2d Civil No. B213866

COURT OF APPEAL STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 1

ARNOLD GREENSPAN, Trustee of the
Andrew Meieran Family Trust,

Plaintiff and Respondent,

v.

LADT, LLC; LA ABC, LLC; BARRY SHY;
and DOES 1 through 50,

Defendants and Appellants.

Appeal from Los Angeles County Superior Court
Honorable Robert L. Hess, Dept. 24
Los Angeles County Superior Court Case No. BC356794

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INTRODUCTION

In an arbitration that appellants insisted on having, before the arbitrator that appellants recommended, the arbitrator found that appellants had unjustifiably failed to pay a $6.3 million debt. He did so in the face of appellants' relentless campaign to force him to recuse himself, which included a lawsuit against him—a campaign transparently triggered by a series of adverse rulings in this and another arbitration. As for the Final Award itself, appellants claimed it was too late because the Interim Award—even though it expressly reserved jurisdiction to decide attorneys fees and expressly set a new deadline for the Final Award—did not expressly state that it extended the original deadline.

Appellants have abandoned some of their more outlandish challenges to the award, such as the claim that the arbitrator should have recused himself because he had to travel from Palm Springs to hold hearings or because appellants' counsel disagreed with JAMS' uniform policy of sending bills jointly to counsel and their clients. (See pp. 12-14, *post*.) But if the challenges that remain are somewhat more conventional, they are no more meritorious. They all have one thing in common: Disregard of the governing legal standards.

- Appellants' strained reading of the arbitration award ignores the standard of review that requires courts to indulge all reasonable intendments in favor of upholding the award.

- Appellants' contention that the arbitrator decided issues the parties didn't submit to him turns on the narrowest possible reading of the

underlying superior court complaint and ignores other components of the parties' arbitration submission. This contravenes the rule that arbitrators are entitled to broadly read a complaint and the rule that courts must grant substantial deference to the arbitrator's assessment of the scope of the issues submitted.

• Appellants' disqualification argument tacitly concedes that the purpose of their lawsuit against the arbitrator was nothing more or less than judge-shopping. Appellants could hardly claim otherwise, given the many and widely varying grounds on which they demanded that the arbitrator recuse himself after he issued some adverse rulings. They seem to argue that no matter how obvious their motive, the arbitrator was required to recuse himself in the absence of a determination that their lawsuit against him was substantively frivolous. That can't be the law, and it isn't. But even if it were, appellants' lawsuit *is* frivolous, because it is unquestionably barred by arbitral immunity.

The applicable legal standards are simple and lead to one and only one result: The judgment confirming the arbitration award must be affirmed.

STATEMENT OF FACTS

This Statement of Facts relies on the arbitrator's factual findings, which are binding on this Court (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 367, fn. 1 (*Advanced Micro Devices*)), supplemented as necessary with facts taken from the undisputed record.

A. The Parties.

The successful claimant in the underlying arbitration and the respondent here is Arnold Greenspan, as trustee of the Andrew Meieran Family Trust. Because the parties and the tribunals generally used "the Trust" as shorthand to describe Mr. Greenspan, we follow that convention.

The arbitration respondents were Barry Shy, LADT LLC, and LA ABC LLC. (JA 7/1761:15-16.)[1] The arbitrator found that LADT and LA ABC are both Shy entities, that "the evidence is clear that Shy has exclusive control over each of his entities, and that he pays little attention to which account is used to make payments" under the underlying contract (JA 7/1786:8-10). LADT and LA ABC are the only appellants. (AOB 4.)

B. Relationship Before The Purchase Agreement.

Andrew Meieran and Shy—"acting through their respective business entities"—formed LADT in 1998 to redevelop the historic Higgins Building in downtown Los Angeles. (JA 7/1767:24-1768:3.) "LABAR, an entity controlled by Shy, held 50% membership in LADT; Albion Pacific, an entity controlled by Meieran," held the other 50% membership.

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[1] "JA 7/1761:15-16" refers to volume 7, page 1761, lines 15 through 16 of the Joint Appendix.

(JA 7/1767:28-1768:2.) Albion's interest ultimately passed to the Trust. (JA 7/1768:4-6.)

LABAR was the managing member of LADT and Shy was appointed the manager of LADT on LABAR's behalf. (JA 7/1768:3-4.)

C. The Purchase Agreement.

After the Trust lost confidence in Shy and the quality of construction at the Higgins Building (JA 7/1769:1-10), "the parties entered into a Purchase Agreement" in which the Trust sold its 50% interest in LADT to LA ABC—"another entity controlled by Shy." (JA 7/1769:15-16, 1771:25-26; see also JA 7/1731-1742.) The purchase price consisted of installment payments totaling $7,750,000 (JA 7/1731-1732, ¶¶ 1.02-1.03) and the promise to transfer to the Trust specific condominium units within the Higgins Building (JA 7/1732, ¶ 1.04). (See also JA 7/1769:16-18.)

Section 6 of the Purchase Agreement sets forth the obligations of LADT, Shy and Meieran. As to LADT, it states

> "LADT, LLC hereby consents to the terms of this Agreement, including, without limitation, the provisions of Section 1.04 and Section 4. LADT, LLC shall cooperate with the parties hereto and *take all actions* and execute any agreements and other documents necessary *to effectuate the transactions contemplated by this Agreement*, including, without

limitation, the transactions set forth in Section 1.04 and Section 4, as necessary." (JA 7/1735, emphasis added.)[2]

Shy signed the Purchase Agreement on behalf of LA ABC as "purchaser" and, along with Meieran, on behalf of LADT under the words "acknowledged and agreed as to Section 6." (JA 7/1738, capitalization omitted.)

D. Post-Purchase Agreement Disputes.

Meieran and Shy had many disputes. (JA 7/1770:15.) Most notably, Shy's entities made changes to the physical spaces that the Trust was supposed to receive and failed to pay most of the purchase price. (JA 7/1770:15-21.)

A mediation resulted in a document entitled "Exhibit 1," which set forth LA ABC's obligations to perform various acts and included an agreement to arbitrate. (JA 7/1744 [copy of document], 1772:1-21 [quoted in award].) Nonetheless, the arbitrator found that "[t]here was no action that reflected performance of any terms listed in the mediation Exhibit 1." (JA 7/1772:23-1773:2.)

[2] Section 1.04 sets forth the obligation to transfer condominium units; Section 4 relates to indemnification. (JA 7/1732-1734.)

E. The Civil Suit.

In August 2006, the Trust sued LADT, LA ABC and Shy in superior court. (JA 17/4323–4357.)

The first and second causes of action are the only ones relevant to this appeal. Both allege breach of the Purchase Agreement, largely through the same breaching conduct. (Compare JA 17/4329:9-19 with JA 17/4330:14-16.) Both allege nonpayment of $4,297,872 of the purchase price. (JA 17/4329 ¶ 33, 4330 ¶ 43.)

The first cause of action is labeled "Rescission of the Higgins Purchase Agreement Based on Failure of Consideration Against LA ABC and LADT." (JA 17/4329:5-6.) The second cause of action is labeled "Breach of the Higgins Purchase Agreement against LA ABC." (JA 17/4330:9.) Both incorporate the allegation that the defendants were all responsible for all of the conduct alleged in the complaint as agents, partners, or otherwise. (JA 1/3:6-12, incorporated by JA 1/7:7-8, JA 1/8:10-11.)

The trial court granted appellants' motion to compel arbitration under Mediation Exhibit 1's arbitration clause. (JA 1/19-34, 105-110.)

F. The Arbitration.

1. The arbitral submission.

Appellants' counsel recommended that the arbitration be conducted before the Honorable G. Keith Wisot (Ret.). (JA 6/1383-1384.) The parties had previously selected Judge Wisot—also at the suggestion of appellants' counsel—to arbitrate a separate matter among the Trust, Shy, and another

of Shy's entities, Manhattan Loft LLC. (JA 6/1383:9-19, 1525-1545, 14/3619.)[3]

The parties' submission in the LADT arbitration was defined in two agreements:

1. As explained by February 28, 2007 correspondence, the parties submitted to arbitration "all issues raised in the state court complaint . . . ." (JA 6/1409.)[4]

2. In March 2007, the parties agreed to have the arbitrator decide the disposition of certain funds that LADT put in escrow. (JA 7/1790:2-11, 16/4182.) These were proceeds from LADT's sale of two condominium units; LADT agreed to put them in escrow and make them subject to the arbitration as consideration for the Trust's removal of a lis pendens on the Higgins Building. (JA 16/4013:22-28, 4182.) However, "[n]o criteria were presented to guide the arbitrator's determination" of this issue (JA 7/1790:4-6)—the agreement provided only that "the funds may only be

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[3] Cross-appeals from the Manhattan Loft arbitration are currently pending before Division 3 (2d Civil No. B205917). Oral argument occurred on August 11, 2009. "Manhattan Loft RB/XAOB" and "Manhattan Loft XARB"—cited elsewhere in this brief—refer to appellate briefs filed in that case, which appellants incorporated into their opening brief. (AOB 28.)

[4] That submission apparently stems from a December stipulation, captioned *Greenspan v. LADT, LLC* (JA 16/4017) that also relates to the Manhattan Loft arbitration (JA 12/3092:23-3093:2, 16/4009:12-18). Although the timing makes its application to the LADT arbitration somewhat unclear, in the appeal from the Manhattan Loft award Shy—through the same counsel as appellants here—acknowledged that the stipulation governed the LADT arbitration. (Manhattan Loft RB/XAOB 23, fn. 19.)

released to a person or entity designated by Judge Wisot in his final award" (JA 16/4182).

2. The early stages of the LADT arbitration.

The arbitrator issued a series of early rulings adverse to appellants. In early March 2007, he denied appellants' request for a temporary restraining order. (JA 6/1416:23-1417:8.) A month later, he denied their second request for such an order, sanctioning them for filing a frivolous motion. (JA 6/1423:4-1424:6.) And on September 26, he denied appellants' motion for summary disposition. (JA 6/1499.)

3. Contemporaneous rulings in the Manhattan Loft arbitration.

At about the same time, the Manhattan Loft arbitration was coming to a close. That case had arisen from Shy's destruction of space held by the Trust in another building, including the cutting of live water pipes that left historic fixtures marred with mold and rust; construction that "entombed" antique bank vaults; and the unauthorized conversion of an open-air space into an additional floor that made it impossible for the Trust to use its space as a bar. (JA 6/1528:18-20, 1531:15-1533:6, 1533:25-1534:11, 1541:24-25.) The arbitrator found that Shy had asked Meieran to give false testimony in separate litigation, and when Meieran refused, "Shy was enraged, yelling and threatening, saying 'No way in hell you're going to build this bar' and 'I'm going to make life hell for you.'" (JA 6/1533:8-1534:3.)

On August 28, 2007, pursuant to the JAMS rules, the arbitrator ordered an extension on the time to render the final award to October 2. (JA 7/1798-1799.) Shy and Manhattan Loft did not object. (Manhattan Loft RB/XAOB 36.)

Then, between August 30 and September 6, Shy's workers re-entered the Trust's space and recommenced the same type of destruction that had necessitated the Manhattan Loft arbitration. (JA 6/1543:7-15, 14/3624-3626.) The Trust contacted the arbitrator to request injunctive relief. (JA 6/1526:21-22, 14/3624-3626, 3663-3691.) The arbitrator responded by setting a hearing for October 3 and soliciting evidence and argument regarding the recent incursions. (JA 6/1526:22-24, 14/3692.) Shy and Manhattan Loft filed a brief and declarations. (JA 6/1543:11-15, 14/3693-3704.)

4. Appellants' various efforts to force the arbitrator to recuse himself in both arbitrations.

a. October 3 Disqualification Demand.

In the Manhattan Loft arbitration, the arbitrator further extended his time to issue an award to October 8, 2007. (JA 14/3705.) On the morning of the October 3 injunction hearing in that case, Shy and all of his entities demanded that the arbitrator disqualify himself from *both* arbitrations. (JA 7/1807-1809.) As Shy and Manhattan Loft saw it, the arbitrator did not have the authority to extend his time to render an award. (JA 7/1807-1807.) They told the arbitrator that they would look into whether the loss of jurisdiction also entitled them to a return of arbitration fees. (JA 7/1807.)

That same letter stated that the arbitrator should also disqualify himself in the LADT arbitration "because of the matters raised herein," although it did not explain why the timeliness of the award in the Manhattan Loft arbitration necessitated disqualification in the LADT arbitration. (*Ibid.*) The letter also asserted, as an additional basis for disqualification, that the arbitrator had raised his fees unilaterally. (*Ibid.*)

The arbitrator denied disqualification and on October 8, JAMS issued the interim award in the Manhattan Loft arbitration, denying disqualification and finding in the Trust's favor. (JA 7/1811-1830, 1832:4-6.) The award stated that the arbitrator "reserve[d] jurisdiction" and set a briefing schedule regarding the precise language of the injunction and the amount of attorneys fees. (JA 7/1829:18-1830:6.)

b. Shy And Manhattan Loft Sue The Arbitrator.

On October 11, Shy and Manhattan Loft asserted that the Interim Award was of no effect because, in their view, the extension orders were invalid; they demanded the return of their arbitration fees. (JA 7/1840-1841.)

Five days later, they filed a civil complaint against the arbitrator and JAMS for the return of fees, *Manhattan Loft v. JAMS* (LASC Case No. BC379171). (JA 1/140-150.) The lawsuit was stayed pending resolution of the timeliness issue in the Manhattan Loft confirmation proceedings (JA 6/1613, 13/3426-3445), which followed the arbitrator's November 5 final award (JA 6/1525-1545).

c. Appellants' Motion To Disqualify The Arbitrator From The LADT Arbitration.

In mid-November 2007, appellants again sought the arbitrator's disqualification in the LADT arbitration, claiming that the arbitrator could not be neutral after having made credibility determinations in the Manhattan Loft arbitration and that he could not be neutral because Shy had sued him. (JA 7/1895-1896.)

The arbitrator, along with the JAMS Executive Vice President, General Counsel, responded that there was no basis for disqualification. (JA 1/227.) They stressed that (1) appellants engaged the arbitrator to handle both arbitrations knowing that he might well determine one case before deciding the other and (2) a stayed lawsuit against the arbitrator cannot "be permitted to serve as a mechanism for influencing or controlling proceedings in other ongoing matters." (*Ibid.*)

Appellants then filed a motion asking the trial court to remove the arbitrator. (JA 2/237-254.) The asserted bases changed somewhat from the November 15 Letter:

- Appellants dropped the issue about credibility determinations in the Manhattan Loft arbitration. (JA 1/131-138, 2/237-254.)
- They resurrected their fee-increase argument and raised an additional issue—the arbitrator's denial of appellants' summary disposition motion. (JA 1/134:7-13, 2/252:11-254:12.)

- They continued to claim that an "average person on the street" might entertain doubts about the arbitrator's impartiality in light of the pending lawsuit. (JA 1/132:5-6, 134:11-21, 2/250:1-252:9.)

In denying appellants' disqualification motion, the trial court said:

> "I have a dim view of people who try and disqualify arbitrators by suing. You are trying to create the basis for disqualification where none exists. I got a real dim view of that. You know, that is, you know, I think the impression that I have here, is that you are trying by hook or by crook, to shortcut this, and you don't like the results, and so it doesn't matter what you try and do—we are pulling out all the stops [by] whatever means." (JA 16/4110:18-26.)

Appellants have since abandoned each of these asserted bases for disqualification, except for the pendency of the lawsuit against the arbitrator.

d. Appellants' Further Efforts To Disqualify The Arbitrator.

Appellants persisted.

- On January 25, 2008—just two days after the trial court's warning about trying to create the appearance of bias where none exists—appellants tried a different approach. Their counsel had previously complained about JAMS' practice of jointly billing attorneys and their clients for arbitration services (JA 9/2528, 2530, 2543), but now he claimed that this uniform billing practice required disqualification (JA 9/2537-2539). He stated:

> "We believe that JAMS' actions with respect to its billing practices makes it untenable for JAMS to continue to administrate this Arbitration. How can we expect to receive a fair hearing from JAMS when we are in conflict with JAMS over matters of serious concern?" (JA 9/2538.)

The letter exchange concluded with repeated threats to sue JAMS. (JA 9/2547, 2551, 2554.)

• Also on January 25, appellants raised concerns about the possibility that JAMS might be contacting judges who were about to retire, in order to inquire whether they might be interested in becoming arbitrators. (JA 9/2539.) Appellants claimed this contact was unethical because those judges might be asked to vacate an award in a JAMS-sponsored arbitration. (*Ibid.*) Accordingly, appellants asked whether JAMS had ever spoken to the judges that played a role in the case (i.e., the petition to compel arbitration, the motion to disqualify the arbitrator). (*Ibid.*)

• One week later, on February 4, appellants urged the arbitrator to disqualify himself because the law firm representing the Trust had merged with Bingham McCutchen (JA 7/1957-1958)—an event that had occurred nearly nine months earlier, on May 10, 2007 (JA 7/1939-1940 [appellants did not seek disclosures regarding the arbitrator's work on arbitrations involving Bingham until January 28, 2008]).

Although the arbitrator did not find further disclosures were required (JA 7/1763), he nonetheless disclosed four Bingham-related matters in which he had played a role. (JA 7/1952-1954.) Appellants immediately

decried these four matters—coupled with previously-disclosed matters involving the firm that merged with Bingham—as "simply too high" and claimed that in any event, they had the right to disqualify the arbitrator without cause. (JA 7/1957 [claiming no justification required by law].)

• Then, on February 15, appellants tried to disqualify the arbitrator because he was living in Palm Springs, saying that this made it "difficult for you to travel to hearings" (JA 16/4159)—although the record shows that appellants knew of that fact more than eight months earlier (JA 16/4013 ¶ 22, 4162 [June 1, 2007]; see also JA 14/3692 [reminded again on September 19, 2007]).

Appellants have since abandoned these asserted bases for disqualification.

G. The Interim Award.

After a two-week hearing and post-hearing briefs, the matter was submitted on May 16, 2008. (JA 7/1764:20-23.)

The arbitrator rendered an Interim Award on June 13, 2008, finding that the Trust was entitled to recover nearly $6.3 million from LA ABC for breach of the Purchase Agreement. (JA 8/2093:25-2095:22, 2099:11-13.) Although the arbitrator found that the funds in escrow were LADT's property, "[i]n an exercise of equitable discretion in fashioning this Award," the arbitrator directed that the "funds are to remain in escrow until the award below is fully satisfied." (JA 8/2099:1-8, 17-18.)

The arbitrator explained that an Interim Award was the best procedure for this arbitration, because it allowed him to address what he

described as the "substantive issues raised in this arbitration" before receiving briefs on the remaining questions he needed to decide. (JA 8/2099:20-2100:13.) First, the arbitrator found that the Trust was the prevailing party, so the parties were now in a position to brief the amount of recoverable attorneys fees. (JA 8/2099:20-26, 2100:1, 9-13.) Second, the arbitrator explained that he still needed to consider modifications to the disposition of the escrow funds and further remedies against LADT, and he asked the Trust to submit briefing on whether he should reopen the hearing to consider additional evidence on those points. (JA 8/2100:2-4, 9-14.)

Accordingly, the arbitrator stated that he "retain[ed] jurisdiction" to decide these remaining issues. (JA 8/2099:25-26.) He set a briefing schedule with the final brief due by July 25, and he set August 1 as the new deadline for the Final Award. (JA 8/2100:9-18.)

H. The Post-Interim Award Briefing.

The Trust responded by filing Claimant's Request To Reopen Hearing. (JA 8/2106-2118.) There, the Trust explained why it would be appropriate to hold LADT jointly and severally liable for breach of the Purchase Agreement, citing both the contractual language and equitable reasons. (JA 8/2108:14-2109:8.)

Appellants responded by "unconditionally" objecting to the arbitrator's "jurisdiction" to consider the issue. (JA 8/2120.) First, appellants maintained that the Interim Award which set a new deadline for the final award, did not expressly order an extension of the original

deadline. (*Ibid.*; JA 8/2132:21-2135:4.) Second, appellants argued that they did not believe the issue of LADT's liability had been submitted to arbitration. (JA 8/2139:23-28.) They said that they would "not participate further in any proceedings related to the merits in this arbitration." (JA 8/2120.)

Appellants also noted—repeatedly—that the Trust's asserted bases for holding LADT liable did not involve the consideration of any new evidence. (JA 8/2129:10-16, 2135:6-11, 2139:6-11.) The Trust agreed that the evidence was previously presented and asked that the arbitrator find LADT liable on that basis. (JA 8/2216:10-27, 2217:23-25.)

I. The Final Award.

The arbitrator rendered the Final Award on August 1. (JA 7/1761-1794.) In addition to awarding attorneys fees and costs (JA 7/1791:4-1793:6, 1793:14-15), he found that LADT should be jointly and severally liable for breach of the Purchase Agreement, on two separate bases. (JA 7/1785:15-1786:18, 1793:9-13.) First, the arbitrator interpreted Section 6 of the Purchase Agreement (JA 7/1735) as obligating LADT to make payments to the Trust (JA 7/1785:17-24, 1786:16-18). Second, he relied on his equitable powers, reasoning that LADT should be held liable because LA ABC did not appear able to satisfy the award and "the evidence is clear that Shy has exclusive control over each of his entities, and that he pays little attention to which account is used to make payments on the Purchase Agreement." (JA 7/1785:26-1786:15.)

J. Trial Court Proceedings And Appeal.

After considering cross-petitions to confirm and to vacate or correct, the trial court confirmed the Final Award in full (JA 18/4691-4692) and entered judgment on December 1, 2008 (JA 18/4774-4780).

STANDARD OF REVIEW

The grounds for judicial review of arbitration awards are extremely limited. (See generally *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*).) The core intent of an agreement to arbitrate is to "bypass the judicial system and thus avoid potential delays . . . ." (*Id.* at p. 10.) In furtherance of that intent "and because an arbitrator is not ordinarily constrained to decide according to the rule of law," the merits of the controversy are not subject to judicial review. (*Id.* at p. 11.) An arbitrator's decision cannot be corrected or vacated for errors of fact or law, for insufficient evidence, or for invalidity of reasoning. (*Ibid*.) Instead, the narrow terms of Code of Civil Procedure sections 1286.2 and 1286.6 provide the exclusive grounds to overturn an arbitration award. (*Id.* at pp. 27-28.)

Submission of issues regarding LADT's liability and disposition of escrow funds. "In determining whether an arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give *substantial deference* to the arbitrator's own assessment of his contractual authority." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443-444, emphasis added.) This includes "substantial deference" to the arbitrator's assessment of the scope of the issues submitted to arbitration.

(*Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401, 406, 413-414, 417 [deference to "arbitrator's determination concerning the scope of the issues before him"]; *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 437 [arbitrator may "broadly" read complaint to determine the issues submitted]; see Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2008) ¶ 5:473.2, pp. 5-327 ["The arbitrator's view of the scope of his or her powers and issues submitted for arbitration receives the same judicial deference as the arbitrator's determination on the merits"].)

Timeliness of award. In addressing the timeliness of arbitration awards, our courts have often repeated the rule that "courts must indulge every reasonable intendment to give effect to arbitration proceedings." (*Rosenquist v. Haralambides* (1987) 192 Cal.App.3d 62, 67; see also, e.g., *Delaney v. Dahl* (2002) 99 Cal.App.4th 647, 658; *A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, 1474-1475; *Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1685.) This rule stems from California's "strong public policy" favoring arbitration as a speedy and inexpensive means of settling disputes—a policy that depends on awards being final and binding. (*Moncharsh, supra*, 3 Cal.4th at p. 9.)

To the extent that appellants question the arbitrator's authority to take certain actions bearing on timeliness of the award, the Court must give substantial deference to the arbitrator's assessment of his own authority. (See pp. 17-18, *ante*.)

Arbitral disqualification. Appellants claim that the arbitrator improperly refused to disqualify himself after being sued—not because of any actual bias, but because a reasonable person might doubt the arbitrator's ability to remain neutral. The Trust argues that disqualification is not required when the obvious purpose of the suit was judge-shopping. (See § IV.B., *post*.) Appellants do not dispute that this was the purpose of their suit. Rather, they offer a different interpretation of the legal standard in the cases cited by the Trust—they say the issue is whether the suit is substantively frivolous. The correct interpretation of the legal standard is a question of law reviewed de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

The Trust also argues that the arbitrator was not required to disqualify himself even under the legal standard appellants propose, in that the suit *is* frivolous because it is barred by arbitral immunity. (See § IV.A., *post*.) Because immunity can be established from the allegations of the suit, this too is a question of law reviewed de novo.

ARGUMENT

I.

THE PARTIES SUBMITTED TO ARBITRATION THE ISSUE OF LADT'S LIABILITY.

The Final Award holds LADT jointly and severally liable for damages on breach of the Purchase Agreement. (JA 7/1793:9-13.) LADT contends that the issue of its liability was not submitted to arbitration by the Trust's complaint and that the arbitrator raised it sua sponte in the Interim Award. (AOB 16, 19-26, 34-45.) With that as a starting point, LADT says that two interrelated problems follow—that the arbitrator exceeded his authority by deciding an unsubmitted issue (AOB 39-45), and that the arbitrator decided the issue without a hearing when LADT refused to participate after the Interim Award (AOB 34-39).

The premise of LADT's arguments fails: The parties *did* submit the issue to arbitration. More to the point, the arbitrator could reasonably conclude that the issue was submitted, and this Court must afford substantial deference to that implicit assessment of the scope of the issues submitted. (See § I.A., *post*.) As we explain below, arbitrators are permitted to "broadly read" a complaint. (See § I.A.1., *post.*) Here, the Trust named LADT in the complaint, alleged that LADT was a party to the Purchase Agreement, and alleged that LADT and LA ABC were jointly

responsible for all the alleged misconduct. (See § I.A.2., *post.*) That is enough.[5]

And LADT not only had the opportunity to present relevant evidence and argument, it actually availed itself of that opportunity in both its opening and closing arbitration brief. There, LADT argued that it was not a party to the Purchase Agreement and thus, could not be held liable under *either* the first or second causes of action—the same argument LADT now claims it didn't make because it was supposedly unaware of the Trust's claim. (See § I.C., *post.*)

A. The Submission Included The Issue Of LADT's Liability For Breach Of The Purchase Agreement.

1. Courts must defer to an arbitrator's broad interpretation regarding the issues submitted by a complaint.

Arbitrators are "entitled" to read the "allegations of the complaint broadly" in determining the scope of the issues submitted to arbitration. (*Hall, supra,* 18 Cal.App.4th at p. 437.) Because substantial deference must be afforded to that determination, courts may not second-guess the arbitrator's interpretation. (*Ibid.*; see also pp. 17-18, *ante*.)

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[5] To the extent the Trust did not make this argument in the trial court, the submission question turns on the contents of the arbitration documents that form the undisputed procedural history of the arbitration. The Court may affirm the judgment on any basis supported by the record. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 802.)

Hall demonstrates this principle. There, after plaintiffs filed a superior court action alleging that the defendant real estate agents were liable for withholding information, the parties submitted their dispute to arbitration. (*Id.* at pp. 430-431.) The complaint did not allege a partnership between the defendants, but rather that each defendant "acted as an agent for the other." (*Id.* at p. 430.) However, the arbitrator held both defendants liable as partners. (*Id.* at p. 432.) The trial court ruled that the arbitrator lacked authority to determine the partnership issue, because it had not been raised in the complaint. (*Id.* at pp. 432, 435.) The Court of Appeal (Chin, J.) reversed, holding that the arbitrator permissibly concluded under a very broad reading of the complaint's agency allegation that partnership liability was among the issues submitted to arbitration. (*Id.* at p. 437.)[6]

LADT's reliance on *Ikerd v. Warren T. Merrill & Sons* (1992) 9 Cal.App.4th 1833 (*Ikerd*) is misplaced. (AOB 41-43.) There, "[t]he sole ground for the [trial] court's ruling was that there was never any *personal jurisdiction* over" one of the arbitration-award debtors. (*Ikerd, supra,* 9 Cal.App.4th at p. 1837, emphasis added; see also *id.* at p. 1841 ["the only issue which was really presented to the trial court was whether the arbitrator had acquired personal jurisdiction over him"].) *Ikerd* involved an

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[6] Appellants note that in *Hall*, the defendant had an opportunity to defend against the partnership claim because that claim was announced during the hearing. (AOB 44.) But that was not relevant to the court's holding regarding *submission*. (*Hall, supra,* 18 Cal.App.4th at pp. 436-437.) It pertained to another issue—the arbitrator's refusal to reopen the hearing to permit more evidence on the partnership issue. (*Id.* at pp. 437-438.) Besides, LADT *did* have an opportunity to defend itself—it argued that it was not liable under either the first or second causes of action because it was not a party to the Purchase Agreement. (§ I.C., *post.*)

individual who (1) was not named in the demand at all, (2) was never served with the demand, (3) never filed a pleading or brief, and (4) only appeared at the arbitration as a person-most-knowledgable witness on behalf of the corporate defendant. (*Id.* at pp. 1842-1844.) *Ikerd* has nothing to do with the scope of the arbitral issues where, as here, there is no question of personal jurisdiction.[7]

2. A broad reading of the complaint together with the later submission agreement easily allowed the arbitrator to conclude that the parties submitted the issue of LADT's liability.

LADT's submission argument focuses exclusively on the complaint, ignoring the later escrow-submission agreement (AOB 34-45; see JA 15/4182) and its interpretation of the complaint is the narrowest possible. However, looking at the entire submission and using the correct legal standard provides ample basis for upholding the arbitrator's implicit conclusion that the parties submitted the issue of LADT's liability.

Joint and several liability allegation. Although the second cause of action's heading only names LA ABC, the complaint alleges facts sufficient to conclude that the Trust submitted a claim that LADT should be held jointly and severally liable for damages under that cause of action. The complaint alleges that "each defendant" was responsible for "all of the acts set forth in this Complaint" as agents, partners, principals or otherwise.

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[7] LADT notes that *Boyer v. Jensen* (2005) 129 Cal.App.4th 62 and the Rutter Guide both cite *Ikerd* with approval. (AOB 42, fn. 39.) While true, neither attempts to expand *Ikerd* beyond the realm of personal jurisdiction.

(JA 1/3:6-12.) The second cause of action expressly "realleges and incorporates" that allegation "as though fully set forth [t]herein." (JA 1/8:10-11.)

The arbitrator could broadly read this allegation as submitting LADT's liability, whether on the basis of agency, partnership, or something else not expressly mentioned in the complaint. Appellants may argue that a court would not read the complaint this way, but that is no answer. *Hall* rejected this same argument in holding that arbitrators are "entitled" to read the "allegations of the complaint broadly" and that the trial court may not "usurp[] the arbitrator's primarily role in interpreting the complaint." (*Hall, supra,* 18 Cal.App.4th at pp. 436-437.)

Allegation that LADT was a party to and liable under the Purchase Agreement. The Trust expressly named LADT as a defendant in the first cause of action, which alleges breach of the Purchase Agreement and seeks rescission. (JA 1/7:4-8:7, 15:3-9.) The substance of that contract claim is largely identical to the second cause of action: Both allege breach of the same contract and that the breach occurred by much the same conduct—including failure to pay the purchase price. (Compare JA 1/7:4-8:7 with JA 1/8:8-9:18.)

By seeking to hold LADT liable for breach of the Purchase Agreement, the first cause of action necessarily included the allegation that LADT was a party to that contract—at the very least, a broad reading permits that interpretation. From there, the arbitrator could permissibly—even if broadly—interpret the complaint as submitting the question of LADT's liability for damages arising out of that breach.

Indeed, the first cause of action's prayer for relief seeks not only rescission, but "actual and compensatory damages in an amount according to proof " "against LA ABC and LADT." (JA 1/15:1-9, capitalization omitted.) Appellants might argue that this means damages consistent with rescission. But again, it wouldn't matter even if that were the better interpretation of the complaint—arbitrators are not required to interpret complaints literally. (*Hall, supra,* 18 Cal.App.4th at p. 437.)

LADT may also argue that the arbitrator labeled his decision as one sounding in the second cause of action rather than the first. But the only question is whether the issue was *submitted*, not the label under which it was ultimately decided.

The escrow submission. LADT fails to recognize that the scope of the submission was defined not just by the complaint, but also by the parties' later agreement that the arbitrator could determine the disposition of funds that LADT had received from the sale of two condominium units. (JA 7/1790:2-11; 16/4013:22-28, 4182.)

That submission did not limit the question to whether the funds belonged to LADT as opposed to the Trust. Rather, the parties agreed that "the funds may only be released to a person or entity designated by Judge Wisot in his final award," with no limitation on the basis for that determination. (JA 16/4182.) As the arbitrator understood it, "[n]o criteria were presented to guide the arbitrator's determination, but only that the funds are to be released to the person or entity designated by the arbitrator in the final award." (JA 7/1790:4-6.)

Given that interpretation, the arbitrator could permissibly conclude that one of the issues before him was LADT's liability for damages arising from breach of contract because the agreement gave the arbitrator power to use the escrow funds to satisfy any award.

Even if there were a reason for appellants to argue that the arbitrator misunderstood the scope of the escrow submission—not likely, given the agreement's breadth—that is not a question for this Court. Courts must grant substantial deference to the arbitrator's assessment of the scope of the issues submitted. (See pp. 17-18, *ante*.) In the absence of "an express and explicit restriction on the arbitrator's powers," LADT cannot question the arbitrator's interpretation. (*California Faculty Assn v. Superior Court* (1998) 63 Cal.App.4th 935, 953.)

Arbitrators have great latitude when it comes to their interpretation of a complaint. Here, there is more than enough from which the arbitrator could have concluded that the issue of LADT's liability was submitted.

B. Nothing In The Interim Award Suggests That The Arbitrator Thought He Was Raising An Issue Sua Sponte.

LADT may argue that the language of the Interim Award shows that the arbitrator did not adopt the Trust's reading of the complaint and instead raised the issue sua sponte. Not true. LADT's reading of the award conflicts both with what the award actually says and with the applicable standard of review.

First, it does not matter that the arbitrator did not explain his reading of the complaint. Neither did the arbitrator in *Hall*, *supra*, 18 Cal.App.4th

427; the court based its holding on the determination that "[t]he arbitrator *could have* reached that conclusion [about the scope of issues submitted] by reading the agency allegations of the complaint broadly to include partnership, or he *could have* determined that by submitting all issues in the complaint, which incorporated the listing agreement, the parties agreed to submit all issues between them." (*Id.* at p. 437, emphasis added.) That is because the standard of review requires courts to interpret an award in the manner necessary to uphold it: "[A]s a general rule, [courts] indulge every reasonable intendment to give effect to arbitration proceedings." (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 355 [refusing to interpret arbitrator's statements in a manner that would lead to vacatur].)

Second, the Interim Award states that it "disposes of all substantive issues raised in this arbitration." (JA 8/2099:20.) Equating "*substantive* issues" with "*submitted* issues," LADT argues that when the arbitrator suggested reopening the hearing for evidence of LADT's liability, he raised a previously *unsubmitted* issue. (AOB 50.) The equation fails, if only because the Interim Award states that the arbitrator had not yet considered the amount of attorneys fees and costs. (JA 8/2099:25-26, 2100:1, 9-13.) As our courts have explained, the amount of attorneys fees and costs is "'one of the contested issues of law and fact submitted to the arbitrator for decision . . . .'" (*Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1315, internal quotation omitted, quoting *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 776 [whether to "award[] fees for certain services claimed by Sandro's counsel" was a "submitted" issue].) So, here the arbitrator *could not* have meant he already decided all "*submitted*" issues. Rather, he seems to have used the term "substantive issues" to refer to the success of the Trust side versus the Shy side

on each cause of action (i.e., breach of the Purchase Agreement, availability of rescission as a remedy, etc.) That is distinct from issues—like fees and additional judgment debtors—that, while also submitted, could properly be decided after the main issues.

And again, even if the term "substantive issues" were unclear, courts must "indulge every reasonable intendment to give effect to arbitration proceedings." (*Roehl, supra,* 147 Cal.App.4th at p. 355, internal quotation and citation omitted.) So, the Court must construe the term "substantive issues" as less inclusive than all "submitted issues."

C. LADT Was Not Denied A Hearing On Its Liability.

LADT argues that the award should be corrected because the arbitrator imposed liability against it "without holding a hearing on the relevant claim." (AOB 34-39.) But that is just an alternate formulation of LADT's argument that the parties did not submit the issue: According to LADT, it did not have an opportunity to be heard before the Interim Award because the claim had not yet been submitted, and it did not have an opportunity to be heard after the Interim Award because the arbitrator decided the issue over its objection that the arbitrator could not decide the issue.

LADT's argument fails for the reasons discussed above. The submission *did* include the issue (see § I.A., *ante*), so LADT had an opportunity to put on its defense from the very beginning. It cannot complain if it failed to do so.

But it did *not* fail to do so. Appellants' brief complains that LADT would have defended itself by submitting evidence and argument that "LADT

is not a party to the Purchase Agreement." (AOB 23-24; see also AOB 7-9.) But LADT's opening arbitration brief made exactly that argument:

> "LADT *is not even a party* to the Purchase Agreement. LADT merely consented to paragraph 6, which provides for the transfer of the six commercial units. LADT does not have anything to return to [the Trust] under the Purchase Agreement." (JA 9/2341:19-22, emphasis added.)

So did its closing arbitration brief:

> "[T]he only party to the contract is LA ABC. LADT and Barry Shy are not parties. LADT and Shy signed only to consent to Section 6, which is the transfer of LADT's commercial units to Claimant." (JA 8/2042:15-18, see also JA 8/2048:1-2.)

In fact, LADT proffered that argument as a response to the *second cause of action* (JA 8/2042:1-18)—the cause of action LADT now says it didn't have an opportunity to respond to. Regardless, as LADT itself told the arbitrator, the question of LADT's status as a party to the Purchase Agreement was a necessary element of any claim for breach of that agreement. (JA 8/2042:15-16.) The evidence and arguments that LADT would have presented on its status are the same.

Perhaps LADT could have introduced additional evidence and arguments in its defense. (AOB 7, 24.) But LADT cannot blame the arbitrator for its own choice on how to litigate its status as a party to the contract.

Nor can LADT blame the arbitrator for LADT's own refusal to participate in a further hearing regarding the issue. The Interim Award invited

further briefing and even contemplated a possible in-person hearing. (JA 8/2100:2-4, 9-14.) This gave LADT a second opportunity to make all of the arguments that it now claims the arbitrator denied it the opportunity to make. Instead, gambling that the issue had not been submitted and that the award was not timely, it "unconditionally" refused to participate. (JA 8/2120, 2132:21-2135:4, 2139:23-28.) Besides, LADT told the arbitrator that the Trust's arguments did not contemplate any new evidence (JA 8/2129:10-16, 2135:6-11, 2139:6-11)—meaning that there was no need to hold a further in-person hearing to receive additional evidence.

In making this gamble, LADT took the risk that the arbitrator would disagree and remain convinced that the issue had been previously submitted. Regardless, at this point the arbitrator had no choice but to decide the issue without further proceedings: He could neither compel LADT to risk waiving its submission and timeliness arguments by arguing the merits of the issue, nor refuse to decide a submitted issue just because LADT refused to participate any further. (See *Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83, 88 [vacatur required when arbitrator fails to decide a submitted issue].) The arbitrator did the only thing he could do: He considered the evidence and

argument previously presented by both sides. (JA 7/1785:15-17, 1790:25-1791:2.)[8]

LADT cannot blame the arbitrator for not considering what LADT first failed, and then refused, to present.[9] That was LADT's choice. Regret is not a basis for overturning an award.

* * * *

LADT's submission arguments are based on a failure to respect the standard of review and to look at the submission as a whole. Under the governing standard, the arbitrator's understanding of the submitted issues is fully supported.

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[8] During arbitration, appellants took the position that a "hearing" requires live testimony and cross-examination rather than the consideration of legal arguments in briefs. (JA 8/2129:10-13, 2135:8-11.) Appellants provided no citation for their understanding of the term "hearing," which is contrary to law. (*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1105 ["'the use of the word "hearing" does not necessarily contemplate either a personal appearance or an oral presentation to the court'" or arbitrator].)

[9] The same holds for LADT's argument that it could have presented arguments that it should not be held liable on an equitable basis. (AOB 24-25.) The complaint was broad enough to submit the issue of LADT's liability under various theories (§ I.A., *ante*), the relevant evidence was presented during the hearing (p. 30, *ante*), and LADT presented other defenses to its liability for breach of contract (p. 29, *ante*). And as a last resort, LADT could have offered its arguments during the post-Interim Award briefing. Besides, equitable liability was only an alternate basis for the arbitrator's decision. (§ II., *post.*) So even if that basis were improper, the award must still be confirmed.

II.

THE REMEDY AWARDED IS RATIONALLY RELATED TO THE AGREEMENT.

A. LADT's Argument Is Nothing But A Challenge To The Merits Of The Award—A Subject Beyond Judicial Review.

We agree with LADT that "[t]he 'remedy awarded . . . must bear some rational relationship to the contract and the breach.'" (AOB 46, emphasis omitted, ellipses in original, quoting *Advanced Micro Devices, supra*, 9 Cal.4th at p. 381.) But LADT oversimplifies the rule, confuses two distinct issues, and makes an argument that is really nothing but a challenge to the merits of the arbitrator's determination of liability—not to the *remedy* that *flows from* that liability. Merits determinations are beyond the scope of judicial review. (*Moncharsh, supra*, 3 Cal.4th at p. 11.)

The correct statement of the rule regarding rational relatedness is as follows: A court may examine whether the remedy is rationally related "to the underlying contract *as interpreted, expressly or impliedly, by the arbitrator* and to the breach of contract found, expressly or impliedly, by the arbitrator." (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 367, emphasis added; see also *id.* at p. 381.)

The Final Award unquestionably satisfies this standard. The award's language strongly suggests, and therefore this Court must infer, that the arbitrator interpreted Section 6 of the Purchase Agreement as directly obligating LADT to pay the purchase price. (JA 7/1785:17-24,

1786:15-18.) The remedy—ordering LADT to pay damages—is rationally related to *that* interpretation of the contract. Damages are the usual remedy for breach of contract, and nothing in the parties' agreement precludes them. (*Advanced Micro Devices, supra*, 9 Cal.4th at pp. 383-385 [remedy is rationally related when not expressly foreclosed by the arbitration agreement]; see *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1061 [arbitrator cannot award remedy expressly forbidden by contract].)

LADT does not argue otherwise. Rather, LADT complains about the arbitrator's finding of *liability*—that is, the arbitrator's *interpretation of the agreement* that led him to conclude that LADT was obligated to pay the purchase price and breached that obligation. Liability and contract interpretation are merits determinations, beyond the scope of judicial review. (*Moncharsh, supra,* 3 Cal.4th at p. 11; see AOB 3.)

LADT also argues that "if anything, the JAMS Rules tighten" the standard, "limiting the arbitrator to remedies that are 'within the scope of the Parties' agreement.'" (AOB 46, quoting JAMS Rule 24(c).) It is not clear why LADT thinks this is a more strenuous standard, but in any event, it pertains only to permissible "*remedies*"—it does not govern the arbitrator's *liability* determination. (JA 7/1756, emphasis added.)

B. Even Under The Questionable "Utterly Irrational" Standard, The Arbitrator's Interpretation Of The Purchase Agreement Withstands LADT's Challenge.

The award must be upheld even if this Court were inclined to consider—despite the Supreme Court's warning in *Advanced Micro Devices* that such a standard may not have survived *Moncharsh*—the rationality of the arbitrator's interpretation of the contract.[10] Even those courts that previously used such a standard recognized it as such a "narrow exception" that it could only be employed in "the most serious claims of abuse" and "require[d] more than a mere conviction that another construction of the contract is plainly correct." (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 423, 594 [discussing "utterly irrational" standard], called into question by *Advanced Micro Devices, supra*, 9 Cal.4th at pp. 376-377 & fn. 10.) Although LADT may be able to offer reasons why it thinks its interpretation is better than the arbitrator's (AOB 8-12), it cannot contend that the arbitrator's interpretation was "utterly irrational."

First, although the agreement defines LA ABC as "Purchaser" and obligates "Purchaser" to make the payments (JA 7/1731), LADT also

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[10] "We need not decide here whether an arbitrator's interpretation of a contract is subject to review for 'irrationality' or 'arbitrariness.' The present case involves an arbitrator's choice of remedies, rather than interpretation of the agreement. We reiterate, however, that an award generally may not be vacated or corrected, under California law, for errors of fact or law. For this reason one Court of Appeal has referred to the 'completely irrational' standard as 'a questionable pre-*Moncharsh* statement of law.' (*Hall v. Superior Court, supra*, 18 Cal.App.4th at p. 434.)" (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 377, fn. 10.)

signed the agreement, "agree[ing]" to the obligations contained in Section 6. (JA 7/1738.) Section 6 provides that LADT "consents to the terms of this Agreement, *including, without limitation*, the provisions of Section 1.04 and Section 4" and "*shall take all actions* and execute any agreements and other documents necessary to effectuate *the transactions contemplated by this Agreement, including, without limitation*, the transactions set forth in Section 1.04 and Section 4, as necessary." (JA 7/1735, emphasis added.) Contrary to LADT's arbitration argument (JA 8/2042:15-17), this obligation explicitly goes beyond the transfer of condominium units and indemnification issues set forth in Sections 1.04 and 4. (JA 7/1732-1734.) It reasonably includes the payment of the purchase price, because that was one of the "transactions contemplated by th[e] Agreement . . . ." (JA 7/1731-1732 ¶¶ 1.02, 1.04, 1735 ¶ 6.)

Second, the arbitrator's interpretation is bolstered by the parties' conduct after signing the agreement—"the best indication of what the parties intended the writing to mean." (Cal. Law Revision Com. com., 20A West's Ann. Code Civ. Proc. (2007 ed.) § 1856, p. 11.) "This rule of practical construction is predicated on the common sense concept that

'actions speak louder than words.'" (*Crestview Cemetery Assn v. Dieden* (1960) 54 Cal.2d 744, 754.)[11]

• As the arbitrator explained, "the evidence demonstrates that payments on the Purchase Agreement were made by LADT, LLC." (JA 7/1785:21-22.) The arbitrator could rationally conclude that LADT's conduct reflected the parties' understanding that LADT was obligated to make those payments.

• Appellants' Petition to Compel Arbitration argued that they were *all* parties to Mediation Exhibit 1's arbitration clause. (JA 1/23:25-28 ["Defendants"—plural—"are parties to the Arbitration Agreement"]; 1/23:6-12 ["Defendants"— plural—are unwilling to waive their rights under the agreement].) Appellants then told the arbitrator that Mediation Exhibit 1 was a settlement involving not just the Trust and LA ABC, but "the parties" and "respondents" (viz., appellants here) regarding the Purchase Agreement. (JA 2/385:15-27, 388:1-16, 389:4-10.) So, the arbitrator could rationally conclude that LADT was a party to the Purchase Agreement, because otherwise there would have been no reason for it to be a party to a contract settling disputes arising under the Purchase Agreement.

Third, nothing in the Purchase Agreement bars an award ordering LADT to pay the purchase price. (See § II.A., *ante*; cf. *California Faculty Assn, supra,* 63 Cal.App.4th at p. 953 ["violation of an express and explicit

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[11] The Purchase Agreement's integration clause (discussed at AOB 8) bars only evidence of prior or contemporaneous agreements—not evidence of the parties' subsequent course of conduct. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 186.)

restriction on the arbitrator's powers" cannot be "'rationally related to a plausible interpretation of the agreement,'" internal citation omitted].)

So, while the arbitrator's interpretation may not be the only possible interpretation and might not even be the interpretation this Court would reach if it could review the contract de novo, his interpretation is not "wholly irrational." At most, LADT suggests an error of fact or law that is not subject to review. (*Moncharsh, supra,* 3 Cal.4th at p. 11.)

C. Even If LADT Were Not A Party To The Purchase Agreement, The Remedy Was Permissible.

The Final Award would still survive LADT's challenge even if none of the above were true. LADT claims that the arbitrator "remade the parties' contract" by making LADT a party to the agreement. (AOB 45, capitalization omitted.) But LADT also acknowledges that the award was premised on an alternate rationale. (AOB 24-25, 46-47.) That alternate rationale cannot be characterized as making LADT a party to the contract.

After impliedly determining that LADT was a party to the Purchase Agreement, the arbitrator went on to find that LADT could also be held jointly and severally liable for LA ABC's breach under an equitable rationale. (JA 7/1786:1-15.) LADT likens this latter determination to the imposition of the alter ego doctrine (AOB 23-25, 46-47) because the arbitrator premised the finding on LA ABC's lack of assets and Shy's disregard of the corporate form (JA 7/1786:6-18). The exact basis is unclear, but doesn't matter. (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 375 ["arbitrators are not bound to award on principles of dry law, but

may decide on principles of equity and good conscience," internal quotation and citation omitted].) All that matters is that by definition, this equitable ruling does *not* rewrite the contract. Consistent with appellants' interpretation of the Purchase Agreement, it says that even if LADT is *not* a party to and did *not* breach any contractual obligation, it is still be liable for the judgment. The entire point of alter ego and similar equitable doctrines is to make a defendant liable *without* "re-writing" the terms that identify the parties to the breached contract. Appellants do not—and cannot—contest the rational relatedness of this alternate rationale to the remedy imposed.

III.

THE AWARD WAS TIMELY.

A. The Interim Award Extended The Deadline To Render The Final Award.

The parties agreed that the JAMS rules would govern the arbitration. (AOB 33-34.) JAMS Rule 24(a) provides that for "good cause," the arbitrator may extend the time to render a final award. (JA 7/1756.) Appellants do not dispute that the arbitrator was empowered to extend the deadline; they just claim that he didn't exercise that power. (AOB 52-53.) The Interim Award tells a different story, particularly in light of the highly deferential standard of review.

- The Interim Award explained that the arbitrator was not prepared to render a Final Award because he still needed to decide several questions that required further briefing. (JA 8/2099:25-2100:13.)

Among these were the amount of attorneys fees, which could not be briefed until the Interim Award determined the prevailing party. (JA 8/2099:20-23.)

- It set a briefing schedule on the remaining issues that exceeded the previously existing deadline to render the Final Award and it "ordered" a new deadline for the Final Award—August 1, 2008. (JA 8/2100:9-18, capitalization omitted.)
- It stated that the arbitrator "retains jurisdiction." (JA 8/2099:25.)

When an arbitrator sets a new deadline to issue an award, specifies the reasons, and "retains jurisdiction," he obviously intends to extend his deadline. No other reading makes sense.

Appellants ignore this. Instead, they argue that this particular arbitrator would have done something more had he intended an extension. They note that in the Manhattan Loft arbitration, "when the [same] arbitrator wanted to extend the deadline under Rule 24(a), he issued written Orders that expressly made a finding of good cause based on identified factors, expressly referred to Rule 24(a) and expressly extended the deadline to a date certain." (AOB 52.) But here, they observe, the arbitrator did not mention Rule 24(a) or the deadline that existed before the extension. (*Ibid.*) So what? JAMS Rule 24(a) does not require magic language to express the extension. That the arbitrator had previously phrased an extension order one way does not mean that he must always express it that way, under pain of surrendering jurisdiction.

Even if there were some doubt as to what the arbitrator intended, courts must "indulge every reasonable intendment to give effect to arbitration proceedings." (See pp. 18, 27, *ante*.) That means interpreting the Interim Award as ordering an extension for good cause.

B. There Is No Merit To Appellants' Challenge To The Existence Of Good Cause Justifying The Extension.

The remainder of appellants' challenge to the award's timeliness seems to argue that no good cause justified the extension. Although appellants do not use that precise language, the thrust of their argument is that the arbitrator had no authority to reserve jurisdiction because he had already stated that he decided all of the submitted issues. (AOB 50-52.)

That argument misreads the Interim Award. As explained above (pp. 27-28, *ante*), he arbitrator had *not* decided—and *did not say* that he had decided—all of the *submitted* issues. He said that he had decided all of the "*substantive* issues." (JA 8/2099:20, emphasis added.) Appellants' effort to conflate those two concepts (AOB 50), is neither logical nor consistent with the standard of review, which requires courts to "indulge every reasonable intendment to give effect to arbitration proceedings." (See pp. 18, 27, *ante*.) For instance, the arbitrator had not decided the amount of attorneys fees to be awarded—a "submitted issue" that the arbitrator evidently did not consider a "substantive issue." (*Ibid.*)

Appellants' more detailed analysis further highlights the problem with their argument.

First, appellants claim that it was "unnecessary" for the arbitrator to retain jurisdiction to add an award of attorneys fees, "because an award of fees can be added to a Final Award." (AOB 51.) It is true that under *Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal.App.4th 1085, 1106, arbitrators may "correct the form of the award" within 30 days by a supplemental order that specifies the amount of fees and costs. But again, so what? It doesn't matter whether the arbitrator's chosen procedure was "unnecessary." What matters is whether the arbitrator had *authority* to use that procedure, even if other procedures were also available.

The Court "must give substantial deference to the arbitrator's own assessment of his contractual authority." (*Jordan, supra,* 100 Cal.App.4th at pp. 443-444.) Because that authority exists within a legal framework, the question is whether the arbitrator could reasonably interpret that framework as permitting him to use an interim award and extended deadline to decide the issue of attorneys fees. Here, the arbitrator was acting pursuant to well-established decisional law and the advice of the Rutter Guide:

• *Rosenquist v. Haralambides* (1987) 192 Cal.App.3d 62 approves the exact approach taken here. In *Rosenquist*, the arbitrator issued an award, not designated as "final," that "reserv[ed] jurisdiction for the purpose of determining the amount of attorney fees . . . ." (*Id.* at p. 65.) The arbitrator set a briefing schedule and a new deadline for the final award. (*Ibid.*) The Court of Appeal held that because the parties had not previously briefed the amount of fees, "it was both necessary and proper for the arbitrator to *extend the time*" to decide the issue. (*Id.* at p. 67, emphasis

added; see also *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 879, fn. 22 [noting that *Rosenquist* recognized "the commonsense proposition that when an arbitrator has actually made an award as to a prevailing party's right to fees, a supplemental hearing and award which determines the amount thereof is not improper"]; *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 159-160 [reservation of jurisdiction to determine fees and interest was sufficient "good cause for delay," the standard by which arbitrators extend their deadline].)

• The Rutter Guide *recommends* that arbitrators bifurcate the fee issue from the merits of the dispute and that they label the merits determination an "Interim Award": "Do *not* label it an 'award' or 'final award' . . . ." (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution, *supra*, ¶ 5:422.7, p. 5-277, emphasis in original.) The Guide does *not* recommend, as appellants suggest (AOB 51, fn. 50), that the arbitrator should just amend a final award with a later-determined amount of attorneys fees.

The arbitrator reasonably assessed his contractual authority, in light of governing law, as permitting the procedure he adopted. Appellants cannot seriously argue that the arbitrator could have called for briefing on attorneys fees and then supplemented the final award, but that vacatur is required because the arbitrator accomplished the identical result through a slightly different procedure. This is not the sort of thing that justifies disregarding California's "strong public policy" favoring arbitration as

a speedy and inexpensive means of settling disputes. (*Moncharsh*, *supra*, 3 Cal.4th at p. 9.) It would be an irrational waste of the parties' resources.[12]

Second, appellants claim that it was improper to retain jurisdiction to insert a "new" issue into the arbitration. (AOB 52.) We have already disposed of that argument: The issue of LADT's liability was not new. It had been submitted all along. (See § I., *ante*.) And even if the Court were to disagree and correct the award by striking the portion holding LADT jointly and severally liable, the award still could not be vacated on timeliness grounds because the issue of attorneys fees was an adequate basis to extend the deadline.

C. There Is No Merit To Appellants' Argument That The Arbitrator Impermissibly Changed His Mind By Making LADT Jointly And Severally Liable.

Appellants also argue that the arbitrator improperly "change[d] his mind" by deciding that LADT was jointly and severally liable for compensatory damages. (AOB 53-55.) The argument adds nothing, since it depends on the theory that the arbitrator did not extend his deadline, and so the Interim Award must be viewed as a partial final award. (AOB 53.)

In any event, the Interim Award did *not* decide that *only* LA ABC was liable or that LADT was *only* liable to the extent of the funds held in

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[12] Although appellants also challenge the arbitrator's decision to reserve jurisdiction to recalculate interest and other charges to the date of the Final Award, they acknowledge that would be justified if the arbitrator were entitled to keep "the arbitration open for other reasons." (AOB 51.) The above analysis provides that other reason.

escrow. Because the arbitrator had not yet made up his mind, he couldn't have changed it.

IV.

THE ARBITRATOR PROPERLY DECLINED TO DISQUALIFY HIMSELF ON THE BASIS OF A FRIVOLOUS LAWSUIT THAT WAS A TRANSPARENT ATTEMPT AT JUDGE-SHOPPING.

The trial court saw at once what Shy and his entities were up to: They "tr[ied] to create the basis for disqualification where none exists . . . trying by hook or by crook, to shortcut this, and [they] don't like the results . . . ." (JA 16/4110:18-26.)

Public policy prohibits such attempts at judge-shopping. When the purpose of the lawsuit is to manufacture a conflict of interest, judges should refuse to disqualify themselves in the absence of real bias because to do otherwise would allow a litigant to "manipulate the legal system . . . ." (*First Western Development Corp. v. Superior Court* (1989) 212 Cal.App.3d 860, 867 (*First Western Development Corp.*); see also *In re Koven* (2005) 134 Cal.App.4th 262, 274; *In re Focus Media, Inc.* (9th Cir. 2004) 378 F.3d 916, 930 [concern about opening "the door to misuse of the judicial misconduct complaint process as a means of removing a disfavored judge from a case"].)

Appellants do not dispute that this same standard applies to arbitrators, nor could they—they seek to disqualify the arbitrator on a ground that applies equally to judges and arbitrators. (AOB 57-60.)

The public policy concerns of judge-shopping must apply at least as strongly when litigants try to circumvent an arbitrator's determinations, since that undercuts a process that is supposed to be speedy, final and relatively inexpensive. (*Moncharsh, supra,* 3 Cal.4th at pp. 8-9.)

Nor have appellants disputed—either below or on appeal—that disqualification was the purpose of their lawsuit. Instead, they view the legal standard differently. As they see it, even when the obvious purpose of a lawsuit is to engage in judge-shopping, the judge *must* be disqualified as long as the lawsuit is not proven to be frivolous. (AOB 57-60.)

As we now demonstrate, there was no basis to disqualify the arbitrator even under appellants' version of the rule: The lawsuit is *both* frivolous *and* an obvious attempt to manufacture the appearance of a conflict of interest.

A. Disqualification Was Not Required Even Under The Standard Appellants Advocate: Their Lawsuit Is Frivolous Because It Is Barred By Arbitral Immunity.

The lawsuit challenges the arbitrator's decisions to extend the deadline for the award in the Manhattan Loft arbitration. Even if Shy and Manhattan Loft (collectively Shy in Section IV) were correct that the award in that case was untimely, the lawsuit would still be frivolous because it is barred by arbitral immunity. (*Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th 1759, 1764-1765, fn. 8 (*Say & Say*) [case is frivolous when barred by judicial immunity]; *Baar v. Tigerman* (1983) 140 Cal.App.3d 979, 982-983 (*Baar*) [judicial immunity applies in arbitration context];

Stasz v. Schwab (2004) 121 Cal.App.4th 420, 433-434, 440-441 (*Stasz*) [claims against the sponsoring organization are subject to same immunity as claims against the arbitrator].)

Appellants misconstrue the narrow exception to judicial immunity created by *Baar, supra,* 140 Cal.App.3d 979. (AOB 23, 59 & fn. 61.) As *Baar* and its progeny make clear, the exception to judicial immunity applies when the arbitrator *fails to make any decision at all*—nonfeasance— but arbitral immunity still applies to challenges to arbitral *decisions*—malfeasance. The latter category includes not only decisions on the merits of the dispute, but also decisions about the arbitration process itself. A petition to vacate the award—not a lawsuit against the arbitrator—was Shy's only permissible avenue of relief.[13]

1. The breadth of arbitral immunity.

It is well established that arbitrators are protected by arbitral immunity "'for actions taken in the arbitrator's quasi-judicial capacity . . . .'" (*Stasz, supra*, 121 Cal.App.4th at pp. 430-431, quoting *Baar, supra,* 140 Cal.App.3d at pp. 982-983, ellipsis in *Stasz*].) "The purpose of arbitral immunity is to encourage fair and independent decision-making by immunizing arbitrators from lawsuits arising from conduct in their decision-making role." (*Morgan Phillips, Inc. v. JAMS/Endispute, LLC* (2006) 140 Cal.App.4th 795, 800 (*Morgan Phillips*);

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[13] Although the Trust did not raise arbitral immunity below, the Court may affirm the judgment on any basis supported by the record. (E.g., *McClain, supra,* 159 Cal.App.4th at p. 802.) Here, the applicability of arbitral immunity can be assessed as a pure question of law on the basis of the allegations against the arbitrator. (See § IV.A.2., *post*.)

see also *Baar, supra,* 140 Cal.App.3d at p. 983 [arbitrators must be free to decide the matter without fear that their decisions will be questioned in suits brought against them].)

That immunity applies not only to arbitrators' substantive decisions, but also to "jurisdictional determinations made in their capacity as arbitrators" (*Stasz, supra,* 121 Cal.App.4th at p. 442)—decisions like the jurisdictional determinations the arbitrator made here to extend his time to issue an award.

As noted above, *Baar v. Tigerman* recognizes "a narrow exception to arbitral immunity: the immunity does not apply to the arbitrator's breach of contract by *failing to make any decision at all*." (*Morgan Phillips, supra,* 140 Cal.App.4th at p. 801, emphasis added; see *Baar, supra,* 140 Cal.App.3d at pp. 981-983 [no arbitral immunity when arbitrator failed to either make an award within the extended deadline or further extend his time].) This is because the "failure to render an arbitration award is not integral to the arbitration process; it is, rather, a breakdown of that process." (*Morgan Phillips, supra,* 140 Cal.App.4th at p. 801.) Thus, a lawsuit is an appropriate remedy "[f]or nonfeasance by an arbitrator . . . ." (*Ibid*.)

Baar, Morgan Phillips and *Stasz* carefully distinguish failure to issue an award from claims of malfeasance, which seek "to hold an arbitrator liable for alleged misconduct *in arriving at a decision*." (*Baar, supra,* 140 Cal.App.3d at p. 983, emphasis in original; see also *Morgan Phillips, supra,* 140 Cal.App.4th at p. 801; *Stasz, supra,* 121 Cal.App.4th at pp. 437-441 [arbitrators immune from suit alleging bias or partiality].) And as those

cases make clear, the range of that kind of misconduct and its immunity extend even to the process of deciding not to issue a final award at all.

For instance, the complaint in *Morgan Phillips, supra*, (cited at AOB 29, fn. 23, 59, fn. 61) alleged that the arbitrator tried to coerce a settlement by threatening to withdraw as arbitrator and then carried out that threat without giving any other reason for his withdrawal. (140 Cal.App.4th at p. 802.) The trial court sustained a demurrer on the basis of arbitral immunity but the Court of Appeal reversed. (*Id.* at pp. 798-800.) In doing so, however, it "emphasize[d]" that the case was at the pleading stage, and that the complaint alleged a complete failure to render an award without any purported justification. (*Id.* at 802-803.)

The Court explained that the evidence might require application of arbitral immunity if an arbitral *decision* was the cause of the arbitrator's failure to render an award: "Certainly, a decision to withdraw because of substantial doubt of the ability to [be] fair and impartial, or because of a conflict of interest, is entitled to immunity." (*Id.* at p. 803.) Such a decision "is integral to the arbitral function; the act itself, as well as the consequent failure to render an arbitration award, is covered by arbitral immunity." (*Ibid.*) Even the validity of the arbitrator's reasons for that decision are off limits. (*Ibid.*)

In other words, by agreeing to arbitration the parties do not bargain for a final award, but for a decision-making process that normally results in a final award. The bargain includes—and arbitral immunity applies to—all decisions that are integral to the arbitration process, including even principled decisions to not issue an award.

2. Shy's lawsuit is barred by arbitral immunity because it alleges misconduct in the arbitrator's decision-making process—not nonfeasance.

Malfeasance immunity easily extends to an arbitrator's decision to extend the deadline for the final award pursuant to the arbitrator's interpretation of the arbitration rules. That too is "integral to the arbitration process function"—not a mere act of nonfeasance that represents a neglect of the arbitration process. (Cf. *Stasz, supra,* 121 Cal.App.4th at p. 442 [arbitral immunity applies to "jurisdictional determinations"].)

Unlike *Morgan Phillips*, the application of arbitral immunity to Shy's lawsuit can be decided without any evidence from the arbitrator. The complaint filed against the arbitrator and the appellate briefing in *Greenspan v. Manhattan Loft* make clear that Shy is challenging the arbitrator's quasi-judicial decisions regarding his jurisdiction, not mere nonfeasance. *Baar*'s narrow exception to judicial immunity does not permit a party to "litigate the validity of an arbitrator's stated . . . grounds" for such decisions (*Morgan Phillips, supra,* 140 Cal.App.4th at p. 803)—even when based on claims of bias or partiality (*Stasz, supra,* 121 Cal.App.4th at p. 440).

The lawsuit. The complaint turns on Shy's allegations that "[t]he extensions Wisot granted himself are void" because the arbitrator (1) wrongly interpreted the parties' agreement as including the extension rules of JAMS Rule 24; (2) wrongly found the existence of good cause; and (3) failed "to hold a hearing to determine whether good cause existed" and

thus "violated [Shy's] due process rights." (JA 13/3383:5-3385:9.) These are all challenges to arbitral decisions that are immune from suit.

Shy's subsequent briefs. The appellate briefs in *Greenspan v. Manhattan Loft* (2d Civil No. B205917) further confirm that the dispute is a challenge to the arbitrator's *decisions* regarding the deadline to render the final award—not his nonfeasance.

• Although the Final Award states that the arbitrator reopened the hearing (JA 6/1526:21-25), Shy contends that the arbitrator did not really do so.[14] Shy's claim about what he says really happened explicitly attacks the arbitrator's decision-making process—he claims the arbitrator created "a total fabrication and included in the Final Award fundamental misstatements of the procedural history of the arbitration." (Manhattan Loft's XARB 2; see also, e.g., Manhattan Loft's XARB 23-26 [discussing the supposed truth as opposed to "the story" that was "invented"].)

• Shy also contends that the arbitrator lacked the power to issue an Interim Award that "reserve[d] jurisdiction" to receive briefing and then decide the amount of attorneys fees to award the Trust. (Manhattan Loft XARB 34-40.) Again, this claim challenges the arbitrator's decision regarding his power to use that procedure—not any nonfeasance.

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[14] The reopening issue is relevant to the timeliness of the arbitration award in the Manhattan Loft arbitration because the JAMS Rules provide that "[i]f the Hearing is re-opened and the re-opening prevents the rendering of the Award within the time limits specified by these Rules, the time limits will be extended until the reopened Hearing is declared closed by the arbitrator." (JA 7/1755 [JAMS Rule 22(i)]; see also JA 7/1756 [JAMS Rule 24(a)].)

Appellants cannot avoid immunity by characterizing these arbitral decisions as breaches of contract. "[V]irtually any claim of misconduct in arriving at a decision can be stated as a breach of the implied covenant of good faith and fair dealing." (*Stasz, supra,* 121 Cal.App.4th at p. 437.) That would "effectively circumvent[]" arbitral immunity "in most, if not all, cases by labeling the wrong as a contract breach." (*Ibid.*) Thus, *Baar* only provides an exception to arbitral immunity for "'complete nonperformance of [the arbitrator's] contract with the parties. Anything short of this complete nonperformance would be protected by arbitral immunity.'" (*Ibid.,* internal citations omitted)

Nor does it matter that in Shy's suit against him, the arbitrator has not yet raised arbitral immunity. (AOB 29.) The arbitrator did what was reasonable: Rather than filing a demurrer or a responsive pleading, he sought (and the trial court granted) a stay pending resolution of the timeliness issue in the confirmation proceeding. (JA 6/1613, 13/3426-3445.) If the Manhattan Loft award is confirmed over Shy's timeliness arguments, the suit against the arbitrator would be barred without any need to burden the parties or the court with the issue of arbitral immunity. If the litigation goes forward, the arbitrator will no doubt raise the defense. And unlike *Morgan Phillips,* the arbitrator will prevail as a matter of law, because the complaint itself establishes immunity.

3. Because it is barred by arbitral immunity as a matter of law, Shy's lawsuit is frivolous and cannot require disqualification even under appellants' understanding of the law.

Appellants also acknowledge that a frivolous lawsuit cannot be the basis of an arbitrator's disqualification under Code of Civil Procedure section 170.1, subdivision (a)(6). (AOB 56-60.) Public policy demands at least that much.

It is well established that a suit is frivolous when barred by arbitral immunity. (See, e.g., *Say & Say, supra*, 20 Cal.App.4th at p. 1764, fn. 8 ["suit is frivolous" when the defendant judges "are immune from any tort liability" alleged in the complaint].) Appellants themselves seem to acknowledge this. (AOB 23, 58-60 & fn. 61 [arguing suit is not frivolous because in appellants' view, it is outside of arbitral immunity].)

Thus, the Final Award must be upheld even if appellants' understanding of the disqualification requirements were correct: Shy's frivolous suit cannot be used to manufacture a basis for disqualification where none exists.

B. In The Alternative, Public Policy Prevents Judge-Shopping Even When That Goal Is Pursued Through A Non-Frivolous Lawsuit. Here, There Can Be No Question That This Was Appellants' Purpose.

The above analysis fully disposes of appellants' disqualification argument. But even if the lawsuit is not frivolous, a judge/arbitrator is not required to disqualify himself when the *purpose* of a lawsuit—even a non-frivolous lawsuit—is to create a basis for disqualification where none exists. That purpose could not be more obvious here. Appellants have not claimed otherwise, either below or on appeal.

1. The relevant inquiry is whether the "purpose" of the lawsuit was to engage in judge-shopping.

The rule counseling judges and arbitrators against disqualifying themselves does not turn on the merits of the suit filed against them. Rather, the focus is on the suit's purpose.

First Western Development Corp., supra, 212 Cal.App.3d 860, is clear on this point. Following the plaintiff's filing of multiple lawsuits, the defendant moved to have him declared a vexatious litigant. (*Id.* at pp. 864-865.) When the trial court denied the motion as premature, the defendant sought writ relief. (*Id.* at p. 865.) The Court of Appeal issued a *Palma* notice. (*Ibid.*) Five days later, in what the Court of Appeal described as an "apparent attempt to avoid the issuance of a writ," the plaintiff filed a lawsuit against all four members of the division, alleging equal protection and due process violations. (*Id.* at p. 865, fn. 5.)

The Court of Appeal rejected the transparent attempt to disqualify the panel on the basis that public policy prohibits judge-shopping. (*Id.* at pp. 866-867.) In labeling the disqualification attempt "frivolous" (*id*. at p. 866), the court looked to the "purpose" of the lawsuit as revealed by its timing—"the lawsuit was filed six days after [the court] sent notice" that it was considering issuing a peremptory writ. (*Id.* at pp. 866-867.) Given this timing, the court could "conceive of only one purpose, i.e., 'judge-shopping,'" and that was the reason that it refused to recuse itself. (*Ibid.*)

Say & Say, supra, 20 Cal.App.4th 1759 (cited at AOB 57) is not contrary. There, the Court of Appeal issued an order to show cause on a vexatious litigant issue. (*Say & Say, supra,* 20 Cal.App.4th at p. 1762.) Five days before the date of oral argument, the plaintiff filed suit against the justices. (*Id.* at pp. 1764, 1765, fn. 8.) In a lengthy footnote, the court addressed a number of disqualification issues arising from that lawsuit. (*Ibid.*) Among them, the court decided that recusal would be inappropriate under *First Western*, because the claims "are frivolous and are part of an effort to delay and frustrate the rights of defendants to have this litigation be brought to an end . . . ." (*Id.* at p. 1764, fn. 8.) Since a frivolous claim could never be a ground for recusal, the court's reference to the improper judge-shopping purpose of the lawsuit strongly suggests that either ground is sufficient. The *First Western Development* court expressed concern about condoning a procedure that would make it possible for a litigant who obtains an unfavorable decision "to cause that court to become disqualified or to recuse itself merely by filing a lawsuit naming the judicial officers as defendants." (*Id.* at p. 867.) That abuse of the legal system is just as real

and just as intolerable when a court is unable to determine the merits of a suit but knows that the suit is aimed at judge-shopping. (See also *In re Focus Media, Inc.*, *supra,* 378 F.3d 916, 929-930 [inferring bias would "open the door to misuse of the judicial misconduct complaint process as a means of removing a disfavored judge from a case].)

This view does not, as appellants suggest, mean "that *any* case filed against an arbitrator must necessarily be frivolous and cannot possibly reflect a real conflict of interest." (AOB 57-58, emphasis in original.) Nor does it mean that a lawsuit can never lead to disqualification. What it means is that courts will not permit a litigant to get away with a tactic obviously aimed at judge-shopping. Under those circumstances, there is no need to conduct a mini-trial to determine whether a separate action is frivolous. (AOB 59-60 [inviting the trial court and this Court to "consider the evidence" in the suit against the arbitrator].)

2. Judge-shopping is the obvious purpose of the suit against the arbitrator.

Appellants do not dispute that judge-shopping motivated Shy's lawsuit against the arbitrator, nor could they: The purpose could not be more apparent.

First, appellants sought disqualification even before there was any dispute regarding the return of fees in the Manhattan Loft arbitration, which is the subject of Shy's lawsuit. The October 3, 2007 letter seeking disqualification in both arbitrations stated "[w]e have not yet looked into whether it is appropriate to demand a refund of fees paid to JAMS (and

you)" in light of the supposedly untimely award in the Manhattan Loft arbitration. (JA 7/1808, emphasis added.)

Second, even after Shy requested the return of fees, appellants made clear that their reason for seeking disqualification was rooted in the arbitrator's merits rulings. For instance, appellants maintained that the arbitrator could not be impartial after determining that Shy's testimony in the Manhattan Loft arbitration lacked credibility. (JA 7/1895.) This was a known risk when the parties—at appellants' urging—chose Judge Wisot as the arbitrator in both cases. (JA 6/1383:9-24.) Yet appellants tried to use it as an escape hatch when they didn't like the arbitrator's direction.

Third, the lawsuit's timing strongly suggests that Shy was attempting to manufacture a conflict of interest in order to avoid the arbitrator's decision. Shy did not object to the arbitrator's initial decision to grant himself an extension. (Manhattan Loft RB/XAOB 36.) He did not even ask the arbitrator to try to render the decision more quickly than the extension permitted. That changed only after Shy and his entities became displeased with the arbitrator's direction on the merits. On September 19, 2007, the arbitrator gave his first indication regarding his resolution of the Manhattan Loft arbitration, declaring that he would consider the need for an injunction barring Shy from causing further damage to the Trust's space. (JA 6/1526:22-24.) Then, on September 26, the arbitrator denied appellants' motion for summary disposition in the LADT arbitration. (JA 6/1499.) Just one week later, appellants demanded disqualification (JA 7/1807-1809), and the suit was filed two weeks later (JA 1/140-150.)

Fourth, this was not the only lawsuit appellants threatened in an effort to manufacture a conflict. Their counsel repeatedly threatened to sue JAMS regarding its uniform policy of addressing bills to both the attorney and the client. (JA 9/2530, 2543, 2538, 2547, 2551, 2554.) JAMS explained this practice and offered a solution (JA 9/2530, 2543, 2549), but the threats kept coming. Their purpose was the same as the suit against the arbitrator. As appellants' counsel put it:

> "We believe that JAMS' actions with respect to its billing practices makes it untenable for JAMS to continue to administrate this Arbitration. How can we expect to receive a fair hearing from JAMS when we are in conflict with JAMS over matters of serious concern?" (JA 9/2538.)

Nor did these claims exhaust appellants' creativity:

• Appellants argued that the arbitrator must disqualify himself because he lived in Palm Springs. (JA 16/4159.) But they knew the arbitrator's residence at least eight months before seeking disqualification on this basis. (JA 16/4013 ¶ 22, 4162; see also JA 14/3692.)

• They argued that the arbitrator must disqualify himself because he supposedly unilaterally raised his fees from $600 per hour to $750 per hour. (JA 7/1808.) Even if such a claim could be the basis of

disqualification, there was no such change.[15] Besides, appellants were aware of the issue at least eight months before seeking disqualification. (JA 6/1400-1407 [2/14/07 fee schedule and bills]; 7/1808 [10/3/07 disqualification request].) They didn't complain until after they began receiving adverse rulings. (See p. 56, *ante*.)

* * * *

The arbitrator was not required to disqualify himself. Shy's lawsuit is frivolous because it is barred by arbitral immunity. Even if that were not so, disqualification is an inappropriate response to appellants' transparent attempt to manufacture the appearance of a conflict. Any other result would only encourage judge-shopping.

V.

THERE IS NO BASIS FOR LADT'S REQUEST THAT THE COURT STRIKE THE ARBITRATOR'S DISPOSITION OF THE ESCROW FUNDS.

Before the arbitration hearing, LADT and the Trust executed "Agreements Concerning Hold Instructions," in which they agreed that certain funds would be held in escrow pending resolution of the arbitration. (JA 16/4182.) As relevant here, the agreement provided that

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[15] The arbitrator's fee schedule made clear that he charged $6,000 for a full day hearing—effectively $750 per hour for "up to 8 hours of hearing time on the scheduled day and all travel time"—and $600 per hour for other work (i.e., "reading and research and follow-up calls after the hearing"). (JA 6/1403, 1429, 1436, 9/2535; see also JA 9/2518-2521 [bills charging different rates for hearing time and other work].)

> "the funds may only be released to a person or entity designated by Judge Wisot in his final award in JAMS Case Number 1220036382. [¶] The parties hereby waive any right to challenge, in court or otherwise, any order to release these funds as set forth in Judge Wisot's final award." (*Ibid.*)

Nonetheless, LADT asks the Court to strike the arbitrator's disposition of those funds. (AOB 61-62.) The argument is frivolous.

The Court need not reach this question if it agrees that LADT's liability was submitted to arbitration. (See § I., *ante*.) LADT itself acknowledges that in that event, "the Held Funds could rationally be applied to LADT's debt." (AOB 61, fn. 62.)

But even if the Court were to correct the award by striking LADT's joint and several liability outright, there is no basis to strike the arbitrator's disposition of the escrow funds. LADT argues that the arbitrator determined that the funds belong to LADT and that "[t]here is no basis in the Purchase Agreement or Promissory Note to hold LADT's money hostage to LA ABC's debt." (AOB 61.) But the source of the arbitrator's authority is not the Purchase Agreement or the Note. It is the later escrow agreement and the terms of the submission of this issue.

As the arbitrator explained, "[t]he parties stipulated the arbitrator is to determine [the] disposition of the proceeds of sale from two units sold, where the proceeds have been held in escrow pending this arbitration." (JA 7/1790:1-2; 8/2099:2-3.) "No criteria were presented to guide the arbitrator's determination, but only that the funds are to be released to

the person or entity designated by the arbitrator in the final award." (JA 7/1790:4-6.) Accordingly, the arbitrator determined that the parties empowered him to award the escrow funds in the manner he determined most equitable—not necessarily to the party who owned the condominiums before they were sold. (JA 7/1790:13-22, 8/2099:4-8.)

The "arbitrator's own assessment of his contractual authority" is entitled to the same deference as his determination of the merits of the case. (See pp. 17-18, *ante*.) It is appellants' burden to "affirmatively establish the existence of error by a proper record." (*Rosenquist, supra,* 192 Cal.App.3d at p. 67.) Here, appellants have submitted nothing to contradict the arbitrator's understanding of the submission. Indeed, they don't even cite the escrow agreement, much less try to explain it away. That agreement is dispositive: It provides that the funds are to "be released to a person or entity designated by [the arbitrator] in his final award," with no limitations set on the manner in which the arbitrator was to decide the issue. (JA 16/4182.)

The remedy imposed "bears a rational relationship to the underlying contract *as interpreted,* expressly or impliedly, by the arbitrator . . . ." (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 367, emphasis added.) The arbitrator interpreted the submission agreement as giving him equitable powers to hold the funds even if they belonged to LADT, and the remedy does just that.

LADT might protest that it did not intend to confer such broad powers, but that's not an issue for this Court: LADT should have expressly limited the arbitrator's powers. In the absence of "an express and explicit

restriction on the arbitrator's powers," LADT has no basis to complain. (*California Faculty Assn, supra*, 63 Cal.App.4th at p. 953.)

CONCLUSION

The arbitration award and the procedure by which the arbitrator rendered it are proper in every respect. That the arbitrator refused to capitulate to appellants' onslaught of frivolous disqualification demands is to his credit: Judges and neutrals should all be so steadfast, and thankfully most are.

The judgment should be confirmed.

Dated: November __, 2009

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204, subdivision (c), I certify that this **RESPONDENT'S BRIEF** contains 13,795 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page, as counted by the word processing program used to generate it.

Dated: November ___, 2009

_____
JEFFREY. E. RASKIN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **November 10, 2009**, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the parties in this action by serving:

Steven A. Schuman, Esq.
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Attorneys for LADT, LLC and LA ABC, LLC

Clerk
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Los Angeles, California 90012
(**Case No. BC356794 - 1 copy)**

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102
(**4 copies)**

(✗) **By Envelope** - by placing **()** the original **(✗)** a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(✗) **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **November 10, 2009**, at Los Angeles, California.

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

_____
Sharon Zelina