includes several recitals and standard clauses that were not part of the Stipulation, but otherwise essentially tracks the Stipulation in the material terms at issue in this appeal.

Paragraph 2(a) of the Settlement Agreement provides, "As of August 31, 2011, it is acknowledged that Pillman/[his wife] are current on all of their assessments. Any and all alleged past due assessments, fees, carrying charges, late fees, or any charges of any nature are hereby waived by Whittley Arms (i.e. the balance due for Apartment 6 and 13 will be [z]ero). It is understood that on September 1, 2011 Pillman/[his wife] will be assessed a carrying charge and mortgage payment for September, 2011 and forward. Copies of the September 1, 2011 carrying charge and mortgage are attached as Exhibit 'B.'" However, the Settlement Agreement attached to the arbitrator's award does not include exhibit B, and there is no evidence in the record that exhibit B ever existed.

Paragraph 2(b) of the Settlement Agreement provides, "Pillman agrees that Pillman shall pay their portion of the assessments and mortgage levied on or after September 1, 2011. The current assessment shall be charged pursuant to the current CC&Rs recorded as document number 20100269646 in the Los Angeles County Recorder's Office. The CC&Rs are attached as Exhibit 'C.'" However, the Settlement Agreement attached to the arbitrator's award does not include exhibit C.

Paragraph 4, "Enforceability," provides, "The terms and provisions of this Agreement are enforceable pursuant to . . . [s]ection 664.6. The parties consent to the continuing jurisdiction of the Los Angeles County Superior Court regarding enforcement

of this Agreement. [¶] This settlement may be enforced pursuant to . . . section 664.6. The parties agree that on failure to comply with the terms of this settlement, a party may apply ex parte for entry of judgment on 48 hours notice to opposing counsel(s) and shall be entitled to reasonable attorney's fees required to enforce the terms of this settlement. The parties further agree that this settlement agreement may be introduced into evidence in any subsequent proceeding to enforce its terms. The parties wish the court to retain jurisdiction to enforce the terms of this agreement, and hereby expressly request in writing that the court retain jurisdiction, and the parties will notify the court of such request, the parties will each execute a request in writing that the court retain jurisdiction; this written request will be prepared by counsel for defendants, sent for signature of the parties, and submitted to the court by such counsel on or before the date of _____."

Following issuance of the arbitrator's award, on June 21, 2012 Trainor signed the Settlement Agreement for WAA and WAC, and on July 11, 2012 WAA and WAC's attorney sent the signed copy to Pillman for his signature. Pillman did not sign the Settlement Agreement or otherwise respond to the request.

D. *The Court's Order Confirming the Settlement Agreement and Dismissing the Case*

After nearly two months with no response from Pillman, on September 4, 2012 WAA and WAC filed a petition for an order confirming the arbitration award or, in the alternative, for an order granting defendants' motion to enforce the settlement agreement pursuant to section 664.6 and to enter judgment. WAA and WAC also sought a declaration that the parties entered

into a valid and enforceable settlement agreement and the Stipulation and Settlement Agreement contain the terms of the settlement agreement among the parties. WAA and WAC requested the court retain jurisdiction to enforce the settlement agreement. WAA attached to its motion the arbitrator's award with the unsigned Settlement Agreement; the Settlement Agreement signed by Trainor; and the Stipulation signed by Pillman and Trainor. All three documents included the parties' request that the court retain jurisdiction under section 664.6.

Pillman, representing himself, opposed WAA's petition on the grounds the Settlement Agreement did not accurately reflect the terms of the Stipulation or the underlying facts of the condominium conversion; the provision requiring arbitration of disputes about the settlement terms had been furtively added to the term sheet attachment after Pillman signed the ARC form; the arbitrator did not have jurisdiction over the settlement; and if he did have jurisdiction, it was limited to confirming the terms of the agreement, not altering the terms. However, Pillman confirmed he approved and signed the two-page ARC form, which contained the section 664.6 enforcement provision. And Pillman did not challenge the provisions of the Stipulation and paragraph 2 of the Settlement Agreement, which required Pillman to pay the mortgage and assessments on his units going forward.

The trial court granted the petition on September 26, 2012. The minute order stated, "The court grants [p]etition for [o]rder [c]onfirming the [a]rbitration [a]ward. [¶] Defense counsel to prepare [o]rder and [p]roposed [j]udgment." On October 16, 2012 the trial court signed the order proposed by WAA and WAC (2012 order) entitled, "Order confirming arbitrator's final award and entry of judgment in favor of defendants." The order provided,

"[T]he Court finds that the Settlement Agreement . . . attached to the [arbitrator's award] accurately reflects the signed agreement of the parties entered into on August 17, 2011." The court ordered: "The Petition to Confirm the Arbitration Award is granted; [¶] The Settlement Agreement . . . , which is attached hereto as Exhibit 'A' and expressly made part of this judgment, is deem signed and fully executed by plaintiff." The order attached the Settlement Agreement signed by Trainor, but not the Stipulation signed by the parties. The order did not expressly state the court retained jurisdiction to enforce the settlement. At its conclusion, the order described the court's resolution of the case as both a judgment and an order of dismissal: "Therefore, it is ADJUDGED, ORDERED AND DECREED that judgment is entered in favor of defendants and against plaintiff. [¶] It is further ADJUDGED, ORDERED AND DECREED that plaintiff's action against defendants is dismissed with prejudice." The court did not enter a minute order clarifying whether the court dismissed the case or ended the case by entry of a judgment.

E. *The Parties' Motions To Enforce the Settlement Agreement*

From 2012 to 2017 Pillman and WAA each filed multiple motions to enforce the Settlement Agreement, referring to the court's October 16, 2012 order as a dismissal order (Pillman) or a judgment (WAA). On December 14, 2012 Pillman filed a "motion to enforce the terms of the Settlement Agreement . . . pursuant to [section] 664.6," contending he had not received the settlement payment required under the Settlement Agreement and WAA failed to record the grant deeds for Pillman's units. The trial court denied the motion as moot, but it ordered WAA to tender the monetary payment to Pillman without conditions.

On March 22, 2013 WAC and WAA filed a "motion to enforce judgment," contending Pillman had stopped making the required monthly mortgage and assessment payments on his units. The trial court granted their motion and ordered Pillman to pay the outstanding balances, which he did.[7]

On August 24, 2015 Pillman, represented by counsel, brought a second motion against WAA and WAC to enforce the Settlement Agreement, contending WAA breached its agreement to provide Pillman unrestricted deeds to units 6 and 13, and WAA and WAC were required to indemnify Pillman for transfer taxes. The trial court granted Pillman's motion. Pillman filed a third motion to enforce the Settlement Agreement on January 23, 2017, again asserting the agreement was enforceable under section 664.6. Pillman contended the grant deeds were still defective, excusing him from paying the mortgage and assessments.[8] Neither Pillman nor WAA at any time challenged the court's authority under section 664.6 to enforce the Settlement Agreement.

F. *WAA's 2017 Motion To Enforce the Settlement Agreement and the Court's Judgment Against Pillman*

WAA again moved to enforce the Settlement Agreement on May 5, 2017. WAA asserted Pillman had not made his mortgage or assessment payments since August 2015, and WAA sought payment of the mortgage and assessment balances for units 6

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[7] Judge Ross M. Klein presided over this and subsequent motions.

[8] The appellate record does not reflect the disposition of Pillman's January 23, 2017 motion to enforce the Settlement Agreement.

and 13. In its motion, WAA referred to the trial court's entry of a "judgment" in 2012.

In support of the motion, WAA submitted the Settlement Agreement, the 2012 order, and the declaration of Pamela Smiley, WAA's current president. In her declaration, Smiley described the mortgage for the building by WAA, and, with respect to Pillman's units, she attached the original 2005 installment note and building's deed of trust. Smiley declared Pillman had not paid the mortgage or assessments levied on his units since August 2015, and she set forth the outstanding balances as of the date of her declaration. Smiley did not describe the assessment allocation process or attach the CC&R's describing the allocation, nor did she submit any further documentation supporting her calculation of the outstanding assessment balances.

Pillman, representing himself, opposed the motion on the ground WAA violated the Settlement Agreement by recording deeds with restrictive language, and WAA therefore could not enforce the mortgage payment and assessment provisions of the Settlement Agreement. Pillman did not challenge Smiley's foundation as witness, her unit allocation formula, her calculations, or her calculation of his outstanding mortgage and allocation balances. Nor did he contend the mortgage and assessment provisions of the Settlement Agreement were ambiguous. And Pillman did not contend that the court was without jurisdiction to enforce the Settlement Agreement.

The court heard argument on WAA's enforcement motion on June 6, 2017.[9] On June 21, 2017 the court granted WAA's motion and entered a judgment ordering Pillman to pay to WAA the following balances owed as of May 1, 2017: $54,532.82 for the mortgage on unit 6; $9,748.13 for the assessments on unit 6; $68,993.337 for the mortgage on unit 13; and $11,728.73 for the assessments on unit 13. On June 23, 2017 WAA served notice of entry of judgment on Pillman. Pillman timely appealed from the June 21 judgment.

DISCUSSION

A. *The Trial Court Retained Jurisdiction over the Settlement Agreement*

Pillman contends the trial court did not have jurisdiction to enforce the Settlement Agreement because the court's 2012 order dismissed the case and did not meet the stringent requirements for the court to retain jurisdiction under section 664.6.[10]

Generally, "'[v]oluntary dismissal of an action or special proceeding terminates the court's jurisdiction over the matter.'

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[9] The appellate record does not contain a transcript or other record of the hearing.

[10] The 2012 order is ambiguous in that the trial court ordered both a judgment and a dismissal. To the extent the court entered a judgment adopting the Settlement Agreement, but not a dismissal, the parties could make their postjudgment enforcement motions without any inquiry as to whether they effectively requested continuing jurisdiction to enforce the settlement pursuant to section 664.6. Because of the ambiguity, we treat the 2012 order as an order of dismissal.

[Citation.] '*If requested by the parties*,' however, 'the [trial] court may retain jurisdiction over the parties to enforce [a] settlement until performance in full of the terms of the settlement.'" (*Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913, 917 (*Mesa*); see *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809 ["Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit."].) Section 664.6 provides, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." "'Because of its summary nature, strict compliance with the requirements of section 664.6 is prerequisite to invoking the power of the court to impose a settlement agreement.'" (*Mesa*, at p. 917; see *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439 (*Wackeen*) ["We construe the second sentence of section 664.6 to mean, and we so hold, that even though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, if the parties have requested this specific retention of jurisdiction."].)

A request for the trial court to retain jurisdiction under section 664.6 "must conform to the same three requirements which the Legislature and the courts have deemed necessary for section 664.6 enforcement of the settlement itself: the request

must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court." (*Wackeen, supra*, 97 Cal.App.4th at p. 440; accord, *Mesa, supra*, 33 Cal.App.5th at p. 917.) The "'request must be express, not implied from other language, and it must be clear and unambiguous.'" (*Mesa*, at p. 917; accord, *Wackeen*, at p. 440.) "[T]he term 'parties' as used in section 664.6 . . . means the litigants themselves, and does not include their attorneys of record." (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 586; accord, *Mesa*, at p. 918.)

Interpretation of section 664.6 and its application to the Settlement Agreement are issues of law we review de novo. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984 ("[W]hether the granting of plaintiffs' motion satisfied the strict requirements of . . . section 664.6, including the requirement that all parties sign the agreement [is a] legal issue[], so that we conduct an independent or de novo review of those most crucial determinations."]; *Wackeen, supra*, 97 Cal.App.4th at p. 437 ["Interpretation of section 664.6, and its application to this case, are issues of law . . . subject to a reviewing court's independent analysis."].)

Because Pillman's appeal raises a jurisdictional question, we consider his challenge even though he did not object to jurisdiction below. "A lack of fundamental jurisdiction is ""an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation.] . . ." [¶] . . . "[F]undamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court's jurisdiction in the fundamental sense is null and void"

ab initio. [Citation.] "Therefore, a claim based on a lack of . . . fundamental jurisdiction[] *may be raised for the first time on appeal*."'" (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339.)

1. *Pillman signed the Stipulation requesting the court retain jurisdiction under section 664.6.*

Pillman acknowledges the parties "executed a settlement" at the August 2012 mediation, but he ignores that the Stipulation he signed expressly and unambiguously included a request for continuing jurisdiction under section 664.6: "This settlement may be enforced pursuant to . . . section 664.6. . . . The parties wish the court to retain jurisdiction to enforce the terms of this agreement . . . ."[11] Pillman confirmed in a 2012 sworn declaration that he signed the Stipulation in which he stated (in opposing arbitration), "I did not see the agreement for binding arbitration at the time I signed the document." Further, WAA filed the Stipulation with the court in 2012 with WAA's petition to confirm the arbitration order or enforce the Settlement Agreement. The Stipulation therefore constitutes "a writing signed by the parties" that includes a clear and unambiguous

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[11] The section 664.6 provision was on the preprinted ARC form, and the parties did not elect which bracketed procedure for presenting the request to the court would apply, for example, "notify[ing] the court" of their request to retain jurisdiction or defendants submitting a separate request. Pillman does not contend the Stipulation was unenforceable as a result of the failure of the parties to select the means of enforcing the Stipulation. Further, WAA complied with one of the options—it submitted the Stipulation to the court in its petition to confirm the arbitration award and enter judgment.

request that the court retain jurisdiction to enforce their settlement. (§ 664.6.)

2. *The Settlement Agreement also contains a section 664.6 request.*

The Settlement Agreement, which the court incorporated into the 2012 order, provides, similar to the Stipulation, the "settlement may be enforced pursuant to . . . section 664.6. . . . The parties wish the court to retain jurisdiction to enforce the terms of this agreement, and hereby expressly request in writing that the court retain jurisdiction . . . ."

Although Pillman refused to sign the Settlement Agreement, the trial court in the 2012 order declared the Settlement Agreement "deemed signed and fully executed by plaintiff," found the Settlement Agreement accurately reflected the agreement of the parties at the mediation, and incorporated the Settlement Agreement into the judgment. Further, although the details of the arbitration are not before us, the arbitrator's award states that "[p]ursuant to stipulation of all parties and counsel, the . . . Settlement Agreement attached hereto, and fully incorporated herein, is the Final Amended Award of Arbitrator in this matter."

Pillman contends the court's 2012 order deeming the Settlement Agreement signed cannot constitute "strict compliance" with section 664.6's requirement a party sign the request, or courts could subvert the signature requirement altogether. But Pillman failed to appeal the court's 2012 order confirming the award and deeming the Settlement Agreement to be signed, and the order is now final and binding. (See *In re Matthew C.* (1993) 6 Cal.4th 386, 393 ["If an order is

appealable . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata."], superseded by statute on another point, as stated in *People v. Mena* (2012) 54 Cal.4th 146, 156; *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1147 ["A prior appealable order becomes res judicata in the sense that it becomes binding in the same case if not appealed."].)

3. *The parties expressly requested the court retain jurisdiction.*

Pillman contends the parties never requested the court retain jurisdiction because the only reference to section 664.6 was embedded in the unsigned Settlement Agreement submitted to the trial court. Pillman is mistaken. In its petition to confirm the arbitration award or enforce the Settlement Agreement, WAA requested the court enter a judgment "[d]eclaring that the terms of the settlement agreement are as set forth in the Settlement/Stipulation" and "[o]rdering that the action be dismissed with prejudice, but that the Court retain jurisdiction to enforce the Settlement Agreement . . . notwithstanding the dismissal of the case." WAA's petition attached the Settlement Agreement signed by WAA, the arbitrator's award deeming the agreement signed, and the Stipulation signed by Pillman and Trainor. As discussed, both the Settlement Agreement and Stipulation contained the parties' requests that the court retain jurisdiction pursuant to section 664.6.

Moreover, although Pillman opposed confirmation of the arbitrator's award and enforcement of the Settlement Agreement, at no time did Pillman challenge the inclusion of the section 664.6 provision in either the Stipulation or the Settlement

Agreement. Instead of appealing the 2012 order, Pillman filed two motions to enforce the Settlement Agreement.

4. *The trial court agreed to retain jurisdiction to enforce the settlement.*

Pillman's argument the trial court "declined" to retain jurisdiction over the settlement lacks merit. Although the 2012 order does not state in its body the court is retaining jurisdiction, the order incorporated the Settlement Agreement as "part of this judgment." As discussed, the Settlement Agreement provided in paragraph 4, "[t]he terms and provisions of this Agreement are enforceable pursuant to . . . [s]ection 664.6." The fact the 2012 order incorporated the Settlement Agreement by reference instead of setting out the 664.6 provision in full does not affect our analysis of whether the relevant language reflected the court's retention of jurisdiction. (*See Lubin v. Lubin* (1956) 144 Cal.App.2d 781, 788 ["[I]incorporation by reference is sufficient to merge the settlement agreement into the . . . judgment and to sustain an action upon the judgment with respect thereto."].)

A trial court should clearly state it is retaining jurisdiction when it dismisses a case pursuant to section 664.6. To ensure clarity, a trial court should state this explicitly in a court order (or minute order) dismissing the case. However, on the unique facts here, the incorporation of the language "[t]he terms and provisions of this Agreement are enforceable pursuant to . . . Section 664.6" into the 2012 order cannot reasonably be interpreted to express anything other than the court's intent to retain jurisdiction under section 664.6 to enforce the agreement. Absent any reference to section 664.6, the settlement was

enforceable by the filing of a separate lawsuit to enforce the agreement as a contract. The incorporated language, however, tracks the second sentence of section 664.6, which allows the court to retain jurisdiction upon the parties' request "to enforce the settlement." By referencing section 664.6, therefore, the court was stating its intention to retain jurisdiction to enforce the agreement in the original action. The trial court's intention to retain jurisdiction is further shown by the court's enforcement of the Settlement Agreement in response to Pillman's December 2012 "motion to enforce the terms of the Settlement Agreement . . . pursuant to [section] 664.6."[12]

B. *Pillman Is Precluded from Challenging the Enforceability of the Mortgage and Assessment Provisions of the Settlement Agreement*

Pillman contends the Settlement Agreement is unenforceable because it lacks a material term, specifically, exhibit B, as referenced in paragraph 2(a), which was supposed to set forth Pillman's carrying charges and mortgage obligations as of September 1, 2011. Pillman argues the court cannot enforce the agreement because a court may not supply missing material terms to the parties' agreement, relying on *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110 (*Gauss*). In *Gauss*, the Court of Appeal concluded the plaintiff could not recover on a claim for breach of a settlement agreement in a pending action where the

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[12] As discussed, Judge Paul signed the September 26, 2012 order granting the petition to confirm the arbitration order; Judge Paul also ruled on Pillman's 2012 motion to enforce the Settlement Agreement. Judge Klein presided over the subsequent motions to enforce the Settlement Agreement.

agreement did not specify the share of a negotiated settlement to be paid by the defendant. (*Id*. at pp. 1115-1116.) The *Gauss* court explained, "In general, before judgment can be entered upon a settlement under section 664.6, 'there must be a "writing signed by the parties" that contains the material terms' of the agreement. [Citation.] The court may consider evidence beyond this writing in deciding a section 664.6 motion, but only to determine what settlement terms the parties *previously* agreed upon." (*Id*. at p. 1123.)

Significantly, *Gauss* did not concern a postjudgment order to enforce the terms of a settlement already entered as a judgment; rather, it addressed constraints on a trial court entering a judgment on a settlement in the first instance. Here, WAA filed a motion to enforce the settlement agreement in 2012, which resulted in entry of the 2012 order. Pillman could have, but did not, challenge the absence of exhibit B attached to the Settlement Agreement. Because Pillman did not appeal from the 2012 order entering judgment and dismissing the case, he is bound by the final adjudication of the issues addressed in the order, including the terms of the Settlement Agreement. (See *In re Matthew C., supra*, 6 Cal.4th at p. 393; *People v. Mbaabu, supra*, 213 Cal.App.4th at p. 1147; see also *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8 ["California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited."].)

In addition, Pillman forfeited any argument the Settlement Agreement is too ambiguous to be enforced by failing to raise the argument in the trial court in opposing WAA's 2017 motion to enforce the Settlement Agreement, instead only arguing he was excused from payment by WAA's violation of the agreement.

Generally, a party cannot raise new issues or change the theory of a cause of action for the first time on appeal. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603 [absent a reason not to apply the established rules, "'issues not raised in the trial court cannot be raised for the first time on appeal'"]; *American Indian Health & Services Corp. v. Kent* (2018) 24 Cal.App.5th 772, 789 [""'As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried.'"].) ""'This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal . . . .'" (*American Indian Health & Services Corp.*, at p. 789; accord, *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1492 ["'opposing party should not be required to defend for the first time on appeal against a new theory'"].)

Here there is no reason not to apply forfeiture. Pillman waited more than seven years after the entry of the Settlement Agreement to challenge it and has sought to enforce the agreement without raising any concerns about the missing exhibit B. In addition, had Pillman challenged the enforceability of the Settlement Agreement in the trial court, WAA could have presented evidence to support its position, including Pillman's September 2011 payment of his assessments without raising a concern about an ambiguity in the Settlement Agreement.

C. *The Trial Court's 2017 Judgment Is Supported by Substantial Evidence*

Pillman contends the 2017 judgment is not supported by substantial evidence because WAA's motion relied only on the

summary declaration of WAA's president and the 2005 deed of trust and promissory note to establish Pillman's outstanding mortgage and assessment balances, but the documents do not specifically show the mortgage and assessment balances he owed. Pillman points out WAA failed to submit the CC&R's, which would have provided the basis for calculation of the assessments. Thus, he argues, Smiley's declaration was inadmissible under Evidence Code section 1523 as secondary evidence to prove the contents of the writings setting forth the mortgage and assessments on his units.

By failing to raise an evidentiary objection to Smiley's declaration in the trial court, Pillman has forfeited any evidentiary challenge to her declaration on appeal. (Evid. Code, § 353; *People v. Clark* (2016) 63 Cal.4th 522, 603 ["Defendant's failure to object on this specific [evidentiary] ground below forfeits his claim on appeal."]; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 ["Under Evidence Code section 353, subdivision (a), a judgment can be reversed because of an erroneous admission of evidence only if the record contains an objection both '"timely made and so stated as to make clear the specific ground of the objection"' or motion."].)

Smiley's declaration provided substantial evidence. '"The trial court's factual findings on a motion to enforce a settlement under section 664.6 "are subject to limited appellate review and will not be disturbed if supported by substantial evidence."'" (*Karpinski v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 461; accord, *J.B.B. Investment Partners, Ltd. v. Fair, supra*, 232 Cal.App.4th at p. 984.) Smiley stated in her declaration, based on her knowledge as WAA's president, that Pillman had not paid the mortgage or assessments levied on his units since

August 2015, and she set forth the outstanding balances as of the date of her declaration. The inclusion of the CC&R's (stating the unit allocation formula) was unnecessary to substantiate Pillman's outstanding balances. The trial court's June 21, 2017 judgment required Pillman to pay the precise amounts set forth in Smiley's declaration as the mortgage and assessment balances owed by Pillman.

DISPOSITION

We affirm the trial court's June 21, 2017 judgment. WAA is to recover its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.