Supreme Court Case No. S235659

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

WILLIAM E. RICE, et al.

Plaintiff, Respondent, and Cross-Appellant,

vs.

GARY P. DOWNS,

Defendant, Appellant, and Cross-Respondent.

After A Decision By The Court of Appeal
Second Appellate District, Division One
2d Civil No. B261860, consolidated with No. B264964
Los Angeles Superior Court Case No. BC506921
Honorable Yvette M. Palazuelos

ANSWER TO PETITION FOR REVIEW

GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP
*Michael Cypers, State Bar No. 100641
mcypers@glaserweil.com
Julia B. Cherlow, State Bar No. 290538
jcherlow@glaserweil.com
10250 Constellation Boulevard, 19th Floor
Los Angeles, California 90067
Telephone: (310) 553-3000 | Facsimile: (310) 556-2920

GREINES, MARTIN, STEIN & RICHLAND LLP
*Robin Meadow, State Bar No. 51126
rmeadow@gmsr.com
Jeffrey E. Raskin, State Bar No. 223608
jraskin@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811 | Facsimile: (310) 276-5261

Attorneys for Plaintiff, Respondent, and Cross-Appellant
WILLIAM E. RICE

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jraskin@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811 ⏐ Facsimile: (310) 276-5261

Attorneys for Plaintiff, Respondent, and Cross-Appellant
WILLIAM E. RICE

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INTRODUCTION

Central to the petition for review is the misguided notion that transactional lawyers don't really know the law—they just "pluck arbitration provisions" from form books or prior contracts "with little thought or appreciation" for the types of disputes that their clients may confront. (Petition, pp. 16, fn. 7; 20-24.) If that really is the state of modern transactional practice, then the Court of Appeal opinion provides an excellent lesson in the need for thoughtful drafting, and it should be required reading for every transactional lawyer.

But the law is well settled: Centuries-old rules governing contract interpretation, and the statutes that embody those rules, require courts to presume conscious action by parties and their lawyers. They also require courts to read contracts as a whole. Here, the Court of Appeal applied that presumption and those rules in an entirely conventional and predictable way. Its reasoning—its actual reasoning, not the version depicted in the petition—allowed no alternative to the result it reached.

Petitioner Gary Downs himself urged the Court of Appeal to apply the very canons of contract interpretation that the court found dispositive. He does not request review of the application of those canons or suggest that their application creates a conflict in the law. Instead, his petition essentially ignores the Court of Appeal's analysis and holding as if the court had never even considered those canons. He offers no basis for review.

THERE IS NO BASIS FOR REVIEW

I. THE OPINION REFLECTS NOTHING MORE THAN AN ENTIRELY CONVENTIONAL—AND CORRECT—APPLICATION OF CENTURIES-OLD RULES OF CONTRACT INTERPRETATION.

The Opinion takes great pains to lay out its reasoning, beginning with an extensive recapitulation of the governing rules of contract interpretation. Although Downs conceded below that these principles apply (e.g., ARB/XRB 69), the petition barely mentions them. But they undergird everything the Opinion says about the parties' intent. And because these principles are so well settled and because the Court of Appeal applied them correctly, the result cannot provide a basis for review.

A. The Opinion Correctly Applies The Settled Rule—Which Downs Himself Cited In The Court Of Appeal—That Courts Must View Contracts As A Whole And Give Meaning To Every Word.

Relegated to a footnote near the end of the petition is Downs' discussion of one of the Opinion's central features: Its focus on the parties' choice of dramatically different language in two neighboring, related contractual provisions—the broad jurisdictional provision and the far narrower arbitration provision. It concluded: "In this case, the parties' intent is revealed by contrasting the narrowly worded arbitration clause with the immediately preceding, expansively worded jurisdiction clause." (Opn., p. 13; see Opn., pp. 3, 9-10, 13-16; Civ. Code, § 1641.)

***Jurisdiction*:** The parties agreed to the jurisdiction of state and federal courts sitting in California for "'any action on a claim *arising out of, under or in connection with this Agreement or the transactions contemplated by this Agreement.*" (*Ibid.*, italics in Opinion.)

***Arbitration*:** The parties agreed to arbitrate only one of those categories of claims—those "arising out of this Agreement." (*Ibid.*)

The court concluded that given the "stark contrast" between the "limited arbitration provision" and the "much broader jurisdictional provision," the parties necessarily intended to arbitrate a "very limited range of controversies, not ones merely connected with the operating agreements or transactions contemplated by those agreements and certainly not all controversies between them. Had the parties intended a broadly applicable arbitration clause, they could have simply used the same phrasing they used in the jurisdiction clause." (Opn., pp. 15-16.)

The Opinion does not conflict with any California decisions because no other decision has addressed similar circumstances. None had reason to consider the Court of Appeal's indisputably proper analysis of the interplay between two contractual provisions as an indication of the parties' intent. At bottom, the agreement is materially different from those in other cases, possibly even unique. The petition does not even begin to confront that dispositive difference.

B. The Opinion Correctly Applies The Settled Rule—Which Downs Himself Cited In The Court Of Appeal—That The Court Must Presume That The Parties Relied On The Law That Would Govern Their Contract.

The petition complains that the Opinion errs in relying on the Ninth Circuit's interpretation of the parties' arbitration language because a majority of federal circuits holds a different view. (Petition, pp. 18-20.) That criticism misapprehends why the Opinion cites Ninth Circuit authority. The Opinion is absolutely clear on the point: Its citation of Ninth Circuit authority has nothing whatever to do with whether the Ninth Circuit's interpretation is right or wrong. It has everything to do with another settled rule of contract interpretation: the well-established presumption that parties frame their agreement in accordance with existing law that courts will use to interpret their agreement. (Opn., p. 16.)

As the Opinion explains, in the jurisdiction clause the parties agreed that their disputes would be heard exclusively by state and federal courts sitting in California. (Opn. pp. 3, 13.) That necessarily means they knew that either a California state court or a federal court *within the Ninth Circuit* would decide the arbitrability of their disputes. Parties are presumed to draft agreements according to how the governing courts will interpret them. (Opn., p. 16.) As the Opinion explains, once parties know how the *relevant* courts interpret specific language, they rely on that language to produce the result that they desire. (Opn., pp. 13-14.) This principle of *reliance* is why the Opinion looks to California's and the Ninth Circuit's interpretation of similar language rather than to the decisional law of other circuits, whose courts would never be called upon to interpret the parties' agreement. (Opn., pp. 13-16.)

The Opinion explains that, at the time the parties drafted the Operating Agreement, their selected jurisdictions—state and federal courts sitting in California—had repeatedly recognized that the language included in the jurisdictional clause, but *excluded* from the arbitration clause, was necessary for an arbitration clause to cover tort claims that have their roots in the parties' contractual relationship. (Opn., pp. 13-14.)[1] For instance, the jurisdictional clause uses the term "in connection with"—a phrase that, at the time, California and Ninth Circuit cases had uniformly held covered torts that had their roots in the contractual relationship (*Izzi, supra*, 186 Cal.App.3d at pp. 1315-1317; *Simula, supra*, 175 F.3d at p. 720 & fn. 3)—but the parties excluded that term from the neighboring arbitration clause. (Opn. p. 13.) The court concluded that given the state of the applicable law at the time, the difference between the jurisdictional and arbitration

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[1] The Opinion cited the following:

California cases: *Cobler v. Stanley, Barber, Southard, Brown & Assoc*. (1990) 217 Cal.App.3d 518, 530 (arbitration clauses covering disputes "arising from this Agreement" are "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," italics and ellipses in original); *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315-1317 (*Izzi*) ("in connection with" broadens scope to cover tort claims); *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 553, fn. 1 ("omission of the phrase *or relating to* has been found to exclude arbitration of some claims," italics in original).

The petition does not mention *Cobler* or *Dream Theater*. (See XARB 33-36 [responding to *Cobler* and *Dream Theater* arguments that Downs made below].)

Ninth Circuit cases: *Simula, Inc. v. Autoliv, Inc*. (9th Cir. 1999) 175 F.3d 716, 720 & fn. 3 (*Simula*) (distinguishing agreement covering claims "arising in connection with" from the more narrow "arising under" or "arising out of"); *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 (parties "narrowly circumscribe[]" the scope of arbitration by covering only claims "arising out of" the agreement).

clauses necessarily demonstrated the parties' intent to exclude such tort claims from arbitration. (Opn., pp. 15-16.)

The Opinion creates no conflict, because no case holds that the Ninth Circuit's interpretation is irrelevant or "wrong" *when the parties' agreement specifically contemplates that disputes may be decided in the Ninth Circuit.*[2] The one case the petition relies regarding federal authority outside the Ninth Circuit—*EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1328 (*EFund*)—*distinguished* the arbitration provision in the Ninth Circuit cases from the arbitration clause before it, which it described as "materially broader" than those in the Ninth Circuit cases. (See p. 16, *post*.) In dictum, *EFund* expressed disagreement with the Ninth Circuit rule, but it did not address the reliance issue, which no party in the case had briefed.[3]

C. Rather Than Confronting These Core Aspects Of The Opinion, The Petition Essentially Argues That Courts Should Presume That Transactional Attorneys Don't Know The Law.

The petition doesn't just ignore the Opinion's reasoning. It also ignores Downs' own concession below that "'the parties are presumed to know and to have had in mind'" the governing law, including judicial decisions. (ARB/XRB 69,

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[2] Nothing in the Operating Agreement requires a federal court to apply anything but Ninth Circuit law.

[3] See Appellants' Opening Brief, 2007 WL 540269 at *7-10 (devoting two sentences to federal cases); Respondent's Brief, 2007 WL 2972178 at *7-12 (claiming no circuit split at all); Reply Brief, 2007 WL 953268 at *4-7, fn. 2-3 (only mentioning federal cases in footnotes that stated Ninth Circuit interpretation was not binding). "'Reference to briefs is a permissible method of ascertaining what issues were before a court.'" (*McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277, citations omitted; see also *Moore v. Superior Court* (1970) 13 Cal.App.3d 869, 873-874 [interpreting decision in light of issues raised in appellate briefs].)

quoting *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 281; see *Alpha Beta Food Markets v. Retail Clerks Union Local 770* (1955) 45 Cal.2d 764, 771; Petition, p. 16 fn. 7, 20-24.)

Instead, the petition argues that there is "no reason in logic or experience to expect" transactional attorneys to be aware of how the law interprets contractual language. (Petition, p. 21.) According to the petition, "lawyers and parties pluck arbitration provisions from the form books, or from prior contracts found in their files or word processors, with little thought or appreciation for the types of disputes relating to their contract that could be governed by the arbitration provision." (Petition, p. 22.)

This breathtaking pronouncement would surely astonish clients of Downs' former firms (Pillsbury and Nixon Peabody) who even in 2003 were accustomed to paying top dollar for elite transactional legal talent. Those clients might well wonder why they should hire transactional lawyers at all if transactional lawyers don't know the law and don't care about how it affects their clients' agreements.

But attorneys *are* expected to know the law. They *are* expected to consider when and how to tailor forms to their clients' interests in particular circumstances. The interpretation of contracts cannot be based on the premise that transactional lawyers routinely commit malpractice.

"Contracts must mean what they say, or the entire exercise of negotiating and executing them defeats the purpose of contract law—predictability and stability." (*Hot Rods, LLC v. Northrop Grumman Sys. Corp.* (2015) 242 Cal.App.4th 1166, 1176.) That purpose cannot be served if courts presume, as the petition suggests, that parties and their lawyers don't pay attention to the language they use and don't take the drafting process seriously. Everything would be up for grabs in a post hoc battle of the litigators, who actually would become the true

authors of contracts. The effect would be to reverse the usual incentives by encouraging vagueness, ambiguity and malleability in contract-drafting, so that each party could retain maximum flexibility in the litigation that would inevitably follow.

This isn't, and cannot be, the law.

The petition's survey of form books does not support a different view. (Petition, pp. 21-22.) Just the opposite: The books recommend different formulations for different types of transactions. Their lesson is that the scope of an arbitration provision should depend on the circumstances, the clients' needs and their bargaining power. For instance, the petition cites California Legal Forms–Transaction Guide as recommending a form for a particular transaction "prescribing arbitration of disputes in simple terms, using the 'arising from' or 'arising out of' formulation." (Petition, p. 21.) But that book specifically recommends that lawyers consider how courts will interpret the agreement and urges them to consider "whether to use 'broad' or 'narrow'" arbitration provisions, explaining that a broad provision is one using "'any claim arising from or related to this agreement.'" (27-75 California Legal Forms–Transaction Guide § 75.250(1)(j) (2016).)

In other words, one of the very form books that the petition relies on as proof that attorneys "pluck arbitration provisions from the form books . . . with little thought or appreciation" recommends *against* that very practice.[4]

The above analysis fully disposes of the petition's contention that the Opinion creates a conflict in the law or charts new territory. It doesn't. It *does* consider circumstances not present in any other case, but it evaluates those circumstances using conventional methods of interpretation that Downs himself told the Court of Appeal were appropriate. For these reasons alone, there is no need for this Court to intervene.

The remainder of this answer more specifically shows that there is no merit to the petition's other claims of internal inconsistencies in the Opinion and conflicts with other authorities.

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[4] The particular form cited in the petition is a listing agreement for laypersons to use when hiring a realtor to sell their home; the form book says that it does not endorse the forms in this chapter of the book, which were prepared by a realtors association. (9-21 California Legal Forms–Transaction Guide § 21.210 (2016), referencing § 21.200; see also 9- California Legal Forms–Transaction Guide, Div. II, Ch. 21, Part IV, scope [introducing these listing forms by stating that, they are popular among those who want to avoid the time and cost of hiring a transactional attorney]; Petition, p. 22.) The Petition doesn't explain why even a formbook-addicted transactional lawyer would use such a form when drafting an LLC operating agreement for a sophisticated, long-term business—instead of, say, the same form book's recommendation for a close corporation shareholder agreement—a more analogous transaction—which recommends using "arising out of or relating to." (4-8C California Legal Forms–Transaction Guide § 8C.200 (2016); see also, e.g., 1-1 Current Legal Forms for General Business, FORM 1.08, 1.11, 1.13, 1.113 [broad provision in partnership agreements], 4-3B Current Legal Forms for General Business, FORM 3B.07B, 3B.07C [broad provision in employment agreements].) And contrary to what the petition says, the other two cited forms do *not* recommend "using the 'arising from' or 'arising out of' formulation." (Petition, pp. 21-22 [petition's parentheticals acknowledge that one form covers "'[a]ny dispute regarding the breach of this Agreement'" and the other "'in connection with this Agreement'"].)

II. THE OPINION DOES NOT CONFLICT WITH ANY OTHER DECISION.

A. The Opinion's Analysis Of "Any Controversy" Does Not Conflict With Any Other Decision.

The petition contends that the Opinion is "needlessly cautious" in saying that "'any dispute' or 'any controversy' *potentially* encompasses tort claims." (Petition, pp. 7-8, italics added.) In fact, *like every other decision*, the Opinion recognizes that the phrase "any controversy . . ." is necessarily qualified by the rest of the sentence that follows the phrase, thus making the adverb "potentially" entirely appropriate. (Opn., p. 12.)

B. The Opinion's Analysis Of "Arising Out Of" Does Not Conflict With Any Other Decision.

1. As The Opinion Explains, It Interprets An Agreement That Is Materially Different From Those Considered In Other Cases.

The petition is simply wrong in suggesting the Opinion creates a conflict regarding the meaning of the phrase "arising out of the agreement." (Petition, p. 8.)

As we have already shown, none of the petition's cases involved either of the unique facts that informed the court's interpretation of the Operating Agreement: Admittedly broader language in an adjacent, related paragraph, and language showing an expectation that arbitrability could be determined by California or Ninth Circuit courts. (§§ I.A.-B., *ante.*) These distinctions are enough to eliminate the petition's claim that the Opinion creates a conflict. Further probing the cited decisions only confirms this.

EFund. The petition tries to cast doubt on the Opinion's distinction of *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311. (Petition, p. 14.) But in *EFund*, the court *itself* distinguished the agreement before it on exactly the same basis as the Opinion does. The petition contends that the *EFund* agreement's use of "arising from or out of" is "obviously redundant" and is equivalent to provisions that simply employ "arising out of." (Petition, p. 14.) But *EFund* said just the opposite—that the phrase "arising from or out of" was "*materially broader*" than the phrase "arising hereunder" or the phrase "arising out of." (*EFund, supra*, 150 Cal.App.4th at p. 1328, italics added.) Courts avoid interpreting language as mere surplusage. In fact, *EFund* called this distinction "crucial" to its interpretation. (*Ibid.*) The Opinion quotes and *agrees with* this distinction. (Opn., p. 15.)

Ericksen. The issue in *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh v. 100 Oak St.* (1983) 35 Cal.3d 312, 316-323 (*Ericksen*) was not contract interpretation, but procedure: The Court adopted the rule that if a plaintiff alleges fraud in the inducement, courts will usually compel arbitration without first making a preliminary determination of the contract's validity—that is, the arbitrator will decide the fraud claim. (*Ibid.*) The Court was concerned that the "difference between a breach of contract and such fraudulent inducement turns upon determination of a party's state of mind at the time the contract was entered into, and we ought not close our eyes to the practical consequences of a rule which would allow a party to avoid an arbitration commitment by relying upon that distinction." (*Id.* at pp. 322-323, see also *id.* at p. 318.)

Contrary to the petition's suggestion (Petition, pp. 9, 12), *Ericksen* did not determine whether the arbitration agreement covered all torts with their roots in the parties' contractual relationship. The Court devoted a single paragraph to the

application of the fraudulent-inducement rule to the specific contract. All the Court decided there was that a fraudulent-inducement challenge was a claim "'with respect to the provisions of this Lease.'" (*Ericksen, supra,* 35 Cal.3d at p. 324 [quoting the arbitration clause before the Court].) Again, there is no conflict with the Opinion.

Bos Material. *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 104 (*Bos Material*) considered the classic, broad form "arising out of or relating to." In suggesting that "arising out of" was the critical phrase, the petition takes a quotation out of context. (Petition, pp. 14-15.)

The decision first recognized that "[i]n the particular situation where contracts provide for arbitration for 'any controversy *arising out of or relating to* the contract . . .' the courts have held such arbitration agreements sufficiently broad" to include tort claims that have their roots in the contractual relationship. (*Bos Material, supra,* 137 Cal.App.3d at pp. 105-106, ellipses in original, italics added, citing *Berman v. Dean Witter & Co.* (1975) 44 Cal.App.3d 999, 1003.) Three paragraphs later—in the portion the petition quotes—the court addressed the plaintiff's attempt to distinguish the previously-discussed *Berman* rule based on the industry involved in the dispute: "The fact that the securities industry is self-regulating does not affect the precedential authority of such cases interpreting 'any controversy . . . arising out of . . .' language in an arbitration agreement to encompass tort claims." (*Bos Material, supra,* 137 Cal.App.3d. at p. 106, ellipses in original, again citing *Berman*.) The court's short-hand reference to the arbitration clause does not mean the court believed that "arising out of," standing alone, was sufficiently broad to encompass tort claims—especially given the reference to "precedential authority." No such question was before the court.

Vianna. The arbitration provision in *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186 (Petition, pp. 15-16) bears no resemblance to the present case, much less to the combined import of the jurisdictional and arbitration provisions present here.[5] What's more, the court in *Vianna* made clear that it based its broad interpretation at least partially on the fact that the arbitration provision covered not just "any dispute" but "'any dispute of any kind whatsoever.'" (*Id.* at p. 1189.)

Non-arbitration cases. Lastly, the petition contends that the Opinion conflicts with a fee-shifting decision, *Adam v. De Charon* (1995) 31 Cal.App.4th 708. (Petition, pp. 16-17.) The petition asserts that it does not matter that *Adam* involved a fee-shifting clause rather than an arbitration clause. But that again ignores one of the pillars of the Opinion's analysis: reliance.

When parties draft an arbitration clause, they rely on how courts interpret *arbitration* clauses, not fee-shifting clauses. Even the petition acknowledges that transactional attorneys use form *arbitration* clauses—not fee-shifting clauses—when drafting arbitration clauses. (Petition, pp. 20-22.) Courts must presume reliance in determining the parties' intent. (Opn., pp. 13-14, 17-18; *Cape Flattery Ltd. v. Titan Maritime, LLC* (9th Cir. 2011) 647 F.3d 914, 923 [parties rely on court interpretation]; *S.A. Mineracao Da Trindade-Samitri v. Utah Internat., Inc.* (2d Cir. 1984) 745 F.2d 190, 194 [refusing to overturn prior interpretation of arbitration provision because parties are presumed to have relied upon it even though the court questioned the correctness of that prior interpretation].)

[5] The *Vianna* parties agreed to arbitrate "[i]n the event of any dispute of any kind whatsoever, regarding the meaning, interpretation or enforcement of the provisions of this Agreement." (*Id.* at p. 1186.)

2. The Petition Misapprehends The Opinion's Analysis About The Scope Of Tort Arbitrability.

The petition suggests an internal inconsistency in the Opinion that does not exist. (Petition, pp. 9-10.) The Opinion holds that the parties' narrow agreement covers "contractual claims and *perhaps* even" tort claims where the duty "originat[es]" from the contract. (*Id.* at p. 16, italics added.) But, according to the petition, *no* tort duty could ever "originat[e]" from a contract because tort duties are *always* "imposed by law, not by the agreement." (*Id.* at p. 9.)

Clearly, that is not what the court was driving at. It meant tort duties that, while imposed by law, exist *by virtue of the parties' contractual relationship*. (Opn., p. 16.) This would include an LLC manager's fiduciary duty to other members by virtue of their relationship under the operating agreement. But, as the court explained, Rice's tort claims—for legal malpractice and breach of an attorney's fiduciary duty—flow from an attorney-client relationship that "did not arise out of the operating agreement or even the parties' decision to go into business together. Moreover, neither the original nor the amended operating agreement addresses an attorney-client relationship between Downs and anyone else, including Rice or HPD." (Opn., p. 16; see Opn., pp. 16-19.) A broader clause can reach duties that exist independently of, but that "relate to" or are "connected with," the parties' contractual relationship—but here the parties *rejected* such breadth.

C. Contrary To What The Petition Says, The Arbitrable And Non-Arbitrable Claims Are Not Based On The Same Allegations.

The petition contends that Rice's claims should all be arbitrable because they are "based upon [the] same allegations" as Rice's arbitrable claims for breach of contract and unjust enrichment. (Petition, pp. 10-12.) That is not correct.

Rule 3-300 allegations. Contrary to what the petition says, Rice's claims for breach of contract and unjust enrichment have nothing to do with disclosure requirements under Rules of Professional Conduct, Rule 3-300. (Petition, p. 10; 1 AA 108-111.) Those claims allege only that Downs received compensation for legal services in contravention of the Operating Agreement's provision that prohibited LLC members from receiving compensation. (1 AA 108-111.) The petition's only basis for suggesting otherwise is a standard allegation in the opening paragraph of each cause of action that incorporates by reference all earlier allegations. (Petition, p. 10 citing 1 AA 108 ¶ 29, 110 ¶ 39.) That does not somehow expand the nature of the cause of action.

Compensation allegations. Also contrary to what the Petition says, Rice's malpractice, fiduciary duty and rescission claims are not "based upon allegations that Downs breached the contract by accepting compensation for fees for legal services." (Petition, pp. 10-11.) The petition again cites paragraphs incorporating all earlier allegations, but again this says nothing about these claims' real substance. (1 AA 103 ¶ 19, 106 ¶ 24, 111 ¶ 42.) The other cited paragraphs do not allege breach of contract. They allege that Downs committed malpractice by drafting the agreement in an ambiguous manner that arguably allowed him to bill for his services while prohibiting other members from doing the same. (1 AA 105 ¶¶ 22(b), (e).)

The thrust of Rice's legal malpractice and fiduciary duty claims are not "based" on the same allegations regarding Downs' right to compensation. Instead, they allege that, *as counsel*, Downs:

- Caused the LLC to engage in detrimental financial transactions to benefit himself and his other clients;

- Interfered with the LLC's transactions that his firm was handling, causing hundreds of thousands of dollars in damages;
- Provided poor legal advice on various issues and even did so with the aim of terminating Rice's membership in the LLC;
- Drafted the operating agreements in various ways that were detrimental to his clients, including Rice; and
- Violated Rule 3-300.[6]

(1 AA 103-108; Opn., pp. 3-5.) And Rice sought partial rescission as a remedy for Downs' legal malpractice and breach of fiduciary duty—not Downs' breach of contract by taking compensation. (1AA 111.)

Even assuming some overlap of any factual or legal issues, that does not permit arbitration of the non-arbitrable claims. The Legislature provides courts with various options to phase litigation and arbitration when issues overlap. (Code Civ. Proc., §§ 1281.2, 1281.4.) In fact, Rice argued that arbitration should be denied under section 1281.2, subdivision (c) even if *all* of his claims against Downs were arbitrable. The Court of Appeal found that issue moot in light of its holding. (Opn., p. 22.)

Highlighting the petition's disconnect from the Opinion is its stated concern about setting "trap[s] for the unwary." (Petition, p. 23.) It says that parties who

[6] In a footnote, the petition states that the arbitrator found that many of Rice's allegations were untrue, including the failure to comply with Rule 3-300. (Petition, p. 2, fn. 1.) That isn't right and, in any event, wouldn't be binding. (See XARB 48-52.) For instance, Downs never obtained a Rule 3-300 waiver for the 2007 Amended Operating Agreement, which made significant revisions favorable to Downs. In any case, as Downs concedes, it is improper for a court to consider the merits of a claim in deciding arbitrability. (Petition, p. 2, fn. 1.)

agree to arbitrate disputes "arising under a contract are highly unlikely to want garden-variety claims for breach of contract sent to arbitration while claims for rescission, contract invalidity, fraud in the inducement or promissory fraud *based on the same events* are litigated in a separate proceeding before a judge or jury." (*Ibid.*, italics in original.) That isn't the Opinion's effect, and it's not what is at issue here. Fraud claims like that are generally arbitrable. (*Ericksen, supra,* 35 Cal.3d at pp. 316-323.)

But when parties evidence an intent for a narrow arbitration provision—specifically eliminating broad language—they do *not* expect that an LLC operating agreement that says nothing about an attorney-client relationship will govern litigation of attorney-client claims. Holding otherwise *would* be a "trap for the unwary."

CONCLUSION

The petition ignores the Opinion's analysis and holding, the well-settled legal principles it applies, and even Downs' own concessions regarding the governing rules of interpretation.

Fairly read, the Opinion is an ordinary exercise in contract interpretation. The Court of Appeal likely published it as a reminder to transactional attorneys that language matters.

It should remain published and the Court should deny review.

Dated: July 25, 2016

Respectfully submitted,

GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP
Michael Cypers
Julia B. Cherlow

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Jeffrey E. Raskin

By _____
Jeffrey E. Raskin
Attorneys for Plaintiff, Respondent, and Cross-Appellant WILLIAM E. RICE

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached **ANSWER TO PETITION FOR REVIEW** 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 4,703 words.

DATED: July 25, 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 July 25, 2016, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the parties in this action by serving:

Joel Zeldin, Esq.
Frank A. Cialone, Esq.
Felicia A. Draper, Esq.
Shartsis Friese LLP
One Maritime Plaza, 18th Floor
San Francisco, California 94111
Attorneys for Defendant, Appellant and Cross-Respondent *Gary P. Downs*

Douglas B. Day
4263 Hensley Circle
El Dorado Hills, California 95762
Respondent, In Pro Per

John A. Marshall
Goshgarian & Marshall
23901 Calabasas Road, Suite 2073
Calabasas, CA 91302
Attorneys for Respondents *Highland Property Development LLC and Highland Property Construction*

Kevin H. Brogan, Esq.
Hill, Farrer & Burrill
300 South Grand Avenue
One California Plaza, 37th Floor
Los Angeles, California 90071-3147
Attorneys for Respondent *Nixon Peabody LLP*

Clerk The Honorable Yvette M. Palazuelos
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012-3117
[LASC Case No. BC506921]

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