2d Civil Nos. B261860, consolidated with B264964

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM E. RICE, et al.

Plaintiff, Respondent, and Cross-Appellant,

vs.

GARY P. DOWNS,

Defendant, Appellant, and Cross-Respondent.

Appeal from Los Angeles Superior Court, Central District
Los Angeles Superior Court Case No. BC506921
Honorable Yvette M. Palazuelos

CROSS-APPELLANT'S REPLY BRIEF

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INTRODUCTION

It would have been child's play for the parties to write an arbitration provision that included tort claims. Case after case instructed them about the various broad formulations they could use.

But they didn't do that. Instead, they drafted neighboring contractual provisions that show they were steering clear of such a broad arbitration provision:

- Claims "in connection with" the agreement had been repeatedly held to include tort claims. The parties used that language in agreeing to *litigate* claims. A few sentences later, they *excluded* that language from their arbitration provision.
- Provisions stringing together multiple classes of claims had been repeatedly held to include tort claims. The parties used that language too. They agreed to *litigate* any claim that arises "out of," "under," or "in connection with" the agreement. A few sentences later, they *excluded* that language from their arbitration provision.
- The parties contracted that their disputes would be heard exclusively by state and federal courts sitting in California. They then chose a narrow arbitration provision that both of those jurisdictions had repeatedly recognized as excluding tort claims.

The drafters were not laypersons. They were lawyers from Pillsbury Winthrop, who any court must presume knew how to choose their words carefully. Indeed, Downs himself acknowledges that the parties' agreement must be interpreted in light of then-existing judicial interpretations of the same language.

Although the law favors arbitration, parties cannot be forced to arbitrate claims that they did not agree to arbitrate. Here, the parties made clear that they did not agree to arbitrate tort claims.

But even were this not the case, the court's failure to exercise its discretion to stay or deny arbitration requires reversal.

Either way, the Court should reverse the order compelling arbitration and finally allow Rice his opportunity to present his significant claims regarding attorneys' breaches of fiduciary duty—claims that Downs' own counsel described as "enormous." (7 AA 1811:8-9.)

ARGUMENT

I. RICE'S TORT CLAIMS ARE NOT ARBITRABLE.

A. The Parties' Agreement Expresses An Intent To Narrowly Limit The Extent Of Claims Subject To Arbitration.

1. The parties used expansive language to describe claims subject to jurisdiction in California courts, but narrow language to describe those subject to arbitration.

Courts are required to interpret arbitration agreements by applying the ordinary rules of contract interpretation, including the common rule that contracts must be construed as a whole with "each clause helping to interpret the other." (RB/XAOB 43.) Here, the parties made clear that they intended a narrow arbitration provision that would not encompass the full range of claims related to their business relationship and that they were intentionally excluding language that would require arbitration of tort claims. (RB/XAOB § I.B.1.)

In both the original and amended operating agreements, the LLC members first agreed that the full range of claims among them would be litigated in California courts—"any action on a claim arising out of, under or in connection with this Agreement or the transactions contemplated by this Agreement." (1 RA 74 at ¶ 12.4, 110 at ¶ 13.4.) Also in both agreements, in the very next paragraph they carved out a subset of those claims as being subject to arbitration—only claims "arising out of this

Agreement." (1 RA 74 at ¶ 12.5, 110 at ¶ 13.5.) The conclusion is inescapable: The parties intended the arbitration provision to be narrow.

As we next demonstrate (§§ I.A.2.-4., *post*), Downs' own arguments demonstrate the limited scope of the arbitration provision. Indeed, Downs even concedes that the arbitration provision must be interpreted as narrower than the jurisdiction provision—but his proposed interpretation eviscerates any distinction. (§ I.A.3., *post*.)

2. As Downs recognizes, the parties' choice of language must be understood in light of then-existing judicial interpretations of arbitration provisions.

We agree with Downs that the agreements must be interpreted in light of then-existing case law because "'the parties are presumed to know and to have had in mind all applicable laws extant when an agreement is made,' including 'the common law of the state.'" (ARB/XRB 69, quoting *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 281.) But he is wrong to claims that the result here must be a broad interpretation, because he overstates the cases he cites and ignores other key cases. Properly applied, the principle supports Rice, not Downs.

a. The parties are presumed to have understood that the phrase "in connection with" would make their arbitration provision cover tort claims—and they *excluded* that language.

Rice's opening brief demonstrated that at the time the parties drafted the original operating agreement in 2003, courts had repeatedly held that the phrase "in connection with this Agreement" covered arbitration of tort claims related to the parties' business relationship. (RB/XAOB 39, 45-46; e.g., *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315-1317 ["in connection with" is comparable to "arising out of or related to"; claims concerning formation of the agreement and claims that relate to the resulting relationship are "'connected'" to the agreement]; *Simula, Inc. v. Autoliv, Inc.* (9th Cir. 1999) 175 F.3d 716, 720 & fn. 3 [distinguishing "arising in connection" from the narrower "arising under" or "arising out of"]; 1 RA 55 [original operating agreement is dated July 15, 2003].) The meaning of this language was reaffirmed before the parties drafted their amended operating agreement. (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 553, fn. 1 (*Dream Theater*) [noting same critical difference; quoting *Simula, supra*]; 1 RA 86 [amended operating agreement dated October 11, 2007].)[1]

[1] The term "opening brief" refers to Rice's cross-appellant's opening brief, which was combined with his respondent's brief.

Yet the parties, having just used this broad "in connection with" language in their jurisdiction provision, *excluded* it just a few sentences later in their arbitration provision. (Compare 1 RA 74 at ¶ 12.4 and 110 at ¶ 13.4 [including "in connection with"] with 1 RA 74 at ¶ 12.5 and 110 at ¶ 13.5 [excluding language].) The only reasonable interpretation is that they did not want their arbitration provision to have the same breadth as their jurisdiction provision—the breadth that the phrase "in connection with" would have provided. So, they crafted these two neighboring provisions of their agreement to ensure that tort claims would be subject to *litigation* in California, but not to *arbitration*. (RB/XAOB 45-46.)

Downs never even tries to explain why, when the law provided such clear guidance about how to write a broad arbitration provision, parties who supposedly wanted to include tort claims would have so clearly excluded the very language that would have guaranteed that result. He does not wrestle with the "in connection" language at all.

b. The parties are presumed to have understood that compound provisions would make their arbitration provision cover tort claims—and they chose a more limited approach.

At the time of the original and amended operating agreements, the law was clear that parties could create broad arbitration provisions that would cover tort claims by stringing together multiple phrases describing

the scope of arbitration. (E.g., *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 435 (*Hall*) [distinguishing arbitration provisions that cover disputes "arising from" the agreement with those covering disputes "arising out of this contract *or any resulting transaction*, italics added]; *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 104 ["arising out of *or* relating to" the agreement, italics added]; *Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1003 [same]; *Bosinger v. Phillips Plastics Corp.* (S.D. Cal. 1999) 57 F.Supp.2d 986, 993-994 [arbitration provision covered tort claims because it covered claims "arising out of *or relating to* the agreement *or the relationship* between the parties," italics added]; see RB/XAOB 50-51; *Dream Theater, Inc., supra*, 124 Cal.App.4th at p. 553, fn. 1 [noting difference created by compound arbitration provision]; *Cobler v. Stanley, Barber, Southard, Brown & Assoc.* (1990) 217 Cal.App.3d 518, 530 (*Cobler*) [same]; see also RB/XAOB 39-41, 47-49.)

But here, too, the parties made the *opposite* choice: Although they used a compound provision to describe the broad range of claims subject to litigation, they used a single, narrow phrase to describe the far more limited scope of arbitration. (Compare 1 RA 74 at ¶ 12.4 and 110 at ¶ 13.4 [compound] with 1 RA 74 at ¶ 12.5 and 110 at ¶ 13.5 [single phrase].)

What's more, at the time of both the original and amended operating agreements, California courts and federal courts sitting in California had regularly recognized that arbitration provisions using only the phrase "arising out of" did not include tort claims. (*Cobler, supra*, 217

Cal.App.3d at p. 530 [arbitration agreements covering disputes "arising from this agreement" are "generally considered to be more limited in scope than would be, for example, a clause agreeing to arbitration 'any controversy . . . arising out of *or relating to* this agreement,' which might thus cover misconduct arising out of the agreement as well as contractual issues," ellipsis and italics in original]; *Dream Theater*, *supra*, 124 Cal.App.4th at p. 553, fn. 1 ["omission of the phrase *or relating to* has been found to exclude arbitration of some claims," italics in original]; *Mediterranean Enterprises, Inc. v. Ssangyong Corp.* (9th Cir. 1983) 708 F.2d 1458, 1464 ["We have no difficulty finding that 'arising hereunder' is intended to cover a much narrower scope of disputes, i.e. only those relating to the interpretation and performance of the contract itself"]; *Tracer Research Corp. v. National Environmental Serv. Co.* (9th Cir. 1994) 42 F.3d 1292, 1294-1295 ["Notwithstanding the federal policy favoring" arbitration, parties "narrowly circumscribe[]" the scope of arbitration by a clause that covered only claims "arising out of" the agreement].) *Those* are the courts that the parties knew would adjudicate their disputes and would be deciding any issue regarding arbitrability. (See § I.B.1.a., *post*.)[2]

The distinction the courts have drawn is hardly surprising. When an arbitration provision includes multiple classes of claims, the parties must have intended a broader scope than that of any one of those classes. (RB/XAOB 47.) Anything else renders part of the agreement surplusage.

[2] For further discussion of *Cobler* and *Dream Theater*, see § I.B.2., *post*.

c. The two cases Downs cites do not support his contrary position.

Downs contends that two cases demonstrate that the parties thought that the phrase "arising out of" was alone sufficient to encompass tort claims. (ARB/XRB 69.) But Downs misreads those cases, and in any event the parties here did not use the arbitration language found in either case. They used similar language in their *jurisdiction* provision, but *not* in their arbitration provision.

Coast Plaza. *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677 (*Coast Plaza*) was decided three years before the original operating agreement. According to Downs, the court "held that the tort and statutory claims therein 'unquestionably have arisen under' the parties' contract." (*Ibid.*, quoting *Coast Plaza*, *supra*, 83 Cal.App.4th at p. 684.) The court did say that, but Downs' brief description of the case omits is factual context. Facts matter: "The subtle yet elementary precept of the common law is that the law is in the holding, i.e., in the application of doctrine and precedent on the facts of the case. (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1061-1062.)

In *Coast Plaza*, a hospital and insurance company entered into a service agreement whereby the hospital would provide medical services to the insurance company's members at set reimbursement rates. (83 Cal.App.4th at p. 681.) Two years later, when the insurance company refused to renegotiate the reimbursement rates, the hospital terminated the

agreement and sued. (*Ibid.*) Each of its causes of action was based on the allegation that the service agreement's reimbursement rates were unreasonably low. (*Id.* at p. 682.)

The Court of Appeal held that those claims were embraced by the service agreement's arbitration provision, which covered "[a]ny problem or dispute arising under this Agreement *and/or concerning the terms of this Agreement* . . . ." (83 Cal.App.4th at pp. 681, fn. 2, 684, italics added.) That multi-phrase arbitration provision was sufficient, because every claim was "directly based on the provisions of the Service Agreement"—the reimbursement rates—and alleged loss of the benefits of the service agreement—lost patients because the hospital had to terminate the agreement. (*Id.* at pp. 684-686.) Every facet of the disputes was about *the contract's terms* and they all fell squarely within the arbitration provision.

Downs asserts that those claims would have fallen within the scope of the arbitration provision even if it had been as limited as the one here. He says that "the reference to disputes 'concerning the terms of this Agreement' would not broaden the scope of the agreement in *Coast Plaza*." (ARB/XRB 64.) That view conflicts with settled principles of contract interpretation. The parties in *Coast Plaza* presumably intended that both clauses of their arbitration provision would have meaning; any other interpretation would render a portion of the agreement mere surplusage. And *Coast Plaza* never considered the single-clause arbitration provision that covered only claims "arising under this Agreement." An opinion is not

authority for a proposition not considered. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

At any rate, the issue here is not so much specific holdings as it is how parties would go about determining how to draft an agreement. A contract drafter would not consider *Coast Plaza* or any other decision in isolation, but rather would consider the decisional law as a whole. The drafter would appreciate that, unlike *Coast Plaza*, *Cobler* squarely addressed the scope of an arbitration provision that covered only claims "arising from" the contract and interpreted the phrase to exclude tort claims. (*Cobler*, *supra*, 217 Cal.App.3d at p. 530; § I.B.2., *post*.) The drafter would also note that even though the court in *Dream Theater*, *supra*, 124 Cal.App.4th 547, was aware of *Coast Plaza* (the decision cites it on a different point, see *id*. at p. 552), it cited multiple authorities for the general proposition that "arising out of" is a narrow formulation (*id.* at p. 553, fn. 1)—and presumably felt that *Coast Plaza*, with its broader clause, was not inconsistent. No reasonable drafter considering these three cases together would use the narrow formulation "arising from" or "arising out of" if he or she wanted to include tort claims.

Moreover, *Coast Plaza* does not address the circumstance where, as here, the parties' intent appears from their decision to use different inclusion language in two neighboring provisions—one broadly expressing the scope of claims to be litigated and the other requiring arbitration of only a subset of those claims.

EFund. Downs argues that because the parties entered into the amended operating agreement a few months after *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311 (*EFund*), they are presumed to have been aware of that case. (ARB/XRB 69.) But *EFund* does not aid Downs.

For one thing, it is difficult to see how *EFund* could have had any impact on the parties' thinking, given that they retained the identical jurisdiction and arbitration provisions they had agreed on four years earlier.

For another, the parties agreed on contract language that, according to *EFund* itself, is "materially broader" than the language addressed in *EFund*. (*EFund*, *supra*, 150 Cal.App.4th at p. 1328.) In that case, the parties used a multi-phrase arbitration provision covering claims "arising from *or* out of" the agreement. (*Id.* at p. 1322, italics added.) *EFund* emphasized that this differed from the "crucial" language of the arbitration provisions interpreted in the Ninth Circuit opinions, which—like the arbitration provision here—were limited to the phrase "arising out of" by itself. (*Id.* at p. 1328.) *EFund* held that the multi-phrase formulation in *EFund* is "materially broader" and thus covered both contract and tort claims. (*Ibid.*) If the parties here had intended to follow *EFund*, they would have used that same "crucial," "materially broader" language. They chose not to. Instead, they continued to use that "materially broader" language only in their agreement to *litigate* claims (1) "arising out of," (2) "under," or (3) "in connection with" the Agreement and its contemplated transactions. (1 RA 110 at ¶ 13.4.)

Besides, Downs' theory leads to an impossible interpretation of the parties' intent. They had agreed that their disputes would be decided exclusively in California, either by California courts or federal courts sitting in California. (1 RA 110 at ¶ 13.4.) Federal courts sitting in California are bound by Ninth Circuit law. (*Hasbrouck v. Texaco, Inc*. (9th Cir. 1981) 663 F.2d 930, 933 (*Hasbrouck*) ["District courts are bound by the law of their own circuit"]; see p. 29, *post*.) So if Downs is correct about the California cases, the parties must have intentionally drafted an arbitration provision that would be interpreted differently by the two jurisdictions that might confront the issue. That is not a reasonable inference.

3. Downs' characterization of paragraph 13.4 as only "marginally broader" than paragraph 13.5 is unavailing: Under his interpretation, there is no difference at all.

Downs concedes that the parties intended "[t]he jurisdiction provision [to be] broader than the arbitration provision," but he claims it is "only marginally so." (ARB/XRB 69.) The argument is not supportable. In fact, his interpretation eliminates any distinction between the jurisdiction and arbitration provisions.

Downs' central thesis is that the parties intended the phrase "arising out of" to cover "any tort claim that would not exist but for the agreement."

(ARB/XRB 62; see ARB/XRB 64-66, 69.) But that interpretation includes *everything* that the jurisdiction provision covers:

- The parties agreed to litigate—but not arbitrate—claims "in connection with this Agreement." (1 RA 110 at ¶¶ 13.4-13.5.) But there would be no claims "in connection with this Agreement" if there were no agreement, so no such claim could exist "but for the agreement."

- The parties also agreed to litigate—but not arbitrate—all claims "in connection with . . . the transactions contemplated by this Agreement." (*Ibid.*) But those claims too are defined by the Agreement that contemplates the transaction. So, this class of claims also would not exist "but for" the agreement, and therefore would be arbitrable under Downs' interpretation.[3]

The problem with Downs' theory is further exemplified through *EFund*, *Coast Plaza* and the other cases on which Downs relies. Those cases interpret broad arbitration provisions to cover all claims "having their roots in the contractual relationship between the parties," including tort claims. (*EFund*, *supra*, 150 Cal.App.4th at p. 1323; see *Coast Plaza*, *supra*, 83 Cal.App.4th at p. 686; ARB/XRB 73.) That approach too would

[3] In passing, Downs suggests that the "transactions" language refers to transactions involving third parties. (ARB/XRB 70 [provision covers "claims that relate to transactions (with third parties) that are contemplated by the HPD Operating Agreements"].) He offers neither argument nor textual support for this view, which on its face is too narrow.

cover everything in the operating agreement's jurisdiction provision. Claims among the LLC members "in connection with" the operating agreement necessarily have their roots in the business relationship created by the operating agreement. So too do claims among the LLC members "in connection with . . . the transactions contemplated by" the operating agreement. That leaves no additional breadth for the jurisdiction provision, despite Downs' concession that there *must* be additional breadth, however "marginal."

Downs offers no answer. He just parrots the language of the operating agreement, asserting that the "addition[al]" claims covered by the jurisdiction provision are those that are "'in connection with,' but do not 'arise out of,' the HPD Operating Agreements" and "claims that relate to transactions (with third parties) that are contemplated by the HPD Operating Agreements." (ARB/XRB 69-70.) But, as just shown, that view cannot be squared with Downs' interpretation of "arise out of," which swallows the additional language of the jurisdiction provision.

Ultimately, Downs offers—in a footnote—a single example of a claim that he thinks "might" be covered by the jurisdiction provision yet still non-arbitrable (ARB/XRB 70, fn. 22), but the example also fails his own interpretation of the contract. Downs says that in acquiring properties "that are contemplated by the HPD Operating Agreement," each member agreed to indemnify the others regarding HPD's loans. (*Ibid.*) He suggests that a claim for breach of that indemnity "might" not be within the scope of the arbitration provision. (*Ibid.*) But the hypothesized claim *would* be

arbitrable under Downs' interpretation: "But for" the operating agreement, the parties would not have had any business relationship, HPD would never have taken any loans, and no cross-indemnity claim would exist. In the language of *EFund*, the cross-indemnity claims "ha[ve] their roots in the parties' contractual relationship" as members of HPD. (*EFund*, *supra*, 150 Cal.App.4th at p. 1323.)

Indeed, there is really no difference between Downs' hypothetically non-arbitrable claim and Rice's claims that Downs asserts are arbitrable. For instance, Rice alleges that Downs and his former firm caused HPD to engage in detrimental financial transactions that benefited Downs and his other clients and failed to obtain conflict waivers. (RB/XAOB 18.) Those claims are not based on the contract itself; the operating agreement does not specify that Downs or his firm would act as HPD's lawyers. Downs' theory is that those claims are arbitrable because "but for" the agreement, the business and the circumstances creating the alleged breach would not exist. But if that really did make the claim arbitrable, then Downs' hypothetical cross-indemnity claim would likewise be arbitrable. Similarly, Rice's claim that Downs violated Rule of Professional Conduct Rule 3-300 stems from Downs' duties as Rice and HPD's attorney. Nothing in the operating agreements created that attorney-client relationship, which is yet another reason why the 3-300 allegations do not arise from the operating agreements but rather from a separate and additional relationship between the parties. None of this illuminates any difference between the jurisdiction and arbitration provisions that *admittedly* are different.

Downs concedes—as he must—that the jurisdiction provision was intended to be broader than the arbitration provision. He cannot simultaneously assert an interpretation that makes the two provisions coextensive. The only interpretation that considers the agreement as a whole is that the parties intended a narrow arbitration provision that excludes tort claims by using language that courts sitting in California had repeatedly indicated would be interpreted to exclude tort claims.

4. Downs' other arguments are meritless.

None of Downs' remaining arguments withstands scrutiny.

1. Downs seems to argue that no case holds that "arising under" should be read in a particular way in light of the parties' choice to use broader language in a neighboring provision. (ARB/XRB 68-70.) If what Downs means is that no case has considered this precise circumstance, that is true. But it is well established that an arbitration agreement's scope is a matter of intent to be determined through ordinary principles of contract interpretation. (RB/XAOB 43.) That includes the familiar principle that the contract must be interpreted as a whole, with each provision serving to help interpret the other. (*Ibid.*) There is no justification for ignoring the parties' chosen language and instead relying on cases that considered wholly different circumstances.

2. Downs urges that courts are required to resolve doubts in favor of arbitrability. (ARB/XRB 60-61.) That is, of course, true. (RB/XAOB 37.) But courts still have the duty to determine an arbitration provision's

intended scope and to compel arbitration only of disputes that the parties actually agreed to arbitrate. (RB/XAOB 37-38.) That decision "rests substantially on whether the clause in question is 'broad' or 'narrow.'" (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1067.) Here, the neighboring provisions make clear that the parties intended a narrow arbitration provision.

3. Downs contends that "[i]n his Opposition to Downs' Motion to Compel Arbitration and in his Motion to Stay Arbitration, Rice acknowledged that [his rescission] cause of action was arbitrable." (ARB/XRB 55.) Not so: Rice repeatedly argued that the rescission claim was non-arbitrable. (2 RA 379, 381, 398, 400.)[4] That is unsurprising since Rice only sought rescission as a remedy for Downs' breach of fiduciary duty—the substantive claim that Rice contended was not arbitrable. (1 RA 17 [seeking rescission due to malpractice and fiduciary duty breaches].) Downs' argument that Rice "acknowledged" the arbitrability of the rescission issue relies on a different page of those documents that did not specifically mention rescission as non-arbitrable. (ARB/XRB 55, citing 2 RA 375, 394.)

4. Downs argues that the "facts of this case demonstrate that Rice knew that tort claims are arbitrable under the HPD Operating Agreement."

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[4] 2 RA 379:22-24 and 398:26-28 ("some, though not all, of these claims are arbitrable (i.e. the Breach of Contract claim), whereas others (i.e. the Malpractice, Breach of Fiduciary Duty, and *Rescission claims*) *are not*," italics added); 2 RA 381:16-17 and 400:27-28 ("Fifth Cause of Action for Rescission is also undisputedly non-arbitrable").

(ARB/XRB 70, underlining omitted.) As he sees it, Rice must have thought tort claims were within the scope of the arbitration provision because Downs brought tort claims in arbitration and Rice supposedly never argued that those tort claims weren't arbitrable. (ARB/XRB 70-71.) It's not true:

- Rice argued from the beginning that tort claims were not within the scope of the parties' arbitration provision, citing the relevant authority. (E.g., 2 RA 399:6-18; 3 RA 728:20-729:13.)
- Rice sought to stay the arbitration of Downs' claims. (2 RA 366-367.)
- Parties can consent to the arbitration of a particular claim that "'they were not contractually compelled to submit to arbitration.'" (*Greenspan v. LADT* (2010) 185 Cal.App.4th 1413, 1438, quoting Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2009) ¶ 5:473.1, pp. 5-326 to 5-327.) But consenting to the arbitration of a particular issue does not constitute a concession that all tort claims are subject to mandatory arbitration.

* * * * *

This Court does not need to decide whether, in general, an arbitration agreement covers tort claims whenever it uses the phrase

"arising out of." When paragraphs 13.4 and 13.5 are read together, it is clear that *these* parties did not intend to require arbitration of all claims that have their roots in their business relationship. They showed their intent by using language from existing California and Ninth Circuit law, which Downs concedes must be presumed to have guided their choice of language. The Court should give effect to that choice.

B. Even Without The Comparison To Paragraph 13.4, The Arbitration Provision Should Be Narrowly Interpreted.

Even if there were no broader provision for comparison, the Court should interpret the arbitration provision narrowly. The opening brief demonstrated that state and federal courts sitting in California have repeatedly expressed that, for purposes of arbitration agreements, the phrase "arising out of" is materially different from "arising out of or relating to" and that the former does not include tort claims. (RB/XAOB 39-42, 47-48.) The parties presumptively relied on such pronouncements in drafting their own arbitration provisions. Reaching a different interpretation now would undermine that reliance, which is at the heart of the parties' intent. (RB/XAOB 48-49.)

In fact, Downs agrees with the principle that the parties must be "presumed to have contracted in reliance" of the prior pronouncements of courts interpreting arbitration provisions. (ARB/XRB 69.) The parties disagree only in two respects: whether the Ninth Circuit's decisions should

serve as a basis for reliance, and whether the California decisions suggest that the phrase "arising out of" by itself is sufficient to embrace tort claims.

1. Contrary to Downs' suggestion, California parties necessarily rely on the Ninth Circuit's interpretation.

For decades, the Ninth Circuit has repeatedly and unambiguously held that an arbitration agreement that only embraces claims "arising out of" the agreement does not require arbitration of tort claims. (*Cape Flattery Ltd. v. Titan Maritime, LLC* (9th Cir. 2011) 647 F.3d 914, 922-923 (*Cape Flattery Ltd.*); *Tracer Research Corp. v. National Environmental Serv. Co.*, *supra*, 42 F.3d at pp. 1294-1295; *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, *supra*, 708 F.2d at p. 1464.) There is no basis for Downs' attempt to discount the impact of that precedent.

a. It is irrelevant that the Ninth Circuit adheres to a minority view. California parties expect the issue to be decided under Ninth Circuit law—not the law of other circuits.

Although Rice agrees that the Ninth Circuit's interpretation is "currently the minority view among federal circuits applying federal law" (ARB/XRB 74-75, underlining omitted; see also RB/XOB 48), that fact is irrelevant to the analysis.

As Downs concedes, parties drafting arbitration agreements must be presumed to have relied on the relevant case law. (ARB/XRB 69.) Where

do parties look for guidance? Unquestionably, they look to the jurisdictions that will actually interpret *their* agreement. California parties drafting an operating agreement for their California business look to state and federal courts that sit in California—not the law in other circuits or other states. That is especially true when their agreement requires that litigation be filed in federal and states courts in California. To those parties, the Ninth Circuit and California are all that matters.

Here, the parties agreed that all claims would be within the "exclusive jurisdiction of the state and federal courts sitting in California . . . ." (1 RA 74 at ¶ 12.4, 110 at ¶ 13.4.) Because federal district courts sitting in California are bound by Ninth Circuit law (*Hasbrouck, supra*, 663 F.2d at p. 933), it does not matter that the Ninth Circuit currently holds a minority view. The same is true of Ninth Circuit panels, which are bound by the Circuit's earlier decisions. (*Biggs v. Secretary of California Dept. of Corrections and Rehabilitation* (9th Cir. 2013) 717 F.3d 678, 689.)[5] Because the issue is the parties' reliance on decisional law, it does not matter that other circuits that could never be called upon to interpret the arbitration provision might take a different view.

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[5] An en banc panel of the Ninth Circuit could theoretically overturn a prior precedent. But decisions of the Ninth Circuit and other circuits make clear that it would be dangerous to do so regarding the interpretation of arbitration provisions because parties will have relied on the earlier precedent. (E.g., *Cape Flattery Ltd., supra*, 647 F.3d at p. 923; *S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc.* (2d Cir. 1984) 745 F.2d 190, 194; see also RB/XAOB 48-49.)

b. *EFund* did not alter the parties' expected reliance on the Ninth Circuit guidance.

Downs argues that *EFund* has already expressed disagreement with the Ninth Circuit's interpretation. (ARB/XRB 71-72, 74.) Indeed it did, but this too is irrelevant.

First, the parties drafted the original operating agreement years before *EFund* was decided, so at that point the decision could not have undermined their reliance on the Ninth Circuit's long line of cases. And it would have been irrational for them to use the *identical* language in their amended operating agreement if they intended it to have the *opposite* effect in light of *EFund*'s doubts about Ninth Circuit law. No one would do that—certainly not a firm as sophisticated as Pillsbury Winthrop.

Rather than risking that some court at some time down the road might think that the parties meant the same thing by using the same language, anyone considering the impact of *EFund* would certainly have used *different* language from that in the pre-*EFund* operating agreement. Indeed, *EFund* all but expressly counseled doing so, since it emphasized that the arbitration provision in that case was "materially broader" than the "crucial" language in the Ninth Circuit cases because it used the phrase "arising from or out of." (150 Cal.App.4th at p. 1328.) Nor were the parties limited by *EFund*'s suggestion—they could have used any variety of broad formulations, including one that expressly described tort claims.

That the language remained the same undercuts any notion that *EFund* played any role in the drafting of the amended operating agreement.

Second, *EFund* does not even consider, much less hold, that courts should disregard the reliance effect of Ninth Circuit precedent.

For one thing, *EFund*'s holding is clear. The Court of Appeal decided that the *multi-phrase* arbitration provision it considered was "materially different" from the "crucial," single-phrase arbitration provision that the Ninth Circuit held excluded tort claims. (*EFund*, *supra*, 150 Cal.App.4th at p. 1328.) The agreement was, therefore, more similar to the multi-phrase arbitration provisions in other California cases, which courts had interpreted as covering tort claims. (*Ibid*.) Given this basis for its holding, *EFund*'s further discussion of the Ninth Circuit's case law was unnecessary to its decision and was therefore non-binding dictum.

For another, Rice's opening brief demonstrated that *EFund's* evaluation of the Ninth Circuit precedent should not be entitled to substantial weight. The *EFund* parties did not brief, and the Court of Appeal did not address, the significance of presumed reliance on the Ninth Circuit's interpretation. (See RB/XAOB 54 & fn. 8.) Rather, *EFund*'s dictum sided with other federal circuits as though the question had been presented on a clean slate, without concern about reliance. Reliance was not raised. *EFund* cannot stand for a proposition that the court neither considered nor decided. (*Ginns v. Savage, supra,* 61 Cal.2d at p. 524, fn. 2.) Downs offers no response.

c. *Bosinger* does not change the analysis.

It is unclear whether Downs continues to rely on the district court decision in *Bosinger v. Phillips Plastics Corp.* (S.D. Cal. 1999) 57 F.Supp.2d 986 (*Bosinger*). Rice's opening brief demonstrated that *Bosinger* followed the Ninth Circuit's distinction, as it was required to do. (RB/XAOB 50-51.) The court compelled arbitration precisely because the arbitration provision used the broader "arising out of or relating to" language. Downs doesn't seem to disagree. But he takes umbrage at our criticism of the trial court's misreading of *Bosinger*, claiming that Rice's trial counsel portrayed *Bosinger* the same way. (ARB/XRB 75.)

Downs misses the point. There is no reason to think that the parties themselves, much less the sophisticated drafting attorneys at Pillsbury Winthrop, relied on anyone's mistaken reading of *Bosinger*. They could not and would not have thought that a district court, bound to follow Ninth Circuit law, would deviate from the Ninth Circuit's interpretation. Nor did Rice's trial counsel argue otherwise.

2. California cases that had long drawn the same distinction served as another source of reasonable reliance by parties preparing arbitration provisions.

The Ninth Circuit cases are alone sufficient to establish the importance of considering the parties' reliance on existing law when drafting an arbitration provision that they knew might be interpreted by

federal courts within the Ninth Circuit. But Rice's opening brief also demonstrated that California cases have long drawn the same distinction, urging parties that there is a meaningful difference between agreements to arbitrate claims "arising out of" and claims "arising out of or related to" the agreement. (RB/XAOB 40-41, 46-49.) There is no substance to Downs' attempts to cast doubt on parties' reliance on those cases.

Cobler. *Cobler*, *supra*, 217 Cal.App.3d 518 stated in no uncertain terms that an arbitration provision covering disputes "arising from this Agreement" does not cover tort claims. "This type of arbitration clause is generally considered to be more limited in scope than would be, for example, a clause agreeing to arbitrate 'any controversy . . . arising out of *or relating to* this agreement,' which might thus cover misconduct arising out of the agreement as well as contractual issues." (*Id.* at p. 530, italics in original.) California parties must be presumed to have relied on that guidance in preparing their arbitration agreements.

Downs' two-sentence response fails to address this point. He argues only that *Cobler* vacated an arbitration award based on an "error of law," a standard later rejected in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1. (ARB/XRB 73-74.) That is true, but irrelevant—it concerns an entirely different issue in *Cobler*. *Moncharsh* does not affect the reliance of California parties on the unaffected portion of *Cobler*.

Moncharsh considered the scope of judicial review of an arbitration award. It held that the Code of Civil Procedure provides the exclusive

grounds to vacate an award and that an award cannot be overturned because of an arbitrator's "error of law." (3 Cal.4th at pp. 27-28, 33.) *Moncharsh* has nothing to do with the proper interpretation of the scope of an arbitration agreement. That is generally a judicial function that precedes the arbitrator's consideration of the merits of the claims. (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1096 ["unless an arbitration agreement expressly provides otherwise, a dispute regarding the arbitrability of a particular dispute is subject to judicial resolution"].)

Moncharsh's limited impact on *Cobler* becomes obvious when one examines the *Cobler* decision. In *Cobler*, the appellant argued that the arbitration award should be vacated because the arbitrator had exceeded his jurisdiction by awarding emotional distress damages. (217 Cal.App.3d at p. 530.) The Court of Appeal explained that it needed to address this question through two sub-issues:

First, the Court of Appeal examined whether the parties had submitted tort claims to arbitration. (*Id.* at pp. 530-531.) It began that analysis by examining the arbitration provision in the underlying contract, concluding that the original agreement did not mandate arbitration of tort claims. (*Id.* at p. 530.) *That* is the portion of *Cobler* that Rice relies on, and it has nothing to do with the "error of law" issue. The Court then explained that the parties could nonetheless have voluntarily submitted tort claims via the arbitration demands or the arbitration briefs, but concluded they had not done so. (*Id.* at p. 531.) Because this reasoning represents a necessary step in the court's overall analysis, it qualifies as a holding.

Second, the Court of Appeal decided that because no tort claims had been submitted, the arbitrator exceeded his powers by awarding emotional distress damages: Since emotional distress damages are not available for breach of contract, the arbitrator committed an "error of law" by providing an improper remedy for the contract claims. (*Id.* at pp. 531-532.) While *Moncharsh* undermines this second conclusion, it casts no doubt on *Cobler*'s analysis of the scope of arbitration provisions. Nor does it do anything to upset California parties' reasonable reliance on *Cobler*'s analysis of that issue. Indeed, the Rutter Guide correctly cites *Cobler* as good law on this issue. (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2015) ¶ 5:223.)

Dream Theater. *Dream Theater*, *supra*, 124 Cal.App.4th at 553, fn. 1, reiterates the same distinction and highlights the relevant Ninth Circuit holdings. While Downs correctly notes that the relevant language is dictum (ARB/XRB 74), that is irrelevant to the issue here: Reliance.

Parties are presumed to have drafted their agreements based on how courts in the governing jurisdiction have interpreted similar agreements. (P. 11, *ante*.) As noted above, *Cobler*'s analysis of the scope of arbitration agreements is a *holding*, not dictum. The Ninth Circuit's analyses are *holdings*, not dictum. And dictum though it may be, *Dream Theater* repeats the governing standard and serves to refresh the memories of California parties who are drafting arbitration provisions in California

contracts. It is hardly surprising that California parties rely on these repeated statements.[6]

3. Downs' discussion of other California cases is off topic and misconstrues the cases.

None of Downs' other California cases detracts from the parties' presumed reliance on the repeated pronouncements of California and Ninth Circuit courts.

1. Downs contends that *Hall v. Superior Court*, *supra*, 18 Cal.App.4th at p. 435 "holds that the phrase 'arising out of' is broader than "arising from." (ARB/XRB 71, 74, fn. 24, underlining omitted.) That isn't what *Hall* said. *Hall* said that the combined phrase "arising out of this contract *or any resulting transaction*" is broader than "arising from" the contract. (*Hall*, *supra*, 18 Cal.App.4th at p. 435, italics added.) The

[6] In passing, Downs cites *Crofoot v. Blair Holdings Corp*. (1953) 119 Cal.App.2d 156. (ARB/XRB 62.) That case interpreted a now-obsolete statute—not a contract provision—as meaning that an old procedure called "statutory arbitration" could resolve tort claims. The court reached that interpretation because the statute permitted statutory arbitration of any dispute, "'which arises out of a contract . . . or the violation of any other obligation.'" (*Crofoot*, *supra*, 119 Cal.App.2d at p. 182.) The court held that "the violation 'of any other obligation,' clearly includes tort claims." (*Ibid*.) It went on to say that "even if the statute were limited to disputes 'arising out of a contract,' which it is not," the statute could be read as covering tort claims "arising out of a contractual dispute." (*Ibid*.) Downs does not rely on this dictum. And in light of subsequent decisions that actually interpret the scope of contractual arbitration provisions, no California party would reasonably rely on it. *Crofoot* does interpret a contractual arbitration provision as to other issues not relevant here (*id.* at pp. 182-187), but those interpretations have since been disapproved by *Posner v. Grunwald-Marx, Inc*. (1961) 56 Cal.2d 169, 183.

decision only reaffirms that multi-phrase arbitration provisions are broader than the phrase "arising out of" standing alone.

2. Below, Downs contended that a number of California cases were "directly on point" in holding that an arbitration provision that only covers claims "arising out of" the contract is sufficient to require arbitration of tort claims. (RB/XAOB 51.) Rice's opening brief demonstrated that this was not so—those cases considered arbitration provisions with classically broader language. (RB/XAOB 51-52.) On appeal, Downs appears to concede as much. (ARB/XRB 72-73.) However, he continues to cite those cases, saying that "none of them support Rice's argument that the words 'related to' are required . . . ." (*Ibid.*, underlining omitted.) Maybe so. But it's just as true that none of them supports Downs' argument—they don't address our provision at all. And other authority clearly *does* support Rice's argument. *That* authority is what the parties must be presumed to have relied on in drafting their narrow arbitration provision.

3. Downs relies heavily on cases that have nothing to do with arbitration agreements. For instance, he discusses three cases interpreting the scope of fee-shifting provisions in real estate contracts. (ARB/XRB 62, 64-65, 68, 71, citing *Adam v. DeCharon* (1995) 31 Cal.App.4th 708, 712; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607-608; *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 159.) And he discusses another case interpreting a statute of limitations provision in an insurance contract. (ARB/XRB 63, 71, citing *Blue Shield of California Life & Health Ins. Co. v. Superior*

Court (2011) 192 Cal.App.4th 727.) Those cases do not inform the analysis that the parties agree is critical here: Reliance.

In drafting arbitration provisions, parties and their attorneys rely on cases interpreting arbitration provisions—not fee-shifting provisions or statute of limitations provisions in insurance policies. Indeed, Downs has not cited, and our research has not disclosed, a single arbitration case that cites any of these fee-shifting cases. That is because neither parties nor courts look to these outside contexts in interpreting or drafting arbitration provisions.

4. While earlier sections of this brief address *EFund* in various contexts (§§ I.A.2.c., I.B.1.b., *ante*), we address one additional point here. In *EFund*, the Court of Appeal considered a provision that required arbitration for all claims "arising from or out of" the agreement. (150 Cal.App.4th at p. 1328.) Downs stresses that Rice admitted that the difference between those two phrases is not entirely clear. (ARB/XRB 71, citing RB/XAOB 53.) He contends that admission is "fatal to Rice's appeal," reasoning that if the difference between the two phrases in *EFund* is not clear, then no one can contend that the phrase "arising out of" alone is not susceptible to the same interpretation as *EFund* provided. (ARB/XRB 71.) The argument misses the mark.

What Rice said was that "[w]hile the substantive differences between these two phrases is not entirely clear, the *EFund* parties *must have intended something broader than what either clause would separately*

cover." (RB/XAOB 53, italics added.) Anything else renders the contract language mere surplusage. *EFund* makes the identical point: The Court of Appeal held that the combined phrase "arising from or out of" is "materially broader" than an arbitration provision that only covers claims "arising hereunder" or that only cover claims "arising out of" the agreement. (*EFund*, *supra*, 150 Cal.App.4th at p. 1328.)

* * * * *

Rice's tort claims are not within the scope of the parties' arbitration provision. The neighboring jurisdiction and arbitration provisions make clear that the parties knew how to express the full range of claims arising out of their business relationship and that they chose to *exclude* from the arbitration provision the language that courts had consistently held would make tort claims arbitrable. The parties must be presumed to have relied on the guidance that had been repeatedly provided by California courts and the Ninth Circuits—the jurisdictions that they agreed would have exclusive jurisdiction to consider their disputes and thus, any arbitrability questions. This Court must respect the parties' choice and reverse the order compelling arbitration.

II. THE TRIAL COURT FAILED TO RECOGNIZE ITS DISCRETION TO DENY OR STAY ARBITRATION PURSUANT TO THE CODE OF CIVIL PROCEDURE.

Rice's opening brief demonstrated that reversal is required even if all of Rice's claims against Downs were arbitrable. That is because the trial court failed to recognize that the circumstances permitted it to exercise discretion as to whether to deny or stay the arbitration under Code of Civil Procedure section 1281.2(c), and as a result it failed to exercise that discretion. Such a failure requires reversal. (RB/XAOB § II; *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99 (*Orabuena*).) Downs' three-page response cannot support affirmance.

A. Downs Tacitly Concedes That There Were Numerous Potential Conflicts Of Fact And Law.

Rice's opening brief demonstrated the numerous potential conflicts regarding Rice's fiduciary duty claims against Downs and Nixon Peabody (Claim 2). (RB/XAOB §§ II.B.1.-2.) Indeed, in the trial court both Downs and Nixon Peabody *conceded* the interrelatedness and the risk of inconsistent factual and legal determinations. (RB/XAOB § II.B.3.)

Downs does not dispute any of this.

B. The Trial Court Failed To Exercise Its Discretion To Deny Or Stay Arbitration Based On The Conceded Possibility Of Inconsistent Rulings On Claim 2.

1. The trial court decision and the standard of review.

While of course the ultimate decision to stay, deny or compel arbitration under section 1281.2, subdivision (c) (section 1281.2(c)) is reviewed for abuse of discretion (see RB/XAOB 35; ARB/XRB 76), that is not the issue here. Rather, the issue is whether the trial court failed to *exercise* its discretion, erroneously believing that there was "no basis" to stay or deny arbitration. (3 RA 747-748.) Here is what happened:

First, Rice asserted a possibility of conflicting rulings regarding the claims that Downs and Nixon Peabody breached their fiduciary duties—Claim 2. (See § II.B.2., *post*; RB/XAOB 66.) He also asserted a possibility of conflicting rulings regarding the claims that Downs and Nixon Peabody were not entitled to collect certain fees for services—Claims 3 and 4. (See RB/XAOB 66.) Downs and Nixon Peabody *conceded* the possibility of inconsistent rulings in Claim 2, but disputed the possibility of inconsistent rulings in Claims 3 and 4. (RB/XAOB § II.B.3.)

Second, the trial court rejected the possibility of conflicting rulings regarding the fee-collection claims—Claims 3 and 4. (3 RA 746-748.) The court explained that Downs' right to collect fees was controlled by the operating agreement, but that this was "irrelevant" to Nixon Peabody since it was not a party to the operating agreement. (3 RA 746-747.)

Accordingly, the court found that there was "no basis" to stay or deny arbitration based on the possibility of conflicting rulings. (3 RA 747-748.)

That was the end of the court's analysis. The court never considered its discretion to stay or deny arbitration based on the *conceded* overlap in the fiduciary duty claims against Downs and Nixon Peabody. As Nixon Peabody itself urged, that overlap created a statutory basis to deny or stay arbitration of Claim 2. (RB/XAOB 21, 56-57; § 1281.2(c) [statutory basis exists when there is a "possibility of conflicting rulings on a common issue of law or fact" to be decided in arbitration against one party and litigation against a third party].)[7]

Whether the statute provides a "basis"—whether the statute applies and triggers discretion—is not itself a matter of discretion. Rather, the court's discretion "does not come into play until it is ascertained that the subdivision applies . . . ." (*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680; RB/XAOB 57.) Whether the statute applies must be reviewed de novo based on the undisputed facts—meaning, in this case, not the underlying facts but rather the content of the parties' pleadings showing an overlap in the factual and legal issues of the claims. (*Abaya v. Spanish Ranch I, L.P.* (2010) 189 Cal.App.4th 1490, 1498-1499 ["possibility" of conflicting rulings requires only a review of the

[7] After denying relief under section 1281.2(c), the court stayed the litigation. (3 RA 748.) As the court noted, that stay order was *not* a discretionary decision under section 1281.2(c). (*Ibid.*) Rather, the stay was issued pursuant to section 1281.4, which requires a stay *if* the court orders arbitration. (*Ibid.* ["Where a court orders arbitration, it shall stay the pending action"].)

allegations—not an evidentiary showing].) Here, everyone conceded the possibility of conflict resulting from these intertwined allegations: Nixon Peaobdy's liability was premised on Down's conduct as a Nixon Peabody partner and the conduct of other Nixon Peabody attorneys who followed Downs' instructions. (See RB/XAOB 18, 35-37; § II.A., *ante*.)

Downs, however, seems to argue that all section 1281.2(c) issues are reviewed for abuse of discretion. (ARB/XRB 76.) He cites *Abaya*, *supra*, 189 Cal.App.4th at p. 1496, but it did not resolve the question. Rather, the court stated that it would affirm the denial of arbitration under "either" abuse of discretion or de novo review. (*Id.* at p. 1496, fn. 5.) Downs provides no explanation for why any discretion is involved in the determination of whether the allegations of a complaint show an overlap that creates the possibility of inconsistent rulings—especially when the risk of inconsistent rulings is conceded.

Downs also says that Rice "ignores" that for a section 1281.2(c) motion, "'there must be not only the possibility of conflicting rulings, but a determination that this possibility should lead to the denial of arbitration, rather than one of the other alternatives set forth in the statute.'" (ARB/XRB 76, quoting *Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 690, underlining omitted.) Rice doesn't ignore this. In fact, its his entire point: The trial court never made the second determination, because it thought that the statute had not been triggered—that there was "no basis" because there was no possibility of inconsistent rulings regarding the fee-collection claims. The failure to exercise

discretion is itself an abuse of discretion requiring reversal. (*Orabuena*, *supra*, 116 Cal.App.4th at p. 99.)

There is no merit to Downs' attempts to avoid the trial court's failure to consider the issue.

2. Contrary to Downs' suggestion, Rice's initial moving papers raised the possibility of inconsistent rulings on Claim 2.

Downs contends that Rice's moving papers did not raise the potential conflict regarding Claim 2 (fiduciary duty), but only the fee-collection claims (Claim 3 based on contract; Claim 4 based on unjust enrichment). (RB 77.) He argues that this Court "can only infer that the Superior Court properly disregarded" the "new arguments raised on Reply." (*Ibid.*) Downs' argument ignores the record.

The very first argument section of Rice's moving papers addressed the possible inconsistent rulings, noting that the potential existed in the "claims for Malpractice, *Breach of Fiduciary Duty* and Unjust Enrichment . . . ." (2 RA 377, italics added.) Beginning in the very next paragraph, Rice devoted more than a page to an extensive description of what the brief specifically identified as the "Fiduciary Duty" cause of action. (2 RA 378-379.) For instance, it detailed the overlapping Claim 2 allegations that Downs and Nixon Peabody breached their fiduciary duties by failing to obtain conflict waivers and that they provided legal services in a manner that would benefit Downs and other Nixon Peabody clients at the

expense of HPD and Rice. (2 RA 378; see RB/XAOB 18 [discussing allegations of the fiduciary duty claim].) None of this had anything to do with the fee-collection claims (Claim 3 and 4). (1 RA 14-16.)

Rice made the possible inconsistencies clear enough that Nixon Peabody responded by *agreeing* with Rice. It urged the trial court to "use its discretion afforded by Code of Civil Procedure section 1281.2(c) to deny arbitration as to the first and second causes of action"—the fiduciary duty claims. (2 RA 511-515.) It described the potential for conflict as a "distinct possibility," and on that basis argued that Rice and Downs should be ordered to arbitration "solely as to the third, fourth, and fifth causes of action"—the fee-collection claims. (2 RA 511.)

3. Contrary to Downs' suggestion, this Court cannot infer that the trial court rejected an issue when the court's order makes clear that it did not consider the issue.

Downs contends that the trial court must have considered Rice's argument about Claim 2, appreciated the possible conflict, and nonetheless exercised its discretion to compel arbitration. (ARB/XRB 76-77.) The argument cannot be squared with the trial court's order.

First, Downs argues that the "Superior Court acknowledged the possibility of conflicting rulings." (*Ibid.*) But even Downs' quotation of the trial court's order makes clear that the court was considering the possibility of conflicting rulings only regarding the fee-collection claims.

The trial court described the question as the risk of conflicting rulings "because there is a dispute as to Defendant Downs' entitlement to be paid for his legal services." (3 RA 746.) The remainder of the order discusses and rejects that theory. (3 RA 746-747.) The court concludes that "*this* possible conflict in rulings is irrelevant . . . ." (3 RA 747, italics added; see also ARB/XRB 77.)

Second, the trial court's meaning is clear on the face of the order. It considered and rejected Rice's argument that a potential conflict existed as to the fee-collection claims. The court described the operating agreement as the linchpin of that question and decided that the operating agreement was "irrelevant" as to Nixon Peabody's right to charge fees because Nixon Peabody was not a party to that contract. (3 RA 746-748.)

Third, the trial court's order refutes the notion that the court appreciated the conceded potential conflict regarding Claim 2. The court rejected the argument about the fee-collection claim on the ground noted above, and then stated that "[t]herefore, there is *no basis* to deny arbitration" on the ground of possibly conflicting rulings. (3 RA 747-748, italics added.) If the court had recognized the possible conflicting rulings on Claim 2 and exercised its discretion, there *would* have been a "basis" to deny arbitration, even though the court could still have chosen to compel arbitration in its discretion. Similarly, the court stated that Rice "has failed to meet [his] burden to show a defense to enforcement of the arbitration provision . . . ." (7 RA 748.) A possibility of conflicting rulings is a "defense to enforcement" of an arbitration agreement and triggers the

court's discretion to deny or stay arbitration. If the court had recognized the possible conflicting rulings on Claim 2, the court would have recognized that Rice *had* met his burden of showing a possibility of conflict, even though the court could still have chosen to compel arbitration in its discretion.

C. There Is No Merit To Downs' Mootness Argument.

Finally, Downs contends that the section 1281.2(c) issue is "moot." (ARB/XRB 77-78.) The argument is both legally meritless and factually untrue.

First, Downs seems to think that the issue is moot because the case was in fact heard in arbitration. (ARB/XRB 77.) He observes that the appeals in the section 1281.2(c) cases Rice relies on were heard before any arbitration, from which Downs apparently concludes that this is the only permissible time to obtain review. (*Ibid.*) This is not correct. Those appeals were heard before the arbitration because that was the only procedural possibility: All of the cases arose from orders denying or staying arbitration—orders that are immediately appealable. (*Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 98-99; Code Civ. Proc., § 1294, subd. (a).)

On the other hand, orders compelling arbitration—the result of denying a section 1281.2(c) motion—are *not* immediately appealable; they can be reviewed only on appeal from the judgment confirming the award. (*State Farm Fire & Casualty v. Hardin* (1989) 211 Cal.App.3d 501, 506.)

The completion of the arbitration *permits*—it does not inhibit—the right to review.

What's more, Rice did everything he could to preserve his appellate rights, having filed a writ petition from the denial of his motion. (2d Civil No. B251549.)

Second, there is no merit to Downs' suggestion that the arbitrator considered and resolved the "core" issues in Rice's claims by way of addressing Downs' claims (ARB/XRB 15-17, 77-78):

1. Downs stresses that, "[i]n particular," the issue of Downs' right to bill for legal services has been fully resolved by the parties stipulation and the award. (ARB/XRB 78; see also ARB/XRB 16.) True, but irrelevant. Rice's appeal does not assert potential conflicting rulings on that issue.

2. Downs argues that, in arbitration, he "sought declaratory relief regarding Rice's claims" (ARB/XRB 16), but he fails to mention that the arbitrator did not decide Rice's fiduciary duty claims by using that vehicle. The award decided two declaratory relief issues—whether Downs had the right to bill for legal services, and whether the Kaufmann settlement agreement was void from the inception. (1 AA 215-217.) That's it. The arbitrator also decided *Downs*' claim that Rice and Day breached their duties—a claim that the arbitrator in part rejected—but that is a different issue entirely. (See 1 AA 217-235.)

3. Downs argues that the arbitrator rejected all of Rice's claims that Downs violated Rule of Professional Conduct Rule 3-300 by rejecting Rice's affirmative defenses. (ARB/XRB 16-17, 77-78.) In fact, however, the arbitrator stated that she would not revisit Rice's dismissed Rule 3-300 claims.

For instance, Downs says that the arbitrator rejected Rice's claim that Downs "had violated Rule 3-300" by agreeing with Downs regarding the manager-selection provisions of the Operating Agreement. (ARB/XRB 17, citing 1 AA 190-199.) Not so. Rice argued that if the manager-selection provision was ambiguous, it should be interpreted in his favor because Downs violated Rule 3-300. (1 AA 194.) The arbitrator made clear that she would not decide *any* Rule 3-300 dispute. She explained that "Rule 3-300 is not a rule of construction; it is a rule that allows a client to rescind an entire agreement under certain circumstances. Here, Rice and Day withdrew, and the Arbitrator then dismissed with prejudice, their Rule 3-300 claims. They cannot revive those claims." (1 AA 195, emphasis omitted.)

Moreover, the record belies Downs argument that "[w]ith respect to Rice's allegations that Downs represented him in negotiating the HPD Operating Agreement and violated Rule 3-300, the Arbitrator found that 'both allegations were false.'" (ARB/XRB 16-17, quoting 1 AA 210.) The arbitrator's finding of falsehood related solely to the two allegations regarding the fee-collection claims that Rice stipulated were not supported—not the allegation that Downs violated Rule 3-300. After

identifying Rice's Rule 3-300 claims, the arbitrator said that "[t]he Complaint also alleged that Downs had agreed he would not bill HPD for any legal services, but he secretly did so by not submitting detailed invoices. Both allegations were false." (1 AA 210.) In other words, it was false that Downs had agreed not to bill, and it was false that Downs had secretly billed by not submitting detailed invoices. That is the only reasonable interpretation of the award, since the remainder of the paragraph describes why both of those fee-collection allegations were untrue. (*Ibid.*) Neither this section, nor any other portion of the award, discusses the truth of the allegation that Downs failed to obtain a Rule 3-300 waiver in connection with the amended operating agreement or later transactions.[8]

To the contrary, the arbitrator made clear that she had not considered or decided the full range of Rule 3-300 and fiduciary duty claims. The award stated that "certain Rule 3-300 allegations" have been disproved in arbitration. (1 AA 221.) Others remained undecided. For instance, the arbitrator recognized that both Downs and Nixon Peabody were alleged to have committed the same conduct in breach of Rule 3-300 and their fiduciary duty. (1 AA 210; see 1 RA 12-14.) Yet, the arbitrator explained, the "entirety of the claims as to the Nixon Peabody firm has not been resolved" and the arbitrator "cannot predict" the ultimate result. (1 AA 221.) Since Nixon Peabody's liability was premised on Downs' conduct,

[8] Similarly, the arbitrator found that Rice had separate representation when the 2003 operating agreement was drafted and executed. (ARB/XRB 16, citing 1 AA 219.) But that says nothing about Rice's Rule 3-300 claims regarding the 2007 Amended and Restated Operating Agreement.

the arbitrator could only have meant that she had not resolved all of the fiduciary duty claims against Downs.

4. Downs even backs away from his argument, saying that the arbitrator rejected "many"—not all—of Rice's claims. (ARB/XRB 77-78.) Indeed, nothing in the award or Downs' appellate briefs suggests how or why the arbitrator would have resolved the numerous and disparate fiduciary duty claims alleged in the complaint. For instance, nothing suggests that the arbitrator considered Rice's claims that Downs and Nixon Peabody caused HPD to enter into detrimental financial transactions in order to help Downs and his other clients or for interfering with HPD's transactions. (See 1 RA 13-14.) Nor is there any indication that Rice continued to press these issues after his claims were dismissed due to his inability to prosecute those claims in light of Downs' and Nixon Peabody's "coordinated campaign" to deny discovery. (RB/XAOB 23-27.)

5. Even if the arbitrator had decided each and every claim Rice presented, the award would not render his appeal moot. His position is that the trial court erred when it compelled arbitration and deprived Rice of his right to a jury. If the trial court's order was wrong, then his claims should not have been resolved at all. No one could claim that the denial of a jury trial was mooted by the conducting of a bench trial without a jury. (See *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 ["The denial of the right to jury trial is reversible error per se"].) The same principle applies here. Downs' sole authority, *MHC Operating Ltd. Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, provides no

basis for such a result. There, the Court of Appeal held it could not grant relief from an administrative writ with which the party had already complied. (*Id*. at p. 214.) That's hardly our case.

CONCLUSION

Rice's tort claims against Downs should never have been compelled to arbitration. They are outside of the narrow arbitration provision that the parties carefully delineated. Even if that were not true, the trial court failed to exercise its discretion to deny or stay arbitration based on the possibility of inconsistent rulings that Rice, Downs and Nixon Peabody all agreed existed.

Downs' arguments to the contrary only further reinforce the trial court's fundamental error that ultimately permitted Downs and his firm to engage in conduct that resulted in the unjust dismissal of Rice's claims. It is time to correct the errors that set the case down the wrong path in the first place. That would finally give Rice the opportunity to present his fiduciary duty claims, which Downs own counsel has characterized as "enormous." (7 AA 1811:8-9.)

The court should vacate the order compelling arbitration.

Dated: February 1, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached **CROSS-APPELLANT'S REPLY BRIEF** is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 10,614 words.

DATED: February 1, 2016

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 February 1, 2016, I served the foregoing document described as: **CROSS-APPELLALNT'S REPLY BRIEF** on the parties in this action by serving:

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Executed on February 1, 2016, 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.

Pauletta L. Herndon