REMEDIES IN ARBITRATION

Los Angeles Resolution Center
(September 11, 2018)

By Richard Chernick

1. **INTRODUCTION: Sources of Arbitral Power**
    - **Why this Topic is Important**
        - **Getting the process right for the parties**
        - **Risk of vacatur (exceeding powers)**
            - **Brewer/Mills research (non-signatories held to arbitrate)**
    - **The Clause**
        - **Focus in preliminary conference on what is arbitrable, comparing clause to Demand for Arbitration**
        - **Broad form v. narrow form clause – key control point**
            - ***E.g., Rice v. Downs; Simula v. Autoliv; Tracer Research**** **(*See Case List attached for cites)**
        - **The clause defines the scope of arbitration**
        - **The clause may expressly limit remedies (*e.g., O'Flaherty v. Belgum*; Anti-*AMD/Intel* clause (*see* below)**
    - **The Pleadings/Submission of the parties**
        - **Scope of arbitration may be narrowed by the Demand/Counterclaim**
        - **Parties may be included who are non-signatories ("Who decides" issues of arbitrability are beyond the scope of this program)**
        - **Remedial provisions/limitations**
            - ***E.g.*, exclude certain kinds of compensatory damages**
            - ***E.g.*, exclude punitive damages**
            - ***E.g.*, limiting equitable remedies (*O'Flaherty, supra*)**
        - **Response/affirmative defenses**
        - **Absence of a response (JAMS Rule 9(a); AAA Rule R-5(a))**
        - **Waiver of jurisdictional challenges (JAMS Rule 9(d); AAA Rule R-7(c)**
    - **Applicable Rules (JAMS Rule 11(b), 24(c), AAA Rules R-7, R-47(a))**
        - **"The arbitrator may grant any remedy or relief that is just and equitable and within the scope of the parties' agreement, including but not limited to specific performance of a contract" Rule 24(c) (same as *AMD/Intel,* below)**
        - **Emergency Procedures—JAMS Rule 2, AAA Rule R-38**
    - **Statutes (*e.g.*, CAA, FAA, Cal. Int. Arb. Act) and statutory law generally**
    - **Case law (*e.g., Advanced Micro Devices, Inc. v. Intel Corp.*; *Ajida Technologies v. Roos Instruments*)**

2. **PROVISIONAL REMEDIES, etc. (JAMS Rule 24(e); AAA Rule R-37)**
    - **Temporary restraining order/preliminary injunction (CCP § 527; *see* CCP § 1281.8) (what is standard for issuance – CCP or Rule 24(e)?**
    - **Bonds for TRO/PI – we may order as appropriate; parties must arrange privately (may be complex because bonding companies are not used to arbitration bonds)**
    - **Emergency relief (above)**
    - **Attachment (CCC § 481.010; *Outdoor Services, Inc. v. Pabagold, Inc.*) (no power to order as arbitrator – this is a court procedure) Receiver (CCP § 564; *Marsch v. Williams)* (no power to order as arbitrator – this is a court procedure)**
    - **Cost bond (CCP § 1030) -- Procedural or substantive law provision?**
        - **Similar to security for costs motion sometimes made in arbitration (authority?**
        - **Interim measures provision? JAMS Rule 24(e); AAA Rule R-37(b))**
    - ***Lis pendens* (CCP § 405 *et seq*.) Recordation is substantive; arbitrator ought to have power to expunge an improperly filed notice. We should be guided by case law as to expungement decision**
    - **Preservation of property (JAMS Rule 24(e); AAA Rule R-37(b)) (security for costs specifically authorized)**
    - **Stay of arbitration, stay of litigation (CCP §§ 1281.2, 1281.4) (*Best Interiors v. Millie & Severson*)**
        - **we have no power to order as arbitrator – for court alone)**
    - **Consolidation of arbitrations (CCP § 1281.3; No FAA provision; JAMS Rule 6(e) (no equivalent AAA provision)**
    - **Unlawful detainer procedures for possession of property (*e.g.* service requirements, timing of steps in process): court procedure not applicable to arbitration. We may order possession in an award, but the award can only be enforced as a judgment upon confirmation by a court.**
        - **<u>NB</u> arbitration clauses in residential leases are unenforceable, Civ. Code § 1953.4(a)(4).**
        - **But a separate arbitration clause independent of the lease may be enforced**
    - **Unlawful detainer substantive law (*e.g.*, repair offsets) these provisions are part of process of determining the right to possession, etc., so if the issue is within the scope of an enforceable arbitration clause, we have power to determine.**
    - **Anti-SLAPP motion (CCP §§ 425.16, 425.17) arbitrator has no power to employ this court process (conflict with CCP § 1286.2(a)(5))**

        - **Intended to weed out meritless suits which chill constitutional rights of free speech and expression at an early stage of proceedings**
        - **Procedural device, not a matter of substantive law**
        - **Not applicable to arbitration – only court proceedings (*Sheppard v. Lighthouse; Century 21 Chamberlain Assoc. v. Haberman; but see Paul v. Friedman*)**
        - **Express limitation on discovery prior to hearing of motion (CCP § 425.16(g)) -- Potential conflict with right to hearing under CAA and *Schlessinger v. Rosenfeld, Meyer & Susman* (dispositive motion standard)**
        - **AAA and JAMS decisions denying anti-SLAPP motions on procedural grounds (attached)**
    - **"Judicial" Notice (Evid. Code § 452) substantive provision of evidence code not required per Rule 22(d), but are some guideline as to what ought to be admitted**

3. **DISPOSITIVE AND OTHER MOTIONS**
    - **Motion to dismiss – statute of limitations (dispositive motion standard)**
    - **Motion to dismiss – contractual limitations period (*same*)**
    - **Motion to dismiss – 5-year statute (CCP § 583.310) ("Time to bring action to trial")**
        - **case law (*Burgess v. Kaiser*) oddly supports, by analogy to CCP § 583.310, arbitral power to dismiss arbitration not resolved within five years on grounds of "unreasonable delay," even though this is clearly a court-established procedural device and not an issue of substantive law (case law is old and may be of questionable authority)**
        - **courts may have authority to dismiss (stayed) court proceeding where arbitration not resolved within five years (*Boutwell v.* Kaiser; *Brock v. Kaiser*) on this basis as well**
        - **arbitrations under uninsured motorist provisions of Ins. Code may be dismissed if not brought to hearing within 5 years of commencement of arbitration; *see* Ins. Code § 11580.2(i)(2)**
    - **Dismissal of arbitration where party is unable to pay fee**
        - ***See Roldan v. Callahan & Blaine*; *Weiler v. Marcus & Millichap***
        - **Inability to pay arbitration fee may justify dismissal of arbitration and return to court**
        - ***Cf. Engalla v. Permanente Medical Group* (respondent's breach of arbitration agreement constitutes waiver of right to arbitrate; claimant permitted to exit arbitration and return to court)**
    - **Motion for summary adjudication/summary judgment (CCP § 437c; JAMS Rule 18; AAA Rule R-33)**

    - **(arbitrator follows latter, not former, for procedure; for substantive standard, reference to case law *may* be appropriate); *see Schlessinger, supra.***
- **Dismissal of claim/withdrawal from arbitration (JAMS Rule 13) (no equivalent AAA provision)**
    - **Withdrawal from arbitration after issuance of commencement letter requires agreement of parties (JAMS Rule 13(a))**
    - **Dismissal of claim or counterclaim "without prejudice" may be challenged and arbitrator may determine it to be "with prejudice" (JAMS Rule 13(b))**
    - **Standard? "With prejudice" might be characterized as an adjudication on the merits without a hearing. This power may be inconsistent with Rule 22(j) (power to proceed in absence of a party, which requires a "prove-up")**
    - **One should be cautious to use power granted by this rule**

4. EQUITABLE REMEDIES (JAMS Rule 24(c); AAA Rule R-47(a))

- **Declaratory relief (*Pacific Investment Co. v. Townsend*) -- OK**
- **Accounting (*same*) -- OK**
- **Dissolution of Partnership, LLC -- OK**
- **Injunction *(Swan Magnetics, Inc. v. Superior Court (Antek)*) -- OK**
- **Modification of injunction (*same*) – OK -- NB. arbitrator, not court, has sole power to modify injunction entered by arbitrator even though court later confirms that order as a judgment. *Id.***
- **Specific performance of contract (JAMS Rule 24(c); AAA Rule R-47(a)) -- OK**
- **Writ of possession of real property *(Mleynek v. Headquarters Cos.,*) -- OK**
- **Reformation of contract (*Pacific Gas & Electric Co. v. Superior Court* (*Anacapa Oil Corp.*)) -- OK**
- **Rescission -- OK**
- **17200 injunction -- NO (except as to actual party to arbitration) *Cruz v. PacifiCare*); *Comedy Club, Inc. v. Improv, West Assoc.***
- **17500 injunction -- NO (except as to actual party to arbitration) *Cruz v. PacifiCare*)**
- **Consumer Legal Remedies Act -- NO (*Broughton v. CIGNA Health Plans of California*) (except as to actual party to arbitration)**
- ***But see Ferguson v. Corinthian Colleges* (9th Cir.) (*Broughton/Cruz* preempted by FAA) and *McGill v. Citibank N.A.* (Cal. Supreme Court) (*Broughton/Cruz* not preempted by FAA)**
- **Remedies "consistent with the parties' agreement" (Rule 24(c), *Advanced MicroDevices, Inc. v. Intel Corp.* – OK**
    - ***E.g.*, Arbitrators in granting dissolution of partnership and fashioning a royalty remedy may include an ADR provision as**

consistent with parties' agreement. ***Ajida Technologies v. Roos Instruments***

   - **Some clauses, mindful of the scope of the *AMD/Intel* holding, provide that the arbitrator shall <u>not</u> have the power to award a remedy that a court could not (an "anti-*AMD/Intel* clause")**

5. DAMAGES

- **Punitive damages -- OK (does due process standard apply? -- NO *See Shahanian v. Cedars-Sinai Med. Center, Bosack v. Soward, Rifkind & Sterling, Inc. v. Rifkind*) (arbitration is not state action; due process clause does not apply)**
   - **Should we nonetheless consider/adhere to Supreme Court guidelines as to ratio of puns to compensatory damages?**
   - **Some international Rules preclude award of punitive and similar (*i.e.* treble) damages**
- **Statutory (*i.e.* treble damages) OK**

6. COSTS/FEES (JAMS Rule 24(f), (g); AAA Rules R- 47(d), 54, 55)

- **Attorneys' fees (contract)**
   - **Civ. Code § 1717 applies in California-venued cases**
   - **Issue of "mandatory fee shifting clauses" (arbitrator shall award . . .) (*DiMarco v. Chaney*)**
   - **Discretion to find no prevailing party**
- **Attorneys' fees (statutory) (*e.g.*, FEHA, Title VII)**
- **Attorneys' fees (Rule) *e.g.*, JAMS Int. Rules, CPR, ICDR, AAA Rule R-47(d)(ii)**
- **Fee or cost shifting per CCP § 998; applicable in a California-venued arbitration where FAA applies?**
- **Attorneys' fees (as sanctions) (*see* above)**
- **Attorneys' fees as damages (*Prentice v. NA Title Guaranty*) (tort of another); *Brandt* fees in insurance bad faith cases (*Brant v. Superior Court*); malicious prosecution (<u>NB</u> determined in the merits hearing, not a later cost phase)**
- **Arbitration fees and costs (clause, applicable rules)**
- **Arbitrator compensation (clause, applicable rules)**
- **Sanctions per JAMS Rule 29; AAA Rule R-58**
   - **Discovery sanctions where CCP § 1283.05 applies**
   - **CCP § 128.7 sanctions, Rule 11 sanctions not awardable because they are court-based procedural rules (*Optimal Markets Inc. v. Salant*)**
   - **Non-discovery sanctions (*see David v. Abergel*); JAMS Rule 29; AAA Rule R-58; *but see Thompson v. Jesperson***

7. **PREAWARD INTEREST**
   - **JAMS Rule 24(g); AAA Rule 47(d)(i); Use statutory guidelines under appropriate body of substantive law. Pleading an entitlement to interest not required. *Id.***

8. **CASE MANAGEMENT PRINCIPLES AND TECHNIQUES**
   - **Equitable remedies usually require multiple steps**
   - **E.g. dissolution of partnership**
   - **Some steps may require court review (partial final award, such as in *Hightower v. Superior Court*)**

<u>Materials attached</u>:
5/9/01 Daily Journal Article (Chernick, Managing the Remedial Process)
AAA redacted anti-SLAPP decision
JAMS anti-SLAPP decision in *Dunn v. State Bar of California*

<u>Case List</u>:

Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362 (1994)

Ajida Technologies, Inc. v. Roos Instruments, Inc., 87 Cal. App. 4th 534 (2001)

Bosak v. Soward, 586 F.3d 1096 (9th Cir. 2009) *(en banc)*

Boutwell v. Kaiser Foundation Hospitals, 206 Cal. App. 3d 1371 (1988)

Best Interiors v. Millie & Severson, 161 Cal. App. 4th 1320 (2008)

Brant v. Superior Court, 37 Cal. 3d 813 (1985)

Brock v. Kaiser Foundation Hospitals, 10 Cal. App. 4th 1790 (1992)

Broughton v. CIGNA HealthPlans of California, 21 Cal. 4th 1066 (1999)

Burgess v. Kaiser Foundation Hospitals, 16 Cal. App. 4th 1077 (1993)

Century 21 Chamberlain & Assoc. v. Haberman, 173 Cal. App. 4th 1 (2009)

Comedy Club Inc. v. Improv. West Assoc., 553 F.3d 1277 (9th Cir. 2009)

Cruz v. PacifiCare, 30 Cal. 4th 303 (2003)

David v. Abergel, 46 Cal. App. 4th 1281 (1996)

Engalla v. Permanente Medical Group, 15 Cal. 4th 951 (1997)

Ferguson v. Corinthian College, 733 F.3d 928 (9th Cir. 2013)

Hightower v. Superior Court, 86 Cal. App. 4th 1415 (2001)

McGill v. Citibank N.A., 2 Cal. 5th 945 (2017)

Marsch v. Williams, 23 Cal. App. 4th 238 (1994)

Mleynek v. Headquarters Cos., 165 Cal. App. 3d 1133 (1984)

O'Flaherty v. Belgum, 115 Cal. App. 4th 1044 (2004)

Optimal Markets, Inc. v. Salant, 221 Cal. App. 4th 912 (2013)

Outdoor Services, Inc. v. Pabagold, Inc., 185 Cal. App. 3d 676 (1986)

Pacific Investment Co. v. Townsend, 58 Cal. App. 3d 1, 10 (1976)

Paul v. Friedman, 95 Cal. App. 4th 853 (2002)

Prentice v. NA Title Guaranty, 59 Cal. 2d 618 (1963)

Rice v. Downs, 248 Cal. App. 4th 175 (2016)

Rifkind & Sterling, Inc. v. Rifkind, 28 Cal. App. 4th 1282 (1994)

Roldan v. Callahan & Blaine, 219 Cal. App. 4th 87 (2013)

Rosenthal v. Great Western S&L, 14 Cal. 4th 394 (1996)

Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096 (1995)

Shahanian v. Cedars-Sinai Med. Center, 194 Cal. App. 4th 987 (2011)

Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999)

Sheppard v. Lightpost Museum Fund, 146 Cal. App. 4th 315 (2006)

Swan Magnetics, Inc. v. Superior Court (Antek), 56 Cal. App. 4th 1504 (1997)

Tillman v. Tillman, 825 F.3d 1069 (9th Cir. 2016)

Tracer Research Corp. v. Nat. Environmental Services Co., 42 F.3d 1292 (9th Cir. 1994)

Weiler v. Marcus & Millichap, 2018 WL 2011048, __ Cal. App. 4th ___ (2018)

MANAGING THE REMEDIAL PROCESS IN COMPLEX ARBITRATIONS

By Richard Chernick

One of the challenges of presiding over complex arbitrations is to provide the parties the process they need without burdening them with unnecessary process elements. An obvious example is the opportunity to control the extent of discovery and exchange of information in proportion to the nature, size and complexity of the case and within the constraints of the clause provisions and the applicable rules. Helping the parties to reach agreement as to a level of discovery that is appropriate for the case will assist them in achieving the goals of efficiency and economy while also assuring a reliable and fair process.

After discovery, probably the most fruitful area of case management is the structuring and sequencing of the hearing(s) so that hearing time is efficiently used and so that the process is proportionate to the parties' particular needs and the actual characteristics of the case.

The most obvious example of this sort of case management is the bifurcation of fee and cost issues so that the merits of the case are determined in a Phase I hearing, including a determination of a prevailing party (in the form of an Interim Award expressly not subject to confirmation or correction under CCP §§ 1284 or 1286), followed by a process for the submission of written cost and fee evidence and argument by both sides followed by a telephonic or in-person hearing as appropriate. Bifurcation is expressly authorized by American Arbitration Association Rule R-32 and may be inferred from JAMS Comprehensive Rules 10 and 20.

It is also common to use a similar procedure for punitive damages – in Phase I a determination is made whether a party is entitled to punitive damages as reflected in an interim award (again, expressly not subject to correction or confirmation processes); this may trigger a request for discovery as to financial means, to which the parties are entitled by law (and consistent with their entitlement to discovery). A Phase II hearing can then be scheduled for determination of the bifurcated issue.

Management of the structure of the process becomes particularly critical in more complex cases where there are obvious areas of potential saving of time and achievement of efficiency. Questionable or highly contested liability issues accompanied by significant proposed damage evidence (economists, accountants, disputed evidence) are factors that suggest the value of bifurcating liability and damages in order to create meaningful efficiencies.

A scheduling order should define what issues are to be determined in Phase I and which are to be deferred to Phase II or later. The liability determination is reflected in an

Interim Award issued after Phase I (which identifies the bifurcation and cites the pertinent Scheduling Order); the interim award should also expressly state that it is not subject to the confirmation process, such as the following:

> "The further determinations to be made at any further hearing or based on written submissions shall be embodied in a Final Award which shall also incorporate the contents of the Interim Award. It is not intended that this Interim Award be subject to review pursuant to Code of Civil Procedure §§ 1284 or 1285 *et seq*."

Structuring of the hearing is particularly valuable where unusual remedies are requested, such as in a partnership dissolution case. The parties may dispute the entitlement of a party to dissolve the partnership, or there might be a dispute about who "caused" the dissolution. In such circumstances, the fashioning of the remedy (dissolution or not, damages or not, and how the dissolution might be effected) usually ought to await resolution of the liability issues.

For example, in the recent arbitration of a family business dispute where two families had equal ownership interests, the faction in power was alleged to have abused its management and to have improperly employed a related party (wife of a family member) to be CEO; one side wanted a dissolution, the other wanted the *status quo* maintained. The CEO had threatened a wrongful termination claim in the event she was removed. The range of remedies necessary to unravel this dispute could not possibly be addressed until a determination was made as to the wrongful conduct claims and the entitlement to dissolution. Liability was bifurcated (as defined in a Scheduling Order), and after extensive hearings an interim award issued finding in favor of the faction that was not in control.

In Phase II, the parties submitted alternate plans for dissolution. The parties ultimately agreed upon a neutral appraiser to fix the value of the business (with the valuation to be submitted to the panel as evidence but not as a binding determination; either side was free to offer additional evidence and argument on that point). The parties also agreed on a mode for a buy-out as between the two factions which eliminated the need to consider a third-party sale. These agreements and the related process were documented in a second interim award.

In Phase III, the arbitrators determined the value of the interest to be acquired and the terms for the buy-out, and the effect of all offsetting claims for damages resulting from the Phase I evidence and interim award. The interest transferred (without any confirmation process) after Phase III in accordance with an agreement worked out among the parties as reflected in a third interim award.

In Phase IV, fee and cost evidence was submitted. These issues had been deferred until after the actual transfer of the business in order to capture any cost occasioned by the process through that point and the conduct of the parties following Phase III. A final award issued at this point.

This result could not have been achieved if the parties objected to the interim determinations of liability or damages; there would have been no agreed transfer until those objections could be resolved by a reviewing court. That was the situation presented in *Hightower v. Superior Court* 86 Cal. App. 4th 1415 (2001). There, two individuals owned equal interests in a successful software development company and were subject to a Stockholders Agreement. That agreement contained a buy-sell provision which permitted either party to offer to buy (at a minimum price derived from corporate earnings); any offer triggered the right of the offeree to become the buyer for the stated price and for a defined period. When one party (Respondent) offered to buy, the offeree (Claimant) attempted to raise sufficient funds to become the buyer himself.

Claimant was unable to obtain financing for his counteroffer; he sought a determination in arbitration that his right to acquire the company had been violated by Respondent's alleged breach of fiduciary duty under the Shareholders' Agreement. Respondent claimed the right to acquire Claimant's stock as prescribed in their agreement and claimed to have been damaged on account of the loss of that opportunity. These issues had be resolved prior to consideration of any remedy.

Phase I resulted in a determination that Respondent was entitled to acquire Claimant's stock per the Shareholders Agreement and was entitled to the benefit of that bargain. Claimant was unwilling to comply voluntarily with the award without court review, but Respondent could not obtain financing for the purchase of the shares until there was a definite and enforceable obligation to deliver the shares. After a hearing dealing with the remedy issue, a Partial Final Award was issued defining Respondent's right to acquire the shares on terms intended to match the original deal as closely as possible but modified to reflect intervening events (payment or non-payment of dividends and salary, differences in the financing costs required for the subsequent deal, an award of fees and costs of more than $2 million, etc.)

The Partial Final Award was structured to be subject to confirmation, unlike the interim awards in the previous example; many issues were reserved in the Partial Final Award for subsequent determination by the same arbitrator, including share price adjustments necessitated by the actual financing achieved, intervening disputes about pre-transfer dividends, and disputes about the parties' relationship in the event Respondent was unable or unwilling to buy the shares, as well as subsequent fee and cost issues, etc.

The trial court denied Claimant's motion to vacate the Partial Final Award; the court of appeal upheld the order denying *vacatur*, and upheld the remedial process chosen by the arbitrator to determine certain issues prior to the confirmation process and to leave certain issues unresolved until later. The court held that this was in these circumstances not contrary to CCP § 1283.4 which requires that "The award shall include a determination of all of the questions submitted to the arbitrators, the resolution of which is necessary to determine the controversy."

The legal basis of the decision upholding this process was the case of *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362 (1994), holding that an arbitrator may grant any remedy which draws its essence from the agreement of the parties, even if a court could not have done so. In this case, the parties' agreement to arbitrate before the AAA, which rules give the arbitrator broad remedial power (former Rule 43 and new Rule R-45), and the nature of the parties' buy-sell agreement, justified the process imposed on the parties by the arbitrator.

The arbitrators' obligation to fashion remedies consistent with the parties' agreement was also considered in *Ajida Technologies, Inc. v. Roos Instruments, Inc.*, 87 Cal. App. 4th 534 (2001), where a joint venture was dissolved and post-dissolution rights to the joint technology were determined by the arbitrators, including a royalty arrangement and prescribed dispute resolution provision including an arbitration provision.

Richard Chernick is an arbitrator and mediator and a member of the Large, Complex Case and Employment Dispute Resolution Panels of the American Arbitration Association. He is a co-author of The Rutter Group's "California Practice Guide -- Alternative Dispute Resolution."

The author was the sole arbitrator in *Hightower v. Superior Court* 86 Cal. App. 4th 1415 (2001) and was one of the neutral arbitrators in *Ajida Technologies, Inc. v. Roos Instruments, Inc.*, 87 Cal. App. 4th 534 (2001).

AMERICAN ARBITRATION ASSOCIATION

XXXXXXXXXXXXXX Claimant, vs. ZZZZZZZZZZZZZZZ Respondent.	Case No. XXXXXXXXXXX ORDER RE SLAPP MOTION
ZZZZZZZZZZZZZZZZZ Counter-claimant, vs. XXXXXXXXXXXXXXXX Counter-respondent.	

Prior to the first Case Management Conference call in this matter, Respondent filed an answer and counterclaims. At the first Case Management Conference call in this case, at the request of Claimant, the Arbitrator ruled that Claimant could file a Special Motion to Strike the Complaint with respect to Respondent's counterclaims. A briefing schedule for Claimant's Motion, Respondent's Opposition and Claimant's Reply was set. Telephonic oral argument on the motion occurred on August 22, 2014 at 10:00 am. Claimant was represented by XXXXXXXXX of XXXXXX and XXXXXXXXXXX of XXXXXXXXX, and Respondent was represented by XXXXXX of XXXXXXXXXXXXXXX.

Having reviewed and considered the Motion, Opposition and Reply, the authorities cited therein, the Declarations and Exhibits and having heard the arguments of the parties in the telephonic hearing, the Arbitrator denies the motion based upon separate and independent grounds, any one of which results in the denial of the motion: (1) The weight of California authority is that an arbitration is not a "judicial proceeding" or "official proceeding authorized by law" under the statute; (2) Arbitration claims are not "causes of action" under the statute; (3) The "remedy" language of the arbitration proceeding as interpreted by the Arbitrator does not compel the conclusion that an anti-SLAPP motion be permitted; (4) The counterclaims do not "arise from Claimant's exercise of any right to petition or free speech in connection with a public issue." The Arbitrator does not reach the issue of probable success on the merits.

Procedural Background

Claimant has demanded arbitration of wage and hour claims, premised on his assertion that he was improperly classified as an exempt employee. These claims were originally asserted in the Superior Court for the State of California, County of Orange, Case No. XXXXXX. The claims asserted are as follows: (1) Failure to Pay Overtime in Violation of Labor Code §1194; (2) Failure to Provide Meal and Rest Periods in Violation of Labor Code §226.7; (3) Violation of Labor Code §2802; (4) Failure to Pay Vested Vacation Wages in Violation of Labor Code §2267.3; (5) Violation of Labor Code §203; (6) Failure to Keep Accurate Records in Violation of Labor Code §226; and (7) Unfair Business Practices (Violation of Business & Professions Code §17200 et seq.).

Respondent has denied Claimant's allegations and has asserted counterclaims for Accounting, Offset and Restitution, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Unjust Enrichment. Respondent alleges generally that if Claimant was not performing managerial tasks more than 50% of the time, Respondent was damaged because Respondent paid Claimant to perform those managerial duties.

Claimant contends that Respondent's claims should be struck pursuant to California Code of Civil Procedure §425.16, known as the anti-SLAPP statute.

Analysis

Code of Civil Procedure §425.16, provides, *inter alia*, as follows:

> "(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection

> with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> *   *   *"
>
> (e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

It is well-established that the party bringing an anti-SLAPP motion bears the burden of establishing that the causes of action in the complaint arise from protected activity under the statute. If this is done, the opposing party has the burden of showing probability of success on the merits. *City of Coatl v. Cashman,* 29 Cal.4th 69, 78 (2002).

Claimant asserts that the counterclaims at issue are subject to a motion to strike under 425.16(e)(1) and (2) (Motion p.3, line 27- p.4, lines 1-5). He argues that Respondent's claims are based entirely upon Claimant's claims in litigation and that they would not exist independent of Claimant's Complaint; accordingly, he asserts that they should be stricken..

Respondent first argues that that the motion must be denied because the statute does not apply to claims made in arbitration. It asserts that the California courts have made it clear "that claims filed in arbitration are <u>not</u> 'protected activity' upon which an anti-SLAPP motion may be based. (Opp. p.2, lines 17-18)

Respondent relies heavily on the case of *Century 21 Chamberlain & Associates v. Haberman,* 173 Cal.App.4th 1 (2009). Haberman filed a demand for arbitration of a negligence claim against Chamberlain. Chamberlin then filed a declaratory relief action in court against Haberman, seeking a declaration that it did not have to arbitrate. Haberman responded with an anti-SLAPP motion to strike Chamberlain's complaint. The trial court denied the motion in part based upon its conclusion that the demand for arbitration was not a "judicial proceeding" within the meaning of the statute and that, therefore, it did not constitute protected activity under the statute. It declared:

> "But a demand commencing private, contractual arbitration does not '"fit[]"' any of the four anti-SLAPP categories. *[footnote and citations omitted]*
>
> Arbitration does not fall into the first two categories of protected activity. These protect statements made in 'a . . . judicial proceeding, or any other official proceeding authorized by law' (§425.16, subd. (e)(1)) or 'in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law.' (§ 425.16, subd. (e)(2).)
>
> Arbitration is not a judicial proceeding — it is an alternative thereto. 'Arbitration claims . . . are not filed in *courts* and they do not initiate *judicial* proceedings.' (*Sheppard v. Lightpost Museum Fund* (2006) 146 Cal.App.4th 315, 323 [52 Cal.Rptr.3d 821].) *[footnote omitted]* The California Supreme Court distinguishes arbitration from judicial proceedings when construing the right to a jury trial. '[P]arties [can] eschew jury trial . . . by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum.' (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 713 [131

> Cal.Rptr. 882, 552 P.2d 1178] (*Madden*).) 'When parties agree to submit their disputes to arbitration they select a forum that is alternative to, and independent of, the judicial [forum].' (*Id.* at p. 714.) '[A]rbitration agreements . . . represent an agreement to avoid the judicial forum altogether.' (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 955 [32 Cal.Rptr.3d 5, 116 P.3d 479] (*Grafton*).)"
>
> *Id.* at 7-8

The court analogized to judicial versus non-judicial disclosure.

> "The distinction between arbitration and judicial proceedings is similar to the distinction between nonjudicial and judicial foreclosure. Nonjudicial foreclosure does not trigger anti-SLAPP protection because it "'is a private, contractual proceeding'" (*Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1520-1521 [68 Cal.Rptr.3d 230] (*Garretson*)) that 'merely provides a nonjudicial, private alternative to judicial foreclosure.' (*Id.* at p. 1521.) Likewise, arbitration is a contractual proceeding that provides a private alternative to the judicial forum. (*Madden*, *supra*, 17 Cal.3d at pp. 713-714; *Grafton, supra,* 36 Cal.4th at p. 955.) Arbitration is not a judicial proceeding triggering anti-SLAPP protection."
>
> *Id.* at 8

Having determined that arbitration is not a "judicial proceeding" within the meaning of the anti-SLAPP lawsuit, the court of appeal considered whether arbitration is an "official proceeding authorized by law." It concluded it is not.

> "Nor is arbitration an 'official proceeding authorized by law,' subject to anti-SLAPP protection. (§ 425.16, subds. (e)(1), (2).) When nongovernmental entities are involved, courts have limited 'official proceeding' anti-SLAPP protection to (1) quasi-judicial proceedings that are part of a 'comprehensive' statutory licensing scheme and 'subject to judicial review by administrative mandate' (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199-200 [46 Cal.Rptr.3d 41, 138 P.3d 193] (*Kibler*) [hospital peer review]),

and (2) proceedings 'established by statute to address a particular type of dispute.' (*Philipson, supra,* 154 Cal.App.4th at p. 358 [mandatory attorney fee arbitration]; see Bus. & Prof. Code, § 6200 et seq.) Unlike hospital peer review, arbitration is not part of a comprehensive statutory licensing scheme and not reviewable by administrative mandate. And unlike mandatory fee arbitration, private arbitration is not required by statute."

Id at 9

Claimant argues that the decision in *Century 21* is distinguishable. He asserts: "The holding in *Century 21* states that an anti-SLAPP motion cannot be filed in response to a demand for arbitration made in court." (Reply, p.3, lines 10-11) The case, according to Claimant applies only to a demand for arbitration challenged in court, not to claims made in arbitration. It is, of course, true that *Century 21* involved an anti-SLAPP motion filed in court in response to a declaratory relief cause of action filed following an arbitration demand. However, the language and reasoning of the case extend further. The statute expressly defines "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include: "(1) any written or oral statement or writing made before a legislative, executive, or *judicial proceeding, or any other official proceeding authorized by law*, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or *judicial body, or any other official proceeding authorized by law . . . .emphasis added]*"[1] The *Century 21* court is unequivocal in its pronouncement that arbitration is not a "judicial proceeding" or "other official proceeding authorized by law." The straightforward application of the court's statements to the anti-SLAPP statute quoted immediately above results in the determination that under Section 425.16, subd. (e)(1) and(2), the protected act must occur in a judicial proceeding, in any other official proceeding or in connection with a matter under consideration by a judicial body. Claimant's claims in arbitration simply do not meet the test.

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[1] There are two additional bases, but these are not relied upon by Claimant.

In addition to arguing that the activity here does not qualify under CCP §425.16(e)(1) or(2) based upon the above reasoning, Respondent argues that its counterclaims "are not 'cause[s] of action' subject to a special motion to strike under the anti-SLAPP statute," because Pei Wei filed them in *arbitration. [emphasis added by Respondent]* (Opp. p.3, lines13-14) It points to the language in CCP §425.16(b)(1) that provides: '"[a] *cause of action* against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike ...."' *[emphasis added by Respondent]*. It asserts that the courts have held that claims made in arbitration, it are not "causes of action."

The authority for this position is stated as follows:

> "California courts have regularly interpreted the term 'cause of action' to *exclude* claims (or counterclaims) filed in arbitration. *See Sheppard v. Lightpost Museum Fund,* 146 Cal.App.4th 315, 323-324 (2006) (holding that arbitration claims asserted only in an arbitral forum are expressly *not* 'causes of action' subject to a motion to strike); *Tendler v. www.jewishsurvivors.blogspot.com,* 164 Cal.App.4th 802, 807 (2008) (holding that a 'cause of action' subject to a special motion to strike must be contained in a complaint, cross-complaint, petition or similar pleading in a *public judicial* proceeding) (emphasis added); Rylaarsdam et al., at7:503 ("The anti-SLAPP statute applies only to 'lawsuits' (i.e., suits filed in a court by way of a complaint, cross-complaint, or petition)."). *[emphasis added by Respondent]*"

(Opp. p.3, lines 18-26)[2]

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[2] Claimant points out that in *Tendler,* the court did not use the word "public" before the words "judicial proceeding."

The Arbitrator finds the cited authorities persuasive. While it is true that the case of *Sheppard v. Lightpost Museum Fund,* 146 Cal.App.4th 315 (2006) involved an anti-SLAPP motion in court, the court of appeal discusses generally the issue whether Section 425.16 makes claims asserted in an arbitration subject to a motion to strike. Because the Arbitrator agrees with the court's reasoning, it is set out at length.

> "Section 425.16 does not expressly make arbitration claims asserted only in an arbitral forum 'subject to' a motion to strike. The statute makes a 'cause of action' in a 'complaint,' which 'includes cross-complaint and petition,' 'subject to' a motion to strike. Nevertheless, the statute's failure to expressly include arbitration claims asserted only in an arbitral forum within its ambit is not necessarily conclusive. 'The term "includes" is ordinarily a word of enlargement and not of limitation. *[Citation.]* The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.' (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 639.) '[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.' (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012 [9 Cal.Rptr.2d 358].) Complaints, cross-complaints and petitions are *pleadings* which are filed in *courts* to initiate *judicial* proceedings. (§§ 22, 420, 422.10.) Arbitration claims filed only in an arbitral forum, while in some ways similar to pleadings, are very different because they are not filed in *courts* and they do not initiate *judicial* proceedings. These distinctions indicate that the Legislature did not intend to include such claims within the term 'complaint.'
>
> Section 425.16's timing provisions provide additional evidence of the Legislature's intent to exclude arbitration claims filed only in an

arbitral forum from the reach of the statute. Section 425.16 requires a motion to strike to be brought within a certain time period after 'service of the complaint.' '[S]ervice of the complaint' is a term of art that refers to the means by which a court obtains jurisdiction over a defendant. (§§ 410.50, 413.10, 415.10.) Arbitration claims filed only in private arbitral forums are not subject to these statutory jurisdictional limitations. By restricting the timing of a motion to strike in terms that are exclusively applicable to an action *in court,* the Legislature expressed its intent to limit the pleadings that are subject to a motion to strike to those pleadings that have been filed in court.

Finally, the Legislature expressly stated its intent that section 425.16 target 'abuse of the *judicial process.*' (§ 425.16, subd. (a), italics added.) Private arbitration proceedings are not part of the judicial process; they are 'nonjudicial' proceedings. 'Nonjudicial [private contractual] arbitration proceedings are generally regulated by the procedural rules established by the arbitration agency; such proceedings are not necessarily controlled by the Code of Civil Procedure *unless expressly provided by that code* (Code Civ. Proc., § 1280 et seq.), by the arbitration rules, by the parties' contract, or other provisions of law regulating such nonjudicial arbitration.' (*Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1387 [32 Cal.Rptr.2d 311], italics added.)

Section 425.16 does not 'expressly provide[]' that it applies to claims asserted only in nonjudicial arbitration proceedings. This statute was expressly intended to prevent abuse of the 'judicial process,' and its terms are not reconcilable with a legislative intent to extend it to arbitration claims filed only in private nonjudicial forums. It follows that

> the Legislature did not authorize superior courts to strike arbitration claims filed only in arbitral forums under section 425.16.
>
> *Id.* at 322-324

Just as the statute does not authorize a court to strike arbitration claims based upon the terms of the statute, it does not authorize striking claims in the arbitration proceeding itself. The court of appeal clearly states that claims asserted in the arbitral forum are not subject to an anti-SLAPP motion.

Claimant argues all remedies available in court are available in arbitration, and that, accordingly, anti-SLAPP motions are available in arbitration to the same extent they are available in court. (Reply p. 2, lines 20-26) Putting aside the above authority that, in court, arbitration claims are not subject to an anti-SLAPP motion and the conclusion that they are not subject to anti-SLAPP attack in arbitration either, this argument presupposes that an anti-SLAPP motion is a "remedy." The Arbitrator does not so interpret the arbitration agreement. It is found that the reference to "remedies" does not include the right to bring motions such as anti-SLAPP motions.[3]

Finally, and as an additional and independent basis for denying the motion, it is concluded for the reasons argued by Respondent, that Respondent's counterclaims do not "arise from" Claimant's exercise of any right to petition or free speech in connection with a public issue." (Opposition, pp. 4-6) The fact that the counterclaims are predicated on Claimant's prevailing on the claims he has asserted does not compel the conclusion that the counterclaims arise from exercise of the free speech right. If this were so, mandatory counterclaims in the nature of offsets arising out of the same set of facts as the initial claim, would always be subject to an anti-SLAPP motion.

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[3] A somewhat analogous result has been reached in cases where it is argued that the remedy language in an arbitration agreement should be interpreted to permit class actions where the agreement is otherwise silent. It has been held that "remedy" language does not include the right to bring a class action. *See, e.g., Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5^{th} Cir. 2012), *abrogated on other grounds*, *Oxford Health Plans v. Sutter,* 133 S.Ct. 2064 (2013)

Ruling Does Not Reach Merits

Given the bases for denial of this motion, the Arbitrator does not reach issues concerning the probability that Respondent will – or will not – be successful on the merits.

Request To Immediately File Further Motion To Dismiss

Claimant requested that if the anti-SLAPP motion were to be denied, that he be permitted immediately to file a motion seeking dismissal of the counterclaims on the merits. After due consideration, it is determined that such a motion is premature at this time. Even though, if misclassified, Claimant is entitled to recover payment for uncompensated overtime, for example, this does not necessarily mean that Respondent may not also recover if it can prove, for example, that it was damaged by a breach of contract. The facts have not yet been developed, and it is most efficient to have all legal and factual arguments with respect to the counterclaims litigated at one time. Were Claimant to file a motion to dismiss/motion for summary judgment, the Arbitrator would, in any event, permit Respondent to conduct discovery in order to oppose the motion to the extent that Respondent contends that factual issues are presented. Claimant may seek permission to file a dispositive motion when discovery is substantially completed.

It is so ordered.

Dated: September 1, 2014

/s/

Pamela L. Hemminger, Arbitrator

JAMS ARBITRATION

DUNN, JOSEPH L. Claimant, v. STATE BAR OF CALIFORNIA, et al., Respondents.	Reference No. 1100083130 **ORDER RE RESPONDENTS' ANTI-SLAPP MOTIONS**

On March 1, 2016, Claimant sent the Arbitrator a letter that raised urgent issues regarding Respondents' pending Special Motions to Strike under Code of Civil Procedure §425.16,[1] and requested an immediate conference with the Arbitrator. Respondents replied to Claimant's letter on March 2, 2016. The Arbitrator held a conference call on March 3, 2016. Mr. Mark Geragos and Mr. Benjamin Meiselas appeared telephonically on behalf of Claimant. Mr. Moez Kaba, Mr. John Hueston, Ms. Vanessa Holden, and Ms. Catherine Nasser appeared telephonically of behalf of Respondents. Claimant questioned whether the Respondents had a right to bring an Anti-SLAPP motion in an arbitration proceeding, and, if they did, Claimant requested leave to

[1] Motions brought under CCP § 425.16 are commonly referred to as anti-SLAPP motions ("Strategic Lawsuits Against Public Participation.") *Jarrow Formulas, Inc. v. LarMarche*, 31 Cal.4th 728, 732, fn. 1 (2003).

conduct discovery to obtain evidence needed to oppose the motion.[2] The Arbitrator allowed Claimant to file a supplemental letter on March 8, 2016, and allowed Respondents to file supplemental responses on March 9, 2016.

Having reviewed the papers submitted, the authorities cited therein, and the arguments made by the parties at the telephonic conference, the Arbitrator determines that Respondents do not have the right to bring an anti-SLAPP motion in this forum.

Background

Claimant was employed as the Executive Director of the State Bar of California from November 22, 2010 until his termination on November 7, 2014. On November 18, 2014, Claimant filed a lawsuit in the Superior Court for the State of California, Los Angeles County, Case No. BC563715, asserting claims for "Whistleblower Retaliation" in violation of Labor Code §1102.5 against the State Bar, and Breach of Fiduciary Duty against Mr. Craig Holden, State Bar President. On April 29, 2015, Claimant filed a First Amended Complaint, asserting an additional claim for Breach of Fiduciary Duty against Mr. Holden and the State Bar Board of Trustees for their purported role in leaking information to the press, and a claim for Intentional Interference with Contractual Relations against Mr. Holden and Respondent Beth Jay, a former employee of the California Supreme Court. Respondents denied Claimant's allegations, asserting that Claimant was terminated from his position following an internal State Bar investigation that uncovered evidence of misconduct.

On June 12, 2015, the Superior Court granted the State Bar's Motion to Compel Arbitration and entered a stay of all proceedings pending the completion of arbitration. Claimant

[2] The filing of a notice of motion under CCP §425.16 automatically stays discovery unless a party shows "good cause" to conduct discovery to oppose the motion. CCP §425.16(g); *see also*, *Britts v. Sup. Ct.(Berg & Berg Enterprises, LLC)*, 145 Cal.App.4th 112, 1129 (2006).

filed its Notice of Claims in Arbitration on February 12, 2016. On February 26, 2016, Respondents State Bar, Craig Holden and Beth Jay filed anti-SLAPP motions to strike Claimant's First, Second, Third, and Fourth Causes of Action in the Notice of Claims filed in this arbitration proceeding.

Analysis

Section 425.16 of the California Code of Civil Procedure §425.16 provides:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
>
> (b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. . . .
>
> . . . .
>
> (e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
>
> (f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.
>
> (g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until

> notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.
>
> (h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."
>
> . . . .

Claimant argues that the anti-SLAPP statute does not apply to claims made in arbitration proceedings, citing *Sheppard v. Lightpost Museum Fund*, 146 Cal.App.4th 315 (2006) and *Century 21 Chamberlain & Associates v. Haberman*, 173 Cal.4th (2009).

In *Sheppard*, the trial court granted a §425.16 anti-SLAPP motion attacking claims the defendant had brought in a parallel arbitration proceeding. *Sheppard*, 146 Cal.App.4th. at 321. On appeal, the Court noted that §425.16 does not "expressly make arbitration claims asserted in an arbitral forum subject to a motion to strike." *Id.* at 322. To the contrary, §425.16(a) states that the statute was expressly intended to target "abuse of the judicial process." The Court ruled that private arbitration proceedings are not "judicial processes," but rather, are "nonjudicial," private contractual proceedings, typically regulated by procedures established by the arbitration agency, and not necessarily by the Code of Civil Procedure unless expressly provided for by the arbitration rules or the parties' private contract. *Id.* at 323.

Furthermore, the Court noted that anti-SLAPP motions to strike apply only to a "'cause of action' in a 'complaint,' which 'includes cross-complaint and petition . . ..'" *Id.* at 322. "[C]omplaints, cross-complaints and petitions are *pleadings*, which are filed in *courts* to initiate *judicial* pre-proceedings. Arbitration claims filed only in an arbitral forum, while in some ways similar to pleadings, are very different because they are not filed in *courts* and they do not initiate *judicial* proceedings. These distinctions indicate that the legislature did not intend to include such claims within the term 'complaint.'" *Id.* at 323 (*emphasis in original*).

The Court also looked to the timing provisions set forth in §425.16(f), which require that anti-SLAPP motions be brought within 60 days of the "service of the complaint," a "term of art" that "refers to the means by which a court obtains jurisdiction over a defendant." *Id.* Arbitration claims, in contrast, are not subject to these statutory jurisdictional limitations. *Id.*

The *Century 21* case, decided three years after *Sheppard*, also supports Claimant's argument. In *Century 21*, the defendant brought an anti-SLAPP motion on the basis that the plaintiff's lawsuit was a ruse to suppress the defendant's effort to bring a parallel claim in arbitration. The trial court denied the anti-SLAPP motion on the basis that the defendant's act of filing an arbitration claim was not encompassed by any of the four categories of protected behavior described in CCP § 425.16(b)(1), and thus plaintiff's cause of action did not "arise from protected activity." *Id.* at 7. The Court of Appeal affirmed, noting that "[a]rbitration is not a judicial proceeding – it is an alternative thereto," because "arbitration agreements represent an agreement to avoid the judicial forum altogether." This analysis supports the *Sheppard* court's ruling that the term "judicial process" as used in §425.16(a), evidences the legislature's intent that the anti-SLAPP statute should apply only to claims brought in a judicial forum, and not to claims brought in arbitration.

Respondents argue that the rulings in *Sheppard* and *Century 21* should be limited to anti-SLAPP motions that attack claims that have never been asserted in a court, and argue that Claimant *did* invoke the "judicial process" by first filing his lawsuit in the Los Angeles Superior Court. There is no reasoned basis to restrict the application of *Sheppard* or *Century 21* to claims in arbitration that were not initially pled in a trial court proceeding. *Sheppard* dictates that the anti-SLAPP statute simply does not apply to a claim in arbitration, and regardless of the origin of the dispute between these parties, Respondents are attempting to utilize the anti-SLAPP procedure to strike claims in arbitration.

Case law cited by Respondents in support of their argument is not persuasive. *Laff v. Manning & Marder, Kass, Ellrod, Ramirez, LLP*, 2004 WL 26750 is an unreported case in which the Court of Appeal stated, in dicta, that there was "nothing to prevent appellants from renewing their anti-SLAPP motion [originally brought in front of the trial court] before the arbitrator." *Id.* at *3. The *Laff* case did not examine the applicability of the anti-SLAPP statute to arbitration claims, and, nonetheless, was decided two years before *Sheppard* and five years before *Century 21*. With the subsequent rulings in *Sheppard* and *Century 21*, it is clear that there *is* now precedent that prevents Respondents from bringing an anti-SLAPP motion before an arbitrator. Similarly, nothing in the rulings set forth in *Hotels Nevada v. L.A. Pac. Ctr., Inc.*, 203 Cal.App.4th 336 (2012) or the unpublished case of *Serv. Employees Int'l Union, Local 790 v. San Francisco Bay Area Rapid Transit Dist.*, No. A099441, 2003 WL 2213879 contradicts the holdings in *Sheppard* and *Century 21*. Neither *Serv. Employees Int'l Union* nor *Hotels Nevada* considered whether the anti-SLAPP statute applies to claims in arbitration. *Serv. Employees Int'l Union* examined whether an arbitrator acted within the scope of his authority when he awarded attorneys' fees to the prevailing party, and referenced the anti-SLAPP statute's attorney's fee provision only in support of the notion that public policy favors attorney's fee awards in cases involving constitutional rights. *Hotels Nevada* involved a case in which *Nevada's* anti-SLAPP statute was invoked in an arbitration governed by *Nevada* State Law.

Because Claimant is correct that §425.16 does not apply to Claimant's claims in arbitration, Respondents' anti-SLAPP motions are DENIED for the reasons stated herein.[3]

Dated: 3-15-16

Edward A. Infante

Edward A. Infante, Arbitrator

[3] Claimant's remaining arguments that judicial estoppel and waiver also act to restrict Respondent's right to bring an anti-SLAPP motion are less persuasive. Respondent State Bar's argument, made in support of its motion to compel arbitration, that this case does not invoke the rule against delegating policymaking powers to an arbitrator, is not inconsistent with Respondent's argument that this case involves "acts in furtherance of" the exercise of constitutional rights "in connection with a public issue." The two arguments are distinct. Furthermore, Respondent Beth Jay was not a party to the case when the Superior Court ruled upon the motion to compel arbitration, and thus Claimant's estoppel argument cannot apply to Ms. Jay's anti-SLAPP motion.

With regard to Claimant's waiver argument, although §425.16(f) states that anti-SLAPP motions must be filed within the first 60 days following the "service of the complaint," the 60 day period runs from service of the *most recent amended complaint*, rather than from the original complaint. *See, Yu v. Signet Bank/Virginia (Yu II")*, 103 Cal.App.4th 298, 314 (2002). Claimant filed a First Amended Complaint in the Los Angeles Superior Court on April 29, 2015. The Superior Court granted Respondent State Bar's Motion to Compel Arbitration 44 days later on June 12, 2015, after which the case was stayed pending the completion of arbitration and the Superior Court lacked jurisdiction to hear an anti-SLAPP motion even if one had been filed. *See, Office & Professional Employees Union v. Sea-Land Service, Inc.*, 90 Cal. App.3d 844, 847 (1979).

PROOF OF SERVICE BY E-Mail

Re: Dunn, Joseph L., et al. vs. State Bar of California, et al.
Reference No. 1100083130

I, Courtney N. Smith, not a party to the within action, hereby declare that on March 15, 2016, I served the attached ORDER RE RESPONDENTS' ANTI-SLAPP MOTIONS on the parties in the within action by electronic mail at San Francisco, CALIFORNIA, addressed as follows:

Mark J. Geragos Esq.
Benjamin J. Meiselas Esq.
Geragos & Geragos
644 S. Figueroa St.
Los Angeles, CA 90017
Phone: 213-625-3900
mark@geragos.com
ben@geragos.com
Parties Represented:
Senator Joseph Dunn (Ret.)

Moez M. Kaba Esq.
Joe Reiter Esq.
Hueston Hennigan LLP
523 W. 6th Street
Los Angeles, CA 90014-1217
Phone: 213-788-4340
mkaba@hueston.com
jreiter@hueston.com
Parties Represented:
Craig Holden
State Bar of California

Vanessa J. Holton Esq.
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Phone: 415-538-2000
Vanessa.Holton@calbar.ca.gov
Parties Represented:
Craig Holden
State Bar of California

Robert A. Naeve Esq.
Jones Day
3161 Michelson Dr.
Suite 800
Irvine, CA 92612
Phone: 949-851-3939
rnaeve@jonesday.com
Parties Represented:
Beth Jay

John C. Hueston Esq.
Hueston Hennigan LLP
620 Newport Center Dr.
Suite 1300
Newport Beach, CA 92660
Phone: 949-229-8640
jhueston@hueston.com
Parties Represented:
Craig Holden
State Bar of California

Catherine S. Nasser Esq.
Jones Day
555 California St.
26th Floor
San Francisco, CA 94104
Phone: 415-626-3939
cnasser@jonesday.com
Parties Represented:
Beth Jay

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco, CALIFORNIA on March 15, 2016.

Courtney N Smith

Courtney N. Smith
csmith@jamsadr.com