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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TIMOTHY SANDQUIST,
Plaintiff and Appellant,

vs.

LEBO AUTOMOTIVE, INC., et al.
Defendants and Respondents.

Appeal from the Superior Court for the County of Los Angeles
Case No. BC476523
The Honorable Elihu M. Berle
After Review by the Court of Appeal,
Second Appellate District, Division Seven
Case No. B244412

DEFENDANTS' AND RESPONDENTS' PETITION FOR REVIEW

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PETITION FOR REVIEW

Defendant and Respondents LEBO AUTOMOTIVE, dba JOHN ELWAY'S MANHATTAN BEACH TOYOTA *now known as* MANHATTAN BEACH TOYOTA ("Respondent MBT"), JOHN ELWAY, MITCHELL D. PIERCE, JERRY L. WILLIAMS, and DARRELL SPERBER (collectively, "Respondents") petition for review of a published decision by the Court of Appeal, Second Appellate District, Division Seven ("Second District"), which reverses an order of the Superior Court for the County of Los Angeles ("Superior Court"). The Superior Court's order had compelled Plaintiff and Appellant TIMOTHY SANDQUIST ("Appellant") to arbitrate his claims against Respondents on an individual basis. The Second District reversed that part of the trial court's order prohibiting class arbitration of Appellant's claims. The Second District opined that the arbitrator, not the Superior Court, should decide whether the arbitrator has jurisdiction to hear class claims even though the arbitration agreement does not authorize class arbitration. A copy of the Second District's opinion ("*Opn.*") is attached hereto as Exhibit "A."

ISSUES PRESENTED FOR REVIEW

1. Did the Second District erroneously determine that arbitrators, not the courts, should determine the scope of their own jurisdiction to hear class claims absent authorizing language in the arbitration agreement?

2. Even if the Superior Court erred by determining itself whether the arbitrator had jurisdiction to hear class claims, was that error harmless given that the Superior Court correctly determined that the arbitration agreements did not authorize the arbitrator to hear class claims?

WHY REVIEW SHOULD BE GRANTED

This Court should grant review in order to resolve the issue, which the Second District below concedes is unsettled (*Opn.* at p. 10), of whether a court or an

arbitrator should determine if the arbitrator has jurisdiction to hear class claims when the arbitration agreement is silent on the issue.

In holding that an arbitrator should decide whether to allow class claims in the absence of authorizing language in the arbitration agreement, the Second District below reached a result that is contrary to this Court's decision in *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086. The Second District's decision is also at odds with decisions of the United States Supreme Court (*Stolt-Nielsen S.A. v. Animalfeeds Int'l* (2010) 559 U.S. 662) and the United States Courts of Appeals (*Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594; *Opalinski v. Robert Half Int'l, Inc.* (3d Cir. July 30, 2014) ___ F.3d ___, 2014 U.S. App. LEXIS 14538).

In *City of Los Angeles,* this Court held that an arbitrator has no authority to decide whether to hear certain claims unless the arbitration agreement expressly provides otherwise. Nevertheless, the Second District below contrarily held that an arbitrator is *exclusively* empowered to determine his or her own jurisdiction over class claims *absent* direction in the underlying arbitration agreement to the contrary. Not only did the Second District publish a decision that directly contradicts *City of Los Angeles*, it did so without even addressing that precedent in its analysis. Should this Court choose not to review the Second District's decision, it should at the very least order the opinion below de-published to avoid the confusion it will cause vis-à-vis *City of Los Angeles*.

Finally, the Second District entirely failed to consider whether any purported error by the Superior Court in making the decision itself regarding the arbitrator's jurisdiction was harmless. Consistent with *Code of Civil Procedure* section 475, this Court held long ago in *People v. Watson* (1956) 46 Cal.2d 818, that an appellate court cannot reverse a trial court order unless the purported error is "prejudicial." This Court further held in *Cassim v. Allstate Insurance Company* (2014) 33 Cal.4th 780, that prejudice cannot be found in the abstract, but requires an examination of

each individual case. The Second District wholly neglected this duty, failing to even consider whether the purported error was harmless. This Court should grant review additionally to reinforce the requirement that appellate courts *must* conduct a harmless error analysis before reversing any trial court order, especially in the context of motions to compel arbitration.

STATEMENT OF THE CASE

A. The Parties

Respondent MBT employed Appellant as a sales manager from September 2000 until Appellant's voluntary resignation on January 7, 2011. 1 JA 52-80.

As alleged in the operative First Amended Complaint ("FAC"), Respondent MBT is located in Manhattan Beach, California, engaged in the sale and repair of Japanese-manufactured automobiles. Respondent Darrel Sperber is the General Manager of Respondent MBT, and was Appellant's immediate supervisor. John Elway, Mitchell Pierce and Jerry Williams were corporate shareholders of Respondent MBT.

B. The Parties' Arbitration Agreements

At the beginning of Appellant's employment, the parties expressly agreed to resolve any employment-related dispute through arbitration. In pertinent part, the arbitration agreement read:

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. ... I and the Company both agree that any claim, dispute, and/or controversy ... which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical

> and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . . . . Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to, notions of "just cause") other than such controlling law.

1 JA 195. That same day, Appellant signed two additional arbitration agreements with Respondents containing similar language. 1 JA 197-198, 200-201.

C. Procedural History

Appellant filed his FAC in the Superior Court on February 1, 2012. 1 JA 52-107. The FAC asserts causes of action for (1) discrimination and harassment in violation of the Fair Employment and Housing Act, (2) violation of *Business and Professions Code* section 17200, and (3) common law constructive discharge. 1 JA 52-80. On March 12, 2012, Respondents filed a motion in the Superior Court to compel individual arbitration of all claims in the FAC, and to stay or dismiss proceedings in the Superior Court. 1 JA 176-177, 179-189. The Superior Court granted Respondents' motion to compel arbitration on August 14, 2012, and it additionally dismissed without prejudice Appellant's class claims "because there's no basis, contractual basis, to compel [class] arbitration." It granted Appellant 60 days to amend his complaint by bringing forth a new class representative who could support the class allegations. *Opn.* at p. 5. On September 28, 2012, Appellant's counsel notified the Superior Court that they could not produce a new class representative who had not signed an arbitration agreement, and on October 5, 2012, the trial court dismissed the class claims with prejudice. *Opn.* at p. 6.

On October 5, 2012, Appellant filed his Notice of Appeal challenging the Superior Court's order. On June 25, 2014, the Second District rendered its opinion. In pertinent part, the Second District determined that the arbitrator, not the Superior Court, should determine his or her own jurisdiction to hear Appellant's class claims. In turn, the Second District reversed and remanded that part of the order prohibiting

Appellant from pursuing class claims in arbitration. *Opn.* at pp. 9-15. On July 22, 2014, the Second District published its opinion.

LEGAL DISCUSSION

I.

THE SECOND DISTRICT FAILS TO ADDRESS THIS COURT'S CONTRADICTORY AND CONTROLLING PRECEDENT IN *CITY OF LOS ANGELES*

A. The Second District Creates a Presumption that Arbitrators May Determine Their Own Jurisdiction To Decide Class Claims Absent Contractual Direction to the Contrary

Appellant signed multiple arbitration agreements with the Respondents which provided "that any claim dispute, and/or controversy...arising from, related to, or having any relationship or connection whatsoever with [Appellant's]... employment by, or other association with the [Respondents]... shall be submitted to and determined exclusively by binding arbitration...." *Opn.* at pp. 2-4. Nowhere do the arbitration agreements provide for arbitration of class claims or state that the arbitrator is empowered to decide whether class claims may be pursued. The parties disputed whether the agreements empowered the arbitrator to hear class claims. *Opn.* at pp. 4-5, 9-16.

In its decision below, the Second District first observed that the text of the arbitration agreements were silent on the issue. *Opn.* at p. 11. The Second District then decided it would purportedly "follow the plurality opinion in [*Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444 ("*Bazzle*")] that the question whether the parties agreed to class arbitration in cases where the arbitration agreement is silent is determined by the arbitrator." *Opn.* at p. 13. Accordingly, pursuant to the Second District's decision, a court must presume that the arbitrator is empowered to

determine his or her own jurisdiction to hear class claims absent language in the arbitration agreement to the contrary.

B. This Court Reached the Opposite Result in *City of Los Angeles*

Notably, the Second District's opinion fails to address, or even mention, this Court's decision last year in *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086 – a decision that reached the exact opposite result.

In *City of Los Angeles*, the arbitration agreement authorized the arbitrator to determine "*a[ny] dispute* concerning the interpretation or application of this written MOU [which included the arbitration agreement]...." 56 Cal.4th at 1093 [emphasis added]. The parties disputed whether the arbitration agreement empowered the arbitrator to hear claims regarding furloughs. *Id.* at 1091-1092. Despite the contractual language stating that "*a[ny] dispute* concerning the interpretation or application of this [arbitration agreement]" fell within the authority of the arbitrator, this Court nonetheless held: "Here, because the parties' MOU did not *expressly* authorize the arbitrator to determine whether particular disputes were subject to arbitration, that determination was for the court to make." *Id.* at 1093 [emphasis added].

In other words, this Court just last year held that, absent *express authorization* in the arbitration agreement for the arbitrator to determine which types of disputes will be arbitrable, the courts must determine the jurisdiction of arbitrators, not the arbitrators themselves. Moreover, this Court in *City of Los Angeles* maintained that for such express authorization to be found, a party must identify language in the text of the arbitration agreement which expressly states to the effect: "The parties agree that the arbitrator is empowered to determine his or her own scope of authority." Language stating merely "any dispute concerning the interpretation or application of the arbitration agreement," is to be decided by the arbitrator is insufficient. 56 Cal.4th at 1093.

Indeed, the United States Supreme Court has likewise counseled against allowing arbitrators to determine their own jurisdiction because they have an inherent conflict of interest to expand the scope of their powers beyond those actually provided in the arbitration agreement. "The willingness of parties to enter into agreements would be drastically reduced ... if a labor arbitrator had the power to determine his own jurisdiction...." *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 651 [internal quotes omitted]. "Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.* [internal quotes omitted]. Moreover, these innately biased decisions of the arbitrator would not be subject to any judicial review to preserve the legitimacy of the arbitration process. *Oxford Health Plans LLC v. Sutter* (2013) 569 U.S. ___, 133 S.Ct. 2064, 2068-2071 [decisions by an arbitrator regarding his or her own scope of authority are not subject to judicial review].

Accordingly, not only does the Second District's decision disregard the controlling authority of *City of Los Angeles*, but it also fails to address the concerns raised by the United States Supreme Court about arbitrators' inherent conflict of interest if they are allowed to determine their own jurisdiction.

II.

THE SECOND DISTRICT ALSO DISREGARDED ESTABLISHED CALIFORNIA LAW BASED UPON AN INCORRECT INTERPRETATION OF *BAZZLE*

A. California Law Has Long Empowered the Courts to Determine the Authority of Arbitrators to Hear Class Claims

In *Garcia v. Direct TV* (2004) 115 Cal.App.4th 297, Division One of the Second Appellate District was confronted with the same question of whether

arbitrators are empowered to determine their own jurisdiction in relation to hearing class claims. Citing both California Supreme Court and Court of Appeal precedent, the *Garcia* court acknowledged that "California law... vests jurisdiction in our trial courts to determine whether" there is an "absence of a class action waiver" in the underlying arbitration agreement; and if so, whether the arbitrator is empowered to hear a class action. *Id.* at 298. Indeed, in *Keating v. Superior Court* (1982) 31 Cal.3d 584, 613, this Court held: "Whether such an order [to permit the arbitrator to hear a class action in arbitration] would be justified in a case of this sort is a question appropriately left to the discretion of the trial court."

However, misconstruing the plurality opinion in *Bazzle*, as well as its lack of binding effect, the *Garcia* court stated, "...[B]ut no longer. The [United States] Supreme Court has spoken, and the foundational issue – whether a particular arbitration agreement prohibits class arbitrations – must (in FAA cases) henceforth be decided by the arbitrators, not the courts. (*Green Tree Financial Corp. v. Bazzle* [].)" 115 Cal.App.4th at 298 [brackets added]. Accordingly, as the *Garcia* court recognized, California law empowered courts to determine an arbitrator's authority to hear class claims prior to *Bazzle.*

However, the United States Supreme Court has since advised, twice, that the *Bazzle* plurality opinion was in fact not binding authority. *Stolt-Nielsen, supra,* 559 U.S. at 678-680; *Oxford Health, supra*, 133 S.Ct. at 2068, fn 2. In turn, the First Appellate District in *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1129, fn. 6, and Division One of the Fourth Appellate District in *Truly Nolen of America v. San Diego County* (2012) 208 Cal.App.4th 487, 515 fn. 4, have both rightfully rejected *Garcia* for its belief that *Bazzle* was controlling precedent. Finally, as demonstrated below, *Garcia*'s interpretation that the *Bazzle* plurality found "whether a particular arbitration agreement prohibits class arbitrations[] must ... henceforth be decided by the arbitrators," is also erroneous.

B. The *Bazzle* Plurality Solely Determined that the Strong Presumption Previously Employed by the United States Supreme Court in Favor of Courts Determining the Jurisdiction of Arbitrators Was Not Appropriate on the Question of Whether an Arbitrator Has the Authority to Hear Class Claims

Similar to *Garcia*, the Second District believes that *Bazzle* found "the question whether the parties agreed to class arbitration in cases where the arbitration agreement is silent is determined by the arbitrator." *Opn.* at p. 13. In fact, *Bazzle* never considered such a global issue. Rather, the *Bazzle* plurality first determined that the question of whether the courts or the arbitrator should determine the arbitrator's jurisdiction to hear class claims is a question of contractual interpretation subject to the rules of the applicable state law. 539 U.S. at 447, 450, 454-455 [J. Stevens concurring]. In other words, courts should first look to the arbitration agreement itself to determine who decides the question.

The arbitration agreement in *Bazzle* read, in pertinent part: "all disputes, claims, or controversies *arising from or relating to this contract* or the relationships which result from this contract" would be subject to arbitration. 539 U.S. at 451 [emphasis added]. The plurality determined that "whether [the arbitration agreement] forbids the use of class arbitration procedures[] is a dispute 'relating to this contract' and the resulting 'relationships.'" *Ibid.* Thus, based upon this contractual interpretation, the *Bazzle* plurality opined that, "[h]ence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question." *Id.* at 451-452. By contrast, the parties to the arbitration agreements at issue here only agreed to arbitrate disputes over Appellant's *employment*, not disputes over the meaning of the arbitration agreements.

Next, the *Bazzle* plurality responded to an argument that its contractual interpretation analysis ran afoul of a rule previously established by the United States

Supreme Court in *AT&T Technologies, supra,* 475 U.S. at 643. *Bazzle, supra,* 539 U.S. at 452; see also pp. 456-457 [C.J. Rehnquist dissenting, raising similar argument citing *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 945]. *AT&T Technologies* held, in pertinent part, that courts shall presume that parties intend for the courts to determine the scope of an arbitrator's jurisdiction in the absence of "clear and unmistakable evidence" within the arbitration agreement to the contrary – a standard the language analyzed by the *Bazzle* plurality did not satisfy. 475 U.S. at 649. While recognizing the precedential authority of *AT&T Technologies*, the *Bazzle* plurality opined that the strong presumption discussed in that case only applied to controversies concerning an arbitrator's authority to hear the type of underlying substantive claim – not an arbitrator's authority to hear those types of substantive claims on a class basis. *Bazzle*, at 452-453.

In short, the *Bazzle* plurality determined that its contractual analysis did not run afoul of *AT&T Technologies* after finding that the strong presumption established in that case did not apply to controversies over the jurisdiction of an arbitrator to hear class claims. "Given these considerations, *along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.*" *Bazzle, supra,* 539 U.S. at 452-453 [emphasis added]. However, the plurality's opinion that the *AT&T Technologies* strong presumption did not apply to such controversies does not equate into a determination that an equal but opposite presumption exists that arbitrators should determine their own jurisdiction to hear class claims. As discussed below, such a presumption would contradict the well-established rule that arbitration "is a matter of consent, not coercion," and that a party cannot be compelled to submit to arbitration unless that party previously agreed to it. *Volt v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 479; *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83.

III.

VOLT AND *STOLT-NIELSEN* FORECLOSE ANY PRESUMPTION IN FAVOR OF ARBITRATORS DETERMINING THEIR OWN SCOPE OF AUTHORITY

In *Volt*, a party asked the United States Supreme Court to void certain provisions of an arbitration agreement as purportedly inconsistent with the Federal Arbitration Act ("FAA"), and inferentially institute alternate provisions that were not a part of the original agreement. 489 U.S. at 468. The Court soundly rejected the suggestion that a court could mandate provisions not contained within the original agreement. "Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreement as they see fit." *Id.* at 479.

Building upon this principle, *Stolt-Nielsen* rejected a proposed presumption that arbitrators had jurisdiction to hear class claims where the arbitration agreement was silent on the issue. 559 U.S. at 662. Again, the Court explained that a party cannot be compelled to submit to arbitration unless there is a contractual basis for concluding that the party agreed to do so. *Id.* at 684. "Nothing in the FAA authorizes a court to compel arbitration of any issues ... that are not already covered in the agreement." *Id.* at 683 [quoting *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 289]. "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id.* at 682-683 [quoting *AT&T Technologies, supra,* 475 U.S. at 648-649]. "Arbitration is simply a matter of contract *between the parties;* it is a way to resolve those disputes – but only those disputes – that the *parties* have agreed to submit to arbitration. *Id.* at 684 [emphasis in original, quoting *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943].

The presumption proposed by the Second District that arbitrators should determine their own jurisdiction absent contractual language to the contrary potentially forces a party to arbitrate an issue that was not previously agreed upon – a result the United States Supreme Court has repeatedly rejected. "[O]ne can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate" matters upon which they did not agree. *First Options, supra,* 514 U.S. at 945.

IV.

DETERMINING WHO WILL DECIDE WHETHER AN ARBITRATOR CAN HEAR CLASS CLAIMS IS NOT A PROCEDURAL QUESTION

The *Stolt-Neilsen* Court noted that "parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement." *Stolt-Nielsen, supra,* 559 U.S. at 684-685. The Second District below mis-cites *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 331; *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1172; and *Sky Sports, Inc. v. Superior Court* (2011) 201 Cal.App.4th 1363, 1369, for the purported proposition that "a class action is a procedural device." In actuality, *Deposit Guaranty* and *Duran* stand for the proposition that class certification motions – i.e., determining whether a claim may proceed on a class basis upon the plaintiff satisfying the requirements of commonality, adequate representation, etc., and in what manner the plaintiff may present class-wide issues at trial – present procedural questions. *Deposit Guaranty*, at 331; *Duran*, at *29-30. Nowhere does *Deposit Guaranty* or *Duran* analyze whether the jurisdictional question – i.e., whether the courts or the arbitrator will determine if the arbitrator can even entertain a class certification motion – is procedural. Indeed, neither *Deposit Guaranty* nor

Duran involve arbitrations to any extent. Both cases involved class actions heard by civil courts. *Deposit Guaranty,* at 327-331; *Duran,* at *3-18.

Similarly, in *Sky Sports*, the California Court of Appeal merely cited that part of *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 715-716 & fn 4 which held that the determination of whether an individual plaintiff has satisfied the general certification standards to proceed with a claim on a class basis, and whether the claims of the different class members will be consolidated into a class action, is a procedural question. 201 Cal.App.4th at 1369. Importantly, the *Vernon* court further held that even procedural certification questions such as whether a party "can fairly and adequately protect that class rests in the sound discretion of the trial court," not the arbitrator. 52 Cal.App.3d at 715, fn 4.

Stolt-Neilsen plainly distinguished procedural class certification questions from the issue of whether parties agreed to class arbitration. That Court maintained: "An implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is because class-action arbitration changes the nature of the arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 559 U.S. at p. 685. The court continued: "In bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Ibid.* Yet, noted the Court, "the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 686-686.

The United States Supreme Court has expressly held that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the "*question of arbitrability,*" is "an issue for judicial determination unless the parties

clearly and unmistakably provide otherwise." *Howsam, supra,* 537 U.S. at 83 [emphasis in original]. The question presented in the instant appeal is one of arbitrability – whether the parties agreed to provide the arbitrator with the power to determine whether to allow a class action to proceed. As explained in *Stolt-Nielsen,* "The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what 'procedural mode' was available to present [the plaintiff's] claims. ... Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration" 559 U.S. at 626 [emphasis in original]. The Second District, as evidenced by its reliance upon *Deposit Guaranty, Duran* and *Sky Sports,* failed to understand this critical difference.

Finally, the United States Supreme Court has long held that the question of *whose* claims an arbitrator is authorized to decide is a gateway question for the courts. *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543. As the Third U.S. Circuit Court of Appeals explained just this month: "By seeking classwide arbitration ... [plaintiffs] contend that their arbitration agreements empower the arbitrator to resolve not only their personal claims but the claims of additional individuals not currently parties to this action. The determination whether [defendant] must include absent individuals in its arbitrations with [plaintiffs] affects whose claims may be arbitrated and is thus a question of arbitrability to be decided by the court." *Opalinski, supra,* at **10-11.

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V.

THE SECOND DISTRICT MISCONSTRUES THE HISTORY OF FEDERAL CASES PREVIOUSLY REVIEWING THE QUESTION

The Second District attempts to bolster its decision by asserting that "[m]ost courts have concluded that the question of class arbitrability is for the arbitrator." *Opn.* at pp. 12-13. The Second District mischaracterizes the current judicial split, however. While several unpublished federal trial court opinions may support the Second District's decision, only two U.S. Circuit Courts of Appeal have directly considered the question and both have found that the decision of whether class arbitration shall proceed is for the courts. *Reed Elsevier, supra,* 734 F.3d at 599 [Sixth Circuit]; *Opalinski, supra,* 2014 U.S. App. LEXIS, at **10-15 [Third Circuit].[1] Indeed, given the avalanche of United States Supreme Court precedent signaling a rejection of any presumption in favor of arbitrators determining their own scope of authority, the Sixth Circuit recently observed: "Although the Supreme Court's puzzle of cases on this issue is not yet complete, the Court has sorted the border pieces and filled in much of the background. ... [R]ecently the Court has given every indication, short of an outright holding, that classwide arbitrability is a

[1] The First, Second and Eleventh Circuits have considered similar questions, but not the specific one at issue in this case. *See Southern Communications Services, Inc. v. Thomas* (11th Cir. 2013) 720 F.3d 1352; *Fantastic Sam's Franchise Corp. v. FSRO Association Ltd.* (1st Cir. 2012) 683 F.3d 18; *Jock v. Sterling Jewelers Inc.* (2d Cir. 2011) 646 F.3d 113. The First Circuit's decision in *Fantastic Sam's* involved associational arbitration, not class arbitration, and expressly recognized that an "associational action . . . is [not] equivalent to a class action." 683 F.3d at 23. In *Jock*, the Second Circuit noted repeatedly that the parties had submitted the question whether their contract allowed for classwide arbitration to the arbitrator, and so the "who decides" question was not before the Court. 646 F.3d at 116, 124. Similarly, the Eleventh Circuit in *Southern Communications* specifically advised that "[l]ike the Supreme Court, we also have not decided whether the availability of class arbitration is a question of arbitrability[.]" 720 F.3d at 1359 n.6.

gateway question rather than a subsidiary one" requiring judicial resolution. *Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594, 597-598.

Given the current proliferation of class actions, the question of whether the courts or an arbitrator has jurisdiction to determine whether a case may proceed in class arbitration where the arbitration agreement is silent is likely to arise in many additional cases. This Court should grant review in order to establish a precedent that will guide this State's courts in the determination of this issue.

VI.

WHEREAS THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE ARBITRATOR HAD NO AUTHORITY TO HEAR A CLASS ARBITRATION, ANY PURPORTED ERROR BY THE SUPERIOR COURT CHOOSING TO MAKE THAT CORRECT DECISION ITSELF WAS HARMLESS

Even assuming *arguendo* that the Second District correctly determined that the arbitrator should have decided whether the arbitrator had jurisdiction to hear the class claims because such questions are purportedly "procedural" in nature, the appellate court still erred by reversing the Superior Court's order without an analysis of whether that purported error was "prejudicial" or "harmless." Article VI, Section 13 of the California Constitution expressly provides that "[n]o judgment shall be set aside ... on the ground of ... any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing] court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." As this Court held in *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, a "miscarriage of justice" will be declared only when the reviewing court, after examining the entire case, is of the opinion that "it is *reasonably probable* that a result *more favorable* to the appealing party would have been reached in the absence of the error." [Emphasis added.]

Likewise, *Code of Civil Procedure* section 475 provides: "The [reviewing] court must ... disregard any error, improper ruling, instruction, or defect, in the ... proceedings which, in the opinion of said [reviewing] court, does not affect the substantial rights of the parties. ... *There shall be no presumption that error is prejudicial, or that injury was done if error is shown.*" [Emphasis added.] Reviewing courts cannot classify errors as "prejudicial" in the abstract. "No precise formula can be drawn for deciding whether there has been a miscarriage of justice." *Alarid v. Vanier* (1958) 50 Cal.2d 617, 625. "Accordingly, errors in civil trials require that [reviewing courts] examine each individual case to determine whether prejudice actually occurred in light of the entire record." *Cassim, supra,* 33 Cal.4th at 801-802. Even "substantial" errors by a Superior Court are considered harmless if the record demonstrates that no other ultimate decision could have been properly rendered. *County of Monterey v. W.W. Leasing Unlimited* (1980) 109 Cal.App.3d 636, 642 [citing Witkin, Cal. Procedures (2d ed. 1971) Appeal, § 315, p. 4293].

Accordingly, after the Second District below determined that the question of whether an arbitrator can hear class claims is for the arbitrator to decide, the State Constitution, the *Code of Civil Procedure*, and the binding precedents of this Court all required the appellate court to have analyzed if the purported "procedural" error of the Superior Court was harmless before ordering a reversal of that trial court's order. Indeed, Appellant does not have a right to an erroneous decision by an arbitrator. If the Superior Court correctly decided the ultimate question of whether the arbitration agreements empowered the arbitrator to hear class claims, Appellant did not suffer any "miscarriage of justice" justifying reversal simply because the Superior Court made the correct decision rather than the arbitrator.

The Superior Court did in fact correctly determine the ultimate issue that the arbitrator was not empowered to hear class claims. *Stolt-Nielsen* unequivocally holds that (1) class arbitration is only allowed where provided within the contract; and (2)

silence, itself, is not indicative of an agreement to provide for such class resolution. 559 U.S. at 682-685. In *Nelsen, supra,* 207 Cal.App.4th at 1128-1130, the California Court of Appeal correctly determined that where an arbitration agreement is silent on class arbitration, and the arbitration agreement limits the scope of arbitrability to disputes between the employee and the employer, the agreement does not provide for class arbitration. *See also Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 517 ("*Kinecta*"). In *Nelsen*, employees (who were referred to as "team members") signed an arbitration agreement which read, in pertinent part:

> "I agree that any claim, dispute, or controversy ... which would otherwise require or resort [sic] to any court ... between myself and [the employer] (or its owners, partners, directors, officers, managers, team members, agents related companies, and parties affiliated with its team member benefit and health plans) ... shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act..."

207 Cal.App.4th at 1120. Finding that this language only addressed actions between the employee and the employer, the *Nelsen* court correctly held that the agreement did not provide for class arbitration. *Id.* at pp. 1129-1130; see also *Kinecta*, *supra*, 205 Cal.App.4th at 517 [employing similar bilateral scope and lacking reference to third parties].

The arbitration agreements in the present case employ nearly identical language to the one in *Nelsen*. The agreement at issue here reads:

> "... I and the Company both agree that any claim, dispute, and/or controversy ... which would otherwise require or allow resort to any court . . . *between myself and the Company* (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) ... shall be submitted to and determined exclusively by binding arbitration."

1 JA 195 [emphasis added]. Thus, consistent with the correct decision in *Nelsen*, the

Arbitration Agreements in the instant matter also do not provide for class arbitration because they address only disputes between the employee and employer (e.g. "between myself and the Company"). *Nelsen*, *supra*, 207 Cal.App.4th at 1129-1130.

In short, the Superior Court correctly held that the Arbitration Agreements do not empower the arbitrator to hear class claims. Thus, even assuming *arguendo* that the Second District correctly determined that the Superior Court erred by making the decision itself, rather than submitting it to the arbitrator, that purported error was harmless and not grounds for reversal by the Second District.

CONCLUSION

For the reasons set forth above, the Court should grant review on both issues raised in this Petition.

DATED: August 26, 2014

Respectfully submitted

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1)

This brief complies with the length limitation of California Rule of Court 8.504(d)(1) because this brief contains 5720 words, excluding the parts of the brief exempted by California Rules of Court 8.504(d)(3).

DATED: August 26, 2014

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TIMOTHY SANDQUIST, Plaintiff and Appellant, v. LEBO AUTOMOTIVE, INC. et al., Defendants and Respondents.	B244412 (Los Angeles County Super. Ct. No. BC476523)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Reversed with directions.

Sanford Heisler, Janette Wipper and Felicia Medina for Plaintiff and Appellant.

Fisher & Phillips, James J. McDonald, Jr., and Grace Y. Horoupian for Defendants and Respondents.

INTRODUCTION

In this class action, plaintiff Timothy Sandquist purports to appeal from the trial court's August 14, 2012 order granting defendants' motion to compel him to arbitrate his individual claims, as well as defendants' motion to dismiss all class claims without prejudice. Although this order is not appealable, we liberally construe Sandquist's notice of appeal to include the trial court's October 5, 2012 order dismissing his class claims with prejudice, which is appealable under the death knell doctrine. Limiting our review to Sandquist's challenges to the order dismissing the class claims, we agree with Sandquist that the trial court erred by deciding the issue whether the parties agreed to class arbitration, and that the court should have submitted the issue to the arbitrator. Therefore, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Sandquist began working in sales at Manhattan Beach Toyota in September 2000. Joel Rabe, Sandquist's sales floor manager, provided Sandquist with a large amount of paperwork to fill out but did not discuss any of the documents with him. Rabe simply told Sandquist to complete the paperwork quickly so he could get out onto the sales floor. The paperwork consisted of about 100 pages, including an employee handbook. Sandquist filled out the paperwork as best and as quickly as he could. Due to time constraints Sandquist did not review the documents and did not know he was signing multiple arbitration agreements. He signed the documents because he needed the job.

Among the documents Sandquist signed was a document entitled "APPLICANT'S STATEMENT & AGREEMENT." It provided in pertinent part: "I and the Company both agree that any claim dispute, and/or controversy (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other

governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . . ."

Sandquist also signed a separate document acknowledging that he was an "at will" employee and agreeing "that any claim, dispute, and/or controversy (including, but not limited to any claims of discrimination and harassment) which would otherwise require or allow resort to any court or other governmental dispute resolution forum, between me and the Company (or its owners, directors, officers, managers, employees agents, and parties affiliated with its employee benefits and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration . . . ."

Finally, Sandquist signed a document entitled "EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT." In addition to an acknowledgment of receipt of the dealership's employee handbook, the document contained the following arbitration provision: "I agree that any claim, or dispute, or controversy (including, but not limited to, any and all claims of discrimination and harassment) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my

seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act, and Employment Development Department claims), shall be submitted to and determine[d] exclusively by binding arbitration . . . ."

All three arbitration provisions further specified that arbitration would be governed by the Federal Arbitration Act (FAA) in conformity with the procedures of the California Arbitration Act (Code Civ. Proc., § 1280 et seq.).

Sandquist, who is African-American, filed this class action on January 9, 2012 against defendants Lebo Automotive, doing business as John Elway's Manhattan Beach Toyota, John Elway, Mitchell D. Pierce, Jerry L. Williams, and Darrell Sperber, who had purchased the dealership in 2007. On February 1, 2012 Sandquist filed his operative first amended class action complaint alleging violations of California's Fair Employment and Housing Act (FEHA; Gov. Code, § 12940 et seq.) and Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.), and seeking injunctive and declaratory relief and damages.

Sandquist asserted individual and class claims against the dealership for race, color, national origin, and ancestry discrimination and against all the defendants for hostile work environment. Sandquist also alleged an individual claim against the dealership for constructive discharge. He alleged that despite his "enormous success at and loyalty to the dealership, [he] was passed over for promotions, denied salary increases, and harassed on the basis of his race. [He] not only experienced discrimination on a routine basis, but he also witnessed" Elway, Pierce, and Williams "participate in, aid, abet, substantially assist, condone, or ratify discrimination and harassment in the face of widespread complaints that GM Sperber was a 'repeat harasser' who freely and openly harassed employees of color. After persevering for four years against the ongoing discrimination and hostile work environment that permeated" the dealership, Sandquist "was forced to resign in 2011."

On March 20, 2012 defendants filed a motion to compel individual arbitration pursuant to Code of Civil Procedure section 1281.2 and to stay or dismiss the proceedings with the trial court retaining jurisdiction to enforce any arbitration award. In support of their motion defendants relied on the three arbitration agreements signed by Sandquist on his first day of work.

On August 14, 2012 the trial court granted the motion. The trial court concluded that the FAA applied and that the agreement was not unconscionable, finding no substantive unconscionability and a "low" level of procedural unconscionability.[1] With regard to the class claims the trial court ruled: "And to clean up any procedural details with regard to . . . class allegations, the Court is going to dismiss or strike the class allegations as being irrelevant, false or an improper matter in the complaint under Code of Civil Procedure section 436[2] because there's no basis, contractual basis, to compel [class] arbitration. [¶] Since the plaintiff himself is now going to be subject to individual arbitration, there would no longer be any representative in the lawsuit that would be able to adequately represent a class action to pursue the claims that are asserted by plaintiff." The trial court further stated that it would "dismiss the class allegations without prejudice and set a time limit of 60 days for plaintiff to amend. And if plaintiff does not amend to bring forth a class representative that could support this class action to reinstitute the class allegations, then the defendant may request the dismissal of the case with prejudice."

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1 The parties do not dispute the trial court's determination that the FAA, which applies in cases involving interstate commerce, governs this case. In fact, all three arbitration provisions specify that the arbitration is governed by the FAA.

2 Code of Civil Procedure section 436 provides: "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: [¶] (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. [¶] (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

On September 28, 2012 counsel for Sandquist advised the trial court that they had been unable to locate an employee of the dealership who had not signed the arbitration agreements. In the absence of a substitute class representative the trial court stated it would dismiss the class claims with prejudice.

On October 5, 2012 the trial court signed an order dismissing the class claims with prejudice. The court's order noted that Sandquist "was provided up to and including September 18, 2012 to amend his Complaint in order to bring forth a class representative that could support Plaintiff's class action to reinstate the class allegations. Plaintiff having failed to amend his complaint by September 18, 2012, IT IS HEREBY ORDERED that Plaintiff's class claims are dismissed with prejudice." That same day, October 5, 2012, Sandquist filed a notice of appeal from the August 14, 2012 order granting defendants' motion to compel arbitration and dismissing class claims without prejudice, and attached a copy of the August 14 order to his notice of appeal. Sandquist did not include in the notice of appeal the October 5, 2012 order entered that same day.

DISCUSSION

A. *Appealability*

Because "'the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion.'" (*deSaulles v. Community Hospital of the Monterey Peninsula* (2014) 225 Cal.App.4th 1427, 1435, *quoting Olson v. Cory* (1983) 35 Cal.3d 390, 398; see *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1544 ["because [appealability] implicates our jurisdiction, we review the issue on our own motion"].)

In his opening brief Sandquist states that "[t]his appeal arises from the August 14, 2012 and October 5, 2012 orders of the Los Angeles Superior Court." In his notice of appeal, however, Sandquist only listed the August 14, 2012 order. Therefore, as a preliminary matter, we must decide whether the trial court's August 14, 2012 order is appealable and, if not, whether Sandquist's failure to include the court's October 5, 2012 order in his notice of appeal requires dismissal of his appeal.

An order granting a motion to compel arbitration is not appealable. (Code Civ. Proc., § 1294, subd. (a); *Goldman v. Sunbridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1164, fn. 2; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1121 (*Nelsen*).) Rather, it is reviewable on appeal from the final judgment entered after confirmation of the arbitration award. (*Nelsen, supra*, at pp. 1121-1122; *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 513.) In his opening brief Sandquist acknowledges that "orders granting motions to compel arbitration are not ordinarily appealable" but asserts that "the instant appeal is authorized under the 'death knell' doctrine," which "allows appeal from any order that is 'tantamount to a dismissal of the action as to all members of the class other than the plaintiff.'"

"The death knell doctrine is applied to orders in class actions that effectively terminate class claims, such as orders denying class certification or decertifying a class, while allowing individual claims to persist. [Citations.] The doctrine is animated by the concern 'that an individual plaintiff may lack incentive to pursue his individual claims to judgment, thereby foreclosing any possible appellate review of class issues.' [Citation.] To preserve appellate review of class issues, the death knell doctrine permits appeal from 'an order that . . . amounts to a de facto final judgment for absent plaintiffs, under circumstances where . . . the persistence of viable but perhaps de minimis individual plaintiff claims creates a risk no *formal* final judgment will ever be entered.' [Citation.] Under this doctrine, an order compelling a plaintiff to pursue his or her claim in arbitration and dismissing the action as to all other members of the class has been held to be immediately appealable. [Citation.]" (*Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 766; see *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 758 ["only an order that entirely terminates class claims is appealable"]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 [order that "is tantamount to a dismissal of the action as to all members of the class other than plaintiff" is appealable]; *Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 19 [termination of class claims is "a prerequisite for the death knell doctrine"].)

Although the August 14, 2012 order compelled Sandquist to arbitrate his individual claims against the defendants, the trial court's order did not finally terminate the class claims. By dismissing the class claims *without prejudice* the trial court left open the possibility that the class claims would continue with the substitution of a new class representative. Such an order was not final and appealable. (See *Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 586 [an order denying class certification without prejudice is not appealable as "[t]he death knell has not yet sounded"].) Because the "death knell doctrine" applies only to "those orders that effectively terminate class claims but permit individual claims to continue" (*In re Baycol Cases I & II, supra*, 51 Cal.4th at p. 754), this doctrine does not make the August 14 order appealable. Although Sandquist could have sought immediate review of the August 14 order by filing a petition for writ of mandate, he did not do so. (See *Phillips v. Sprint PCS, supra*, 209 Cal.App.4th at p. 767 ["'immediate review of an order granting a motion to compel arbitration may be obtained by a petition for writ of mandate'"]; *Kinecta Alternative Financial Solutions, Inc. v. Superior Court, supra*, 205 Cal.App.4th at p. 513 [same].)

While we may treat a nonappealable order granting a motion to compel arbitration as a writ, we decline to do so here. "'[W]rit review of orders compelling arbitration is proper . . . (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive.' [Citation.]" (*Kinecta Alternative Financial Solutions, Inc. v. Superior Court, supra*, 205 Cal.App.4th at p. 513, quoting *Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160; accord, *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1566.) Sandquist's individual claims do not "fall clearly outside the scope" of the arbitration agreements, and nothing in the record indicates that arbitration of Sandquist's individual claims would be unduly time consuming or expensive. Therefore, we do not at this time review the propriety of the trial court's August 14, 2012 order, including the trial court's determination that the arbitration provisions were not unconscionable.

The question remaining is whether we may and should liberally construe Sandquist's notice of appeal to include an appeal from the October 5, 2012 order

dismissing the class claims with prejudice. In *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, after the trial court had entered a judgment in favor of the defendant, the plaintiff unsuccessfully moved for a new trial. The plaintiff appealed from the nonappealable order denying his motion for a new trial but did not appeal from the existing judgment. The *Walker* court contrasted cases like *Rodriquez v. Barnett* (1959) 52 Cal.2d 154, where the appellant appeals from both an appealable judgment and a nonappealable order with cases where the appellant appeals only from a nonappealable order. (*Walker*, *supra*, 35 Cal.4th at pp. 19-20.) The *Walker* court noted that, in the latter category of cases, dismissal of the appeal from the nonappealable order would have the effect of completely denying appellate review. The Supreme Court held that "[b]ecause '[t]he law aspires to respect substance over formalism and nomenclature' [citation], a reviewing court should construe a notice of appeal from an order denying a new trial to be an appeal from the underlying judgment when it is reasonably clear the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced." (*Id.* at p. 22, fn. omitted.)

Here, Sandquist filed his notice of appeal the same day that the trial court entered its order dismissing the class claims with prejudice. Because this order effectively terminated the class claims, it was appealable under the death knell doctrine. (See *In re Baycol Cases I & II*, *supra*, 51 Cal.4th at p. 754.) We therefore liberally construe Sandquist's notice of appeal to encompass the trial court's October 5, 2012 order.

B. *The Determination of Whether an Arbitration Agreement Provides for Class Arbitration: Trial Court or Arbitrator*

Sandquist contends that the trial court "wrongly conducted a clause construction analysis of the Acknowledgements and held that they contain an *implied* class action waiver." Sandquist, citing *Green Tree Fin. Corp. v. Bazzle* (2003) 539 U.S. 444 [123 S.Ct. 2402, 156 L.Ed.2d 414] (*Bazzle*) and *Garcia v. DIRECTV, Inc.* (2004) 115 Cal.App.4th 297 (*Garcia*), argues that the arbitrator, not the court, determines whether the arbitration agreement provides for class arbitration. Defendants argue that the trial

court correctly relied on *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662 [130 S.Ct. 1758, 176 L.Ed.2d 605] (*Stolt-Nielsen*) in ruling that the court decides this issue. It turns out that this issue is not entirely settled.

"'[A]rbitration 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.' [Citations.]" (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83 [123 S.Ct. 588, 154 L.Ed.2d 491] (*Howsam*); see *Am. Express v. Italian Colors Rest.* (2013) 570 U.S. ___ [133 S.Ct. 2304, 2306, 186 L.Ed.2d 417] [it is an "overarching principle that arbitration is a matter of contract"]; *Oxford Health Plans LLC v. Sutter* (2013) 569 U.S. ___ [133 S.Ct. 2064, 2066, 186 L.Ed.2d 113] ["[c]lass arbitration is a matter of consent: [a]n arbitrator may employ class procedures only if the parties have authorized them"].)

In *Howsam, supra*, 537 U.S. 79, the United States Supreme Court explained that, although the Court has "long recognized and enforced a 'liberal federal policy favoring arbitration agreements,' [citation], it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' [Citations.]" (*Id.* at p. 83.)

The Supreme Court noted that "[l]inguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that . . . the phrase 'question of arbitrability' has a far more limited scope. [Citation.] The Court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

"Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide. [Citations.] Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court. [Citations.]

"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 which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide. [Citation.] So, too, the presumption is that the arbitrator should decide 'allegations of waiver, delay, or a like defense to arbitrability.' [Citation.]" (*Howsam*, *supra*, 537 U.S. at pp. 83-84.)

A majority of the United States Supreme Court has yet to decide whether the determination of whether the parties agreed to class arbitration is a gateway question for the court or a question for the arbitrator where, as here, the arbitration agreement is silent on the issue of class arbitration. (See *Oxford Health Plans LLC v. Sutter*, *supra*, 569 U.S. at p. ___ [133 S.Ct. at p. 2068, fn. 2] ["this Court has not yet decided whether the availability of class arbitration is a question of arbitrability" and "this case gives us no opportunity to do so"].) In *Bazzle*, *supra*, 539 U.S. 444 a plurality of four justices of the United States Supreme Court concluded that, where the parties to an arbitration agreement agree to submit to the arbitrator "'*all* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract,'" the arbitrator decides whether the arbitration agreement allows or precludes class arbitration. (*Id.* at pp. 451-452.) Following *Bazzle*, the Court of Appeal in *Garcia* stated that "[t]he Supreme Court has spoken, and the foundational issue—whether a particular arbitration agreement prohibits class arbitrations—must (in FAA cases) henceforth be decided by the arbitrators, not the courts." (*Garcia*, *supra*, 115 Cal.App.4th at p. 298.)

The Supreme Court in *Bazzle*, however, did not speak on this issue with five votes. In *Stolt-Nielsen*, *supra*, 559 U.S. 662, the United States Supreme Court noted that *Bazzle* "did not yield a majority decision" on the question whether the court or the arbitrator

should decide if the arbitration agreement contemplates class arbitration. (*Id.* at p. 679.) The *Stotl-Nielsen* court further observed: "Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. . . . In fact, however, only the plurality decided that question. But 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." (*Id.* at p. 680; see *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 515, fn. 4 ["as *Stolt-Nielsen* noted, *Bazzle* was a plurality decision on this point and is not binding authority"]; *Nelsen, supra*, 207 Cal.App.4th at p. 1129, fn. 6 [same].)

As the court in *Nelsen* noted, "some federal courts have decided issues of class arbitration are generally for the arbitrator to decide, at least when the arbitration agreement does not provide otherwise. (See, e.g., *Guida v. Home Savings of America, Inc.* (E.D.N.Y. 2011) 793 F.Supp.2d 611, 617-618, and cases collected therein.)" (*Nelsen, supra*, 207 Cal.App.4th pp. 1128-1129, fn. omitted.) Because the parties in *Nelsen* asked the appellate court to decide the arbitrability issue, the *Nelsen* court did not have to resolve the issue of whether the court or the arbitrator should decide it.[3]

Courts that have decided the issue have reached conflicting conclusions. Most courts have concluded that the question of class arbitrability is for the arbitrator. (See,

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3 The court in *Nelsen* observed that "neither party has proposed we leave the question of class arbitration for the arbitrator. Both parties invite *this court* to decide the issue. [The defendant] asks that we find the arbitration agreement does not reflect its consent to class arbitration, while [the plaintiff] requests we either find the arbitration agreement unenforceable or interpret it to allow class arbitration. In any event, for the reasons we will discuss, we believe it is clear the agreement precludes class arbitration and do not think any reasonable arbitrator applying California law could find otherwise." (*Nelsen, supra*, 207 Cal.App.4th at p. 1129.) The adoption of this "reasonable arbitrator" test allowed the *Nelsen* court to avoid the issue. Neither side in this appeal advocates for a "reasonable arbitrator" test.

e.g., *Quilloin v. Tenet HealthSystem Philadelphia, Inc.* (3d Cir. 2012) 673 F.3d 221, 232; *In re A2P SMS Antitrust Litigation* (S.D.N.Y., May 29, 2014, No. 12 CV 2656) ___ F.Supp.2d ___ [2014 WL 2445756, p. 10]; *Lee v. JPMorgan Chase & Co.* (C.D. Cal., Nov. 14, 2013, SACV 13-511) ___ F.Supp.2d ___ [2013 WL 6068601, pp. 2-4]; *Guida v. Home Savings of America, Inc.*, *supra*, 793 F.Supp.2d at p. 615.) Some courts have concluded that class arbitrability is a question for the court. (See, e.g., *Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594, 598-599 (*Reed Elsevier*); *Chassen v. Fidelity Nat. Financial, Inc.* (D.N.J., Jan. 17, 2014, No. 09-291) 2014 WL 202763, p. 6.)

Although the plurality opinion in *Bazzle* is not binding, it is persuasive. (See *Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d 1109, 1127, fn. 5 ["we follow the [Supreme Court] plurality opinion as persuasive authority, though 'not a binding precedent'"], quoting *Texas v. Brown* (1983) 460 U.S. 730, 737 [103 S.Ct. 1535, 75 L.Ed.2d 502].) We agree with the majority of cases that follow the plurality opinion in *Bazzle* that the question whether the parties agreed to class arbitration in cases where the arbitration agreement is silent is determined by the arbitrator. (See, e.g., *Lee v. JPMorgan Chase & Co.*, *supra*, ___ F.Supp.2d at p. ___ [2013 WL 6068601, p. 4, fn. 4 [although *Bazzle* is a plurality opinion and thus is not binding it nevertheless is instructive].) Such a rule is particularly appropriate in light of the fact that a class action is a procedural device. (See *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 331 [class action is a "procedural device"]; *Duran v. U.S. Bank Nat. Assn.* (May 29, 2014, S200923) ___ Cal.4th ___ [2014 WL 2219042, p. 17]; *Sky Sports, Inc. Superior Court* (2011) 201 Cal.App.4th 1363, 1369 ["[a] class action is a procedural device"].) As noted, a majority of the United States Supreme Court has stated that "'"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." (*Howsam*, *supra*, 537 U.S. at p. 84.)

Those courts that have reached a contrary result have emphasized the Supreme Court's statements about the "'fundamental'" differences between bilateral and classwide arbitration. (See, e.g., *Reed Elsevier*, *supra*, 734 F.3d at p. 598, citing *AT&T Mobility*

LLC v. Concepcion (2011) 563 U.S. ___ [131 S.Ct. 1740, 1750, 179 L.Ed.2d 742] (*Concepcion*).)[4] As those courts that have concluded the arbitrator decides whether the parties agreed to class arbitration have explained, however, these concerns are more relevant to the issue of whether the parties agreed to class arbitration rather than to the issue of whether the court or the arbitrator decides if an agreement contemplates class arbitration. (See *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, *supra*, 673 F.3d at p. 232 ["the actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator"]; *In re A2P SMS Antitrust Litigation*, *supra*, ___ F.Supp.2d at p. ___ [2014 WL 2445756, p. 11] ["under *Stolt-Nielsen* [the] differences [between bilateral and class arbitration] are primarily relevant to deciding the availability of such class arbitration, not the antecedent question of whether that decision is assigned to the Court or the arbitrator"]; *Lee v. JPMorgan Chase & Co.*, *supra*, ___ F.Supp.2d at p. ___ [2013 WL 6068601, p. 4] ["[t]he only question, as in *Bazzle*, is the interpretive one of whether or not the agreements authorize Plaintiffs to pursue their claims on a class, collective, or representative basis," and "[t]hat question concerns the

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4 The *Reed Elsevier* court listed several differences between bilateral and classwide arbitration: "First, arbitration's putative benefits—'lower costs, greater efficiency and speed,' et cetera—'are much less assured' with respect to classwide arbitration, 'giving reason to doubt the parties' mutual consent' to that procedure. *Stolt-Nielsen*[, *supra*, 559 U.S.] at [p.] 685; see also *Concepcion*, [*supra*, 563 U.S. at p. ___] 131 S.Ct. at [p.] 1751 . . . . Second, '[c]onfidentiality becomes more difficult' in classwide arbitrations, [*Concepcion*, *supra*,] at [p.] 1750—thus 'potentially frustrating the parties' assumptions when they agreed to arbitrate.' *Stolt-Nielsen*, [*supra*,] at [p.] 686. Third, 'the commercial stakes of class-action arbitration are comparable to those of class-action litigation' . . . 'even though the scope of judicial review is much more limited[.]' *Id.* at [pp.] 686-[6]87." (*Reed Elsevier*, *supra*, 734 F.3d at p. 598.) The *Reed Elsevier* court also noted that "'where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.' *Oxford Health* [*Plans LLC v. Sutter*], [*supra*, 569 U.S. at p. ___] 133 S.Ct. at [pp.] 2071-[20]72 . . . . Thus, in sum, '[a]rbitration is poorly suited to the higher stakes of class litigation.' *Concepcion*, [*supra*, 563 U.S. at p. ___] 131 S.Ct. at [p.] 1752." (*Reed Elsevier*, *supra*, at p. 598.)

procedural arbitration mechanisms available to Plaintiffs, and does not fall into the limited scope of this Court's responsibilities in deciding a motion to compel arbitration"]; *Guida v. Home Savings of America, Inc.*, *supra*, 793 F.Supp.2d at p. 616, fn. omitted [in light of *Stolt-Nielsen* and *Bazzle* "the ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for the arbitrator to decide"].)

We therefore hold that the question whether the parties agreed to class arbitration was for the arbitrator rather than the court to decide, and that the trial court erred by deciding that issue in this case. We do not reach, and leave for the arbitrator, the merits of whether the arbitration provisions Sandquist signed permit class arbitration. We also do not address, and leave for the arbitrator to consider, Sandquist's argument that the trial court failed to consider extrinsic evidence demonstrating that the parties impliedly agreed to arbitrate on a class-wide basis.[5]

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[5] In correspondence dated April 22, 2014, counsel for Sandquist notified this court that "Sandquist is rescinding the arguments outlined in Appellant's Opening Brief and Reply brief concerning the viability of *Gentry v. Superior Court* [(2007)] 42 Cal.4th 443." In *Gentry* the California Supreme Court held that class arbitration waivers in employment arbitration agreements should not be enforced if the trial court, after considering specific factors, determines "that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." (*Id.* at pp. 450, 463.) At the time we received counsel for Sandquist's correspondence, the question whether the United States Supreme Court's decision in *Concepcion*, *supra*, 563 U.S. ___ [131 S.Ct. 1740], impliedly overruled *Gentry* was pending before the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles, LLC*, S204032. On June 23, 2014 the Supreme Court issued its decision in *Iskanian* and concluded "in light of *Concepcion* that the FAA preempts the *Gentry* rule." (*Iskanian v. CLS Transp. Los Angeles, LLC* (June 23, 2014, S204032) ___ Cal.4th ___ [2014 WL 2808963, p. 6].)

DISPOSITION

The order dismissing the class claims is reversed and the matter is remanded to the trial court with directions to vacate its order dismissing class claims and to enter a new order submitting the issue of whether the parties agreed to arbitrate class claims to the arbitrator. Sandquist is to recover his costs on appeal.

SEGAL, J.*

We concur:

PERLUSS, P. J.

WOODS, J.

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 7/22/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TIMOTHY SANDQUIST,

Plaintiff and Appellant,

v.

LEBO AUTOMOTIVE, INC. et al.,

Defendants and Respondents.

B244412

(Los Angeles County
Super. Ct. No. BC476523)

ORDER MODIFYING OPINION AND CERTIFYING FOR PUBLICATION, NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on June 25, 2014, be modified as follows:

On page 8, the second full paragraph, the first sentence beginning "While we may treat" is revised so the sentence now reads as follows:

> While we may treat an appeal from a nonappealable order granting a motion to compel arbitration as a petition for a writ, we decline to do so here.

There is no change in the judgment.

The opinion in the above-entitled matter filed on June 25, 2014, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

PERLUSS, P. J.	WOODS, J.	SEGAL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

State of California)
County of Irvine) PROOF OF SERVICE

I, Susan Jackson, declare that I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action. I am employed with the law office of Fisher & Phillips LLP, and my business address is 2050 Main Street, Suite 1000, Irvine, CA 92614.

On the below date, I caused to be served the attached DEFENDANTS' AND RESPONDENTS' PETITION FOR REVIEW as follows:

Janette Wipper Felicia Medina SANFORD HEISLER LLP 555 Montgomery Street, Suite 1206 San Francisco, CA 94111 Ph: (415) 795-2020 Fax: (415) 795-2021 Attorney for Plaintiff/Appellant - Timothy Sandquist **Copy (1) via Federal Express**	Clerk for the Hon. Elihu Berle SUPERIOR COURT OF CALIFORNIA County of Los Angeles (Central District) Central Civil West Courthouse 600 South Commonwealth Avenue Los Angeles, California 90005 Trial Court Judge **Copy (1) U.S. Mail**
Office of the Clerk SUPREME COURT OF CALIFORNIA 350 McAllister Street San Francisco, California 94102-4797 **Electronically Submitted and Original and eight (8) copies delivered via Federal Express**	Clerk of the Court California Court of Appeal Second Appellate District, Division Seven Ronald Reagan State Building 300 South Spring Street, Second Floor Los Angeles, CA 90013 **Copy (1) U.S. Mail**

By properly addressing wrapper in a Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California; by electronically serving the above-noted parties in accordance with the Rules stated above, and by causing to be delivered by messenger such envelope(s) by hand to the office of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 26, 2014 at Irvine, California.

Susan Jackson
[PRINT NAME]

[SIGNATURE]