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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

INNOVATION ADVISORY GROUP, INC., Plaintiff and Appellant, v. NATIONAL PACIFIC CORPORATION, Defendant and Respondent.	B288237 (Los Angeles County Super. Ct. No. BS171465)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Feffer, Judge. Affirmed.

Walton Law Group, John R. Walton, and Ali Z. Vaqar for Plaintiff and Appellant.

Cappello & Noel, A. Barry Cappello, and David L. Cousineau for Defendant and Respondent.

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A company initiated an arbitration and lost. On appeal, the company complains that the arbitrator lost jurisdiction before issuing his award, that the arbitrator's rejection of the jurisdictional challenge rendered him personally biased, and that the arbitrator's refusal to admit a deposition transcript for one witness rendered the entire six-day arbitration unfair. Each of these arguments lacks merit, and we accordingly affirm the trial court's order confirming the arbitration award. We also note that the invective the company's appellate counsel launches at the arbitrator in its briefs and at oral argument is unsupported by the record, ostensibly unethical and, at a minimum, unbecoming an officer of the court.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Loans*

The National Pacific Corporation (National) is owned by Leonard Himelsein. Innovation Advisory Group, Inc. (Innovation) is owned by Leonard's adult son, Wayne. In 2007 and 2008, Innovation loaned National $4,369,977.29 in a series of loans.

B. *Loan and Security Agreement*

On August 28, 2008, Innovation and National signed a Loan and Security Agreement (the agreement). The agreement acknowledged the prior 2007 and 2008 loans, but did not spell out any maturity or due dates for them.

The agreement specified that the loans were to be secured by "collateral," obligated National to "deliver" this "collateral" to Innovation, and provided that Innovation's "sole and exclusive remedy" under the agreement was to "take" and "dispose of" that collateral. The agreement defined the "collateral" as two loans

that National had made to two different companies from South Africa, and, more specifically, as the two loans "represented by [a] Non-Recourse Promissory Note . . ., [a] Loan and Security Agreement . . ., and the security for said loan." National's loans to the two foreign companies had been secured by stock in those companies.

The agreement obligated the parties to arbitrate, "under the rules of the [American Arbitration Association (AAA)] and the laws of the State of California," "[a]ny claims, questions or controversies arising under or related to in any manner whatsoever this . . . [a]greement."

C. *Delivery of security interest*

Soon after the agreement was executed in 2008, National assigned Innovation its interest in the two foreign loans. National did not deliver to Innovation the stock used to secure those foreign loans, and Innovation did not at that time request that stock and did not otherwise object that National had not fully complied with its contractual obligation.[1]

II. Procedural Background

A. *Arbitration*

Nearly five years later, in late March 2013, Innovation filed with the AAA a petition to arbitrate against National. Notwithstanding the non-recourse clause in the agreement, Innovation sought (1) repayment of the loan amounts, plus interest, (2) costs, (3) attorney fees, and (4) arbitrator's fees.

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1 Because Innovation chose not to include the record from the arbitration in the record on appeal, we necessarily draw some facts from the arbitrator's award, particularly those to which the parties register no disagreement on appeal.

Innovation alleged that National had breached the agreement by not delivering the foreign company's stock as collateral.

The arbitrator conducted five days of evidentiary hearings in March and June 2017, where the parties presented six witnesses and more than 500 exhibits. Closing argument was held on June 15, 2017.

On August 4, 2017, the arbitrator issued a partial final award rejecting Innovation's claim because (1) the agreement was "not intended to serve as a genuine loan agreement" and was "not intended to be a 'normal' enforceable contract," and (2) the agreement did not obligate National to deliver the stock certificates themselves. A few months later, the arbitrator issued a final award granting National attorney fees of $963,556.25 and costs of $166,364.14.

B. *Trial court proceedings*

In November 2017, Innovation filed a petition to vacate the arbitrator's final award. National opposed the petition, and filed a petition to confirm the award. After receiving Innovation's opposition to the petition to confirm, and entertaining oral argument, the trial court in a single-sentence order granted National's petition to confirm the award and denied Innovation's petition to vacate it.

After the trial court entered judgment over Innovation's objections, Innovation filed this timely appeal.

DISCUSSION

Innovation argues that the trial court erred in denying its motion to vacate the arbitration award (and, concomitantly, in granting National's petition to confirm) for three reasons: (1) the arbitrator lacked jurisdiction to render its award because the award was issued four days after the parties' agreed-upon due

date, (2) the arbitrator's rejection of Innovation's jurisdictional challenge disqualified him from continuing as the arbitrator, and (3) the arbitrator's refusal to admit the deposition testimony of Innovation's transactional counsel constituted prejudicial error that warrants vacating the arbitration award.

Where, as here, the parties to an arbitration agreement have not otherwise specified, the grounds for vacating an arbitration award are confined to the narrow grounds for relief set forth in Code of Civil Procedure section 1286.2.[2] (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.) Because they are not set forth in section 1286.2, errors of fact and errors of law made by the arbitrator are not grounds for relief. (*Id.*; *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 917 (*Richey*).) This "'risk [of uncorrectable legal or factual error]'" is the price paid for the "'quick, inexpensive, and conclusive resolution to . . . [a] dispute'" that arbitration provides. (*Heimlich v. Shivji* (2019) 7 Cal.5th 350, 367 (*Heimlich*), quoting *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 (*Moncharsh*).) We independently review a trial court's order confirming an arbitration award or declining to vacate such an award. (*Richey,* at p. 918, fn. 1.)

I. Loss of Jurisdiction

A. *Pertinent facts*

On March 29, 2017, which was the last of the five days of evidentiary hearings, the parties had an off-the-record conversation with the arbitrator regarding the due date for closing briefs, the date for the closing argument and the date on which the arbitrator was to issue the award. Counsel for

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2 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

National summarized the off-the-record conversation on the record, explaining, in pertinent part, that "July 31st is the *target date* for the award." (Italics added.) Counsel for Innovation did not object in any way to the summary.

On June 15, 2017, the arbitrator held closing arguments, and at the end of that session, declared "the hearing . . . closed" and "the matter . . . submitted."

On July 24, 2017, the arbitrator's assistant emailed both parties' counsel. The email reported that "it is likely that [the arbitrator] will not be able to complete the award by July 31" "[d]ue to a number of family issues that have come up," and "ask[ed] if the due date for the award can be extended to August 15."

National consented, but Innovation's counsel replied that it was "awaiting a response" from Innovation and promised to "get back to" the arbitrator's assistant "after we hear from our client."

At 12:07:45 a.m. on August 1, 2017, Innovation sent the arbitrator's assistant and National an email with an attached, two-page formal "[Notice] of Objection Re Untimely Award" proclaiming that the arbitrator no longer "has . . . jurisdiction to issue an award" because the "deadline for issuing the award" expired eight minutes earlier.

Around noon on August 1, 2017, the arbitrator sent an email to the parties effectively overruling Innovation's objection. As alternative rationales, the arbitrator "advise[d]" that (1) under the parties' March 29, 2017 stipulation, July 31 was merely a "target date" for the award's issuance and the arbitrator's July 24 request for an extension was "an attempt . . . to keep counsel and the parties," "as a courtesy," "informed of [the arbitrator's] progress on preparation of the award," and (2) the arbitrator had

until August 15, 2017 to issue the award under the International Centre for Dispute Resolution (ICDR Procedures), which make an award due 60 days after the closing of the hearing.

Three days later, on August 4, 2017, the arbitrator issued a partial final award. In this award, the arbitrator offered several reasons why the award was still timely: (1) the parties had agreed to make July 31 a "target date" rather than a due date; (2) Innovation was estopped from asserting any time bar because it had "concealed [its] intention to object" by promising to respond to the arbitrator's request for an extension, not responding in a timely fashion, and then filing an objection minutes after the "target date" ended; and (3) the arbitration hearing had not really closed on June 15, 2017 (and thus not triggered any deadlines for preparation of the award) because National still had the right to seek ancillary relief (such as attorney fees and costs).

B. *Analysis*

A trial court may vacate an arbitration award if the arbitrator has "exceeded [his] powers." (§ 1286.2, subd. (a)(4).) Because nonjudicial arbitration is "a matter of contract" (*Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 9; *Heimlich*, *supra*, 7 Cal.5th at p. 358 ["[a]rbitration is a matter of consent"]), """[t]he powers of an arbitrator derive from, and are limited by, the agreement to arbitrate."" (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1356, quoting *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375.) Part and parcel of the contractual nature of the arbitrator's power, an arbitrator's "award shall be made within the time fixed therefor by the agreement . . ." (§ 1283.8.)

Here, Innovation and National agreed that "the rules of the AAA" would apply in any arbitration. Rule 45 of the AAA's

Commercial Rules generally requires an arbitrator to render an award within "30 calendar days from the date of closing the hearing." However, AAA Commercial Rules 45, 39(c), and 42 expressly grant the parties the power to agree to a different due date for the award. Indeed, courts have sometimes inferred such an agreement from the parties' conduct. (See *Librascope, Inc. v. Precision Lodge No. 1600, etc.* (1961) 189 Cal.App.2d 71, 76.)

The arbitrator did not exceed his powers when he issued the partial final award on August 4, 2017, because the parties had expressly agreed not only to waive AAA Commercial Rule 45's 30-day rule (which would have made the award due on July 15, 2017), but also to make that waiver open-ended by only setting a "target date" of July 31, 2017. Where, as here, the law so permits, the parties may stipulate to an open-ended waiver of a deadline. (E.g., *Wheeler v. Payless Super Drug Stores* (1987) 193 Cal.App.3d 1292, 1299 [holding that an agreement that "extended" a deadline "indefinitely" "reflect[ed] mutual intent to defer the proceedings and must be enforced"].) And that is precisely what the parties here did by stipulating that July 31, 2017 would be the "*target* date." A "target date" implies something to shoot for, rather than an absolute deadline or due date.

Innovation argues that the arbitrator erred in treating July 31 as merely a "target date" because (1) the parties' off-the-record stipulation was to set July 31 as the "due date," and (2) the arbitrator reinforced this notion by referring to July 31 as a "due date" in the July 24, 2017 email requesting an extension.

As a threshold matter, the parties in this case specified that the AAA Commercial Rules applied, and Rule 8 empowers the arbitrator to "interpret and apply these rules insofar as they

relate to [his] powers and duties." Because the parties' agreement did not otherwise specify, any error the arbitrator made in interpreting and applying the deadlines set forth in the AAA Commercial Rules is outside the scope of our review. (See *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1422, 1449-1455 ["defer[ring] to the arbitrator's interpretation and application of the [JAMS] rules" regarding the due date for an award]; accord, *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 788 ["a reference to the rules of arbitration services [that] permit the arbitrator to determine issues of his or her jurisdiction [is] clear and unmistakable evidence that the parties intended to delegate the issue to the arbitrators"].)

Even if we could reach the merits of Innovation's challenge, we would reject it. "[A]n arbitrator has the authority to find the facts" (*Heimlich*, *supra*, 7 Cal.5th at p. 358), and the arbitrator here found that the parties' on-the-record reference to July 31 as a "target date" deserved more weight than Innovation's counsel's post-award assertion that they had agreed to a "due date" off-the-record. This finding is certainly supported by substantial evidence, particularly considering that Innovation did not contemporaneously object to the characterization of July 31 as a "target date." Nor did the arbitrator's use of the term "due date" in the July 24 email undermine his finding: Nothing the arbitrator could say in an email nearly four months after the parties' stipulation could change that stipulation, and the arbitrator's desire to take a "belt-and-suspenders" approach by obtaining a consent that was not strictly necessary (the "suspenders," as it were) does not somehow mean that there was no open-ended consent (the "belt," as it were) in the first place.

In light of our analysis, we have no occasion to reach the parties' alternative arguments for affirmance or reversal, such as (1) whether Innovation is properly estopped from objecting to the timeliness of the award, (2) whether the arbitrator erred, in his August 1, 2017 email, in relying on the 60-day deadline in the ICDR Procedures, (3) whether the arbitrator erred, in the partial final order, in finding that the hearing had not really closed on June 15, 2017, and (4) whether the failure to issue an order by the agreed-upon deadline is merely directory rather than jurisdictional.

II. Bias

A. *Pertinent Facts*

A day after the arbitrator sent his August 1, 2017 email to the parties rejecting Innovation's jurisdictional objection on the ground that July 31 was merely a "target date" and that the arbitrator had until August 15 to issue an award under the ICDR Procedures, Innovation sent an email (1) accusing the arbitrator of "mak[ing] . . . arguments in an effort to rescue his own jurisdiction" and "seeking to change the rules by fiat," (2) declaring that the arbitrator's rejection of Innovation's objection meant that the arbitrator "ha[d] become . . . a litigant with an interest in the outcome," and (3) informing the arbitrator that he "must accept that his jurisdiction is ended."

Just under two weeks after the arbitrator issued the partial final award, Innovation sent a letter to the arbitrator stating that (1) the partial final award "make[s] it clear that [the arbitrator] ha[s] a personal stake in this matter" and that he has a "personal bias . . . against [Innovation] and its counsel," and (2) the arbitrator should "acknowledge that the circumstances have disqualified [him] to fulfill the role of arbitrator."

B. *Analysis*

A trial court may vacate an arbitration award if the "arbitrator making the award . . . was subject to disqualification upon grounds specified in [s]ection 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision." (§ 1286.2, subd. (a)(6)(B); see also *id.*, subds. (a)(2) [award subject to vacation if "[t]here was corruption in any of the arbitrators"] & (a)(3) [award subject to vacation if "[t]he rights of [a] party were substantially prejudiced by misconduct of a neutral arbitrator"].) An arbitrator is subject to disqualification under section 1281.91 if "any ground specified in [s]ection 170.1 exists" (§ 1281.91, subd. (d)), and section 170.1 requires disqualification if the arbitrator "believes there is a substantial doubt as to his or her capacity to be impartial" or "[a] person aware of the facts might reasonably entertain a doubt that the [arbitrator] would be able to be impartial" (§ 170.1, subd. (a)(6)(A)(ii), (iii)).

As the language of section 170.1 suggests, an arbitrator is subject to disqualification—and an arbitration award is consequently subject to vacation due to the refusal to disqualify—if the arbitrator is (1) actually biased or (2) if there is an "appearance-of-partiality." (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 393 (*Haworth*); *Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 723 (*Roitz*).) Whether there is an appearance of partiality is to be judged objectively—that is, by asking whether a "'"well-informed, thoughtful,"' "'disinterested"' "'observer"' "'could reasonably form a belief that [the] arbitrator was biased for or against a party for a particular reason.' [Citation]." (*Haworth*, at pp. 388-389; *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219

Cal.App.4th 1299, 1311; *Ceriale v. Amco Ins. Co.* (1996) 48 Cal.App.4th 500, 506, italics omitted.) The appearance of bias is consequently *not* to be judged from the perspective of "[t]he partisan litigant emotionally involved in the controversy." (*Haworth*, at p. 389.) The party alleging actual or apparent bias bears the burden of "clearly . . . establish[ing]" that bias; "unsubstantiated suggestion[s] of personal bias" do not suffice. (*Ibid*; *Betz v. Pankow* (1993) 16 Cal.App.4th 919, 926.)

Innovation did not carry its burden of showing that the arbitrator in this case was biased or that an objective observer would believe that he was biased.

The allegations of bias set forth in Innovation's August 2 email and August 17 letter are premised on the arbitrator's rejection of its jurisdictional objection. That an adjudicator has ruled against a party does not mean that he is biased against that party and does not create the appearance of such bias. (*McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11 ["Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review."]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1112 ["adverse or erroneous rulings, especially those that are subject to review, do not establish a charge of judicial bias."], overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151; see also *People v. Hamilton* (1988) 45 Cal.3d 351, 378 [a judge's "adverse" "state of mind" "based upon actual observance of the witnesses and evidence given during the trial" is not bias].) Were the rule otherwise, every adjudicator would be biased by virtue of doing his or her job, and disqualification would be the norm. This is obviously not the law. This rule applies even when the ruling adverse to a

party means that the adjudicator continues to get paid for doing his or her job. (*Roitz*, *supra*, 62 Cal.App.4th at p. 724 [arbitrator's "refusal to continue [a] hearing and waive his fee" does not "g[i]ve rise to disqualification"].) Because Innovation's contemporaneous bias objection rested on the arbitrator's adverse ruling on its jurisdictional objection, and because that ruling was subject to some level of review on the merits, it provides no basis for disqualification on the grounds of bias.

In its post-arbitration filings, Innovation added new grounds for disqualification, including that (1) the arbitrator "deleted" and "manufactured evidence to support [a] false narrative" and "claim[ed] victimization" (by finding that Innovation's conduct in not responding to the arbitrator's request and then filing a jurisdictional objection amounted to an estoppel, by erroneously finding that the ICDR Procedures applied rather than the Commercial Rules, and by not repeating the discussion of its continued jurisdiction in its final award); (2) the arbitrator's rejection of the jurisdictional argument deepened into personal animosity against Innovation once National agreed with the arbitrator's position because "the embattled arbitrator [found] an ally in" National; (3) the arbitrator's very request for an extension due to family matters disqualified him because it made it "difficult [for any party] to deny [that] request without fear of retaliation"; and (4) the only way for Innovation to avoid the arbitrator's wrath was for its counsel to violate the duty of loyalty and confidentiality to their client. In support of its additional arguments, Innovation also cites a number of cases.

We reject these additional arguments for three reasons.

First, they lack merit on their face. Innovation's claim of manufactured and deleted evidence and attribution of perceived

victimization boil down to disagreement with the arbitrator's ruling on its jurisdictional objection, which for the reasons set forth above does not create actual or apparent bias. Innovation's claim that National's approval of the jurisdictional ruling hardened into bias fails for the same reason. Innovation's claim that an arbitrator's request for an extension, particularly for personal reasons, automatically disqualifies him (because any party who says "no" thereby risks his wrath) would ostensibly turn every scheduling or other request by a court or arbitrator into a ground for disqualification, which is absurd. And Innovation's counsels' claim that the only way to avoid the arbitrator's bad graces once the arbitrator requested an extension was to violate their duty of confidentiality (by explaining to the arbitrator why Innovation did not agree to an extension) and loyalty (by agreeing to the arbitrator's requested extension over their client's objection) to their client is nonsensical. Communicating a client's position to an adjudicator is an attorney's *job*, not a violation of the duty of confidentiality. And the arbitrator's conduct in rejecting Innovation's jurisdictional objection is not proof that Innovation's refusal to accede to the extension request would have been met with bias (such that Innovation's counsel would need to be disloyal to Innovation to avoid such bias).

Second, Innovation's bias argument—if accepted—would give dissatisfied parties a handy tool to derail an arbitration and get a "do over" if the arbitration starts to go against them. Here, Innovation agreed on the record to an open-ended extension of the due date for the arbitrator's award, later claimed that off-the-record conversations established a hard deadline, and then sought to disqualify the arbitrator due to bias when the

arbitrator rejected Innovation's later claim by giving greater weight to the parties' on-the-record stipulation. Time and again, courts have avoided rulings that enable "'procedural gamesmanship'" by handing parties to arbitration a proverbial reset button that, when pressed, would "'undermine[] the advantages of arbitration.'" (*Moncharsh*, *supra*, 3 Cal.4th at p. 30; *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1671; *Caro v. Smith* (1997) 59 Cal.App.4th 725, 731-732; *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1343.)

Lastly, the cases Innovation cites all involve far greater showings of actual or apparent bias, and are for that reason inapt. (See *In re Wagner* (2005) 127 Cal.App.4th 138, 147-148 [judge remanded defendant into custody without giving him any time to respond to the charges, and filed a brief to defend herself before the appellate court]; *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 392-395 [judge accepted plea agreement that unlawfully banished a defendant from the state and thereby required him to violate a condition of probation in order to reappear in court]; *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 885 [judge had personal views opposing the law he was to apply]; *People v. Enriquez* (2008) 160 Cal.App.4th 230, 244 [same]; *Betsworth v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 586, 596-600 [referee showed "personal indignation" at parties' remarks to her]; *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 797-802 [judge "flipped off" criminal defendant, cussed at the parties, appointed his friends as court-appointed attorneys]; see also *People v. Dutra* (2006) 145 Cal.App.4th 1359, 1369 [case remanded for other reasons reassigned a different

judge on remand "to forestall any claim of undue embroilment" because he later refused to let a party brief or argue an issue].)

C. *Rhetoric by appellate counsel*

We pause to note the language used by Innovation's appellate counsel to describe the arbitrator's actions in this case. In Innovation's opening brief, Innovation's counsel, in support of the disqualification argument, labels the arbitrator as being "emotionally distraught," of "claim[ing] victimhood," of engaging in "self-help" by "re-writ[ing] history," and of engaging in the criminal acts of "deleting and manufacturing evidence to support a false narrative" (see, e.g, Pen. Code, § 135). In the reply brief, Innovation's counsel continues the accusations of criminal behavior, and further ratchets up the rhetoric by accusing the arbitrator of "succumb[ing] to the temptation [of letting] the ends justify the means" and of engaging in "sophistry claiming himself to be a victim of fraud." When we suggested to Innovation's counsel during oral argument that this language may have exceeded the bounds of appropriate and zealous advocacy, counsel effectively "doubled down" by asserting that the arbitrator's rejection of its position smacked of "desperation" and evinced a "read[iness] to retaliate" that ripened into orders that were "punish[ing]" and "dripping with malice."

"It is unfair, unethical, and immoral to falsely assail the character or official conduct of any [judicial] officer." (*In re Graves* (1923) 64 Cal.App. 176, 181.) This statement was made nearly a century ago, but it is just as true today. California attorneys have a "duty . . . to . . . maintain the respect due to the courts of justice and judicial officers" (Bus. & Prof. Code, § 6068, subd. (b)), and "not [to] make a false statement of fact that the lawyer knows to be false or with reckless disregard as to its truth

or falsity concerning the qualifications or integrity of a judge or judicial officer" (Rules Prof. Conduct, Rule 8.2(a)). Those duties of respect and honesty are violated when a lawyer accuses a judicial officer, and by extension a former judicial officer serving as a neutral, of committing criminal acts and impugns that arbitrator's integrity based on nothing more than the arbitrator's adverse rulings in that very case. At worst, such violations are worthy of contempt. (*In re White* (2004) 121 Cal.App.4th 1453, 1478.) At best, they are untrue to the promise in the oath taken by every new attorney in this state to "strive to conduct [themselves] at all times with dignity, courtesy, and integrity." (Cal. Rules of Court, rule 9.7.) Ours is an honorable profession, and the imprecations Innovation's counsel hurls at the arbitrator dishonor our profession and, for that reason, cannot pass without comment. (*Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.* (2013) 217 Cal.App.4th 708, 710 ["If we ignore transgressions, we encourage transgressors."].)

III. Evidentiary Ruling

A. *Pertinent facts*

During the evidentiary hearings before the arbitrator, Innovation sought to call the transactional attorney who represented Innovation during the negotiations with National to testify that the agreement was "intended to be . . . enforceable." But Innovation never subpoenaed that attorney as a witness. Instead, Innovation asked the arbitrator to admit the transcript from the attorney's deposition. National objected, asserting that it wanted to cross-examine the attorney as a "live" witness.

In a ruling issued after the hearings concluded, the arbitrator rejected Innovation's request to use the deposition transcript in lieu of the attorney's live testimony. In coming to

this conclusion, the arbitrator reasoned that (1) the transcript was an inadequate substitute for cross-examination of the attorney in person because the deposition was "short" and had been "designed" to "learn the scope of [the attorney's] knowledge" rather than "to cross-examine him," and (2) the parties "reasonably expected" that the attorney would testify in person, and the absence of any "advance notice" of the intent to use deposition testimony precluded National from using other means of compensation for the lack of live cross-examination (such as "tak[ing] a [second] deposition with cross-examination in mind," "obtain[ing] its own declarations," or "marshal[ing] other evidence to meet the subject witness's testimony").

B. *Analysis*

A trial court may vacate an arbitration award if the "rights of the party were substantially prejudiced by . . . the refusal of the arbitrator[] to hear evidence material to the controversy." (§ 1286.2, subd. (a)(5).) Although this language could be read to allow for judicial review of evidentiary rulings by an arbitrator, our Supreme Court has construed this provision to require "more than a simple error in applying the rules of evidence" and instead to require a showing that an evidentiary error "'prevented the party from fairly presenting its case.' [Citation.]" (*Heimlich*, *supra*, 7 Cal.5th at p. 368; see also *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1110.)

Innovation has not established this basis for relief. In arguing that the arbitrator erred in not admitting the deposition of its transactional lawyer, Innovation is arguing that the court erred in making an evidentiary ruling. As explained, this is not enough. Further, Innovation does not spell out how the exclusion of this deposition testimony "prevented [it] from fairly presenting

its case" when the record indicates that the parties put on five days' worth of witnesses and introduced more than 500 exhibits. Innovation has also not established that it was "substantially prejudiced" by the exclusion of the transactional attorney's deposition testimony. As noted above, the arbitrator's ruling for National rested on its findings that (1) the agreement was "not intended to be a 'normal' enforceable contract," and (2) did not obligate National to deliver the stock certificates. Innovation claims that the transactional attorney's deposition testimony would have provided evidence that the agreement was meant to be enforceable, but that would leave the other basis for the arbitrator's ruling unimpeached. Although the attorney in his deposition testified *both* that he did not "recall" whether the stock certificates were part of the collateral and that they "were," none of this testimony undermines the reality that Innovation did not object when National assigned its security interest but not did not deliver the stock certificates.

DISPOSITION

The judgment is affirmed. National is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ