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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

PRISCILLA AHERN et al., Plaintiffs and Appellants, v. ASSET MANAGEMENT CONSULTANTS INC., et al., Defendants and Respondents.	B253974 and B257684 (Los Angeles County Super. Ct. No. BC484356)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Elihu M. Berle and John Shepard Wiley, Jr., Judges. Reversed and remanded with directions.

Catanzarita Law Corporation, Kenneth J. Catanzarite and Nicole M. Catanzarite-Woodward, and Eric V. Anderton, for Plaintiffs and Appellants.

Jackson, DeMarco, Tidus & Peckenpaugh, M. Alim Malik and Charles M. Clark, for Defendants and Respondents, Asset Management Consultants, Inc., BH & Sons, LLC, Argent Associates, LLC, Argent Real Estate Associates L.P., James Hopper and Gloria Hopper.

Priscilla Ahern, Thomas Ahern, Amlap Ahern, LLC and Michael Stella (collectively Ahern parties) appeal from the judgment confirming an arbitration award in favor of Asset Management Consultants, Inc., BH & Sons, LLC, Argent Associates, LLC, Argent Real Estate Associates, L.P., James R. Hopper and Gloria Hopper (collectively Hopper parties). The arbitration was conducted pursuant to the arbitration provision contained in a real estate purchase and sale agreement between iStar CTL I, L.P., as seller, and BH & Sons, LLC, as purchaser, dated July 26, 2006 (iStar PSA), after the trial court granted the Hopper parties' petition to compel arbitration. The Ahern parties, who are not signatories to the iStar PSA, contend that agreement neither established nor governs any relationship between them and the Hopper parties and that the claims resolved by the arbitrator are outside the scope of the iStar PSA's arbitration provision. We agree, reverse the judgment and remand with directions to the trial court to deny the Hopper parties' petition to confirm the arbitration award and to grant the Ahern parties' petition to vacate that award.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Transaction for the La Palma Avenue property and the iStar PSA*

In 2006 iStar CTL I, through its broker CB Richard Ellis, circulated an offering memorandum to potential buyers soliciting bids for commercial real property located at 5515 East La Palma Avenue in Anaheim. BH & Sons, a California limited liability company, ultimately submitted the winning bid and entered into the iStar PSA with iStar CTL I. BH & Sons's managing member is Asset Management Consultants; James Hopper and Gloria Hopper are partial owners and employees of Asset Management Consultants.

The iStar PSA stated it was "made and entered into by and between Purchaser and Seller as of July 26, 2006." The agreement defined "Seller" as iStar CTL I, L.P., a Delaware limited partnership, and "Purchaser" as BH & Sons, LLC, a California limited liability company. CB Richard Ellis (Stephen Batcheller) was identified as "Seller's

Broker," and Asset Management Consultants, Inc. as "Purchaser's Broker." The purchase price for the property was $34,550,000.

Section 12.1 provided the iStar PSA was binding on assigns of each of the parties to the agreement and authorized Purchaser to assign its rights under the agreement under certain conditions, specifically including to "an entity controlling, controlled by, or under common control with Purchaser and/or Asset Management Consultants, Inc., a California corporation, or tenant in common investors procured by Purchaser and/or Asset Management Consultants, Inc." Section 12.18 provided there were no third party beneficiaries of the iStar PSA: "The provisions of this Agreement and of the documents to be executed and delivered at Closing are and will be for the benefit of Seller and Purchaser only and are not for the benefit of any third party, and accordingly, no third party shall have the right to enforce the provisions of this Agreement . . . ."

The iStar PSA contained an arbitration provision, section 12.20, "Mandatory Arbitration," which is at the center of the controversy before this court. It provided, "Except for an action in which Purchaser asserts a claim of specific performance as and to the extent permitted by this Agreement, the parties have agreed to submit disputes to mandatory arbitration in accordance with the provisions of Exhibit H hereto and made a part hereof for all purposes. Each of Seller and Purchaser waives the right to commence an action in connection with this Agreement in any court and expressly agrees to be bound by the decision of the arbitrator determined in Exhibit H. The waiver of this Section 12.20 will not prevent Seller or Purchaser from commencing an action in any court for the sole purpose of enforcing the obligation of the other party to submit to binding arbitration or the enforcement of an award granted by arbitration herein . . . ."

Exhibit H, in turn, provided, "The parties have agreed to submit disputes to mandatory arbitration in accordance with the following provisions: [¶] . . . [¶] . . . Any dispute among Seller and Purchaser as to the interpretation of any provision of this Agreement or the rights and obligations of any party hereunder shall be resolved through binding arbitration as hereinafter provided in Los Angeles, California. . . ."

2. *The Ahern Parties' Acquisition of Interests in the La Palma Avenue property*

After acquiring the La Palma Avenue property, BH & Sons (and Asset Management Consultants) intended to sell direct or indirect fractional ownership interests in the property, apparently with contemplated tax benefits for the new purchasers. To that end, BH & Sons and Asset Management Consultants provided property information packages and a private placement memorandum to various qualified sophisticated individual investors and business entities. Investors either formed their own single purpose limited liability companies, which purchased an interest in the La Palma Avenue property as tenants in common, or became limited partners in Amlap Venture, L.P., which then purchased a tenancy in common interest in the property. Ultimately, Amlap Venture had 39 limited partners and owned a 24.17 percent interest in the property as a tenant in common; 13 newly formed limited liability companies owned remaining portions of the property as tenants in common. The cotenancy was operated and managed by BH & Sons pursuant to the terms of cotenancy agreements signed by each investor.[1]

In September 2006 BH & Sons assigned (sold) the iStar PSA to the cotenancy. Each investor who purchased a direct tenant-in-common interest signed a purchase and sale agreement that provided BH & Sons was selling the investor's property interest to the investor and assigning and transferring to the investor BH & Sons's rights and remedies under the iStar PSA with respect to the investor's property interest. The

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[1] The cotenancy agreements between the investors and BH & Sons contained their own arbitration provision: "Unless the relief sought requires the exercise of equity powers of a court of competent jurisdiction, any dispute arising in connection with the interpretation or enforcement of the provisions of this Agreement, or the application or validity thereof, shall be submitted to arbitration." Although the Hopper parties' petition to compel arbitration identified the arbitration provisions in both the iStar PSA and the cotenancy agreements, the superior court granted the petition based solely on the iStar PSA; and the arbitration proceedings and subsequent court order confirming the arbitration award were similarly based on the iStar PSA alone. The Ahern parties and the Hopper parties agree the issues on appeal do not relate to the arbitration provision in the cotenancy agreements.

assignment agreement specified, "Except as otherwise provided in this Agreement, the terms of sale contained in the [iStar PSA] shall be incorporated here by reference, and apply with equal force to this Agreement, and [the investor/tenant in common] agrees to assume, carry-out and perform, as and when required, all of the obligations of the purchaser under the [iStar PSA] related to [the investor/tenant in common's] Property Interest . . . . For convenience, a deed shall be issued directly to [the investor/tenant in common] by the Seller . . . ." Investors who acquired a limited partnership interest in Amlap Venture executed both a subscription agreement and a limited partnership agreement.

The cotenancy acquired the La Palma Avenue property through a combination of $12.6 million contributed by the limited liability companies and limited partners who had formed the cotenancy and a loan from PNC Bank. The venture performed according to expectations for approximately three years (through September 2009) when the lease of the sole tenant (Cingular Wireless) ended; no replacement tenant was found.

3. *The Ahern Parties' Complaint and the Demand for Arbitration*

In a 77-page, 16 cause-of-action putative class action complaint filed May 10, 2012, the Ahern parties alleged they had been fraudulently induced to enter into the La Palma Avenue property transaction through the promotional materials and offering memoranda developed and distributed by BH & Sons and Asset Management Consultants. According to the complaint, Priscilla and Thomas Ahern and Amlap Ahern had purchased a direct tenant-in-common interest for $450,000; and Michael Stella had purchased $40,000 in limited partnership units in Amlap Venture.

In their complaint the Ahern parties alleged, "The transaction was nothing more than a real estate scam put together by the defendants to line their own pockets." According to the complaint, the offering materials falsely represented the purchase price for the property was $34,550,000 including a $1.3 million commission to be paid by iStar CTL I to Asset Management Consultants and the Hoppers. "However, the true purchase price was in fact $30,000,000 or less and what was purported to be a commission was an

illegal and secret mark-up of the Property purchase price in which the defendants conspired to inflate the price to hide the fact the Property could have been purchased for $30,000,000 or less." The original seller of the property, iStar CTL I, was not named as a defendant, but the Ahern parties alleged it had "conspired with the defendants to secretly markup the Property purchase price so the same was inflated by at least $5,000,000 including the bogus $1,300,000 commission."

The Ahern parties additionally alleged the Hopper parties and others had misrepresented the likelihood that Cingular would renew its lease at the property, that a new institutional tenant could be found if Cingular left the premises and that a portion of the loan from PNC Bank would be used to create a reserve account for lost rent in the event of a vacancy. Claims were asserted (among others) for breach of fiduciary duty, intentional misrepresentation, fraud by concealment and unfair business practices under Business and Professions Code section 17200 et seq.

On June 8, 2012 the Hopper parties sent a demand for arbitration to the Ahern parties. After the Ahern parties advised the court at a status conference that they opposed arbitration, the Hopper parties petitioned to compel arbitration pursuant to the iStar PSA's mandatory arbitration provision.[2] The petition identified BH & Sons as a party to the iStar PSA, added that Asset Management Consultants, as its managing member and agent, had actually signed the agreement, and emphasized that the Ahern parties' complaint alleged that the Hopper parties were all agents of each other.

The Ahern parties opposed the petition, contending the Hopper parties lacked standing to compel arbitration under the iStar PSA because BH & Sons had assigned all of its rights and interests in the agreement, including the right to compel arbitration, to the tenant-in-common investors. The Ahern parties also argued the claims in their complaint were outside the scope of the iStar PSA arbitration provision, which was

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[2] As noted above, the Hopper parties initially argued arbitration was also required pursuant to the terms of the cotenancy agreement between the investors/tenants in common and BH & Sons, but that position has been abandoned.

expressly limited to disputes between the seller (iStar CTL I) and the buyer (BH & Sons), and did not cover disputes between BH & Sons (and its agents) and investor cotenants.

4. *The September 19, 2012 Order Compelling Arbitration*

The hearing on the petition to compel arbitration was held September 19, 2012. Although the court did not prepare a written tentative opinion, at the outset it provided the parties an oral statement as to why it believed the petition should be granted. In its explanation the court emphasized that the theory of the complaint was that "all these Hopper defendants are agents of each other. They're more than just agents. They're agents, and servants, and employees, and joint venture[rs]. So the Hopper family, their entities and their accountants are nothing more than a bunch of co-conspirators acting with authority to bind the others." With respect to the Ahern parties' primary argument in opposition to the petition that they were not signatories to the iStar PSA and thus not bound by its arbitration provision, the court stated, "I believe their own allegation in the complaint distinguishes this case from all cited cases and defeats the logic of their position. An agent is one who has the authority to act on behalf of the principal. The Aherns believe and allege and sue on the basis of a co-conspiracy . . . . When there's just one transaction truly at issue which the complaint tells us is true on page 1, paragraph 1, to say, one entity or one individual wasn't the right signatory is a paradoxical and unsuccessful argument. So by alleging that it's one simple scam, the plaintiffs have created a dilemma for themselves by choosing this their first line of defense. So for that reason, I respectfully reject this attack on the . . . arbitration petition."

Following extended oral argument the superior court granted the petition to compel arbitration filed by the Hopper parties, denied the joinder in the petition by Kevin James Hopper, a lawyer who had participated in the transaction, and stayed the lawsuit against the remaining defendants, which included not only Kevin Hopper but also CB Richard Ellis, Stephen Batcheller, and several additional parties (accountants and other professionals). The court's order stated, "The scope of the Arbitration covers all causes of action, factual allegations and issues alleged by Plaintiffs [the Ahern parties], on

behalf of themselves and all others similarly situated, (collectively 'Plaintiffs') against the Petitioners [the Hopper parties]." The court did not expressly identify the arbitration agreement it was enforcing either during argument at the hearing or in its order compelling arbitration.

5. *The Arbitration Proceedings*

Following the court's order the Ahern parties elected not to pursue their claims against the Hopper parties in arbitration and to continue with their lawsuit against the remaining defendants. Accordingly, on October 9, 2012 the Ahern parties filed separate requests for a voluntary dismissal without prejudice of their action against each of the six Hopper parties; the dismissals were entered by the clerk on the same date. On January 3, 2013, pursuant to a stipulation between the Ahern parties and the remaining non-Hopper parties, the court dismissed the complaint's class allegations without prejudice; the Ahern parties were permitted to proceed individually.

Notwithstanding the October 9, 2012 dismissals, in late October 2012 the Hopper parties prepared and served a demand for arbitration with the alternative dispute resolution provider JAMS, citing as the arbitration agreement "September 19, 2012 Court Order compelling arbitration pursuant to paragraph 12.20 and Exhibit H of the Purchase and Sale Agreement Between iStar CTL, L.P., As Seller, and BH & Sons, LLC, as Purchaser." The Hopper parties described their claims and relief sought in the following language, "The Hopper Defendants request that Respondents' Requests for Dismissal, without prejudice, be ordered as dismissed with prejudice. The Hopper Defendants further request damages according to proof at the arbitration for affirmative claims they may assert."

On November 8, 2012 JAMS sent the Hopper parties and the Ahern parties a notice of commencement of arbitration and appointment of Alexander S. Polsky as the arbitrator. The Ahern parties objected to the arbitration and sought to terminate it on the ground they had previously dismissed the claims that the superior court ordered to arbitration. The arbitrator denied the motion to dismiss, concluding his jurisdiction

pursuant to the iStar PSA and the September 19, 2012 order "remains intact." The Ahern parties then filed a separate lawsuit seeking to restrain the arbitration for lack of a valid agreement; a demurrer to their amended complaint for declaratory relief was sustained without leave to amend; and our colleagues in Division Five of this court recently affirmed the order dismissing that action, explaining the complaint sought to adjudicate the identical issues previously determined by the superior court in denying the Ahern parties' petition to vacate the arbitration award, which are at issue in this appeal: "Because those determinations had been made by the trial court in the first action well prior to the hearing on the demurrer in the instant action, the trial court did not err by determining that there was no currently active controversy to be determined in the declaratory relief action." (*Ahern v. Asset Management Consultants, Inc*. (June 6, 2015, B255853) [nonpub. opn.].)

In denying the Ahern parties' attempt to dismiss the arbitration, arbitrator Polsky interpreted the September 19, 2012 order regarding the scope of the arbitration to include "all issues and factual allegations relating to the causes of action asserted." Accordingly, the arbitrator ruled he had jurisdiction to determine the Hopper parties' affirmative claims "wholly relating to the factual allegations and issues set forth in the original complaint, including, but not limited to declaratory relief and indemnification."

On February 8, 2013 the Hopper parties served an arbitration complaint seeking contractual indemnity from the Aherns under their tenant-in-common purchase and sale agreement, from Stella under the subscription agreement for Amlap Venture and the limited partnership agreement, and from Amlap Ahern under the cotenancy agreements. According to the Hopper parties, the Ahern parties had represented and warranted in the documents they signed that they were sophisticated investors, had reviewed and understood the various offering and purchase materials, including the descriptions of risk involved in the investment in the La Palma Avenue property, and would conduct an independent investigation of facts determined to be material to their investment decision. They had also agreed to indemnify the Hopper parties from any damages resulting from a

breach of their representations and warranties. The Hopper parties sought to recover all fees and costs incurred in responding to the underlying lawsuit under these indemnity provisions.

The Hopper parties also sought declaratory relief with respect to various aspects of the dispute between the Ahern parties and the Hopper parties as originally pleaded in the Ahern parties' lawsuit. In particular the Hopper parties sought a determination whether they had orchestrated a fraudulent scheme to induce the Ahern parties to purchase fractional interests in the La Palma Avenue property so the Hopper parties could earn a secret profit.

An arbitration hearing was held on September 12, 2013. The Ahern parties did not participate, maintaining their objection that the iStar PSA did not constitute a valid arbitration agreement between them and the Hopper parties and the arbitrator thus lacked jurisdiction over them. Accordingly, the arbitrator proceeded on a default basis as permitted under JAMS rules.

On September 17, 2013 the arbitrator issued his award, expressly stating the arbitration was conducted in accordance with the court's September 19, 2012 order, "and as such was conducted in accordance [with] the 'Mandatory Arbitration' clause in Exhibit H and paragraph 12.20 of the Purchase and Sale Agreement Between iStar CTL, I, L.P., as Seller and BH & Sons, LLC, as Purchasers Dated: July 26, 2006." The arbitrator found no merit to the Ahern parties' complaint against the Hopper parties and concluded the complaint arose from a breach of the Ahern parties' representations and warranties. Accordingly, he found Stella liable for contractual indemnity pursuant to the subscription agreement in the sum of $240,854.95 and Priscilla and Thomas Ahern liable to BH & Sons for contractual indemnity pursuant to the tenant-in-common purchase and sale agreement in the sum of $399,114.16. The arbitrator further found that Asset Management Consultants properly received the $1.3 million commission and that the Ahern parties had not been defrauded into purchasing their interests in the La Palma Avenue property.

6. *The Petition To Confirm the Arbitration Award*

The Hopper parties petitioned the superior court to confirm the arbitration award; the Ahern parties responded to the petition and cross-petitioned to vacate the award. On November 14, 2013, after hearing oral argument, the court confirmed the award under the iStar PSA's arbitration provision and denied the request to vacate, providing the parties with an oral statement of decision.[3]

The court initially rejected the Ahern parties' principal argument that there was no enforceable arbitration agreement on which the award could be based as an improper motion for reconsideration of the court's September 19, 2012 order compelling arbitration. The court similarly found no merit to the claim the arbitrator had exceeded his jurisdiction in deciding the Hopper parties' affirmative claims, both because those claims were encompassed within the scope of the September 19, 2012 order and because the Hopper parties were entitled to request arbitration without reference to the superior court order compelling arbitration: "The iStar PSA's arbitration provision . . . applies to, quote, any dispute as to the interpretation of any provision of the agreement on the rights and obligations of any party hereunder. Based on the plain language of this provision, the [Hopper parties] also had a right to seek arbitration of any disputes with regard to the rights and obligations between themselves and plaintiffs, not just a right to seek arbitration on the plaintiffs' own claims. Finally, it is for the arbitrator to determine which issues were actually necessary to the ultimate decision. Any doubts as to the meaning or extent of the arbitration agreement are for the arbitrators and not for the court to resolve."

In denying the petition to vacate and confirming the award, the superior court also rejected the Ahern parties' arguments that the arbitration provision in the iStar PSA is unconscionable, the September 19, 2012 order compelling arbitration failed to include necessary findings, the arbitrator was effectively party-appointed and therefore not a true

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[3] The court expressly stated, "[A]rbitration was ordered pursuant to the iStar PSA, not the cotenancy agreement."

neutral, and the award itself violated Civil Code section 1668 and California public policy by exempting the Hopper parties from responsibility for their own fraud. Judgment was entered in favor of the Hopper parties in accordance with the arbitration award on December 12, 2013. The Ahern parties filed a timely notice of appeal.

7. *The Fee Award*

On December 27, 2013 the Hopper parties moved for an award of attorney fees incurred in connection with the petition to confirm the arbitration award pursuant to Code of Civil Procedure section 1293.2, arguing the iStar PSA's attorney fee provision authorized their recovery of fees as the prevailing party. The motion also sought an award of prejudgment interest from the time the arbitration award was issued until the court entered its judgment on the award.

The Ahern parties opposed the motion, arguing the iStar PSA attorney fee provision was expressly limited to disputes between the original contracting parties arising under the terms of the iStar PSA agreement itself. The Ahern parties insisted neither restriction was met in this case: Only iStar CTL, I and BH & Sons were contracting parties; and the indemnification awarded by the arbitrator was not based on the terms of the iStar PSA, but provisions in other contracts signed by the Ahern parties (the subscription agreement and the tenant-in-common purchase agreement). Acknowledging that the superior court had ordered them to arbitrate with the Hopper parties pursuant to the arbitration provision in the iStar PSA, the Ahern parties contended the court's power to compel arbitration was broader than its authority to award contractual attorney fees.

The court held several hearings on the motion, ordering supplemental briefing from the parties as new issues were raised. In particular, because the Ahern parties had alleged the Hopper parties' fraudulent scheme was accomplished in part through the use of sham agreements, at the second hearing the court raised the possibility that a fee award could be based on the cotenancy agreements, which the Ahern parties did sign and which also contained an attorney fee provision. Ultimately the court found the Hopper parties

were the prevailing parties in the arbitration (which was not in dispute) and were entitled to fees under the iStar PSA agreement, the cotenancy agreements and the tenant-in-common purchase and sale agreement. On June 17, 2014 the court granted the motion, awarding the Hopper parties $26,435 in attorney fees and costs and $9,403.76 in prejudgment interest.

The Ahern parties filed a timely notice of appeal from the postjudgment fee order. In their briefs they seek reversal of the entire postjudgment order if the judgment entered in favor of the Hopper parties in accordance with the arbitration award is reversed by this court. If the judgment is not reversed, they seek reversal only of the award of attorney fees.

DISCUSSION

1. *Standard of Review*

We review the trial court's interpretation of an arbitration agreement de novo when, as here, that interpretation does not depend on conflicting extrinsic evidence. (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352; see *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 12 ["'[w]hether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of [the] interpretation was introduced in the trial court'"].) Our de novo review includes the scope of an arbitration provision (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1522; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684), as well as the legal determination whether and to what extent nonsignatories to an agreement may be compelled to arbitrate or may invoke the arbitration provision in an agreement. (*DMS Services*, at p. 1352; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 707-708.

2. *Governing Law*

There is a strong public policy in favor of arbitration. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 [recognizing strong federal and state public policies favoring arbitration]; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971-972.) Still, "[a]lthough '[t]he law favors contracts for arbitration of disputes between parties' [citation], '"there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate."'" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744; accord, *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. __ [133 S.Ct. 2304, 2306, 186 L.Ed.2d 417 [it is an "overarching principle that arbitration is a matter of contract"]; *AT&T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 658 [106 S.Ct. 1415, 89 L.Ed.2d 648] ["'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'"]; see also *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).)

Because arbitration is a matter of contract, generally "'"one must be a party to an arbitration agreement to be bound by it or invoke it."'" (*Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1416; accord, *Molecular Analytical v. Ciphergen Biosystems, Inc., supra,* 186 Cal.App.4th at p. 705; *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 598 ["right to arbitration depends on a contract, and a party can be compelled to submit a dispute to arbitration only if the party has agreed in writing to do so"].) However, there are limited exceptions to this rule, allowing nonsignatories to an agreement containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement. (See *Pinnacle, supra,* 55 Cal.4th at p. 240 ["common law principles such as fiduciary duty and agency permit enforcement of arbitration agreements against nonsignatory third parties"]; *Marenco,* at p. 1417 ["[e]nforcement is permitted where the nonsignatory is the agent for a party to

the arbitration agreement [citations], or the nonsignatory is a third party beneficiary of the agreement"]; *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513 [describing "six theories by which a nonsignatory may compel or be bound to arbitrate: '(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary'"]; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 268 [same, citing federal cases].) "These exceptions to the general rule that one must be a party to an arbitration agreement to invoke it or be bound by it 'generally are based on the existence of a relationship between the nonsignatory and the signatory, such as principal and agent or employer and employee, where a sufficient "identity of interest" exists between them.'" (*DMS Services, LLC v. Superior Court, supra*, 205 Cal.App.4th at p. 1353.)

Unless the parties to an arbitration agreement have clearly and unmistakably provided otherwise, questions of arbitrability require a judicial determination. (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83 [123 S.Ct. 588, 154 L.Ed.2d 491]; accord, *AT&T Technologies, Inc. v. Communications Workers of America*, *supra*, 475 U.S. at p. 649; *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1096.) "Linguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability' . . . ." (*Howsam*, at p. 83.) However, that phrase is applicable only in the "kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." (*Ibid.*) Thus, questions of arbitrability include such "gateway issues" as the validity of the arbitration agreement, its scope and who is bound by its terms. (See *id.* at p. 84 [citing cases].)

3. *The Superior Court Erred in Compelling Arbitration and Thereafter Confirming the Arbitration Award Against the Ahern Parties Pursuant to the Arbitration Provisions in the iStar PSA*

Pursuant to the section 12.20 and Exhibit H of the iStar PSA, with limited exceptions not relevant to this appeal, "Seller" (iStar CTL I) and "Purchaser" (BH & Sons) agreed to submit to mandatory arbitration, "Any dispute among Seller and Purchaser as to the interpretation of any provision of this Agreement or the rights and obligations of any party hereunder . . . ." The Ahern parties who were direct investors (as tenants in common) in the La Palma Avenue property, although not signatories to the iStar PSA, nonetheless agreed to be bound by its provisions in connection with their investments. As discussed, the purchase and sale agreements signed by the direct investors confirmed that BH & Sons was assigning and transferring to those investors its rights and remedies under the iStar PSA and the investors agreed to assume and perform "all of the obligations of the purchaser" under the iStar PSA. Accordingly, under well-established authority permitting the enforcement of arbitration agreements against certain categories of nonsignatories, iStar CTL I would most likely have been entitled to require the Ahern parties to arbitrate disputes regarding their respective rights and obligations regarding the sale to the tenants in common of interests in the La Palma Avenue property.[4] (See, e.g., *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1069-1070 ["[u]nder California law, a nonsignatory can be compelled to arbitrate under two set of circumstances: (1) where the nonsignatory is a third party beneficiary of the contract containing the arbitration agreement; and (2) where 'a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim'"].) But iStar CTL I's hypothetical right to compel arbitration with the Ahern parties is quite different from what is at issue here.

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[4] Unlike the other Ahern parties, Michael Stella was only an indirect investor in the La Palma Avenue property, purchasing limited partnership units in Amlap Venture, L.P. Amlap Venture, as other direct investors, was assigned BH & Sons's interest in the iStar

In this case the purchaser of the La Palma Avenue property and persons and entities alleged to be agents, servants, employees and/or joint venturers of the purchaser, and of each other, were sued by third party investors who were the assignees of the purchaser. The seller was not a party to the lawsuit or to the affirmative claims asserted by the Hopper parties when they filed their JAMS arbitration demand. And the dispute, although it unquestionably related in general to the subject matter of the iStar PSA, did not concern the interpretation of any its provisions or the rights and obligations of the parties under the terms of that agreement. Rather, it was directed to the Hopper parties' methods of marketing BH & Sons's rights under the iStar PSA and the respective rights and obligations of the third party investors and the Hopper parties under various agreements separate from the iStar PSA. Those claims, whether asserted in the lawsuit by the Ahern parties or in the arbitration demand by the Hopper parties, were not properly subject to arbitration under the iStar PSA, which was expressly limited to disputes between the seller (and perhaps the seller's agents), on the one hand, and the purchaser (and perhaps its agents), on the other hand.

This court considered a closely analogous situation several years ago in *Lindemann v. Hume* (2012) 204 Cal.App.4th 556 (*Lindemann*), which affirmed the superior court's denial of motions to compel arbitration pursuant to the terms of a purchase and sale agreement in a multiparty action arising out of the acquisition of a

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PSA. Neither the subscription agreement through which Stella purchased his partnership units nor the limited partnership agreement he signed incorporated provisions of the iStar PSA. Thus, it is doubtful even iStar CTL I could have compelled Stella to arbitrate disputes relating to the La Palma transaction. (Cf. *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 991 [arbitration provisions in licensing agreements between two corporations do not obligate corporate officer who signed agreements only in that capacity to arbitrate defamation claim filed in his individual capacity although claim arose from, and related to, corporate dispute subject to arbitration; "[t]he fact that a nonsignatory to a contract may in some circumstances be viewed as a third party beneficiary or an agent who is entitled to *compel* arbitration [citation] is legally irrelevant where, as here, [the nonsignatory] *is not the one who wants to be bound by the arbitration provision in a contract that he signed only in a representative capacity*"].)

newly built home. Part of that case involved the selling parties' motions to compel their business advisors to arbitrate the advisors' cross-claims for indemnification. The arbitration clause in the purchase agreement broadly applied to all disputes or claims between the seller and buyer trusts arising out of the transaction. An additional provision expanded the scope of the arbitration provision to include disputes between either of the two trusts and the real estate brokers who had assisted in the transaction. (*Id*. at p. 569.) Although the litigants vigorously contested whether the nonsignatory advisors, who were indisputably agents of the sellers for certain purposes, were bound by the arbitration clause under any circumstances, we concluded it was unnecessary to resolve that dispute because the indemnification claims by the advisors against the selling parties were "outside the scope of the arbitration provision, which covers only disputes between the seller and the buyer, not internecine disputes among members of the seller's team of advisors." (*Id*. at p. 570.) As we explained, while the business advisors had a preexisting relationship with the selling parties, "nothing in the purchase agreement for the Ocean Front Walk property contemplates that disputes between one of the principals to the transaction and its own advisors are subject to arbitration, whether or not those claims somehow relate to, or arise out of, the Schlei Trust's acquisition of the home. The [selling parties] could have included such a right in the purchase agreement (as they did for their real estate agent) or bargained for it when engaging Levin and Nazarian as business advisors, but apparently either chose not to or were unable to obtain their agreement." (*Id*. at p. 571.)

Similar to the arbitration clause in *Lindemann*, the scope of the arbitration provision in the iStar PSA was expressly limited to disputes between the purchaser and the seller. The Ahern parties did not (indeed, could not) assert such claims: They were fully aligned with the purchaser side of the transaction only, as were the Hopper parties.[5]

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[5] The Ahern parties, of course, acknowledged that the Hopper parties sold (and assigned) their interest in the La Palma Avenue property, as well as their rights under the iStar PSA, through the offering of various direct and indirect investment vehicles. The

As was true in *Lindemann*, the iStar PSA could have required these investors to arbitrate disputes with BH & Sons and its affiliates—the agreement contemplated that BH & Sons would assign its rights to tenant-in-common investors or entities under common control of Asset Management Consultants—but did not, perhaps because several of the agreements between the investors and the Hopper parties had their own arbitration provisions. For whatever reason, those other agreements were not the basis for the arbitration award or judgment here on appeal. Accordingly, they can have no bearing on our decision.

Our conclusion the Ahern-Hopper parties' disputes were not subject to arbitration under the iStar PSA is not altered by the allegations in the Ahern parties' complaint of agency and alter ego relationships among BH & Sons and the other Hopper parties. The cases allowing nonsignatory individuals or entities who are agents or alter egos of a signatory party to enforce an arbitration agreement are premised on the agents' right "to invoke the benefit of an arbitration agreement executed by their principal even though the agents are not parties to the agreement." (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614-615; see *DMS Services, LLC v. Superior Court, supra,* 205 Cal.App.4th at pp. 1353-1354.) Although BH & Sons was a signatory, as "Purchaser," of the iStar PSA, its agents and alter egos have no more right than their principal to demand arbitration of disputes with investors who purchased direct or indirect interests in the La Palma Avenue property from BH & Sons, not from "Seller," iStar CTL I.[6]

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lawsuit was premised on allegations those sales efforts were fraudulent. But the Hopper parties' role as sellers in that subsequent phase of the overall transaction does not convert them into the "Seller" as expressly defined by the iStar PSA.

[6] Because the Hopper parties' purported status as agents of each other is immaterial to the issue before us, we need not decide whether a complaint's allegation that a nonsignatory is the agent of a party bound by an arbitration agreement, when contested by the nonsignatory party, is sufficient to permit the nonsignatory to compel arbitration. (Compare, e.g., *Thomas v. Westlake, supra,* 204 Cal.App.4th at pp. 614-615 [finding plaintiff's allegations of an agency relationship among defendants sufficient to allow the alleged agents to enforce an arbitration agreement executed by their principal] with, e.g.,

Similarly, the Ahern parties' allegation that iStar CTL I, the seller of the La Palma Avenue property, conspired with the Hopper parties to secretly inflate the purchase price of the property does not provide an adequate ground for compelling arbitration of the Ahern-Hopper parties' disputes. It is true, as the Hopper parties argue, that, "[i]n the arbitration context, a party who has *not* signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him." (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1713; see *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1238-1240 [nonsignatory plaintiff may be equitably estopped from repudiating arbitration clause in contract when asserting claims that rely on contract terms, particularly when signatory and nonsignatory plaintiffs are related entities]; *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 220, fn. 5 ["'[i]n the arbitration context, the doctrine [of equitable estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when [the party] has consistently maintained that other provisions of the same contract should be enforced to benefit him'"].) But the Ahern parties did not sue iStar CTL I; and their claims for fraud and breach of fiduciary duty against the Hopper defendants are not based on, or inextricably intertwined with, the iStar PSA, the contract containing the arbitration clause. To the contrary, they challenge the legitimacy of the purchase price identified in

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Barsegian v. Kessler & Kessler (2013) 215 Cal.App.4th 446, 452-453 [holding allegation that all defendants are each other's agents does not constitute a judicial admission and does not authorize the nonsignatory defendants to enforce the signatory defendants' arbitration agreement; "a judicial admission is ordinarily *a factual allegation by one party that is admitted by the opposing party*"]; *City of Hope v. Bryan Cave, L.L.P.* (2002) 102 Cal.App.4th 1356, 1370-1371 [parties claiming right to invoke arbitration provision as third party beneficiary or agent of party that signed agreement cannot rely entirely on allegations in complaint that they deny]; see generally *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 15 [nonsignatory bears the burden of establishing it should be treated as a party to the arbitration agreement].)

the agreement, negotiated by iStar CTL I and BH & Sons, and argue it was part of BH & Sons and Asset Management Consultants' unlawful scheme to defraud third party investors. Because the Ahern parties are not seeking to enforce or otherwise take advantage of any portion of the iStar PSA, the doctrine of equitable estoppel discussed and invoked by the court in *Metalclad Corp*. and the other cases cited by the Hopper parties is simply inapplicable. (See *Goldman*, at p. 225 ["allegations of interdependent and concerted misconduct by signatories and nonsignatories will justify allowing a nonsignatory to enforce an arbitration clause only . . . when the claims against the nonsignatory are 'inextricably bound up with the terms and duties of the contract the plaintiff has signed with the other defendant'"].)

In sum, the superior court erred when it initially compelled arbitration of the Ahern parties' claims against the Hopper parties and again when it confirmed the arbitration award over the Ahern parties' objection.

4. *The Postjudgment Award of Attorney Fees and Prejudgment Interest Must Be Reversed*

Our reversal of the judgment in favor of the Hopper parties requires reversal of the superior court's postjudgment order awarding them attorney fees and costs as the prevailing parties in the confirmation proceedings (*Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1452 ["[b]ecause we reverse the judgment, the attorney fees awards fall as well"]; *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053 [same]), as well as the award of prejudgment interest (*GuideOne Mutual Ins.Co. v. Utica National Ins. Group* (2013) 213 Cal.App.4th 1494, 1504 ["[b]ecause we are reversing the $600,000 judgment in favor of GuideOne, we must also necessarily reverse the award of prejudgment interest that is based upon that judgment"]; see *Steinman v. Malamed* (2010) 185 Cal.App.4th 1550, 1562).

DISPOSITION

The judgment confirming the arbitration award and the postjudgment order awarding attorney fees are reversed. The matter is remanded with direction to deny the petition to confirm the arbitration award, to grant the petition to vacate the arbitration award and to vacate the September 19, 2012 order compelling arbitration. The Ahern parties are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.