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May 18, 2015

Via Overnight Mail

Presiding Justice and Associate Justices
Court of Appeal of the State California
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Re: **Julio Oregel v. PacPizza, LLC, No. A141947**
(May 1, 2015); (Contra Costa County Super. Ct. No. MSC12-01454)

Dear Presiding Justice Kline and Associate Justices:

Pursuant to California Rule of Court 8.1120(a), Consumer Attorneys of California ("CAOC") respectfully requests that this Court publish its recently-issued opinion in *Oregel v. PacPizza, LLC* (1st App. Dist. May 1, 2015) ("*Oregel*"). In *Oregel*, this Court affirmed the trial court's denial of a motion to compel arbitration, concluding, "We are loathe to condone conduct by which a defendant repeatedly uses the court proceedings for its own purposes . . . , all the while not breathing a word about the existence of an arbitration agreement, or a desire to pursue arbitration. . . . We note that 'the 'bad faith' or 'willful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration.'" *Oregel* at 22 (citations omitted). As will be discussed below, the Court's well-reasoned opinion meets several of the requirements for publication under Rule 8.1105(c).

INTEREST OF 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

Presiding Justice and Associate Justices
Court of Appeal of the State California
First Appellate District
May 18, 2015
Page 2

important consumer and employee rights cases, including recent cases such as: *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 access to courts is available to remedy wrongful acts and omissions committed against employees and consumers, and that contractual arbitration provisions are not abused by employers and corporations. This is particularly true in the area of employment law.

DISCUSSION

This Court's Opinion in *Oregel* merits publication because it (1) clarifies and re-affirms the applicable standard of review of an order denying a motion to compel arbitration, (2) explains and clarifies for trial courts their obligations when determining whether a defendant has failed to compel arbitration in a timely and reasonable manner, (3) applies the existing rule of law regarding prejudice and waiver to a set of facts significantly different from those stated in published opinions, (4) involves legal issues of widespread and continuing public interest in accessing courts and California's public policy in favor of arbitration as a speedy and inexpensive means of dispute resolution, and (5) makes a significant contribution to legal literature by reviewing the case law concerning prejudice, waiver, and a motion to compel arbitration. Rule 8.1105(c).

First, *Oregel* clarifies current standards of review of an order denying a motion to compel arbitration. While the Court holds that it would affirm the trial court's ruling under an abuse of discretion or *de novo* standard of review, *Oregel* at 12-13, the Court, at p. 12, recites the Supreme Court's holding in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 ("*St. Agnes*"), finding it "instructive": "Generally, the determination of waiver [of the right to arbitrate] is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' [Citation.]" *Id.* at 1196. Therefore, *Oregel* meets the requirements of Rule 8.1105(c)(3) and should be published.

Presiding Justice and Associate Justices
Court of Appeal of the State California
First Appellate District
May 18, 2015
Page 3

Second, given that “[n]o single test defines the conduct that will constitute waiver of an arbitration right,” *Oregel* at 13, the Court explains and clarifies for trial courts their obligations when determining whether a defendant has failed to compel arbitration in a timely and reasonable manner under five of the six factors listed in *St. Agnes*. Here, defendant did not plead an agreement to arbitrate as an affirmative defense, *Oregel* at 14; defendant waited for a period of 17 months prior to moving to compel arbitration, *Id.*; defendant paid the jury fee deposit, *Id.* at 13; defendant conducted extensive class discovery, including 25 putative class member depositions, *Id.* at 4; defendant propounded 226 written discovery requests, *Id.* at p.4; and defendant filed the petition seeking arbitration after plaintiff filed the class certification moving papers. *Id.* Publication of the Court’s analysis of this case will discourage future litigants from causing a party to incur substantial expense due to the other party’s unreasonable and unjustified delay. *Id.* at 21. Thus, *Oregel* meets the requirements of Rule 8.1105(c)(2) and (3), and should be published.

Third, *Oregel* applies the existing rule of law regarding prejudice and waiver as established in *St. Agnes* to a set of facts significantly different from those stated in published opinions. Indeed, as discussed above, the facts involved in this case allowed the Court to “easily conclude PacPizza waived any claimed right to arbitrate.” *Oregel* at 21. *Oregel* meets the publication requirements of Rule 8.1105(c)(2).

Fourth, *Oregel* involves legal issues of widespread and continuing public interest in accessing courts and California’s public policy in favor of arbitration as a speedy and inexpensive means of dispute resolution. Indeed, access to justice, timely-filed arbitration petitions, and the economics of litigation, particularly the trial court’s judicial economy, relate to the public interest. The *Oregel* Court discusses the arbitration clause at issue, found in a job application, in particularly small font, which begins: “Because of the delay and expense of the court system, Pizza Hut and I agree to use confidential binding arbitration, instead of going to court. . .” *Oregel* at p. 2. The Court also illuminates the litigation strategy of submitting to the court system— even paying the jury fee deposit, *Id.* at p.13— and then seeking to compel arbitration after the filing of the plaintiff’s motion for class certification and its supporting declarations and exhibits. Such tactics “substantially undermined [the] important public policy [of arbitration as a speedy and relatively inexpensive means of dispute resolution] or substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration.” *Id.* at 20. The requirements of Rule 8.1105(c)(6) are met.

Fifth, *Oregel* makes a significant contribution to legal literature by reviewing the case law concerning prejudice, waiver, and a motion to compel arbitration, and provides a specific factual

Presiding Justice and Associate Justices
Court of Appeal of the State California
First Appellate District
May 18, 2015
Page 4

situation for other courts and litigants to consider in evaluating cases. *Oregel* therefore readily meets the requirements of Rule 8.1105(c)(7).

CONCLUSION

The guidance and clarification contained in this Court's Opinion, if published, will secure uniformity of decision and greatly advance the efficiency of the untold number of trial courts who are currently grappling with these extremely important matters of widespread interest. And, in addition to the specific legal issues which *Oregel* correctly and efficiently resolves, the framework by which it also provides to resolve these, and other issues like them, also could assist other trial courts in ruling on motions to compel arbitration in proceedings that have proceeded in court for some time. For these and reasons discussed above, CAOC respectfully requests that this Court publish the *Oregel* Opinion.

Respectfully Submitted:

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cc: Counsel of Record

1 **PROOF OF SERVICE**

2 Julio Oregel v. PacPizza, LLC, Case No. A141947

3 I am over the age of eighteen years and not a party to the within action. My business address
4 is 350 Tenth Ave., Suite 880, San Diego, CA 92101. I am employed at that address at The Bronson
5 Firm APC. On the date set forth below I served the document(s) described as **Correspondence to**
6 **Presiding Justice and Associate Justices Court of Appeal of the State of California First**
7 **Appellate District, dated May 18, 2015** on all the interested parties in this action, by placing:
8 [] the original [xx] true copies thereof enclosed in sealed envelopes, addressed as follows, which
addresses are the addresses last given by the respective addressees on any document filed in the
above case and served on The Bronson Firm APC:

9 Presiding Justice and Associate Justices Via Overnight Mail
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Via US Mail & Email

- [✓] **BY MAIL (Drop Off):** On the date set forth below I deposited such envelope(s), in a mailbox regularly maintained by the U.S. Postal Service in San Diego County, California. The envelope(s) was/were deposited with postage thereon fully prepaid.
- [✓] **BY ELECTRONIC TRANSMISSION:** On the date set forth below I caused to be transmitted the document(s) listed above to the above email address(s) before 6:00 p.m.
- [✓] **BY OVERNIGHT MAIL - CCP § 1013(c):** I am personally and readily familiar with the business practice of THE BRONSON FIRM for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 18th day of May, 2015, in the State of California, County of San Diego, San Diego, California.



 THALIA TENORIO