S220812

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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TIMOTHY SANDQUIST,

Plaintiff and Appellant,

vs.

LEBO AUTOMOTIVE, INC. *et al.*,

Defendants and Respondents

==========

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT • DIVISION 7 • CASE NO. B244412
SUPERIOR COURT OF LOS ANGELES • HON. ELIHU M. BERLE • NO. BC476523

==========

BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS *AMICUS CURIAE*

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
C.R.C. Rule 8.208

The following application and brief are made by the Consumer Attorneys of California ("CAOC"). CAOC is a non-profit organization of attorneys and is not a party to this action. CAOC is not aware of any entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Dated: May 4, 2015

Respectfully submitted,

By: _____

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE:

The undersigned respectfully request permission to file a brief as *amicus curiae* in the matter of Timothy Sandquist v. Lebo Automotive, Inc. et al. (2014) 180 Cal.Rptr.3d 1 (hereafter Sandquist) under Rule 8.520(t) in support of Plaintiff and Appellant, on behalf of Consumer Attorneys of California ("CAOC").

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. In particular, CAOC has participated as *amicus* in numerous important consumer and employee rights cases, including: Rose v. Bank of America, N.A. (2013) 57 Cal.4th 390; Aryeh v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185; Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004; and Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th

348. CAOC has also participated as an *amicus* in many cases pending at the intermediate appellate level.

CAOC has a substantive and abiding interest in ensuring that the representative and class action procedural devices are available to remedy wrongful acts and omissions committed in a uniform and common manner. This is particularly true in the area of employment and consumer law.

With respect to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. No party or counsel for a party, and indeed no person, save the authors themselves, has made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows.

Executed in Los Angeles, California, this 4th day of May, 2015.

Application for Leave to File Amicus Brief

Respectfully submitted,

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INTRODUCTION

Consumer Attorneys of California ("CAOC") respectfully submits that the holding of Second Appellate District is correct and should be upheld. Arbitrators are competent to resolve any ambiguity in a contract. In particular, whether the class action procedural device should be employed by simply applying the rule that contracts should be interpreted against the drafter. Here, the Court of Appeal correctly determined, the trial court's responsibility ended after its ruling on the gateway question of "arbitrability." Consistent with federal and state precedent, once the trial court made its gateway determination on whether the plaintiff's claims were subject to arbitration, its role in the case should have ceased. The arbitrator, and not the court, then needs to determine whether, under the terms of the agreement, it will arbitrate the matter on a class-wide basis.

Finally, the Court of Appeal's holding is supported by persuasive U. S. Supreme Court authority.

Accordingly, the CAOC respectfully urges this Court to uphold the Court of Appeal's decision finding that the question of whether the parties agreed to class arbitration is for the arbitrator rather than the court to decide and that the trial court erred by going beyond the gateway question of "arbitrability."

LEGAL DISCUSSION

I. An Arbitrator, Using the Normal Rules that Apply to All Contracts, May Apply the Rule that Contracts Should Be Interpreted Against their Drafters.

As the Second District's Opinion points out, plaintiff needed a job. Once hired, he quickly signed, without having reviewed, the hiring documents that consisted of over 100 pages that his employer demanded he sign. (Opinion at p. 2). Within these documents, plaintiff signed three documents that contained arbitration clauses. (Id.) Each arbitration clause signed uniformly stated that all disputes related to employment "shall be submitted to and determined exclusively by binding arbitration . . ." (Id. at pp. 2-3.) In addition, each arbitration clause uniformly stated that all disputes related to employment "which would otherwise require or allow resort to any court . . ." be submitted to arbitration. (Id. at p. 3.) Thus, the documents themselves unambiguously delegate to the arbitrator all disputes arising from plaintiff's employment, including the procedural issue of whether the class action device is appropriate in this case.

To the extent that there is any ambiguity as to whether the class action procedural device may be employed by the arbitrator, that question can and should be answered by the arbitrator by simply applying the rules that apply to all contracts, including the "generally accepted principal" that contracts should be interpreted against the drafter. (See 11 Williston on Contracts (4th ed. 2014)

§ 32:12.) In fact, CAOC was unable to find a single jurisdiction that does not follow this rule of contract interpretation.

"The primary goal of contract interpretation is to give effect to the mutual intent of the parties." (Villacres v. ABM Industries, Inc. (2010) 189 Cal.App.4th 562, 598.) Moreover, it is a standard principle of contract interpretation that ambiguities be resolved against the drafter. More specifically, as this Court has noted in a case involving the interpretation of an arbitration agreement, "ambiguities in standard form contracts are to be construed against the drafter." (Steven v. Fidelity & Casualty Co. (1962) 58 Cal.2d 862, 882–884; Rest.2d Contracts (1981) § 206 pp. 105–106; 4 Williston on Contracts (3d ed. 1961) § 621, pp. 760–774.)

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (AT&T Technologies, Inc. v. Communications Workers of Am. (1986) 475 U.S. 643, 648.) The U.S. Supreme Court has directed that "we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement." (Equal Employment Opportunity Comm 'n v. Waffle House, Inc. (2002) 534 U.S. 279, 294.)

The U.S. Supreme Court has made clear that the Federal Arbitration Act ("FAA") does not preempt the field of arbitration law. (Volt Info. Sciences, Inc. v. Bd. of Trustees (1989) 489 U.S. 468, 477.) Instead, the FAA, by its terms,

as intended by Congress and as interpreted by the U.S. Supreme Court, preserves a key role for the normal rules of state contract law. As the Supreme Court explained in Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 281, state contract law is "a method for protecting consumers against unfair pressure" in the arbitration context. One illustration of the normal protections in state contract law is that arbitration agreements are construed according to traditional common-law principles of contract interpretation, and one of those rules is that contracts are to be interpreted against their drafters. (Maggio v. Winward Capital Management Co. (2000) 80 Cal.App.4th 1210, 1215 ("any ambiguity in the language of the arbitration clause must be interpreted against the drafter."))

This rule of contract law is not merely a feature of U.S. Supreme Court jurisprudence or contract law in other states. This Court, like numerous others, have long applied the rule that a contract must be construed against its drafter. (See, e.g., Victoria v. Superior Court (1985) 40 Cal.3d 734, 739 (finding ambiguities in contract to be construed against drafter); In re Miller's Estate (N.J. 1982) 447 A.2d 549, 555 (same); Osborn ex re. Osborn v. Kemp (Del.Supr. 2010) 991 A.2d 1153, 1160 (same); Dickson v. Hubbell Realty Co. (Iowa 1997) 567 N.W.2d 427, 430 (same); Burroughs Corp. v. Chesapeake Petroleum & Supply Co., Inc. (Md. 1978) 384 A.2d 734, 737 (same); Peri-Mack Enterprises Co. v. City and County of Denver (Colo. 1977) 568 P.2d 468, 471 (same); McMinn v. City of Oklahoma City (Okla. 1997) 952 P.2d 517, 522 (same); A.C.

Beals Co. v. Rhode Island Hospital (R.I. 1972) 292 A.2d 865, 872 (same); Schultz & Lindsay Const. Co. v. State (N.M. 1972) 494 P.2d 612, 614 (same); Wisconsin Label Corp. v. Northbrook Property & Cas. Ins. Co. (Wis. 2000) 607 N.W.2d 276, 283 (same); Wade v. Selby (Miss. 1998) 722 So.2d 698, 701 (same); Nadherny v. Roseland Property Company, Inc. (1st Cir. 2004) 390 F.3d 44, 49 (same, applying Massachusetts law); Photopaint Technologies, LLC v. Smartlens Corp. (2nd Cir. 2003) 335 F.3d 152, 161 (same); Matter of Community Medical Center (3rd Cir. 1980) 623 F.2d 864, 866 (same, applying New Jersey law); Maersk Line, Ltd. v. U.S. (4th Cir. 2008) 513 F.3d 418, 423; Nicholas Acoustics & Specialty Co. v. H & M Const. Co., Inc. (5th Cir. 1983) 695 F.2d 839, 843 (same, applying Mississippi law); Mead Corp. v. ABB Power Generation, Inc. (6th Cir. 2003) 319 F.3d 790, 798 (same, applying Ohio law); Bourke v. Dun & Bradstreet Corp. (7th Cir. 1998) 159 F.3d 1032, 1036 (same, applying Illinois law); Corso v. Creighton University (8th Cir. 1984) 731 F.2d 529, 533 (same, applying Nebraska law); U. S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp. (9th Cir. 1978) 577 F.2d 568, 574 (same); Miller v. Monumental Life Ins. Co. (10th Cir. 2007) 502 F.3d 1245, 1253 (same); Arriaga v. Florida Pacific Farms, L.L.C. (11th Cir. 2002) 305 F.3d 1228, 1247 (same, applying Florida law).

The U.S. Supreme Court and other federal and state courts routinely apply this rule to arbitration agreements, including in cases where the parties

dispute an arbitration clause's scope. (See Mastrobuono v. Shearson Lehman Hutton, Inc. (1995) 514 U.S. 52, 62 ("respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it."); Victoria v. Superior Court (1985) 40 Cal.3d 734 (interpreting ambiguities in the scope of an arbitration agreement against the drafter); AGCO Corp. v. Anglin (7th Cir. 2000) 216 F.3d 589, 595 (applying rule; reversing confirmation of arbitration award); Storey v. Shearson Lehman Hutton, Inc. (8th Cir. 1991) 949 F.2d 1039, 1042 (same); Luke v. Gentry Realty, Ltd. (Hawaii 2004) 96 P.3d 261, 269; Maggio v. Windward Capital Management Co. (2000) 80 Cal.App.4th 1210, 1215 ("Any ambiguity in the language of the arbitration clause must be interpreted against the drafter. [Citations.]"); PaineWebber Inc. v. Bybyk (2nd Cir. 1996) 81 F.3d 1193, 1199 (applying common-law rule of contract interpretation that construes ambiguous language against drafter to arbitration agreement); Seifert v. U.S. Home Corp. (Fla. 1999) 750 So.2d 633, 641 (construing ambiguous contract, including arbitration provision, against drafter); Barrett v. McDonald Investments, Inc. (Me. 2005) 870 A.2d 146, 151 ("[W]e join other courts that have favored interpreting ambiguous arbitration clauses against the drafter. [Citations.]"); Caruso v. Ravenswood Developers, Inc. (N.J. 2001) 337 N.J.Super. 499, 506 ("If there is an ambiguity in the language of the arbitration clause, it should be construed against the party that drafted it.");

Mork v. Loram Maintenance of Way, Inc. (D. Minn. 2012) 844 F.Supp.2d 950, 953 ("Like any contract dispute, however, ambiguities in the [arbitration] agreement must be construed against the drafter. [Citation.]"); Ahern v. Northern Technologies Interm. Corp. (W.D.N.Y. 2002) 206 F.Supp.2d 418, 420 (finding where employer drafted contract, employee had no role in preparing contract or negotiating its terms, and employee was required to sign contract as a condition of his employment, any ambiguities in arbitration clause in contract between employer and employee had to be interpreted against employer); In re United Companies Financial Corp. (Bkrtcy. D.Del. 2002) 277 B.R. 596, 603 (finding ambiguity in arbitration agreement must be construed against drafter)

In Victoria, this Court considered a contract between a health care company and a large employer. Although the entire agreement could not be deemed a contract of adhesion, it was a standard-form agreement with some "adhesive characteristics." (Victoria, 40 Cal.3d at 838.) This Court held that the traditional common-law rule should apply, and the contract's arbitration agreement should be construed against its drafter. (Id. at 838-39.) By interpreting arbitration agreements against the drafter, courts "protect the party who did not choose the language from an unintended or unfair result." Mastrobuono, 514 U.S. at 63. Consistent with this purpose, the rule is particularly appropriate in cases involving "standardized contracts" and in cases "where the drafting party has the stronger bargaining position." (Rest. (Second)

of Contracts §206 cmt. a (1981).) The importance of the rule is to "protect" parties with less control is obviously heightened in a case where one party has very little control over the language or terms of an agreement, such as under the facts of this case.

Here, the question of whether to employ the class action procedural device in this case is, at most, ambiguous. Given that the record strongly suggests that the standardized form agreements were forced onto Plaintiff as a condition of his employment by Defendant, basic contract law should apply leaving the arbitrator to decide whether it is appropriate to employ the class action procedural device in this case.

II. The Court of Appeal Correctly Determined That this Matter Should Proceed to Arbitration and the Arbitrator Is to Decide All Procedural Issues Including the Applicability of the Class Action Procedural Device.

After reviewing the standardized form contracts signed by plaintiff, the Court of Appeal correctly decided the gateway question of arbitrability and ordered the remaining procedural questions to be decided by the arbitrator. (Opinion at p. 15.) In reaching this conclusion, the Court of Appeal keenly observed that once the trial court determined that the case must be submitted to arbitration, the role of the trial court was complete and the arbitrator is to decide all procedural issues. (Id.) CAOC agrees.

This Court and the U.S. Supreme Court have long recognized class action as a procedural vehicle to enforce substantive law. (See Deposit Guaranty Nat. Bank v. Roper (1980) 445 U.S. 326, 331; accord, Duran v. United States Bank Nat. Assn. (2014) 59 Cal.4th 1, 34 (class actions are a procedural device provided "only as a means to enforce substantive law.").) The class action question being entirely procedural in nature, the Court of Appeal correctly left this question for the arbitrator to decide. (See Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 84 ("' "procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide."))

When determining whether to compel arbitration, trial courts are to consider only "gateway" matters unless the contract expressly provides otherwise. (Howsam, 537 U.S. at 83-84 (2002); Rent-A-Ctr., W., Inc. v. Jackson (2010) 561 U.S. 63, 68-69 ("Jackson").) In particular, "[i]t is the job of the arbitrator, not the court, to resolve all questions needed to determine the controversy." (Titan/Value Equities Group, Inc. v. Superior Court (1994) 29 Cal.App.4th 482, 488; see also Howsam, 537 U.S. at 83-84 ("At the same time the Court has found the phrase 'question of arbitrability' *not* applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus '"procedural" questions that grow out of the dispute and bear on its final disposition' are presumptively *not*

for the judge, but for an arbitrator, to decide. [Citation.])) The arbitrator, and not the court, decides questions of procedure and discovery. (See Brock v. Kaiser Foundation Hospitals (1992) 10 Cal.App.4th 1780, 1802; Titan/Value Equities Group, Inc., 29 Cal.App.4th at 488.)

"The FAA . . . envisions a limited role for courts asked to stay litigation and refer disputes to arbitration." (Jackson, 561 U.S. at 77; see also, Barragan v. Washington Mut. Bank (N.D. Cal. Aug. 28, 2006) No. C 06-01646-CRB, 2006 WL 2479125, at *3 ("The Supreme Court has preserved a limited role for the federal courts to play in interpreting arbitration agreements.")) Courts are tasked only with determining the narrow gateway questions as to the validity of an arbitration agreement and whether it requires arbitration of a particular type of dispute. (Jackson, 561 U.S. at 68-69.) These questions are typically resolved by the courts based on the assumption that the "contracting parties would likely have expected a court to" decide such limited threshold issues. (Howsam, 537 U.S. at 83-84; see also Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967) 388 U.S. 395, 403-04 (holding that section 4 of the FAA permits a federal court to consider only issues concerning "the making of the agreement for arbitration or the failure to comply (with the arbitration agreement)").

The question of "whether the contracts forbid class arbitration [] does not fall into this narrow exception" to the courts' circumscribed role because "[i]t concerns neither the validity of the arbitration clause nor its applicability to the

underlying dispute between the parties." (Green Tree Fin. Corp. v. Bazzle (2003) 539 U.S. 444, 452-53 (Bazzle) (plurality opinion). Rather, the question involves "what kind of arbitration proceeding the parties agreed to," which is an issue of contract interpretation that "[a]rbitrators are well situated to answer." (Id. at 452-53; see also PacifiCare Health Sys., Inc. v. Book (2003) 538 U.S. 401, 407 (where an arbitration agreement is ambiguous, "the antecedent question of how the ambiguity is to be resolved" is one for the arbitrator); Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co. (3rd Cir. 2007) 489 F.3d 580, 587-88 (whether an arbitration agreement foreclosed consolidated arbitration is a question of contract interpretation for the arbitrator).)

In the Ninth Circuit, district courts are "limited" to determining (1) whether a valid agreement to arbitrate exists and (2) whether it covers the substantive dispute at issue. (See Chiron Corp. v. Ortho Diagnostic Systems, Inc. (2000) 207 F.3d 1126, 1131 (observing that the Federal Arbitration Act ("FAA") restricts the court's review to deciding only whether the dispute is arbitrable, that is, whether it falls within the scope of the parties' agreement to arbitrate.)

In Bazzle, five justices agreed that an arbitrator should decide in the first instance whether an arbitration clause permits class arbitration. While the majority in Stolt-Nielsen S.A. v. AnimalFeeds International Corp. (2010) 559 U.S. 662 (Stolt-Nielsen) discussed Bazzle in detail, it expressly declined to

revisit the holding of Bazzle. (See Stolt-Nielsen, 559 U.S. at 680 ("we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible."))

Thus, while the plurality opinion in Bazzle "is not binding" it is nevertheless instructive. (See Thalheimer v. City of San Diego (9th Cir.2011) 645 F.3d 1109, 1127 n. 5 ("[W]e follow the [Supreme Court] plurality opinion as persuasive authority, though 'not a binding precedent.' " (quoting Texas v. Brown (1983) 460 U.S. 730, 737.) See also Lee v. JPMorgan Chase & Co. (C.D.Cal. 2013) 982 F.Supp.2d 1109 (finding Bazzle persuasive that the class action question concerns the procedural arbitration mechanisms available to plaintiffs and that the class action procedural question does not fall into the limited scope of the court's responsibilities in deciding a motion to compel arbitration.))

Once a court makes the gateway determination that an agreement to arbitrate is valid and applies to the dispute, the question of whether class or collective arbitration is permitted is a "matter of contract interpretation . . . for the arbitrator, not the courts, to decide." (Bazzle, 539 U.S. at 452-53.)

Accordingly, trial courts in this state should follow the same narrow set of basic threshold questions about whether arbitration may take place at all – namely, whether the parties agreed to arbitrate, whether that agreement is valid

and enforceable, and whether it encompasses a particular substantive claim. Any remaining procedural questions should then be left for the arbitrator to decide.

CONCLUSION

For the forgoing reasons, CAOC urges this Court to uphold the Court of Appeal holding that the question of whether the parties agreed to class arbitration is for the arbitrator rather than the court to decide, and that the trial court erred by deciding that issue in this case.

Dated: May 4, 2015 Respectfully submitted,

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned counsel certifies that the text of this petition uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this petition consists of 2953 words as counted by the Corel WordPerfect X5 program used to generate this petition.

Dated: May 4, 2015

_____
David M. Arbogast

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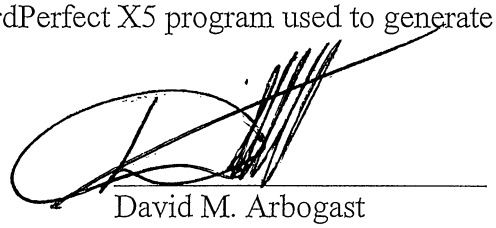
Dated: May 4, 2015



David M. Arbogast

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 8117 W. Manchester Ave., Suite 530, Playa Del Rey, California 90293.

2. That on May 4, 2015, declarant served the **BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS AMICUS CURIAE** 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 4th day of May, at Los Angeles, California.

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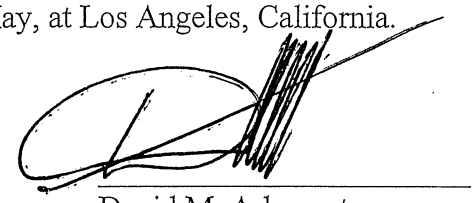

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