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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL JUSTICE CENTER

BR CO I, LLC, a California limited liability
company, and NEDCO, LLC, a Wyoming
limited liability company, suing individually and
derivatively on behalf of COOKIES
CREATIVE CONSULTING & PROMOTIONS,
INC.,

Plaintiffs,

v.

GILBERT MILAM, an individual; PARKER
BERLING, an individual; MICHAEL JOHN
ROBERTS, an individual; OMAR ORTIZ, an
individual; IAN HABENICHT, an individual;
LESJAI PERONNET CHANG, an individual;
12/12 VENTURES FUND I, LLC, a Delaware
limited liability company; 12/12 VENTURES
GP I, LLC, a Delaware limited liability
company; 12/12 SPV I, LLC: Cookies LLC, a
Delaware limited liability company; MESH
VENTURES, LLC, a Delaware limited liability
company; and DOES 1 through 25, inclusive,

Defendants.

COOKIES CREATIVE CONSULTING &
PROMOTIONS, INC., a California corporation,

Nominal Defendant.

Case No. 23STCV02764

**DEFENDANTS GILBERT MILAM,
PARKER BERLING AND NOMINAL
DEFENDANT COOKIES CREATIVE
CONSULTING & PROMOTIONS, INC.'S
NOTICE OF MOTION AND MOTION TO
STAY CASE UNTIL COMPLETION OF
ARBITRATION OR, IN THE
ALTERNATIVE, STAY DISCOVERY**

[Filed concurrently with the Declaration of
Robert J. Becher, and Request for Judicial
Notice]

Assigned for All Purposes to:
Honorable Gregory Keosian
Department 61

Complaint filed: February 8, 2023
FAC filed: March 9, 2023

Hearing Date: June 12, 2023
Hearing Time: 10:00 AM
Reservation No.: 620192794839

1 **NOTICE OF MOTION TO STAY**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on June 12, 2023 at 10:00 AM, or as soon thereafter as the
4 matter may be heard, in the Superior Court of the State of California for the County of Los
5 Angeles, Central Justice Center, Department 61, before the Honorable Judge Gregory Keosian
6 located at 111 N. Hill Street, Los Angeles, CA 90012, the undersigned, on behalf of Defendants
7 Gilbert Milam, Parker Berling and nominal defendant Cookies Creative Consulting & Promotions,
8 Inc., will, and hereby do, move this Court for an order staying the proceedings in the above-
9 captioned case in favor of a previously-filed arbitration against Gilbert Milam, Parker Berling and
10 Cookies Creative Consulting & Promotions, Inc. pending before the American Arbitration
11 Association (“AAA”). In the alternative, Gilbert Milam, Parker Berling, and Cookies Creative
12 Consulting & Promotions, Inc. move for an order staying discovery pending resolution of the
13 concurrently filed Demurrer.

14 This Motion is made pursuant to California Code of Civil Procedure section 128 and the
15 Court’s inherent authority to manage its docket and promote judicial economy and equity on the
16 grounds that the outcome of the pending AAA arbitration will materially affect the course of this
17 case, there is a danger of inconsistent and contradictory results if this case proceeds
18 simultaneously with the AAA arbitration and this case is being pursued for an improper purpose.
19 It is also made on the grounds that discovery is inappropriate while the Demurrer directed to the
20 entire First Amended Complaint is pending and shareholder plaintiffs to a derivative action are not
21 entitled to conduct discovery to assist with their compliance with the particularized pleading
22 requirements of California Corporations Code section 800. This Motion is based on this Notice,
23 the attached Memorandum of Points and Authorities, the Declaration of Robert J. Becher, all other
24 matters of which this Court may take judicial notice, and such other evidence and argument as
25 may be presented at or before the hearing on the Motion.

1 DATED: April 25, 2023

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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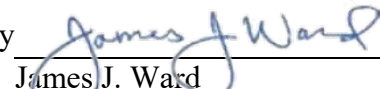
4 By _____

Robert J. Becher
Attorneys for Defendants Gilbert Milam and
Parker Berling

7 DATED: April 25, 2023

BAKER & MCKENZIE LLP

10 By _____


James J. Ward
Attorneys for Nominal Defendant
COOKIES CREATIVE CONSULTING
& PROMOTIONS, INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 This case, which consists exclusively of purported derivative claims and a claim for
4 declaratory relief, is one part of a concerted and harassing litigation campaign against defendants
5 Gilbert Milam (“Milam”) and Parker Berling (“Berling”) and nominal defendant Cookies Creative
6 Consulting & Promotions, Inc. (“Cookies” and collectively “Defendants”). All three are named as
7 respondents in an arbitration that was filed with the American Arbitration Association before
8 Plaintiffs instituted this case (“Arbitration”). Demonstrating the relationship between the
9 Arbitration and this lawsuit, (i) many of the allegations in this lawsuit and the Arbitration are
10 identical or nearly identical; (ii) Claimants in the Arbitration are represented by the same law firm
11 as the Plaintiffs in this case; and (iii) the Managing Member of Plaintiff BR CO I, LLC (“BR
12 CO”) controls one of the Claimants in the Arbitration.

13 The lawsuit and Arbitration constitute a calculated effort to force Milam, Berling and
14 Cookies to expend resources defending litigation in multiple fora. Under these circumstances, it is
15 appropriate for the Court to exercise its discretion to impose a stay on this case (to the extent the
16 concurrently filed Demurrer is not granted) during the pendency of the Arbitration. A stay will
17 encourage efficiency, avoid the possibility of inconsistent outcomes between the Arbitration and
18 this case and prevent Plaintiff BR CO from using this case to drain Milam, Berling and Cookies’
19 resources. Due to the overlap between the factual and legal issues in this case and the Arbitration,
20 it is inevitable that there will be inconsistent rulings on factual and legal issues and discovery
21 disputes if both actions proceed simultaneously.

22 At a minimum, a stay of discovery is warranted because Plaintiffs have not asserted any
23 valid causes of action in this case and they are seeking discovery for the improper purpose of
24 trying to remedy their failure to plead the basic requirements of California Corporations Code
25 section 800. Defendants are concurrently filing a Demurrer to the First Amended Complaint
26 (“FAC”) on the overarching basis that the entire derivative action should be dismissed because
27 Cookies properly exercised its business judgment in not taking the actions BR CO requested in the
28 shareholder demand it sent before filing its lawsuit. Given the strength of the Demurrer, discovery

1 should not be allowed at this time. Discovery should also be stayed in light of the well-established
2 rule that a plaintiff to a derivative action is not entitled to conduct discovery to try and satisfy the
3 particularized pleading requirements of California Corporations Code section 800. Instead, a
4 plaintiff must plead that it complied with these requirements using information already in its
5 possession. BR CO's document requests served on Defendants and its corporate representative
6 deposition notice directed to Cookies are focused on the Board's response to its shareholder
7 demand and were served for the impermissible purpose of trying to patch holes in the FAC.
8 Accordingly, discovery should be stayed.

9 **Factual Background**

10 Pending AAA Arbitration. On December 22, 2022, Red Tech Holdings, LLC ("Red
11 Tech") and Gron Ventures Fund I, LP ("Gron" and collectively "AAA Claimants"), two entities
12 that entered into convertible promissory notes with Cookies, filed a Complaint with the American
13 Arbitration Association ("AAA") against Gilbert Milam ("Milam"), Parker Berling ("Berling"),
14 and Cookies (collectively "Respondents"). (Becher Decl. ¶ 3, Ex. A.) The Honorable Gail Andler
15 (Ret.) has been appointed as the arbitrator and she held a preliminary conference in the case on
16 April 13, 2023. (*Id.* ¶ 4.) The parties have agreed that they will be permitted to serve requests for
17 production and take depositions in the Arbitration. (*Id.*)

18 In their complaint filed with the AAA ("AAA Complaint"), AAA Claimants allege that
19 Cookies is a cannabis company, Milam is Cookies' founder and CEO and Berling is its President.
20 (*Id.*, Ex. A at ¶ 8.) AAA Claimants set forth the following seven causes of action in the AAA
21 Complaint: (1) breach of contract on behalf of Red Tech against Cookies; (2) breach of contract
22 on behalf of Gron against Cookies; (3) breach of implied covenant of good faith and fair dealing
23 against Cookies; (4) fraud against Milam, Berling and Cookies; (5) securities fraud against Milam,
24 Berling and Cookies; (6) violation of Penal Code section 496 against Milam, Berling and Cookies;
25 and (7) intentional interference with contractual relations against Milam and Berling. (*Id.* at ¶¶
26 18-64.) Claimants allege in the AAA Complaint that Milam, Berling and Cookies engaged in self-
27 dealing and misappropriated Cookies' resources. (*Id.* at ¶ 16.) These allegations are the lynchpin
28 of AAA Claimants' causes of action for breach of contract on behalf of Red Tech (*id.* at ¶¶ 18-24),

1 breach of contract on behalf of Gron (*id.* ¶¶ at 25-31), breach of the implied covenant of good faith
2 and fair dealing (*id.* at ¶¶ 32-36), fraud (*id.* at ¶¶ 37-43), securities fraud (*id.* at ¶¶ 44-50), violation
3 of Penal Code section 496 (*id.* at ¶¶ 51-57) and intentional interference with contractual relations
4 (*id.* at ¶¶ 58-64). Specifically, AAA Claimants allege the purported instances of self-dealing and
5 misappropriation of Cookies’ resources: (i) breached contracts between AAA Claimants and
6 Cookies, resulting in breaches of contracts and breach of the implied covenant of good faith and
7 fair dealing (*id.* at ¶¶ 21, 28, 35); (ii) rendered certain contractual representations false, resulting in
8 fraud, securities fraud, and violation of Penal Code section 496 (*id.* at ¶¶ 37-38, 45-46, 52-53); and
9 caused Cookies to breach its contracts with AAA Claimants, resulting in intentional interference
10 of contractual relations (*id.* at ¶¶ 59-62).

11 BR CO’s Shareholder Demand and Complaint. Also on December 22, 2022—the same
12 day the AAA Claimants initiated the Arbitration—BR CO sent a shareholder “demand letter”
13 asking Cookies’ Board to “take legal action” on the claims and allegations set forth in its letter
14 (“shareholder demand”). (Becher Decl. ¶ 5, Ex. B.) It contained some identical and some nearly-
15 identical allegations as the AAA Complaint. (*Compare* Becher Decl., Ex. B at 1-3 (alleging
16 instances of purported self-dealing and misappropriation by Milam and Berling reflecting those
17 same allegations made in the AAA Complaint) *with* Becher Decl., Ex. A at ¶ 15.) BR CO
18 concluded its letter with a formal demand for legal action. (Becher Decl., Ex. B at 4.) Rather than
19 waiting for the Board’s substantive response to the demand, on February 8, 2023, BR CO filed the
20 complaint in this case. (Becher Decl. ¶ 6, Ex. C.)

21 Cookies’ Response to the Shareholder Demand. On March 8, 2023, Cookies sent BR CO a
22 seven-page written response to the shareholder demand, which stated that the Board had voted “to
23 defer any action in response to BR CO’s demands until the company’s AAA arbitration with [the
24 AAA Claimants] has concluded.” (Becher Decl. ¶ 7, Ex. D at 6.) The Board articulated *six*
25 distinct bases for its decision, including that it had “serious concerns that BR CO lodged its
26 complaint as a proxy for . . . [the AAA Claimants], in coordination with them as part of a larger
27 litigation strategy, and with the specific intent of circumventing the arbitrator’s authority . . .
28 and/or trying to compromise Cookies’ position in the AAA arbitration” (*id.* at 3); and it had

1 “similar concerns about the potentially adverse impact” this action may have on the AAA
2 arbitration because “Cookies is a respondent in the AAA arbitration and the allegations in that
3 proceeding and [BR CO’s shareholder demand] overlap significantly.” (*Id.* at 4.) Cookies
4 concluded its response with additional context to explain the Board’s decision:

5 As you know, the arbitrator has already been appointed and that proceeding will
6 begin in earnest very soon. The Board believes this approach is the most
7 reasonable, good faith response available to it under the circumstances. From a
8 practical perspective, the parties can focus on one proceeding at a time, thereby
9 maximizing efficiency and being as cost effective as possible. The AAA
10 arbitration should resolve all, or substantially all, of the claims in BR CO’s
11 shareholder demand and accompanying (procedurally defective) state court
complaint. And any possibility of conflicting rulings would be effectively
negated through this approach because only one fact finder (i.e., the arbitrator)
will be making determinations about the myriad underlying issues that are
common to the AAA arbitration and BR CO’s shareholder demand.

12 (*Id.* at 6.)

13 The First Amended Complaint. BR CO filed the FAC on March 9, 2023, one day after
14 Cookies responded to its shareholder demand. (Becher Decl. ¶ 8, Ex. E.) The FAC names
15 NedCo, LLC (“NedCo”) as an additional plaintiff. (*Compare* Becher Decl., Ex. C at ¶¶ 1-9 with
16 Becher Decl., Ex. E at ¶ 2.) The same law firm that represents AAA Claimants is also
17 representing BR CO and NedCo (“Plaintiffs”) in this case. (Becher Decl., Ex. E at 1.) BR CO is
18 closely aligned with AAA Claimants. (*Compare* Request for Judicial Notice (“RJN”), Ex. A with
19 RJN, Ex. B.) Specifically, Thomas Linovitz (“Linovitz”) is a Managing Member of BR CO and
20 the manager of the General Partner of Gron, one of the Claimants in the Arbitration. (*Id.*) In the
21 FAC, Plaintiffs purport to assert derivative causes of action against Milam and Berling, among
22 others, as defendants and against Cookies as nominal defendant for breach of fiduciary duty,
23 breach of duty of loyalty, violation of California Corporations Code section 310, unjust
24 enrichment and imposition of a constructive trust, accounting, intentional interference with
25 contractual relations, intentional interference with prospective economic relations, removal of

1 directors, unfair competition and a claim for declaratory relief.¹ (Becher Decl., Ex. E) The
2 specific factual allegations purportedly forming the basis for Plaintiffs’ legal claims in this case
3 either closely resemble or mirror the facts in the AAA Complaint. (*Compare* Becher Decl., Ex. E
4 at ¶ 24 *with* Becher Decl., Ex. A at ¶ 15; *compare* Becher Decl., Ex. E at ¶ 25 *with* Becher Decl.,
5 Ex. A at ¶ 15; *compare* Becher Decl., Ex. E at ¶ 26 *with* Becher Decl., Ex. A at ¶ 15; *compare*
6 Becher Decl., Ex. E at ¶ 28 *with* Becher Decl., Ex. A at ¶ 15; *compare* Becher Decl., Ex. E at ¶ 32
7 *with* Becher Decl., Ex. A at ¶ 15; *compare* Becher Decl., Ex. E at ¶ 33 *with* Becher Decl., Ex. A at
8 ¶ 15; *compare* Becher Decl., Ex. E at ¶ 36 *with* Becher Decl., Ex. A at ¶ 13; *compare* Becher
9 Decl., Ex. E at ¶ 37 *with* Becher Decl., Ex. A at ¶ 16; *compare* Becher Decl., Ex. E at ¶¶ 88-92
10 *with* Becher Decl., Ex. A at ¶¶ 58-64 (alleging a cause of action for intentional interference with
11 contractual relations against, among others, Milam and Berling).) For the Court’s convenience,
12 the chart attached as Exhibit F to the Declaration of Robert J. Becher contains a comparison of
13 allegations that are substantially the same in the AAA Complaint and the FAC. (Becher Decl. ¶ 9,
14 Ex. F.)

15 In the FAC, Plaintiffs challenge Cookies’ Series A financing by claiming Cookies’ entry
16 into a Series A Preferred Stock Purchase Agreement (“SPA”) and amended corporate documents
17 (“Transaction Documents”) involved self-dealing. (Becher Decl., Ex. E at ¶¶ 39-46.) They seek a
18 declaration “concerning . . . whether Defendants complied with Corporations Code section 310
19 with respect to the self-dealing transactions, and whether the SPA and Transactional Documents
20 [sic] are void or voidable.” (*Id.* at ¶ 107.)

21 Cookies’ AAA Counterclaim. On April 3, 2023, Cookies filed its Counterclaim against
22 AAA Claimants. (Becher Decl. ¶ 10, Ex. G.) Among other causes of action, Cookies asserts a
23 cause of action for declaratory judgment addressing transactions that are at issue in this case. (*Id.*
24 at ¶¶ 92-95.) Specifically, Cookies seeks a declaration regarding the impact of the SPA and
25 Transaction Documents: that AAA Claimants’ convertible promissory notes are no longer
26

27 ¹ On April 7, 2023, Plaintiffs BR CO and NedCo dismissed their second, fifth, seventh, and ninth
28 causes of action. (Becher Decl. ¶ 11, Ex. H.)

1 effective; that Cookies is not in breach of the convertible promissory notes; that Red Tech holds
2 no interest in Cookies; and that Gron is now a minority shareholder pursuant to the terms of the
3 convertible promissory note. (*Id.* at ¶ 94.)

4 BR CO's Discovery Requests. On March 21, 2023, BR CO served requests for production
5 on Milam, Berling and Cookies. (Becher Decl. ¶ 12, Exs. I-K.) BR CO seeks documents related
6 to the allegations in its shareholder demand and Cookies' response to the shareholder demand, and
7 fourteen of its requests for production specifically reference and quote from the Board's response
8 to the shareholder demand. (Becher Decl., Exs. I-K at Request Nos. 12-25.) BR CO seeks
9 discovery of materials relating to the allegedly self-dealing transactions involving Milam and
10 Berling; materials pertaining to Cookies' recent entrance into the SPA; documents relating to other
11 litigation involving Cookies; and communications in which Milam or Berling, among others,
12 purportedly threatened others. (Becher Decl., Exs. I-K.) Examples of BR CO's discovery
13 requests that specifically refer to or quote from the response to the shareholder demand include:

14 All WRITINGS (excluding attorney-client communications or attorney work
15 product) which constitute or refer or relate to COOKIES' and/or its Board of
16 Directors' "evaluat[ion]" of the matters raised in BRC's December 30, 2022 letter
as referenced at Page 1 of the 3/8 DUGAN LETTER. (Becher Decl., Exs. I-K at
Request No. 12.)

17 All WRITINGS (excluding attorney-client communications or attorney work
18 product) which support or refer or relate to COOKIES' and/or its Board of
19 Directors' assertion that Thomas Linovitz "effectively served as an unregistered
20 broker-dealer" with regard to BRC's obtaining of its interest in COOKIES as
referenced at Page 2 of the 3/8 DUGAN LETTER. (Becher Decl., Exs. I-K at
Request No. 15.)

21 All WRITINGS (excluding attorney-client communications or attorney work
22 product) which refer or relate to COOKIES' and/or its Board of Directors'
23 "general need for working capital due to [BRC's] coordinated and systematic
efforts to deprive the company of outside funding and lucrative business
opportunities through [BRC's] unlawful business practices" as referenced at Page
3 of the 3/8 DUGAN LETTER. (Becher Decl., Exs. I-K at Request No. 17.)

24 Also on March 21, 2023, BR CO served a notice of deposition of Cookies through the
25 person most qualified to testify on its behalf. (Becher Decl. ¶ 13, Ex. L.) BR CO seeks testimony
26 relating to the same topics covered by its requests for production and fourteen of the topics for
27 examination specifically reference and quote from the Board's response to the shareholder
28 demand. (*Id.* at Topics 10-23.)

The Parties' Meet and Confer. On April 20, 2023, counsel for BR CO and NedCo, on the one hand, and counsel for Milam, Berling and Cookies, on the other hand, met and conferred regarding this motion and the filing of a demurrer. (Becher Decl. ¶¶ 14-16, Ex. M.) After the meet and confer, counsel for BR CO and NedCo sent an email stating that they wanted to amend the First Amended Complaint but that they would not agree to a stay pending the Arbitration or a stay of discovery. (Becher Decl. ¶¶ 15-16, Ex. M.) Counsel for Milam and Berling responded by stating that (i) Plaintiffs did not have a right to amend the First Amended Complaint without obtaining leave of court; and (ii) because Milam and Berling were concerned Plaintiffs were using the amendment as a “vehicle to obtain a tactical advantage,” they would only agree to stipulate to the amendment if Plaintiffs agreed, among other things, “to extend the date for responses to the discovery served on Messrs. Milam and Berling until one day before the date on which their response to the Second Amended Complaint is due . . .” (*Id.*) Plaintiffs responded that they would not agree to the proposal and were not willing to agree to a stay. (*Id.*)

Argument

I. THIS COURT SHOULD STAY THIS ACTION PENDING RESOLUTION OF THE ARBITRATION

A. This Court Has Authority to Issue a Stay

A court’s “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.* (1936) 299 U.S. 248, 254. A discretionary stay pending another action may be proper even where the parties and issues involved are not identical. *See, e.g., id.* at 254 (stating court is “unable to assent to the suggestion that . . . the parties to the two causes must be shown to be the same and the issues identical” for a discretionary stay to be proper); *see also St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Corp.* (2022) 80 Cal.App.5th 1, 17 (holding trial court properly exercised discretion to enter stay based on forum non conveniens and “[t]here is no requirement that the parties be identical in both cases for a stay to be granted”). The California Supreme Court has recognized the court’s inherent

1 power to stay proceedings extends to situations where, as here, the alternate forum is private
2 arbitration. *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 141.

3 A stay is proper to prevent “multiple and vexatious litigation.” *See Leadford v. Leadford*
4 (1992) 6 Cal.App.4th 571, 575 (holding it is within court’s discretion upon party’s motion to stay
5 proceeding pending action in other state). “Trial courts generally have the inherent power to stay
6 proceedings in the interests of justice and to promote judicial efficiency.” *Freiberg v. City of*
7 *Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489. Courts may also enter a stay to avoid unseemly
8 conflicts between separate forums. *See Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.*
9 (1993) 15 Cal.App.4th 800, 807 (affirming trial court’s exercise of discretionary stay of state court
10 proceedings pending outcome of federal action in part to avoid “unseemly conflict” between
11 courts).

12 **B. The Overlap With The Pending Arbitration Militates In Favor Of A Stay**

13 Milam, Berling and Cookies are concurrently filing a Demurrer to the FAC. If the Court
14 denies the concurrently filed Demurrer, a stay of this action is warranted so the Arbitration can be
15 completed before this case moves forward. First, the factual allegations that are the foundation of
16 this lawsuit and the Arbitration—the alleged self-dealing and misappropriation by Milam and
17 Berling—are overlapping. The FAC in this lawsuit contains numerous factual allegations that
18 have been lifted directly from the AAA Complaint. (*Compare* Becher Decl., Ex. E at ¶¶ 24-26,
19 28, 32-33, 36-37 *with* Becher Decl., Ex. A at ¶¶ 13, 15-16.) Second, Cookies seeks declaratory
20 judgment in its Counterclaim in the Arbitration regarding factual disputes that are the subject of
21 BR CO’s declaratory relief claim in this case. (*Compare* Becher Decl., Ex. G at ¶¶ 92-95 *with*
22 Becher Decl., Ex. E at ¶¶ 106-107.) Third, Plaintiffs and AAA Claimants are all represented by
23 the same law firm and lawyers. Fourth, there is overlap in who controls BR CO and one of the
24 AAA Claimants. (*Compare* RJN, Ex. A *with* RJN, Ex. B.) Specifically, Thomas Linovitz
25 (“Linovitz”) is a Managing Member of BR CO and the manager of the General Partner of Gron,
26 one of the Claimants in the Arbitration. (*Id.*) All of these facts demonstrate that the Arbitration
27 and this lawsuit are being carefully orchestrated by AAA Claimants and Plaintiffs for the improper
28 purposes of imposing maximum burdens on Milam, Berling and Cookies.

1 A stay of the instant proceeding pending resolution of the Arbitration will serve the
2 interests of justice. By initiating multiple actions involving the same facts and overlapping
3 defendants across multiple forums, Plaintiffs are engaged in a coordinated campaign to harass
4 Milam, Berling and Cookies and force them to devote time and expense to defending against
5 duplicative claims. A stay is warranted to counter such abusive tactics. *See Leadford v. Leadford*
6 (1992) 6 Cal.App.4th 571, 575. Issuance of a stay of the instant proceeding pending resolution of
7 the Arbitration will better serve the interests of justice by ensuring that the Arbitration, which
8 involves the same factual issues as this case, is resolved first and that Milam, Berling and Cookies
9 are not forced to simultaneously devote time and money to litigating overlapping cases. A stay of
10 this case will also promote judicial efficiency. By staying this case, this Court can prioritize
11 urgent matters on its docket while identical factual and legal issues and discovery disputes are
12 addressed in the Arbitration.

13 Finally, a stay of the proceeding is necessary to avoid the possibility of inconsistent
14 decisions. Because the allegations of self-dealing and misappropriation of Cookies' resources are
15 largely the same in the Arbitration and this case and Cookies, Milam and Berling are parties to
16 both the Arbitration and this case, there is a risk of inconsistent outcomes that will undermine the
17 Arbitration or make it ineffectual. First, the Arbitrator will be making factual and legal findings
18 regarding the same issues that will ultimately have to be considered by the Court, to the extent
19 Defendants' Demurrer is not granted in full. There is a genuine danger of inconsistent findings
20 between the Arbitrator and the Court about these identical factual and legal issues. Second,
21 Plaintiffs are also expected to seek many of the same documents and depositions in discovery in
22 the Arbitration that they are already seeking or will seek in the future in this action. Defendants
23 anticipate there will be disputes over the scope of proper discovery, privilege and other issues and
24 there is a risk that the Arbitrator and the Court will reach different decisions. Contradictory or
25 inconsistent rulings regarding discovery issues will sow confusion and result in further
26 unnecessary expenditure of resources by counsel and the Court. Third, there is also a risk of
27 inconsistent rulings and decisions regarding declaratory relief given Cookies is seeking
28 declaratory relief in the Arbitration about issues raised by the declaratory relief cause of action in

1 the FAC. (*Compare* Becher Decl., Ex. G ¶¶ 92-95 with Becher Decl., Ex. E at ¶¶ 106-107.)
2 Issuance of a stay will serve the important purpose of avoiding unseemly conflicts with the
3 Arbitration. *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800,
4 807.

5 **II. IN THE ALTERNATIVE, THIS COURT SHOULD STAY ALL DISCOVERY**
6 **PENDING RESOLUTION OF THE DEMURRER**

7 If the Court does not stay the proceeding pending resolution of the Arbitration, it should
8 stay all discovery in the proceeding pending resolution of the Demurrer. Pursuant to California
9 Code of Civil Procedure section 2019.020, “the court may establish the sequence and timing of
10 discovery for the convenience of parties and witnesses and in the interests of justice.” Discovery
11 is properly stayed where a complaint fails to state “at least one triable cause of action.” *Terminals*
12 *Equipment Co. v. City & County of San Francisco* (1990) 221 Cal.App.3d 234, 247 (holding trial
13 court did not abuse its discretion in staying discovery where discovery “would only be an
14 unnecessary and burdensome additional expense to respondent”). “Once it is recognized that the
15 complaint shows that plaintiff has no claim, all concerned should be spared the expense of further
16 proceedings.” *Silver v. City of Los Angeles* (1966) 245 Cal.App.2d 673, 674-75; *see also Pacific*
17 *Architects Collaborative v. California*, 100 Cal.App.3d 110, 127 (1979) (court’s discretionary
18 issuance of protective order regarding discovery “is proper where the complaint fails to state a
19 cause of action”). Here, the concurrently filed Demurrer of Milam, Berling and Cookies seeks to
20 dismiss the entire Complaint because Cookies’ Board properly exercised its business judgment to
21 not take any immediate action in response to BR CO’s shareholder demand and Plaintiffs cannot
22 meet the stringent pleading requirements of California Corporations Code section 800. They have
23 already admitted the FAC is defective as they met and conferred with Defendants about the
24 Demurrer and immediately afterwards asked to amend the FAC. (Becher Decl. ¶¶ 14-16, Ex. M.)
25 Milam, Berling and Cookies should be spared the expense of responding to discovery requests
26 unless and until the Court rules on their Demurrer and allows the case to proceed.

27 A stay is especially appropriate here because shareholder plaintiffs to a derivative action
28 are not entitled to conduct discovery to assist with their compliance with the particularized

1 pleading requirements of California Corporations Code section 800. *See Bezirdjian v. O'Reilly*
2 (2010) 183 Cal.App.4th 316, 326.² Plaintiffs bear the burden to allege facts sufficient to rebut the
3 presumption that a corporation exercised valid business judgment when it refused a demand. *Id.*
4 The question of whether Plaintiffs have met their burden will be resolved in connection with the
5 concurrently-filed Demurrer and discovery is not permissible in the meantime. The *Bezirdjian*
6 court supported its ruling upholding the denial of discovery by citing to the holding in *Scattered*
7 *Corp. v. Chicago Stock Exchange, Inc.* (Del. 1997) 701 A.2d 70, 77, that “[t]he law . . . is settled
8 that plaintiffs in a derivative suit are not entitled to discovery to assist their compliance with the
9 particularized pleading requirement . . . in a case of demand refusal.” *Bezirdjian*, 183 Cal.App.4th
10 at 326 (citing *Scattered Corp.*, 701 A.2d at 77). *Scattered Corp.* explains that “[a] plaintiff’s
11 standing to sue in a derivative suit, whether based on demand-refused or demand-excused, must be
12 determined based on the well-pleaded allegations of the complaint.” *Scattered Corp.*, 701 A.2d at
13 77. *Bezirdjian* also relied on *Grimes v. Donald* (Del. 1996) 673 A.2d 1207, 1218, which held that
14 a stockholder must use the “tools at hand” prior to filing a derivative lawsuit to obtain the
15 information it needs to argue that a demand was wrongfully refused. *Bezirdjian*, 183 Cal.App.4th
16 at 326 (citing *Grimes*, 673 A.2d at 1218); *Grimes*, 673 A.2d at 1218.

17 All of the discovery served by Plaintiffs seeks to obtain documents and information that
18 relate in some way to the Board’s response to BR CO’s shareholder demand. BR CO makes no
19 effort to conceal the fact it is seeking discovery for a prohibited purpose. Fourteen of BR CO’s
20 requests for production specifically reference and quote from the Board’s response to the
21 shareholder demand (Becher Decl., Exs. I-K, Request Nos. 12-25) and fourteen of the topics for
22 examination in BR CO’s notice of deposition of Cookies specifically reference and quote from the
23

24 _____
25 ² In *Bezirdjian*, the California Court of Appeal applied Delaware law in reaching its decision.
26 California courts often look to Delaware law governing shareholder demand requirements, and
27 thus Delaware law is instructive. *See, e.g., Potter v. Hughes* (9th Cir. 2008) 546 F.3d 1051, 1057
28 (“Although the case applies Delaware law, California law, as we have said, is identical to
Delaware law on the demand requirement.”); *see also Apple Inc. v. Superior Court* (2017) 18
Cal.App.5th 222, 244 (relying on Delaware law where “no California authority has addressed the
issue before us, and California’s demand requirement standards closely track Delaware law”).

1 Board's response to the shareholder demand. (Becher Decl., Ex. L, Request Nos. 10-23.) BR CO
2 confirmed that it is seeking discovery for the impermissible purpose of remedying defects in the
3 FAC when it asked Defendants to stipulate to allow it to amend the FAC on some unspecified,
4 future date, but refused to extend Defendants' time to respond to BR CO's discovery requests.
5 (Becher Decl. ¶¶ 14-16, Ex. M.) Because Plaintiffs are using discovery for an improper purpose,
6 discovery should be stayed.

7 **Conclusion**

8 For the above reasons, the Court should exercise its discretionary power to enter a stay of
9 the entire case or, at a minimum, stay discovery.

10 DATED: April 25, 2023

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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12 


13 By _____

Robert J. Becher
Attorneys for Gilbert Milam and Parker Berling

14
15
16 DATED: April 25, 2023

BAKER & MCKENZIE LLP

17
18 By _____


James J. Ward
Attorneys for Nominal Defendant
COOKIES CREATIVE CONSULTING
& PROMOTIONS, INC.



Make a Reservation

BR CO I, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, SUING INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF COOKIES CREATIVE CONSU vs GILBERT MILAM, et al.

Case Number: 23STCV02764 Case Type: Civil Unlimited Category: Other Commercial/Business Tort (not fraud/breach of contract)

Date Filed: 2023-02-08 Location: Stanley Mosk Courthouse - Department 61

Reservation

Case Name:

BR CO I, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, SUING INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF COOKIES CREATIVE CONSU vs GILBERT MILAM, et al.

Case Number:

23STCV02764

Type:

Motion for Stay of Proceedings

Status:

RESERVED

Filing Party:

COOKIES CREATIVE CONSULTING & PROMOTIONS, INC., a California corporation (Defendant)

Location:

Stanley Mosk Courthouse - Department 61

Date/Time:

06/12/2023 10:00 AM

Number of Motions:

1

Reservation ID:

620192794839

Confirmation Code:

CR-6YFACD5QBNR6557VK

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