Docket No. 22-55938

In the

United States Court of Appeals

For the

Ninth Circuit

JOHN C. VERNILE,

Petitioner-Appellee,

v.

PACIFICA FOUNDATION, INC.,
a California nonprofit corporation,

Respondent-Appellant.

Appeal from a Decision of the United States District Court for the Central District of California, No. 2:22-cv-02599-SVW-PVC · Honorable Stephen V. Wilson

APPELLANT'S OPENING BRIEF

ARTHUR Z. SCHWARTZ, ESQ.
ADVOCATES FOR JUSTICE, CHARTERED ATTORNEYS
225 Broadway, Suite 1902
New York, New York 10007
(212) 285-1400 Telephone
(212) 285-1410 Facsimile
aschwartz@advocatesny.com

Attorney for Appellant Pacifica Foundation, Inc.

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

RULE 26.1 DISCLOSURE STATEMENT

Appellant Pacifica Foundation, Inc. is a not-for-profit corporation and has no parent corporation or owner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Appellant is pursuing this appeal knowing that it a steep hill to climb. We know that all courts, Federal and State, abhor vacating arbitration awards, even ones where the arbitrator misapplies the law or misstates the facts.

But the underlying petition to vacate presents compelling issues. It involves a nonprofit radio network which fired its Interim Executive Director back in 2019 after three and a half months on the job. During his second week on the job he announced an intention to take Pacifica's New York City station, WBAI, off the air. Six weeks later he did just that, without Board of Directors notice or approval. He was stopped only when a New York Supreme Court judge ordered him to. 5-ER-818.[1] He demanded arbitration, as was his right—contesting his termination only—as was his right under his employment contract.

Fast forward to his arbitration. After a seven-day of hearing, which took no testimony about a "defamation claim,"[2] the parties wound up with an anomalous award. The Arbitrator found that the former ED, whose actions were big news in New York City, was fired *for good cause*—taking an extreme action without approval of the Board, and also found that he was not a "whistleblower" under the

---

[1] The District Court makes no mention of the preliminary injunction and ends the New York City litigation stay with an order issued by a Federal Judge who ultimately eschewed jurisdiction.

[2] The word "slander" did come up once, without any specificity.

California Labor Code. But then the Arbitrator held that Pacifica was vicariously liable because an employee in New York City, *six weeks after the firing*, stated, on the air, that Vernile was part of a "rogue group," who had staged a "coup" as part of a plan that had been "in the works for a long time." That was labeled "defamation per se," liability was set at $300,000, without proof of damages.

So what we have here is a non-profit foundation which had righteous reasons to fire Mr. Vernile, after a tumultuous three months on the job, being held liable for $300,000 in damages because of some statements the station he took off the air broadcast six weeks past termination. As the Court will read below, the issue upon which Pacifica was held liable was not covered by the arbitration clause in the underlying employment contract and "proof" was introduced only after the close of testimony. Further, the Arbitrator's reasoning was in manifest disregard of the law—namely, the First Amendment.

The Court below did not properly address the arbitrability of the defamation claim under California law, did not properly address the procedural unfairness of the addition of the post-discharge defamation claim and evidence after the close of testimony, and brushed aside the First Amendment issues raised by Appellant.

That is why we take on the tall task of seeking to vacate and arbitration award.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291, since the appeal arises from a final decision of the District Court.

STATEMENT OF ISSUES PRESENTED

1. Whether under California Law, a contractual arbitration clause in an employment contract allowing arbitration "arising out of [or concerning]

2. Employees' employment or the termination of employment" is broad enough to require arbitration of a defamation clause arising six weeks after termination.

3. Whether consideration of evidence about a claim which was not introduced or addressed during the testimonial portion of an arbitration hearing, and refusal to reopen testimony, amounted to arbitral misconduct under California Law.

4. Whether in a defamation case involving a limited public figure, where *N.Y. Times v. Sullivan* animus must be proved, an arbitrator acted in manifest disregard of the defendant's First Amendment rights by holding that general animus towards the defendant Foundation was sufficient to prove reckless disregard for the truth the employee who made the statements at issue, without any findings about that individual.

STANDARD OF REVIEW

This Court must engage in *de novo* review of a grant of summary judgment. *Hesketh v. Total Renal Care*, ____ F.3d ___, 2012 WL 16832818 (9th Cir. Nov. 9,

2022). Similarly, this Court must engage in *de novo* review of district court decisions about the arbitrability of claims. *Brennan v. Opus Bank*, 796 F.3d 1125, 1128 (9th Cir. 2015); *Momet v. Mastro*, 652 F.3d 982, 986 (9th Cir. 2011).

Summary judgment is appropriate where the record, taken in the light most favorable to the opposing party, shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[3]

The principal argument of Appellant is that the arbitration agreement (Exhibits 2 and 3) (3-ER-381–387) was addressed only to matters concerning or arising out of the termination of Appellant's employment, and that his November 15, 2019 demand for arbitration (Exhibit 8) (3-ER-441–442) properly only addressed his termination from employment. The secondary, and irrefutable argument is addressed to the arbitrator's decision to allow recorded evidence into the record, after the testimonial hearing had closed. These recordings were introduced to prove post-termination defamation. The Arbitrator acted over Appellant's objection, and its request that the hearing be reopened. The Appellee

[3] We concede that this is rather complex when both sides are moving for summary judgment, particularly in an Arbitration Act case.

cannot make a showing that either of these assertions is inaccurate, even though they will argue that the word "defamation" (as opposed to a single particularized instance) came up several times during the course of two-and-one-half yearlong arbitration process. Nor can the Appellee show any "reckless disregard" findings by the Arbitrator on the part of Ms. Perry, the person who allegedly defamed Appellee, because Ms. Perry's actions were never explored via testimony or document.

STATEMENT OF THE CASE

Statement of Facts

Respondent-Appellant Pacifica Foundation, a chain of five nonprofit, listener-supported radio stations, hired Petitioner John Vernile to serve a six-month stint as its Interim Executive Director beginning August 1, 2019. 3-ER-384. Barely two months later, without approval of the Board of Directors, he fired the entire staff of Pacifica's New York City radio station, WBAI, took all local programming off the air and substituted programming from elsewhere—which he chose. His action was a major public event—the then Mayor of New York City Tweeted about the loss; the current Mayor stood on the steps of City Hall denouncing the move; the New York Times ran an article about the "death of WBAI." His action spawned litigation by the affected staff and station members[4]—which was successful. 3-ER-399–428.

[4] Pacifica is a membership corporation, with leadership elected by members and member involvement in governance.

It also led to Vernile's suspension by the Board on October 20, 2019, and then his termination, on November 14, 2019, a mere three and one-half months after he was hired. Animosity did run high among the staff at WBAI he had fired: about 12 full-time employees and 150 volunteer program producers.

Mr. Vernile had signed two documents, one called a Draft Agreement (3-ER-381) and one an Offer of Employment (3-ER-384). Both had the following language:

> Arbitration. In the unlikely event of a dispute between Pacifica and the Employee arising out of Employee employment or the termination of employment: Pacifica and Employee agree to submit our dispute to final and binding arbitration with the American Arbitration Association (AAA) or similar provider. Employer and Employee will select a mutually agreeable arbitrator. The arbitration will be held in accordance with AAA's then applicable rules for the resolution of employment disputes, as the exclusive remedy for such controversy, claim or dispute, unless another forum or Arbitrator or Association is agreed to by both parties. A copy of the current AAA employment arbitration rules is available at https://www.adr.org/. …
>
> By agreeing to arbitration, Employee and Pacifica are agreeing that there will be no court or jury trial of disputes between parties concerning Employee's employment or the termination of Employee employment. …. In addition. Pacifica and Employee agree that Pacifica and Employee shall have the right to seek judicial relief in the form of injunctive and/or other equitable relief under the California Arbitration Act, Code of Civil Procedure section 1281.8… .

The day after Petitioner was fired, on November 15, 2019 he sent in a letter demanding arbitration. In it he stated: "I am **protesting my termination** as being in violation of the terms of my employment agreement and in violation of federal and

California state laws. Pursuant to the terms of my employment contract I am invoking/requesting arbitration with the American Arbitration Association in the state of California." (Emphasis added.) See Ex. 8 (3-ER-943–944). Not word about a tort, defamation or any other. The next day a lawyer appeared on his behalf, and insisted that "California law be applied to any litigation concerning [Vernile's] employment. See Ex. 10 (3-ER-445–452). Not a word about "defamation" or any other tort.

Six months later his lawyer got around to filing the form which spurs the American Association to appoint an arbitrator. On that form (called "Demand for Arbitration") he stated that the claim involved ""Breach of contract," "wrongful termination" and "defamation and intentional infliction of emotional distress" based on the facts set forth in the attachment, but nowhere in his lengthy description of the claim did he discuss a defamatory statement, most certainly not one post-dating his employment. (See Exhibit 11) (3-ER-453–457). The logical assumption was that he was alleging that his termination was "defamatory and an intentional infliction of emotional distress,"

One year and seven months later, after discovery was completed, Vernile's lawyer filed a "Pre-Hearing Brief." (Exhibit 14) (3-ER-468–490). At no point in the 22-page brief did Petitioner's counsel mention the word "defamation." The closest he came was an assertion on page 15 (3-ER-23) of the Brief that "[on or about

October 12, 2019] Ms. Aarons, and other persons opposing the WBAI layoffs started spreading false claims and accusations against Claimant regarding the actions taken in New York," and an assertion on page 16 (3-ER-24) that on the same date Vernile had filed a complaint with Pacifica's Human Resources Director and its Board Chair, that he had been "subject to acts of intimidation, slander and harassment in retaliation for his attempt to fulfill his legal, contractual, fiduciary and professional obligations." There was no mention of the words "slander," "defamation" or false statements" on any date after October 12, 2019. The only damages sought were "damages he suffered from his wrongful termination ($720,000 in salary and $210,000 in benefits)," "punitive damages and attorney's fees in amounts to be established at the hearing." Not a word about damages flowing from defamation or intentional infliction of emotional distress.

Petitioner Vernile, several weeks later, presented his case over the first five days of a seven-day arbitration hearing. He submitted to the District Court all of the testimony (all of 11 minutes' worth) which *he says* show that he litigated a defamation claim. (See Vernile Exhibit E) (2-ER-160–179). But only two of those snippets involved testimony during his direct case, one from a former Board member Sabrina Jacobs, who said before and after Venile's termination there was "a lot of slander, libel, mendacity, lot of ---just a bunch of lies"; and a second snippet from Jacobs where she said "the slander started after Grace [Aaron] was removed as Chair

[which occurred in mid-September 2019]… it was her; it was Alex Steinberg… saying that I [not Vernile] was coming in trying to take over WBAI… just ugly, ugly…untruths, just mendacious crap …like "Oh we need to protect WBAI, blah, blah, blah." That was the full extent of the testimony. No names, no dates.

On rebuttal Respondent Vernile put on one witness, former National Board Secretary Bill Crosier, who stated that the grounds for termination in the termination letter are false and expose [Pacifica to] more liability and litigation." Hence Appellant's assumption that the termination was the sum and substance of the defamation claim.

The arbitration hearing ended, and the arbitrator offered to allow either side to put in documents which hadn't been introduced during the hearing (4-ER-601–602). Appellee wanted to put in a series of 11 taped records, each from two to seven hours in length, with no testimony to ascertain when they were taped, who was speaking on the recordings or in what capacity, in order to "prove defamation." Respondent vigorously objected (4-ER-603) to adding this material after the testimony had closed, with no statement of what on the tapes (which had dates through February 2021) was defamatory, and no opportunity to put on testimony about any statements being put into evidence. The arbitrator allowed the tapes in, without foundation, refused to reopen the hearing, and gave Respondent only the opportunity, in a Rebuttal Brief, to respond. (4-ER-620).

The award itself read like an indictment of Pacifica, reciting every smarmy criticism Petitioner Vernile had at length, but then found that he was not fired because he was a whistleblower. The Arbitrator held:

> Pacifica has met its burden of establishing by clear and convincing evidence that it terminated Vernile's employment because the PNB believed that he had *exceeded his authority* by discharging WBAI staff and shutting down its local programming without full PNB approval, and that further, that he exceeded his authority by not reversing that decision until ordered to do so by Justice Crane. Pacifica has established that it would have terminated Vernile's employment even if he had never complained about other legal violations.

Exhibit 34 at Page 32 (5-ER-53) (emphasis added).

But the arbitrator went on to find that in a broadcast on WBAI on December 19, 2019, where a tape of a November 7, 2019 rally was played, a Pacifica employee, Linda Perry, stated that Vernile was hired to carry out a plan to sell WBAI for "millions and millions of dollars to benefit the other stations" and that he was part of a "rogue group" who had staged a "coup." Further, the Arbitrator held that Perry stated that the plan had been "in the works for a long time, to dump WBAI."

The Arbitrator found that these comments were "defamation per se" (ignoring what defamation per se is, since members of the general public listening to the radio would have no idea what the comments made on Perry's broadcast referred to), and found that *Pacifica was vicariously liable* for what Perry said because she was an employee, and because the tort was "willful and malicious" (5-ER-756)). The

Arbitrator then acknowledged that Vernile was at least a "limited public figure," and that constitutional "actual malice" had to be proven by Vernile (5-ER-756). She had to figure out how Vernile did that, given that there was no testimony by either side about the statements, the broadcasts, or Perry's knowledge of what occurred So this is how the arbitrator addressed the need to show "actual malice":

> Vernile has met this burden. He has shown by clear and convincing evidence that Perry, **along with other supporters of WBAI**, including those on the PNB, were **colossally hostile** towards Vernile. As just one example, when Vernile first began working at Pacifica, **Aaron** told him that she was 100% behind him, but that if he hurt Pacifica she "would destroy him." Apparently that was the attempt. Vernile was denounced in public and called "vermin." He was called a "rat" and a "crook" on the air. **Although these sophomoric epitaphs do not constitute slander, as explained *supra*, they nonetheless reveal the maliciousness** Vernile faced; so much so that he feared for his and his family's safety. In this highly charged and vitriolic environment, **it is no wonder** that Perry (and others) **did not investigate claims they made on air to determine their truth or falsity**. They were in an echo chamber, repeating falsehoods as received wisdom, when in fact the falsehoods were simply that."

Award at Pages 37-38 (5-ER-757) (emphasis added).

The Arbitrator did not explain the connection between Perry and Aaron, or what she knew about Perry's investigation.

As a coup de grace, given that the arbitrator had found the broadcast comments to be "slander per se," and having made the observation that,

> What broadcaster would want to hire someone who had acted as a "rogue" and staged a "coup?" Who would want to hire

> someone who surreptitiously sought to sell off a station's assets? Or who told the station's landlady to find a new tenant, potentially leaving the station without a home from which to air programming?

without asking what broadcaster would want to hire someone who the Arbitrator found took a station off the air, *fired all of its employees, and did so without having been given authority by the Foundation's Board*, to great public awareness. The Arbitrator stated that **no damages need to be proved**, and arbitrarily awarded Vernile $300,000 in damages.

What Happened At WBAI?

According to the testimony of the General Manager of Pacifica's General Manager for its Bay Area station, KPFA, Quincy McCoy, at the arbitration, approximately two weeks into Petitioner's term as Interim Executive Director, Petitioner met with the McCoy and Grace Aaron (the Board Chair) in Berkeley, CA. During that meeting Petitioner announced that he wanted to create a Sirius XM station called Pacifica Across America, and that he had decided to run WBAI utilizing that programming as its feed until WBAI stabilized financially. Apparently, by the time Vernile started his new job he had a drastic plan in mind—a plan which he implemented eight weeks later without permission from the Board of Directors, or even discussion with the Board.

On September 30, 2019, Petitioner issued an internal memo (dated September 25, 2019), see Exhibit 4, 3-ER-388–395, warning that the financial

situation of WBAI was so bad that Pacifica was on the verge of imminent collapse. Not once in that memo did Petitioner talk about firing the WBAI General Manager (something he had no power to do himself), about firing staff, or about implementing his Pacifica Across America solution, replacing all local programming in New York. The record in the arbitration also showed that that Petitioner discussed his plans for WBAI with Pacifica's then General Counsel, Ford Greene ("Greene"), who advised Petitioner that it was imperative, under the law, that he get the National Board to approve his WBAI plan. Greene added that at minimum, he should at least poll the Board to ascertain its support—despite the Bylaws having no provision for polling the Board. (See Exhibit 5) (3-ER-396–398).

On October 7, 2019 Petitioner and a few others went to WBAI to shut the station down. All but one member of the staff (Linda Perry) was asked to leave. The program feed was changed to Pacifica Across America, the General Manager and all paid staff were "terminated," the union was told that all union staff were "terminated," and all volunteer staff (about 150 producers) were told that they too were being fired.

That evening, the WBAI Local Station Board Chair and a number of members, filed suit and were able to have an emergency motion for a temporary restraining order ("TRO") heard by New York State Supreme Court Judge Frank Nervo. The TRO was granted, directing that all staff be put back on payroll and that WBAI be

put back on the air, and its studio returned to the NYC staff. Vernile did not comply with the TRO and hired counsel (at a cost up front of over $160,000) and fought the case. On October 10, 2019, the New York Appellate Division modified the TRO and required only that the staff be kept on payroll. (They were restored to the payroll, and were actually paid by WBAI's cash reserves, which, contrary to Petitioner's September 30 warning, were sufficient to pay all staff through the next five weeks.)

WBAI's extensive listener base, and its 60-year history as a pioneer in talk radio, Petitioner's action prompted extensive coverage in the press and support from the public. The then New York City Mayor, Bill de Blasio, tweeted regrets about the loss of the station, and Brooklyn Borough President Eric Adams (who is now New York's Mayor) led a rally on the steps of City Hall denouncing Petitioner's actions.

A month of full-scale litigation in the New York and Federal court system followed. Eventually the case was assigned to New York State Supreme Court Justice Melissa Crane, who, on November 7, 2019, issued a Preliminary Injunction ordering Pacifica to restore WBAI to the status it held before October 7, 2019. 5-ER-818–847.

While the New York litigation was pending, the Pacifica National Board held a series of meetings. One of them was a Special Meeting conducted on October 20, 2019. A majority of the Board attended, and they again voted, unanimously, to order Petitioner to reverse what he had done at WBAI, and to restore local control over

WBAI's programing. It also voted to suspend Petitioner. Petitioner, who controlled access to WBAI's broadcast apparatus and antenna, ignored this express direction from the National Board, continued to hold himself out as Pacifica's Interim Executive Director, and continued to air Pacifica Across America on WBAI.

In her November 6, 2019 ruling, and her November 7, 2019 Order, Judge Crane found that the October 20, 2019 Board meeting was properly called, and that its directions to Mr. Vernile had to be followed. Given the vote from the October 20th Board meeting, Judge Crane reinstated Judge Nervo's original TRO, restoring local control over programming, reinstatement of all employees and staff, and non-interference with WBAI's operations by Pacifica. 5-ER-818–847. The station went back on the air on November 7, 2019.

The National Board, at its next meeting, on November 14, 2019, voted unanimously to terminate Petitioner's employment. The minority faction which had been supportive of Vernile, did not attend.

The Proceedings Below

Appellee filed a Petition to Confirm (5-ER-897–953), which was responded to with a Cross-Petition to Vacate (5-ER-769–895).

After both sides filed Motions to Dismiss, it was agreed to file simultaneous Motions for Summary Judgment. Appellee's Motion is in the record from 2-ER-111 to 2-ER-268; Appellant's is at 3-ER-273 to 5-ER-767. Appellee's Reply papers are

at 2-ER-23 to 2-ER-56, and Appellant's Reply is set forth from 2-ER-57 to 2-ER-107.

Without hearing argument, the District Court issued a decision on September 13, 2022 (1-ER-4–18) and entered Judgment on September 16, 2022 (2-ER-2–3).

The Court then held that the California Arbitration Act governed the dispute.[5]

On the question of arbitrability, the Court held that since the parties had incorporated the AAA Employment Arbitration Rules, the Arbitrator had "sole authority to construe the meaning of the arbitration contract." The Court then stated that the "Arbitrator **apparently** found that the defamation claims 'arose from' Vernile's employment with Pacifica and that it was properly before the Arbitrator." (Emphasis added.) The Court made this finding even though the Arbitrator did not discuss arbitrability once in her Award. The Court printed the language in the arbitration agreement which stated that it was to be "construed broadly" but omitted that it was followed by references to employment claims like race, sex, and age discrimination and the California Labor Code.

Next the District Court found no prejudicial misconduct by stating that Appellant had "access to the main evidence of defamation: tape recordings from

[5] The Court made a similar statement on page 13 of its decision (1-ER-15), where he stated that the Arbitrator "**evidently** viewed the defamation claim within the ambit of the parties' arbitration clause." (Emphasis added.)

Pacifica's own radio station," and were "on notice both from the arbitration demand and from subsequent directives from Arbitrator Welch."[6]

The Court then held that Pacifica had "opportunities to present evidence on the defamation claim," even though it was introduced with specificity after the close of testimony.

With regard to the First Amendment argument and the Court's holding about the failure to address "actual malice," the Court held that "Defamatory statements are not protected under the First Amendment."[7]

The District Court's Decision

The District Court began with a review of the Facts as drawn from the arbitration award, but skipped over what occurred between October 15, 2019 and Vernile's firing. What occurred was:

a. The Federal Court concluded that it had no jurisdiction over the WBAI lawsuit;

b. A Board meeting on October 20, 2019 where Mr. Vernile was instructed to cease his station takeover in New York City; and

---

[6] Which directives directed to submit a brief on the "defamation" issue, something Vernile's attorney did not address and waived.

[7] The Court then held that Pacifica did not show "bias" on the part of the Arbitrator. Appellant did not present such an allegation.

c. A Decision and Order by a New York State Supreme Court Judge finding that the October 13, 2019 Board meeting approving the takeover was unlawful, holding that the October 20, 2019 meeting was lawful, and ordering Mr. Vernile to restore WBAI (3-ER-399–440).

The Court found that it had jurisdiction under 28 U.S.C. § 1332 (diversity and that the California Arbitration Act and not Federal Law applied).

Tucked away in Footnote 1 the Court addressed the defamation claim, stating that "Because of the forum's election clause's narrow construct and the defamation award issue *did not* 'arise under the contract.' It arose from Vernile's termination." The Court continued, "More specifically, a legal claim for defamation could exist independently of the rights and obligations under the contract … Vernile now seeks to confirm that award, which is a statutory—not contract—action under the CAA."[8]

SUMMARY OF ARGUMENT

THE COUNTER-PETITION SHOULD BE GRANTED AND THE AWARD REGARDING DEFAMATION VACATED UNDER THE CALIFORNIA ARBITRATION ACT

The California Arbitration Act (Code Civ. Proc., § 1280 *et seq.*), the substantive law which the parties agreed would be applied, provides limited grounds

[8] This flawed explanation for why the defamation clause could be heard in arbitration underlies the District Court's most basic error.

for judicial review of an arbitration award. Under the Act, courts are authorized to vacate an award if

> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was corruption in any of the arbitrators.
>
> (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
>
> (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
>
> (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(Code Civ. Proc., § 1286.2, subd. (a); 9 U.S.C. § 10(a).)

Appellant asserts that the Award before this Court, to the extent that it addressed the "defamation" issue, should be vacated under Section (3)(4) and (5).

– Arbitrator Welch exceeded her authority in that the arbitration agreement was only to be applicable to a dispute between Pacifica and Employee" "arising out of" or "concerning" "Employee's employment and termination of employment."

– Arbitrator Welch acted improperly by allowing "litigation" of the defamation issue even though it was not included in Plaintiff Vernicle's initial demand for arbitration, was not discussed and was essentially waived in Plaintiff

Vernicle's pre-hearing brief, was not addressed through witnesses during the hearing or documents introduced during the hearing, and was not properly added to the claim under American Arbitration Association Rules.

– Arbitrator Welch acted improperly by not permitting the testimonial record to be reopened once she ruled that the audio files could be introduced to "prove' defamation after the testimony had closed.

– Arbitrator Welch also exceeded her powers by violating Pacifica's right of free speech.

ARGUMENT

POINT I

BY ISSUING AN AWARD OF DEFAMATION DAMAGES FOR A STATEMENT BY A NON-MANAGERIAL EMPLOYEE WHICH DID NOT "ARISE OUT OF PETITIONER'S EMPLOYMENT, OR THE TERMINATION OF HIS EMPLOYMENT" THE ARBITRATOR ACTED IN EXCESS OF HER AUTHORITY

Under California Law Arbitrators may not issue an unauthorized remedy or grant an award on an unsubmitted issue. The California Supreme Court has stated: "In cases involving private arbitration, that "[t]he scope of arbitration is … a matter of agreement between the parties" *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* 35 Cal.3d 312, 323, 197 Cal.Rptr. 581, 673 P.2d 251 (1983), and '[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.'" *O'Malley v. Petroleum Maintenance Co.*

48 Cal.2d 107, 110 (1957), quoting *Pac. Fire etc. Bureau v. Bookbinders' Union* (1952) 115 Cal.App.2d 111, 114, 251 P.2d 694 (1952); *Moncharsh v. Heily & Blase*, 10 Cal.Rptr.2d 183, 186, 3 Cal.4th 1, 8–9 (1992).

In *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 36 Cal.Rptr.2d 581, 885 P.2d 994 (1994), the Court held that 'the deference due an arbitrator's decision on the merits of the controversy… is not unrestricted, and indeed, is limited by the agreement to arbitrate. (*Id*., at 375. The Court "also recognized that courts retain the authority to overturn arbitration awards 'as beyond the arbitrator's powers, whether for an unauthorized remedy or [a] decision on an unsubmitted issue." *Id.*, and see *Board of Education v. Round Valley Teachers Assn*., 52 Cal.Rptr.2d 115, 118, 13 Cal.4th 269, 275 (1996) ("The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate.") "To confirm an arbitration award in excess of the powers granted by an arbitration agreement would destroy the very purpose of arbitration and be contrary to the sound policy of encouraging the settlement of private disputes by the voluntary agreement of the parties…. Under these principles, a party may successfully challenge an arbitration award if the relief granted was in violation of 'specific restrictions' (1) 'in the arbitration agreement'; (2) 'the submission' of the claim to the arbitrator; **or** (3) 'the rules of arbitration.'" *Emerald Aero, LLC v. Kaplan,* 215 Cal.Rptr.3d 5, 17, 9 Cal.App.5th 1125,1140, 1139–40, 9 Cal.App.5th 78, 1139–40 (Cal.App. 4 Dist.,

2017). *Buckhorn v St. Jude Heritage Medical*, 121 Cal. App. 4th 1401 (Ct. of Appeal, 4th District), which the District Court cites is not to the contrary. The clause in that case provided for arbitration "in the event a dispute arises between the parties concerning the enforcement or the interpretation of any provisions of this agreement." The court held that the use of the word "any" could encompass a tort. The language in this case was not as broad; most importantly there was no use of the word "any." One of the more recent cases on this question is *Ahern v. Asset Management Consultants, Inc.*, 289 Cal.Rptr.3d 773, 74 Cal.App.5th 675 (Cal.App. 2 Dist. 2022) where the Court stated:

> "[T]he decision as to whether a contractual arbitration clause covers a particular dispute rests substantially on whether the clause in question is 'broad' or 'narrow.'" (*Id.* at p. 186, 203 Cal.Rptr.3d 555; accord, *Howard v. Goldbloom* (2018) 30 Cal.App.5th 659, 663-664, 241 Cal.Rptr.3d 743.) A broad clause includes language that requires arbitration of "*any claim* arising from or *related* to" the agreement. (*Rice*, at p. 186, 203 Cal.Rptr.3d 555; see, e.g., *Yuen v. Superior Court* (2004) 121 Cal.App.4th 1133, 1138, 18 Cal.Rptr.3d 127 [arbitration clause stating all disputes relating to contract shall be submitted to arbitration was "broad"]; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684, 681 & fn. 2, 99 Cal.Rptr.2d 809 [agreement to arbitrate "'*any* problem or dispute' that arose under or concerned the terms of the [service agreement]" is "clear," "plain" and "very broad," giving rise to a presumption parties intended to arbitrate claims including tort claims relating to the agreement].)
>
> A narrow clause, on the other hand, typically includes language that requires arbitration of "a claim, dispute, or controversy '**arising from'** or '**arising out of' an agreement,** i.e., excluding language such as 'relating to this agreement' or

> 'in connection with this agreement.'" (*Rice v. Downs*, *supra*, 248 Cal.App.4th at p. 186, 203 Cal.Rptr.3d 555.) Narrow arbitration clauses are generally interpreted "to be more limited in scope" (*Howard v. Goldbloom*, *supra*, 30 Cal.App.5th at p. 664, 241 Cal.Rptr.3d 743; *Rice*, at p. 186, 203 Cal.Rptr.3d 555) and "apply only to disputes regarding the interpretation and performance of the agreement" (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1052, 239 Cal.Rptr.3d 679; accord, *Howard*, at p. 664, 241 Cal.Rptr.3d 743).

Ahern v. Asset Management Consultants, Inc., 289 Cal.Rptr.3d 773, 786, 74, Cal.App.5th 675, 689–90 (Cal.App. 2 Dist., 2022) (emphasis added). The clause before the Court is an "arising from" type of clause, and should be interpreted narrowly. The scope of the arbitration agreement is discussed in two different phrases in what both sides agree was Petitioner's simultaneous contracts. In one paragraph it is described as "**a dispute between Pacifica and the Employee arising out of Employee employment or the termination of employment**," and several sentences later it is described as "**disputes between parties concerning Employee's employment or the termination of Employee employment."**

Contrary to the District Court's assertion the Arbitrator never discusses the scope of her authority, nor how the defamation claim was a "dispute concerning Employee's employment of the termination of his employment." Despite Appellant's objections, the Award is silent on this issue.

Given this clear direction from the California Courts, the Award, in its consideration of an issue not included in the arbitration clause (since it involved

activity and an issue which did not "concern[] Plaintiff's employment or the termination of his employment," and which involved an alleged tort which occurred after his employment ended, not addressed in pre-hearing briefs, and not addressed in testimony before the arbitrator, followed by denial of a request to reopen the record, states a very straightforward, factual and legally indefensible claim for vacatur. As a matter of law Arbitrator Welch exceeded her powers under the arbitration agreement when she allowed litigation of a claim for post-discharge arbitration.

The Arbitrator's consideration of that claim took her way beyond the authority she had under the arbitration agreement, as did the relief that she granted, entitling Appellant to summary judgment on its vacatur claim under California Arbitration Act Section 1280(4).

Respondent Did Not Waive the Scope of the Arbitration Agreement

There is no question that once Petitioner tried to litigate the post-termination defamation issue, through the post-hearing introduction of post-termination tape recordings, Pacifica counsel vigorously objected, both on due process grounds, and because any such claim had been waived.

None of what Pacifica's counsel did during the arbitration had the effect of expanding the scope of the arbitration clause.

> If the Court finds that the alleged violations were beyond the contemplation of the submission, the arbitrator certainly had no

> authority to hear them. For the same reason, defendant's contention that the plaintiff *impliedly recognized* the arbitrator's 'authority' is not helpful. Nor is it accurate. The attorney representing Delta at the hearing before Arbitrator Myers made clear his position that the only issue to be arbitrated was whether Weaver was discharged for just cause. This Court will not say that plaintiff 'recognized' the arbitrator's authority merely because it chose to contest the procedural propriety of arbitrating the alleged violations, and then took the added precaution of arguing those issues on the merits once it appeared the arbitrator had decided to include them in his consideration.

Delta Lines, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers, Local 85, 409 F.Supp. 873, 875–76 (ND Cal. 1976) (emphasis added).

There was no waiver in the proceeding of the limitations of the arbitration clause.

POINT II

THE PROCEEDING WAS MARKED BY ARBITRAL MISCONDUCT

A. Allowing the Defamation Claim to Be Litigated After the Close of Testimony Was a Gross Violation of Appellant's Due Process Rights

Petitioner Vernile's pre-arbitration submissions, whether set out in Exhibit 8 3-ER-441–442, his initial arbitration demand, or in his initial filing with AAA (Exhibit 11, 3-ER-453–457), or in his pre-Arbitration Brief (Exhibit 14) (3-ER-468–490) never addressed a claim that he was "defamed" *in broadcasts after his termination*. Had he done so, the claim would have been the subject of an objection. By adding this claim in the context of a discussion about which additional exhibits

each party wanted to add to the record after the close of testimony, violated AAA Rule 4, which requires advance written notice of an amended claim. 4-ER-501–537.

Any assertion that this claim was being made all along because the word "defamation" appeared in the submission to the AAA, or because "defamation" was listed as an issue to be addressed by the Arbitrator, is not evidence that post-termination, and in fact, post-arbitration demand "defamation," (the first demand was made on November 15, 2019—the defamation the arbitrator found occurred on December 19, 2019) was an expected or agreed upon subject of the arbitration. It was not added as per Rule 4, and the arbitrator violated the rules governing the proceeding by adding it in.

A similar circumstance was addressed by the California Court of Appeals in *Emerald Aero, LLC v. Kaplan,* 215 Cal.Rptr.3d 5, 17–19, 9 Cal.App.5th 1125, 1140–42, 9 Cal.App.5th, 1140–42 (Cal.App. 4 Dist., 2017)

> "The AAA rules were expressly incorporated into the parties' arbitration agreement and thus contractually limited the arbitrator's authority. (AAA rule R-1(a).) The AAA rules provide the "arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." (AAA rule R-47(a).) But the AAA rules also restrict the available remedies to those of which the parties had reasonable notice. Specifically, the AAA rules require a party to specify in his or her initial filing "the relief sought and the amount involved," and require the parties to provide written notice of any changes to this claim information. (AAA rule 4(e)(iv).) …

Both subdivisions of AAA rule R-6 require a party to notify the arbitrator and the opposing party of a changed or increased claim, but subdivision (b) contains stricter requirements—requiring at least 14 days' notice and an arbitrator's consent before a new or different claim may be submitted. In this case, plaintiffs changed their claim by adding a punitive damages request less than 24 hours before the arbitration hearing. We need not resolve whether this claim was a "new or different claim" under subdivision (b) or merely an "increase" in the claim amount under subdivision (a). Under both subdivisions of AAA rule R-6, the rule requires written notice before a party could materially add to his or her arbitration claim, and an arbitrator has no authority to award amounts for a new punitive damages claim without this notice. (See *Alexander Securities, supra*, 17 Cal.App.4th at p. 1095, 21 Cal.Rptr.2d 826 [rejecting challenge to punitive damages arbitration award where "[a]ppellant does not claim that it did not have notice of respondent's claim for punitive damages .."]; see also *Mave, supra*, 219 Cal.App.4th at p. 1434, 162 Cal.Rptr.3d 671 [emphasizing the fact of prior notice of requested damage item]; see also *Totem Marine Tug & Barge v. North American Towing* (5th Cir. 1979) 607 F.2d 649, 651-652 (*Totem Marine*) [arbitration award vacated where arbitrator awarded "an unrequested item of damages"].)

…Reasonably understood, the notice required under AAA rule 6 means providing the opposing party with the time and opportunity to review and understand the contents of the notice, and the opportunity to respond to the notice. Under the circumstances here, attaching a brief to an e-mail less than 24 hours before the merits hearing did not constitute notice calculated to apprise the opposing party of a new and substantially increased monetary claim, nor did it provide the opposing party with a fair opportunity to assert a challenge to the new punitive damage claim. Plaintiffs did not provide any information in the cover e-mail regarding the substantially increased value of the claim (more than 30 times the initial Arbitration Claim amount and $20 million more than the amount claimed in the complaint), nor did the brief clearly highlight this information…

The decision in *Emerald Aero* also provides guidance about how this Court should address the failure to reopen the testimonial record, denying Respondent's request once Arbitrator ruled that she would allow the recordings of alleged defamatory material in:

> "The arbitration process had other procedural shortcomings that also call into question the fairness of the damages award. Courts have long recognized the fundamental requirement that arbitrations be conducted in a fair and neutral manner. (*Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1108, 206 Cal.Rptr.3d 805 ["the procedural flexibility of the arbitral forum does not override participants' fundamental, common law right to a fair proceeding"].) An arbitrator exceeds his powers by conducting an unfair proceeding. (*Hoso, supra*, 190 Cal.App.4th at p. 889, 118 Cal.Rptr.3d 594.) Thus, "arbitration procedures that interfere with a party's right to a fair hearing are reviewable on appeal." (*Id.* at p. 888, 118 Cal.Rptr.3d 594; see *Moncharsh, supra*, 3 Cal.4th at p. 12, 10 Cal.Rptr.2d 183, 832 P.2d 899; *Royal Alliance, supra*, at pp. 1105, 1108, 1110, 206 Cal.Rptr.3d 805.) Notice and an opportunity to be heard are essential ingredients to a fair hearing, and these principles apply to arbitration hearings. (See *Smith v. Campbell & Facciolla, Inc.* (1962) 202 Cal.App.2d 134, 135, 20 Cal.Rptr. 606; *Totem Marine, supra*, 607 F.2d at p. 651.) " '[A]rbitration procedures violate the common law right to a fair hearing .. "when the applicable procedures essentially preclude the possibility of a fair hearing." [Citation.]'" (*Hoso, supra*, at pp. 888-889, 118 Cal.Rptr.3d 594; see also *Haworth, supra*, 50 Cal.4th at p. 395, 112 Cal.Rptr.3d 853, 235 P.3d 152 (dis. opn. of Werdegar, J.) [although arbitration finality is critical, "[a]n equally vital principle" is that the arbitration system must have "sufficient integrity that parties can be confident they will receive a fair hearing and an impartial decision from the arbitrator"].)

Emerald Aero, LLC v. Kaplan, 215 Cal.Rptr.3d 5, 17–19, 9 Cal.App.5th 1125, 1140–42, 9 Cal.App.5th 78, 1140–42 (Cal.App. 4 Dist., 2017).

The facts here are on all fours with what occurred in *Emerald Aero*; the grant of Summary Judgment on this issue alone was an error.

B. The Arbitrator Did Not Require a Pleading of the "Defamation" Claim Which Comported with Due Process, and Which Violated Respondent's Fundamental Rights

The manner in which a "defamation" claim is pled, is also an element of due process; it is not just a pleading violation.

The California Court of Appeal's decision in *McGarry v. University of San Diego*, 154 Cal.App.4th 97 (4th District Div. 1 2007), a case involving a fired high school football coach, is instructive about how a defamation claim is supposed to be presented in order to comport with due process. The Court there discussed some of the very issues at play here: (a) the defamation was not properly pled; (b) what was said was a matter of opinion; (c) the expression involved a public figure, and required a showing of First Amendment "malice" ("reckless disregard for the truth"); and (d) the defamation claim violates California's anti SLAPP law.

The principles the Court laid out are pretty clear:

a. On pleading: A claim for defamation requires proof of a false and unprivileged publication that exposes the plaintiff "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to

injure him in his occupation." (Civ. Code, § 45.) A statement is defamatory when it tends "directly to injure [a person] in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, trade, profession, or business that has a natural tendency to lessen its profits[.]" (Civ. Code, § 46, subd. 3.) Statements that contain such a charge directly, and without the need for explanatory matter, are libelous per se. (Civ. Code, § 45a.) A statement can also be libelous per se if it contains a charge by implication from the language employed by the speaker and a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter. *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 548–550, 343 P.2d 36 (1959) However, if the listener would not recognize the defamatory meaning without "knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons" (*Barnes-Hind v. Superior Court*, 181 Cal.App.3d 377, 387, 226 Cal.Rptr. 354 (1986), the matter is deemed defamatory per quod and requires pleading and proof of special damages. (Ibid.)

b. On opinion: "The sine qua non of recovery for defamation … is the existence of falsehood." Citing *Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974). Because the statement must contain a provable falsehood, courts distinguish between

statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. Citing *Baker v. Los Angeles Herald Examiner*, 42 Cal.3d 254, 260, 228 Cal.Rptr. 206, 721 P.2d 87 (1986). Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected…Use of 'hyperbolic, informal' *ComputerXpress, Inc. v. Jackson*, 93 Cal.App.4th 993, 1013,113 Cal.Rptr.2d 625 (2001) ('crude, [or] ungrammatical' language, satirical tone, [or] vituperative, 'juvenile name-calling' provide support for the conclusion that offensive comments were nonactionable opinion. *Bently Reserve v Papaliolios,* 218 Cal.App.4th 418, 429-430; 160 Cal.Rptr.3d 423,429-430 (Ct of Appeal, First District, Division 1 2013). Similarly, overly vague statements *ComputerXpress, supra*, at p. 1013, 113 Cal.Rptr.2d 625, and 'generalized' comments … 'lack[ing] any specificity as to the time or place' of alleged conduct may be a 'further signal to the reader there is no factual basis for the accusations.' *Bently Reserve, supra*, at p. 431, 160 Cal.Rptr.3d 423, citing *Chaker v. Mateo*, 209 Cal.App.4th 1138, 1149-1150, 147 Cal.Rptr.3d 496 (2012)(claims the plaintiff "pick[ed] up streetwalkers and homeless drug addicts and [was] a deadbeat dad" were nonactionable).

c. On Constitutional malice: "A threshold determination in a defamation action is whether the plaintiff is a 'public figure.'" The courts have "defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' Citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his [or her] reputation only to the extent that the allegedly defamatory communication relates to his role [or her] in a public controversy." *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 253–254, 208 Cal.Rptr. 137, 690 P.2d 610 (1984).

When the plaintiff is a public figure, as Appellee here was, he or she may not recover defamation damages merely by showing the defamatory statement was false. Instead, the plaintiff must also show the speaker made the objectionable statement with malice in its constitutional sense, "that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Reader's Digest Assn. v. Superior Court, supra*, 37 Cal.3d at p. 256, 208 Cal.Rptr. 137, 690 P.2d 610) The test is "a subjective test, under which the defendant's actual belief concerning the

truthfulness of the publication is the crucial issue. … This test directs attention to the 'defendant's attitude toward the truth or falsity of the material published [,] … [not] the defendant's attitude toward the plaintiff.' *Widener v. Pacific Gas & Electric Co*., (1977) 75 Cal.App.3d 415, 434, 142 Cal.Rptr. 304, disapproved on other grounds by *McCoy v. Hearst Corp*. 42 Cal.3d 835, 846, fn. 9, 231 Cal.Rptr. 518, 727 P.2d 711(1986)"; *Reader's Digest*, at p. 257, 208 Cal.Rptr. at 137.

The reckless disregard test is not a negligence test measured by whether a reasonably prudent person would have published, or would have investigated before publishing, the defamatory statement. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). Instead, the evidence must "permit the conclusion that the defendant actually had a 'high degree of awareness of … probable falsity.' As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989). Instead, to support a finding of actual malice, the failure to investigate must fairly be characterized as demonstrating the speaker purposefully avoided the truth or deliberately decided not to acquire knowledge of facts that might confirm the probable falsity of charges. *Antonovich v. Superior Court*, 234 Cal.App.3d 1041, 1049, 285 Cal.Rptr. 863 (1991). The requisite malice must be shown by clear and convincing evidence. This standard requires that the evidence of actual knowledge of the falsity or reckless

disregard for its falsity must be of such a character "as to command the unhesitating assent of every reasonable mind." *Rosenaur v. Scherer*, 88 Cal.App.4th 260, 274, 105 Cal.Rptr.2d 674 (2001). None of this was required by the Arbitrator in this case.

None of this was pled, much less set out in testimony. In fact, there was no testimony which Appellant's counsel could have explored or cross examined. All there was was a tape recording. The record which the Arbitrator relied on in drawing her conclusions about the speaker she identified, Linda Perry, is explained by describing generalities about other people in Pacifica's hostility towards Mr. Vernile. Here is what she held:

> Vernile has met this burden. He has shown by clear and convincing evidence that Perry, along with other supporters of WBAI, including those on the PNB, were **colossally hostile** towards Vernile. As just one example, when Vernile first began working at Pacifica, Aaron told him that she was 100% behind him, but that if he hurt Pacifica she "would destroy him." Apparently that was the attempt. Vernile was denounced in public and called "vermin." He was called a "rat" and a "crook" on the air. **Although these sophomoric epitaphs do not constitute slander, as explained *supra*, they nonetheless reveal the maliciousness** Vernile faced; so much so that he feared for his and his family's safety. In this highly charged and vitriolic environment, **it is no wonder that Perry** (and others) did not investigate claims they made on air to determine their truth or falsity. They were in an echo chamber, repeating falsehoods as received wisdom, when in fact the falsehoods were simply that."

(Emphasis added.)

The denial of that opportunity to explore the p[roof at the arbitration hearing is a both a legal issue and a due process issue.

The U.S. Supreme Court has made it clear that under the First Amendment the Arbitrator's reasoning was not enough substantively. The actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. See *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967) (*per curiam*); *Henry v. Collins,* 380 U.S. 356 (1965) (*per curiam*). And although the concept of "reckless disregard" "cannot be fully encompassed in one infallible definition," *St. Amant v. Thompson,* 390 U.S. 727, 730, the Court has made clear that the defendant must have made the false publication with a "high degree of awareness of … probable falsity," *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964), or must have "entertained serious doubts as to the truth of his publication," *St. Amant, supra,* 390 U.S. at 731; *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666–67 (1989). And in the very case that the arbitrator cites, the California Supreme Court **did not** bless Arbitrator Welch's cursory approach to "actual malice. "As we noted earlier, the *New York Times* decision superimposed a constitutional standard on the common law of libel. If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence (see *New York Times Co. v. Sullivan,* 376 U.S. 254, 285-286, that the libelous statement was made

with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

There was no effort to prove that here, and no opportunity to challenge that proof. This lack of opportunity has to be seen as part of the Arbitrator's misconduct, and requires that the Award be vacated.

POINT III

THE ARBITRATOR EXCEEDED HER POWERS BY ISSUING AN AWARD THAT VIOLATED RESPONDENT'S UNWAIVABLE STATUTORY RIGHTS AND EXPLICIT LEGISLATIVE EXPRESSION OF PUBLIC POLICY IN MANIFEST DISREGARD OF THE LAW

Under California law, which this Court is required to apply, "Arbitrators may exceed their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy." *Richey v. AutoNation, Inc.*, 60 Cal. 4t 909, 916, 182 Cal.Rptr.3d 644 (2015); *Board of Education v. Round Valley Teachers Assn.,* 13 Cal.4th 269, 272–277, 52 Cal.Rptr.2d 115, 914 P.2d 193 (1996); *California Dept. of Human Resources v. Service Employees Internat. Union, Local 1000*, 209 Cal.App.4th 1420, 1434, 148 Cal.Rptr.3d 57 (2012). "Vacating an arbitration award based on public policy or a statutory right requires an explicit legislative expression of a public policy violated by the award or a conflict with a statutory scheme." *SunLine Transit Agency v. Amalgamated Transit Union, Local 1277*, 189 Cal.App.4th 292, 303, 116

Cal.Rptr.3d 839) (4th District Div. 2 2010)," *Ling v. P.F. Chang's China Bistro, Inc*., 200 Cal.Rptr.3d 230, 237, 245 Cal.App.4th 1242, 1252 (Cal.App. 6 Dist., 2016); and see *Armendariz v. Foundation Health Psychcare Services, Inc*., 99 Cal.Rptr.2d 745, 757–58, 24 Cal.4th 83, 100–01; 6 P.3d 669, 680–81 (2000), *Armendariz v. Foundation Health Psychcare Services, Inc*., 99 Cal.Rptr.2d 745, 757–58, 24 Cal.4th 83, 100–01 (2000).

The free speech right set forth in the U.S. and California Constitutions are inviolable rights. But they are rights which may only be illegally abrogated by the government. Of course, one of those state entities are the Courts, and the Courts have developed elaborate mechanisms, including the Federal and State "public figure" requirements before a court can be used to penalize speech. In California, and many other states, "anti-SLAPP suit" statutes have been enacted to not only to protect speech, but to penalize those who use litigation to attack the exercise of free speech, particularly speech on a matter of public intertest express in the media.

In California, "[T]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech. From that fact the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights." *Equilon*

Enterprises v. Consumer Cause, Inc., 124 Cal.Rptr.2d 507, 514, 29 Cal.4th 53, 61 (2002).

The Anti-SLAPP Suit provisions of the California Code provide as follows:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
>
> (b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

§ 425.16. Anti-SLAPP motion, CA Civ Pro § 425.16.

The very nature of what the Arbitrator allowed is the essence of SLAPP litigation. Petitioner Vernile was involved in unlawfully taking a radio station off the air, and firing all of its staff, and substituting his own programming. He did so without any authority; only muscle. He continued to do that as the issue played out in the press, and caught the attention, and chagrin of the NYC Mayor, and Eric Adams, then the Brooklyn Borough President (who is now Mayor). The matter was litigated in the courts and that decision was reported in the press, and wound up with

the radio station being restored to the air, with the formally fired staff talking about what happened on the air, for many months.

Petitioner Vernile took about 14 hours of radio broadcasts addressed to what had occurred at WBAI, stretching out for two years after his termination, where hosts and guests (including Eric Adams) discussed the events surrounding Vernile's takeover of WBAI in October 2019, and expressed their views, arguments, and opinions. Vernile invited the Arbitrator to parse those recordings for expressions of *opinion* which Vernile—only in his lawyer's post-hearing brief—characterized as inaccurate, and asked for damages. He didn't present testimony, explain why the statements made on the air were inaccurate, or even describe the context. The Arbitrator asserts that the description of what Vernile did at WBAI, as being "in excess of his authority," furthering the views of a "significant minority on the Pacifica Board," but objected to someone on the radio subsequently describing that as a "coup." She didn't see the word "coup" as an expression of opinion, but one of inaccurate fact, and she found the actual malice required by State and Federal Law to have been established because the speaker was part of a staff which was "angry." There is no question, however, that what occurred here was "abuse of the judicial process" in order to "chill speech." Respondent has made out a case, as a matter of law, that the Arbitrator's Award, in this respect, was issued in excess of her authority.

CONCLUSION

Based on the record, and the applicable law, the Appeal should be granted and the arbitration award should be vacated.

Dated: December 6, 2022

/s/ Arthur Z. Schwartz
Arthur Z. Schwartz
ADVOCATES FOR JUSTICE,
CHARTERED ATTORNEYS
Attorneys for Appellant
225 Broadway, Suite 1902
New York, NY 10007
Tel.: 917-923-8136
Fax: 212-285-1410
aschwartz@afjlaw.com

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 22-55938

I am the attorney or self-represented party.

This brief contains 9,803 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[XX] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Arthur Z. Schwartz **Date** December 6, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 22-55938

The undersigned attorney or self-represented party states the following:

[XX] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature /s/ Arthur Z. Schwartz **Date** December 6, 2022

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirstin E. Largent