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November 2, 2012

Chief Justice and Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-7421

**Via Overnight Mail**

**Re: Amicus Letter in Support of Petition for Review  
*Reyes v. Liberman Broadcasting, Inc.*  
Second Appellate District, Division One, No. B235211**

To the Honorable Court:

Consumer Attorneys of California (“CAOC”) respectfully requests the Supreme Court of California to accept review of the Second Appellate District’s published decision in *Reyes v. Liberman Broadcasting, Inc.* (2012) 208 Cal.App.4th 1537 (*Reyes*.) The United States Supreme Court decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 (*Concepcion*) fundamentally altered the application of California contract law to arbitration agreements when it held that state courts cannot impose class-wide arbitration on certain consumer arbitration agreements. Since then, trial courts and courts of appeal have struggled to apply *Concepcion* consistently to cases involving class action waivers in alleged unconscionable arbitration agreements as well as a host of issues related to class action waivers and class-wide arbitration.

Since *Concepcion*, the question of whether a defendant has “waived” its right to compel arbitration by knowingly litigating its case in the trial court has gained new importance. (See *Reyes, supra*, 208 Cal.App.4th at p. 1551; see also *Iskanian, supra*, 147 Cal.Rptr. at pp. 386-387.) Specifically, defendants that chose to litigate their case in the trial court and failed to compel arbitration despite the existence of an arbitration agreement may be deemed to have waived their right to compel arbitration. (See *St. Agnes Medical Center v. PacifiCare of Calif.* (2003) 31Cal.4th 1187, 1196 (“*St. Agnes*”) (discussing the six factors

in assessing waiver claims.) In order to avoid the consequences of sitting on their right to compel arbitration, some defendants have asserted a “futility” defense, first articulated in *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 697 (9th Cir. 1986 (“*Fisher*”)) (finding that a futility defense is available to the moving party since it *did not have a right* to arbitrate prior to change in law) (emphasis added). The “futility” defense was a limited doctrine intended only for a party who did not previously have a right to arbitrate. (*Ibid.*)

Now, the Court of Appeal in *Reyes* has expanded the so-called “futility” defense by holding that a defendant’s “reasonable belief” that it would not succeed on a motion to compel arbitration before the *Concepcion* decision is sufficient to excuse delay. (*Reyes, supra*, 208 Cal.App.4th at p. 1551.) This expansion of the “futility” defense is inconsistent with other Court of Appeal decisions and federal law, and will create confusion among courts if not reviewed and resolved by the this Court.

At minimum, CAOC believes that this Court should issue a grant and hold in *Reyes* pending the resolution of *Iskanian v. CLS Transp. Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 147 Cal.Rptr. 372, reh’g denied (June 26, 2012), review granted and opinion superseded sub nom. *Iskanian v. CLS Transp. of Los Angeles LLC* (Cal. 2012) 147 Cal.Rptr.3d 324 (“*Iskanian*”).

### **STATEMENT OF INTEREST**

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries, and insurance bad faith. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees, and injured victims in the courts and before the Legislature. This protection has often been accomplished through class actions and other representative actions under California and federal law. CAOC has previously participated as amicus curiae in significant cases involving employment law issues (e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004) and class action issues (e.g., *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 374.)

As an organization that represents the plaintiffs' trial bar throughout California and that includes many attorneys who represent employees who are subject to mandatory pre-dispute arbitration agreements, CAOC has an abiding interest in the issues addressed in the *Reyes* opinion. Pursuant to California Rule of Court, rule 8.500(g), CAOC respectfully requests that the Supreme Court of California grant review of the *Reyes* decision. In addition, pursuant to California Rule of Court, rule 8.512(d), CAOC respectfully requests that the Supreme Court of California order a grant and hold of the *Reyes* decision pending the outcome of this Court's resolution of *Iskanian*.

### **DISCUSSION**

Recent U.S. Supreme Court jurisprudence on arbitration agreements has created upheaval in California contract law as state and district courts determine the breadth of *Concepcion*. *Concepcion* addressed "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." (*Concepcion, supra*, 131 S.Ct. at p. 1744.) Specifically, *Concepcion* struck down California's *Discover Bank* rule, that class action waivers in certain types of consumer contracts are as a general matter unconscionable, regardless of a plaintiff's ability to vindicate his or her statutory rights. (*Id.* at p. 1753.) Not only has there been an upheaval regarding the validity of class action waivers, there also has been upheaval in whether or not a party can be deemed to have waived their right to compel arbitration.

Among the waiver issues in upheaval is a defendant's so-called "futility" defense; whether a defendant has waived its right to compel arbitration if it delayed moving to compel arbitration based on a subjective belief that the motion is unlikely to succeed. Originally, the "futility" defense was a limited doctrine intended only for a party who did not previously have a right to arbitrate. (*Fisher, supra*, 791 F.2d at 697.) However, recently some courts have found that a defendant has not waived its right to compel arbitration because it would have been futile for defendants to have moved to compel arbitration before the *Concepcion* decision was handed down. (See *Reyes, supra*, 208 Cal.App.4th at p. 1551; see also *Iskanian, supra*, 147 Cal.Rptr. at pp. 386-387.) Yet other courts have taken an opposite view. Those courts hold, "no party has a right to unfairly play a game of 'wait and see' and not assert its legal rights until and unless the law

becomes more favorable to its position.” (*In re Toyota Motor Corp. Hybrid Brake M-ktg.*(C.D.Cal. 2011) 828 F.Supp.2d 1150, 1163.)

CAOC respectfully requests the Supreme Court grant a review of the *Reyes* decision to resolve this widespread important issue, whether the “futility” defense to waiver is available to a party who delayed moving to compel arbitration based merely upon a subjective belief that a motion was unlikely to succeed. Resolution of this issue is necessary to secure uniformity of decision and to settle an important question of law. (See Cal. Rules of Court, rule 8.500(b)(1).) As a result of the *Reyes* decision, the doctrine of “futility” is now unsettled and needs resolution by this Court. The *Reyes* decision has also caused a split of authority. In particular, *Reyes* held that merely a defendant’s “reasonable belief” that it would not succeed on a motion to compel arbitration before the *Concepcion* decision is sufficient to excuse delay. (*Reyes, supra*, 208 Cal.App.4th at p. 1551; see also *Iskanian, supra*, 147 Cal.Rptr. at pp. 386-387.) However, *Reyes* is in direct conflict with two Court of Appeal decisions, *Roberts v. El Cajon Motors Inc.* (2011) 200 Cal.App.4th 832 and *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436 that held, prior to *Concepcion*, that there was no legal bar to class action waivers that would excuse a party’s delay in asserting its right to arbitrate. (See *Roberts, supra*, 200 Cal.App.4th at p. 846, fn.10; *Lewis, supra*, 205 Cal.App.4th at p. 447.) Resolution of this important issue of law is needed.

The *Reyes* opinion also conflicts with federal authority that holds the “futility” defense is only available to a moving party if that party previously *had no right* to arbitrate, not merely just a “reasonable belief” that it would not succeed. (See, e.g., *Kingsbury v. U.S. Greenfiber, LLC* (C.D.Cal. June 29, 2012, No.2:08-cv-00151-AHM -AGR) 2012 U.S. Dist. Lexis 94854, \*7-9) (rejecting defendant’s attempt to invoke a "futility defense" based on *Concepcion*); *In re Toyota Motor Corp. Hybrid Brake M-ktg.* (C.D.Cal. 2011) 828 F.Supp.2d 1150, 1163) (rejecting the futility defense based on *Concepcion*); (*Martinez v. Welk Group, Inc.* (S.D. Cal. Jan. 12, No. 09cv2883), 2012 U.S. Dist. Lexis 3893, at \* 14 (rejecting a futility defense based on *Concepcion*) (emphasis added). Thus, this Court should grant review to secure uniformity of this important question of law. Clear guidelines regarding when a party has waived their right to compel arbitration will lend certainty to parties’ litigation, promote decisions on the “merits” and discourage long protracted procedural battles. Resolving this important legal question

will also conserve judicial resources because parties will be encouraged to make the strategic decision to compel arbitration early instead of needlessly litigating in state court putting off the decision to compel arbitration under the cover of unsettled law.

Alternatively, pursuant to California Rules of Court, rule 8.512(d), this Court may issue a grant and hold of the *Reyes* decision pending the outcome of this Court's resolution of the waiver issues in *Iskanian*. The *Reyes* opinion is, in part, based on *Iskanian's* holding that a "futility" defense was available for a party invoking *Concepcion* for a "change in law" that excused a party's delay in seeking arbitration. (*Iskanian, supra*, 147 Cal.Rptr. at pp. 386-387.) This Court has already granted review of the *Iskanian* decision. (*Iskanian v. CLS Transp. of Los Angeles LLC* (Cal. 2012) 147 Cal.Rptr.3d 324.) Thus, because *Reyes* incorporates and relies on *Iskanian*, that is now under review, at minimum, this Court should issue a grant and hold pending resolution of *Iskanian*.

For the forgoing reasons, CAOC respectfully requests that the Supreme Court of California grant review of the *Reyes* decision. Alternatively, issue a grant and hold pending the outcome of this Court's resolution of *Iskanian*.

Respectfully submitted,

Dated: November 2, 2012

**ARBOGAST BOWEN LLP**

A handwritten signature in black ink, appearing to read 'D. Arbogast', is written over a horizontal line. The signature is stylized and somewhat scribbled.

DAVID M. ARBOGAST

*Attorney for Amicus Curiae,  
Consumer Attorneys of California*

## DECLARATION OF SERVICE BY MAIL

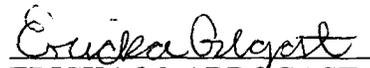
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 11400 W. Olympic Blvd., 2nd Floor, Los Angeles, CA 90064.

2. That on November 2, 2012, declarant served the **REQUEST FOR REVIEW ON BEHALF OF CONSUMER ATTORNEYS OF CALIFORNIA** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of November, 2012 at Los Angeles, California.

  
ERICKA M. ARBGAST

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