Upland Chamber of Commerce

215 N. Second Avenue
Suite D
Upland, CA 91786

P 909.204.4465
F 909.204.4464

uplandchamber.org

@Upland Chamber of Commerce

@UplandChamber

May 24, 2023

TO: Members, Senate Appropriations Committee

SUBJECT: SB 365 (WIENER) CIVIL PROCEDURE: ARBITRATION OPPOSE/JOB KILLER – AS INTRODUCED FEBRUARY 8, 2023

The Upland Chamber of Commerce respectfully OPPOSE SB 365 (Wiener) which has been labeled as a JOB KILLER. It is clear that the true motive behind SB 365 is an attempt to eliminate the use of arbitration agreements altogether. SB 365 incorrectly assumes that all appeals related to arbitration are meritless. It also undermines the judicial principles embodied in Code of Civil Procedure section 916 and eliminates a trial court's inherent right to stay its own proceedings. The motive behind SB 365 to deter arbitration and single out arbitration from other types of proceedings will result in a finding that it is preempted by the Federal Arbitration Act (FAA) as the Ninth Circuit recently did by striking down another attempt at limiting arbitration – AB 51 (Gonzalez) from 2019. SB 365 will only lead to additional litigation and more money in the pockets of trial attorneys, which will increase the cost of doing business in California and exacerbate the ongoing affordability crisis we are facing.

SB 365 Will Increase Litigation to the Detriment of Consumers, Employees, and Companies

The motive behind SB 365 and its likely result is to increase civil litigation. The stakeholder that generally profits from civil litigation is the attorney, not the consumer or worker.1 For example, consumers and employees typically receive higher awards and have their claims resolved more quickly in arbitration than litigation.2 The same holds true when one looks at data from California's own agencies regarding outcomes in litigation versus agency enforcement. In the case of the Private Attorneys General Act (PAGA), the current average payment that a worker receives from a PAGA case filed in court is $1,300, compared to $5,700 for cases adjudicated by the state's enforcement agency. Attorneys on average recover a minimum of 33% of the workers' total recovery, or $372,000 on average in litigation. In addition to receiving lower average recoveries in PAGA cases, workers also wait almost twice as long for their owed wages. Resolving disputes outside of

litigation is better for all parties and ensures the consumer and worker are made whole more quickly rather than increasing fees and payments for trial attorneys.

SB 365 is Based on the False Assumption that All Appeals are Frivolous

SB 365 erroneously assumes that every single appeal of a denial to compel arbitration is meritless. According to the author the stated motive behind SB 365 is to "reign in" arbitration by allowing all trial court proceedings to continue during an appeal of "obviously invalid or inapplicable forced arbitration clauses". 3 In reality, SB 365 is not so limited. It does not simply apply to situations where there has been a determination that an appeal is frivolous or the arbitration clause is "obviously invalid". Rather, it applies to every single appeal of a ruling denying a motion to compel arbitration.

To enact SB 365 is to assume that no trial court is ever wrong, which is simply untrue. Indeed, in a case currently pending before the United States Supreme Court on the very issue of whether proceedings should be stayed during appeal, both district courts that made the rulings at issue specifically acknowledged that they may be overturned on appeal. One stated "reasonable minds may differ" over the denial on the motion to compel arbitration and the other stated "I could see a different legal set of minds looking at this factual pattern and saying I was wrong" and that it was "really hesitating" because "if I'm wrong, then you'll go forward in arbitration, but the parties will have spent a lot of time and money dealing with things that you would not have otherwise had to deal with if I'm wrong."4 To appeal decisions like these is certainly not meritless. It does not make sense that SB 365's complete ban on staying proceedings should apply in situations like these.

SB 365 Undermines the Intent of Code of Civil Procedure Section 916 and Divests Trial Courts of the Power to Grant Discretionary Stays

Under California Code of Civil Procedure section 916, if an appeal is filed it stays the trial court proceedings for all matters related to the appeal. To determine if section 916 applies, the court looks not only at whether the appeal would be rendered moot if trial court proceedings moved forward, but also whether continuing trial court proceedings would be "irreconcilable" with the appeal outcome. An example of this is where "the very purpose of the appeal is to avoid the need for the proceeding". Varian Medical Systems, Inc. v. Delfino, 35 Cal. 4th 180, 190 (2005) (emphasis added). The purpose of section 916 "is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents

1 Coalition Letter on a Hearing Related to Arbitration in Financial Service Products | U.S. Chamber of Commerce (uschamber.com); Why the CFPB's Anti-Arbitration Bias Is Bad for Consumers | U.S. Chamber of Commerce (uschamber.com)

2 FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf (instituteforlegalreform.com)

3 Senator Wiener Introduces Legislation To Stop Corporate Arbitration Abuse | Senator Scott Wiener (ca.gov)

4 Joint Petition for a Writ of Certiorari in Coinbase, Inc. v. Bielski, available at: https://www.supremecourt.gov/DocketPDF/22/22-105/232231/20220729160525276_Coinbase%20Joint%20Cert%20Petition%207-29-22%20Final.pdf the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it." Id. at 189 (cleaned up) (emphasis added). In essence, trial proceedings should be stayed if the result on appeal may void the need to have the trial altogether. A stay under section 916 should be granted even if the trial court judge believes the appeal will fail. See Daly v. San Bernadino County Board of Supervisors, 11 Cal. 5th 1030, 1051 (2021).

Courts have repeatedly held that an appeal from a denial of a motion to compel arbitration falls squarely within the exact issue that section 916 was enacted to address: that allowing trial to move forward would be irreconcilable with an outcome on appeal if the trial court is reversed. Id. at 190; Prudential-Bache Securities, Inc. v. Superior Court, 201 Cal. App. 3d 925 (1988). If the appeal is successful, the parties and court will have wasted tremendous costs and resources on a proceeding that should never have happened in the first place. SB 365 discriminates against arbitration by saying that section 916 should never apply with regard to appeals related to a motion to compel.

It should also be noted that SB 365 goes one step further in its undermining of existing procedure. Not only does it remove arbitration from the purview of section 916, it also eliminates the trial court's discretion to stay proceedings. Presently, trial courts have the inherent power to grant a discretionary stay if it serves the interests of justice and judicial efficiency. See OTO, LLC v. Kho, 8 Cal. 5th 111, 141 ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants") (internal citations omitted). SB 365 completely divests the trial court of this power when it comes to arbitration.

SB 365 is Likely Preempted by the Federal Arbitration Act (FAA):

The United States Supreme Court has consistently and unequivocally declared a national policy favoring arbitration of claims. As the Ninth Circuit recently noted when striking down yet another California arbitration law: The Court has "repeatedly described the Act as 'embod[ying] [a] national policy favoring arbitration,' and 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" Id. at 346, 131 S.Ct. 1740 (citations omitted). In enacting the FAA, Congress intended to combat the longstanding "hostility towards arbitration" that "had manifested itself in a great variety of devices and formulas declaring arbitration against public policy." Id. at 342, 131 S.Ct. 1740 (citation and quotation marks omitted). We have gone further, stating that "the FAA's purpose is to give preference (instead of mere

equality) to arbitration provisions." Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1160 (9th Cir. 2013).

Chamber of Commerce of the United States of America v. Bonta, 2023 WL 2013326 at *6 (9th Cir. 2023) (holding AB 51 (Gonzalez) (2019) is preempted by the FAA).

Based on the purpose of the FAA, the Supreme Court has established an "equal-treatment principle", which requires arbitration agreements to be on equal footing with all other contracts. Id. A state law will be struck down if it discriminates against

arbitration on its face, has a disproportionate impact on arbitration agreements, stands as an obstacle to the objectives of the FAA, or disfavors arbitration agreements. Id. at *6-*7; AT&T v. Concepcion, 563 U.S. 333, 352 (2011). Courts have consistently invalidated California laws relating to arbitration as preempted by the FAA for these reasons and many others have been vetoed. See Chamber of Commerce, 2023 WL 2013326 at *2-*3 (citing examples).

By requiring litigation to continue in every case during the appeal of a denial of a motion to compel, SB 365 undercuts the benefits of arbitration in providing a speedier, less costly forum in which to resolve disputes. Similar to the Ninth Circuit's analysis of AB 51, it is clear that the intent behind SB 365 and its impact of forcing litigation in every case where an appeal is pending is to have a deterrent effect on a company's willingness to enter into arbitration agreements. 5 That is "antithetical" to the "liberal federal policy favoring arbitration agreements." Id. at *10 (citations omitted). A state law "evincing hostility toward arbitration" is in direct conflict with the equal-treatment principle. Id. (citations omitted).

Further, SB 365 "singles out arbitration provisions as an exception" to the law. It does so by removing appeals related to the denial of a motion to compel arbitration from the purview of Code of Civil Procedure Section 916 as well as eliminating a trial court's inherent power to grant a discretionary stay in that circumstance only. Id. at *10. SB 365 is clearly preempted by the FAA.

If Enacted, SB 365 Would Be a Significant Departure from Federal Procedure

The United States Supreme Court is set to rule this year in Coinbase, Inc. v. Bielski. The issue in Coinbase is for the Court to settle a circuit split regarding whether an appeal of a denial of a motion to compel arbitration ousts a district court's jurisdiction to proceed with litigation pending appeal. Most circuits have said "yes," requiring district court proceedings to be stayed while the appeal is pending. Other circuits, including the Ninth Circuit, have held that the district court has discretion over whether to stay the proceedings pending appeal.

With either outcome, SB 365 would represent a significant departure from federal procedure on this issue. SB 365 prohibits any stay whatsoever, even if the trial court thinks it prudent, while federally either the district court would be mandated to stay proceedings or would at least have the discretion to do so. Further, if SB 365 is enacted, many parties may choose to have FAA procedure apply to their arbitration

agreements and therefore instead follow the result reached in Coinbase. The California Supreme Court has held that parties to an arbitration agreement can contract to require that FAA procedure apply. See Cronus Investments, Inc. v. Concierge Services, 35 Cal. 4th 376 (2005).

For these reasons and more, we are OPPOSED to your SB 365 as a JOB KILLER.

Sincerely,

Chris Alanis

Upland Chamber Chairman of the Board