

S225090

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT C. BARAL,

*Plaintiff and Respondent,*

v.

DAVID SCHNITT,

*Defendant and Appellant.*

SUPREME COURT  
FILED

AUG 25 2015

Frank A. McGuire Clerk

Deputy

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After a Published Decision by the Court of Appeal Second Appellate District, Division One Case No. B253620, Affirmed a Judgment Entered by the Superior Court for the County of Los Angeles, Case No. BC475350, The Honorable Maureen Duffy-Lewis presiding

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**VERIFIED PETITION FOR WRIT OF SUPERSEDEAS;  
MEMORANDUM OF POINTS AND AUTHORITIES**

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**IMMEDIATE STAY REQUESTED OF ALL TRIAL COURT  
PROCEEDINGS PENDING DECISION ON REVIEW**

---

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## INTRODUCTION

Plaintiff and respondent Robert Baral has attempted to restart discovery in this matter while the Petition for Review is pending in this Court. His stated ground for doing so is that this Court's grant of the Petition for Review dissolved the stay imposed by the Court of Appeal when it issued a Writ of Supersedeas following the trial court's refusal to stay proceedings pending appeal. Baral apparently contends that, by granting review, this Court also granted Baral permission to prosecute his claims in the Superior Court pending this Court's decision on the merits. That argument is groundless and seeks to undo the precise protections the anti-SLAPP statute imposes by staying discovery. *See also Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180 [25 Cal.Rptr.3d 298, 106 P.3d 958].

Yet, following efforts by counsel for defendant and appellant David Schnitt to convince Baral's counsel to desist, Baral's counsel have actually stated that they will *accelerate* their discovery efforts because counsel for Mr. Schnitt have "refused to cooperate" with Baral's efforts to resume discovery. (Writ Appendix ["WA"] 7.) Thus, Mr. Schnitt has no choice but to seek immediate intervention by this Court. Mr. Schnitt further requests an award of sanctions to reimburse his costs of seeking this court's intervention.

## VERIFIED PETITION

By this verified Petition, Petitioner David Schnitt alleges as follows:

1. This Petition is supported by the attached Memorandum of Points and Authorities and the Appellant's Writ Appendix, which includes in Tab 1 the Declaration of Michael C. Lieb submitted pursuant to California Rule of Court 8.112(a)(4)(B)(iii)-(iv). (WA1).
2. David Schnitt ("Schnitt") is the defendant in this action. Robert Baral ("Baral") is the plaintiff.
3. The operative complaint is Baral's Second Amended Complaint ("SAC"). (WA 34).
4. On December 13, 2013, the trial court denied Schnitt's anti-SLAPP motion attacking certain allegations in the SAC. (WA 56).
5. On December 31, 2013, Schnitt timely filed his notice of appeal.
6. While the appeal was pending, Baral attempted to conduct discovery, and on February 11, 2014, Schnitt filed his Motion to Stay Case Pending Appeal ("Motion to Stay") in the trial court. (WA 58).
7. By order dated March 12, 2014, the trial court denied the Motion to Stay. (WA 71).
8. On October 14, 2014, Schnitt filed a Petition for Writ of Supersedeas in the Court of Appeal. (WA 11).

9. On November 19, 2014, the Court of Appeal issued a Writ of Supersedeas, staying all trial court proceedings “pending resolution of the above-entitled appeal or further order of this Court.” (WA 33).

10. On February 5, 2015, the Court of Appeal issued its ruling denying Schnitt’s appeal and affirming the trial court’s ruling denying Schnitt’s anti-SLAPP motion. *Baral v. Schnitt* (2015) 183 Cal.Rptr.3d 615, rv. granted 186 Cal.Rptr.3d 840.

11. On May 13, 2015, this Court granted review of the ruling of the Court of Appeal. *Id.*

12. On July 16, 2015, Schnitt filed his Opening Brief on the merits. Following Baral’s unopposed motion for an extension of time, Baral’s Opening Brief is due on September 18, 2015.

13. On August 5, 2015, Baral’s New Jersey counsel sent a letter to third-party witness Technology Holdings, Inc. demanding that Technology Holdings produce documents and appear for deposition in New Jersey on October 1 and 2, 2015. (WA 4). In that same letter, Baral’s counsel claimed that discovery was no longer stayed because this Court’s grant of review deprived the Court of Appeal of jurisdiction, thus vacating the Writ of Supersedeas, and restoring the trial court’s erroneous denial of Schnitt’s Motion to Stay. *Id.*

14. Baral’s counsel did not copy Schnitt or his counsel on this letter to Technology Holdings. Counsel for Technology Holdings

contacted Schnitt's counsel to advise them of the letter from Baral's New Jersey counsel. (WA 3).

15. Counsel for Schnitt contacted Baral's California counsel, Mr. Sauer, to demand that Baral cease his efforts to conduct discovery. (WA 6, 7). Baral's counsel rejected that demand and, ultimately, wrote that, due to the refusal of Schnitt's counsel to "cooperate" with discovery, counsel for Baral would *accelerate* their efforts to conduct discovery. (WA 7 ["I am contemplating setting the New Jersey depositions on dates earlier than October 1 and 2, 2015 since you have refused to cooperate."].).

16. As this Court held in *Varian, supra*, discovery pending appeal of the denial of an anti-SLAPP motion violates Code Civ. Proc. § 916(a), which stays all proceedings in the trial court "upon the judgment or order appealed from or upon the matters embraced therein or affected thereby...." Cal. Code Civ. Proc. § 916, subd. (a). Because no remittitur has issued, nothing that has occurred in this case has restored jurisdiction to the trial court.

17. Furthermore, as established by the anti-SLAPP statute itself, the fundamental purpose of the anti-SLAPP statute is to avoid a situation in which the plaintiff may abuse the judicial process by requiring defendant in a SLAPP suit to spend time and money to defend the invalid claim. Cal. Code Civ. Proc. §425.16, subd. (a). Recognizing this, the Second District Court of Appeal issued its Writ of Supersedeas, staying trial court

proceedings for precisely the reason that still exists – *i.e.*, Schnitt’s appeal of the denial of his anti-SLAPP Motion is pending.

18. Counsel for Schnitt estimates that the cost of seeking this writ will total approximately \$25,000, and will supplement this filing to detail the precise expenses incurred if this Court finds that Schnitt is entitled to recover his fees and costs as a sanction. (WA 2).

19. Because of the threat by Baral’s counsel to pursue discovery in an accelerated fashion, Schnitt has no choice but to bring this application to seek an immediate stay of all trial court proceedings, including all efforts to issue or enforce subpoenas or other discovery.

20. Absent immediate intervention, Mr. Schnitt will suffer severe and irreparable harm because he will be forced to defend and participate in ongoing discovery in a case presently stayed while this Court reviews the ruling of the Court of Appeal.

21. Furthermore, while Baral contends that his discovery will be limited to issues unaffected by the issues on appeal, that argument lacks credibility in light of the fact that the issue on review is Baral’s efforts to shield his allegations of protected conduct from an anti-SLAPP motion by combining them with allegations of unprotected conduct.

22. This Petition satisfies all the requirements for issuance of a Writ of Supersedeas, to wit: (i) there is an appeal pending; (ii) Mr. Schnitt has exhausted his trial court remedies; (iii) Mr. Schnitt will suffer

irreparable harm and/or the balance of harm tilts decidedly in Mr. Schnitt's favor; and (iv) the pending appeal has merit, as demonstrated by this Court's decision to grant review.

WHEREFORE, Petitioner David Schnitt prays for relief as follows:

1. That all proceedings in the trial court, including specifically any and all discovery be stayed pending the outcome of this appeal, including this Court's review of the decision of the Court of Appeal;
2. For sanctions in an amount estimated to be \$25,000.00, and to be substantiated by declaration to be separately filed; and
3. For such other or further relief as this Court may find appropriate.

DATED: August 24, 2015

ERVIN COHEN & JESSUP LLP  
Michael C. Lieb  
Leemore L. Kushner

By:           /s/ Michael C. Lieb            
Michael C. Lieb  
Attorneys for Defendant and Appellant  
DAVID SCHNITT

VERIFICATION

I, Michael C. Lieb, declare as follows:

I am counsel for Defendant and Appellant David Schnitt, the Petitioner herein. I have prepared the foregoing Petition for Writ of Supersedeas and know its contents. The facts alleged in the Petition pertaining to the judicial proceedings and the judicial record of the underlying lawsuit are within my own knowledge and I know these facts to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on August 24, 2015, in Beverly Hills, California.

*/s/ Michael C. Lieb*

Michael C. Lieb

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. SUMMARY OF ARGUMENT

“[T]he perfecting of an appeal stays trial court proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby....” Cal. Civ. Proc. Code § 916, subd.

(a). Trial proceedings that contravene the automatic stay are void because

“[s]uch proceedings exceed the trial court’s subject matter jurisdiction.”

*Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4<sup>th</sup> at pp. 196-98.

As *Varian* held, the trial court lacks subject matter jurisdiction over the matters stayed pending appeal. (*Id.*) A “trial court cannot make any order which will lessen the effectiveness of the appellate court’s opinion.”

*In re Marriage of Varner* (1998) 68 Cal.App.4<sup>th</sup> 932, 936 [80 Cal.Rptr.2d 628].

*Varian*, which applies Section 916(a) to an anti-SLAPP Motion, is directly on point: “the point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights. ... The protections of the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process.” *Varian*, 35 Cal.4th at p. 186 (emphasis in original) (citing *Fabre v. Walton* (2002) 436 Mass. 517).

The automatic stay thus prevents the trial court from rendering an appeal

futile by altering the appealed judgment or by conducting further proceedings that may affect it, and protects the appellate court's jurisdiction by preserving the status quo until the appeal is decided. (*In re Marriage of Varner* (1998) 68 Cal. App. 4th at p. 936 [80 Cal.Rptr.2d 628]; *see also*, *City of Lodi v. Randtron* (2004) 118 Cal. App. 4th 337, 362 [13 Cal.Rptr.3d 107] [stay of litigation is required to maintain the status quo pending appeal]).

The stay pending appeal is jurisdictional – it “divests the trial court of jurisdiction over the subject matter on appeal.” *Varian*, 35 Cal. 4<sup>th</sup> at p. 198. The stay is jurisdictional “in its most fundamental sense.” *Id.*

Recognizing *Varian's* binding precedent, the Court of Appeal stayed all proceedings in this action pending the outcome of this appeal. Plainly, nothing has changed that would support the lifting of the stay – the same issues pending before the Second District Court of Appeal are now pending review before this Court. Yet, Baral contends that he may now conduct the discovery that the appellate court prohibited.

## **II. ARGUMENT**

### **A. The Trial Court Lacks Jurisdiction To Issue Or Enforce A Subpoena.**

This Petition is triggered by Baral's efforts to revive subpoenas issued prior to the Court of Appeal's issuance of its Writ of Supersedeas. Those subpoenas, however, issue from the trial court, and are to be

enforced, if at all, by the trial court. That is not possible because, as *Varian* makes clear, the trial court does not have jurisdiction to do anything.

Indeed, it is not reasonably disputable that, until a remittitur is issued, the trial court has no jurisdiction to do anything at all. *See In re Anna S.* (2010) 180 Cal.App.4th 1489, 1500 [103 Cal.Rptr.3d 889, 896-97] (“Until the remittitur issues, the trial court cannot act upon the reviewing court’s decision.”) *citing Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 12 [270 Cal.Rptr. 346]; *Tamborino v. Superior Court* (1986) 41 Cal.3d 919, 921, fn. 1 [226 Cal.Rptr. 868, 719 P.2d 242]; *People v. Sonoqui* (1934) 1 Cal.2d 364, 365–367 [35 P.2d 123] “The remittitur is not issued until the appellate opinion is final for all purposes.” *In re Anna S.*, *supra*, 180 Cal.App.4<sup>th</sup> at p. 1500 [citing Cal. Rules of Court, rule 8.272].

Furthermore, “the effect of the delay between the filing of the Court of Appeal opinion and the issuance of the remittitur is to afford the parties the opportunity to petition for rehearing in the Court of Appeal (rule 27(b)), and to seek review in the Supreme Court, before appellate jurisdiction is lost.” *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330, 336 [248 Cal.Rptr. 341]. When, and only when, the remittitur issues, “the jurisdiction of the reviewing court terminates and the jurisdiction of the trial court reattaches.” *In re Anna S.*, 180 Cal.App.4<sup>th</sup> at p. 1500 [citing *Bellows v. Aliquot Associates, Inc.* (1994) 25 Cal.App.4th 426, 432–433 [30 Cal.Rptr.2d 723].]

The pending petition for review in this Court thus bars the trial court from taking any actions at all. (*See also People v. Tulare County Superior Court* (2005) 129 Cal.App.4th 324, 332 [28 Cal.Rptr.3d 276] (with petition for review pending, “the trial court lacked jurisdiction to enter any further order on the merits in the case.”).) The clerk of the trial court issues deposition subpoenas. (Code Civ. Proc. § 1986.) Although, as an administrative convenience, the subpoenas are available without any action by the clerk, the fact remains that the subpoena is an order by the court compelling attendance of a witness. No such order may be issued or enforced because the trial court lacks jurisdiction of this action.

**B. Supersedeas Is The Proper Remedy.**

A writ of supersedeas may be ordered where the trial court denies a discretionary stay (*Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 455 [111 Cal.Rptr.2d 842]), or as a remedy to enforce an automatic stay (*Chapala Mgmt. Corp. v. Stanton* (2010) 186 Cal.App.4<sup>th</sup> 1532, 1542 [113 Cal.Rptr.3d 617] [“Supersedeas’ is the appropriate remedy for a refusal to acknowledge the applicability of statutory provisions automatically staying the judgment while an appeal is pursued.”]).<sup>1</sup>

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<sup>1</sup> Alternatively, Schnitt could have sought a contempt citation against Baral and his counsel. (*See* Code Civ. Proc. § 1209, subs. (a)(4) [contempt for abuse of process]; (a)(9) [contempt for “unlawful interference with the process or proceedings of a court”].) But Schnitt’s purpose is merely to

**C. Schnitt Properly Brings This Petition To This Court.**

Supersedeas will issue if a stay pending appeal “is essential to the complete exercise of appellate jurisdiction, or is required in order to preserve to the defendant the fruits of his appeal.” *Bd. Of Dental Examiners of Cal. v. Jameson* (1944) 23 Cal.2d 689, 690 [145 P.2d 205] (“*Jameson*”). While supersedeas generally issues from the Court of Appeal, the Supreme Court will issue such a writ when appropriate. In *Food & Grocery Bureau of Southern Cal.* (1941) 18 Cal.2d 174 [114 P.2d 579], this Court issued a writ of supersedeas to stay the effect of an injunction prohibiting the defendant from issuing trading stamps in its business. (*See also Jameson, supra* [considering writ but denying issuance on the merits].)

It is this Court’s appellate jurisdiction that is challenged and thus this Court that should determine whether to stay trial court proceedings (if, in fact, they are no longer stayed as Baral contends). (*See John Paul Lumber Co. v. Agnew* (1953) 116 Cal. App. 2d 638, 639-40 [254 P.2d 131] (supersedeas “issues only in aid of the reviewing court’s jurisdiction”). ) As discussed below, allowing Baral to conduct discovery while review is pending in this Court imposes on Schnitt the burden of both litigating in this Court the propriety of Baral’s complaint, and defending Baral’s efforts

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preserve the *status quo ante*, and not to extract a penalty for Baral’s refusal to acknowledge that this action is stayed.

to conduct full-blown discovery (and triggering the likely ensuing discovery disputes) in the trial court.

**D. This Petition Satisfied The Requirements For Supersedeas.**

The requirements for issuance of a writ of supersedeas are as follows:

- There must be an appeal pending;
- Trial court remedies must have been exhausted;
- The appellant must demonstrate that he will suffer irreparable harm absent the stay, and/or that the prejudice to appellant of no stay outweighs the harm to the appeal respondent from granting it; and
- The appeal has merit.

*See, generally*, California Rule of Court 8.112, subd. (a).

As applied here, there is no dispute that the first requirement is met.

The remaining three factors are addressed below.

**1. Trial Court Remedies Have Been Exhausted.**

As discussed above, Schnitt previously brought his Motion to Stay in the trial court. The trial court denied that motion. The Court of Appeal then issued its Writ of Supersedeas. We are before this Court because Baral contends that the Court of Appeal Writ of Supersedeas was voided by the grant of review. (WA 4). Either Baral is wrong (in which case, the case is stayed and it is up to this Court to make that clear); or Baral is correct,

and only this Court has the power to issue a stay. In either case, all other remedies have been exhausted.

**2. David Schnitt Will Suffer Irreparable Harm From Denial of the Stay; While the Grant of the Stay Will Not Substantially Harm Baral.**

The harm to David Schnitt from the refusal to grant a stay is that he will be subjected to continued litigation over claims that include allegations that Baral is precluded from asserted under the litigation privilege. The anti-SLAPP statute is designed to prevent the prosecution of meritless claims and it specifically *imposes* a discovery stay to prevent precisely the type of abuse practiced here by Baral – i.e., the pretextual use of a meritless claim to impose costs on a litigation adversary and to conduct discovery into matters that are not the legitimate basis of a cognizable claim. (Cal. Code Civ. Proc. § 425.16, subd. (g).)

Baral contends that his discovery attempts now consist only of discovery to address allegations of unprotected conduct in the SAC. But, there are at least two reasons that this justification rings hollow. First, Baral has combined allegations of protected conduct and unprotected conduct into the same count and then asserted in this appeal that *precisely because of this pleading artifice* the individual allegations within that count simply cannot be analyzed separately for purposes of the anti-SLAPP statute. Given Baral's position, it is entirely inconsistent for him to argue

that he can somehow – despite the automatic stay imposed by the anti-SLAPP statute – limit his discovery to address only those individual allegations within a count that involve unprotected conduct. Second, it is possible that this Court will rule in Baral’s favor and allow him to pursue his additional claims alleging protected conduct. Thus discovery will need to be repeated, with the witnesses previously asked only about allegations of unprotected conduct later called upon to testify as to allegations that address protected conduct.

Deferring discovery until this Court rules does not cause any harm. The same discovery available now will be available after a ruling by this Court, and that ruling will clarify the extent to which Baral’s SAC survives Schnitt’s anti-SLAPP motion. That ruling will thus give the trial court the guidance it will need to referee any disputes over the scope of discovery. Conducting discovery now, however, only threatens to create additional cost and to sow confusion. Baral’s effort to resume discovery is, in short, precisely the evil that the anti-SLAPP statute is designed to prevent.

### **3. The Pending Appeal Has Merit.**

The final issue is one this Court has already addressed by its grant of review. It is self-evident that the court would not have granted review if it believed Schnitt’s appeal lacked merit.

### III. SCHNITT IS ENTITLED TO AN AWARD OF SANCTIONS.

This Court may award sanctions under California Rule of Court 8.544 “for committing any unreasonable violation of these rules.” Schnitt respectfully submits that Baral’s decision to ignore this Court’s jurisdiction and to insist on continuing to prosecute this action in the trial court constitutes an unreasonable violation of the rules that merits sanctions.

### IV. CONCLUSION

Trial court proceedings have been stayed by the perfecting of Schnitt’s appeal, and they remain stayed pending this Court’s ruling on review. In light of Baral’s continued efforts to ignore the stay, Schnitt respectfully requests that this Court issue a Writ of Supersedeas and award Schnitt his costs and attorneys’ fees incurred in connection with this Petition.

DATED: August 24, 2015

ERVIN COHEN & JESSUP LLP  
Michael C. Lieb  
Leemore L. Kushner

By:           /s/ Michael C. Lieb            
Michael C. Lieb  
Attorneys for Defendant and Appellant  
DAVID SCHNITT

## CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I certify that the attached brief is proportionately spaced, using Times New Roman 13-point type, and contains 3,319 words.

DATED: August 24, 2015

ERVIN COHEN & JESSUP LLP

Michael C. Lieb

Leemore L. Kushner

By:           /s/ Michael C. Lieb            
Michael C. Lieb  
Attorneys for Defendant and Appellant  
DAVID SCHNITT

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 9401 Wilshire Boulevard, Ninth Floor, Beverly Hills, CA 90212-2974.

On August 24, 2015, I served true copies of the following document(s) described as **VERIFIED PETITION FOR WRIT OF SUPERSEDEAS; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

- |    |  |   |
|----|--|---|
| ** | Gerald Sauer<br>Amir Torkamani<br>SAUER & WAGNER LLP<br>1801 Century Park East, Suite 1150<br>Los Angeles, CA 90067  | Via Federal Express                     |
| ** | California Supreme Court<br>350 McAllister Street<br>San Francisco, CA 94102   | Via Federal Express<br>and e-submission |
| *  | California Court of Appeal<br>Second Appellant District<br>Division 1<br>300 S. Spring Street<br>2 <sup>nd</sup> Floor, North Tower<br>Los Angeles, CA 90013 | Via First Class Mail                    |
| *  | Hon. Maureen Duffy-Lewis<br>Los Angeles Superior Court<br>111 North Hill Street<br>Los Angeles, CA 90012   | Via First Class Mail                    |

[\*] **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Ervin Cohen & Jessup LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**[\*\*] BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on August 24, 2015, at Beverly Hills, California.

*/s/ Linda M. Moore*  
Linda M. Moore