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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CITY OF PIEDMONT,

Plaintiff and Respondent,

v.

HARRIS & ASSOCIATES,

Defendant and Appellant;

ROBERT GRAY & ASSOCIATES,

Defendant and Respondent.

A133983

(Contra Costa County  
Super. Ct. No. C11-00762)

The trial court denied a petition to compel arbitration of an action brought by respondent City of Piedmont (Piedmont) against appellant Harris & Associates (Harris), in part because of the risk that arbitration of their dispute might result in conflicting rulings affecting an action arising out of the same transaction between the city and respondent Robert Gray & Associates (Gray). Harris appeals, contending inter alia that the trial court had insufficient evidence of third party common issues to warrant denial of his petition to compel arbitration. (Code Civ. Proc.,<sup>1</sup> § 1281.2, subd. (c), pars. 1, 4 (section 1281.2(c)).) We affirm the trial court's order.

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<sup>1</sup> All statutory references are to the Code of Civil Procedure unless otherwise indicated.

## I. FACTS<sup>2</sup>

In May 2005, Piedmont created the Piedmont Hills Underground Assessment District to underground certain municipal utilities. For many years, Piedmont had contracted with Harris—a civil engineering firm—to serve as its city engineer. To obtain engineering services for the assessment district project, Piedmont entered into a separate contract with Harris in May 2005. In March 2007, Harris again contracted with Piedmont to continue to serve in its more general role as city engineer through June 2009. The 2005 assessment district contract did not include an arbitration clause, but the more general city engineer contract dating from 2007 did.

In the summer of 2008, Harris and Piedmont agreed that work on the assessment district project would be deleted from Harris's scope of work and that those tasks would be undertaken by a third party. In November 2008, Piedmont and Harris executed an amendment to the 2005 assessment district project contract. In it, Piedmont reduced Harris's scope of work and agreed to contract with civil engineers Gray to complete the remaining work on the assessment district project. The same month, Piedmont entered into a professional services contract with Gray to do so. The 2008 Gray contract did not include an arbitration clause.

According to Piedmont, Harris and Gray created the plans and specifications that formed the basis of Piedmont's competitive bid process. In 2009, Piedmont instructed its successful bidder to begin construction, based on those plans and specifications. The construction process was subject to serious delays and significant cost overruns, which Piedmont claims resulted from the failure of the plans and specifications to account for bedrock in the project area. In March 2011, Harris made a demand for arbitration of the resulting dispute with Piedmont, citing the 2007 contract. Piedmont—citing the 2005 contract—refused to arbitrate.

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<sup>2</sup> Some aspects of our statement of facts are taken from the allegations of Piedmont's complaint. These allegations are hotly disputed by Harris and Piedmont and have yet to be adjudicated. Nevertheless, we include them to place Piedmont's lawsuit in context.

In April 2011, Piedmont brought an action for breach of contract and negligence against Harris and Gray. It alleged that the two engineering firms jointly and severally created the plans and specifications on which the assessment district bidding process was based. Its two breach of contract causes of action alleged that Harris and Gray had each prepared inadequate and incomplete plans and specifications, and failed to recommend or review a preproject soils analysis. The complaint alleged that Harris breached the 2005 and 2007 contracts, and that Gray breached the 2008 contract.<sup>3</sup> In a third negligence cause of action, Piedmont alleged that the professional services provided by Harris and Gray “and each of them” fell below the applicable standard of care for professional engineers, damaging Piedmont.

Gray’s May 2011 answer included a denial that Gray and Harris had jointly and severally created plans and specifications for the project.

Harris did not file an answer to Piedmont’s complaint. Instead, in August 2011, it petitioned for an order compelling Piedmont to arbitrate the issues raised in the complaint pursuant to the terms of the 2007 contract. Harris also sought a stay of the underlying action until arbitration was completed. (§ 1281.2.) The petition to compel incorporated a copy of this contract by reference. (See Cal. Rules of Court, rule 3.1330.) Its petition was supported by point and authorities, several declarations and numerous attachments. Harris asked the trial court to take judicial notice of Piedmont’s complaint and the relevant contracts. Three days later, Harris filed an amended petition to compel.

The petition to compel focused on two issues. Harris first argued that the 2005 contract that did not contain an arbitration agreement was not the contract underlying Piedmont’s lawsuit, which Harris reasoned turned only on the 2007 agreement—the one that included an arbitration clause. It asked the trial court to examine these contracts and to find—as a matter of law—that Piedmont had only set out a cause of action for breach of the 2007 contract. Based on this conclusion, Harris reasoned that there was no basis to find that some aspects of Piedmont’s case were subject to arbitration but others were not.

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<sup>3</sup> Copies of these contracts were attached to the complaint.

Second, Harris argued that it had no liability for the project design, because Gray took over the project with the 2008 contract, before the plans and specifications were finalized and before the construction bidding process began. Harris asserted that its involvement in the circumstances giving rise to Piedmont's complaint was "minimal" because its duty to provide engineering services for the project had been removed by the amended agreement assigning those duties to Gray before any damage occurred.

In September 2011, Piedmont opposed the petition to compel on both grounds. It asserted that its claims were grounded in both the 2005 and the 2007 contracts, some of which were not subject to arbitration. It also argued that its complaint raised issues involving Gray that were not subject to arbitration. It filed three declarations with attachments in opposition to the petition, prompting Harris to object to significant aspects of them. Harris also filed a new declaration in support of its petition to compel, including the 2008 amendment to the 2005 contract as an attachment.

On October 4, 2011, the trial court sustained Harris's objections to many aspects of Piedmont's three declarations. It issued a tentative decision exercising its discretion to deny the petition to compel on two grounds. First, it rejected Harris's invitation to make a conclusive finding that the Piedmont action was not based on the 2005 contract. The trial court concluded that to make such a binding determination on a petition to compel arbitration would be improper. Instead, the trial court accepted Piedmont's allegations that Harris breached both the 2005 and the 2007 contracts. (See § 1281.2(c), par. 3.)

The trial court also found that the resolution of some issues arising from the 2007 arbitration agreement and other issues in litigation involving third party Gray created a substantial risk of conflicting rulings on common issues of law and fact. It found that Piedmont's claims against Harris were not easily severable from those alleged against Gray. It also rejected Harris's claim that the issues involving Gray involved no common issues of law or fact that could affect the Harris aspect of the Piedmont action. It found that Gray took over a project on which Harris had worked for several years, and on which Harris continued to have "at least a modest role." (See § 1281.2(c), pars. 1, 4.)

The trial court conducted a hearing on the petition, allowing Harris to contest the tentative decision. Attorneys for Piedmont, Harris and Gray appeared at that hearing. Harris argued that after the trial court sustained its objections to Piedmont's declarations, the court was left with no other admissible evidence of any risk of conflicting rulings affecting Gray.

Gray filed a posthearing objection to Harris's petition to compel, which Harris challenged on standing grounds.<sup>4</sup> On October 21, 2011, the trial court affirmed its tentative decision and denied the petition to compel arbitration. This appeal followed. During the pendency of the appeal, Gray filed a cross-complaint for indemnity and declaratory relief against Harris.

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<sup>4</sup> In the trial court, in addition to its posthearing objection, Gray's counsel filed a declaration in opposition to Harris's petition to compel arbitration, appeared at the hearing and argued against it.

In its reply brief, Harris also contests whether Gray may be considered a respondent on appeal. Harris did not list Gray as a party to this appeal, but Gray was added as a respondent at its request. Harris also opposed Gray's request for an extension of time to file a respondent's brief on this basis, but we did not receive this opposition until after both Piedmont and Gray had been granted additional time to file respondents' briefs.

On appeal, Gray asserts that a reversal of the trial court's denial order would adversely affect its interests, given its later-filed cross-complaint against Harris. Thus, we have already rejected Harris's earlier opposition to allowing Gray to act as a respondent. Even if that earlier determination was erroneous, we would come to the same conclusions on appeal without the benefit of Gray's respondent's brief.

## II. PETITION TO COMPEL

### A. *Contentions on Appeal*

On appeal, Harris contends that the trial court erred when it denied its petition to compel arbitration on both grounds. It argues that the trial court incorrectly concluded that it had no authority to determine whether Piedmont's complaint was based on the 2005 or the 2007 contract, and erred further when it accepted the allegations of that complaint at face value. (See § 1281.2(c), par. 3.) Harris also contends that the trial court had no basis to conclude that common issues of law and fact involving third party Gray created a risk of conflicting rulings, that severance of the actions against Harris and Gray was impractical, and that denial of the petition to compel arbitration was the best available alternative. (See § 1281.2(c), pars. 1, 4.) Harris reasons that these errors require reversal. It seeks an order directing the trial court to sever the two parts of Piedmont's action and to Harris's part of it to arbitration. The resolution of the issues presented on appeal requires a careful consideration of the statutory requirements for a petition to compel arbitration.

### B. *Legal Framework*

When a party to an arbitration agreement alleges the existence of a written agreement to arbitrate and demonstrates that another party to that agreement refuses to arbitrate a controversy, the initial party may petition the trial court to compel the other party to arbitrate. If the trial court determines that an agreement to arbitrate exists, it must compel the parties to arbitrate that controversy, barring some statutory defense to enforcement of the arbitration agreement. (§ 1281.2, subds. (a)-(b).) As the moving party in the trial court, Harris had the burden of proving by a preponderance of evidence a valid arbitration agreement, a request to arbitrate, and a Piedmont refusal to arbitrate. (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705 (*Molecular Analytical*); *Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 641-642; see also *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754,

761.) Harris made this prima facie case for a petition to compel arbitration under the 2007 contract.

Even if Harris made this prima facie case, under certain circumstances the trial court retained the authority to delay arbitration or to deny the petition to compel. The trial court has discretion to delay an arbitration order if it finds that some issues between the petitioner and the opponent of the petition are subject to arbitration, but others are not. (§ 1281.2(c), par. 3.) It also has the power to deny arbitration altogether if a third party who is not subject to arbitration is involved in the transactions forming the basis of the underlying action. If one of the parties to the arbitration agreement is also a party to a pending court action arising from the same transaction or a series of related transactions involving a third party, and if there is a possibility of conflicting rulings on a common issue of law or fact, the trial court has discretion to decline to enforce the arbitration agreement. (§ 1281.2(c), pars. 1, 4; *Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 564-565.) While strong public policy favors enforcement of an arbitration agreement, an equally compelling argument exists for refusing to enforce one when to do so creates the possibility of inconsistent outcomes and duplication of effort. (*Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 475.) Harris asked the trial court to find that Piedmont's complaint raised no Harris issues that fell outside of the arbitration agreement. It also argued that Gray's presence did not raise third party common issues. The trial court ruled against Harris on both arguments.

A careful review of the statute and California Supreme Court authority reveals three different sets of issues that may arise when a trial court is faced with a petition to compel arbitration. The first set focuses on the prima facie case for a petition to compel—whether an arbitration agreement exists and, if so, whether enforcement of it is negated by waiver, revocation, or fraud in the execution. (§ 1281.2, subs. (a), (b), (c), par. 2; *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at pp. 413-417.) The second requires the trial court to consider whether it is appropriate to delay arbitration of some issues between the parties to an arbitration agreement because other issues between them fall outside that agreement. (§ 1281.2(c), par. 3.) The third asks

whether compelling the dispute between the parties to arbitration is practical if common issues involving a third party that is not subject to arbitration may result in conflicting rulings if part goes to arbitration and part proceeds in litigation. (§ 1281.2(c), pars. 1, 4.) In the case at bar, the trial court considered the second and third set of these issues and rejected Harris's petition to compel arbitration on the basis of each of them. Although stemming from the same statute, each issue requires its own unique analysis which may be based on differing evidence. Thus, we consider separately each of these potential grounds for error on appeal.

### *C. Issues Arising out of Single Contract*

The trial court rejected Harris's request to make a conclusive factual finding that all the issues in dispute between Piedmont and Harris arose from the 2005 arbitration agreement and that none of those issues arose in the 2007 agreement that did not include such a clause. Instead, the trial court accepted the allegations of Piedmont's complaint that the dispute arose from both contracts as true. This decision was part of the trial court's analysis of whether some issues between Harris and Piedmont were subject to arbitration, but others were not. A finding that some parts of their dispute were arbitrable but others were not would have allowed the trial court to conclude that litigating the nonarbitrable aspects of the case would make arbitrating the aspects subject to the arbitration agreement unnecessary. That conclusion would give the trial court the authority—not to *deny* the petition to compel arbitration—but to *delay* arbitration of the part of the case falling within an arbitration clause while the rest of the case between Piedmont and Harris was litigated. (§ 1281.2(c), par. 3.) If the trial court had agreed with Harris that all aspects of the case Piedmont alleged fell within the arbitration agreement, it would have had no authority to delay arbitration, absent another independent reason to deny the petition to compel.

On appeal, Harris contends that the trial court erred by failing to review the contractual evidence and failing to make a factual finding whether all or only some of Piedmont's claims arose under the 2007 contract requiring arbitration. In essence, Harris asserts that case law *requires* that the trial court undertake this inquiry and make a

conclusive finding on this underlying issue in Piedmont’s case. Whether this is correct is unclear. In some contexts—if an issue arose about whether a valid arbitration agreement existed because the complaint alleged that the contract was fraudulent, or if Piedmont asserted a waiver or revocation defense to Harris’s petition to compel—the trial court is required to conduct an evidentiary hearing on these issues and to determine them on the basis of competent evidence.<sup>5</sup> (See *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at pp. 413-417; *Molecular Analytical*, *supra*, 186 Cal.App.4th at p. 705; *Mansouri v. Superior Court*, *supra*, 181 Cal.App.4th at pp. 641-642; see also §§ 1281.2, subds. (a), (b), (c), par. 2, 1290.2; *Hotels Nevada v. L.A. Pacific Center, Inc.*, *supra*, 144 Cal.App.4th at pp. 761-762.) By contrast, when the issue before the trial court is whether claims involving a third party are interrelated with those asserted against the party seeking to arbitrate its dispute such that common issues might result in conflicting rulings, appellate courts allow consideration of the allegations of the complaint. (See, e.g., *Lindemann v. Hume*, *supra*, 204 Cal.App.4th at pp. 566-568; *Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 691, fn. 7; *Molecular Analytical*, *supra*, 186 Cal.App.4th at p. 708; *Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, 1319-1320; see also § 1281.2(c), pars. 1, 4.)

It is unclear whether a trial court faced with the question of whether Piedmont’s claims against Harris arose from both contracts or only one would be entitled to rely on the allegations of the complaint. (See § 1281.2(c), pars. 1, 4.) We need not resolve this question because even if we assume *arguendo* that the trial court had insufficient evidence to support this aspect of its ruling, Harris cannot prevail on appeal unless it also establishes that the trial court erred when denying the petition to compel arbitration on its alternative ground that its dispute with Piedmont was intertwined with Piedmont’s dispute with Gray.

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<sup>5</sup> Harris has already established a *prima facie* case for its petition and Piedmont did not assert the statutory defenses of waiver or revocation.

#### D. *Issues Involving Gray*

The trial court rejected Harris's arguments that Piedmont's claims against it were separate from Piedmont's claims against Gray; that the Piedmont claims against Harris were easily severable from those against Gray; and that the two sets of issues involved no common questions of law or fact. On appeal, Harris does not contest that Gray is a third party in this litigation. However, it does challenge the sufficiency of evidence to support the trial court's conclusions (1) that Piedmont's claims against Gray and its claims against Harris arose out of a series of related transactions; (2) that there were common issues of law and fact in the two aspects of Piedmont's case; and (3) that those common issues raise a substantial risk of conflicting rulings if arbitration was compelled. ~ (AOB 22)~ (§ 1281.2(c), pars. 1, 4.)

Harris argues that a review of the underlying contracts necessarily establishes that in November 2008, its obligations on the assessment district project ended when Gray took them on. Reasoning that the two transactions were clearly separate, did not raise common issues, and did not create a risk of conflicting rulings in arbitration and in litigation, Harris contends that the trial court erred by finding otherwise. In essence, Harris asserts that the November 2008 "handoff" of responsibilities necessarily separates Piedmont's claims against Harris and Gray. However, a temporal separation does not necessarily negate the existence of a series of related transactions involving a third party. (*Birl v. Heritage Care, LLC, supra*, 172 Cal.App.4th at p. 1320; see *Lindemann v. Hume, supra*, 204 Cal.App.4th at pp. 566-567.) Even if they were separate in time, the decisions Harris made in the early stage of the assessment district plans and specifications could have affected the final set that Gray issues, such that they were related transactions.

When determining whether the trial court acted within its discretion when finding that the claims Piedmont filed against Harris arose out of the same transaction or a series of transactions related to those that the city raised against Gray, we may consider the factual allegations of the complaint. (See, e.g., *Lindemann v. Hume, supra*, 204 Cal.App.4th at pp. 566-568; *Metis Development LLC v. Bohacek, supra*, 200 Cal.App.4th

at p. 691, fn. 7; *Molecular Analytical, supra*, 186 Cal.App.4th at p. 708; *Birl v. Heritage Care, LLC, supra*, 172 Cal.App.4th at pp. 1319-1320.) Piedmont's pleading alleges that Harris and Gray jointly and severally created the plans and specifications for the assessment district project. In addition to this evidence, Harris's own declarations tend to prove that it had an ongoing role in the assessment district project after November 2008. Specifically, a declaration from Harris officials states that after the contractual shift in responsibilities, Harris received Gray's drawings of the project and provided comments about a preliminary set of drawings to Gray.

On appeal, Harris protests that this evidence shows that its involvement was minor and could not form the basis of liability for the final plans and specifications that Gray issued. However, that argument goes to the weight of the evidence, not to its admissibility. (See Evid. Code, §§ 210, 350.) We ask only whether there was sufficient evidence from which the trial court could find that the two sets of Piedmont claims arose from a series of related transactions. In our view, the complaint and the Harris declaration provide substantial evidence supporting the trial court's finding that Piedmont's claims against Harris and its claims against Gray arose out of a series of related transactions.

Next, we must consider the trial court's determination that common issues of law and fact raised the possibility of conflicting rulings in a Harris arbitration and the Gray litigation. On appeal, we review this determination for an abuse of discretion. (*Metis Development LLC v. Bohacek, supra*, 200 Cal.App.4th at p. 691.) We will not disturb a trial court's discretionary ruling refusing to enforce an arbitration agreement unless that decision exceeds the bounds of reason. (*Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC, supra*, 150 Cal.App.4th at p. 475.)

If the trial court's order turns on a factual finding made on the basis of disputed facts, we first determine if there is substantial evidence to support that finding. (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406; see *Molecular Analytical, supra*, 186 Cal.App.4th at p. 708.) When determining the factual issue whether there are common issues raising the potential for conflicting rulings, we may consider what the

pleadings allege. (See *Metis Development LLC v. Bohacek*, *supra*, 200 Cal.App.4th at p. 691, fn. 7.) Piedmont's allegation that Harris and Gray jointly and severally created the assessment district project plans and specifications constitutes substantial evidence to support the trial court's factual determination that there were common issues raising the potential for conflicting rulings if one part of the interconnected case went to arbitration and another aspect of it proceeded in litigation. Thus, the trial court did not abuse its discretion when it denied Harris's petition to compel arbitration.

We close by noting that our decision is based on the evidence that was before the trial court in November 2011, when it denied Harris's petition to compel arbitration. (See *Hotels Nevada v. L.A. Pacific Center, Inc.*, *supra*, 144 Cal.App.4th at p. 763, fn. 3; *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 112 [when unnamed third party was not identified until after ruling, later substitution of third party for Doe defendant does not allow appellate court to consider new third party].) While we do not rely on the later-filed cross-complaint in which Gray asserts claims against Harris for indemnity and declaratory relief, the fact that this cross-complaint was filed affirms the wisdom of the trial court's exercise of its discretion.<sup>6</sup>

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<sup>6</sup> We took judicial notice of this cross-complaint without making a determination of relevance. We now conclude that this evidence is not relevant to our appeal because the cross-complaint was not before the trial court when it decided the motion to compel arbitration. (See *Hotels Nevada v. L.A. Pacific Center, Inc.*, *supra*, 144 Cal.App.4th at p. 763, fn. 3; *Bos Material Handling, Inc. v. Crown Controls Corp.*, *supra*, 137 Cal.App.3d at p. 112.)

The order denying Harris's petition to compel arbitration is affirmed.

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REARDON, J.

We concur:

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RUVOLO, P. J.

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BASKIN, J.\*

\* Judge of the Contra Costa Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.