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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PERIWINKLE ENTERTAINMENT, INC., F/S/O SCARLETT JOHANSSON, a California corporation,

Plaintiff,

v.

THE WALT DISNEY COMPANY, a Delaware corporation,

Defendant.

Case No. 21STCV27831

DEFENDANT'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY COURT PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES

Judge: Robert S. Draper
Department: 78
Hearing Date: October 15, 2021
Hearing Time: 8:30 a.m.

Complaint Filed: July 29, 2021

RES ID: 467187923651

[DECLARATIONS OF LEAH GODESKY AND SETH WEINGER FILED CONCURRENTLY]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 15, 2021 at 8:30 a.m., or as soon thereafter as the matter may be heard in Department 78 of the Los Angeles Superior Court, located at 111 N. Hill Street, Los Angeles, California 90012, Defendant The Walt Disney Company will and hereby does move for an order (i) compelling Plaintiff Periwinkle Entertainment, Inc. f/s/o Scarlett Johansson to arbitrate the claims it has asserted against Defendant in this action consistent with the terms of the arbitration agreement reflected in Exhibit 1 to the concurrently filed Declaration of Leah Godesky and incorporated herein by reference, and (ii) staying this litigation pending arbitration.

This Motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, California Code of Civil Procedure Section 1281.4, the authorities cited in the accompanying Memorandum of Points and Authorities, and following Disney's demand that its dispute with Periwinkle be submitted to arbitration.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of Leah Godesky and Seth Weinger, all papers filed concurrently herewith, all pleadings and records on file in this action, and such further evidence or argument as the Court receives before its decision.

Dated: August 20, 2021

DANIEL M. PETROCELLI
LEAH GODESKY
TIMOTHY B. HEAFNER
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By: _____
Daniel M. Petrocelli
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The Walt Disney Company

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MEMORANDUM OF POINTS AND AUTHORITIES[1]

Periwinkle agreed that ***all*** claims "arising out of, in connection with, or relating to" Scarlett Johansson's acting services for *Black Widow* would be submitted to confidential, binding arbitration in New York. Whether Periwinkle's claims against Disney fall within the scope of that agreement is not a close call: Periwinkle's interference and inducement claims are premised on Periwinkle's allegation that Marvel breached the contract's requirement that any release of *Black Widow* include a "wide theatrical release" on "no less than 1,500 screens." The plain and expansive language of the arbitration agreement easily encompasses Periwinkle's Complaint.

In a futile effort to evade this unavoidable result (and generate publicity through a public filing), Periwinkle excluded Marvel as a party to this lawsuit—substituting instead its parent company Disney under contract-interference theories. But longstanding principles do not permit such gamesmanship. As a Court of Appeal has explained, "a signatory [like Periwinkle] to an agreement containing an arbitration clause may be compelled to arbitrate its claims against a nonsignatory [like Disney,] when the relevant causes of action rely on and presume the existence of the contract." *Boucher v. Alliance Title Co., Inc.*, 127 Cal. App. 4th 262, 269 (2005).

Periwinkle's two causes of action are ***entirely*** dependent on its untenable claim that Marvel breached the Periwinkle-Marvel contract by releasing *Black Widow* simultaneously in theaters and on Premier Access on Disney+. The contract does not mandate theatrical distribution—let alone require that any such distribution be exclusive. Moreover, the contract expressly provides that any theatrical-distribution obligations are satisfied by distribution on "no less than 1500 screens." And even though *Black Widow's* release coincided with a global public-health crisis, Marvel made good on its promises. After shifting the original May 2020 release date several times—including at Johansson's request—the Picture ultimately debuted on July 9, 2021 on more than ***30,000*** screens. This latest motion-picture release in the Marvel Cinematic Universe claimed the pandemic-era opening-weekend box-office record previously held by *F9* (of the *Fast and Furious* franchise), and Marvel is gratified that the millions of fans who felt

[1] Unless indicated, all emphasis is added and all internal quotations and citations are omitted.

comfortable doing so were able to watch Johansson's prowess on a big screen. Periwinkle's claim that Marvel breached the requirement that *Black Widow* be released on "no less than 1,500 screens" by releasing it on more than 30,000 screens is thus as indefensible as it sounds, as Disney and Marvel will demonstrate in arbitration.

Permitting this litigation to proceed would thwart not only Periwinkle's express agreement to arbitrate all *Black Widow*-related claims, but also decades of law and policy requiring enforcement of arbitration agreements. The Court should order Periwinkle to arbitrate its claims against Disney.

FACTUAL BACKGROUND

Periwinkle's Contract With Marvel Regarding Black Widow

Marvel and Periwinkle entered an agreement dated as of May 9, 2017 (the "Agreement"), pursuant to which Periwinkle agreed to furnish the services of Scarlett Johansson to perform the role of Natasha Romanova, also known by her Super Hero alter ego "Black Widow" (the "Picture").[2] The Agreement was executed in 2019 after years of extensive negotiation, and Periwinkle was represented by highly sophisticated entertainment lawyers and agents who had negotiated hundreds of motion-picture agreements.

Marvel negotiated for and obtained "sole discretion" over the Picture's exploitation and distribution, including discretion to forgo releasing the Picture ***at all***.[3] Indeed, the parties agreed that Marvel "shall have ***no*** obligation to produce, distribute, or exploit the Picture."[4] ***If*** the Picture were released, the contract required (i) a "wide theatrical release of the Picture," which it specifically defined as "no less than 1,500 screens"[5]; and (ii) consultation in good faith concerning "the initial release pattern."[6] Periwinkle expressly acknowledged and agreed, however, that Marvel's decision with respect to the initial release pattern would be "final."[7]

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[2] Declaration of Leah Godesky ("Godesky Decl.") Ex. 1
[3] *Id.* at 6, ¶ 2; 15, ¶ 12(n).
[4] *Id.* at 21, Standard Terms & Conditions, ¶ 11(a); *see also id*. at 20, Standard Terms & Conditions to Agreement ¶ 6.
[5] *Id*. at 6, ¶ 2.
[6] *Id.* at 15, ¶ 12(n).
[7] *Id*.

For its part, Marvel was obligated to pay Johansson fixed compensation, regardless of whether the Picture was released or how it performed at the box office.[8] Although the parties agreed that Johansson could potentially earn additional compensation if the Picture were released and hit certain box-office thresholds,[9] the parties expressly acknowledged that Marvel could offer "no representation that the Picture will generate any, or any particular amount of box office receipts."[10] Periwinkle likewise agreed the "likelihood that the Picture will generate any specific box office levels is highly speculative."[11]

The Agreement identifies Disney—Marvel's parent company—as the Picture's "main distributor,"[12] and grants Disney certain rights. For example, Periwinkle granted Disney "the right to use [Johansson's] name, voice and/or likeness in connection with the marketing, promotion, advertising, distribution, and other exploitation of the Picture."[13] Periwinkle also agreed that Johansson would provide, at Disney's request, "a reasonable amount of domestic and international publicity services."[14]

Importantly for this motion, Marvel and Periwinkle agreed "[a]ll claims, controversies or disputes arising out of, in connection with, or relating to [the] Agreement, the performance or breach thereof or default hereunder, whether based on contract, tort or statute … shall be resolved by binding arbitration in New York, New York."[15] They further specified the Agreement "is governed by the laws of the United States and of the internal laws of the state of New York."[16]

Black Widow's Release

The Picture was initially scheduled to be released in May 2020. Compl. ¶ 30. The release date was pushed back multiple times as a result of the pandemic, which has devastated theaters domestically and internationally since early 2020. Compl. ¶ 30. The Picture's release date was

[8] *Id.* at 7, ¶ 5A.
[9] *Id*. at 8, ¶ 5B; 10, ¶ 6.
[10] *See id*.; *id*. at 12, ¶ 6(b).
[11] *Id*. at 12, ¶ 6(b).
[12] *Id*. at 13 ¶ 10(g); 16-17, ¶ 13(e)(i)-(ii). The Picture is distributed by Disney subsidiaries.
[13] *Id*. at 12, ¶ 7.
[14] *Id*. at 16, ¶ 13.
[15] *Id.* at 22, Standard Terms & Conditions to Agreement ¶ 19(a).
[16] *Id.*

first pushed back from May 2020 to November 2020, and then to May 2021, before finally settling—at Johansson's request—on July 9, 2021.[17] While the Agreement only required that the theatrical release be on 1,500 screens, the Picture was ultimately released on more than ***9,600*** screens in the United States and more than ***30,000*** screens worldwide.[18]

Given the persistent effects of the pandemic—which continued to dramatically impact consumers' viewing habits—the Picture was released simultaneously through Premier Access on Disney+. Compl. ¶¶ 34-35. On August 10, 2021, the Picture was also released via Premium Electronic Home Video ("PEHV"), which enables any consumer to watch a downloadable copy of the Picture at any time.[19] The hybrid release pattern was the best thing for the Picture and all the valued talent who contributed to its production, especially given the continued uncertainty in the theatrical market and unprecedented circumstances of the pandemic.

Marvel discussed the hybrid-release-pattern decision with Johansson in spring 2021, as the parties were conferring regarding the Picture's release date. Marvel has assured Johansson that she will be credited with 100% of the Premier Access and PEHV receipts for purposes of the box-office thresholds used to calculate any additional compensation,[20] even though Marvel has no obligation under the Agreement to do so.

In its opening weekend, the Picture grossed more than $80 million in the domestic box office—an opening-weekend record for the pandemic and nearly $10 million more than Universal's *F9* (of the *Fast and Furious* franchise), which was released exclusively in theaters and set the record two weeks earlier.[21] The Picture also earned more than $78.8 million in international box-office receipts in its opening weekend, for a total worldwide debut of $158.8 million.[22] In addition, the Picture grossed more than $55 million in its domestic opening weekend from Premier Access on Disney+.[23] When the $55 million in Premier Access receipts is added to

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[17] Declaration of Seth Weinger ("Weinger Decl.") ¶ 3.
[18] *Id.*
[19] *Id.* ¶ 6.
[20] *Id.* ¶ 7.
[21] Godesky Decl. Ex. 2.
[22] *Id.*
[23] Weinger Decl. ¶ 10 ($67MM in total worldwide Premier Access opening-weekend receipts).

the $80 million domestic-box-office total, the total domestic "box office" for the opening weekend was more than $135 million—more than that of many other Marvel Cinematic Universe films, including *Thor: The Dark World*; *Ant-Man*; *Ant-Man and the Wasp*; and *Guardians of the Galaxy*.[24] As of August 15, 2021, the Picture has grossed more than $367 million in worldwide box-office receipts and more than $125 million in streaming and download retail receipts.[25]

Periwinkle's Claims Against Disney

Notwithstanding the Picture's impressive pandemic-era showing and the decision to credit Periwinkle with streaming and download receipts, Periwinkle was dissatisfied. According to Periwinkle, the attempt to capture the broadest possible audience by utilizing a simultaneous release of *Black Widow* in theaters and on Premier Access on Disney+ constituted a breach of Marvel's promise to secure a "wide theatrical release" of the Picture. Compl. ¶¶ 49, 57.

Although Periwinkle claims ***Marvel*** breached its promise, Periwinkle decided to publicly sue ***Disney***. Periwinkle apparently hopes that its maneuver will pressure Marvel to pay additional compensation. Both of Periwinkle's claims against Disney, however, are expressly predicated on an alleged breach of the Periwinkle-Marvel Agreement. Periwinkle's intentional-interference claim, for example, alleges that Disney "induced ***Marvel*** to breach ***its agreement with [Periwinkle]*** by releasing the film on Disney+ simultaneously with its release in theaters." *Id.* ¶ 49. Periwinkle's inducement claim likewise alleges that Disney "cause[d]" ***Marvel*** to "***violat[e] … the Agreement[,]*** which required a 'theatrical release of the Picture.'" *Id.* ¶¶ 57-58. Both causes of action are thus precisely the type of claim that Periwinkle previously agreed—without qualification—to commit to arbitration. *See supra* at 6.

Marvel and Disney Initiate An Arbitration Against Periwinkle

On August 10, 2021, Marvel and Disney served on Periwinkle a demand for confidential arbitration in New York.[26] Although Periwinkle has not yet responded to the demand, Periwinkle previously asserted in correspondence between the parties that it need not arbitrate claims against

[24] Godesky Decl. Ex. 3.
[25] Weinger Decl. ¶¶ 8-9.
[26] Godesky Decl. ¶ 2.

Disney, and ignored Marvel's and Disney's showing to the contrary[27] by filing this litigation.

Periwinkle's Claims Have No Merit

Although Marvel and Disney share Periwinkle's frustration with the challenges associated with releasing films during an ever-shifting public-health crisis, Periwinkle's claims that Marvel breached the Agreement and Disney induced that breach or otherwise interfered with the Agreement have no merit. There is nothing in the Agreement requiring that a "wide theatrical release" also be an "exclusive" theatrical release. *See Greenfield v. Philles Recs., Inc*., 98 N.Y.2d 562, 569 (2002) ("The best evidence of what parties to a written agreement intend is what they say in their writing."). In fact, the parties specifically defined what they ***did*** intend by "wide theatrical release" with the "i.e." parenthetical that immediately follows the phrase: "(***i.e., no less than 1,500 screens***)." Because the Picture was released theatrically on more than ***30,000*** screens, it necessarily follows that Marvel did not breach the wide-theatrical-release provision.

While Periwinkle tries to call that unambiguous contract language into question by citing a pre-pandemic, 2019 e-mail by a Marvel executive (Compl. ¶ 7), the communication merely confirmed Marvel's intent to stand by the contract's "wide theatrical release" provision—which Marvel ultimately did, notwithstanding the dramatically changed circumstances of a 2020-2021 global pandemic. The executive's commitment that *Black Widow's* theatrical release would be "like [Marvel's] other pictures" is wholly consistent with the Agreement's 1,500-screen requirement and the circumstances of the Picture's summer-2021 release. For example, *Black Widow* has so far reached audiences on more than ***9,600*** screens in the United States, a domestic screen count that ***exceeds*** that of other recent Marvel pictures, including *Ant-Man* (2015), *Captain Marvel* (2019), and *Black Panther* (2018).[28]

[27] Godesky Decl. ¶ 6.
[28] Weinger Decl. ¶ 4.

ARGUMENT

I. THE COURT SHOULD COMPEL ARBITRATION ON THE THRESHOLD QUESTION OF ARBITRABILITY.

"Although the scope of an arbitration clause is generally a question for judicial determination, the parties may, by clear and unmistakable agreement, elect to have the arbitrator, rather than the court, decide which grievances are arbitrable." *Rodriguez v. Am. Technologies, Inc.*, 136 Cal. App. 4th 1110, 1123 (2006). "Here, the parties clearly and unmistakably agreed to have the arbitrator determine the scope of the arbitration clause." *Id.* The contract mandates arbitration in accordance with the Comprehensive Commercial Arbitration Rules of JAMS, and JAMS Rule 11 states that "arbitrability disputes" "shall be submitted to and ruled on by the Arbitrator." JAMS Rule 11. "By incorporating [Rule 11] into their agreement, the parties clearly evidenced their intention to accord the arbitrator the authority to determine issues of arbitrability." *Rodriguez*, 136 Cal. App. 4th at 1123; *see also Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (similar). Accordingly, the Court should compel arbitration to decide the threshold arbitrability question and stay the litigation pending arbitration.

II. IF THE COURT DECIDES ARBITRABILITY, IT SHOULD COMPEL ARBITRATION.

"The primary substantive provision of the [Federal Arbitration Act ("FAA")] is section 2, which provides '[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable.'" *Rosenthal v. Great Western Fin. Sec. Corp.,* 14 Cal. 4th 394, 405 (1996). "The rule of enforceability established by section 2 of the [FAA] preempts any contrary state law and is binding on state courts as well as federal." *Id.*; *Southland Corp. v. Keating*, 465 U.S. 1 (1984). A court's role under the FAA is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

The Agreement is subject to the FAA because the contract involves commerce—i.e., the global distribution of a major motion picture.[29] *See, e.g.*, *Moritz v. Universal City Studios LLC*, 54 Cal. App. 5th 238, 245 (2020) (contracts regarding terms under which Moritz rendered services as producer on *Fast & Furious* franchise are "contracts involving interstate commerce"); *Hong v. CJ CGV Am. Holdings, Inc.*, 222 Cal. App. 4th 240, 251 (2013) (contract involving company operating television network "directed towards all Asian-American and South Asian-American groups in the United States" involves commerce). There is also no dispute that Marvel and Periwinkle entered a valid contract containing a broad arbitration provision. *See* Compl. ¶ 47 ("Plaintiff and Marvel were parties to the Agreement, which is a valid and binding contract."). Thus, the only question is whether the arbitration provision in the Agreement "encompasses" this dispute. *Chiron*, 207 F.3d at 1130.

If the Court evaluates arbitrability, it should order Periwinkle to arbitrate its claims against Disney and stay this litigation in the meantime, because (i) the FAA reflects a strong preference in favor of arbitration, (ii) the Agreement's plain and expansive language encompasses this dispute, and (iii) equitable-estoppel and third-party-beneficiary principles preclude Periwinkle from avoiding arbitration with Disney.

A. Federal Law Favors Enforcement Of Arbitration Provisions.

Federal law recognizes a strong presumption in favor of enforcing arbitration agreements. "Accordingly, in most cases, the FAA mandates arbitration when contracts involving interstate commerce contain arbitration provisions." *Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233, 1239 (2015). Under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Courts applying the FAA must "liberally construe arbitration clauses." *EFund Capital Partners v. Pless*, 150 Cal. App. 4th 1311, 1329 (2007). California policy is in accord with these longstanding principles. *See Alvarez v. Altamed Health Servs. Corp.*, 60 Cal. App. 5th 572, 580 (2021) ("Both the Federal Arbitration Act and the

[29] Godesky Decl. Ex. 1.

California Arbitration Act favor enforcement of valid arbitration agreements").[30]

B. The Agreement's Plain Language Encompasses This Dispute.

Periwinkle agreed broadly to arbitrate "[a]ll claims, controversies or disputes arising out of, in connection with, or relating to this Agreement, the performance or breach thereof … whether based on contract [or] tort."[31] *See Khalatian v. Prime Time Shuttle, Inc*., 237 Cal. App. 4th 651, 659 (2015) ("The language 'arising out of or relating to' as used in the parties' arbitration provision is generally considered a broad provision"); *see also Ferrari N. Am., Inc. v. Ogner Motor Cars, Inc.*, 2003 WL 102839, at *3 (S.D.N.Y. Jan. 9, 2003) (similar).

Periwinkle's claims quite obviously "aris[e] out of," are "in connection with," and "relat[e]" to the Agreement and the "performance or breach" thereof. The entire Complaint centers around Periwinkle's (unfounded) assertion that Marvel breached the Agreement by releasing *Black Widow* simultaneously in theatres and on Premier Access on Disney+, and that Disney induced that breach or otherwise interfered with the Agreement. *See, e.g.*, Compl. ¶¶ 1, 5-8, 11-12, 37-45, 47-51, 55-59. Periwinkle's two causes of action specifically identify the Agreement, allege that Marvel breached the Agreement, and assert that Disney induced that alleged breach. *See, e.g.*, *id*. ¶¶ 49, 57-58. Accordingly, Periwinkle's claims fall squarely within

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[30] To the extent Periwinkle cites the choice-of-law provision in the Agreement to support an argument that New York law applies to the question of whether Periwinkle's claims are arbitrable, the result would be no different. New York law, like the FAA, weighs in favor of enforcing arbitration provisions. *See 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 93 (1991) ("Arbitration is a favored method of dispute resolution in New York."). But the FAA, rather than New York law, properly applies for two reasons. *First*, the choice-of-law provision in the Agreement does not specifically include issues regarding "enforcement" of the provision. *Compare Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130-31 (9th Cir. 2000) (applying FAA to question of arbitrability where choice-of-law provision stated agreement "shall be construed and interpreted according to the laws of the State of New Jersey") *with Mount Diablo Medical Ctr. v. Health Net of Cal.*, 101 Cal. App. 4th 711, 722-23 (2002) (because choice-of-law provision stated the "validity, construction, interpretation, ***and enforcement*** of this Agreement shall be governed by the laws of the State of California," arbitrability resolved under California law rather than FAA). *Second*, the Agreement's choice-of-law provision incorporates ***both*** federal law and New York law and thus cannot be interpreted as an attempt to override the FAA's application. *See* Godesky Decl. Ex. 1 at 22, ¶ 19(a) (referencing "laws of the United States ***and*** of the internal laws of the state of New York").

[31] Godesky Decl. Ex. 1 at 22, ¶ 19(a).

the scope of the binding arbitration provision. *See Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell*, 76 Cal. App. 4th 227, 230 (1999) (characterizing similar arbitration provision as "very broad" and ordering arbitration because "[t]he controversy as alleged would not have arisen at all but for the [underlying contract with arbitration agreement]").

Although Periwinkle has previously disputed this point by citing the Agreement's second arbitration clause's reference to "disputes or controversies of any nature ***between the parties***,"[32] there are two reasons why that clause does not change the analysis. *First*, as detailed below (*infra* Section II.C), courts regularly empower non-parties to an arbitration agreement (like Disney) to rely on the provision to compel arbitration. *Second*, long-established principles of contract interpretation instruct that the entire contract must be read together, and construed in a manner that gives effect to each provision. *See Corhill Corp. v. S. D. Plants, Inc.*, 9 N.Y.2d 595, 599 (1961) ("It is a cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract . . . without force and effect"). Any reading of "Exhibit 'DR'" that purports to limit the arbitration agreement to only Marvel-Periwinkle disputes would improperly read out of the contract Paragraph 19(a)'s unequivocally expansive language—which plainly reflects an intent to arbitrate, without limitation, "***all*** claims, controversies, or disputes arising out of, in connection with or relating to th[e] Agreement," *see supra* at 6. *See also Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002) (if arbitration provision ambiguous, doubts should "be resolved in favor of arbitration.'").

C. Disney's Non-Signatory Status Is Not A Basis On Which Periwinkle Can Avoid Arbitration.

Arbitration is appropriate here for the additional and independent reason that there are several "exceptions to the general rule under the United States Arbitration Act that arbitration is a contractual right available only to signatories to the agreement." *Boucher v. Alliance Title Co., Inc.*, 127 Cal. App. 4th 262, 268 (2005); *see also Metalclad Corp. v. Ventana Env't Organizational P'ship*, 109 Cal. App. 4th 1705, 1712 (2003) (litigant's non-signatory status "is

[32] Godesky Decl. ¶ 6; *see also id.* Ex. 1 at 24, Exhibit "DR."

not an impediment to arbitration"). In determining whether such an exception applies in a case subject to the FAA, California courts apply "the federal substantive law of arbitrability." *Boucher* 127 Cal. App. 4th at 268; *see also Metalclad*, 109 Cal. App. 4th at 1712 ("Whether … a nonsignatory to [an] agreement may rely on it to compel [a signatory] to arbitration is answered by federal law, not state law").[33] As detailed below, equitable-estoppel and third-party-beneficiary principles require Johansson to arbitrate her claims against Disney.

1. The FAA Estops Johansson From Avoiding Arbitration With Disney.

"Under the doctrine of equitable estoppel, a party may be precluded from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *In re Apple & AT&TM Antitrust Litig.*, 826 F. Supp. 2d 1168, 1176 (N.D. Cal. 2011). "The federal circuits that have considered the doctrine of equitable estoppel have uniformly accepted it, in appropriate factual circumstances, as a basis for compelling signatories to a contract containing an arbitration clause to arbitrate their claims against nonsignatories." *Metalclad*, 109 Cal. App. 4th at 1714. In particular, "a signatory to a[n] agreement containing an arbitration clause may be compelled to arbitrate its claims against a nonsignatory when the relevant causes of action rely on and presume the existence of the contract." *Boucher*, 127 Cal. App. 4th at 269. Indeed, the circuits have consistently "been willing to estop a ***signatory*** from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Id.* (emphasis in original); *see also The Fujian Pac. Elec. Co. Ltd. v. Bechtel Power Corp.*, 2004 WL 2645974, at *7 (N.D. Cal. Nov. 19, 2004) (ordering signatory to arbitrate claims against non-signatory where claims against non-signatory "are directly related to the contracts between [signatory

[33] At least one California court has held that "whether a contract may be enforced by or against a nonsignatory to the contract is determined by principles of state law." *Philadelphia Indemnity Ins. Co. v. SMG Holdings, Inc.*, 44 Cal. App. 5th 834, 840-41 (2019). It is, however, a distinction without a difference in this case, because California state law likewise recognizes "there are [certain] theories by which a nonsignatory may be bound to arbitrate," including "estoppel" and "third party beneficiary." *Id.*

plaintiff and non-signatory defendant's subsidiaries] and [signatory plaintiff] must rely on the terms of those contracts to assert its claims against [non-signatory defendant]").

California courts applying the federal law of arbitrability have followed suit. In *Boucher*, for example, the Court of Appeal examined a written employment agreement between Craig Boucher and Financial Title Company providing that "[a]ny dispute or controversy arising under or in connection with this Agreement shall be submitted to binding arbitration." 127 Cal. App. 4th at 266. When Boucher's position was transferred to Alliance Title, Inc. ("ATI"), Boucher sued ATI for (among other things) interference with contractual and prospective employment relations. *Id.* Boucher argued he should not have to arbitrate his claims, but the Court of Appeal disagreed. Under federal law, the court explained, "equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." *Id.* at 270. In estopping Boucher from circumventing the arbitration provision, the Court of Appeal emphasized that all of Boucher's claims against the nonsignatory "rely on, make reference to, and presume the existence of the [] employment agreement with Financial." *Id.* at 272; *see also Victrola 89, LLC v. Jaman Properties 8 LLC*, 46 Cal. App. 5th 337, 353 (2020) (non-signatory may invoke arbitration clause against signatory "when the causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract"); *Goldman v. KPMG, LLP*, 173 Cal. App. 4th 209, 229-230 (2009) (equitable estoppel applies where "plaintiffs' claims against the nonsignatory are dependent upon, or inextricably bound up with, the obligations imposed by the contract").

In *Metalclad*, a waste-disposal company (Metalclad) entered a stock-purchase agreement with another company (Geologic) for the sale of a Metalclad subsidiary. *See Metalclad*, 109 Cal. App. 4th at 1709. The stock-purchase agreement provided that "any controversy or claim arising out of or relating to this contract shall be settled by binding arbitration." *Id.* at 1710. When the subsidiary sale fell apart and Metalclad initiated a litigation against Geologic's parent company, the parent company (Ventana), contended that Metalclad should be equitably estopped from using Ventana's nonsignatory status to avoid arbitration. *Id.* at 1710-11. The Court of Appeal agreed,

explaining that "[t]he nexus here between Metalclad's claims against Ventana and the underlying contract with Geologic, as well as the integral relationship between Geologic and Ventana persuades us equitable estoppel should apply." *Id.* at 1717. Nor did it matter that certain of Metalclad's claims were torts: "it is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract." *Id.* 1717-18.

So too here. Periwinkle agreed broadly to arbitrate all "claims, controversies or disputes" that "aris[e] out of," are "in connection with," or "relat[e]" to the Agreement and the "performance or breach" thereof. *See supra* at 15. All of Periwinkle's claims against Disney "rely on, make reference to, and presume the existence of," *Boucher*, 127 Cal. App. 4th at 272, the Periwinkle-Marvel contract. *See supra* at 6. In fact, both of Periwinkle's tort claims are "inextricably bound up with[] the obligations imposed by the contract [Periwinkle] has signed with [Marvel]," because they are predicated on a breach of the Agreement's "wide theatrical release" provision. *Goldman*, 173 Cal. App. 4th at 229-30. And Disney and Marvel's relationship is "integral," *Metalclad*, 109 Cal. App. 4th at 1717, to the dispute and contractual relationship: Disney is Marvel's parent company and identified in the Agreement as the Picture's "main distributor." *See supra* at 8; *see also McCann v. Royal Group, Inc.*, 77 Fed. App'x 552, 554 (2d Cir. 2003) (nonsignatory compelled signatory to arbitrate where "court considering his tort claim will be forced to parse the Agreement [containing arbitration provision] in order to determine whether [nonsignatory] caused [signatory] to breach that contract").

Accordingly, "[e]stoppel prevents [Periwinkle] from avoiding arbitration by suing only the parent company in these circumstances. Otherwise, the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Metalclad*, 109 Cal. App. 4th at 1718; *see also Sanders v. Swift Transportation Co. of Arizona, LLC*, 843 F. Supp. 2d 1033, 1038 (N.D. Cal. 2012) (compelling arbitration under estoppel principles because "Sanders, a signatory to the ICOA, alleges concerted misconduct by Interstate, a nonsignatory, and Swift, a signatory").[34]

[34] The result would be no different under New York law. New York "courts are willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is

2. Disney Is A Third Party Beneficiary That Can Enforce The Arbitration Provision.

"Chapter 1 of the [FAA] permits courts to apply state-law doctrines related to the enforcement of arbitration agreements," including those holding that "arbitration agreements may be enforced by nonsignatories through … third-party beneficiary theories." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1642-44 (2020); *see also Spear, Leeds & Kellogg v. Central Life Assur.*, 85 F.3d 21, 26 (2d Cir. 1996) ("[D]ecisional law recognizes that the FAA requires the enforcement of an arbitration agreement not just in favor of parties to the agreement, but also in favor of third party beneficiaries."); *Cohen v. TNP 2008 Participating Notes Program, LLC*, 31 Cal. App. 5th 840, 856 (2019) ("Third parties may enforce a contract with an arbitration provision, however, when they are intended third party beneficiaries or are assigned rights under the contract.").

A party "does not have to be named in the [contracts at issue] in order to be a third party beneficiary," but "there must be language in them or extrinsic evidence that the promisor … understood that the promisee [ ] entered into the [contract] with the intent that they benefit the [third party]." *The H.N. & Frances C. Berger Foundation v. Perez*, 218 Cal. App. 4th 37, 46 (2013); *see also 981 Third Ave. Corp. v. Beltramini*, 108 A.D.2d 667, 669 (1st Dep't 1985) ("[i]t is not necessary that third-party beneficiaries be identified or identifiable at the time of the making of the contract," but "the person who claims to be a third-party beneficiary must be one of a class of persons intended to be benefited"). "[T]he intention which controls in determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee." *MK West Street Co. v. Meridien Hotels, Inc.*, 184 A.D.2d 312, 313 (1st Dep't 1992).

Disney easily qualifies as a third-party beneficiary of the Agreement. Disney is specifically identified in the contract as the "main distributor" of the Picture,[35] and when

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seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'" *Hoffman v. Finger Lakes Instrumentation, LLC*, 789 N.Y.S.2d 410, 415 (N.Y. Sup. Ct. 2005); *see also Matter of Berger v. Signac Invs.*, 194 A.D.3d 402, 402-03 (1st Dep't 2021) (non-signatory entitled to invoke arbitration provision).

[35] Godesky Decl. Ex. 1 at 14, ¶ 10(g); 16-17, ¶ 13(e)(i)-(ii).

Periwinkle signed the Agreement, it obviously intended to benefit Disney. Periwinkle agreed, for example, that Disney would have the right to use Johansson's name and likeness in connection with the marketing of the Picture. *See supra* at 8. Disney may accordingly enforce the arbitration provision to its benefit. *See Meridien Hotels*, 184 A.D. 312 at 313; *see also Macaulay v. Norlander*, 12 Cal. App. 4th 1, 7-8 (1992) (applying New York law and permitting nonsignatory to enforce arbitration agreement as third-party beneficiary).

III. THE COURT SHOULD STAY THE LITIGATION PENDING ARBITRATION.

"A state's procedural statutes automatically apply in state court unless the parties expressly agree otherwise." *Valencia v. Smyth*, 185 Cal. App. 4th 153, 179 (2010); *see also Vivid Video, Inc. v. Playboy Entm't Grp., Inc.*, 147 Cal. App. 4th 434, 440 (2007) ("[S]tate procedural rules govern determination of defendants' motion to compel arbitration"). And under California Code of Civil Procedure § 1281.4, when a court orders "arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this state," the court "***shall***, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate." *See also Twentieth Century Fox Film Corp. v. Superior Court*, 79 Cal. App. 4th 188, 192 (2000) (characterizing Section 1281.4 as "clear and unambiguous"). The Court must therefore stay this litigation pending arbitration of Periwinkle's claims against Disney. Even if Periwinkle's claims against Disney were not arbitrable, this litigation would still need to be stayed pending a determination in the Marvel-Periwinkle arbitration as to whether Marvel breached the Agreement, because the alleged breach is a predicate for Periwinkle's claims against Disney.[36]

CONCLUSION

Disney respectfully requests an order (i) that an arbitrator will decide the question of arbitrability or compelling Periwinkle to submit to binding arbitration in New York all the claims it has asserted against Disney in this action, and (ii) staying this litigation pending arbitration.

[36] The result would be no different under the FAA. *See* 9 U.S.C. § 3 (court "shall on application of one of the parties stay the trial of the action until … arbitration has been had in accordance with the terms of the agreement").

Dated: August 20, 2021

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Make a Reservation

PERIWINKLE ENTERTAINMENT, INC., F/S/O SCARLETT JOHANSSON, A CALIFORNIA CORPORATION vs THE WALT DISNEY COMPANY, A DELAWARE CORPORATION

Case Number: 21STCV27831 Case Type: Civil Unlimited Category: Tortious Interference
Date Filed: 2021-07-29 Location: Stanley Mosk Courthouse - Department 78

Reservation

Case Name:
PERIWINKLE ENTERTAINMENT, INC., F/S/O SCARLETT JOHANSSON, A CALIFORNIA CORPORATION vs THE WALT DISNEY COMPANY, A DELAWARE CORPORATION

Case Number:
21STCV27831

Type:
Motion to Compel Arbitration

Status:
RESERVED

Filing Party:
The Walt Disney Company, a Delaware corporation (Defendant)

Location:
Stanley Mosk Courthouse - Department 78

Date/Time:
10/15/2021 8:30 AM

Number of Motions:
1

Reservation ID:
467187923651

Confirmation Code:
CR-VX2VFDZ4YLDCBXFXP

Fees

Description	Fee	Qty	Amount
First Paper Fees (Unlimited Civil)	435.00	1	435.00
Credit Card Percentage Fee (2.75%)	11.96	1	11.96
TOTAL			**$446.96**

Payment

Amount:
$446.96

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