California Supreme Court Case Number S225090

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT BARAL,

Plaintiff and Respondent,

vs.

DAVID SCHNITT,

Defendant and Petitioner.

After a Published Decision of the Court of Appeal
Second Appellate District, Division One (Case No. B253620)
Appeal from the Los Angeles Superior Court
Honorable Maureen Duffy-Lewis (Case No. BC475350)

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS

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RESPONSE TO VERIFIED PETITION

By this Opposition to the Verified Petition for Writ of Supersedeas ("Petition") filed by Defendant, Appellant, and Petitioner David Schnitt ("Schnitt" or "Petitioner"), Plaintiff and Respondent Robert Baral ("Baral" or "Respondent") states as follows:

1. Baral admits the allegations of Paragraph 1. This Opposition is supported by the attached Memorandum of Points and Authorities, Petitioner's Writ Appendix, and Respondent's Supplemental Writ Appendix, which includes, in Tab 1, the Declaration of Gerald L. Sauer submitted pursuant to California Rule of Court 8.112(a)(4)(B)(iii)-(v).

2. Baral admits the allegations of Paragraph 2.

3. Baral admits the allegations of Paragraph 3.

4. Baral admits the allegations of Paragraph 4.

5. Baral admits the allegations of Paragraph 5.

6. Baral admits the allegations of Paragraph 6.

7. Baral admits the allegations of Paragraph 7.

8. Baral admits the allegations of Paragraph 8.

9. Baral admits the allegations of Paragraph 9.

10. Baral admits the allegations of Paragraph 10.

11. Baral admits the allegations of Paragraph 11.

12. Baral admits the allegations of Paragraph 12.

13. Baral admits that his local counsel in New Jersey sent a letter to a third-party witness, Technology Holdings Worldwide, Inc. ("Technology Holdings"), seeking to schedule depositions on October 1 and 2, 2015. Baral denies that the letter "demanded" that document productions and depositions occur on those dates. Baral admits the remainder of the allegations of Paragraph 13.

14. Baral admits his counsel did not copy Schnitt or his counsel on the August 5, 2015 letter to Technology Holdings. There is no authority

requiring that Schnitt and/or his counsel be copied on communications with third-parties. Baral lacks sufficient information to admit or deny the remaining allegations of Paragraph 14.

15. Baral admits the allegations of Paragraph 15.

16. Baral denies the allegations of Paragraph 16 insofar as they omit the fact that trial court proceedings that are not "embraced" or "affected" by the appeal are not stayed. (Cal. Code Civ. Proc. § 916(a).) In interpreting Section 916, this Court has specifically stated that proceedings that will occur "regardless of the outcome of the appeal" are not "embraced" or "affected" by the appeal, and therefore are not stayed. (*Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 189, 106 P.3d 958 (*Varian*).) As applied here, the Court will find that Baral is attempting to obtain discovery that will occur regardless of the outcome of the appeal, and therefore the trial court does not lack jurisdiction over those proceedings. Indeed, the trial court recognized this rule when it denied Schnitt's Motion to Stay on March 12, 2014.

17. Baral denies the allegations of Paragraph 17. The Petition mischaracterizes the purpose of the anti-SLAPP statute: the stated purpose of the anti-SLAPP statute is to discourage "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Cal. Code Civ. Proc. § 425.16(a).) Moreover, the Court of Appeal for the Second District did not express any reason for issuance of the writ of supersedeas. In fact, it appears that the appellate court issued the writ on November 19, 2014 simply because it knew oral argument was scheduled for December 16, 2014, less than one month later, and thus the appellate court likely saw little harm in maintaining the status quo for that short period of time.

18. Baral denies the allegations of Paragraph 18.

19. Baral denies the allegations of Paragraph 19.

20. Baral denies the allegations of Paragraph 20. Schnitt will not suffer any prejudice by participating in the discovery at issue because that discovery will occur regardless of the outcome of the proceedings before this Court.

21. Baral denies the allegations of Paragraph 21. The discovery that precipitated Schnitt's Petition, *i.e.* the depositions of Technology Holdings, are proceedings that will occur regardless of the outcome of Schnitt's appeal. Those proceedings relate to the "LiveIt Claims", which have never been the subject of Schnitt's anti-SLAPP motion, and therefore are indisputably unaffected by the outcome of Schnitt's appeal.

22. Baral denies the allegations of Paragraph 22. As noted above, Schnitt will not suffer any prejudice as a result of participating in discovery that will occur regardless of the outcome of the proceedings before this Court. Baral, on the other hand, will suffer disproportionate injury as a result of being unable to obtain discovery, during the pendency of proceedings before this Court, that is directly relevant to his claims.

WHEREFORE, Respondent prays for relief as follows:

1. Denial of Petitioner's request that all proceedings in the trial court be stayed pending the outcome of this appeal; and

2. For such other or further relief as this Court may find appropriate.

DATED: September 8, 2015

SAUER & WAGNER LLP

Gerald L. Sauer
Attorneys for Plaintiff and
Respondent Robert C. Baral

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Petitioner David Schnitt's ("Schnitt") Petition for Writ of Supersedeas ("Petition") is a prime example of why this Court should not expand the scope of the anti-SLAPP statute to permit motions targeting specific allegations. By way of his Petition, Schnitt seeks to utilize the anti-SLAPP statute to stay and prevent discovery that will occur ***regardless of the outcome of these proceedings***, *i.e.* discovery that relates solely to the "LiveIt Claims" that are not the subject of Schnitt's anti-SLAPP motion. California *Code of Civil Procedure* § 916 specifically provides that such proceedings do not fall within an appeal's automatic stay. Schnitt's Petition should accordingly be denied.

The proceedings before this Court relate to whether a party can utilize an anti-SLAPP motion to strike specific allegations from a complaint. In this case, Schnitt and Respondent Robert Baral ("Baral") were co-managing members of a limited liability company, IQ BackOffice, LLC ("IQ"). Without telling Baral, Schnitt secretly decided to sell IQ, identified a buyer, entered into a binding Letter of Intent ("LOI") to sell IQ, and negotiated terms of a sale that were extremely favorable to himself, thereby blocking Baral from participating in IQ's management. These facts form the basis of the "LiveIt Claims" asserted by Baral against Schnitt in the operative Second Amended Complaint ("SAC"). After telling Baral about the sale, Schnitt, acting on behalf of IQ, retained an accounting firm, Moss Adams LLP ("Moss Adams"), to conduct an investigation into the suspected misappropriation of funds from IQ. After Moss Adams issued its Investigative Report, Baral requested that Schnitt direct Moss Adams to consider additional information, but Schnitt refused, thereby, once again, preventing Baral from participating in IQ's management. These facts form the basis of the "Moss Adams Claims" asserted by Baral against Schnitt in

the SAC. Schnitt filed an anti-SLAPP motion in the trial court seeking to strike only the allegations comprising the "Moss Adams Claims" from the SAC's causes of action for breach of fiduciary duty, constructive fraud, and declaratory relief, while leaving the "LiveIt Claims" as part of those same causes of action. The trial court denied the anti-SLAPP motion, noting that this type of a motion cannot be used to parse allegations, and the Court of Appeal affirmed the trial court's ruling. Thereafter, Schnitt petitioned this Court for review.

California *Code of Civil Procedure* § 916 specifically provides that an appeal does not stay matters that are not "affected" or "embraced" by the appeal. In interpreting that provision, this Court specifically held that matters are not "embraced" or "affected" by an appeal if they will occur "regardless of the outcome of the appeal." (*Varian, supra*, 35 Cal.4th at 189, 106 P.3d 958.) In this case, it is clear that proceedings relating to the "LiveIt Claims" will occur regardless of the outcome of the appeal, because they are not the subject of Schnitt's anti-SLAPP motion. The trial court clearly retains jurisdiction over those matters. The trial court acknowledged that fact when it denied Schnitt's Motion to Stay this case.

Rather than permit Baral to obtain discovery to which he is indisputably entitled, Schnitt has petitioned this Court for issuance of a writ of supersedeas, erroneously asserting that he will be prejudiced if he is forced to participate in discovery concerning claims that are subject to the anti-SLAPP statute. Schnitt's assertion, however, entirely misses the point because Baral is seeking to obtain discovery relating to claims that are ***not*** subject to Schnitt's anti-SLAPP motion. Schnitt will suffer no prejudice whatsoever if Baral is permitted to obtain that discovery during the pendency of the appeal before this Court. Baral, on the other hand, has already suffered disproportionate prejudice as a result of Schnitt's litigation tactics designed solely to delay prosecution of this matter. Since the

initiation of this action in December 2011, Schnitt has filed three anti-SLAPP motions, two appeals, a motion to quash, a motion to stay the case, and two separate petitions for issuance of writs of supersedeas. Despite prevailing on only two out of the nine proceedings, Schnitt's procedural tactics have enabled him to stay this action for most of its existence, approximately 3.75 years. During that time, witnesses have moved, documents have undoubtedly been destroyed or lost, and important witnesses' memories have likely faded, resulting in the loss of evidence that is central to the prosecution of Baral's claims.

This Court should not permit Schnitt to utilize the anti-SLAPP statute as a shield to prevent Baral from prosecuting claims that even Schnitt admits will proceed regardless of the outcome of his appeal and this Court's review thereof. Therefore, Schnitt's Petition for Writ of Supersedeas should be denied.

II. STATEMENT OF MATERIAL ALLEGATIONS AND PROCEDURAL HISTORY.

1. Summary of Relevant Allegations.

Schnitt and Baral are two of the founders, members, and managers of IQ. (WA 36, ¶ 9.) In or about September 2003, they formed IQ and operated it at all times as co-managing members. (Petitioner David Schnitt's Writ Appendix ("WA") 46, ¶ 37.) They signed various documents evidencing Baral's status as a co-managing member. (*Ibid.*)

In January 2010, without Baral's knowledge or consent, Schnitt began secretly negotiating for the sale of IQ. On October 12, 2010, Schnitt executed a binding LOI to sell IQ to LiveIt Investments, Ltd. ("LiveIt"). (WA 41-42, ¶ 23.) As part of the LOI, Schnitt retained a 21.1% ownership interest and an employment position in the resulting company. (*Ibid.*) Baral, on the other hand, was not entitled to retain an ownership interest and/or employment position with the resulting company, and was denied

the opportunity to negotiate for those benefits as a result of being excluded from the negotiations. (*Ibid.*)

In December 2010, Schnitt, acting on behalf of IQ, hired Moss Adams to investigate the suspected misappropriation of funds from IQ. (WA 43, ¶ 28.) On February 2, 2011, Moss Adams issued a written report (the "Fraud Report") resulting from its investigation. (*Ibid.*) Upon receipt of the Fraud Report, Baral asked Schnitt to instruct Moss Adams to withdraw the Fraud Report, reopen its investigation, consider additional information and documents, interview Baral, and/or issue a revised report based on consideration of additional evidence. (WA 43-44, ¶ 29) Schnitt refused Baral's request, thereby barring Baral from exercising his rights as a managing member of IQ. (*Ibid.*)

2. <u>Summary of Relevant Procedural History.</u>

On January 24, 2013, Baral filed the Second Amended Complaint (the "SAC"), which contains causes of action for breach of fiduciary duty and constructive fraud and alleges that Schnitt engaged in the following misconduct:

a. Excluding Baral from the initial negotiation of the sale of IQ leading to execution of the LOI;

b. Engaging in self-dealing by negotiating for the retention of an ownership interest in the resulting company subsequent to the sale of IQ and preventing Baral from having the opportunity to do so;

c. Engaging in self-dealing by negotiating for an employment position with the resulting company subsequent to the sale of IQ and preventing Baral from having the opportunity to do so; and

d. Circumventing Baral's rights as a co-managing member by refusing to allow Moss Adams to consider additional

> information submitted by Baral to determine if the Investigative Report [*i.e.*, the Fraud Report herein] should be withdrawn and a new written report issued. (WA 47, ¶ 40; WA 49, ¶ 46.)

The SAC also contains an alternative cause of action for negligent misrepresentation, which alleges that Schnitt negligently misrepresented to Baral that Baral was a co-managing member of IQ. (WA 51-52, ¶¶ 52-57.) Finally, the SAC contains a cause of action for declaratory relief, seeking declarations regarding Baral's status as a co-managing member and his authority to submit information to Moss Adams.[1] (WA 52-53, ¶¶ 58-60.)

Schnitt filed an anti-SLAPP motion in response to the SAC, seeking to strike only the "Moss Adams Claims" from the SAC. (Respondent Robert Baral's Supplemental Writ Appendix ("SWA") 36-78.) The trial court denied the anti-SLAPP motion, holding that a special motion to strike must target an entire cause of action (*i.e.,* it cannot parse allegations from a complaint). (WA 56.)

On December 31, 2013, Schnitt appealed that ruling. While the appeal was pending, Schnitt filed a Motion to Stay Case Pending Appeal, which Baral opposed and which the trial court denied on March 12, 2014. (SWA 79-94; WA 58-75.) Schnitt then petitioned the Court of Appeal for the issuance of a writ of supersedeas, which Baral again opposed and which the appellate court granted on November 19, 2014. (SWA 6-35; WA 11-

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[1] The parties in these proceedings have referred to the allegations relating to Schnitt's wrongful conduct in connection with the sale of IQ as the "LiveIt Claims", whereas they have referred to the allegations relating to Schnitt's wrongful conduct in circumventing Baral's rights as a managing member by barring him from providing information to Moss Adams as the "Moss Adams Claims". For the sake of clarity only, Baral will continue to adopt those labels herein.

33.)[2] The appellate court ultimately affirmed the trial court's ruling denying Schnitt's anti-SLAPP motion. (*Baral v. Schnitt* (2015) 233 Cal.App.4th 1423, 183 Cal.Rptr.3d 615, rv. granted 186 Cal.Rptr.3d 840.)

Schnitt petitioned this Court for review on March 16, 2015, which this Court granted on May 13, 2015, in order to determine whether an anti-SLAPP motion can be used to target allegations, rather than a cause of action. Schnitt's Petition for Review did not include a request that the trial court proceedings be stayed.

3. Schnitt's Refusal To Permit Baral To Obtain Discovery.

On August 5, 2015, Baral's local counsel in New Jersey sent a letter to Mr. Hyder Naqvi, Esq., counsel for Technology Holdings Worldwide, Inc. ("Technology Holdings")[3], requesting available dates for a deposition.

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[2] Because the parties did not have the opportunity to orally argue the merits of Schnitt's Petition for Writ of Supersedeas before the Court of Appeal, and because there was no substantive written opinion issued in granting the writ, it is unclear why the appellate court decided to grant the stay. It bears noting, however, that the matter was set for oral argument on December 16, 2014, less than one month after the writ was issued. It is entirely possible, and probable, that the Court of Appeal decided to issue the writ simply because oral argument was quickly approaching, and it saw little prejudice in staying the matter for a short time until the appeal was resolved.

[3] Technology Holdings is an investment banking company based out of New Jersey that was retained by Schnitt, acting on behalf of IQ, to assist with marketing IQ to potential purchasers and calculating a valuation for IQ. Vern Snider ("Snider") and Vivek Subramanyam ("Subramanyam") were Schnitt's two primary contacts at Technology Holdings. These parties are all in possession of information that is relevant to the "LiveIt Claims". Specifically, Technology Holdings is in possession of information relating to negotiations for the sale of IQ, and is potentially in possession of communications relating to whether Schnitt was purportedly acting as the sole managing member of IQ. To be clear, the relevant information that can be gleaned from the depositions of Technology Holdings, Snider and Subramanyam relates solely to the "LiveIt Claims" and will not lead to the discovery of any admissible evidence as to the "Moss Adams Claims".

(WA, 4.) Schnitt's counsel objected to the discovery taking place, despite the fact that there is no stay currently in place, and despite the fact that the discovery from Technology Holdings relates exclusively to the "LiveIt Claims", not the "Moss Adams Claims" that are the subject of Schnitt's anti-SLAPP motion. (WA 7-10.)

III. STANDARD OF REVIEW

A petition for a writ of supersedeas should be granted if the petitioner is able to demonstrate the necessity for the writ. (Cal. R. Ct. 8.112(a)(3).) Necessity for the writ is established only upon a showing of (1) irreparable harm to the petitioner absent a stay, (2) lack of disproportionate injury to the respondent if a stay is granted, and (3) the pending appeal has merit. (*See generally, ibid.*; *see also, Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861, 159 Cal.Rptr. 679.)

IV. SCHNITT'S PETITION FOR WRIT OF SUPERSEDEAS SHOULD BE DENIED.

1. The Trial Court Has Jurisdiction To Issue And Enforce Subpoenas, As Well As Other Proceedings.

As a preliminary matter, Schnitt's contention that the trial court completely lacks jurisdiction to enforce or issue a subpoena during the pendency of an appeal is based entirely on a conspicuous omission of relevant law. The Petition conveniently sidesteps the well-established legal principle that matters that are not "embraced" or "affected" by the appeal are not subject to the appellate stay that divests the trial court of jurisdiction. (Cal. Code Civ. Proc. § 916(a); *Varian, supra,* 35 Cal.4th at 189, 106 P.3d 958.) Indeed, it was for this very reason that the trial court denied Schnitt's Motion to Stay. Upon a review of the SAC and the anti-SLAPP motion, this Court will similarly find that the scope of the anti-SLAPP motion is extremely narrow, and therefore, the trial court continues to retain jurisdiction over the bulk of this case.

Relying on California *Code of Civil Procedure* § 916, Schnitt broadly asserts that the trial court lacks jurisdiction over this matter because the appeal automatically divested the trial court of jurisdiction. However, Section 916 specifically provides "the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." Thus, rather than automatically divesting the trial court of any and all jurisdiction, Section 916 requires courts to take a narrow approach and stay only those issues that are "embraced" or "affected" by the appeal:

> Whether a matter is 'embraced' in or 'affected' by a judgment [or order] within the meaning of section 916 depends on whether postjudgment or postorder proceedings on the matter would have any effect on the 'effectiveness' of the appeal. If so, the proceedings are stayed; if not, the proceedings are permitted. . . . By contrast, an appeal does not stay proceedings on 'ancillary or collateral matters which do not affect the judgment [or order] on appeal' even though the proceedings may render the appeal moot. . . . A postjudgment or postorder proceeding is also ancillary or collateral to the appeal despite its potential effect on the appeal, if the proceeding could or would have occurred regardless of the outcome of the appeal. (*Varian, supra*, 35 Cal.4th at 189-191, 106 P.3d 958, quoting *In re Marriage of Horowitz* (1984) 159 Cal.App.3d 377, 381, 205 Cal.Rptr. 880 (*Horowitz*), and *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938, 20 Cal.Rptr.2d 841.)

Thus, for example, a proceeding affects the effectiveness of an appeal, and is therefore stayed, if "the very purpose of the appeal is to avoid the need for that proceeding." (*Varian, supra*, 35 Cal.4th at 190, 106 P.3d 958.) Conversely, a proceeding does not affect the effectiveness of an appeal, and therefore is not stayed, "if the proceeding could or would have occurred ***regardless of the outcome of the appeal.***" (*Id.* at 191 (Emphasis added), citing *Horowitz, supra*, 159 Cal.App.3d at 382-383, 205 Cal.Rptr.880; *see also, City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 311, 149 Cal.Rptr.3d 491 ("In determining whether a proceeding is embraced in or affected by the appeal, we must consider the appeal and its possible outcomes in relation to the proceeding and its possible results. A postjudgment proceeding that is ancillary or collateral to the appeal is not stayed if the proceeding could or would have occurred regardless of the outcome of the appeal."); *Gridley v. Gridley* (2008) 166 Cal.App.4th 1562, 1587, 83 Cal.Rptr.3d 715 (same).) Even the authorities cited in Schnitt's Petition recognize that although the filing of a notice of appeal generally vests jurisdiction with the appellate court until the issuance of a remittitur, "[t]his rule is subject to certain exceptions." (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499, 103 Cal.Rptr.3d 889.)

There is no dispute here that Schnitt's anti-SLAPP motion seeks only to strike the "Moss Adams Claims", and does not target the "LiveIt Claims". (SWA 39.) It indisputably follows that proceedings relating to the "LiveIt Claims" will occur "regardless of the outcome of the appeal", and are therefore not stayed and remain within the trial court's jurisdiction. In this particular matter, the deposition of Technology Holdings, which relates to Schnitt's exclusion of Baral from the decision to sell IQ and negotiations for the sale of IQ, will occur regardless of whether the "Moss Adams Claims" are stricken from the SAC.

The deposition of Technology Holdings, and other proceedings that will occur regardless of the outcome of the appeal, are accordingly not "embraced" or "affected" by the appeal, and should be permitted to proceed. There is no need for a remittitur to issue before the trial court can conduct those proceedings. [4]

2. Schnitt Will Not Be Irreparably Harmed Absent A Stay.

It is impossible for Schnitt to establish irreparable harm absent a stay because, as noted above, the proceedings at issue will occur ***regardless of the outcome of the proceedings before this Court.*** In other words, even if this Court were to reverse the appellate and trial courts, and direct the trial court to grant Schnitt's anti-SLAPP motion by striking the "Moss Adams Claims" from the SAC, the parties will still engage in discovery pertaining to the "LiveIt Claims", including the deposition of Technology Holdings. Accordingly, Schnitt cannot possibly argue that he will be irreparably harmed if that discovery occurs now.

The anti-SLAPP motion specifically states that "[a]lthough the LiveIt Claims lack merit, they are not at issue here." (SWA 39.) Those claims, as noted above, relate to Schnitt's exclusion of Baral from the decision to sell IQ as well as negotiations leading to the sale of IQ. (WA 47, ¶40; WA 49, ¶46.) The deposition of Technology Holdings, the company that was intimately involved in the marketing, valuation, and sale of IQ, is central to those claims. Accordingly, the deposition of

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[4] Schnitt's Petition also references, in passing, the possibility that the writ issued by the appellate court remains in effect despite this Court's granting of review. However, it is well-established that the grant of review by this Court nullifies the decisions of the appellate court and divests it of jurisdiction over the matter. (*See, Farmers Ins. Exch. v. Super. Ct.* (2013) 218 Cal.App.4th 96, 109, 159 Cal.Rptr.3d 580 ("[I]t is a well-established principle of law that a grant of review by the Supreme Court nullifies the opinion and causes it to no longer exist."); *see also,* Cal. R. Ct. 8.1105(e).)

Technology Holdings and its principals will occur even if the parties were to completely ignore the "Moss Adams Claims".

Schnitt attempts to side-step this issue by manufacturing concerns that Baral is attempting to "conduct discovery into matters that are not the legitimate basis of a cognizable claim" and that permitting Baral to conduct discovery will somehow result in duplicative proceedings. The former assertion is clearly false insofar as there is no dispute that the "LiveIt Claims" will proceed, and therefore they are the basis of a cognizable claim. The latter assertion also fails. First, it is entirely unclear how obtaining discovery from Technology Holdings will result in duplicative proceedings because that discovery, as far as Baral knows, relates exclusively to the "LiveIt Claims". Second, even if Technology Holdings were to have some information relating to IQ's relationship with Moss Adams, that information is directly relevant to the "LiveIt Claims" insofar as it relates to Baral's membership interest in IQ and IQ's valuation and sale, and is therefore also discoverable as part of the "LiveIt Claims". (*See, Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168, 728 P.2d 1202 ("The privileges of Civil Code section 47 [the 'litigation privilege'], unlike evidentiary privileges which function by the exclusion of evidence (*see* Evid. Code § 900 *et seq.*), operate as limitations upon liability. Indeed, on brief reflection, it is quite clear that section 47(2) has never been interpreted to bar evidentiary use of every 'statement or publication' made in the course of a judicial proceeding . . . Thus, while section 47(2) bars certain tort causes of action which are predicated on a judicial statement or publication itself, the section does not create an evidentiary privilege for such statements.").) To be clear, Baral does not intend to depose Technology Holdings and/or its principals more than once, nor will duplicative proceedings be required to obtain the information Baral needs to prosecute his claims.

In short, the clear, underlying purpose of Schnitt's Petition is to simply delay discovery that Baral is entitled to obtain regardless of the outcome of the proceedings before this Court. There is no cognizable "irreparable harm" to Schnitt in permitting Baral to obtain this information sooner rather than later.

3. Baral Will Suffer Disproportionate Injury If A Stay Is Granted.

Baral, on the other hand, will suffer irreparable, disproportionate injury if this case is stayed. Delaying Baral's ability to obtain information relevant to his claims will serve only to increase the likelihood that witnesses will no longer remember relevant facts, documents will be unavailable, and/or witnesses will have moved or be unreachable.

This action has been pending since December 2011. Since then, in order to ensure that Baral's prosecution of his claims does not move forward, Schnitt has filed three special motions to strike, two appeals, a motion to stay the entire case, a motion to quash, and two Petitions for Writ of Supersedeas. Of those nine proceedings, Schnitt has substantively prevailed on only two, but has effectively stayed this case and prevented Baral from obtaining important third-party discovery for almost 3.75 years. Schnitt's strategy from the beginning has been to delay this case in order to frustrate Baral's prosecution of his claims, and the pending Petition is nothing more than a tool to continue that strategy.

In fact, Baral has already been severely prejudiced by the continued delays in this matter. Vern Snider, one of the principals of Technology Holdings who was intimately involved with the sale of IQ, is no longer employed by Technology Holdings and has apparently moved from New Jersey to Phoenix, Arizona. (SWA 3-5.) Thus far, Baral has been unable to locate Mr. Snider, and further delays could result in a loss of testimony from an important witness or, at a minimum, result in a diminished

recollection of critical events. Clearly, further delays will only increase the risk that important evidence will be lost.[5]

Baral's inability to obtain evidence relevant to his claims is, of course, substantially prejudicial. That prejudice is disproportionate to the relative lack of harm that Schnitt will suffer by permitting discovery to go forward, particularly in light of the fact that the discovery at issue will eventually occur regardless of the outcome of the proceedings before this Court.

4. The Pending Appeal Lacks Merit.

As discussed above, whether Schnitt will prevail on his appeal has no bearing on whether Baral is entitled to the discovery at issue, and therefore, Schnitt cannot establish irreparable harm. However, for purposes of determining whether Schnitt has satisfied the requirements for a writ of supersedeas, the Court should find that the pending appeal has no merit.

Schnitt's Petition glosses over this element that the petitioner is required to establish in order to obtain a writ of supersedeas. As will be discussed at-length in Baral's Answering Brief, the pending appeal lacks merit because the anti-SLAPP motion (1) was procedurally improper; (2) the SAC does not target protected activity, (3) the rule espoused by *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 15 Cal.Rptr.3d 215 and affirmed by *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 250 P.3d 1115 is in line with the legislative intent of the SLAPP statute and warrants denying Schnitt's anti-SLAPP motion, and (4) Baral has established a probability of prevailing on his claims. Moreover, Schnitt's Opening Brief reveals that he is now requesting review of his anti-SLAPP motion based on a "primary right" theory analysis, which was

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[5] To the extent Baral is able to locate Mr. Snider, Baral intends to depose him, as Mr. Snider likely obtained information during his time with Technology Holdings that is directly relevant to the "LiveIt Claims".

never raised prior to proceedings before this Court, and therefore cannot provide a basis for this Court to order that the trial court erroneously denied Schnitt's anti-SLAPP motion. (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1398-1399, 159 Cal.Rptr.3d 345; *see also,* Cal. R. Ct. 8.500(c) ("[T]he Supreme Court will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.").)

In light of the above, as well as Schnitt's complete failure to establish that the pending appeal has any merit, Schnitt's request for a stay should be denied.

V. THE REMEDY REQUESTED BY SCHNITT IS OVERBROAD

Schnitt is utilizing his Petition as an opportunity to request a stay that goes far beyond the scope of his appeal and this Court's review. Specifically, Schnitt is requesting a stay of ***all*** proceedings. The discovery that precipitated the Petition, however, relates solely to whether Baral is entitled to obtain discovery from Technology Holdings that is directly relevant to the "LiveIt Claims". To the extent this Court is inclined to grant Schnitt's request and stay this matter, the stay should be limited to matters that relate exclusively to the "Moss Adams Claims".

Schnitt will not face any irreparable harm by limiting the stay to the "Moss Adams Claims". The "LiveIt Claims" have never been the subject of Schnitt's anti-SLAPP motion, and therefore, those claims will survive regardless of the outcome of Schnitt's appeal and this Court's review. Thus, proceedings, including discovery, that are relevant to the "LiveIt Claims" can and must proceed regardless of the outcome of the appeal. [6]

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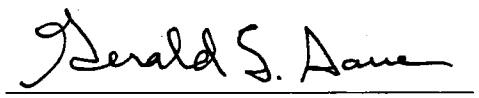
[6] Schnitt's request for sanctions is also superfluous and meritless. The grounds for issuance of sanctions require an "unreasonable violation" of the California Rules of Court. Schnitt has not identified any violation of those rules by Baral, let alone an "unreasonable" one. Baral is, of course, opposed to the issuance of sanctions. To the extent this Court is at all inclined to grant sanctions, Baral respectfully requests an opportunity to

VI. CONCLUSION

As demonstrated above, Schnitt will not suffer "irreparable harm" if the Petition is denied. To the extent the Court is inclined to impose a stay pending the outcome of the appeal, the stay should be narrowly tailored to only preclude proceedings relating exclusively to the "Moss Adams Claims", thereby minimizing any further disproportionate injury to Baral.

DATED: September 8, 2015

SAUER & WAGNER LLP



Gerald L. Sauer
Attorneys for Plaintiff and
Respondent Robert C. Baral

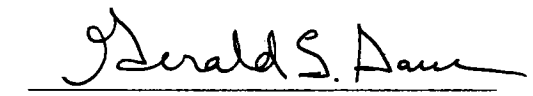
submit a supplemental letter brief as to any specific concerns the Court may have on that issue.

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 5784 words.

DATED: September 8, 2015

SAUER & WAGNER LLP



Gerald L. Sauer
Attorneys for Plaintiff and
Respondent Robert C. Baral

PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 1801 Century Park East, Suite 1150, Los Angeles, California 90067.

On September 8, 2015 I served the foregoing document(s) described as: **OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS** on the interested party(ies) in this action, enclosed in a sealed envelope, addressed as follows:

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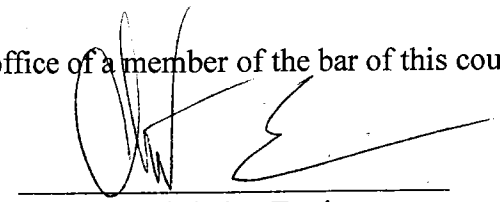
(X) By Overnite Express, I caused to be delivered such envelope via Golden State Overnite to the office(s) of the addressee(s) noted above.

Executed this 8th day of September, 2015 at Los Angeles, California.

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

(X) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Christian Erwin