ALTERNATIVE RESOLUTION CENTERS
HONORABLE VINCENT J. O'NEILL, JR.
ARC NO. 78M8839
CAL. SUP. CT. NO. 2024CUPA031167

DR. JAMES STUDNICKI, ET AL.

Claimants,

v.

SAGE PUBLICATIONS, INC.,

Respondent.

CLAIMANTS' REPLY IN SUPPORT OF THEIR MOTION FOR DISCOVERY

Philip A. Sechler*
Matthew C. Ray*
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, Virginia 20176
(571) 707-4655

David A. Shaneyfelt (SBN 240777)
THE ALVAREZ FIRM
760 Paseo Camarillo, Suite 315
Camarillo, CA 93010
(805) 823-4200

Patrick Strawbridge*
Steven C. Begakis (SBN 314814)
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423

**OSAAC Application Pending*[1]

Counsel for Claimants

[1] Counsel for Claimants submitted OSAAC applications to the Arbitrator for approval on March 10, 2025.

TABLE OF CONTENTS

INTRODUCTION

S.B. 940 governs this arbitration, so the parties have a right to discovery. Sage effectively concedes this. It concedes that S.B. 940 grants discovery in arbitrations like this one. And it concedes that the Publishing Agreements incorporate "the laws of the State of California." These "laws," of course, include S.B. 940.

Sage makes two arguments for why S.B. 940 doesn't apply, and neither has merit. *First*, Sage argues that the Publishing Agreements implicitly incorporated CCP §1283.1, the old California law that limited discovery in arbitration. But the opposite is true. The Agreements *expressly* incorporated S.B. 940 by adopting "the laws of the State of California." *Second*, Sage claims that S.B. 940 does not apply because the Authors "commenced" this arbitration in 2024, before S.B. 940 took effect. But S.B. 940 applies to *all* arbitrations, not just those "commenced" by a certain date. And in any event this arbitration commenced in February 2025, well after S.B. 940's effective date. The Authors thus have a right to discovery under S.B. 940, and Sage never disputes that discovery should include depositions.

Sage insists that the Authors would not be entitled to discovery under old California law, but those arguments also fail. *First*, Sage argues that there is no case expressly holding that reputational harm is a "personal injury" under CCP §1283.1, but a statute can apply to new situations without directly-on-point precedent. *Second*, Sage argues that the Authors may only receive discovery for "unwaivable" statutory claims, but that is wrong, and in any case, the Authors' Unruh claim is not waivable. Sage also argues that discovery into Sage's publication and retraction process is too broad, but the Authors seek only targeted discovery that is critical for the Authors to

prove their statutory claims. The Arbitrator should therefore grant the parties discovery and the Authors depositions.

ARGUMENT

I. S.B. 940 governs this arbitration.

Sage concedes that S.B. 940 guarantees discovery in every California arbitration. *See* Respondents' Opp. to Claimants' Mot. for Disc. 6, 10 (Apr. 4, 2025). As such, S.B. 940 clearly applies to this case. Claimants' Mot. for Disc. 10-11 (Mar. 21, 2025). Sage has only two arguments in response, and both fail. *First*, Sage argues that the Agreements implicitly incorporate limits on discovery, Opp. 6, but on the contrary, the Agreements expressly incorporate S.B. 940's guarantee of discovery. Mot. 11-12. *Second*, Sage argues that S.B. 940 doesn't apply here because this arbitration was "commenced" in 2024 before S.B. 940 went into effect. Opp. 11 But S.B. 940 applies to *all* arbitrations, regardless of commencement date, and this arbitration began in February 2025—months after S.B. 940's effective date. Mot. 8, 10-11.

A. Sage concedes that S.B. 940 grants discovery in every arbitration, which includes this arbitration.

First, Sage concedes S.B. 940 repealed California's former limits on discovery in arbitration, Opp. 6, 10, thus guaranteeing full discovery to parties in every California arbitration, Mot. 10-11. It is thus undisputed that California law now gives the parties to every arbitration "the same ability to obtain discovery that they would have in the trial court." *Cox v. Bonni*, 30 Cal. App. 5th 287, 304 (2018), *see* Mot. 10-11; Opp. 10. That concession alone is enough for the Arbitrator to grant the Authors' motion. *See* Mot. 10-11 ("[S]ince January 1, California law has provided that

'[d]epositions may be taken and discovery obtained in arbitration proceedings'—period. CCP §1283.05.").

B. The Publishing Agreements incorporate California law, which includes S.B. 940.

To avoid S.B. 940's obvious application here, Sage argues that the Arbitrator must "presum[e]" that the Publishing Agreements implicitly incorporated the now-repealed CCP §1283.1, which limited discovery to only those arbitrations involving "'injury to ... a person caused by the wrongful act or neglect of another.'" Opp. 6. Sage further argues that "subsequent changes to the law" like S.B. 940 are not incorporated into the Agreements "unless the language of the agreement 'clearly indicates this to have been the intention of the parties.'" *Id.* (quoting *Swenson v. File*, 475 P.2d 852, 854-55 (Cal. 1970)).

But this argument fails on its own terms because, as the Authors explained, the parties clearly intended to incorporate S.B. 940. Mot. 11-12. The Publishing Agreements adopt "'the laws of the State of California.'" Opp. 2; *see* Demand for Arbitration (Feb. 21, 2025), Exs. E at 3, F at 3, G at 3. And California law is clear that this language incorporates existing law, such as S.B. 940. Mot. 11-12. For example, in *Gallo v. Wood Ranch USA*, 81 Cal. App. 5th 621 (2022), the arbitration clause said that the arbitrator must "look to the 'California Arbitration Act ... to conduct the arbitration and any pre-arbitration activities.'" *Id.* at 630. The Court held that this language "incorporate[d] a law that [was] to be used at some time in the future (here, at the time the arbitration takes place)," and thus the parties were "deemed to have contemplated—and hence, consented to—the incorporation of

postcontract changes to that law." *Id.* at 642. The Court reasoned that applying a new version of the CAA that did not exist when the contract was formed was not "retroactive," as Sage argues here, Opp. 10, but "honor[ed] the parties' intent." *Gallo*, 81 Cal. App. 5th at 642.

Gallo is on all fours here. Mot. 11-12. The Publishing Agreements provide that their "*validity, interpretation, performance[,] and enforcement* ... shall be governed ... by the laws of the State of California." Demand Ex. E at 3; Ex. F at 3; Ex. G at 3 (emphasis added). Because the parties agreed that California law would "be used at some time in the future"—when the Publishing Agreements were "interpret[ed]," "perform[ed]," or "enforce[d]"—the parties expressly "incorporat[ed] ... postcontract changes to that law." *Gallo*, 81 Cal. App. 5th at 642. Sage simply asserts that this is wrong without giving any explanation why. Opp. 11; *see, e.g.*, *Roe v. McDonald's Corp.*, 129 Cal. App. 4th 1107, 1114 (2005) ("An issue merely raised by a party without any argument or authority is [forfeited]." (cleaned up)).[2]

C. S.B. 940 is not limited to arbitrations commenced after its effective date, and even if it was, it would still apply here.

Unable to respond to *Gallo*, Sage makes a second argument. It asserts that S.B. 940 is inapplicable here because this arbitration "commenced" in 2024, before S.B. 940 went into effect. Opp. 11. That argument fails for many reasons.

[2] Sage is also wrong to characterize S.B. 940 as a retroactive law. Opp. 10. Even if the Agreements did not incorporate S.B. 940, the law would still govern this arbitration without operating retroactively. S.B. 940 "makes only moderate, procedural-type adjustments to the rules for conduct that will apply in the event of some future circumstance," which is not a retroactive effect and therefore does not require a clear statement of retroactivity. *McHugh v. Protective Life Ins. Co.*, 12 Cal. 5th 213, 231 (2021).

First, S.B. 940 applies to all arbitrations and not just those commenced after its effective date. Mot. 8, 10-11. Unlike some provisions of the bill that specifically apply only to "contract[s] entered into, modified, or extended on or after January 1, 2025," Section 8 of S.B. 940 broadly "repealed" CCP §1283.1 for all arbitrations, no matter when the parties formed the contract. CA S.B. 940 §§2(e), 3(b), 8, Reg. Sess. (2024), bit.ly/3R5BDkq. Sage makes no response to this point. Opp. 11-12.

Second, there is no basis in the record for Sage to argue that this arbitration "commenced" in 2024. That would surely be news to the Arbitrator, who was appointed in February 2025. And it's certainly news to the Authors, who spent all of 2024 trying and failing to persuade Sage to agree to arbitration. *See, e.g.*, Pet. to Compel Arb. 6-14 ¶¶19-58, *Studnicki v. Sage Publ'ns, Inc.*, 2024CUPA031167 (Cal. Sup. Ct. Oct. 3, 2024) (Opp. Ex. F). Because of Sage's intransigence, the Authors were forced to petition to compel Sage into arbitration in October 2024. *Id.* Then the Authors had to wait until January 29, 2025, to receive an order appointing the Arbitrator. Demand Ex. J. The Authors wanted this arbitration to start in 2024, but it didn't—because of Sage.

Sage's argument not only blinks reality: it also has no basis in law. California law is clear that "[t]he proper means of commencing arbitration under the CAA is the *filing* of a demand[.]" *Rosenson v. Greenberg Glusker Fields Claman & Machtinger LLP*, 203 Cal. App. 4th 688, 694 (2012) (emphasis added); *see also Blatt v. Farley*, 226 Cal. App. 3d 621, 627 (1990) (a demand is "a pleading analogous to a complaint in a civil lawsuit"). The Authors commenced this arbitration by filing their arbitration

demand with the Arbitrator on February 21, 2025. They couldn't file a demand any earlier because, as Sage admits, the arbitration agreements "d[id] not provide an arbitration forum" and "Sage would not consent to a forum in which the rules provide for discovery"—which is *every* arbitration forum. Opp. at 4; Opp. Ex. F at 13 ¶50 ("every provider permits … discovery as [allowed] by law"); *see, e.g.*, Opp. Ex. D at 1 (counsel for the Authors sought Sage's consent to "file a demand for arbitration" with AAA); Opp. Ex. E at 2 (Sage refused to "agree to submit the dispute to AAA" unless the Authors waived their discovery rights). That is why the Authors were forced to sue. Opp. Ex. F at 1-2 ¶¶4-6.

Sage tries to argue that the Authors' letter to Sage in February 2024, telling Sage that they were "prepared to waive mediation and proceed directly to arbitration," Opp. Ex. B at 2, was a "demand letter [that] initiated arbitration" under the CAA. Opp. 11. But this letter demanded *mediation*, not arbitration. Opp. Ex. B at 1 ("Mediation is demanded."). And there is no authority for the notion that such a letter initiates an arbitration under the CAA. Sage's only authority for this idea, *Santangelo v. Allstate Ins. Co.*, 65 Cal. App. 4th 804 (1998), does not even concern the CAA. *Santangelo* was about the arbitration of an uninsured motorist claim that, under the statutory process set forth in the Insurance Code, was automatically initiated by the claimant simply mailing the insurer a notice. *See id.* at 807, 812; *see* Cal. Ins. Code §11580.2(h) (an "insured ... formally institute[s] arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested"). The Authors did not have that luxury here, otherwise they would have sent Sage a letter

demanding arbitration in February 2024 with AAA, arbitration would have immediately commenced, and this case would already be over.

Next, Sage posits that arbitration commenced when the Authors' counsel sent Sage an embargoed copy of an unsigned, undated, draft Demand for Arbitration with AAA on May 28, 2024. *See* Opp. at 11; Opp. Ex. D at 63-64. But this was not the "filing" of the Authors' demand. *Rosenson*, 203 Cal. App. 4th at 694. Indeed, the Authors never filed that demand with AAA because Sage would not consent to AAA. *Supra* p. 6; Opp. at 5 (admitting the Authors filed a different "Demand for Arbitration" with ARC); *see also* Opp. Ex. D at 1 (the Authors only "intend[ed] to file" the Demand with AAA). The Authors' decision to share this draft document with Sage was merely an effort "to reach an agreement" with Sage on "a mutually beneficial venue" so that the parties could initiate arbitration. Opp. Ex. D at 1.

Sage also suggests that the Authors' "petition to compel arbitration" might have commenced the arbitration because it was "in essence a suit to compel specific performance of, *i.e.*, to enforce, an arbitration agreement." Opp. 11. But that is clearly wrong. The Authors filed a petition to compel arbitration because no arbitration had commenced yet—because Sage would not agree to commence it. *See, e.g.*, CCP §1281.2 (if "a party to the agreement refuses to arbitrate that controversy, the court shall order the [party] to arbitrate"); *see also* Opp. Ex. F at 1 ¶4 ("The Authors have thus been urging Sage to submit their claims to arbitration, as required by Sage's Publishing Agreements, making repeated offers to Sage *to begin the process*[.]" (emphasis added)).

Finally, Sage suggests that the arbitration "commenced" on November 21, 2024, when the Court granted the Authors' petition to compel arbitration. *See* Opp. at 11. But that order did not "commence" the arbitration; it ordered the parties to "submit Petitioners' claims to binding arbitration" and set deadlines for the parties to propose and select a Court-appointed arbitrator. Opp. Ex. G at 1; *see id.* at 2 ("Pursuant to Code of Civil Procedure §1281.6, the ... parties have until Dec. 13 to agree on one of the [Court's arbitrator] nominees and inform the Court of the same; but if they fail to do so within that time, the Court will appoint an arbitrator from the nominees."); *see, e.g., Aronow v. Sup. Ct.*, 76 Cal. App. 5th 865, 871, 882 (2022) ("arbitration ha[d] not [yet] commenced," even though the trial court granted a petition to compel arbitration, because a party had not yet paid arbitration fees).

The fact that Sage can't even make up its mind about when the arbitration commenced—February 6? May 28? October 3? November 21?—shows that Sage is grasping at straws and not even convinced of its own argument. *See* Opp. 11. This arbitration was plainly commenced in February 2025. And that fact removes any doubt that S.B. 940 applies.

* * *

Sage cannot deny that S.B. 940 guarantees discovery. Nor can it deny that the publishing agreements incorporate S.B. 940. The best response that Sage can muster against S.B. 940 applying here is a meritless argument that somehow the arbitration commenced in 2024. The Arbitrator should reject Sage's arguments, find that S.B. 940 applies, and grant the parties discovery. And because the Authors have an

"unqualified right" to obtain discovery without the Arbitrator's permission, just as they would in a civil case, Mot. 10-11, the Arbitrator should reject Sage's request to "defe[r]" discovery until the Authors submit "specific discovery requests" for approval, Opp. 15.

II. Even before S.B. 940, the CAA allowed discovery in this arbitration.

The Authors would also be entitled to discovery under pre-S.B. 940 law. Sage focuses its opposition here, meticulously analyzing outdated precedent. *See* Opp. 7-10. But Sage's arguments fail.

First, Sage catalogues the few "known decisions" interpreting CCP §1283.1—the repealed provision of the CAA restricting discovery to arbitrations of "'injury to ... a person'"—and observes that none of them "involv[e] ... reputational harm." Opp. 7-8. But just because prior judicial decisions do not address whether CCP §1283.1 applies to reputational injury does not mean that such harms are not "injur[ies] to … a person." *See, e.g.*, *People v. Bell*, 241 Cal. App. 4th 315, 343 (2015) ("[I]f the statute's language fairly brings a given situation within its terms, 'it is unimportant that the [statute's] particular application may not have been contemplated.'"); *In re New Invs., Inc.*, 840 F.3d 1137, 1141 (9th Cir. 2016) (same); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985) (statutes have "evolving" applications). Moreover, it should come as no surprise to the Arbitrator that few decisions have interpreted CCP §1283.1, given that discovery matters are resolved by the arbitrator with limited

judicial review. *See, e.g.*, *Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.*, 44 Cal. 4th 528, 535-36 (2008).

Here, reputational harm "easily falls within the literal terms of" CCP §1283.1. *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663-64 (D.C. Cir. 2009). Harm to "reputation and [a] good name" is plainly a "personal injury." *O'Hara v. Storer Commc'ns, Inc.*, 231 Cal. App. 3d 1101, 1117-18 (1991). And Sage is wrong to characterize the Authors' reputational harm as merely lost business opportunities. Mot. 7. The reputational harm that Sage inflicted is far more severe, and lost business opportunities are only "the tip of the iceberg." Demand 4-5, 29-31, 43-48, 51, 53 ¶¶12-13, 77-79, 81-82, 102-17, 132, 139; *see, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (the loss of a "good name" harms a person's "'essential dignity and worth [as a] human being'").

Second, Sage asserts that discovery for arbitration of statutory claims is available only if the claim is "unwaivable." Opp. 12. But that is wrong; there is no such requirement. *See Vo v. Tech. Credit Union*, 108 Cal. App. 5th 632, 640 (2025). And in any case, the Authors' Unruh claims, like the FEHA claims in *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000), are not waivable, *see, e.g.*, *id.* at 100; Cal. Civ. Code §§1668, 3513. The Authors are thus entitled to discovery into "'the inner workings of Sage's retraction process and how Sage carried out that process in the Author's case,'" Opp. 13-14, because Sage alone possesses the "essential documents" showing discrimination, Mot. 12-13; *see Armendariz*, 24 Cal. 4th at 104 (where, as here, the respondent "ha[s] in [its] possession many of the documents"

showing discrimination, "denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the [claimants'] statutory rights"). Obtaining these documents will be critical for proving discriminatory intent. *See, e.g.*, *Liapes v. Facebook, Inc.*, 95 Cal. App. 5th 910, 922 (2023) ("[A] plaintiff must prove … willful, affirmative misconduct." (cleaned up)). Nor will the Authors' requests be overbroad, Mot. 4-6, as Sage hyperbolically claims, Opp. 13-15. And discovery will not prevent a speedy arbitration. *Id.* at 15. Sage has had since November 2023 to collect and review documents, *id.* at 4, so it is more than capable of producing records in a timely manner.

III. Sage does not dispute that the Arbitrator should order depositions.

Finally, Sage does not oppose the Authors receiving depositions if there is discovery. *See generally* Opp. 6-15; *see, e.g.*, *Jordan v. M & T Bank Corp.*, 2025 WL 887120, at *18 (N.D. Ind. Mar. 21) ("'When a party fails to respond to an issue raised in a ... response brief, the issue or claim is deemed waived.'"). Because there are good reasons to grant depositions, *see* Mot. 14-16, and this request is unopposed, the Arbitrator should grant it.

CONCLUSION

The Arbitrator should grant the parties discovery and the Authors depositions.

Dated: April 11, 2025

Respectfully submitted,

/s/ Philip A. Sechler
Philip A. Sechler*
Matthew C. Ray*
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, Virginia 20176
(571) 707-4655
psechler@ADFlegal.org
mray@adflegal.org

/s/ Steven C. Begakis
Patrick Strawbridge*
Steven C. Begakis (SBN 314814)
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
patrick@consovoymccarthy.com
steven@consovoymccarthy.com

David A. Shaneyfelt (SBN 240777)
THE ALVAREZ FIRM
760 Paseo Camarillo, Suite 315
Camarillo, CA 93010
(805) 823-4200
DShaneyfelt@alvarezfirm.com

**OSAAC Application Pending*

Counsel for Claimants

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, this Motion for Discovery was served on Respondents via email, as follows:

Counsel for Respondent

Dated: April 11, 2025

/s/ Steven C. Begakis
Steven C. Begakis