SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-03-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:
(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

IN PERSON HEARINGS: **Courtrooms are again open and all litigants may appear in person** at the Downtown Superior Courthouse located at 191 N. First Street, San Jose.

VIRTUAL HEARINGS: You should **appear by video**, unless it is not possible.

To **Join Teams Meeting** -Click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	18CV339157 Hearing: Motion a/f after MTC	Spielbaur Law Office v Midland Funding, LLC et al	See Tentative Ruling.
LINE 2	21CV376818 Motion: Tax Cost	Floyd D'Aguiar vs City of Campbell, CA et al	See Tentative Ruling. Defendants shall submit the final order.
LINE 3	21CV376818 Motion: Order a/f after MTC	Floyd D'Aguiar vs City of Campbell, CA et al	See Tentative Ruling. Defendants shall submit the final order.
LINE 4	21CV387960 Hearing: Petition Compel Arbitration	Nextbt Group LLC vs Peter Jewett and Jeffrey Wooley	See Tentative Ruling. Motion shall be continued to Nov. 14, 2023 at 9 a.m. and Defendants are ordered to file their petition to compel arbitration no later than October 13, 2023, also to be heard on November 14, 2023.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 5	23CV416426 Hearing: Motion prejudgment possession	SANTA CLARA VALLEY WATER DISTRICT vs PRESTON POWELL et a	Off calendar as granted due to no opposition
LINE 6			
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1
Case Name: Spielbaur Law Office v. Midland Funding, LLC, et al.
Case No.: 18CV339157

Defendants Midland Funding LLC and Midland Credit Management, Inc. ("Defendants") move for attorney fees incurred while litigating the appeal filed by Plaintiff of the court's order granting Midland's motion to compel judgment debtor discovery and for sanctions ("Discovery Order") and for fees incurred in filing the present motion. Plaintiff does not dispute that Defendants are entitled to reasonable attorney fees, pursuant to Code of Civil Procedure (CCP) § 425.16(c)(1) and 685.040, because the Discovery Order was reasonable and necessary to enforce Midland's anti-SLAPP fee award. Rather, the dispute over is the amount of reasonable attorney fees.

JUDICIAL NOTICE

Plaintiff requests for judicial notice of 1, 2 and 3 are denied as not relevant to the motion. See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 (stating that "judicial notice. . .is always confined to those matters which are relevant to the issue at hand"); see also *Aquila, Inc. v. City and County of San Francisco* (2007) 148 Cal.App.4th 556, 569 (stating that "[a]lthough a court may judicially notice a variety of matters, only relevant material may be noticed"). The Court grants the unopposed requests for judicial notice of 4, 5, 6, and 7.

DISCUSSION AND ANALYSIS

Defendants' motion seeks an award of $18,114.50 in attorneys' fees comprised of $14,873.50 for responding to Plaintiff's appeal of the Discovery Order and $3,271 for bringing the instant motion. Defendants submit declarations in support of services rendered, hourly rates charged and time incurred and billed, including billing statements. In determining reasonable attorneys' fees, the court determines the lodestar figure which is the number of hours reasonably expended multiplied by the reasonable hourly rate for each attorney. See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96. The court may adjust this figure upward or downward based on factors specific to the case in order to fix the fee at the fair market value for the services rendered. *Id.* at p. 1095.

The hourly rates of defendants' attorneys are $360-$375 for Mr. Landers and $300-$310 for Mr. Arvizu. Facts in support are set forth in the declaration of defendants' attorneys Mr. Landers and Mr. Arvizu. Plaintiff does not contest the reasonableness of the hourly rates of defendants' attorneys. The court finds the rates reasonable.

Rather, Plaintiff claims that Defendants' are asking for an unreasonable amount of hours worked given the tasks. Specifically, Plaintiff claims that the block billing inflates the actual compensable time, that Defendants have included bogus charges, and that Defendants have charged for excessive or inflated time.

ATTORNEY FEES INCURRED IN LITIGATION OF APPEAL

An itemization of services of each attorney is provided evidencing date of service, time expended in tenths of an hour, and description of services. (Decl. Arvizu, Exs. 8-10). Defendants spent 47 hours of time on the appeal and 10.3 hours on this motion.

Plaintiff asserts that the defendants' engaged in block billing, inflating the time they spent on these matters. The party challenging an award of fees has the burden to show more than simply argue that fees are excessive. The challenge must be specific and supported by relevant evidence. *Premier Med. Mgmt. Sys. Inc. v. California Ins. Guar. Ass 'n* (2008) 163 Cal.App.4th 550, 564. Here, plaintiff has not met his burden of presenting relevant evidence to support the argument that fees are inflated or excessive or to support the allegations of fraud.

Defendants' time sheets spell out with specificity the tasks for which they are billing and the time sheets do not include the dangers generally cited from block billing. See e.g. *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830 (block billing is particularly problematic where there is a need to separate out work that qualifies for compensation versus work that does not). Here, all the work included in any particular "block" was all done for the appeal or motion at issue, such there is no need to separate out the work done in any one time block. Plaintiff's objection on this grounds is not well taken.

Plaintiff next claims that Defendants included bogus charges, citing their billing for "attention to" matters. Opp. pp9-10. It is not clear what Defendants mean by "attention to," particularly given that they have other entries for reviewing, analyzing or drafting matters. They do not adequately address this in their reply, but simply state there is nothing vague about what they are billing for. Reply, p6. The Court disagrees. Accordingly, the Court will discount time for the "attention to" items cited by Plaintiff, as it is not clear what these charges are for. These items total $2,704. Opp. pp9-10

Next, Plaintiff claims that the work was "excessive" or "inflated" and argues that the briefs should not have taken the time that they did. He cites similar motions filed by Defendants as evidence that they need not have written the motions wholly from scratch. See Plaintiff's Exs. 4 and 5 and Opp. p 14. While there is some overlap between the previous motions and the current motions, they differ in several respects including that the prior appeal did not involve the appeal of a discovery motion and the underlying facts were distinct. The time saved from having previously done research and writing regarding the law for the underlying motion has been taken into account by Defendants. See Reply, p9. The Court finds the time spent reasonable.

Additionally, Plaintiff states that Defendants have a history of filing inflated fee requests. The Court does not find the other cases relevant to this case or that the other courts found Defendants to have billed excessively or fraudulently.

Finally, Defendants claim in their reply that they are due an additional $6,744 based on their work done for their reply to this motion. The Court agrees that Plaintiff has not had the opportunity to object to these additional costs and declines to grant them.

Because the Court finds the time spent on the appeal reasonable and well supported, the Court GRANTS the motion for fees in the amount of $18,144.50-$2,704 for a total of $15,410.50. Plaintiff is ordered to pay Defendants $15,410.50 in attorney's fees within 10 days of the final order. Defendants are required to submit the final order.

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Calendar Lines 2 and 3
Case Name: Floyd D'Aguiar v. City of Campbell, et at.
Case No.: 21CV376818

Defendants Housekeys, Inc. and Julius Nyanda ("Defendants") move for attorney's fees incurred while defending against the complaints filed by Plaintiff Floyd D'Aguiar ("Plaintiff"). Plaintiff also brings a motion to tax the costs of Defendants Mark Robson, Alvin's Corder at Penny Lane LLC, and Robson Properties, Inc. (Robson Defendants).

DEFENDANTS' MOTION FOR ATTORNEY'S FEES

Defendants seek the fees they incurred for drafting multiple demurrers to the complaint and first amended complaint, opposing plaintiff's motion for injunctive relief and motion for leave to amend, attending and preparing for the motions and other court appearances, responding to discovery, opposing Plaintiff's post-judgment motion for new trial, motion to tax costs and motion to stay enforcement of the judgment, work related to Plaintiff's appeal, and other litigation expenses.

JUDICIAL NOTICE

Defendants request for judicial notice of items 1-5 is GRANTED, as they are all Court records.

OBJECTIONS

Plaintiff objects to Defendants' Exhibits A, B, and C. Plaintiff's objections are not in fact evidentiary objections under the Evidence Code. They are DENIED.

DISCUSSION AND ANALYSIS

PREVAILING PARTY

Under CCP § 1032(a)(4), a prevailing includes "a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." Here, Defendants' demurrers were sustained without leave to amend to all of the causes of action against them in Plaintiff's operative First Amended Complaint. See Order of June 29, 2022 (sustaining Nyanda's demurrer to all causes of action against him); see Order of July 20, 2022 (sustaining Housekey's demurrer to all causes of action against it). As such, Defendants are entitled to attorney fees, so long as they are authorized by contract, statute, or law. CCP § 1033.5(a)(10).

FEES ARE AUTHORIZED BY STATUTE

Defendants claim that their fees are authorized by several statutes. First, they contend that they are entitled to fees pursuant to Civil Code § 1942.5(i) which states that "in any action brought for damages for retaliatory eviction, the court shall award reasonable attorney's fees to the prevailing party if either party requests attorney's fees upon the initiation of the action."

Defendants state that the initial complaint was based on the premise that Defendants retaliated against Plaintiff under Civil Code § 1942.5 for his refusal to provide the necessary documentation as part of the annual re-certification process. See e.g., Complaint ¶¶ 29, 72, 74. Plaintiff's First Amended Complaint also alleged retaliatory eviction. See e.g., FAC ¶¶ 22, 214, 216. In fact, Plaintiff himself stated in the FAC that "the gravamen of Plaintiff's Complaint is that the BMR-Defendants . . . retaliated and discriminated against Plaintiff" and that they "constructively evicted Plaintiff from affordable housing (i.e., a government benefit) to satisfy a bigoted grudge against Plaintff for asserting his Constitutional right to protect his financial statements from substantial harm." FAC, ¶ 22.

In addition to making claims of retaliation, both Plaintiff's Complaint and FAC asked for attorney's fees. See H of the prayer for relief of Complaint; and see J of the prayer for relief of the FAC. Accordingly, attorney fees are authorized by § 1942.5(i).

Defendants also claim that they are entitled to attorney fees under Civil Code § 1780(e) if Plaintiff's action was not in good faith, under Federal and State credit reporting laws of 15 USC § 1681n(c) and 15 USC § 1681o(b) and CA Civil Code § 1788.30(c), under Federal and State Debt Collection Statutes, and that they may recover fees under 42 USC § 1988(b). The Court finds it unnecessary to address these claims, given that Defendants have shown that they are entitled to fees under Civil Code § 1942.5(i).

Plaintiff's objections to the awarding of fees are addressed below.

PLAINTIFF'S OBJECTIONS

Jurisdiction

Plaintiff first asserts that under *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, this Court cannot grant attorney fees while the judgment is not final. See Opp. p3. This cited case does not stand for this proposition, but rather addresses the ability to add a new party to the judgment as a clerical error. Moreover, it is clear from Cal. Rules of Court (CRC) Rule 3.1702(b)(1) that Plaintiff's claim is incorrect. This basis for denying fees is DENIED.

Waiver based on Untimeliness

Plaintiff next claims that Defendants waived their right to fees by filing their motion too late. Cal. Rules of Court (CRC) Rule 3.1702(b)(1) states that the a motion for attorney's fees must be filed "within the time for filing a notice of appeal under rules 8.104 and 8.108." Those rules require the motion to be filed on or before the earliest of :

(1)

(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, showing the ddate either was served;

(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, accompanied by a proof of service; or

(C) 180 days after entry of judgment.

CRC 8.104(a).

Here, the judgment was not entered by the Court until April 12, 2023. Plaintiff claims that relevant date for starting the 180-clock is December 8, 2022 when the Court issued its minute order granting the judgment of dismissal. See Opp. p4. The minute order was only a preliminary order which authorized the subsequent judgment. See *Davis v. Taliaferro* (1963) 218 Cal. App. 2d 120, 123 (where a minute order directs that a written order be prepared, signed and filed, an appeal does not lie from the minute order but from the written order); and see *Hyundai Motor America v. Superior Court* (2015) 235 Cal. App. 4th 418, 425 (minute order is not enforceable judgment). Defendants served and filed a notice of entry of the Judgment of Dismissal on April 17, 2023. Accordingly, 60 days from April 17, 2023 was June 16, 2023. Because the motion was filed June 12, 2023, it is timely.

The Court does not agree that delay in the case has been prejudicial to Plaintiff or that it has cause manifest injustice. Plaintiff cites no case stating that fees should not be awarded due to the delay and as such this claim is DENIED.

Granting of Fees would cause Plaintiff Substantial Hardship

Plaintiff next claims that fees should not be awarded both because it would be a substantial hardship given his financial circumstances and because his lawsuit was in the public interest of affordable housing renters. See Opp. p5. In PAGA cases, it is true that "[w]hen the statutory criteria have been met, fees must be awarded unless special circumstances render such an award unjust." *Early v. Becerra* (2021) 60 Cal. App. 5th 726, 736. This case was not a PAGA case, however, such that this line of cases does not apply. Nor was Plaintiff's lawsuit in the public interest, despite his claims**.** There is some authority for taking the financial circumstances of the non-prevailing party into account when awarding attorney's fees in a statutory fee case. See *Garcia v. Santana* (2009) 174 Cal. App. 4th 464, 476-477 ("In determining the amount of fees to be awarded to the prevailing party where the statute, as here, requires that the fee be reasonable, the trial court must therefore consider the other circumstances in the case in performing the lodestar analysis. Those other circumstances will include, as appropriate, the financial circumstances of the losing party and the impact of the award on that party.") Some subsequent cases have distinguished *Garcia*, such as the case cited by Defendants--*Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 364 (declining to consider financial condition). The *Walker* case is distinguishable from this case, as it was a case for contractual, not statutory fees, which the court specifically said was different and was the court's basis for distinguishing its ruling from the *Garcia* court's ruling. Yet, it seems that despite *Garcia*, financial circumstances should not be considered when fees are awarded under CCP § 1033.5, as they are here. See *LAOSD Asbestos Cases* (2018) 25 Cal. App. 5th 1116, 1125 ("We note that the *Garcia* court cited to section 998 as another statute allowing consideration of the economic circumstances of the parties, but did not reference sections 1032 or 1033.5, the statutes at issue here. (*Garcia,* at p. 476.) We are not persuaded that the statutory language of the latter statutes permits the same interpretation, nor that the imposition of reasonable, enumerated costs as a matter of right threatens litigants' right of access to our courts.")

Here, the Court has found Plaintiff to be indigent and waived the requirement of a further undertaking on that basis. See Order of 7/25/2023. This Court has also found, however, that Plaintiff has filed frivolous motions, engaged in sanctionable behavior, and acted in bad faith over the course of this litigation. His indigency has not appeared to restrict his ability to access the courts and has not prevented him from filing numerous motions and numerous frivolous motions, driving up the costs of litigation for his opponents with no cost to himself. Moreover, it should be noted that there is no evidence of Plaintiff's indigency other than his declarations on his fee waiver.

This Court finds that because the fees are mandatory under CC § 1942.5, because it is Plaintiff's request for attorney fees that triggers Defendants' ability to recover fees, because the fees are awarded as costs under CCP §§ 1032 and 1033.5 like the *LAOAD Asbestos Cases*, and because indigency has not affected Plaintiff's ability to aggressively litigate the case, his financial condition should not be taken into consideration.

Remaining Arguments Regarding Attorney's Fees

The Court is not persuaded by any of Plaintiff's other arguments regarding governmental entities, as Defendants are not governmental entities, or the unreasonableness of Defendants' rates or hours worked. In this Court's experience adjudicating numerous motions for fees in the last several years, Defendants' rate of $440 per hour is reasonable for this area. Defendants' billing records, together with the declaration of Grant Turner, show the rate, the hours worked and the specific work performed. This is sufficient to meet Defendants' burden. *Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559. The party challenging an award of fees has the burden to show more than simply argue that fees are excessive. The challenge must be specific and supported by relevant evidence. *Premier Med. Mgmt. Sys. Inc. v. California Ins. Guar. Ass 'n* (2008) 163 Cal.App.4th 550, 564. Here, plaintiff has not met his burden of presenting relevant evidence to support the argument that fees are inflated or excessive or to support his opposition to the fees requested. Defendants' time sheets spell out with specificity the tasks for which they are billing. Plaintiff's argument about redactions is not well taken. Defendants are not asking for any fees related to the redacted portions of the billing records.

MOTION TO TAX COSTS

Plaintiff brings a motion to tax costs of the Robson Defendants. Given the Declaration of Grant Turner and the attached Exhibit A in support of Robson Defendants' opposition to tax costs, the Court finds that because the demurrer to the FAC was sustained without leave to amend, Robson Defendants are the prevailing party entitled to costs under CCP §§ 1032 and 1033.5. The fees requested are costs allowable under the statute. CCP § 1033.5(a)(1) and (15). These costs were incurred, were reasonably necessary to the litigation, and are reasonable in amount. The Court does not find any merit in Plaintiff's arguments. The motion to tax costs is DENIED in its entirety.

CONCLUSION

Plaintiff is ordered to pay Defendants their attorney's fees in the amount of $91,168. Robson Defendants are entitled to costs from Plaintiff in the amount of $1,746.10. Plaintiff is ordered to pay fees and costs within 30 days of the final order. Defendants shall prepare the final order.

Calendar line 4
Case Name: *NextBT Group, LLC, et al. v. Peter Jewett, et al.*
Case No.: 21-CV-387960

Petition to Compel Arbitration and to Stay Cross-Complaint by Cross-Defendants Michael Petras and Scott Pappas

Factual and Procedural Background

This is an action for breach of fiduciary duty and intentional interference with prospective economic advantage.

On December 13, 2021, plaintiffs NextBT Group, LLC and NextBTL, LLC (collectively, "Plaintiffs") filed the operative first amended complaint ("FAC") against defendants alleging causes of action for: (1) breach of fiduciary duty (duty of loyalty); (2) breach of fiduciary duty (duty of care); (3) breach of fiduciary duty (duty of good faith); (4) aiding and abetting breach of fiduciary duty; and (5) intentional interference with prospective economic advantage.

Plaintiffs allege defendants Peter Jewett ("Jewett") and Jeffrey Wooley ("Wooley") breached fiduciary duties to them. (FAC at ¶¶ 46, 85, 91, 97.) Plaintiffs also bring claims against defendants Texas Pyrolysis Group LLC ("TPG"), Nicholas & Joanne Moore Revocable Trust ("Moore Trust"), Todd Gile ("Gile"), David Snakenborg ("Snakenborg"), Steven Liu, and LALenders2018, Inc. As to these defendants, Plaintiffs allege they aided and abetted the alleged breaches of fiduciary duties and interfered with Plaintiffs' economic advantage.

On January 17, 2023, defendants and cross-complainants Gile, Jewett, Wooley, TPG, Moore Trust, and Snakenborg (collectively, "Cross-Complainants") filed a cross-complaint against cross-defendants Michael Petras and Scott Pappas (collectively, "Cross-Defendants") for various derivative and direct causes of action including: (1) breach of fiduciary duty; (2) unjust enrichment; (3) fraud; (4) negligence; (5) conversion; (6) intentional interference with prospective business advantage; and (7) declaratory relief.

Cross-Complainants allege Cross-Defendants breached their fiduciary duties to members of Plaintiffs, and engaged in other acts of misconduct, including fraud and conversion, against the Cross-Complainants.

On April 14, 2023, Cross-Defendants filed the motion presently before the court, a petition to compel arbitration and to stay the cross-complaint. Plaintiffs filed a response taking no position on whether the petition should be granted. Cross-Complainants filed a statement of conditional opposition to the motion. Cross-Defendants filed reply papers.

A further case management conference is scheduled for November 7, 2023.

Petition to Compel Arbitration and to Stay Cross-Complaint

Cross-Defendants seek an order to compel arbitration of all claims raised in the cross-complaint and to stay the cross-complaint pending arbitration of those claims.

Legal Standard

" 'The purpose of arbitration is to have a simple, quick and efficient method to resolve controversies.' [Citation.] For this reason, there is a strong public policy favoring contractual arbitration. [Citation.]" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704 (*Molecular Analytical Systems*).)

"[Code of Civil Procedure] Section 1281.2 requires the court to order contractual arbitration in a proper case. It provides: 'On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists … ,' unless enumerated exceptions apply." (*Molecular Analytical Systems, supra*, 186 Cal.App.4th at p. 704.)

" 'The scope of arbitration is a matter of agreement between the parties.' [Citation.] 'A party can be compelled to arbitrate only those issues it has agreed to arbitrate.' [Citation.] Thus, 'the terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested.' [Citation.] For that reason, 'the contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration' by the court. [Citation.]" (*Molecular Analytical Systems, supra*, 186 Cal.App.4th at p. 705.)

" 'However, doubts as to the scope of an agreement to arbitrate are to be resolved in favor of arbitration.' [Citations.] As a corollary, 'an exclusionary clause in an arbitration provision should be narrowly construed.' [Citation.]" (*Molecular Analytical Systems, supra*, 186 Cal.App.4th at p. 705.)

"The party opposing arbitration has the burden of showing that the agreement, as properly interpreted, does not apply to the dispute. [Citations.]" (*Molecular Analytical Systems, supra*, 186 Cal.App.4th at p. 705.)

"The statutory provisions governing contractual arbitration 'create a summary proceeding for resolving' petitions or motions to compel arbitration. [Citation.] 'The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense.' [Citation.] To satisfy the moving party's initial burden, the petition or motion must be 'accompanied by prima facie evidence of a written agreement to arbitrate the controversy' in question. [Citation.] In ruling on the petition or motion, 'the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question, construing the agreement to the limited extent necessary to make this determination.' [Citation.]" (*Molecular Analytical Systems, supra*, 186 Cal.App.4th at pp. 705-706.)

Analysis

Cross-Defendants argue Cross-Complainants are bound by multiple agreements to arbitrate the subject matter of the cross-complaint.

The first agreement containing an arbitration provision and memorialized in a written document is the NextBT Group, LLC AMENDED RESTATED LIMITED LIABILITY COMPANY AGREEMENT, dated September 30, 2016 (the "Operating Agreement"). (See Petition at ¶ 11, Ex. A.) Paragraph 14.2 of the Operating Agreement provides:

> **14.2 Disputes**. Any dispute, controversy or claim (each a "**Dispute**" and collectively, "**Disputes**") arising out of, relating to or in connection with this Agreement shall be submitted to final and binding arbitration in San Francisco, CA. The arbitration shall be administered by Judicial Arbitration and Mediation Services ("**JAMS**") under its Comprehensive Arbitration Rules and Procedures (the "**Comprehensive Rules**") in effect on the date hereof, and judgment on the award rendered by such arbitrators may be entered in any court having jurisdiction thereof. Any party may commence the arbitration process by delivering a copy of such demand to the other party to such Dispute. The panel of arbitrators shall be comprised of one arbitrator appointed by the party initiating the arbitration, one arbitrator appointed by the other party to such arbitration and one arbitrator appointed upon the mutual agreement of each of the two party-appointed arbitrators. Unless the parties to a Dispute otherwise agree to conduct any arbitration proceedings pursuant to this Section 14.2 elsewhere, such proceeding shall be conducted and any decision shall be rendered in San Francisco, California. The award rendered by the arbitrators shall be final and binding on the parties to the Dispute and judgment on the award may be rendered by any court of competent jurisdiction.

Cross-Defendants also direct the court to an arbitration provision contained in a document titled the "TERM SHEET, SECURED, CONVERTIBLE LOAN NEXTBTL LLC, WITH GUARANTIES BY NEXTBT GROUP LLC & FUTURE BLENDS, LTD" (the "Term Sheet"). (See Petition at ¶ 14, Ex. B.) Under the section identified as "Governance," the Term Sheet provides in relevant part:

> "In lieu of litigation any matter sought to be litigated shall be resolved in an alternative dispute resolution forum using the Silicon Valley offices of JAMS."

In addition, Cross-Defendants submit a document called the "INTER-COMPANY MANAGEMENT AGREEMENT BY AND BETWEEN NEXTBT GROUP, LLC AND NEXTBTL, LLC" (the "Inter-Company Agreement"), dated February 1, 2016. (See Petition at ¶ 17, Ex. C.) Section 9 of the Inter-Company Agreement states:

> ARBITRATION Any dispute, controversy, or claim (each a "Dispute" and collectively, "Disputes") arising out of, relating to or in connection with this Agreement shall be submitted to final and binding arbitration in San Jose, CA. The arbitration shall be administered by Judicial Arbitration and Mediation Services ("JAMS") under its Comprehensive Arbitration Rules and Procedures in effect on the date hereof, and judgment on the award rendered by such arbitrators may be entered in any court having jurisdiction thereof. Any party may commence the arbitration process by filing a written demand to the other party to such Dispute. The award rendered by the arbitrators shall be final and binding on the parties to the Dispute and judgment on the award may be rendered by any court of competent jurisdiction.

Finally, Cross-Defendants attach a copy of the employment offer letter and agreement of cross-defendant Scott Pappas with NextBTL and dated February 13, 2016. (See Petition at ¶ 19, Ex. D.) The employment offer letter and agreement were executed by both Cross-Defendants and provides in pertinent part:

> In the event of any dispute or claim relating to or arising out of our employment relationship, you and the Company agree that (i) any and all disputes between you and the Company shall be fully and finally resolved by binding arbitration, (ii) you are waiving any and all rights to a jury trial but all court remedies will be available in arbitration, (iii) all disputes shall be resolved by a neutral arbitrator who shall issue a written opinion, (iv) the arbitration shall provide for adequate discovery, and (v) the Company shall pay all the arbitration fees, except an amount equal to the filing fees you would have paid had you filed a complaint in a court of law.

Since the cross-complaint alleges claims in connection with the aforementioned agreements, Cross-Defendants contend this action is subject to binding arbitration under the California Arbitration Act. As a consequence, Cross-Defendants also request the cross-complaint be stayed in its entirety until resolution of the arbitration by JAMS.

As stated above, Plaintiffs filed a response to the petition taking no position on whether the petition to compel arbitration should be granted. (See Plaintiffs' Response at p. 2:6-7.) Plaintiffs however object to an order that they be required to arbitrate their claims in the underlying action as Cross-Defendants do not seek any substantive relief from Plaintiffs. (Id. at p. 2:8-9.) As Plaintiffs have no stake in the cross-complaint, they contend there is no reason the arbitration could not proceed separately should the court decide to grant the petition. (Id. at p. 2:10-12.)

Cross-Complainants (also Defendants) filed a statement of conditional non-opposition agreeing to arbitration of the cross-complaint by this **court on the condition that all filed claims be ordered to arbitration** rather than just claims in the cross-complaint. (See Cross-Complainants' Conditional OPP at p. 3:19-23.) The balance of the opposition contains arguments explaining why claims in the underlying action should also be ordered to arbitration along with the cross-complaint. (Id. at pp. 3-12.)

But, given Plaintiffs' response and the conditional opposition by Cross-Complainants, there appears to be a dispute as to whether claims in the underlying action should be sent to arbitration. (See Plaintiffs' Response at p. 2:7-12; see also Gregg Decl. at ¶ 4 ISO Conditional OPP.) At this point, the court is not prepared to consider the dispute as there is no noticed motion before the court to compel arbitration of claims in the underlying action. Furthermore, this court believes judicial economy and the interests of all parties would be best served by determining whether the entire action, as opposed to the cross-complaint, should be ordered to arbitration. (See *Kelemen v. Super. Ct.* (1982) 136 Cal.App.3d 861, 865 ["That issue will have to be decided at some point in this case; since it is presently before us, considerations of judicial economy are best served if we address it now."]; see also *Canal St. v. Sorich* (2000) 77 Cal.App.4th 602, 609 ["We do not imply by our decision that appellants are entitled to any interest or penalties, but merely that the interests of judicial economy are best served if those issues are resolved in one proceeding."].)

Therefore, the court CONTINUES the petition to compel arbitration of the cross-complaint and defers its ruling. Defendants shall file and serve their petition to compel arbitration of claims in the underlying action no later than October 13, 2023 (a date suggested in the Conditional OPP). The court will address both petitions to compel arbitration during the Law & Motion Calendar on November 14, 2023 at 9:00 a.m. As to Defendants' petition to compel arbitration of claims in the underlying action, opposition and reply papers shall be filed and served in accordance with the Code of Civil Procedure. No further briefing will be accepted in connection with the petition to compel arbitration of the cross-complaint.

Disposition

The petition to compel arbitration is CONTINUED to November 14, 2023 to be heard in conjunction with the petition to compel arbitration filed by Defendants.

The court will prepare the Order.

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