

No. S274625

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

EVERARDO RODRIGUEZ and JUDITH V. ARELLANO,

Plaintiffs and Appellants,

v.

FCA US, LLC,

Defendant and Respondent.

California Court of Appeal, Fourth District, Division Two, Civil No. E073766
Appeal from Riverside County Superior Court
Case No. RIC1807727
Honorable Jackson Lucky, Judge Presiding

**PETITIONERS' MOTION FOR JUDICIAL NOTICE IN
SUPPORT OF REPLY BRIEF; DECLARATION OF
CYNTHIA E. TOBISMAN; [PROPOSED] ORDER
[Evidence Code Sections 451, 452, 453, 459]**

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
MOTION FOR JUDICIAL NOTICE	4
MEMORANDUM OF POINTS AND AUTHORITIES	6
I. The <i>Jensen</i> Appellate Briefs Are Proper Subjects Of Judicial Notice.	7
II. The <i>Jensen</i> Appellate Briefs Are Relevant To This Appeal.	7
III. Conclusion.	8
DECLARATION OF CYNTHIA E. TOBISMAN	10
PROOF OF SERVICE	12

TABLE OF AUTHORITIES

	PAGE(S)
Cases	
<i>Jensen v. BMW of North America, Inc</i> (1995) 35 Cal.App.4th 112	6, 8
<i>McAdory v. Rogers</i> (1989) 215 Cal.App.3d 1273	7
<i>Pacific Indem. Co. v. Transport Indem. Co.</i> (1978) 81 Cal.App.3d 649	7
<i>People v. Ouellette</i> (1969) 271 Cal.App.2d 33	7
Statutes	
Civ. Code, § 1793.22(e)(2)	6
Evid. Code, § 451	4
Evid. Code, § 452	4
Evid. Code, § 453	4
Evid. Code, § 453, subd. (a)	7
Evid. Code, § 453, subd. (b)	7
Evid. Code, § 459	4, 7
Rules	
Cal. Rules of Court, rule 8.252(a)	4

MOTION FOR JUDICIAL NOTICE

Pursuant to California Rules of Court, rule 8.252(a), and in conjunction with the concurrently-filed Reply Brief on the Merits, petitioners Everardo Rodriguez and Judith V. Arellano hereby move the Court to take judicial notice of the following documents submitted in the concurrently-filed, consecutively-paginated appendix:

- Exhibit A: *Jensen v. BMW of North America, Inc.* – Case No. C018430 Appellant’s Opening Brief, filed October 11, 1994.
- Exhibit B: *Jensen v. BMW of North America, Inc.* – Case No. C018430 Appellant’s Reply Brief and Cross-Respondent’s Brief, filed January 17, 1995.

Good cause exists to judicially notice these documents. FCA has already asked this Court to take judicial notice of the Respondent’s Brief in *Jensen*, in support of FCA’s argument about what the Court of Appeal decided in *Jensen*. The Opening and Reply Briefs provide a more complete picture of the facts and issues presented to the *Jensen* court.

This Motion is based on Evidence Code sections 451, 452, 453 and 459, the attached memorandum, the attached Declaration of Cynthia E. Tobisman, the concurrently-filed exhibits, and the briefs filed in this appeal.

May 11, 2023

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MEMORANDUM OF POINTS AND AUTHORITIES

This appeal concerns whether the phrase “or other motor vehicle sold with a manufacturer’s new car warranty” in Civil Code section 1793.22’s definition of a “new motor vehicle” covers sales of pre-owned vehicles still covered by the manufacturer’s express new car warranty.¹

The parties disagree on whether the Court of Appeal’s decision in *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112 addressed this same question. FCA has sought judicial notice of one of the appellate briefs in *Jensen*, claiming it “rebutts plaintiffs’ mischaracterization of the case.” (FCA MJN 5, 13-14.) In fact, however, the appellate briefs in *Jensen* demonstrate that the issue the parties teed up there was the same as the issue here: whether a *used* car sold with a remainder on the new car warranty is a “new motor vehicle” within the meaning of section 1793.22(e)(2). Petitioners seek judicial notice of the two *Jensen* appellate briefs on this issue that FCA omitted from its motion for judicial notice—namely, the Appellant’s Opening Brief, and the Appellant’s Reply Brief/Cross-Respondent’s Brief. These two briefs provide a more complete picture, refuting FCA’s characterization of the facts and issues presented to the *Jensen* Court of Appeal. They are proper subjects of judicial notice as described further below.

¹ All further statutory references are to the Civil Code unless otherwise indicated.

I. The *Jensen* Appellate Briefs Are Proper Subjects Of Judicial Notice.

An appellate court’s power and obligation to take judicial notice is governed by Evidence Code sections 451, 452 and 453. (Evid. Code, § 459; *People v. Ouellette* (1969) 271 Cal.App.2d 33, 36.) Appellate briefs are judicially noticeable under Section 452, subdivision (d) as court records. FCA *agrees*—it, too, has requested judicial notice of a brief in the *Jensen* appeal on this basis. (FCA Motion for Judicial Notice 13.)

Under section 453, judicial notice of any matter specified in section 452 is compulsory if a party requests judicial notice and (a) “[g]ives each adverse party sufficient notice of the request . . . to enable such adverse party to prepare to meet the request” and (b) “[f]urnishes the court with sufficient information to enable it to take judicial notice of the matter.” (Evid. Code, § 453, subs. (a), (b).) That is the case here.

II. The *Jensen* Appellate Briefs Are Relevant To This Appeal.

As FCA has argued, courts may consider appellate briefs to illuminate what issues were before a court, or otherwise provide context for a decision. (FCA MJN 13-14; see also *Pacific Indem. Co. v. Transport Indem. Co.* (1978) 81 Cal.App.3d 649, 659, fn. 2 [“Reference to briefs is a permissible method of ascertaining what issues were before a court”]; *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277 [same].)

The two *Jensen* briefs of which Petitioners seek notice are relevant for this purpose. FCA has already urged this Court to review the *Jensen* respondent’s brief to understand the nature of what *Jensen* decided, and to put the decision in context. (FCA MJN 13-15.) The *Jensen* opening and reply briefs provide additional context. Together with the respondent’s brief, they show that the parties in *Jensen* teed up the same issue, and addressed many of the same arguments, presented here: The focus was on whether a “used” car with a remainder on the new car warranty fits within section 1793.22’s “new motor vehicle” definition, not on whether the dealer in *Jensen* represented the car as a “demonstrator” or as coming with a “full” warranty.²

III. Conclusion.

The two *Jensen* briefs of which Petitioners seek judicial notice round out the *Jensen* brief of which FCA has already sought notice. The briefs are judicially noticeable as court records. They are relevant to show how the *Jensen* parties presented their case to the Court of Appeal—namely, as implicating the same issue presented by this case: whether section 1793.22(e)(2) encompasses used cars sold with a remainder on the warranty. Although the *Jensen* opinion itself makes clear that it was deciding that issue, the briefs drive home

² The plaintiff’s brief argued *estoppel* based on those facts, as an alternative ground for affirmance. But the Court of Appeal’s opinion didn’t rest on an estoppel theory—it addressed whether a used car with a remainder on the balance is a “new motor vehicle” within section 1793.22(e)(2). *Jensen, supra*, 35 Cal.App.4th at p. 122.)

the point, and refute FCA's attempt to cabin the opinion. The Court therefore should take judicial notice of them.

May 11, 2023

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DECLARATION OF CYNTHIA E. TOBISMAN

I, Cynthia E. Tobisman, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am a partner in the law firm of Greines, Martin, Stein & Richland LLP (“GMSR”), which specializes exclusively in appellate practice. GMSR is appellate counsel of record for petitioners Everardo Rodriguez and Judith V. Arellano. I am the GMSR partner with primary responsibility for this appeal.

2. Exhibits A is a true and correct copy of the Appellant’s Opening Brief that BMW of North America filed in *Jensen v. BMW of North America, Inc.* on October 13, 1994.

3. Exhibit B is a true and correct copy of the Reply/Cross-Respondent’s Brief that BMW of North America filed in *Jensen v. BMW of North America, Inc.* on January 17, 1995.

4. My firm obtained both briefs from the Los Angeles County Law Library’s brief repository.

5. FCA has already sought judicial notice of the plaintiff’s Respondent’s Brief in *Jensen v. BMW of North American, Inc.*

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on May 11, 2023, at Los Angeles, California.



Cynthia E. Tobisman

No. S274625

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California Court of Appeal, Fourth District, Division Two, Civil No. E073766

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Case No. RIC1807727

Honorable Jackson Lucky, Judge Presiding

[PROPOSED] ORDER

IT IS HEREBY ORDERED that, pursuant to Evidence Code sections 451, 452, 453 and 459, and rule 8.252(a) of the California Rules of Court, judicial notice is taken of Exhibits A-J submitted with Petitioners Everardo Rodriguez's and Judith V. Arellano's motion for judicial notice.

Dated: _____

Presiding Justice

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

On May 11, 2023, I served the foregoing document described as: **PETITIONERS' MOTION FOR JUDICIAL NOTICE; DECLARATION OF CYNTHIA E. TOBISMAN; [PROPOSED] ORDER** on the parties in this action by serving:

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I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on May 11, 2023, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Chris Hsu

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RODRIGUEZ v. FCA**
US

Case Number: **S274625**

Lower Court Case Number: **E073766**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **ctobisman@gmsr.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Petitioners' Reply Brief on the Merits
REQUEST FOR JUDICIAL NOTICE	Motion for Judicial Notice
ADDITIONAL DOCUMENTS	Exhibits in Support of Motion for Judicial Notice

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/11/2023

Date

/s/Chris Hsu

Signature

Tobisman, Cynthia (197983)

Last Name, First Name (PNum)

Greines Martin Stein & Richland LLP

Law Firm