UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-1862-GW(PJWx)	Date	September 19, 2019
Title	*Optimum Productions et al v. Home Box Office, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Terri A. Hourigan	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Bryan J. Freedman Jonathan P. Steinsapir Howard Weitzman Zachary T. Elsea	Daniel M. Petrocelli Drew E. Breuder Patrick McNally

PROCEEDINGS: HOME BOX OFFICE, INC.'S MOTION TO STRIKE PLAINTIFFS' PETITION (CAL. CODE CIV. PROC. § 425.16) [46]

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, Defendant's Motion is TAKEN UNDER SUBMISSION. Court to issue ruling.

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Initials of Preparer JG

Optimum Productions et al v. Home Box Office et al; Case No. 2:19-cv-01862-GW-(PJWx)
Tentative Ruling on Motion to Strike Plaintiffs' Petition

I. Background

Plaintiffs Optimum Productions and the Estate filed a petition to compel arbitration against HBO[1] in Los Angeles County Superior Court. *See generally* Petition, Docket No. 1-1. The Petition seeks to arbitrate claims for breach of contract (disparagement clause) and breach of the covenant of good faith and fair dealing. *See generally id.* HBO removed the action claiming diversity jurisdiction. *See* Notice of Removal, Docket No. 1, ¶ 4. Plaintiffs then moved this Court to remand the action to the Superior Court or, alternatively, to compel arbitration. *See* Motion to Remand, Docket No. 17; Arbitration Motion, Docket No. 18.

On May 23, 2019, the Court denied Plaintiffs' Motion to Remand and denied in part Plaintiffs' Arbitration Motion. *See* Minutes in Chambers – Ruling on Plaintiffs' Motion to Remand, Docket No. 28; Minutes of Plaintiffs' Motion to Remand ("Partial Ruling"), Docket No. 27. Specifically, the Court denied Plaintiffs' Arbitration Motion to the extent it argued that the Agreement delegated the arbitrability question to the arbitrator. *See* Partial Ruling at 12; Minutes in Chambers – Ruling on Plaintiffs' Motion to Remand, Docket No. 28 (making the Partial Ruling final and emphasizing that the Court would decide arbitrability). The Court reserved judgment on whether Plaintiffs' claims were arbitrable and ordered supplemental briefing from the parties on the matter. *See* Minutes in Chambers – Ruling on Plaintiffs' Motion to Remand, Docket No. 28. After considering the supplemental briefing on the Motion to Compel, the Court issued a tentative ruling. *See* Minutes of Plaintiffs' Motion to Compel ("Tentative Ruling"), Docket No. 40. In the Tentative Ruling, the Court generally indicated that Plaintiffs' claims were arbitrable, but that the Court still had questions relating to Defendants' First Amendment challenge. *See generally id.* At the hearing, the parties and the Court discussed the matter and Defendants stated that they would file an anti-SLAPP motion.[2] Defendants so filed. *See* Motion to Strike Plaintiffs' Petition ("Motion"), Docket No. 46. Plaintiffs opposed. *See* Opposition to Motion ("Opp'n"), Docket No.

[1] Unless otherwise noted, the defined terms herein have the same meaning as those in the Court's Partial and Tentative Rulings.

[2] The Court will not repeat the factual background here. The parties should refer to the description in the Partial Ruling. To the extent different facts are relevant, the Court includes those in the body of this ruling.

48. And Defendants filed a reply. *See* Reply in Support of Motion ("Reply"), Docket No. 49.[3]

II. Legal Standard

California's anti-SLAPP procedure – which applies, at least in part, in federal court – is designed to prevent "cause[s] of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech." Cal. Code Civ. Proc. § 425.16(b)(1). In a motion to strike under section 425.16, the court engages in a two-part analysis: (1) the court decides whether the moving party has made a threshold showing that the challenged causes of action arise from a protected activity; and (2) if such a showing has been made, the burden then shifts to the opposing party to demonstrate a probability of prevailing on the merits of their claims. *See Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67 (2002).

As the foregoing suggests, the moving party bears the initial burden of establishing a *prima facie* showing that the opposing party's cause of action arises from the defendant's free speech or petition activity. *See Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013); *Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir. 2007). "A defendant meets [its burden under section 425.16(b)(1)] by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)…." *City of Cotati v. Cashman*, 29 Cal.4th 69, 78 (2002) (quotation marks omitted). The statute includes four categories of protected conduct:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
>
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or

[3] After Defendants' Reply, Plaintiffs filed an *Ex Parte* Application for Leave to file a Sur-Reply in Opposition to the Motion ("Application"). *See* Docket No. 50. They argue that there is good cause to allow the sur-reply because Defendants stated at the hearing on the Tentative Ruling that they would respond to Plaintiffs' preemption argument in an anti-SLAPP motion, but then Defendants failed to raise the issue in their Motion. *Id.* at 2. Thus, Defendants only stated their position on preemption in Reply, meaning that Plaintiffs had no opportunity to respond. *Id.* at 2-3. Defendants opposed the Application, stating that the issue of federal preemption was raised in Plaintiff's Opposition as a defense to the Motion. *See id.* Ex. 1; Opposition re: Application, Docket No. 51. The Court granted the Application and also permitted Defendants to file a response. *See* Order Granting the Application, Docket No. 52. Thus, the Court accepted Plaintiffs' "Sur-Reply," *see* Docket No. 50-2, and Defendants' "Response," *see* Docket No. 53.

> (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Code Civ. Proc. § 425.16(e).

The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to its asserted liability – and whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten*, 29 Cal.4th 82, 92 (2002). Thus, the critical question is whether the plaintiff's claim is based on an act or acts in furtherance of the right of petition or free speech. *See City of Cotati,* 29 Cal.4th at 78. Whether the anti-SLAPP statute applies is determined by the "principal thrust or gravamen" of the plaintiff's claim. *See Martinez v. Metabolife Int'l, Inc.,* 113 Cal.App.4th 181, 188 (2003); Weil & Brown, Calif. Prac. Guide: Civ. Proc. Before Trial ("Weil & Brown") (The Rutter Group 2019), § 7:876, at 7(II)-36.

Where the moving party satisfies its *prima facie* burden at the first step, "[t]he burden then shifts to the plaintiff . . . to establish a reasonable probability that it will prevail on its claim in order for that claim to survive dismissal." *Makaeff*, 715 F.3d at 261. At the second step of the anti-SLAPP process, a plaintiff must demonstrate that the complaint is "both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2009); *see also Makaeff*, 715 F.3d at 261. The required probability of prevailing "need not be high." *Hilton*, 599 F.3d at 908. However, "a defendant's anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for the claims or 'when no evidence of sufficient substantiality exists to support a judgment for the plaintiff.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001).

III. Discussion

The parties frame the relevant issues in this Motion quite differently. Assuming that the anti-SLAPP law applies to petitions to compel arbitration, Defendants jump headlong into the anti-SLAPP two-part process and argue that the Court must analyze the claims underlying the Plaintiffs' Motion to Compel; *i.e.*, the claims for breach of contract (disparagement clause) and breach of the covenant of good faith and fair dealing. *See* Motion at 8-10. Plaintiffs meanwhile assert that the anti-SLAPP law cannot apply to the Petition because the Petition is governed by the *Federal* Arbitration Act ("FAA"), the FAA preempts the anti-SLAPP law, or California courts

have held under California law that the anti-SLAPP law does not apply to petitions to compel arbitration. *See* Opp'n at 3-10. Alternatively, Plaintiffs argue that the Petition survives the two-step process because the Court should analyze the Petition itself – and Defendants' refusal to submit to arbitration – rather than the underlying breach claims as the challenged conduct. *See* Opp'n at 12-19.[4]

A. Is the Anti-SLAPP Law Applicable?

1. Claims Based on Federal Law?

Federal courts in the Ninth Circuit apply California's anti-SLAPP statute to state-law but not to federal-law claims. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010) ("[A] federal court can only entertain anti-SLAPP special motions to strike in connection with state law claims.").[5] Recognizing this distinction, Plaintiffs first argue that their Petition sounds in federal law because the only question it raises to the Court is whether the underlying claims are arbitrable pursuant to the FAA. *See* Opp'n at 3-6. Defendants contend that the underlying claims in the Petition are simple state law causes of action, Motion at 8-10, that Plaintiffs initially asserted their action under the California Arbitration Act, and that the FAA does not create a private right of action or provide an independent basis for federal question jurisdiction, *see* Reply at 2-3.

First of all, there is no question that the FAA governs whether the Petition's claims are arbitrable.[6] Section 2 of the FAA provides that "[a] written provision in. . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such

[4] Complicating matters, as Plaintiffs point out, Plaintiffs' breach claims are not causes of action *per se*. In other words, Plaintiffs are not asking this Court to consider whether there was a breach of the Agreement or a breach of the covenant of good faith and fair dealing; rather, they assert "cause[s] of action to be arbitrated." *See* Petition at 21 (Docket 1-1 at 22 of 54); *see also* Opp'n at 13 n.5. As the Plaintiffs put it "the *only* relief sought in this Court is an order compelling arbitration." *Id.* at 1.

[5] Some Ninth Circuit judges disagree with the court's precedent regarding the applicability of anti-SLAPP laws in federal court. *See Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1183-86 (9th Cir. 2016) (Kozinski, J., concurring) (arguing that anti-SLAPP provisions conflict with the Federal Rules of Civil Procedure); *id.* at 1186 (Gould, J., concurring); *Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing en banc); *see also Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1356 (11th Cir. 2018) (discussing circuit split on issue and holding that anti-SLAPP statutes do not apply in federal court); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (holding that anti-SLAPP law does not apply in federal court). For what it is worth, the Court would agree with those Ninth Circuit judges that have objected to the application of anti-SLAPP motions in federal courts. Nevertheless, this Court must and will apply the established law of the circuit unless and until such time that it is overruled.

[6] On the other hand, whether a valid arbitration agreement exists is made by reference to ordinary state law contract principles. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Neither party suggests that the Agreement is not a "contract evidencing a transaction involving commerce," and thus it falls within the FAA's purview. Further, while parties may bargain for the application of non-federal arbitrability law, *see Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989), the parties did not clearly and unmistakably provide for non-federal arbitration law in the Agreement, *see Cape Flattery Ltd. v. Titan Maritime*, 647 F.3d 914, 921 (9th Cir. 2011) (holding that a general choice of law provision does not override presumption of federal arbitrability law under FAA). That Plaintiffs initially sought to compel arbitration pursuant to the California Arbitration Act seems irrelevant as to whether the FAA would in fact apply.

While it is true that the FAA does not create jurisdiction or establish a private cause of action, *see Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984), there is no doubt that federal arbitrability law dictates the answer to the primary question Plaintiffs raised to the Court: whether to compel Defendants to arbitrate. In short, the Court agrees that the only question before the Court right now – whether it must grant the Petition – sounds under the FAA. And,

> By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§ 3, 4. Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

Thus, the arbitrability inquiry is a federal one, but it does not follow that a petition to compel arbitration is necessarily a federal claim like those discussed in Ninth Circuit cases applying anti-SLAPP to the state causes of action. In short, the Court is not entirely satisfied that the federal nature of the inquiry ends the anti-SLAPP analysis. As such, the Court will address Plaintiffs' preemption argument.

2. Does the FAA Preempt the Anti-SLAPP Law?

Plaintiffs next argue that the FAA preempts the anti-SLAPP law in cases seeking to compel

arbitration under the FAA because it acts as an obstacle to enforcing arbitration agreements governed by the FAA. *See* Opp'n at 6-9. Defendants assert that the anti-SLAPP law is compatible with the FAA, that state laws are only preempted if they specifically target arbitration agreements, and that a California Court of Appeal has rejected Plaintiffs' preemption argument. *See* Reply at 3-6.

As the Supreme Court has explained,

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. *See Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA). But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Volt, 489 U.S. at 477.

The Supreme Court further discussed FAA preemption at length in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339-46 (2010). In setting forth its preemption analysis, the Supreme Court stated that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 341 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). It further noted that "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Id.* Finally, the Supreme Court explained that FAA "§ 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.[7] Of course, "[t]he

[7] Defendants citation to the quote, "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" for the premise that such defenses are preempted is somewhat imprecise. *See* Reply at 4-5 (quoting *Concepcion*, 563 U.S. at 339). The full quote from *Concepcion* is: "The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion,* 563 U.S. at 339 (quoting *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996)). Thus, the Supreme Court was discussing when arbitration agreements could be invalidated; not what types of laws § 2 preempts.

'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' " *Id.* at 344 (quoting *Volt*, 489 U.S. at 478).

An argument can be made that applying California's anti-SLAPP law to Plaintiffs' Petition "stands as an obstacle" to "Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 478. Allowing anti-SLAPP motions against petitions to compel arbitration would add a preliminary step to the federal court's analysis regarding the gateway issues of arbitrability. Such a step counteracts the FAA's intent to enforce arbitration agreements by their terms and provide the parties the efficiencies that arbitration allows. In this regard, the Court would briefly provide an overview of the relevant Supreme Court law on FAA preemption, and a description of the California Court of Appeal case that addressed the issue in the anti-SLAPP context.

In *Volt*, the Supreme Court held that the FAA did not preempt a California statute that allowed a court to stay an arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by the agreement. *Volt*, 489 U.S. at 470. In reaching that conclusion, the Supreme Court assumed that the parties had incorporated California arbitration rules into their agreement. *See id.* at 476. The Court then reasoned that it would be "inimical to the FAA's primary purpose" for the Court to disregard the parties' selection of California arbitration procedure. *Id.* at 479. Thus, the Court concluded that there was no conflict between the California statute the parties' incorporated and the FAA. *Id.*

Conversely, the Supreme Court has held that state laws that require judicial resolution of certain issues must fall in light of the FAA. *See Perry v. Thomas*, 482 U.S. 483, 490-92 (1987); *Southland Corp.*, 465 U.S. at 11-12. In essence, the Supreme Court has stated the obvious in concluding that States' attempts to require a judicial forum for certain disputes conflicts with the federal policy of enforcing private arbitration agreements. *Perry*, 482 U.S. at 490-91.

Likewise, in *Preston* the Supreme Court extended the reasoning in *Perry* and *Southland* to proceedings in front of a state administrative body. Specifically, the Supreme Court held that the FAA preempted a California law providing that the Labor Commissioner must first exercise "exclusive jurisdiction" to determine whether a contract was invalid under the California Talent Agencies Act ("TAA"), Cal. Lab. Code §§ 1700, *et seq.*, before a claim arising under such a contract could be arbitrated. *Preston*, 552 U.S. at 354-56. The Court explained:

> Procedural prescriptions of the TAA thus conflict with the FAA's

> dispute resolution regime in two basic respects: First, the TAA, in § 1700.44(a), grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate, *see Buckeye*, 546 U.S., at 446, 126 S.Ct. 1204; second, the TAA, in § 1700.45, imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally, *see Doctor's Associates, Inc.*, 517 U.S., at 687, 116 S.Ct. 1652.

Id. at 356.[8] Therefore, the Supreme Court concluded that applying the TAA to arbitration agreements conflicted with the FAA's mandate by thwarting the will of the parties and extinguishing the efficiencies of bargained-for arbitration. *Id.* at 357-59.

In *Concepcion*, the Supreme Court held that the FAA preempted California's "*Discover Bank*" rule, which provided that class action waivers in arbitration agreements in consumer contracts of adhesion were unconscionable and, therefore, unenforceable. *Id.* at 340 (citing *Discover Bank v. Superior Court*, 36 Cal.4th 148, 162-63 (2005)). The Court reasoned that even though the *Discover Bank* rule relied on unconscionability – a ground that exists in law or equity to revoke a contract – it in effect allowed "any party to a consumer contract to demand [classwide arbitration] *ex post.*" *Concepcion* 563 U.S. at 346. In reaching its decision the Supreme Court examined the purposes of the FAA and considered whether requiring the availability of classwide arbitration frustrated those goals. *See id.* at 344-52. Delineating the purposes of the FAA, the Court explained "that the FAA was designed to promote arbitration," *id.* at 346, and recognized the "two goals" of enforcing private arbitration agreements by their terms and "allow[ing] for efficient, streamlined procedures," *id.* at 344. Then, examining the nature of classwide arbitration, the Supreme Court articulated that classwide arbitration increased the formality of arbitration proceedings and that "[a]rbitration is poorly suited to the higher stakes of class litigation." In sum, the Supreme Court concluded that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.[9]

As should be obvious from the previous discussion, the Supreme Court – and, to the Court's and the parties' knowledge, no federal court – has ever considered whether an anti-SLAPP motion

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[8] Section 1700.45 of the TAA provided that notwithstanding the Labor Commissioner's exclusive jurisdiction, arbitration agreements were valid if, among other conditions, the Labor Commissioner had the right to attend all arbitration hearings. *See* Cal. Labor Code § 1700.45(d).

[9] That is not to say that parties are precluded from bargaining for the availability of classwide arbitration. *See id.* at 351.

may be brought against a petition to compel arbitration governed by the FAA. Although not decided in federal court, the closest case is *Moss Bros. Toy, Inc. v. Ruiz*, in which the California Court of appeal granted an anti-SLAPP motion against Plaintiff's first amended complaint and, in an unpublished portion of the opinion, concluded that the FAA does not preempt California's anti-SLAPP law. *See Moss Bros.*, No. E067240, at *22 (Cal. Ct. App. Sept. 20, 2018) *available at* https://www.courts.ca.gov/opinions/archive/E067240.PDF. *Moss Bros.* has a long and convoluted procedural history that the Court describes in some detail to provide context. Ruiz (the defendant in *Moss Bros.*) had previously sued Moss Bros.' agent, MBAG, for employment-related claims. *See id.* at *2. In the first suit, MBAG twice sought to compel Ruiz to arbitrate his individual claims. *Id.* at *3-*6. After MBAG filed its second motion to compel arbitration, Moss Bros. filed an application to intervene in the action. *Id.* at *6. The court denied the application to intervene and MBAG's second motion to compel arbitration. *Id.* at *6-*7. Thereafter, Moss Bros. filed a new lawsuit asserting that Ruiz breached the arbitration agreements. *Id.* at *7. Moss Bros. also filed a motion to compel arbitration. *Id.* *8. The court sustained a demurrer as to the initial complaint and denied the motion to compel. *Id.* After the demurrer, Moss Bros. filed its first amended complaint, which asserted the breach causes of action and sought specific performance of the arbitration agreements. *Id.* at *8-*9. In response, Ruiz moved pursuant to California's anti-SLAPP law to strike the entire first amended complaint. *Id.* at *9. The trial court granted the motion, *id.*, and the Court of Appeal affirmed, *id.* at *22.

In an unpublished section of its opinion, the Court of Appeal rejected Moss Bros.' argument that the FAA preempted the anti-SLAPP law to the extent the California statute could "be applied to an action to compel performance of an arbitration agreement." *Id.* The Court of Appeal relied on the same quote from *Concepcion* that this Court finds somewhat imprecise. *Id.* ("Section 2 of the FAA preempts 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " (quoting *Concepcion*, 563 U.S. at 339)); *see also supra* at 6-7 n.7. The Court of Appeal then reasoned that "Code of Civil Procedure section 425.16 does not provide a defense to arbitration, and does not derive its meaning from the fact an arbitration agreement may be in issue. Rather, the anti-SLAPP statute applies to all claims that are based on acts in furtherance of protected rights of petition and free speech." *Id.* Further, the Court commented that the anti-SLAPP statute did not prevent Moss Bros. from seeking to enforce the arbitration agreements because "the statute does not bar a plaintiff from

litigating an action that arises out of the defendant's free speech" as long as the suit "possess[es] minimal merit." *Id.* at *23 (internal quotation marks and citations omitted).

This Court would decline to rely on *Moss Bros.* for several reasons. First, the opinion is unpublished and thus only valuable to the extent it is persuasive. *See Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 (9th Cir. 2003). Next, the opinion fails to confront the intricacies of the matter and lacks a thorough examination of the issue. In other words, its reasoning is bare and conclusory. Third, as alluded to above, *Moss Bros.* takes the quote from *Concepcion* out of context. Relying solely on that quote does not support the weight of the conclusion. In *Concepcion*, the Supreme Court was merely noting that generally applicable contract defenses could invalidate an arbitration, while arbitration-specific contract defenses could not. *Concepcion*, 563 U.S. at 339. Lastly, *Moss Bros.*' final justification for finding preemption contradicts Supreme Court precedent on the matter. The *Moss Bros.* court reasoned that Moss Bros. could still attempt to enforce arbitration if it survived an anti-SLAPP motion. *Moss Bros.*, No. E067240, at *23. However, in *Preston* the Supreme Court rejected a similar argument. *Preston*, 552 U.S. at 357-59. There, the party arguing against preemption asserted that the TAA merely postponed arbitration and was therefore compatible with the FAA. *Id.* at 357. The Court concluded that even if arbitration were still eventually available, any delay would frustrate one of the primary goals of arbitration – "to achieve streamlined proceedings and expeditious results." *Id.* (internal quotation marks and citations omitted). Thus, the Supreme Court held that the FAA preempted the TAA as applied to contracts with arbitration agreements. *Id.* at 359. This Court would reject *Moss Bros.*' justification for the same reason.

Therefore, in the absence of persuasive direct precedent, the Court must read the Supreme Court's tea leaves to render a decision. The Court is inclined to conclude that the FAA preempts California's anti-SLAPP law as applied to Plaintiffs' Petition. *Concepcion* and *Preston*, while factually distinguishable, are instructive and convince this Court that the anti-SLAPP law cannot stand in the way of parties' agreements to arbitrate disputes. Allowing an anti-SLAPP inquiry to proceed before the court engages in the arbitrability analysis adds an extra step to the process that Congress, in enacting the FAA, did not envision. That analysis would frustrate the FAA's dual goals of enforcing arbitration agreements by their terms and allowing for streamlined dispute resolution. And, as the *Concepcion* opinion remarks, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at

351. The Court recognizes that a preemption analysis may not be a perfect fit for the issues presented in this novel motion, but would find that it is the most analogous framework to capture the concerns between respecting California's anti-SLAPP law and the FAA.

Moreover, while *Concepcion* addressed a state rule that specifically targeted arbitration, Defendants' argument that the FAA only preempts such rules is unconvincing. *See* Reply at 4-6. In short, the Court does not believe that the Supreme Court has ever articulated such a hard and fast rule. While laws that specifically target arbitration are suspect and may be susceptible to a preemption challenge, generally applicable laws can raise concerns as well. In fact, *Concepcion* and *Volt* framed the preemption rule in broader terms, noting that nothing in the FAA "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343; *see also Volt*, 489 U.S. at 477 (employing the "obstacle" language). By using language about laws being an "obstacle" to the goals of the FAA, the Supreme Court suggested that state law hindrances must bow before the federal law on arbitrability. *Concepcion* itself seemed to recognize that the FAA may preempt generally applicable laws when applied in a way that hinders the FAA. *Concepcion*, 563 U.S. at 341 ("[T]he [preemption] inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."). Further, the TAA – addressed in *Preston* – only partially targeted arbitration. *Preston*, 552 U.S. at 355-56. Section 1700.44(a) of the TAA set forth that parties to a controversy under that law must refer the dispute to the Labor Commissioner. *Id.* at 355. In *Preston* the issue involved an arbitration agreement, but presumably, that provision from the TAA would also have affected the parties' right to litigate a dispute. Thus, granting the Labor Commissioner exclusive jurisdiction was not solely an attack on arbitration, and was more generally applicable. Still, because of the TAA's *effect* on arbitration agreements, the Supreme Court held that the FAA overruled the state law in those situations. *Id.* at 356.

Here, it is unquestionable that California's anti-SLAPP law is generally applicable and does not target arbitration. But, as evidenced by the instant dispute, it may affect and frustrate the goals of the FAA. To demonstrate the Court's point, it imagines a cleaner scenario where two contracting parties entered into an agreement with a broad arbitration provision requiring the arbitration of any dispute between the parties. The imaginary parties do not really challenge existence of the contract or the applicability of the arbitration provision. Assuming those facts,

say a dispute arises and plaintiff files a claim to compel arbitration. Believing that plaintiff's claim is frivolous and affects its speech, defendant files an anti-SLAPP motion. Clearly, a court's consideration of that motion would frustrate the agreed-upon intent of the parties and delay any reference to arbitration. Thus, the anti-SLAPP law would act as a state procedural barrier to what would otherwise be a straightforward motion to compel arbitration.[10]

Unlike the Court's hypothetical, the issues here are messy. Defendants vigorously dispute the applicability of the Agreement, whether the Agreement has expired, and whether the Agreement as a whole is void based on First Amendment concerns. But the Court has addressed the first two issues in its Tentative Ruling, and Defendants may argue the third in front of the arbitrator. If the Court were also to analyze whether the Petition runs afoul of the anti-SLAPP law, it believes it would be contravening the intent of congress as set forth in the FAA and shaped by the federal courts. And, considering that no federal court has ever applied an anti-SLAPP law to a petition to compel arbitration, the Court would decline to do so here. Therefore, the Court would deny Defendants' Motion.

3. Under California Law, Does the Anti-SLAPP Statute Apply to Petitions to Compel Arbitration?

Because the Court is inclined to conclude that the FAA preempts the anti-SLAPP law as applied to the Petition, it need not discuss in too much depth the parties' arguments about *Century 21 Chamberlain & Assocs. v. Haberman*, 173 Cal. App. 4th 1 (2009), *Sheppard v. Lightpost Museum Fund*, 146 Cal. App. 4th 315 (2006), and *Sahlolbei v. Montgomery*, No. E047099, 2010 WL 197298 (Cal. Ct. App. Jan. 21, 2010). Nonetheless, the Court will describe the cases in order to be comprehensive. Suffice it to say, the Court would not find any of the state cases determinative on the precise issue here.

Sheppard held that the anti-SLAPP law did "not authorize a superior court to grant a motion to strike an arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court." 146 Cal. App. 4th at 318. As the arbitration demand was only filed in the arbitral forum, the California Court of Appeal reasoned that the demand was not within the anti-SLAPP law's purview. *Id.* at 324. *Sheppard* is distinguishable from the instant case, however, because Plaintiffs filed the Petition in court rather

[10] The Court recognizes that its hypothetical is not exact, so the parties should not quibble about it too much at the hearing.

than in an arbitral forum.[11]

In *Century 21*, defendant demanded the plaintiff arbitrate a dispute, but had not filed a petition to compel arbitration in court. Plaintiff responded by filing a cause of action seeking declaratory relief that no arbitration agreement existed between the parties. *Century 21*, 173 Cal. App. 4th at 5. Once in court, defendant filed an anti-SLAPP motion and a motion to compel arbitration. *Id.* at 6. The trial court denied the anti-SLAPP motion and the Court of Appeal affirmed. *Id.* at 6-8. The Court of Appeal concluded that defendant's demand for arbitration did not fall within one of the anti-SLAPP law's categories, meaning that defendant's motion failed on the first step of the anti-SLAPP analysis. *Id.* at 7-9. Specifically, the court reasoned that arbitration is not a judicial proceeding or any other official proceeding authorized by law because arbitration is a private and contractual proceeding. *Id.* at 8-9. Further, the court held that defendant's "alleged demand to arbitrate a negligence claim against plaintiffs is neither a public issue nor an issue of public interest." *Id.* at 9.

Unlike the situation in this Court, the party seeking arbitration in *Century 21* was the one that filed the anti-SLAPP motion. Thus, the situation in *Century 21* was a "mirror image" of the instant case. The parties dispute whether that distinction matters. Plaintiffs contend that the *Century 21* holding that a demand for arbitration cannot support an anti-SLAPP motion applies regardless of which party is seeking arbitration. *See* Opp'n at 10-11. Defendants respond that because Plaintiffs first filed its Petition in Court rather than in an arbitral forum, the Petition is subject to an anti-SLAPP motion. *See* Reply at 6-7. The Court notes that it does not find *Century 21* particularly supportive of either sides' argument. To a certain extent it is noteworthy that the demand for arbitration was not a protected activity under the anti-SLAPP law, but it is also interesting that the Court of Appeal would ask whether the underlying negligence that defendant wanted to arbitrate was a matter of public interest. *Century 21*, 173 Cal. App. 4th at 9. As such,

[11] The focus on whether a demand for arbitration is initially filed with the arbitrator or with a court seems like something of a red herring to the Court. Here, it is clear from the record of the parties' communications that HBO would have resisted arbitration even if Plaintiffs had gone straight to an arbitrator. Defendants could then have filed an action in court trying to avoid arbitration, and Plaintiffs could have responded with a motion to compel. Could Defendants then file an anti-SLAPP motion against the motion to compel? It would be anomalous if Defendants could drag Plaintiffs to Court to determine arbitrability and then assert an anti-SLAPP motion. Conversely, if Defendants could not file an anti-SLAPP motion, the Court's inquiry would be limited to the arbitrability threshold questions. This would suggest to the Court that the actual conduct being challenged is merely the *filing* of the Petition in Court. But, as described below, the seeking of arbitration does not necessarily fall within one of the four anti-SLAPP categories.

Century 21 could cut both ways, or be distinguished on a number of different facts.

In *Sahlolbei*, Montgomery was an elected board member for the Palo Verde Healthcare District and Sahlolbei was a surgeon at Palo Verde Hospital. *Id.* at * 1. Sahlolbei and Montgomery had previously entered into a settlement agreement that included non-disparagement and arbitration clauses. *Sahlolbei*, 2010 WL 197298, at *1-*2. Years after the settlement, "Sahlolbei filed a combined complaint for breach of contract and petition to compel arbitration against Montgomery," alleging that Montgomery breached the non-disparagement clause of the settlement agreement. *Id.* at * 1. Montgomery allegedly told a reporter that Sahlolbei was verbally abusive toward nurses and other staff at the hospital and that his departure would do much to solve the hospital's problems. *Id.* The California Court of Appeal affirmed the denial of the anti-SLAPP motion against the petition to compel arbitration primarily because "Sahlolbei's cause of action is the demand for arbitration," and a "demand for commencing private, contractual arbitration does not fit any of the four anti-SLAPP categories." *Id.* at *4 (internal quotation marks, citations, and alterations omitted).[12] Thus, Montgomery's anti-SLAPP motion failed the first step of the anti-SLAPP inquiry. *See id.* at *4-*6.

However, it bears mentioning that *Sahlolbei* also concluded that petitions to compel arbitration may be subject to an anti-SLAPP motion if the movant demonstrates how the demand for arbitration affects her right of free speech. *Id.* at *5. The California Court of Appeal, nonetheless, found that Montgomery failed to explain how the arbitration would affect his free speech rights. *Id.* The court's reasoning on that issue is strange considering that the underlying conduct in *Sahlolbei* – making allegedly disparaging remarks to a reporter – obviously related to free speech. *Id.* Perhaps the court was trying to say that the arbitration demand itself must be an attempt to restrict speech, rather than the underlying breach claim, but it is unclear from the decision. Nevertheless, the confusion about which conduct to address demonstrates one of the issues with considering an anti-SLAPP motion against a petition to compel arbitration.[13]

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[12] It bears mentioning that *Sahlholbei* also concludes that petitions to compel arbitration may be subject to an anti-SLAPP motion if the movant demonstrates how the demand for arbitration affects her right of free speech. *Id.* at *5. The California Court of Appeal, nonetheless, concluded that Montgomery failed to explain how the arbitration would affect his free speech rights. *Id.* The court's reasoning on that issue is strange considering that the underlying conduct in *Sahlolbei* – making allegedly disparaging remarks to a reporter – obviously relates to free speech. Perhaps the court was trying to say that the arbitration demand itself must be an attempt to restrict speech, rather than the underlying breach claim, but it is unclear from the decision. Nevertheless, the confusion about which conduct to address demonstrates one of the issues with considering an anti-SLAPP motion as against a petition to compel arbitration.

[13] For example, as discussed above in footnote 12, if the underlying conduct is the seeking of arbitration, it is not a

Like *Century 21*, therefore, *Sahlolbei* could be read to support either sides' position. To some extent, *Sahlolbei* is both factually and procedurally analogous to the situation in front of this Court. There, as here, the party resisting arbitration utilized the anti-SLAPP law to challenge a petition to compel arbitration. *Id.* at *1-*2. And, like here, the alleged underlying breach was the making of disparaging remarks about a matter of arguable public interest. But, even though *Sahlolbei* denied Montgomery's anti-SLAPP motion, the court's comment about granting such a motion when the petition to compel arbitration affected speech renders the court's decision somewhat narrow.

As such, even if the Court were to apply California law, it would not find any of the foregoing cases determinative.

B. Anti-SLAPP Two-Step Process

Because the Court is inclined to conclude that the FAA preempts the anti-SLAPP law as applied to the Petition, the Court will not engage in the two-step analysis.

IV. Conclusion

Therefore, for the foregoing reasons, the Court would **DENY** Defendants' anti-SLAPP Motion.[14] In addition, the Court would **GRANT** Plaintiffs' Petition for the reasons set forth in the Tentative Ruling at Docket Entry No. 40.[15]

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foregone conclusion that that conduct would constitute a matter of public interest. Though the documentary that kicked off this fight is inarguably a matter of public interest, the parties' disputing interpretations of the Agreement may not be.

[14] To echo the sentiment that the Court has expressed throughout its consideration of the Petition, the Court repeats that Defendants may raise First Amendment and contract validity questions to the arbitrator. Nothing in any of the Court's rulings is meant to foreclose or suggest different veins of argumentation for the parties before the arbitrator.

[15] The Court takes no position on whether the arbitration must be "public." As Plaintiffs concede, that is a question for the arbitrator. Opp'n at 17.