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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SHERA BECHARD,

Plaintiff,

v.

ELLIOTT BROIDY, an individual, KEITH DAVIDSON, an individual; MICHAEL AVENATTI, an individual; DAVIDSON & ASSOCIATES, PLC, a professional limited liability company; and DOES 1 through 20, inclusive,

Defendants.

[Assigned for all purposes to Hon. Elizabeth A. White]

Case No. BC712913

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT ELLIOTT BROIDY'S MOTION TO COMPEL ARBITRATION AND STAY FURTHER PROCEEDINGS AGAISNT BROIDY

Date: September 7, 2018
Time: 8:30 a.m.
Dep't: 48

HEARING ORDERED BY THE COURT

Action Filed: July 6, 2018
Trial Date: None Set

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Plaintiff Shera Bechard hereby opposes Defendant Elliott Broidy's Motion to Compel Arbitration and Stay Further Proceedings Against Broidy, filed August 3, 2018. The third-party litigation exception (Code Civil Proc., § 1281.2(c)) indisputably applies to this case.

INTRODUCTION

Plaintiff's claims against all Defendants concern an alleged breach of an agreement between Ms. Bechard and Broidy (the "Settlement Agreement"). According to Broidy, Davidson disclosed confidential information to Avenatti, thereby breaching the Settlement Agreement. But Davidson denies this; according to Davidson, there was no breach. Avenatti too denies any wrongdoing.

The one thing that no one disputes is that ***Ms. Bechard*** was not the one who breached, as even Broidy admits that his refusal to pay was because Davidson/Avenatti (not Ms. Bechard) allegedly disclosed the Agreement. Given these flatly conflicting claims, Ms. Bechard has sued all these parties for the damages she suffered when Broidy refused to pay.

The case is a simple one. Either Broidy must pay (if there's no breach), or Davidson and/or Avenatti must pay (if there was a breach). Critically, Ms. Bechard needs ***one consistent answer*** to this question. One person must decide whether or not there was a breach, and then foist upon the relevant party (Broidy, Davidson, or Avenatti) the resulting liability.

But Broidy doesn't want this. He admits that ***there's inevitably going to be one lawsuit in court***, because Davidson and Avenatti have never signed an arbitration agreement (and also have no interest in arbitrating anyway). So Ms. Bechard's claims against them will be litigated in court. But he asks this Court to create two separate proceedings: one in court (with Bechard, Davidson, and Avenatti), and the other in arbitration (with Bechard and Broidy). Even though these two actions will involve the ***exact same question***: Has there been a breach, and if so, who is responsible?

Although Broidy does indeed identify an arbitration agreement, Code of Civil Procedure section 1281.2(c) expressly authorizes the denial of arbitration where, as here, (1) third parties are joined in an action with the party seeking to compel arbitration, (2) the claims against them arise out of the same set of events, and (3) there is a possibility of conflicting rulings on a common issue of law and fact. The present case is literally an archetype of precisely the situation to which section 1281.2(c) applies, and the potential for conflicting (and unjust) inconsistent rulings is manifest.

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Unsurprisingly, in an effort to avoid section 1281.2(c), Broidy takes the position that Ms. Bechard's claims against the other defendants are totally unrelated to the one against him. But Broidy's argument is indisputably belied by the clear and repeated allegations of the Complaint, which expressly allege claims against the other defendants that based on the central question of whether the contract was breached. (See, e.g., Complaint, ¶¶ 68, 74, 86(e), 92, 96.) How a trier of fact determines this issue unquestionably will impact the parties' respective liability:

a) If what Broidy alleges is true and Davidson breached the Agreement by disclosing confidential information to Avenatti, then Davidson (and likely Avenatti) will be liable to Ms. Bechard for the remaining $1.2 million in payments under the Agreement that Broidy would otherwise have been required to make.

b) In contrast, if what Davidson (and Avenatti) alleges is true, and there has been no breach of the Agreement (or that Broidy's own lawyer actually caused the breach), then Broidy will be liable to Ms. Bechard for the remaining $1.2 million in payments.

Circumstances such as these cry out for application of the third-party litigation exception and for the case to be tried in a single action. While the California Arbitration Act often requires arbitration, the Legislature adopted the third-party litigation exception based on the recognition that "[i]n actions involving multiple parties with related claims, where some claimants agree to arbitrate their differences and others remain outside the agreement, *arbitration is unworkable*." (*Abaya v. Spanish Ranch I, L.P.* (2010) 189 Cal.App.4th 1490, 1497-98 (*Abaya*) (quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1628 (1997-1998 Reg. Sess.) p. 2, italics added by *Abaya*).)

The fact pattern here is a paradigmatic example of why that is so. As explained below, splitting this case into separate actions would duplicate the proceedings, and worse, present a substantial risk that Ms. Bechard may be left with ***no remedy whatsoever*** as a result of conflicting decisions about whether the Settlement Agreement was breached. Because forcing Ms. Bechard—***who has done nothing wrong***—to face such burdens and risks would be profoundly unfair, and because section 1281.2(c) squarely applies, the motion to compel arbitration should be denied.

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LEGAL STANDARD

Broidy concedes that the California Arbitration Act (Code Civil Proc., §§ 1281-1294.4) governs here. Under section 1281.2, arbitration is not compelled if one of four exceptions applies. The third exception, applicable here, is known as the third-party litigation exception. (§ 1281.2(c).) It "addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement," and it "avoid[s] potential inconsistency in outcome as well as duplication of effort." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.)

The third-party litigation exception applies where "(1) a party to the agreement also is a party to pending litigation with a third party who did not agree to arbitration; (2) the pending third-party litigation arises out of the same transaction or series of related transactions as the claims subject to arbitration; and (3) the possibility of conflicting rulings on common factual or legal issues exists." (*Acquire II, Ltd. v. Colton Real Estate Grp.* (2013) 213 Cal.App.4th 959, 964 (*Acquire II*).) Where each of those conditions are satisfied, the trial court may properly deny arbitration despite an agreement to arbitrate. (*Id.* at p. 968.) Specifically, section 1281.2 authorizes the court to (1) "refuse to enforce the arbitration agreement and . . . order intervention or joinder of all parties in a single action or special proceeding;" (2) "order intervention or joinder as to all or only certain issues;" (3) "order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding;" or (4) "stay arbitration pending the outcome of the court action or special proceeding." (§ 1281.2.)

Consistent with section 1281.2(c), the public policy favoring contractual arbitration "does not extend to those who are not parties to an arbitration agreement." (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704.) Thus, contractual arbitration "may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon. [Citation.]" (*Id.* at pp. 704-705.) That is precisely the case here.

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ARGUMENT

I. The Third-Party Litigation Exception (§ 1281.2(c)) Applies To This Dispute.

Each of the three conditions set forth in section 1281.2(c) indisputably apply here.

A. Broidy Is A Party To A Pending Court Action With A Third Party.

The first question is whether Broidy, a party to the Settlement Agreement, is a party to pending litigation with Davidson and Avenatti, who did not agree to arbitration. He surely is.

For purposes of section 1281.2(c), "a third party is one who is neither bound by nor entitled to enforce the arbitration agreement. [Citation.]" (*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 679.) Because Davidson and Broidy did not sign the Settlement Agreement, they are neither bound by nor have any contractual entitlement to enforce the arbitration agreement. Nor is there any other basis on which to find that the arbitration agreement applies to the claims asserted against them.

To be sure: there are circumstances where nonsignatories to an arbitration agreement may be compelled to arbitrate under it. "As one authority has stated, there are six theories by which a nonsignatory may be bound to arbitrate: '(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary.' [Citations.]" (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513.) But none of those theories apply here—neither Davidson nor Avenatti could possibly compel Ms. Bechard's claims against ***them*** to arbitration based on the arbitration clause in the Settlement Agreement with ***Broidy***. Broidy does not contend otherwise, and indeed only seeks to compel arbitration of the breach of contract claim asserted by Ms. Bechard ***against him***, and to stay the case ***against him***. (Mot. at p. 3.)

It thus bears repetition that the claims against Davidson and Avenatti will be litigated in court, not in arbitration. The same is true for Davidson's affirmative cross-claims, which he has filed in court in this action against both Broidy and Ms. Bechard. ***There will be a court case involving these parties, who will not be compelled to arbitrate***. Davidson and Avenatti cannot be compelled to arbitrate (nor do they want to), nor can Ms. Bechard be compelled to arbitrate her claims against these same parties. There will be litigation on these issues in court. That is material to section 1281.2(c), and is the central feature of its invocation in the present case.

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B. The Third-Party Action Arises Out Of The Same Transaction As The Action Against Broidy.

The next question is whether the third-party claims arise out of the same transaction or series of transactions as the claims against Broidy. They undeniably do.

When evaluating whether Ms. Bechard's claims against Davidson and Avenatti arose out of the same transaction or a series of transactions as those that Broidy seeks to arbitrate, the trial court considers the factual allegations of the complaint. (See *Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 566-68 (*Lindemann*); *Abaya, supra*, 189 Cal.App.4th at p. 1499; *Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, 1319-20 (*Birl*).) Broidy's argument ignores the complaint's allegations that expressly relate the breach of contract claim asserted against him to the claims asserted against the other Defendants. (See, e.g., Complaint, ¶¶ 68, 74, 86(e), 92, 96.) As pled, the merits of ***all*** claims turn centrally on whether Davidson's conduct (and Avenatti's wrongful participation therein) breached the Settlement Agreement (as Broidy contends) or did not breach the Settlement Agreement (as Davidson contends).

Indeed, it is the ***exact same issue*** in both claims. Did Davidson and/or Avenatti materially breach the Settlement Agreement by disclosing its contents? If so, they're liable for $1.2 million for the counts pled against them. If not, Broidy's liable for the same $1.2 million instead.

Exact same issue. Was there a material breach, and if so, who did it?

C. A Possibility Of Conflicting Rulings On Common Issues Of Law And Fact Exists.

This leaves only the final step of the section 1281.2(c) analysis: whether sending some claims to arbitration may raise a possibility of conflicting rulings on common issues of law and fact. And here, that possibility is not only demonstrably present, but could also leave Ms. Bechard with ***no*** remedy whatsoever. If she is forced to litigate her claims against Broidy in arbitration, an arbitrator might decide that Davidson and/or Avenatti breached the contract, so Broidy does not have to pay. Yet in the separate proceeding against Davidson and Avenatti in court, a judge or jury will not be bound by (indeed, will not even have evidence introduced regarding) that prior finding in arbitration, and thus may find the exact opposite: that Davidson and Avenatti did ***not*** breach the contract, thereby leaving Ms. Bechard with exactly nothing given these directly contrary findings.

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That these two adjudications may come to different conclusions based on ***the very same set of factual and legal questions*** is the paradigmatic circumstance warranting trial of all claims in a single action.

"The issue to be addressed under section 1281.2, subdivision (c), . . . is not whether inconsistent rulings are inevitable but whether they are possible if arbitration is ordered." (*Lindemann*, *supra*, 204 Cal.App.4th at p. 567). "A party relying on section 1281.2(c) to oppose a motion to compel arbitration does not bear an evidentiary burden to establish a likelihood of success or make any other showing regarding the viability of the claims and issues that create the possibility of conflicting rulings. [Citation.]." (*Los Angeles Unified Sch. Dist. v. Safety Nat'l Cas. Corp.* (2017) 13 Cal. App. 5th 471, 484 (*L.A. Unified*).) "An evidentiary burden is unworkable under section 1281.2(c) because the question presented is whether a '"possibility" of conflicting rulings exists [citation] and a motion to compel arbitration is typically brought before the parties have conducted discovery.' [Citation.]" (*Ibid.*) Instead, the trial court may rely on the allegations in the relevant pleadings to decide whether a possibility of inconsistent rulings would exist. (*Abaya*, *supra*, 89 Cal.App.4th at pp. 1498-99.)

Each of the claims against Broidy, Davidson, and Avenatti will require the determination of a number of common, and important, factual and legal issues, including (1) did Davidson disclose information forbidden from disclosure under the Settlement Agreement to Avenatti, (2) if he did, to what extent did he do so, (3) if he did, under what circumstances did he make the disclosure, (4) if he did, did these facts constitute a material breach of the Settlement Agreement that is imputed to Ms. Bechard, and (5) what information was already public at the time of that alleged disclosure, including any previous disclosure made by Broidy or his own attorney, Michael Cohen. The claims will also require the determination of common legal questions based on the answer to these factual issues, including the legal effect, if any, of Davidson's allegedly improper disclosure. All of these issues will have to be resolved in any litigation or arbitration with respect to each of the claims against each Defendant, thereby presenting the possibility of conflicting rulings.

In short, pursuant to the express terms and provisions of section 1281.2(c), arbitration is not required, and a court may properly refuse to compel arbitration given the possibility of inconsistent

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factual and legal findings in the multiple adjudications. The court may instead permissibly and properly order these matters efficiently and consistently adjudicated in a ***single*** proceeding in the ***one place*** that has the power to bind all the parties to the dispute: court.

D. The Court Should Reject Broidy's Novel Argument That Section 1281.2(c) Does Not Apply When Third Parties Are Sued On Different Theories Of Liability.

The three conditions necessary to apply section 1281.2(c) are well established. As set forth above, each of them are satisfied in this case. Nothing more is required to trigger section 1281.2(c). Yet while he conclusorily asserts that those conditions are not satisfied, Broidy's core position appears to be that a party cannot "evade arbitration merely by adding different parties under different theories of liability." (Mot. at p. 8:10-12 (claiming this is the "more fundamental[]" problem with applying section 1281.2(c) here).)

This argument should be rejected. It is not based in the statutory text, which says nothing about the type of theories a plaintiff may assert. (Cf. § 1281.2(c).) And it is not grounded in the cases Broidy cites. Broidy cites *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 112 (*Bos Material*), which simply found section 1281.2(c) inapplicable where the plaintiff had included nonsignatory ***Doe defendants*** (on ***the same*** theories of liability as the signatory defendant no less) and "the record [was] silent as to whether or not any third parties would agree to submit to arbitration." (*Ibid.*) The point was that a plaintiff cannot invoke section 1281.2(c) simply by adding Doe defendants to the case and nakedly asserting they are not subject to arbitration.

This case could not be more different. Davidson and Avenatti are not fictional, unidentified ***Doe*** defendants. They are real, identified people against whom Ms. Bechard has ***actual and asserted*** claims, and darn good ones. Nor do we have here Doe defendants sued (as in *Bos Material*) on the same theory as the suit against the party with the arbitration agreement. Instead we have here claims against real individuals that are the ***opposite*** of those alleged against the arbitrating party. Broidy is liable if there was no breach, but Davidson and Avenatti are liable if there ***was***. That's the exact opposite of the claims asserted against the fictional defendants in *Bos Material*.

Moreover, the record is abundantly clear that neither Davidson nor Avenatti will agree to submit to arbitration. Davidson has already answered the complaint and filed a cross-complaint.

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Avenatti likewise has filed an answer, and also an anti-SLAPP motion. And neither defendant has joined in Broidy's motion to compel arbitration, given any indication that they would be willing to do so, nor brought a separate motion to compel arbitration himself. Nor can either of these people be compelled to arbitrate involuntarily, as they never signed an arbitration agreement.

Broidy also cites *Henry v. Alcove Investment, Inc.* (1991) 233 Cal. App. 3d 94, 102 (*Henry*), but that case expressly distinguished *Bos Material* and ***affirmed the application of section 1281.2(c)*** precisely because "the plaintiff ha[d] done more than merely name third parties as defendants" by alleging "the fraudulent acts of those defendants and the connection between those defendants and [the defendant seeking arbitration]." So too here. Davidson and Avenatti are not Doe defendants nor in any way immaterial (e.g., nominal, sham), and Ms. Bechard has clearly and expressly stated her allegations against them. Thus, Broidy's cases only underscore that Ms. Bechard properly invokes section 1281.2(c) here.[1]

II. The Court Should Deny The Motion.

Because section 1281.2(c) applies, this Court is authorized to (1) "refuse to enforce the arbitration agreement and . . . order intervention or joinder of all parties in a single action or special proceeding;" (2) "order intervention or joinder as to all or only certain issues;" (3) "order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding;" and (4) "stay arbitration pending the outcome of the court action or special proceeding." (§ 1281.2.)

The sole relief requested in Broidy's motion is Option No. 4. To be clear: Broidy asks that this Court permit the court lawsuit by Ms. Bechard against Davidson and Avenatti to go forward—with the resulting disclosure of purportedly confidential information in that court ***as well as*** the substantial

[1] The final case Broidy relies upon, *Metalclad Corp. v. Ventana Envtl. Organizational P'ship* (2003) 109 Cal.App.4th 1705, is also inapposite. The Court of Appeal there examined circumstances where a ***nonsignatory*** defendant should be permitted to compel arbitration of claims against it over a signatory plaintiff's objection. (*Id.* at pp. 1716-19.) As noted, the record here is clear that Davidson and Avenatti have no interest in arbitrating their claims, making the theories discussed in *Metalcald* inapplicable. And in any event, as discussed above, neither Davidson nor Avenatti have any basis – contractual or otherwise—to compel arbitration of the claims against ***them*** based on the arbitration clause in Ms. Bechard's agreement with ***Broidy***.

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risk of conflicting findings—while ordering a separate (potentially stayed) arbitration proceeding solely against Broidy. (Notice of Motion at p. 2:4-7 ("Defendant Elliott Broidy ('Mr. Broidy') will and hereby does move for an order compelling arbitration of plaintiff's ***first cause of action*** in the above-captioned case (the sole cause of action to which Mr. Broidy is a defendant), and staying any further proceedings ***against Mr. Broidy***." (emphases added).)

This Court should not do so. It should instead exercise Option No. 1—to "refuse to enforce the arbitration agreement and . . . order intervention or joinder of all parties in a single action" (§ 1281.2)—and may do so simply by denying Broidy's motion.

A. The Only Equitable Solution Is To Have The Case Tried As One Action.

The public policy favoring enforcement of an arbitration agreements does not outweigh the equally compelling public policy expressed in section 1281.2(c) of refusing to enforce these agreements when doing so creates the possibility of inconsistent outcomes and duplication of effort. (*Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC* (2007) 150 Cal. App. 4th 469, 475.) That strong public policy against duplicative litigation and inconsistent outcomes applies with particularly compelling force here. If this case is not tried as a single action, there is an obvious likelihood that duplicative discovery and adjudication of overlapping issues will be necessary. Moreover, given the nature of the potential conflict in rulings here, profound injustice may well result were Ms. Bechard's claims against Broidy litigated in arbitration yet the claims involving Davidson and Avenatti litigated in court.

Consider the potential inconsistencies that may arise if, instead of trying this case as a single action, Broidy obtained the relief he seeks in his motion:

Scenario 1 – Litigation Stayed; Ms. Bechard Recovers Nothing. If the Court were to stay litigation and allow arbitration to proceed, an arbitrator could find that Davidson materially breached the contract. Such a finding would mean that Broidy would not be liable for refusing to honor the contract. Ms. Bechard would then need to litigate her claims against Davidson. But because collateral estoppel and *res judicata* ***could not apply against Davidson*** based on the results of an arbitration involving Broidy, the jury could reach the opposite conclusion—i.e., that Davidson did ***not*** breach

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the contract. In that case, Davidson would be held not liable as well, and Ms. Bechard would recover nothing based on irreconcilable rulings on ***exactly the same*** factual and legal questions.

Scenario 2 – Litigation Stayed; Ms. Bechard Recovers. If the Court were to stay the litigation and allow arbitration to proceed, an arbitrator could find that Davidson did not breach the contract. Such a finding would mean that Broidy would indeed be held liable for breach of contract himself, and thus Ms. Bechard would recover. But to be clear: Ms. Bechard would not thereafter be able to recover these same sums from Davidson, as there would be no damage (since Broidy paid).

Scenario 3 – Arbitration Stayed; Ms. Bechard Recovers Nothing. If the Court were to stay the arbitration and allow the litigation to proceed, a jury could find that Davidson did not breach the contract. Such a finding would mean that Davidson would be held not liable. Ms. Bechard would then need to arbitrate her breach of contract claim against Broidy. But, again, because collateral estoppel and *res judicata* could not apply—because Broidy could not be bound by the result of a lawsuit in which he did not participate—the arbitrator could reach the opposite conclusion—i.e., that Davidson ***did breach*** the contract. In that case, Broidy would be held not liable as well, and Ms. Bechard would again recover nothing—again based on irreconcilable rulings on ***the exact same*** legal and factual issues.

This is, parenthetically, the real reason why Broidy wants two separate proceedings. It is not because private facts will thus remain confidential; they won't, because those matters will *already be discussed* (and discovery allowed thereon) in the ongoing litigation between Ms. Bechard and Davidson/Avenatti: a litigation in court that (to reiterate) Broidy's motion ***cannot and does not even attempt to stop***. The "let's keep everything secret" rationale is thus merely a smokescreen; either we can do that in court anyway (with a sealing order) or it won't be secret at all because everyone admits that Ms. Bechard's claims against Davidson and Avenatti are entitled to be heard ***in court***.

Rather, Broidy really wants two proceedings because it (1) multiplies Ms. Bechard's expense (indeed, many times over, given the out-of-pocket costs of arbitration) by requiring two different adjudications, and (2) permits Broidy to take advantage of issue preclusion while not permitting Ms. Bechard to do the same. If a jury finds that Davidson breached the contract, Broidy will bind Ms. Bechard to that finding through nonmutual defensive issue preclusion. Yet if that jury finds that

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Davidson did ***not*** breach that contract, you can be certain that Broidy will claim (rightly) that the Due Process Clause bars him from being bound to ***that*** result since he was not a party at that trial. Head's Broidy wins, but tails Broidy doesn't lose—he merely gets another flip in arbitration.

It would be one thing if Broidy asked for arbitration and agreed to be bound to whatever the jury finds about whether there was in fact a breach (and who did it). But Broidy tellingly nowhere makes such an offer, nor will one likely come in his reply brief. That's because the possibility of inconsistent results is precisely the advantage that Broidy seeks; one devastating to Ms. Bechard, who (it bears repetition) is the ***one and only party in this litigation*** who (unlike Broidy, Davidson, and Avenatti) has said nary a word to the public about the affair. Such a result is profoundly unjust.

Scenario 4 – Arbitration Stayed; Ms. Bechard Recovers. Finally, if the Court were to stay the arbitration and allow the litigation to proceed, a jury could find that Davidson breached the contract. Such a finding would mean that Davidson would be liable on the claims asserted against him, and thus Ms. Bechard would recover. But to be clear: Ms. Bechard would not thereafter be able to arbitrate her claims against Broidy because he would raise non-mutual defensive issue preclusion as a defense, as Ms. Bechard was a party to the prior proceeding that made that finding. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810-14 (adopting nonmutual defensive collateral estoppel).)

In half of the above scenarios, Ms. Bechard would be left without a recovery—despite having done nothing wrong and the existence of defendants who are alternatively responsible for her injuries. Such a result would be tremendously inequitable. It is no wonder that the Court of Appeals has recognized stay orders are most suitable for cases where mischief is afoot in joining multiple fictitious or otherwise inappropriate defendants to the action. (E.g., *Henry*, *supra*, 233 Cal. App. 3d at pp. 101-02 ("stay orders were authorized by the Legislature in order to avoid gamesmanship").)

In contrast, courts routinely deny motions to compel arbitration in cases where, as here, there are legitimate reasons for the joinder of multiple defendants in a single action. (See, e.g., *L.A. Unified*, *supra*, 13 Cal. App. 5th at p. 485; *Lindemann*, *supra*, 204 Cal. App. 4th at pp. 566-68; *Abaya*, *supra*, 189 Cal. App. 4th at p. 1499; *Valencia v. Smyth* (2010) 185 Cal. App. 4th 153, 180; *Birl*, *supra*, 172 Cal. App. 4th at 1321; *C. V. Starr & Co. v. Boston Reinsurance Corp.* (1987) 190 Cal. App. 3d 1637,

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1642.) And here, joinder is not just legitimate; it is necessary to ensure Ms. Bechard is not left remediless as a result of inconsistent and irreconcilable rulings on the same factual and legal issues.

B. Broidy's Specious Arguments Fail To Justify Any Other Result.

Broidy argues that Ms. Bechard "tactically chose to ignore her agreement to arbitrate and thereby keep this matter confidential, instead filing suit." (Mot. at p. 4:27-28.) But suing all Defendants in a one action is not some strategic attempt to escape arbitration because Ms. Bechard thinks she will fare better in court, nor is it one intended to escape confidentiality obligations.

First, it is true that Ms. Bechard's decision to file this lawsuit as a single action was "tactical" in the sense she seeks to avoid the possibility of inconsistent rulings discussed above. But Section 1281.2(c) expressly recognizes her right to pursue that fair and just result. It was not "tactical" in the sense suggested by Broidy; i.e., that Ms. Bechard sought some advantage vis-à-vis Broidy by pursuing litigation rather than arbitration. Nor was it an effort to purportedly extort additional money out of Broidy by threatening to reveal public information. Ms. Bechard and her lawyers have ***never asked for that***. Ever. The only thing they have ***ever*** asked for is simply for Broidy to pay the remaining $1.2 million that he promised. Period. And Ms. Bechard filed suit ***only after*** Broidy stopped paying a cessation not accompanied by a letter or e-mail or even an arbitration demand filed by Broidy, but rather announced by Broidy to the *Wall Street Journal*.

Second, to the extent Broidy is arguing he has been somehow harmed by his loss of the right to secrecy, that argument is baseless. A secret forum would only be important if the existence of the Settlement Agreement ***were still a secret.*** But as Broidy has recognized—by the fact that he did not move to seal the complaint with respect to allegations about the Agreement, as well as through his extensive statements to press confirming the existence of the Agreement, his version of the circumstances surrounding it, his public admission of his affair with Ms. Bechard, and his false public claims that she was actually never pregnant, that he was not the father, and that it was her decision alone to have an abortion—there is no secrecy left, ***because of Broidy***.

Moreover, that horse left the barn long ago and cannot now be put back. Broidy's attorney was raided, his files and tape recordings were seized by the FBI, and the details leaked (***not by Ms. Bechard***) to the *Wall Street Journal*. Broidy has already made a million statements. Ditto for Avenatti

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(and, to some degree, Davidson). Whatever was once a secret cannot at this point be made a secret again. Nor would a separate arbitration keep things silent anyway. Whatever may or may not be revealed in court (e.g., via a sealing order or no) will already inevitably be revealed since Ms. Bechard's claims against Davidson and Avenatti will not and cannot be privately arbitrated and will instead continue in court. Thus an arbitration of the breach of contract action against Broidy would not advance his privacy interests in any material way.

Section 1281.2(c) unambiguously applies. There is no reason not to invoke it here, and substantial duplication of effort – as well as manifest injustice –would result were this Court to require multiple different proceedings about the same issue, one in court and one in arbitration. For these reasons, Broidy's motion to compel arbitration should be denied.

III. The Court Should Ignore Any New Arguments In Broidy's Reply Brief.

One final point bears brief mention. Broidy's lengthy Motion to Compel Arbitration devotes many pages to the baseless slander of Ms. Bechard. But in the entirety of the nine pages of Broidy's memorandum of points and authorities, Broidy devotes only ***a single paragraph***– –one on page eight– to a "discussion" of Section 1281.2(c), which Broidy's counsel knows full well (from their meet and confer efforts) is the core basis for Ms. Bechard's opposition to the motion.

Apart from this single (utterly barebones) paragraph, Ms. Bechard is forced to entirely guess at the doctrinal basis for Broidy's motion. This Court should look askance at any effort by Broidy and his counsel to add additional details in his reply brief—a submission to which Ms. Bechard will obviously have no permissible written response. The cases cited in Broidy's moving papers, which typically involve mere Doe defendants and no actual possibility of inconsistent results, clearly do not warrant a refusal to apply section 1281.2(c) and the granting of a motion to compel arbitration. That is all that Broidy has argued, and it is utterly far afield from the case at hand. Additional argument in Broidy's reply brief should be taken with a grain of salt.

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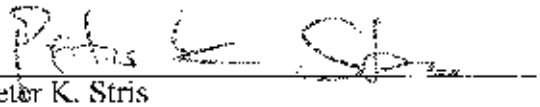
CONCLUSION

Section 1281.2(c) applies. Broidy's motion to compel arbitration should be denied. There is no compelling reason why multiple different tribunals should decide if the Settlement Agreement was materially breached (and, if so, by who), rather than one. By contrast, deciding that issue in a single tribunal in court will both be efficient and avoid manifest injustice from conflicting results.

STRIS & MAHER LLP

Dated: August 24, 2018



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