Case No. A133983

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

HARRIS & ASSOCIATES,

Appellant,

v.

CITY OF PIEDMONT,

Respondent.

Appeal from the Superior Court of the State of California
County of Contra Costa
The Honorable Judith Craddick, Judge Presiding
Superior Court Action No. MSC1100762

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
[Cal. Rules of Court, Rule 8.208]

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party filing this Certificate (Cal. Rules of Court, Rule 8.208(d)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, Rule 8.208(d)(2)):

Harris & Associates, Inc.

Harris & Associates Employee Stock Ownership Trust

City of Piedmont

Robert Gray & Associates

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I. INTRODUCTION

This appeal arises from the Superior Court's denial of Defendant Harris & Associate's ("Harris") Motion to Compel Arbitration. As aptly demonstrated from a review of the City of Piedmont complaint, the relevant contracts between the parties, the operative pleadings, and the trial court's tentative and final rulings, the motion was properly denied pursuant to Code of Civil Procedure section 1281.2. The trial court correctly determined that Harris is a party to the pending court action together with a third party, Robert Gray & Associates ("RGA"), and that the claims against Harris and RGA arise out of the same facts, creating a possibility of conflicting rulings on common issues of law and fact. Accordingly, the court properly exercised its discretion pursuant to CCP 1281.2(c) in determining that requiring the arbitration of only the claims against Harris would not promote judicial economy and thus, the motion to compel arbitration should be denied.

Harris filed this appeal, proffering a plethora of unmeritorious arguments as to why the trial court's order was inadequate. However, none of appellant's arguments demonstrate an abuse of discretion for which this Court should reverse the ruling. Appellant's brief repeatedly relies on erroneous "lack of evidence" arguments, disregarding the agreements and declarations on record. Additionally, appellant continually argues that the court erred because public policy generally favors arbitration. However,

appellant fails to consider that the Legislature specifically enacted CCP 1281.2(c) to allow courts to deny arbitration in situations involving third parties which is precisely the situation presented to the lower court in this instance.

Additionally, RGA has recently filed a cross complaint against Harris[1]. The existence of a cross complaint between the two defendants adds further support to the trial court's already sound reasoning for denying the motion to compel arbitration. As such, respondent respectfully request that this Court affirm the Superior Court's ruling.

II. FACTUAL AND PROCEDURAL BACKGROUND

For approximately 15 years, Piedmont employed Harris as an on-call City Engineer. (CT 127 [Moore Declaration at ¶3]). On May 2, 2005, the City Council of Piedmont approved a Resolution of Intention to create the Piedmont Hills Underground Assessment District (herein after, the "District") for the purpose of undergrounding existing overhead and ground-level utility facilities in a specific area of the City (contained in a boundary map, which the City Council also approved on this date) (hereinafter, the "Project"). (CT 12; CT 164-199 [Complaint, attached as Exhibit A to Harris' Request for Judicial Notice in Support of its Motion]).

[1] The RGA cross complaint against Harris was filed after the trial court denied the Harris motion, though the likelihood of such an indemnity cross complaint was discussed in the parties' memoranda. Respondent has filed an Application to Augment the Record on Appeal, which Appellant has opposed. As of the filing date of this brief, there has been no ruling on the application.

The City Council then entered into a specific professional services agreement with Harris for those activities associated with the District in Furtherance of the Project. This contract (hereinafter "2005 Utility Contract") was signed on May 2, 2005 and incorporated by reference both the Proposal to Provide District Engineering Services signed by the parties, dated October 11, 2002, and an estimate of costs that Harris prepared specifically for the District. (CT 142-148). The 2005 Utility Contract contains a mediation clause, and the contract does not contain an arbitration provision. (*Id.*)

Thereafter, the City entered into a second contract with Harris dated March 1, 2007 (hereinafter the "City Engineer Agreement"). (CT 129-141). Harris' obligations under the City Engineer Agreement included, among other things, reviewing standards for construction with the City, reviewing and supervising engineering aspects of development, reviewing and approving improvement plans prepared by outside engineers, inspecting construction sites, and performing other statutory responsibilities of City Engineer. (*Id*). The 2007 City Engineer Agreement does not make specific reference to the Piedmont Hills Undergrounding Project. This contract does contain a binding arbitration clause.

On November 3, 2008 an Amended Agreement regarding engineering services for the Piedmont Hills Utility Underground Assessment District (hereinafter "Amended Agreement") was signed. (CT

300-305). The amendment provided that Harris would continue performing Assessment Engineering/Engineer of Work duties, and that third party RGA would, among other things, prepare the bid packages and job instructions, complete the composite drawings, and perform field analysis and review. (*Id*). A contract was signed between RGA and the City on November 3, 2008 (hereinafter "2008 RGA Contract") which incorporated some of the engineering duties originally assigned to Harris under the City Engineer Agreement, and the RGA contract does not contain an arbitration clause. (CT 149-155).

On April 1, 2011 City of Piedmont filed its complaint in Contra Costa Superior Court against Harris and RGA. The complaint alleges that Harris breached both of its contracts with the City, and that RGA breached its contract with the City. The complaint also contains a single cause of action for negligence against both Harris and RGA. (CT 12; 164-169).

On August 12, 2011, Harris filed a motion to compel arbitration, seeking an order compelling the City to arbitrate its dispute with Harris. On September 21, 2011, the City filed its Opposition to the Motion to Compel Arbitration. Harris then filed its Reply to the Opposition on September 27, 2011. On October 5, 2011 the matter was heard before Honorable Judith Craddick, based upon a tentative ruling on October 3, 2011. (CT 308-15). On October 21, 2011 the trial court expressly adopted its prior tentative ruling and denied the petition to compel arbitration. (CT

326-27). The court also sustained Harris' Evidentiary Objections to each of the City's declarations. (CT 309).

On December 7, 2011 Harris filed its Notice of Appeal. On March 19, 2012, RGA filed a cross-complaint against Harris for full or partial indemnity and declaratory relief. RGA requests a judicial determination of the respective rights and duties of RGA and Harris with respect to the damages claimed in the City's complaint.

III. THE STANDARD OF REVIEW ON APPEAL

An order denying a petition to compel arbitration on grounds of the possibility of conflicting rulings on common issues of law or fact pursuant to the third-party exception of Code of Civil Procedure (CCP) section 1281.2 is reviewed for abuse of discretion. (*Lindemann v. Hume* (2012) 138 Cal.Rptr.3d 597, 604). "If the third-party exception applies, the trial court's discretionary decision as to whether to stay or deny arbitration is subject to review for abuse." (*Laswell v. AG Seal Beach, LLC*, (2010) 189 Cal.App.4th 1399, 1406). CCP 1281.2(c), "is discretionary with the trial court" and provides that "contractual arbitration 'may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon.'" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.*, (2010) 186 Cal.App.4th 698, 704-705, citing *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 348).

Appellant bears the burden of proof to show an abuse of discretion, which it cannot meet simply by arguing a different ruling would have been "better"; appellant must show that the trial court "exceeded the bounds of reason, all of the circumstances before it being considered." (*Denham v. Superior Ct.* (1970) 2 Cal.3d 557, 566 (citation omitted)). That is, as long as the trial court applied governing rules of law in exercising its discretion, the court's decision cannot be said to amount to a reversible "abuse" of discretion. (*Department of Parks and Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 831). "Under the "abuse of discretion" standard of review, appellate courts will disturb discretionary trial court rulings *only* upon a showing of 'a clear case of abuse' *and* 'a miscarriage of justice.'" (*Rutter Group*, California Practice Guide: Civil Appeals and Writs, Chapter 8 [8:86], citing *Blank v. Kirwan* (1985) 39 C3d 311).

If the result reached by the lower court was correct on any basis--even on one it did not consider and even if the reasons it did consider were erroneous--its decision will not be disturbed. (*Farmers Ins. Exch. v. Zerin* (1997) 53 Cal.App.4th 445, 459; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329). "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." *Davey*, at 329.

IV. LEGAL ARGUMENT

A. THE CROSS-COMPLAINT FILED BY RGA AGAINST HARRIS FOR INDEMNITY INDISPUTABLY CREATES COMMON ISSUES OF FACT AND LAW AND MAKES SEVERANCE IMPRACTICAL

Appellant's argument that the claims against Harris are separate and easily severable from RGA is no longer relevant because RGA has filed a cross-complaint against Harris. Therefore, Harris is indisputably a party to the action between the City and RGA by virtue of its status as a cross-defendant. Appellant's argument that "there was a clean and complete separation of legal and fact issues between Harris (which had been relieved of its obligations to perform such tasks) and RGA (which had accepted the obligations) back in 2008" no longer applies. (Appellant's Brief, p. 25). Assuming that statement was ever true, it clearly is no longer remotely accurate. There cannot be a "clean and complete separation" between Harris and RGA while RGA is seeking indemnity from Harris. Harris can no longer claim that it has "no involvement" in the City's claims against RGA or in the suit altogether by virtue of the RGA cross-complaint. No arbitration clause exists between Harris and RGA and thus, Harris must appear in court to defend itself as a cross-defendant.

Although the cross-complaint had not been filed at the time of the trial court's order, an abuse of discretion standard considers all relevant evidence, even that which the trial court did not consider in making its

decision. (*Farmers Inc. Exch.*, *supra* at 459; *Davey*, *supra* at 329). Thus, although the cross-complaint had not yet been filed, it now lends additional support to the trial court's denial of arbitration. The mere existence of RGA's cross-complaint is sufficient to uphold the lower court's finding that conflicting issues of common law and fact exist and thus, arbitration would not promote judicial economy. To resolve claims that now indisputably relate to both Harris and RGA in different forums could result in different rulings, and possibly subject RGA to a binding arbitration decision, despite never having agreed to an arbitration clause.

B. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO MAKE A FACTUAL DETERMINATION AS TO WHETHER THE CITY ALLEGED FACTUALLY SUPPORTABLE CLAIMS UNDER THE 2005 AGREEMENT WITH HARRIS

Appellant's belief that the trial court abused its discretion by failing to make a conclusive finding as to whether the complaint contains factually supportable claims under the 2005 Utility Contract is misguided. As noted in detail above, the relationship between the City and Harris is controlled by two agreements. The agreement specific to the project at issue in this case, the 2005 Utility Contract, does not contain an arbitration clause. (CT 19-23 [Exhibit A to Complaint]). The 2007 City Engineer Agreement for general city engineering services does contain an arbitration clause. (CT 58-70 [Exhibit A to Harris' Notice of Motion and Motion to Compel Arbitration and Stay Litigation]). The inconsistent ADR provisions

contained in each contract create a clear conflict. The law is well-settled that there must be a voluntary agreement to arbitrate. (*Mitri v. Arnel Management Co*. (2007) 157 Cal.App.4th 1164, 1170). Even though the law favors agreements for arbitration of disputes between parties, "[t]here is no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Romo v. Y-3 Holdings, Inc*. (2001) 87 Cal.App.4th 1153, 1158 (citations omitted)). In an evident attempt to resolve this conflict, Harris asked the lower court to conclusively determine that the 2005 Utility Contract (without the arbitration clause) was somehow irrelevant to the proceedings, despite the fact that the 2005 contract is specifically identified in the complaint as one basis for the City's breach of contract claims.

Appellant contends that the lower court erred by declining to make a factual finding as to the sufficiency of the complaint and such "legal errors demonstrate an abuse of discretion." (Appellant's Opening Brief (hereinafter "Appellant's Brief"), dated May 16, 2012, p. 17). Appellant states that the "trial court appears to have been laboring under a misimpression" and was "affirmatively required" to make a conclusive finding that the City has no factually supportable claims under the 2005 Utility Contract. (*Id*. at p. 15-16). However, it is the appellant, not the trial court, who is laboring under a misimpression regarding whether the lower

court was mandated to make such determinations regarding the City's causes of action.

The primary case relied on by the appellant, *Rosenthal v. Great Western Fin. Securities Corp.*, (1996) 14 Cal.4th 394, is clearly distinguishable. The *Rosenthal* court analyzed whether factual discrepancies should have been resolved regarding the permeation of fraud in an arbitration clause. The court concluded "where- as is common with allegations of fraud as are made here- the enforceability of an arbitration clause may depend upon which of two sharply conflicting factual accounts is to be believed" the court should resolve the factual discrepancies. (*Id*. at 414). The *Rosenthal* court found that conducting a factual inquiry to assess if fraud had in fact permeated the arbitration clause was *essential* to the determination of whether to grant a motion to compel arbitration. (*Id*).

In contrast, here the dispute regarding whether the City has alleged factually supportable claims under the 2005 Utility Contract is not a determinative issue for purposes of Harris' motion to compel. The lower court was not determining the validity of the 2007 City Engineer Agreement's arbitration clause, but rather whether the existence of *other* contracts and the involvement of *other* parties which are indisputably not subject to the arbitration clause created the possibility of conflicting rulings. In fact, neither the City nor the trial court disputes whether the arbitration clause contained in the 2007 City Engineer Agreement is valid.

Rather, the controlling question is whether a possibility of conflicting rulings gives the court discretion to deny arbitration pursuant to section 1281.2. Therefore, unlike in *Rosenthal*, the enforceability of the arbitration clause is not dependent on the resolution of the conflicting factual issues.

The trial court did not misinterpret or misunderstand the law. Rather, the trial court recognized that determining whether the 2005 Utility Contract is the subject of the City's claims is nonessential to the ultimate holding that arbitration would create the possibility of conflicting rulings on common questions of law and fact. As the lower court clearly articulates in the tentative ruling, the fact that RGA "is not a party to the 2007 on-call agreement" and the fact that "plaintiff's claims against Harris and plaintiff's claims against RGA arise out of a series of related transactions" create the basis for holding that there is a substantial risk of conflicting rulings.

Whether the 2005 Utility Contract, rather than just the 2007 City Engineer Agreement, between Harris and the City constitutes the basis for the City's claims would only lend *additional*, but *not necessary* support to the finding that the motion should be denied.

Under abuse of discretion review, the trial court's decision cannot be reversed merely because a different ruling might have been "better". (*Denham, supra* at 566). Appellant may believe a conclusive factual determination would have been better, but the court's refusal to do so does

not exceed the bounds of reason. Declining to conclusively decide at this early stage the merit of certain causes of action when such a decision would not be determinative of the ultimate question as to arbitration certainly is not an abuse of discretion.

Further, the *Rosenthal* court specifically noted that in the context of a motion to compel arbitration, it is not appropriate for the court to make a determination regarding the merit of plaintiff's causes of action. "In deciding an application to compel, in contrast, the superior court does not decide whether the plaintiff's causes of action have merit, although some factual questions considered in deciding the application may overlap those raised by the plaintiff's claims for relief." (*Id*. at 413). Therefore, the lower court was correct in declining to address the factual sufficiency of the complaint since it would speak to the merit of plaintiff's causes of action, while not impacting the outcome of the motion to compel arbitration. Later in its brief, appellant concedes that it would not be proper for the court to make conclusive findings as to the merit of the causes of action.

In arguing that there is no evidence to support Harris' involvement in the acts alleged in the complaint, appellant admits that, "the trial court could not rule on that substantive issue (both because of the nature of the motion and because that claim would properly be decided in arbitration)…" (Appellant's Brief, p. 29). Because determining whether the complaint contains factually supportable claims under the 2005 Utility Contract

speaks to the merit of the causes of action and resolution of the dispute would not change the outcome of the court's ruling, the lower court did not abuse its discretion in declining to make such a factual finding.

Further, even if the lower court did err in declining to make a conclusive factual finding, it would not have changed the outcome of the order. As discussed above, whether or not the 2005 Utility Contract was the basis for some of the City's claims was not a determinative issue. Even if the court had concluded that the 2005 Utility Contract was irrelevant to these proceedings, there were other persuasive reasons, such as the presence of RGA in the suit, to support denying the motion. The decision will not be disturbed if the result reached by the lower court was correct on any basis - even on one it did not consider and even if the reasons it did consider were erroneous. (*Farmers Ins. Exch., supra* at 459). Thus, if this Court agrees with appellant that a conclusive factual finding was required, the decision should still not be disturbed since the result reached was ultimately correct.

Appellant further argues that the court "aggravated the error when it wrongly accepted Piedmont's unverified complaint allegations as established facts despite the absence of supporting evidence and the existence of contrary evidence." (Appellant's Brief, p. 12). In support of this argument, appellant cites *Hotels Nevada v. L.A. Pacific Center, Inc.*, (2006) 144 Cal.App.4th 754, in which the court again determines whether

fraud invalidated the arbitration clause. Appellant attempts to compare *Hotels Nevada*'s criticism of the lower court basing its determination of fraud "exclusively upon the unverified complaint allegations" to the statement in the tentative ruling that the lower court "must take plaintiff's claims against Harris at face value." (Appellant's Brief, p. 17, citing *Hotels Nevada, supra* at 762). However, the lower court did not rely "exclusively" on the complaint in finding that overlapping parties and factual issues exist. Rather, the lower court reviewed the agreements between the City, Harris and RGA, which clearly demonstrate a potential for conflicting rulings and results. When "determining whether an arbitration agreement applies to a specific dispute, the court may examine only the agreement itself and the complaint filed by the party refusing arbitration." (*Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353). Thus, the court did not abuse its discretion by relying on the complaint and the agreements to render its decision.

C. WHETHER THE 2005 AGREEMENT IS APPLICABLE IS IRRELEVANT BECAUSE OF THE EXISTENCE OF A THIRD PARTY, THEREBY CREATING THE POSSIBILITY OF CONFLICTING RULINGS

Regardless of whether the 2007 City Engineer Agreement's arbitration clause is controlling with respect to the claims against Harris, or whether the court erred in not making such a factual determination, the court still did not abuse its discretion in denying the motion to compel arbitration. Pursuant to CCP 1281.2(c), the court properly exercised its

discretion in determining that RGA's involvement in the pending court action as a third party creates the possibility of conflicting rulings on a common issue of law or fact. Code of Civil Procedure 1281.2 subsection (c) states in relevant part that:

> On a petition of a party to an arbitration agreement…the court shall order the petitioner and the respondent to arbitrate…unless it determines that…a party to the arbitration agreement is also a party to a pending court action…with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting ruling son a common issue of law or fact.

Code of Civil Procedure 1281.2(c) specifically gives courts discretion to not enforce the arbitration agreement if the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party. "The Legislature has…authorized trial courts to refuse enforcement of an arbitration agreement where, as here, there is a possibility of conflicting rulings." (*C.V. Starr & Co. v. Boston Reinsurance Corp*. (1987) 190 Cal.App.3d 1637, 1642). While there is a strong public policy in favor of arbitration, courts should not overlook "the equally compelling argument that the Legislature has also authorized trial courts to refuse enforcement of an arbitration agreement when, as here, there is a possibility of conflicting rulings." (*Id*).

On appeal, the trial court's determination of conflicting rulings on common issue of fact and law is reviewed under the abuse of discretion standard.

> "The standard of review for an order staying or denying arbitration under section 1281.2, subdivision (c) is the well-known test for abuse of discretion. Thus, the trial court's order will not be disturbed on appeal unless it exceeds the bounds of reason."
>
> [*Henry v. Alcove Investment, Inc.*, (1991) 223 Cal.App.3d 94, 101 (citations omitted).]

Here, the lower court correctly identified RGA as a third party to the suit and accordingly, conducted the appropriate analysis under CCP 1281.2(c). Appellant concedes that the trial court had discretion to determine whether a conflict exists.

> "Specifically, once Harris met its burden, and the court correctly determined that the litigation involved RGA (who was not a party to the 2007 Contract), it was entitled to consider admissible evidence on the issue of whether the litigation involved the same transaction (or series), whether there existed common issues of law or fact, and whether there existed a possibility of conflicting rulings on such issues (if they existed)."
>
> [Appellant's Brief, p. 22]

Accordingly, after a review of the evidence and arguments by the parties, the court determined, "Defendant Robert Gray & Associates ("RGA") is not a party to the 2007 on-call agreement between plaintiff City and defendant Harris" and "plaintiff's claims against Harris and plaintiff's

claims against RGA arise out of a series of related transactions that plaintiff entered into in order to complete the subject engineering project." (CT 309). The court rejects Harris' argument that the City's claims against Harris are easily severable from those against RGA and involve no common question of law or fact. (*Id*. "This argument lacks merit.").

1. Appellant's Argument That the Trial Court Lacked Any Evidence in Support of its Findings is Erroneous

Appellant erroneously argues that the court had *no* evidence to support its findings, disregarding the agreements and declarations before the trial court. Appellant argues that "there is *no evidence* to support the trial court's conclusion that conflicting rulings were a real danger, *no evidence* to support the trial court's conclusion that it could not sever or stay, and *no evidence* to support the trial court's implied conclusion that denying arbitration was the best available option." (Appellant's Brief, p. 23 (emphasis added)). This bold statement is blatantly false and disregards the other evidence before the trial court. While appellant is correct that the court "excluded all of the substantive evidence that Piedmont had submitted" based on the Evidentiary Objections, appellant fails to recognize that the relevant agreements were properly submitted into evidence by Harris itself. (Appellant's Brief, p. 18). The 2005 Utility Contract, the 2007 City Engineering Contract, and the 2008 RGA Contract appear repeatedly in the trial court record:

- As exhibits to the complaint (CT 12)
- As exhibits to the Harris' Request for Judicial Notice (CT 162);
- As exhibits to Harris' Declaration of Russell A. Moore in Support of Motion to Compel Arbitration (CT 126);

The 2008 Amended Agreement is also well established in the trial court record:

- As exhibit to Harris' Reply Declaration of Russell A. Moore (CT 296);

Based on the evidence before the lower court, it cannot be reasonably disputed that the Superior Court proceeding as to both defendants arises out of the same transaction or series of related transactions. The claims against Harris and RGA clearly relate to the same public works project, for which both parties performed substantial work. The agreements before the court describe the duties each party was contractually obligated to perform and the complaint demonstrates how Harris and RGA allegedly fell short of these duties.

Respondent disputes appellant's contention that a complete "handoff" of all the duties and tasks from Harris to RGA occurred in 2008. The 2008 Amended Agreement indicates that certain tasks were still to be split between Harris and RGA and Harris was still expected to perform certain engineering duties. (CT at 300). For example, the 2008

Amendment states that Harris "shall continue to provide Assessment Engineering services and perform the duties of the Engineer of Work", including drafting and finalizing the Preliminary Engineer's Report & Diagram. (*Id*.) Harris admits that the "Amendment *reduced* Harris' scope of services on the Project." (CT 127 [Moore Declaration (emphasis added)]). In Moore's declaration, he does not contend that Harris was completely removed from the project, but rather that Harris' involvement was minimized.

Further, Harris' declarant Colicchia admits that, as the City Engineer, Harris was in constant contact with RGA to procure the drawings, specifications, and other information. (CT 81-83 [Colicchia Declaration ¶5-13]). Findings regarding to what extent Harris supervised RGA, and to what extent each depended on representations of each other, are also ripe for inconsistency. Even if appellant's suggestion that a complete "handoff" occurred is true, that would not necessitate that the claims against Harris and RGA are completely separate and easily severable. RGA took over a project that Harris had already started. Therefore, problems that arose after RGA took over the project could still have been caused or exacerbated by Harris' prior negligence.

A determination must be made as to who was ultimately at fault for the various problems encountered during this project. Allowing the claims against Harris to proceed in arbitration and the claims against RGA to

proceed to trial would quite likely result in inconsistent apportionment of fault percentages. For instance, an arbitrator might find Harris 20% responsible and RGA 80% responsible, while a jury might find RGA 20% responsible and Harris 80% responsible. This inconsistent and irreconcilable result would wreak havoc, triggering a shortfall for the City which could collect only 40% of its damages (20% from each Harris and RGA)[2].

The trial court was privy to the many possibilities of conflicting rulings and thus, appropriately exercised its discretion pursuant to CCP 1281.2(c).

Further, as previously discussed, RGA has filed a cross-complaint against Harris for indemnity. There is no arbitration agreement between RGA and Harris. Thus, Harris will be required to defend itself in court as a cross defendant on the very same issues and claims. Therefore, it is nonsensical to have Harris disputing the same issues based on the same facts and law in arbitration against the City and in trial against RGA.

Further, the tentative ruling explains that the trial court considered the Declarations of Colicchia and Moore in Support of the Motion to Compel Arbitration when deciding that common questions of law or fact are present. (CT 309). The court found that the claims against Harris and

[2] Conversely, there could be inconsistent outcomes which would result in a windfall to the City, a scenario which would undoubtedly become the breeding ground for loud protests from both defendants.

RGA were not easily severable because "RGA took over the project on which Harris had worked for several years, and Harris continued to have at least a modest role in that project." (*Id*). The court then cited paragraphs 8-13 and Exhibit "D" of the Colicchia Declaration and corrected exhibit "C" of the Moore Declaration. (*Id*). In Colicchia's declaration he states that in 2009 Harris was authorized to review RGA's drawings for the Piedmont Hills Utility Underground Assessment District. (CT 82-83 [Colicchia Declaration, ¶8-12]). As such, Harris admits that it was involved to some degree with the project after 2008 and was collaborating with RGA. Not only did the court have sufficient evidence before it, the court clearly considered the evidence in arriving at its decision. Thus, appellant's argument that *no* evidence supports the trial court's decision is so manifestly erroneous that it calls into question the good faith nature of the appeal.

Additionally, appellant argues that the court abused its discretion by not sufficiently explaining what issues are common to both Harris and RGA. Appellant relies on *Metis v. Bohacek*, (2011) 200 Cal.App.4th 679, to support this argument, citing the *Metis* court's statement that "we are given no idea by the court's order – or by the respondent's brief in the trial court…precisely what issues are common to both." (Appellant's Brief, p. 23-24, citing *Metis, supra* at 691-2). However, appellant fails to point out that the *Metis* court ultimately agreed with the trial court's conclusion that a

risk of conflicting rulings exists. After conducting its own review of the record, the *Metis* court held that, "it would not be arbitrary or illogical for the court to conclude that there is at least a risk of conflicting rulings on some common questions." (*Metis, supra* at 692). While appellant may prefer that the tentative ruling had precisely listed each common fact upon which the court based its ruling, the court was not obligated to do so. As illustrated by *Metis*, an order lacking in specificity does not constitute an abuse of discretion and is therefore, not grounds to overturn the decision.

2. The Court Did Not Abuse it's Discretion in Finding that Denying Arbitration was the Best Alternative Pursuant to Code of Civil Procedure 1281.2(c)

Appellant's argument that the claims against Harris and RGA could have been severed and therefore, the trial court's decision amounts to an abuse of discretion is misguided. For the reasons stated in detail above, severance is not practical. The fact that the City had "plead two distinct causes of action for breach of contract - one against RGA and one against Harris" is irrelevant to whether common issues of fact and law could create conflicting rulings. (Appellant's Brief, p.28). Further, the City's negligence cause of action names both parties, for the obvious reason that the City alleges that both parties were negligent in their work on the same project. Most importantly, the cross-complaint filed against Harris by RGA indisputably creates claims between Harris and RGA regarding the project that cannot be severed.

Appellant further argues that the trial court lacked evidence in support of its finding that denial of Harris' arbitration was the best alternative. Appellant relies largely on the public policy favoring arbitration as the grounds for its argument. However, as discussed previously, "[t]here is no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Romo, supra* at 58 (citations omitted)). Appellant's statement that the "trial court's tentative ruling suggests it ignored this strong policy backdrop favoring arbitration" disregards that the Legislature has specifically provided that arbitration may not be the best solution in third party situations such as this. (Appellant's Brief, p. 31). Courts should not overlook "the equally compelling argument that the Legislature has also authorized trial courts to refuse enforcement of an arbitration agreement when, as here, there is a possibility of conflicting rulings." (*C.V. Starr & Co., supra* at 1642).

Further, the trial court's choice of denying the arbitration, rather than one of the other options under CCP 1281.2(c), was not an abuse of discretion. Any arbitration determination would create the distinct possibility of conflicting rulings regardless of whether trial court proceedings came before or after arbitration.

Assuming the arbitration occurred first, and the arbitrator determined that Harris was 20% at fault and RGA was 80% at fault. RGA would not be bound by that determination (as a non-party to the arbitration

proceedings) and RGA would predictably resist any effort to impose that ruling upon the later trial court proceedings. This situation was discussed in *C.V. Starr & Co*, *supra*, where the appellate court rejected the argument that the trial court should have stayed the court action until arbitration was complete and then taken the arbitration award into account when deciding allocation among the others. The court reasoned that "the potential result of the suggested procedure would be to give the arbitrators' decision binding effect on all the other [parties] as well, even though, of course, they are not legally bound to arbitrate." (*Id*. at 1641). The court ultimately found that the "optimal procedure…seems to be a single proceeding bringing together all the affected parties for an orderly decision on the allocations of each [party]." (*Id*. at 1642).

Similarly, because RGA would not be bound by any arbitration decision, the optimal procedure is bringing together all the affected parties, as the court properly decided to do by denying the Harris motion to compel arbitration.

V. CONCLUSION

Based on the foregoing, respondent respectfully request that this Court affirm the trial court ruling denying the Harris motion to compel

arbitration.

DATED: June 19, 2012 LOMBARDI, LOPER & CONANT

By: /s/ *Kara A. Abelson*
KARA A. ABELSON
Attorneys for Respondent

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 5,528 words as counted by the Microsoft Word word-processing program used to generate the brief.

DATED: June 19, 2012 LOMBARDI, LOPER & CONANT

By: /s/ *Kara A. Abelson*
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Attorneys for Respondent

CERTIFICATE OF SERVICE
Harris & Associates v. City of Piedmont
Court of Appeal, First Appellate Dist., Div. 4 Case No. A133983
Contra Costa County Superior Court Case No.: MSC11-00762
(City of Piedmont v. Robert Gray & Associates, et al.)

I, Joni Gordon, hereby declare:

I am a citizen of the United States, over 18 years of age and not a party to the within action. I am employed in the county of Alameda; my business address is 1999 Harrison Street, Suite 2600, Oakland, CA 94612-3541.

I served the within:

RESPONDENT'S BRIEF

on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

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Contra Costa Superior Court
Appeals Division
725 Court Street
Martinez, CA 94553

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797
(1 copy via Electronic Filing)

☒ By United States Mail: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope/package for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing documents for mailing. On the same day that the document is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

☒ By Electronic Transmission: Pursuant to Rule 8.212(c)(2), I caused the documents to be sent to the Supreme Court via electronic filing. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful

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

Executed on June 19, 2012, at Oakland, California.

/s/ *Joni Gordon*
Joni Gordon