S220812

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 REPLY

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PETITION FOR REVIEW REPLY

Understanding the truth of the Sixth Circuit Court of Appeal's finding that "recently the [United States Supreme] Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one," requiring judicial resolution absent a contractual agreement to the contrary, Plaintiff and Appellant TIMOTHY SANDQUIST ("Appellant") begs this Court not to review the erroneous, contrary decision of the Court of Appeal, Second Appellate District, Division Seven ("Second District") below. In doing so, Appellant mis-characterizes nearly every single legal authority he cites along the way. Indeed, believing this Court somehow does not even know its own discretionary standard of review, Appellant goes so far as to fabricate that this Court does not review questions of federal law raised in state courts because it is not the final arbiter of such issues.[1]

What Appellant's opposition does effectively accomplish is evidence a complete misunderstanding by both him and some courts as to (1) the primacy of state law rules of contract interpretation in resolving the question of whether the courts or the arbitrator determine if an arbitration agreement includes a class waiver, and (2) the limited role federal law plays in such questions by merely creating a boundary that prohibits state rules of interpretation from undermining the objectives of the Federal Arbitration Act ("FAA"). Appellant's opposition also evidences equal confusion about the holding of the United States Supreme Court's plurality decision in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, and its continued viability in the wake of subsequent United States Supreme Court precedents.

Despite this Court's recent decision in *City of Los Angeles v. Superior Court*

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[1] In an additional ploy of gamesmanship, Appellant mail served his Opposition to Respondents on September 16, 2014 – rather than personal or overnight service. As result, the undersigned counsel did not receive Appellant's Opposition until the late afternoon on September 23, 2014.

(2013) 56 Cal.4th 1086, which provides that arbitrators have no authority over jurisdictional questions absent an express delegation of authority within the underlying arbitration agreement, the courts of this State still lack any semblance of uniformity on analyzing the question of whether an arbitration agreement empowers the courts or the arbitrator to determine class waiver questions. This Court is the ultimate arbiter of state law rules on contract interpretation. To bring conformity to this issue, it is time that this Court finally determine the question.

I. THIS COURT ROUTINELY DETERMINES QUESTIONS OF FEDERAL LAW RAISED IN STATE COURT – ESPECIALLY CONCERNING THE FEDERAL ARBITRATION ACT

California Rule of Court 8.500, subdivision (b)(1) ("Rule 8.500") reads in pertinent part: "The Supreme Court may order review of a Court of Appeal decision ... [w]hen necessary to secure uniformity of decision or to settle an important question of law...." *Cal. R. Ct.,* § 8.500(b)(1). Appellant opposes review of the Second District's opinion on three grounds. First, Appellant contends that there is an implied qualifier to the term "important question" as used in Rule 8.500 in that the question must only be one of state law because this Court is not the final arbiter of federal law issues. "The Petition raises an issue of federal arbitration law that is not apt for review by this Court and, accordingly, the Petition should be denied. ... Review here is not necessary to ... settle an important question of law *of which this Court is the ultimate arbiter.*" *Opposition*, at 1, 8 [emphasis added, footnote omitted].

Even a cursory review of the historical docket reveals a long and significant account of this Court granting review of federal questions. Indeed, with respect to questions concerning the FAA specifically, this Court has granted review of approximately two dozen cases, including most recently: (1) *Iskanian v. CLS Transportation Los Angeles* (2014) 59 Cal.4th 348; (2) *Sonic-Calabasas A, Inc. v.*

Moreno (2011) 51 Cal.4th 659 *(Sonic I)* and *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 *(Sonic II)*; and (3) *Gentry v. Superior Court* (2007) 42 Cal.4th 443. Accordingly, even assuming *arguendo* that the questions raised by the this Petition are exclusively determined by the FAA – which they are not as discussed in the initial petition papers and below, such a circumstance is not grounds for denying review.

II. THE QUESTIONS RAISED BY THIS PETITION ARE TO BE DETERMINED BY STATE LAW SUBJECT ONLY TO THE BOUNDARIES SET BY FEDERAL PREEMPTION

As discussed in Respondents' initial petition papers, and as entirely ignored by Appellant in his Opposition, the plurality opinion in *Bazzle* determined that the question of whether the courts or the arbitrator should determine if an arbitration agreement includes a class waiver is first and foremost 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]; *Petition*, at 9-10. The plurality then responded to an argument that federal law, as previously interpreted by the United States Supreme Court in *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 649, *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 945, and other cases, preempted any state law which provides that a contract could be interpreted as bestowing such jurisdiction to an arbitrator absent express language. *Bazzle, supra,* at 452-453; *Petition*, at 9-10. The plurality determined that federal law did not in fact require an express contractual delegation. *Ibid.*; *Petition*, at 10.[2]

[2] As set forth in detail within the initial petition papers, Respondents argue that (1) the United States Supreme Court has indicated its intention to reject the *Bazzle* plurality analysis and find that federal law does in fact preempt any state law which provides that a contract could be interpreted as bestowing such jurisdiction to an arbitrator absent express language; and (2) the only federal Circuit Courts of Appeals to have considered the question agree with Respondents' argument. *Petition,* at 11-16.

Thus, whether or not the Second District correctly interpreted the arbitration agreement in this matter is almost entirely a question of state law. In this Petition, Respondents highlight the fact that this Court determined in *City of Los Angeles* that state law, unlike federal law pursuant to the *Bazzle* plurality opinion, requires any delegation of authority to the arbitrator over questions regarding the arbitrator's powers – including the power to hear class claims, to be expressly set forth in the arbitration agreement. *City of Los Angeles, supra,* 56 Cal.4th at 1091-1093; *Petition*, at 6. Respondents further argue that the Second District strayed from this binding precedent by finding the arbitration agreement in this case delegated such authority to the arbitrator without expressly so stating. *Petition*, at 5-7. Appellant disagrees. *Opposition,* at 7-20. As the ultimate arbiter of California law, the final decision on this question of contractual interpretation is vested in this Court. *Cal. Const.,* Art. VI, § 1; *Cooper v. Swoap* (1974) 11 Cal.3d 856, 886. Federal law is only a consideration in resolving the petitioned questions to the extent that this Court must determine if the governing state rules of construction announced in *City of Los Angeles* undermine, and therefore are preempted by, the FAA. *AT&T Mobility LLC v. Concepcion* (2011) 536 U.S. 321, 131 S.Ct. 1740, 1748 [state law rules which stand as an obstacle to the objectives of the FAA are preempted].

Accordingly, Appellant's argument that the underlying petition only concerns questions of federal law better left to federal courts is entirely meritless.

III. AS DEMONSTRATED BY RECENT LITIGATION BOTH IN CALIFORNIA AND THROUGHOUT THE UNITED STATES, THE QUESTION OF WHETHER THE COURTS OR THE ARBITRATOR DETERMINE IF AN ARBITRATION AGREEMENT INCLUDES A CLASS WAIVER IS AN IMPORTANT QUESTION OF LAW

Appellant next contends that the questions raised by this Petition are not important enough to garner consideration. In support of this contention, Appellant

contends that this Court has twice previously chosen not to review such questions. *Opposition*, at 1, 4. As an initial matter, the questions raised by Respondents have only once before been petitioned to this Court. Appellant's citation to *Yuen v. Superior Court* (2004) 121 Cal.App.4th 1133, review denied (Dec. 1, 2004) S128174, 2004 Cal. LEXIS 11370 is in error. That case concerned whether the courts have the power to consolidate two separate arbitrations pursuant to *Code of Civil Procedure* section 1281.3, not whether an arbitration agreement afforded the courts or the arbitrator jurisdiction over determining if the contract included a class waiver. *Ibid.*

In the other case, *Nelsen v. Legacy Partners Residential Inc.* (2012) 207 Cal.App.4th 1115, review denied (Oct. 31, 2012) S204953, 2012 Cal. LEXIS 10188, neither party raised the question in the lower courts. Rather, the Court of Appeal brought up the issue *sua sponte* and found it moot because the parties had stipulated to the courts determining the question. *Id.* at 1128-1129. Accordingly, this Court's decision not to subsequently grant review in *Nelsen* does not indicate the question's lack of importance as much as it does that the petitioner had already waived the issue and that the case therefore did not present an adequate vehicle for review.

Regardless, the importance of whether the courts or the arbitrator determine if an arbitration agreement includes a class waiver is undeniable after the United States Supreme Court's subsequent decision in *Oxford Health Plans, LLC v. Sutter* (2013) 569 U.S. ___, 133 S.Ct. 2064. In *Oxford* the United States Supreme Court held that any decision by an arbitrator on the question of whether an arbitration agreement includes a class waiver is not subject to judicial appeal. *Ibid.* Thus, after *Oxford*, if a court fails to follow governing law when making the decision of whether an arbitration agreement includes a class waiver, that decision is appealable; but if an arbitrator fails to follow governing law in making such a decision, a party is powerless to stop an arbitration to which it never agreed.

The importance of this dichotomy has led to a tidal wave of litigation at the trial and appellate court levels both within California and nationwide – and despite Appellants protestations as discussed below, the courts have been anything but uniform in their decisions.

IV. STATE COURTS HAVE NOT BEEN UNIFORM IN THEIR DECISIONS ON THE PETITIONED QUESTIONS

Finally, Appellant contends that there is no need for this Court to review the question "[b]ecause California courts consistently follow the *Bazzle* plurality to hold that an arbitrator should be the one to determine whether an arbitration agreement allows for class procedures, there is no conflict for this Court to resolve. The only departures from *Bazzle* are a handful of decisions from the federal courts."[3] *Opposition,* at 4. Of course, Appellant's argument fails to take into account (1) the trial court in the instant case, (2) the San Diego County trial court two months ago in *Randy Steel v. Walters Wholesale Electric Co.* (July 25, 2014) Minute Order, Case No 37-2013-00076992; (3) the Santa Barbara County trial court four months ago in *Raphael Roberts v. Santa Barbara Automotive Ltd. et. al.,* (April 22, 2014) Order, Case No. 1439804; (4) the Los Angeles County trial court six months ago in *Lujan v. Century Foods* (Mar. 10, 2014) Order, Case No. BC513815; (5) the Los Angeles County trial court seven months ago in *Gregorians v. ATV, Inc. et al.* (Feb. 4, 2014) Order, Case No. BC525591; and (6) the Orange County trial court last year in *Network Capital v. Papke* (Oct. 10, 2013) Minute Order, Case No. 30-2013-00659735 – which merely represents the orders Respondents' counsel have obtained in Southern California in its Los Angeles and Irvine offices this past year, let alone

[3] As discussed above, this statement is a gross mis-characterization of the *Bazzle* decision; and therefore, if all state courts are in fact uniformly determining the question based upon on the analysis articulated by Appellant, it is imperative that this Court review the matter so as to correct the lower courts.

all management-side defense counsel throughout the State since the *Bazzle* plurality opinion was issued. Indeed, this Court's very analysis and decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 is premised upon the courts determining if an arbitration agreement includes a class waiver so that they can then determine if any class waiver is conscionable or not. Finally, the "handful" of federal courts to have recently departed from *Bazzle* happen to include the only published Circuit Courts of Appeals decisions on these specific questions. *Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594, 599; *Huffman v. HillTop* (6th Cir. 2014) 747 F.3d 391, 398; *Opalinski v. Robert Half Int'l, Inc.* (3d Cir. July 30, 2014) ___ F.3d ___, 2014 U.S. App. LEXIS 14538, at **10-15 [certified for publication].[4]

In another bizarre argument, Appellant contends that there is no reason for this Court to review the question because the United States Supreme Court has not "overruled" the "established precedent" of the *Bazzle* plurality opinion. *Opinion,* at

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[4] In his Opposition, Appellant cites *Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d 1109, 1127 fn. 5, for the purported proposition that "the Ninth Circuit recently indicated that *Bazzle* should be followed as 'persuasive authority.'" *Opinion,* at 11. *Thalheimer* had nothing to do with arbitrations. Rather, *Thalmier* merely stands for the proposition that plurality decisions, in general, are "persuasive authority." *Ibid.* In similar fashion, and as already discussed in the initial petition papers which Appellant entirely ignored, the First Circuit case *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.* (1st Cir. 2012) 683 F.3d 18, characterized as "closely analogous" by Appellant, involved "associational action . . .[which] is [not] equivalent to a class action." *Id.* at 23; *Petition,* at 15, fn. 1. Finally, the remaining cases cited by Appellant all predate the United States Supreme Court's decisions in *Stolt-Nielsen S.A. v. Animalfeeds Int'l* (2010) 559 U.S. 662, 678-680 and *Oxford Health Plans LLC v. Sutter* (2013) 569 U.S. ___, 133 S.Ct. 2064, 2068, fn 2, where (1) the Federal High Court corrected those lower court decisions for believing that *Bazzle* was binding precedential authority, and (2) the Federal High Court held that a court cannot compel arbitration of issues unless there is contractual authority to do so. For this reason, the Third Circuit Court of Appeal itself has determined that only it and the Sixth Circuit Court of Appeal have considered the question in light of the latest United States Supreme Court authority. *Opalinski, supra,* 2014 U.S. App. LEXIS 14538, at **16-19.

1, 4, 11. This argument buries its head in the sand to the fact that the United States Supreme Court has *twice* instructed all federal and state courts that the *Bazzle* plurality *is not binding precedent*, and that the Federal High Court has yet to determine the matter. *Stolt-Nielsen S.A. v. Animalfeeds Int'l* (2010) 559 U.S. 662, 678-680; *Oxford Health Plans LLC v. Sutter* (2013) 569 U.S. ___, 133 S.Ct. 2064, 2068, fn 2. Thus, per the United States Supreme Court's own express direction, the *Bazzle* plurality opinion is not "established precedent," and there is nothing for the Federal High Court to "overrule," because it has never considered the question.

Given enough time[5] and resources, both parties could undoubtedly discover dozens upon dozens of recent Superior Court trial order throughout the state with contradictory analyses as to whether the courts or the arbitrator should determine whether an arbitration agreement includes a class waiver. Until this Court provides a definitive ruling, such a lack of conformity will run rampant through its judicial system.

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[5] Again, due Appellant's untimely filing and servicing of his Opposition, Respondents had only a few days to draft this Reply.

CONCLUSION[6]

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

DATED: September 26, 2014

Respectfully submitted

FISHER & PHILLIPS LLP

By: _____

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[6] Appellant spends a great deal of his Opposition rebutting Respondents' substantive analyses on the petitioned questions. Respondents stand on the strength of its initial petition papers in this regard, and focuses the instant Reply solely upon Appellant's argument that the Petition fails to satisfy the standard of Rule 8.500.

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 2658 words, excluding the parts of the brief exempted by California Rules of Court 8.504(d)(3).

DATED: September 26, 2014

FISHER & PHILLIPS LLP

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State of California)
County of Irvine) **DECLARATION 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 REPLY** 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 September 26, 2014 at Irvine, California.

SUSAN JACKSON
[PRINT NAME]

[SIGNATURE]