SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: November 28, 2023 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV414965	Citizens for Free Speech and Equal Justice, LLC v. Robison, Sharp, Sullivan & Brust et al.	In accordance with the parties' stipulation, the hearing on this motion is continued to March 26, 2024 at 9:00 a.m.
LINE 2	22CV393460	Henry Lippincott v. Arash Hassibi et al.	Click on LINE 2 or scroll down for ruling in lines 2-6.
LINE 3	22CV393460	Henry Lippincott v. Arash Hassibi et al.	Click on LINE 2 or scroll down for ruling in lines 2-6.
LINE 4	22CV393460	Henry Lippincott v. Arash Hassibi et al.	Click on LINE 2 or scroll down for ruling in lines 2-6.
LINE 5	22CV393460	Henry Lippincott v. Arash Hassibi et al.	Click on LINE 2 or scroll down for ruling in lines 2-6.
LINE 6	22CV393460	Henry Lippincott v. Arash Hassibi et al.	Click on LINE 2 or scroll down for ruling in lines 2-6.
LINE 7	22CV405327	RH BAS, Inc. et al. v. Arnold R. Steiner et al.	Click on LINE 7 or scroll down for ruling.
LINE 8	20CV362680	Bank of America, N.A. v. Michael D. Jennings	Motion for entry of judgment pursuant to stipulation: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. The court will sign the proposed order submitted by the moving party.
LINE 9	20CV374065	Villa Developers and Investment, LLC et al. v. Taylor Morrison of California, LLC et al.	Click on LINE 9 or scroll down for ruling.
LINE 10	23CV413836	Baan Thai Immigration Solutions Co., Ltd. v. Google Asia Pacific Pte. Ltd. et al.	Click on LINE 10 or scroll down for ruling in lines 10-11.

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LINE 11	23CV413836	Baan Thai Immigration Solutions Co., Ltd. v. Google Asia Pacific Pte. Ltd. et al.	Click on LINE 10 or scroll down for ruling in lines 10-11.
LINE 12	23CV423013	Milpitas-District 2 Owner, LLC v. Terry Zheng et al.	Motion to quash: Defendants indicated that they intended to file a third motion to quash by November 22, 2023, but nothing has been filed. OFF CALENDAR.

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Calendar Lines 2-6
Case Name: *Henry Lippincott v. Arash Hassibi et al.*
Case No.: 22CV393460

Plaintiff Henry Lippincott brings this motion for sanctions under Code of Civil Procedure sections 1281.98 and 1281.99, based on the admitted failure of defendants Arash Hassibi and Joinedapp, Inc. (collectively, "Defendants") to pay timely arbitration fees, which resulted in the termination of the ongoing American Arbitration Association ("AAA") proceedings between the parties.

In addition, Lippincott has filed four motions to compel responses to interrogatories and document requests propounded on Defendants.

For the reasons that follow, the court GRANTS in part and DENIES in part Lippincott's motion for sanctions. The court also GRANTS Lippincott's motions to compel.

1. Motion for Sanctions

a. Background

This is an action for fraud, breach of contract, wrongful termination, various Labor Code violations, and numerous other causes of action (21 in total) in which Lippincott alleges that he was recruited by Hassibi to work for Joinedapp under false pretenses, did so for 11 months under multiple agreements, was incorrectly reclassified as an independent contractor, and then was wrongfully terminated without adequate compensation. (First Amended Complaint at ¶¶ 4-39.) Lippincott's written agreements with Joinedapp included arbitration clauses that required the parties to arbitrate any disputes arising out of the agreements, and so Lippincott initiated arbitration with AAA on July 15, 2020. According to Lippincott, Defendants were repeatedly delinquent with their payments of the arbitration fees, and it was Lippincott who ultimately advanced Defendants' initial $1,900 arbitration fee. After the arbitration continued for a number of months and was set for a seven-to-ten day hearing on October 25, 2021, the AAA arbitrator suspended the proceedings on August 3, 2021, because Defendants had failed to pay an additional installment of $20,000 in arbitration fees (out of $63,450 owed by Defendants). A payment deadline of September 2, 2021 came and went, without any payment by Defendants, which resulted in a termination of the proceedings on September 9, 2021.

Lippincott then filed this court action on January 14, 2022.

b. Applicable Law

Under Code of Civil Procedure section 1281.97, subdivision (b)(1), when a "drafting party" (*i.e.*, the employer in an employment case) is in material breach of an arbitration agreement for failure to pay the required fees and costs, the employee may "[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction." If the employee proceeds with a court action, the court "shall impose sanctions on the drafting party in accordance with Section 1281.99." (Code Civ. Proc., § 1281.97, subd. (d).)

Under Code of Civil Procedure section 1281.98, subdivision (c)(1), if the employee proceeds with a court action instead of arbitration, the employee "may bring a motion, or a

separate action, to recover all attorney's fees and all costs associated with the abandoned arbitration proceeding. The recovery of arbitration fees, interest, and related attorney's fees shall be without regard to any findings on the merits in the underlying action or arbitration."

Under Code of Civil Procedure section 1281.99, subdivision (a), upon a determination that the drafting party has breached the arbitration agreement by failing to pay the required fees and costs, "The court shall impose a monetary sanction" against that drafting party "by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee . . . as a result of the material breach." Under subdivision (b), the court "may" also order additional sanctions in the form of an evidence sanction, terminating sanction, or a contempt sanction, "unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

At present, there is very little reported case law that cites, let alone discusses, sections 1281.98 and 1281.99, which became effective in 2020. The court's interpretation of the foregoing, somewhat convoluted, statutory language is the following: (1) monetary sanctions under section 1281.99(a) are *mandatory* ("court shall impose") and consist of reasonable attorney's fees and expenses incurred "as a result of the material breach"; (2) monetary sanctions under section 1281.98(c) may also be awarded for "all attorney's fees and all costs associated with the abandoned arbitration proceeding"; and (3) additional non-monetary sanctions under section 1281.99(b) are *discretionary*, and are dependent on whether the drafting party acted with substantial justification or presents circumstances that would make imposing additional sanctions "unjust." It is not entirely clear whether monetary sanctions under section 1281.98(c) for the fees and costs from the abandoned arbitration are mandatory or discretionary, as the statute provides that a party "*may* bring a motion, or a separate action" to recover those amounts but does not say whether the court "shall" or "may" award those amounts. Nevertheless, because the language provides for the possibility of a *separate lawsuit* being brought to recover such amounts and also emphasizes that the award is to be made "without regard to any findings on the merits in the underlying action or arbitration," the court interprets the statutory language as setting forth an expectation that the court will generally award reasonable fees and costs associated with the abandoned arbitration to the employee, just as the court would normally award reasonable attorney's fees and costs to a prevailing party in a civil action that was firmly based on a contractual or statutory attorney's fees provision.

c. Lippincott's Demand

Lippincott seeks an exceptionally far-reaching award of sanctions:

- First, for costs associated with the abandoned arbitration under section 1281.98(c), he seeks $213,000 in attorney's fees (representing 266.25 hours at $800/hour), plus $3,901.40 in costs, plus $27,194.33 in interest, plus a lodestar multiplier of 2x, for a total of **$488,191.46**.

- Second, for costs incurred "as a result of" the breach under section 1281.99(a), he seeks all fees and costs incurred in the court case to date, multiplied by a 2x lodestar, which, as of June 12, 2023, consists of: $141,800 in attorney's fees, plus $3,846.88 in costs, plus $10,590.74 in interest, plus $22,314.96 for local

counsel's attorney's fees and costs, plus $850.58 for local counsel's interest on its attorney's fees and costs, plus the multiplier, for a total of **$358,806.32**.

- Third, because Lippincott is continuing to incur legal fees and costs in this court case—all of which he contends are "a result of the material breach" under section 1281.99(a)—he seeks ongoing payments of such amounts on a monthly basis, billed at his primary counsel's hourly rate of $800/hour, as well as his local counsel's hourly rates of $625/hour, $425/hour, $325/hour, plus paralegal time and other costs.

- Fourth, Lippincott seeks a terminating sanction under section 1281.99(b) in the form of a default judgment. Rather than litigate this case on the merits, he suggests that this case proceed to a default "prove up" hearing for a final determination of damages.

d. Defendants' Response

Defendants raise a number of arguments in opposition to Lippincott's motion. First, they contend that Lippincott lacks standing to bring this motion because he was an independent consultant rather than an "employee" under Title 9 ("Arbitration") of the Code of Civil Procedure. The court rejects this contention because it fails to account for Code of Civil Procedure section 1280, subdivision (f), which explicitly defines an "[e]mployee" as follows: "any current employee, former employee, or applicant for employment. The term includes any person who is, was, *or who claims to have been misclassified* as an independent contractor or otherwise improperly placed into a category other than employee or applicant for employment." (*Ibid.*, emphasis added.) In this case, Lippincott explicitly alleges in his first amended complaint that he was originally classified as an "employee" and then improperly reclassified as a "consultant" in an effort by Defendants to evade their legal obligations to him. (FAC, ¶¶ 25-26, 61-62.)

Second, Defendants object to any fees or expenses that were incurred prior to January 1, 2020, the effective date of sections 1281.98 and 1281.99, as they argue this would be an impermissible retroactive application of the statutes. The court disagrees with this argument, as well. In this case, Lippincott filed for arbitration on July 15, 2020, and Defendants' alleged breach occurred in mid-2021, and so Defendants were already on notice of the potential sanctions for such a breach. Moreover, Lippincott's pre-2020 fees and expenses appear to consist primarily of fees incurred for preparatory work for the arbitration, which reflects a small fraction of the total amount claimed for the abandoned arbitration (less than 10%).

Third, Defendants object to any fees or costs under section 1281.99 (*i.e.*, "as a result of the material breach") that were incurred prior to alleged date of breach of October 2, 2022. The court does not understand where this October 2, 2022 date comes from, as it is the court's understanding that AAA suspended the arbitration on August 3, 2021 and then terminated it on September 9, 2021, based on Defendants' failure to pay the outstanding fees at that time. Nevertheless, Lippincott has clarified that he does not seek any fees and costs under section 1281.99 that were incurred prior to October 2, 2022. All of his pre-October 2022 fees and costs are instead being requested under section 1281.98.

Fourth, Defendants raise various arguments that are directed to the reasonableness of Lippincott's requested amounts, including his entitlement to a lodestar multiplier. The court agrees with at least some of Defendants' arguments, as follows.

i. Lodestar Multiplier

The court does not find an adequate basis for a lodestar multiplier of two times the fees and costs actually incurred by Lippincott in this case. As Lippincott notes, the court has the discretion to apply a positive multiplier based on various factors, including: (1) the novelty and difficulty of the issues presented, (2) the extent to which the nature of the litigation precluded other employment by the attorneys, and (3) the contingent nature of the fee award. (See *Mikhaeilpoor v. BMW of North America, LLC* (2020) 48 Cal.App.5th 240, 247-248.) Although Lippincott points out that he is being represented on a contingency fee basis, the court finds that the first factor mentioned above—the novelty and difficulty of the issues presented—weighs heavily against the application of a positive multiplier. This is not a novel or challenging case, in the court's estimation. Indeed, it appears that Defendants have failed to litigate this case vigorously in the past, having gone through multiple changes of counsel, having defaulted on their arbitration payment obligations, and having cited a lack of sufficient funds to the AAA arbitrator (with defendant Hassibi even representing himself in the arbitration for a period of time). Moreover, although the fee award here is somewhat "contingent," any award under section 1281.98 is not "contingent" in the same sense that an attorney's fee award to a "prevailing party" would be contingent on the outcome of the underlying litigation. That is because section 1281.98(c)(1) explicitly provides that any "recovery of arbitration fees, interest, and related attorney's fees *shall be without regard* to any findings on the merits."

Having taken the upper hand over somewhat passive and non-responsive Defendants who failed to pay their fees in the arbitration, Lippincott is entitled to fees and costs under section 1281.98 and 1281.99, but he is not entitled to a positive lodestar multiplier.

ii. Court Litigation Costs

The court also takes issue with Lippincott's interpretation of section 1299, subdivision (a), to the extent that he asserts that it entitles him to all fees and costs associated with the current lawsuit since the filing of this case (January 2022) to the present. The court finds that to be an unduly overbroad interpretation of fees and expenses incurred "as a result of the material breach," and the court discerns no support for it in the statutory language or any case law. Rather, the court interprets "as a result of the material breach" to refer to any fees and costs that may have been incurred as a result of having had to transition from arbitration to litigation, including any fees and costs associated with bringing this motion for sanctions. The court does not interpret this phrase to mean all costs of litigation going forward, which would constitute an excessive windfall to employees and consumers arising out of a drafting party's failure to pay arbitration fees.

iii. Preparation for Arbitration/Litigation

At the same time, the court disagrees with Defendants' argument that Lippincott cannot claim time entries for "work preliminary to" the arbitration proceeding, or for "duplicative, unnecessary, and meritless motion practice" in the arbitration. Defendants have failed to

identify any entries that actually fall into this category. The court finds that as a general matter, Lippicott should be awarded any fees that were incurred for preparatory work, for any motion practice that was reasonably worked up by his attorneys (regardless of whether the arbitrator ultimately issued a ruling on the merits), and for any internal investigation or analysis that was done in service of the case.

The court also determines that the number of hours expended by counsel in the arbitration over the course of multiple years, as well as counsel's hourly rate, were reasonable under the lodestar analysis.

Finally, as to Lippincott's request for terminating sanctions, the court finds that the imposition of such sanctions would be unjust here given the circumstances, particularly given Defendants' financial situation, which appeared to be the primary driver of their failure to pay arbitration fees. Again, defendant Joinedapp displayed all the hallmarks of a company in financial trouble in 2021, in light of its multiple changes of counsel, lack of counsel for a period of time, and inability to pay the arbitration fees. To then impose a default judgment on top of that—even as Defendants are now represented by counsel—would be excessive.[1] The court generally resolves any doubts as to the propriety of a terminating sanction or default judgment in the non-requesting party's favor, as there is a strong public policy in California that favors deciding cases on the merits. (E.g., *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685.) Accordingly, the court denies Lippincott's request for terminating sanctions—or any other discretionary sanctions—under section 1299, subdivision (b).

In short, the court GRANTS in part and DENIES in part the motion for sanctions and awards the following monetary sanctions to Lippincott:

- For the costs associated with the abandoned arbitration, under section 1281.98: $213,000 in attorney's fees, plus $3,901.40 in costs, plus $27,194.33 in interest, for a total of **$244,095.73**.

PLUS

- For the costs incurred as a result of having brought *this* motion, under section 1281.99. The court estimates that a reasonable amount expended on preparing and filing this motion would have been approximately 15 hours at primary counsel's hourly billing rate of $800/hour, for a total of **$12,000**.

Defendants shall pay these fees and costs to Lippincott within 60 days of notice of entry of this order.

2. Motions to Compel

In their brief opposition to Lippincott's motions to compel, Defendants assert that they needed more time to respond to Lippincott's various discovery requests but that they have now "engaged the services of an e-discovery vendor" and are ready to produce interrogatory

[1] Lippincott presents some speculative evidence regarding defendant Hassibi's financial circumstances (based on the alleged value of Hassibi's home and the alleged value of his car). Without any more concrete information about Hassibi's actual finances, including any debt information, the court finds this information to be of limited value, at best, and accords it zero weight.

responses and documents, subject to a protective order. The court agrees with the production of discovery pursuant to a protective order, but the court does not understand why any responsive information as to which Lippincott was likely privy during his time working at Joinedapp now needs to be marked "attorneys' eyes only." Accordingly, the court determines that any documents (or interrogatory answers) may be marked "confidential" pursuant to a protective order, not "attorney's eyes only," and shall be produced, so long as Lippincott signs and undertaking in which he agrees to be bound by the protective order.

The court GRANTS the motions to compel (and DENIES Defendants' request for monetary sanctions). Defendants shall provide responsive discovery within 30 days of notice of entry of this order.

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Calendar Line 7
Case Name: *RH BAS, Inc. et al. v. Arnold R. Steiner et al.*
Case No.: 22CV405327

This motion to compel was originally heard on September 19, 2023. On September 18, 2023, in accordance with the court's tentative ruling procedures, the court (Judge Kulkarni, covering for the undersigned) posted the following tentative ruling:

> In this business litigation case, Defendants/Cross-Complainants Arnold Steiner and Joanna Steiner move to compel further responses to certain special interrogatories, form interrogatories, and two requests for admission[s]. Plaintiffs/Cross-Defendants RH BAS and Allied Aire Service oppose this motion. After reviewing the submitted papers and the record in this case, the Court makes the following rulings:
>
> 1. The Court GRANTS the motion to compel further responses to the special interrogatories at issue, all of which are contention interrogatories. These contention interrogatories are proper and not premature; after all, once more discovery occurs, the interrogatory responses can be amended.
>
> 2. The Court GRANTS the motion to compel a further response to Form Interrogatory 17.1 relating to RFA 3. Plaintiffs need to give more detail on why they believe they don't owe the $200,000, "due to the terms and conditions stated in the Stock Purchase Agreement, Amendments/Addendums and supporting documentation, as well as text messages." Plaintiffs need to specify which terms or conditions give rise to this belief, and which text messages give rise to this belief.
>
> The Court also GRANTS the motion to compel a further response to Form Interrogatory 50.1. Plaintiffs' response is inadquate. Plaintiffs need to identify specific agreements by name (and now by Bates number, as apparently they have been produced).
>
> 3. The Court DENIES the motion to compel further responses to RFAs 5 and 8. The Court believes the RFAs are compound and could give rise to ambiguous answers. And it is easy for Defendants to separate out the parts of these RFAs into separate, "smaller" RFAs.
>
> 4. All further responses must be verified and Code-compliant, and contain no objections (except for privilege). These further responses must be served within 30 days of service of this order.
>
> 5. Defendants prevailed on the majority of their arguments, and the Court sees no substantial justification for Plaintiff's arguments. Nor do "other circumstances" make the imposition of monetary sanctions unjust. But Defendants did not prevail on all of their arguments. In light of that, the Court awards reasonable monetary sanctions of $2,500, payable by Plaintiffs to Defendants payable to Defendants' counsel within 30 days of this order.

At the hearing on September 19, 2023, plaintiffs/cross-defendants RH BAS and Allied Aire Service made a last-minute request for a continuance of the hearing, and Judge Kulkarni granted it.

Since then, the court has not received any further papers from the parties relating to this discovery dispute. Given the absence of any basis to depart from Judge Kulkarni's tentative ruling, the court adopts the tentative ruling on the motion to compel.

GRANTED in part and DENIED in part. Sanctions are awarded in the amount of $2,500 and are to be paid by Plaintiffs within 30 days of this order.

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Calendar Line 9
Case Name: *Villa Developers and Investment, LLC et al. v. Taylor Morrison of California, LLC et al.*
Case No.: 20CV374065

This is a motion for determination of good-faith settlement under Code of Civil Procedure section 877.6, brought by defendant and cross-complainant Taylor Morrison of California, LLC ("TMC") and cross-complainant Taylor Morrison Services, Inc. ("TMS"). TMC and TMS have entered into a settlement agreement with plaintiffs Villa Developers and Investment, LLC and Montecito San Jose, LLC (collectively, "Plaintiffs") in this construction case and now wish to be dismissed. Defendant Mountain Cascade, Inc. ("MCI") opposes the motion on the ground that it still has pending claims against TMS (as to which it has filed a motion for leave to add as a cross-defendant to its cross-complaint) that are not adequately addressed by the settlement, and that TMC and TMS should not be treated as one and the same; defendant Medrano Electric, Inc. ("Medrano") has filed a joinder to MCI's opposition to the motion.

The court ultimately agrees with MCI and Medrano that the moving parties have indiscriminately blurred TMC and TMS in this motion. The only Taylor Morrison entity that was actually sued by Plaintiffs is TMC. While TMC is a defendant, TMS is only a cross-complainant.[2] ***Therefore, section 877.6 does not apply to TMS***, and the court does not understand how any party could possibly believe that section 877.6 might so apply. Section 877.6 provides that the court may decide "the issue of the good faith of a settlement entered into by the plaintiff or other claimant *and one or more alleged tortfeasors or co-obligors*." (Code Civ. Proc., § 877.6, subd. (a)(1), emphasis added.) Here, the only settling tortfeasor or co-obligor (along with non-settling co-defendants MCI, Medrano, and BKF Engineers) is TMC. Because TMS is not an "alleged tortfeasor or co-obligor," it does not make any sense for the court to issue any determination as to whether a settlement between Plaintiffs and TMS was entered into in good faith. That is not what section 877.6 was designed to cover.

The court DENIES the motion as to TMS.

Because MCI and Medrano have not raised any concerns as to whether the settlement agreement between Plaintiffs and TMC was entered into in good faith, the court GRANTS the motion as to TMC.

GRANTED in part and DENIED in part.

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[2] Indeed, the settlement agreement between Plaintiffs, TMC, and TMS does not say anything about the cross-complaint; it states only that Plaintiffs will dismiss their complaint against TMC.

Calendar Lines 10-11
Case Name: *Baan Thai Immigration Solutions Co., Ltd. v. Google Asia Pacific Pte. Ltd. et al.*
Case No.: 23CV413836

This is a petition to compel arbitration by defendants Google LLC, Alphabet Inc., and XXVI Holdings, Inc. ("Defendants"). Plaintiff Baan Thai Immigration Solutions Co. Ltd. ("Baan Thai") opposes the petition, primarily on the ground that the moving defendants were not signatories to the arbitration agreement between Baan Thai and Google Asia Pacific Pte. Ltd. ("Google Asia"), but also on the basis of two other standalone arguments. Having considered the parties' submissions, the court concludes that Baan Thai's arguments are without merit, and the petition should be granted.

1. Delegation of Arbitrability

As threshold matter, the parties disagree about whether the arbitration agreement "clearly and unmistakeably" delegates the determination of arbitrability to the arbitrator, or whether that is something the court must decide first. Defendants argue that the following language constitutes a clear and unmistakeable delegation: ". . . the dispute will be finally determined by arbitration administered by the International Centre for Dispute Resolution ('ICDR') under its International Arbitration Rules ('Rules')." According the Defendants, because the ICDR rules allow an arbitrator to decide arbitrability, this language incorporating those rules is evidence that the parties agreed to arbitrate arbitrability.

Normally, under California law, the question of arbitrability is something that a judge decides. (*Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co.* (2018) 30 Cal.App.5th 970, 978-981.) But if there is "clear and unmistakeable" evidence that the parties agreed to delegate the question to the arbitrator, then the agreement controls. (See, e.g., *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 892-893; *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1440). Here, the agreement expressly states that it is governed by California law (see Declaration of Courtney Shadd, Exhibit A, § 14), but Defendants argue that the Federal Arbitration Act ("FAA") nevertheless trumps the application of California law, because the agreement between Baan Thai and Google Asia is one involving interstate commerce. Defendants then rely on federal cases that hold that the mere incorporation of an arbitration provider's rules constitutes a "clear and unmistakeable" delegation of arbitrability. (See *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130 [incorporation of AAA rules is clear and unmistakable delegation of arbitrability to arbitrator; *ASUS Computer International v. InterDigital, Inc.* (N.D. Cal. Aug. 25, 2015) No. 15-CV-01716-BLF, 2015 U.S. Dist. LEXIS 118794, at *12-13) [incorporation of ICDR rules].)

The court finds this to be an unusually complicated question that is not fully addressed in the parties' briefs. First, it is not clear to the court that a contract between a Thai corporation (Baan Thai) and a Singapore corporation (Google Asia) is necessarily a contract involving interstate commerce, such that the FAA clearly applies. Even if the contract states that it is governed by California law, and even if there are third-party beneficiaries arguably located in California (*e.g.*, Google LLC), there does not appear to be any clear evidence of "commerce" with California. Neither party addresses this in their briefs. Second, if California law applies, California courts have not taken the same unequivocal approach as the Ninth Circuit in finding the mere incorporation of an arbitration provider's rules to be a clear and unmistakeable delegation. (See *Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th

523, 543 [declining to decide whether an agreement to arbitrate in accordance with the JAMS rules constitutes a clear and unmistakeable agreement to delegate arbitrability to arbitrator].) Third, Baan Thai points out that even if the parties to the arbitration agreement agreed to delegate the question of arbitrability to the arbitrator, it is not obvious that that agreement extends to the right of non-signatory third parties such as Google LLC, Alphabet Inc., and XXVI Holdings, Inc. to compel arbitration. (See *Kramer v. Toyota Motor Corp.* (9th Cir. 2013) 705 F.3d 1122, 1127 ["Given the absence of clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability with nonsignatories, the district court had the authority to decide whether the instant dispute is arbitrable."] [applying the FAA].) Thus, even if Defendants are correct that the FAA rather than California law applies here, the case law suggests that the court must still decide arbitrability as to the moving Defendants.

In view of the foregoing, the court concludes that Defendants have not shown a clear and unmistakable delegation of the question of arbitrability to an ICDR arbitrator.

2. Arbitrability

As for the merits of the arbitrability question, the court finds the analysis to be much simpler and more straightforward. The language of the arbitration agreement between Baan Thai and Google Asia is quite broad—encompassing "any dispute [that] arises out of or in connection with [the parties' agreement]"—and it expressly contemplates third-party beneficiaries who are affiliates or parent companies of Google Asia: "This agreement to arbitrate is intended to be broadly interpreted and, among other claims, applies to any claims brought by or against (i) Google, Google affiliates that provide the Programs to Customer or Advertiser, Google parent companies, and the respective officers, directors, employees, agents, predecessors, successors, and assigns of these entities . . . ." (Shadd Declaration, Exhibit A, § 13.) The Shadd Declaration establishes that Google LLC, Alphabet Inc., and XXVI Holdings, Inc. are all "Google affiliates" or "Google parent companies," as Alphabet Inc. is the parent company of XXVI Holdings, Inc., Google LLC, *and* Google Asia. (Shadd Declaration at ¶ 4.)

Thus, the court finds that the arbitration agreement was "made expressly for the benefit of" the moving Defendants here, and it therefore "may be enforced by [them]." (Civ. Code, § 1559.) The court is not persuaded by Baan Thai's reliance on *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1339 (aka "*Ochoa*"), because in contrast to the present case, the alleged third-party beneficiary in *Ochoa* was not mentioned anywhere in the arbitration agreement, and so the third party had to resort to principles of *equitable estoppel* and *agency* (the notion of an "undisclosed principal") in an effort to enforce the arbitration agreement. Neither of those principles needs to be addressed here, given the clear application of Civil Code section 1559.

3. Condition Precedent

Baan Thai argues that even if Defendants were entitled to enforce the arbitration agreement, they may not do so here because they failed to satisfy the condition precedent of meeting and conferring in good faith. They rely on the following language of the agreement:

> In the event that any dispute arises out of or in connection with these Terms (each, a "Dispute"), *the parties will make good faith efforts to resolve the*

> *Dispute within 60 days of written notice of the Dispute* from the other party. If the parties are unable or unwilling to resolve the Dispute in that time, the Dispute will be finally determined by arbitration . . . .

(Emphasis added.) Contrary to Baan Thai's interpretation, the court finds that this language does not set forth a condition precedent. Even though it requires the parties to try to meet and confer first, before resorting to arbitration, it does not expressly *condition* the initiation of arbitration on a party's good-faith behavior. Indeed, it states that if a party is "unable *or unwilling* to resolve the Dispute," the dispute will be resolved by arbitration. At most, this provision requires a party to wait "60 days" after giving notice of a dispute, but there is no argument here that this petition is being brought less than 60 days after the dispute first arose between the parties.

Moreover, even if this language did set forth a condition precedent, the court is satisfied that Defendants complied with it by engaging with Baan Thai by both telephone and email after the dispute was first raised. (Declaration of William Randall, Exhibits A-D.)

4. Unconscionability

Baan Thai also argues that the arbitration agreement is unenforceable as unconscionable, "because it deprives Baan Thai of the right to seek public injunctive relief in any forum in violation of . . . *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945." (Opposition at p. 14:12-17.) The court rejects this argument, because Baan Thai is no longer entitled to injunctive relief, by its own admission. Baan Thai admits in its opposition brief that after it filed this suit, Google "rescinded the ban" on its advertisements and reinstated those advertisements. As a result, there is no longer any basis for an injunction, even assuming *arguendo* that Baan Thai is correct that it cannot obtain an injunction through arbitration. (And even assuming *arguendo* that Baan Thai can establish procedural unconscionability, which it has not attempted to show in its opposition brief.) Baan Thai argues that even though Google restored its ads, it has suffered damages arising from the period its ad campaign was offline. (Opposition at pp. 6:7-7:11.)

Given the inapplicability of injunctive relief to the present dispute, the court finds Baan Thai's unconscionability argument to be irrelevant.

5. Dismissal for Mootness

Finally, Defendants argue for the first time in reply that the case should be dismissed as moot, given the restoration of Baan Thai's ad campaign: "[T]here is no live controversy that requires judicial resolution, and this case must be dismissed as moot." (Reply at p. 1:23-24.) Even though Baan Thai still alleges that it is entitled to damages, Defendants argue that lost business profits are not available to Baan Thai as a matter of law, because the parties' agreement purportedly limits any monetary recovery to "direct damages" rather than "consequential damages." (*Id.* at pp. 2:24-3:2.)

Because this argument is being raised for the first time in reply—without an adequate opportunity for Baan Thai to respond—the court will not consider it. It is not obvious to the court that Baan Thai has not sought any "direct damages" in this case—or what those damages might consist of. It is also not obvious to the court what Baan Thai's position is regarding

"consequential damages"—whether it is seeking any and whether it is necessarily precluded by its agreement with Google Asia from seeking any such amounts.

That is obviously a matter that can be taken up in arbitration.

The court GRANTS the petition to compel arbitration. The court VACATES the current case management conference on January 30, 2024 and instead sets this matter for a case status review regarding arbitration on June 13, 2024 at 10:00 a.m. in Department 10.

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