Supreme Court of California
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Supreme Court of California
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S270798

IN THE SUPREME COURT OF CALIFORNIA

LAW FINANCE GROUP, LLC,
Plaintiff-Appellant,

v.

SARAH PLOTT KEY,
Defendant-Respondent.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO, CASE NO. B305790

FROM AN ORDER VACATING AN ARBITRATION AWARD
LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. 19STCP04251
HONORABLE RAFAEL A. ONGKEKO

APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE MICHAEL TENENBAUM AND MICHA STAR LIBERTY

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APPLICATION TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Michael Tenenbaum and Micha Star Liberty ("Amici") respectfully request permission to file the attached brief as amici curiae supporting neither party in this case.

Amici are experienced California lawyers and former members and vice presidents of the Board of Governors (now the Board of Trustees) of the State Bar of California. (Amici speak only for themselves and in no way suggest any current affiliation with the State Bar other than as active licensees.) Mr. Tenenbaum represents clients in commercial litigation and arbitration in California and has done so for over 25 years; he also serves from time to time as an arbitrator. Ms. Liberty litigates personal injury cases in this State and has similarly done so for over 20 years. Amici have direct experience as counsel for parties in cases that are often resolved through contractual arbitration, such as the case here.

Amici's brief presents two points that they wish to ensure are carefully noted by the Court in its resolution of this appeal. While they do not purport to speak on behalf of other California lawyers, their experience shows that these points have not always been appreciated by the bar — and even by some trial courts and courts of appeal. One reason for this, as amici note in their brief, is that the statutory scheme for resolving petitions to confirm and vacate arbitration awards is far from a cohesive model of clarity. And, especially since arbitration is intended to make dispute resolution more accessible even for people without

lawyers, the code should not function as a perplexing procedural trap.

Pursuant to Rule 8.520(f), no party or counsel for a party has authored the attached amicus brief in any part or made any monetary contribution intended to fund its preparation or submission. Indeed, as previously noted by Amici, counsel has prepared this amicus brief on a pro bono basis, solely to assist the Court in reaching the correct result in this case and in disapproving any lower court pronouncements to the contrary.

June 23, 2022

THE OFFICE OF MICHAEL TENENBAUM, ESQ.

MICHAEL TENENBAUM

Counsel for Amici Curiae

MICHAEL TENENBAUM and MICHA STAR LIBERTY

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INTEREST OF AMICI CURIAE

As noted in their application above, Amici are experienced California lawyers and former members and vice presidents of the Board of Governors (now the Board of Trustees) of the State Bar of California. (Amici speak only for themselves and in no way suggest any current affiliation with the State Bar other than as active licensees.) Mr. Tenenbaum represents clients in commercial litigation and arbitration in California and has done so for over 25 years; he also serves from time to time as an arbitrator. Ms. Liberty litigates personal injury cases in this State and has similarly done so for over 20 years. Amici have direct experience as counsel for parties in cases that are often resolved through contractual arbitration, such as the case here.

Amici's brief presents two points that they wish to ensure are carefully noted by the Court in its resolution of this appeal. While they do not purport to speak on behalf of other California lawyers, their experience shows that these points have not always been appreciated by other lawyers — and even by some courts of appeal. One reason for this, as amici note in their brief, is that the statutory scheme for resolving petitions to confirm and vacate arbitration awards is far from a cohesive model of clarity. And, especially since arbitration is intended to make dispute resolution more accessible even for people without lawyers, the code should not function as a perplexing procedural trap.

ARGUMENT

I. Whatever the Court Rules, It Should Make Clear that the 10-Day Period in Section 1290.6 for a Response to a Petition Is Not Jurisdictional.

The issues raised in the parties' briefing are likely to lead the Court to address the interplay between sections 1288.2 and 1290.6.[1] It should be beyond cavil that, whatever may be said of any other time period in Title 9 of the Code of Civil Procedure, the 10-day period in section 1290.6 for a response to a petition relating to arbitration is ***not*** jurisdictional. Indeed, the Legislature expressly authorizes that 10-day period to be extended either by the trial court for good cause or even by the parties themselves with nothing more than an unfiled agreement between them in writing.

Moreover, a review of the overall statutory structure shows how section 1290.6 applies far more generally than section 1288.2. As the code contemplates, all court proceedings relating to arbitration begin with the filing of a petition, to which a response may be filed. "A proceeding under this title in the courts of this State is commenced by filing a petition. Any person named as a respondent in a petition may file a response thereto." Cal. Civ. Proc. Code § 1290. These include not only post-arbitration petitions to confirm and vacate arbitral awards; the proceedings under Title 9 also include petitions to compel

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[1] All unspecified statutory references are to the California Cod of Civil Procedure.

arbitration in the first place as well as, *inter alia*, petitions to appoint an arbitrator, to consolidate separate arbitration proceedings, and to compel an arbitrator to allow a certified shorthand reporter to transcribe any deposition or hearing in arbitration. Cal. Civ. Proc. Code §§ 1281.2, 1281.6, 1281.3, 1281.5(c).[2] It cannot be the case that the Court somehow loses ***jurisdiction*** to consider a party's response to any of these petitions if the response is not served and filed within 10 days.

Section 1290.6 provides a general timeframe, applicable to all petitions, under which a response is ordinarily due within 10 days. It certainly does not provide that that 10-day period is jurisdictional. And it is rarely the case that important issues such as whether a dispute is even arbitrable or whether an arbitration award based on an illegal agreement is somehow enforceable can be properly briefed within such a short time frame.

In Amici's experience, the parties and the trial court frequently stipulate to some form of briefing schedule — akin to regular motion practice — in connection with what the code refers to as petitions. Indeed, it appears that this is what the parties in this appeal intended to do. In contrast to regular

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[2] When one party has already commenced a court case by filing, e.g., a civil complaint against the other, it may be odd for the other party to need to "commence" a "proceeding" to raise the issues that are properly the subject of a petition under Title 9. In Amici's experience, whether proper under the code or not, when a civil action is already pending, the parties will often style an arbitration-related request to the Court as a "motion" rather than a petition.

motion practice, it is notable that the code does not provide for any reply to a response, i.e., a reply brief in support of the petition. Indeed, this Court may further note that, while the Code of Civil Procedure provides for the parties to file briefs (including reply briefs) in connection with various motions, there is no reference to briefing — at all — in connection with petitions relating to arbitration in Title 9.[3]

And the consequence of failing to file any response to a petition is merely — as section 1290 itself provides — that the factual allegations of the petition are deemed admitted: "The allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed." Cal. Civ. Proc. Code § 1290; *cf.* Cal. R. Ct. 8.54(c) ("A failure to oppose a motion may be deemed a consent to the granting of the motion.").

And, like in a civil action, courts are encouraged to grant relief from procedural defaults where the opposing party would otherwise gain a substantive advantage — especially where the delay is not prejudicial to anyone — and to resolve cases on their actual merits. "[T]he policy of the law is to have every litigated

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[3] If anything, the basic petition and response procedure in Article 1 of Chapter 5 of Title 9 should be understood to simply frame the dispute that precipitated the court proceeding, much like the function of the pleadings, i.e., the complaint and answer, in a civil action. This conclusion is reinforced by the single court form that the Judicial Council provides for a petition to confirm, correct, or vacate an arbitration award. *See* Form ADR-106 at https://www.courts.ca.gov/documents/adr106.pdf.

case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855. It is thus no wonder that section 1290.6 authorizes the trial court to extend the time for serving and filing a response to a petition — including a petition to confirm an arbitration award.

A faithful reading of Title 9 should make all of the foregoing unremarkable, and it should similarly be beyond dispute that the 10-day period in section 1290.6 is not jurisdictional. Yet amici have seen lawyers continue to argue — and have reviewed published opinions of the courts of appeal suggesting — that the failure to file a response within this period somehow deprives the court of authority to hear a request to vacate an arbitration award. In *Rivera v. Shivers* (2020) 54 Cal.App.5th 82, Mr. and Mrs. Shivers filed a petition to confirm an arbitration award in their favor, and Mr. Rivera filed what the court of appeal referred to as an "opposition," in which Rivera asked the trial court to vacate the award on the ground of alleged arbitrator bias. *Id*. at 88-89. The Shiverses argued that Rivera's request to vacate the award was untimely because it was not filed within 10 days of the petition to confirm, as required under section 1290.6. *Id*. at 89. As a result — even though the request to vacate was included in a response that was filed well within the 100-day period in section 1288.2 — they contended that "the issue should not even be considered." *Id*. at 93.

The Court of Appeal accepted this argument, concluding as part of its alternative holdings, as follows: "Because Rivera's

response to the petition to confirm was not filed and served within 10 days of the petition, it was not 'duly served and filed,' and thus the trial court ***had no authority*** to hear it." *Id.* at 94 (emphasis added). In doing so, the court relied on *DeMello v. Souza* (1973) 36 Cal.App.3d 79. In *DeMello*, the question was whether the trial court could correct an arbitration award where a petition to confirm had been filed and the response — which sought correction of the award (not to vacate it) — was not filed until some 35 days after the petition to confirm had been served. *Id.* at 82-84. Curiously, *DeMello* referred to ***both*** section 1288.2's 100-day period and section 1290.6's 10-day period as "statutes of limitation." *Id.* at 83-84. This is not only an odd description but makes too much of section 1290.6 in particular, since only section 1288.2 is found in the chapter of the arbitration statute entitled "Limitations of Time." Cal. Civ. Proc. Code Tit. 9, Art. 2, Ch. 4.

The *DeMello* court believed that ***both*** code sections were somehow jurisdictional, such that — independent of the 100-day period — the trial court "had no authority" to even consider the request to correct if not included in a response served and filed within 10 days of the petition to confirm:

> Since Respondents failed to duly serve and file their response seeking correction under both sections 1288.2 and 1290.6, the trial court as a matter of law was ***barred*** from correcting the award in question.
>
> …
>
> Respondents contend that the above mentioned statutes of limitation are ***not jurisdictional*** and as a consequence the trial court was

> empowered to disregard them in order to prevent fraud. ***We disagree***."

Id. at 84 (emphasis added). Yet the court in *DeMello* did not point to anything in the statutory scheme, in any decision of this Court, or even in any prior Court of Appeal opinion to support this unfounded conclusion. And that is because, as outlined above, Title 9 quite clearly contemplates that the 10-day period in section 1290.6 is ***not*** jurisdictional, especially as it provides for that time to be extended by either the parties or the trial court.

In the case at bar, as the Court knows, after Law Finance Group filed a petition to confirm, Key filed both a response to that petition as well as a separate petition to vacate. The trial court found Key's petition to vacate untimely under section 1288's provision that such a petition be filed within 100 days after service of the arbitration award. At the same time, it noted the trial court's exercise of its own power under section 1290.6 to extend the 10-day period under that latter section for a response to Law Finance's petition to confirm. *Law Finance Group, LLC v. Key* (2021) 67 Cal.App.5th 307, 316 (quoting trial court's ruling that "[i]f there is a need to extend the time to the actual filing date to enable the court to decide the petition on its merits, the court finds good cause to grant such an extension").

Unfortunately, the Court of Appeal repeatedly referred to the failure to comply with "either" the 100-day period in section 1288.2 or the 10-period in section 1290.6 as rendering a request to vacate "untimely" — without distinguishing the consequence of such untimeliness under each statutory provision. *Id*. at 319 ("A

response that fails to comply with either deadline is untimely."); *id*. at 319 n.5 (referring to "the rule that, when a party requests vacation of an arbitration award in response to a petition to confirm the award, the party's response must comply with both the 10-day deadline in section 1290.6 and the 100-day deadline in section 1288.2.") It even cited *Rivera* in claiming that "courts have held that a response requesting vacation that is filed within the 100-day deadline is nevertheless untimely if it fails to comply with the 10-day filing deadline of section 1290.6." *Id*.

Yet, as discussed above, the ***only*** specified statutory consequence of failing to file a response to an arbitration-related petition within 10 days — whether or not the response includes a request to vacate an arbitration award — is that the (factual) allegations of the petition are deemed admitted. Cal. Civ. Proc. Code § 1290. And nothing in the Code of Civil Procedure, or in any decision from this Court, goes so far as to amend sections 1290 *et seq*. to deprive a court of "authority" or "jurisdiction" to consider a response filed beyond the 10-day period — especially where section 1290.6 expressly provides for that time period to be extended. Of course, if the response includes a request to vacate the award, then section 1288.2 provides that it must be filed not later than 100 days after service of the award. Whether that deadline may be equitably tolled where such a request is filed in response to a petition to confirm is the issue on which this Court granted review, as to which Amici take no position.

But whatever this Court may rule regarding the 100-day period in section 1288.2, it should make clear that the 10-day period for a response in section 1290.6 is obviously ***not***

jurisdictional — and should expressly disapprove any contrary suggestion in *Rivera, DeMello*, and the Court of Appeal's opinion in this case.

II. The Code of Civil Procedure's Only Time Limitation on a Petition to Vacate an Arbitration Award is the 100-Day Period in Section 1288.

There is little doubt that, where a party files a response to any petition under Title 9, section 1290.6 requires it to be filed within 10 days after service of the petition — subject to any extensions by the parties' written agreement or by the trial court. And section 1288.2 is likewise quite clear that, as to petitions relating to the enforcement of an award (i.e., in Chapter 4 of Title 9), if a response to a petition to confirm an arbitration award includes a request that the award be vacated (or corrected), then that response must be filed within 100 days after service of the award. But what about a separate petition to vacate an arbitration award?

Although the cases largely overlook the distinction, the Legislature expressly gave a party dissatisfied with an arbitration award ***two*** procedural mechanisms for seeking to have it vacated. ***First***, the party may await the filing of a petition to confirm and then, within 10 days as provided by section 1290.6, file a response that includes the request to vacate. In that instance, section 1288.2 includes an additional limitation that such response be filed not later than 100 days after service of the award. It is amici's experience that, not wanting to allow the allegations of a petition to confirm to be deemed admitted, a

party opposing confirmation of the award will routinely file a response to such petition and, for good measure, include in the response a request that the award be vacated. But including such a request to vacate within the response is by no means mandatory, as section 1285.2 expressly provides that "[a] response to a petition under this chapter ***may*** request the court to dismiss the petition or to confirm, correct or vacate the award." Cal. Civ. Proc. Code § 1285.2.[4]

As a ***second*** option, the code authorizes a party to seek to vacate an award by filing her own separate petition requesting exactly that. Section 1285 provides that "[a]ny party to an arbitration in which an award has been made may petition the court to … vacate the award." Cal. Civ. Proc. Code § 1285. Section 1286.4 recognizes that either of these two methods provides a sufficient basis for vacating the award. "The court may not vacate an award unless: (a) A ***petition or response*** requesting that the award be vacated has been duly served and filed[.]" Cal. Civ. Proc. Code § 1286.4. And it is amici's experience that the party seeking to vacate an award often employs both methods — i.e., including a request to vacate in its response to a petition to confirm as well as filing its own separate

[4] Indeed, consider what happens when a party seeking to vacate an arbitration award files her petition first, i.e., before the prevailing party files its petition to confirm. Section 1285.2 contemplates that it may be the prevailing party who, in lieu of or in addition to filing its own petition, simply files a response to the petition to vacate which "request[s] the court to … confirm … the award." Cal. Civ. Proc. Code § 1285.2.

petition to vacate, as reinforced by the countless court decisions referring to that practice.

Importantly, nothing in the code makes these two methods mutually exclusive. And, just as importantly, the Legislature has never said that the 100-day time period in section 1288 for a party to file a separate petition to vacate is somehow reduced by 90% — to just 10 days — whenever another party files a petition to confirm the award. If the Court is faithful to the statutory text, it should hold that a request to vacate is timely if it is filed ***either*** as part of a response to a petition to confirm an award, in which event it must be filed within 10 days (or within any extended time) under section 1290.6 — and in any event within 100 days under section 1288.2 — ***or*** as a separate petition to vacate the award, in which event it must be filed within 100 days after service of the award under section 1288.

For example, if one party files a petition to confirm 10 days after service of an award,[5] and the other party does not file a response within 10 days thereafter — and does not obtain an agreement in writing or court order extending that time, as a consequence of which the factual allegations of the petition to confirm are deemed admitted — but, within 100 days after service of the award, the other files her own petition to vacate the award, there is no reason to consider that petition untimely. And

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[5] Section 1288.4 provides that "[n]o petition may be served and filed under this chapter until at least 10 days after service of the signed copy of the award upon the petitioner." Cal. Civ. Proc. Code § 1288.4.

there is certainly no such reason anywhere in the Code of Civil Procedure itself.

Finally, Amici respectfully suggest that, rather than condoning games of "gotcha," the Court should seriously consider inviting the Judicial Council to formulate a court rule providing for a post-award case management conference to be held promptly upon the filing of the initial petition (whether a petition to confirm or vacate) at which the parties can discuss with the court how they intend to proceed and submit any stipulations or obtain any court order on an appropriate briefing and hearing schedule. *See Oaktree Capital Mgmt. LP v. Bernard* (2010) 182 Cal.App.4th 60, 67 (recognizing that "commentators have expressed that the various deadlines, overlapping as they are, create confusion and, in some scenarios, mischief"). That would go a long way to trying to fulfill the original purpose of arbitration, i.e., to "resolve private disputes in an expeditious and efficient manner." *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1080.

CONCLUSION

Whatever this Court may rule regarding the 100-day period in section 1288.2, it should make clear that the 10-day period for a response in section 1290.6 is obviously ***not*** jurisdictional — and should expressly disapprove any contrary suggestion in *Rivera, DeMello*, and the Court of Appeal's opinion in this case.

In addition, the Court should clarify that, where a party has not filed a response to a petition to confirm an arbitration award within 10 days from service of the petition, nothing in the Code of Civil Procedure provisions relating to arbitration awards

precludes that party from filing her own petition to vacate within 100 days of service of the award under section 1288.

June 23, 2022

THE OFFICE OF MICHAEL TENENBAUM, ESQ.

/s/ *Michael Tenenbaum*

MICHAEL TENENBAUM

Counsel for Amici Curiae
MICHAEL TENENBAUM and MICHA STAR LIBERTY

PROOF OF SERVICE

I, Michael Tenenbaum, declare as follows:

I am at least 18 years old. My business address is 1431 Ocean Ave., Ste. 400, Santa Monica, CA 90401-2136.

On June 23, 2022, I electronically served the foregoing document, **APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE MICHAEL TENENBAUM AND MICHA STAR LIBERTY**, from my email address, michael@michaeltenenbaum.com, using the TrueFiling system, on the following parties through their counsel as indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 23, 2022 /s/ *Michael Tenenbaum*

Michael Tenenbaum

Supreme Court of California
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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