Case No. S270798

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LAW FINANCE GROUP, LLC,

Plaintiff and Appellant,

vs.

SARAH PLOTT KEY,

Defendant and 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

OPENING BRIEF ON THE MERITS

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2. May equitable estoppel be applied to Code of Civil Procedure section 1288.2's 100-day deadline to serve and file a request to vacate an arbitration award in a response to a petition to confirm the award?

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4. Where a petition to confirm an arbitration award is filed within 100 days of service of the award, and a response requesting the award be vacated is timely filed pursuant to the 10-day time limit of Code of Civil Procedure section 1290.6, is the response timely regardless of whether it is filed more than 100 days after service of the award?

II.
INTRODUCTION

Faced with an imminent probate court trial to invalidate a trust amendment effectively disinheriting her and an attorney threatening to withdraw, Defendant and Respondent Sarah Plott Key reluctantly accepted a litigation funding loan with interest of 1.53% per month, compounded monthly, and substantial loan-servicing fees. Plaintiff and Appellant Law Finance Group, LLC ("Lender") paid Key's attorneys $2.4 million, which Key repaid in full. But Key did not pay Lender the $3.5 million in illegal compound interest and loan-servicing fees it charged in addition to the $2.4 million.

Key was correct. When Lender claimed its illegal interest and fees in arbitration, the Arbitrators found that Key's loan was a consumer loan, and compound interest and loan-servicing fees for consumer loans are illegal under the Financing Law. Loans violating these provisions are void and unenforceable, and a lender is prohibited from recovering any compensation for them. Instead of issuing an award for Key, however, the Arbitrators inexplicably awarded Lender approximately $1.9 million in simple interest, attorneys' fees, costs and expenses, enforcing the illegal loan agreement.

Two weeks after the award was issued, Lender petitioned to confirm the award. Key's counsel immediately informed Lender that Key intended to seek to vacate the award. To coordinate rulings on the two petitions, the parties' counsel agreed: (1) to obtain a joint

hearing date for both petitions; (2) Key would file her petition to vacate after a joint hearing date had been obtained; and (3) the petition to vacate, responses and replies would be filed under a stipulated, joint briefing schedule. Only after Key filed her petition to vacate (130 days after service of the award) and her response to Lender's petition to confirm (139 days after service of the award), did Lender renege on its agreement and assert the award could not be vacated because Key had not filed her petition to vacate or response within the 100-days set forth in the statutes of limitations for arbitration award vacation, though she had filed them per the parties' agreed briefing schedule. Continuing its inequitable conduct, Lender took full advantage of all provisions of the stipulation that were to its benefit.

The trial court disagreed with Lender that Key's request to vacate the illegal award was untimely, and instead found the response timely because the parties had agreed to a briefing schedule. The trial court also found good cause to extend the due date for filing the response to the date on which it was actually filed. The trial court ordered the award vacated because it violated the Financing Law's public policy. Lender appealed and the Court of Appeal reversed on the ground the response was untimely. The Court of Appeal concluded the parties could not agree to extend the deadline and that no equitable relief was available because the 100-day statute of limitations is jurisdictional and absolute. The Court of Appeal ordered the trial court to confirm the arbitration award, thereby enforcing an illegal loan agreement.

This Court granted review. Key seeks reversal of the Court of Appeal judgment with directions that the trial court judgment be affirmed and the award vacated. First, the 100-day statute of limitations in Code of Civil Procedure section 1288.2[1] is an ordinary statute of limitations subject to equitable tolling under the courts' inherent equitable powers. The courts presume a statute of limitations is subject to equitable tolling, section 1288.2 contains no language precluding equitable tolling, the 100-day time limit is brief, and the legislative history does not demonstrate a clear legislative intent to foreclose equitable tolling. Key provided Lender timely notice of her intent to challenge the award, Lender was not prejudiced by the brief delay to which it had agreed, Key's counsel acted in good faith, and his conduct was objectively reasonable in light of the statutory language and existing case law. Fundamental practicality and fairness demand that section 1288.2's statute of limitations be equitably tolled.

Second, Lender is equitably estopped from asserting the 100-day statute of limitations. Section 1288.2 is subject to equitable estoppel, Lender agreed to extend the statutory deadlines and the mutually-beneficial briefing schedule, Key's counsel acted in good faith, and his conduct was objectively reasonable in light of the statutory language and existing case law. Lender misled Key's counsel into not filing Key's petition to vacate and response within 100 days of service of the award. Justice and equity demand that

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[1] All future statutory references are to the Code of Civil Procedure unless otherwise indicated.

Lender be estopped from benefitting from its conduct.

Third, in all events, the award should not be confirmed. The loan agreement violates the Financing Law—it includes illegal compound interest and loan-servicing fees barred by the Financing Law. The agreement is therefore void and completely unenforceable. Nevertheless, the award enforces this illegal loan agreement, and confirmation of the award would make the courts complicit in enforcing illegal contracts.

Fourth, because Lender's petition to confirm the arbitration award was filed within 100 days of service of the award, Key's response requesting vacatur was timely filed within section 1290.6's 10-day time limit as extended by agreement of the parties and court order for good cause. When a petition to confirm is filed within 100 days of service of the award, section 1290.6's 10-day time limit supplants section 1288.2's 100-day time limit. A response complying with section 1290.6 is then timely regardless of whether it is filed more than 100 days after service of the award. This construction of the statutes is straightforward, reasonable and fair.

For each of these reasons, this Court should reverse the judgment of the Court of Appeal and order that the trial court's judgment be affirmed and the award be vacated.

III.

FACTUAL AND PROCEDURAL BACKGROUND

Key borrowed $2.4 million from Lender to finance her probate action establishing that her sister exercised undue influence over their mother in orchestrating an amendment to their parents' trust that effectively disinherited Key. (1 Appellant's Appendix ("AA") AA 107, 111.) Key repaid the $2.4 million in full. (1 AA 107, 111.) This appeal arises out of Lender's attempt to enforce its void consumer loan that charged illegal compound interest and loan-servicing fees.

A. Key's Sister Attempts To Steal Key's One-Third Interest In Her Mother's Trust And Valuable Assets Of Her Father's Irrevocable Trusts Belonging To Key

Key is one of three daughters of Thomas and Elizabeth Plott ("Plotts"). (1 AA 107.) During their lives, the Plotts owned and operated a successful chain of skilled nursing homes and made numerous real estate investments. (1 AA 107.) In 1999, the Plotts signed the Plott Family Trust ("Trust"). (1 AA 107.) Under the terms of the Trust, as amended, each of the daughters was to receive a one-third interest. (1 AA 107.) Thomas Plott died in 2003, and Key's interest in her father's side of the Trust then became irrevocable. (1 AA 107.)

The Trust called for its assets to be allocated equally to Key's father's and mother's sides of the Trust shortly after Thomas Plott's death. (1 AA 107.) However, more than two years after Key's father's death, Key's sister had the assets allocated unequally, with valuable skilled nursing homes allocated to her mother's side, and

real estate assets requiring additional investment to maintain allocated to her father's side. (1 AA 107.) In 2007, an amendment to the Trust was executed by Key's mother, reducing Key's share in her mother's side of the Trust and effectively disinheriting her, and transferring millions of dollars in assets from her Father's irrevocable trusts to Key's sister. (1 AA 107.) Unbeknownst to Key at the time, the unequal asset allocations and the 2007 Amendment were orchestrated by Key's sister exercising undue influence on Key's mother. (1 AA 107, 139.)

Key's mother died on June 27, 2011. (1 AA 107.) Then, Key learned her father's side of the Trust had been substantially diminished in favor of her mother's side, and she had effectively been disinherited from her mother's side. (1 AA 107.) Most of Key's interest in her mother's side of the Trust had been transferred to her sister, including 65% of the skilled nursing homes, worth more than $50 million. (1 AA 107-108; *Key v. Tyler* (June 29, 2016), Case No. B258055, 2016 WL 3587505, *5, fn. 5.)

B. Key Institutes Probate Litigation To Reverse The Changes To Her Parents' Trust Estate Orchestrated By Her Sister's Undue Influence

Key retained attorneys to help her reverse the Trust estate changes. (1 AA 108.) David Parker of Parker Shumaker & Mills LLP, an attorney working for Key on other related matters, referred her to Bruce Ross of Holland & Knight, LLP, a probate litigation attorney. (1 AA 108.) Ross represented Key in probate court to invalidate the 2007 amendment, for breach of trust, and for improperly taking trust property. (1 AA 108.) At the time of Holland

& Knight's retention, Key had $2,225,000 in liquid assets to fund the probate litigation, but she began to receive substantial invoices from Holland & Knight in August 2012. (1 AA 108.) By mid-April 2013, with the probate trial still not begun, Key had almost no money left to pay for legal fees—the attorneys had already gone through almost her entire life savings. (1 AA 108.)

Ross told Key that Holland & Knight would carry the invoices for its legal services with 4% annual interest. (1 AA 108.) On April 25, 2013, Key thanked Ross for that agreement. (1 AA 108.)

One month later, Ross reneged. (1 AA 108.) Ross threatened Key on the eve of trial that she would have to pay Holland & Knight $500,000 in one week and a total of $1 million in one month, or Holland & Knight would not represent her in the upcoming probate trial. (1 AA 109.) Ross told Key he had already spoken to his former client, Alan Zimmerman, the CEO and owner of Lender, which would provide Key with alternative financing for Ross's fees. (1 AA 109.)

C. Lender Loans $2.4 Million To Prosecute The Probate Litigation, Which Key Repays In Full

Lender, a California-licensed finance lender, extended Key a loan of up to $3 million to pay her attorneys' fees as they were incurred, in the litigation over her family inheritance (approximately $2.4 million was transferred to her attorneys to pay those fees). (1 AA 111-112.) The loan was governed by a June 28, 2013 Loan and Security Agreement ("Loan Agreement"). (1 AA 81-104, 109.) Key was not happy to sign the Loan Agreement, but she believed she had no other alternative due to Holland & Knight's reneging and

demands, and the impending trial date. (1 AA 111-112.)

The loan was arranged and negotiated by Holland & Knight and Parker, whose invoices also were to be paid by the loan. (1 AA 109, 111.) Interest accrued at the rate of 1.53% *per month, compounded monthly*. (1 AA 81, 86.) In the event of default, additional compound interest of 0.5% accrued monthly. (1 AA 85.) The Loan Agreement also charged a loan-servicing fee of 0.25% of the loan amount at the end of each month, a due-diligence fee, and an origination fee of $60,000, which were added to the balance owed and compound interest applied. (1 AA 81.)

Key ultimately prevailed in the Trust amendment invalidity proceeding. (1 AA 111; *Key v. Tyler* (June 29, 2016), Case No. B258055, 2016 WL 3587505, *9.) Key repaid Lender $2.4 million, but did not pay any of the illegal interest, fees, or costs charged by Lender. (1 AA 111; 3 AA 942-946; 6 AA 2103-2104; 8 AA 3866.)

The Loan Agreement included an arbitration provision. (1 AA 103.) Lender submitted the parties' dispute to arbitration, claiming breach of the Loan Agreement. (1 AA 58-59, 103; 5 AA 1620-1630.) In addition to its attorneys' fees, Lender sought almost $3.5 million in unlawful compound interest and loan-servicing fees. (1 AA 111, 138.)

D. The Arbitrators Find The Loan Is A Consumer Loan Under The Financing Law And Lender Contracted For And Charged Unlawful Compound Interest And Loan-Servicing Fees

Under the Financing Law,[2] a "consumer loan" is a loan, "the proceeds of which are intended by the borrower for use primarily for personal, family, or household purposes." (Fin. Code, § 22203.) The Arbitrators found that Lender's loan to Key was a consumer loan. (1 AA 113.) "The loan was used to pay Key's personal attorneys to assist her in obtaining her mother's gifts to her. Key is a beneficiary of a family trust created to transfer gifts to the next generation in the family…." (1 AA 113-114.) The Arbitrators described the litigation as involving Key's personal claims of disinheritance caused by her sister's undue influence over her mother. (1 AA 113.)

The Arbitrators also found: "Key had personal and family interests in the underlying litigation with respect to the Plott Family Trust, in which she was seeking to reverse the trust amendment initiated by her sister…. Key's outstanding and future legal fees, which were the reason for the loan from [Lender], were personal legal fees of Key. Her retainer agreements with Holland & Knight and Parker Shumaker & Mills were personal transactions relating to the litigation concerning the Plott Family Trust." (1 AA 114.) The Arbitrators concluded the primary purpose of the loan is what matters, and the loan was used to pay Key's personal attorneys' fees,

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[2] Effective October 4, 2017, the Finance Lenders Law name was changed to the Financing Law. (Fin. Code, § 22000, as amended by Stats. 2017, ch. 475, Assem. Bill No. 1284 (2017-2018 Reg. Sess.) § 4.)

associated with her challenge to her sister's undue influence over her mother. (1 AA 114.)

The Arbitrators further found that their conclusion was supported by the Loan Agreement, which referred to payment of attorneys' fees and costs for litigation of an inheritance and trust dispute. (1 AA 113.) The Arbitrators also found support in Lender's internal funding memorandum, which described the loan's purpose as payment of personal legal expenses incurred to Holland & Knight for the inheritance litigation, and to Parker Shumaker & Mills for a malpractice case related to that litigation. (1 AA 114.) Similarly, the memorandum described the loan proceeds as paying for attorneys' fees for trust litigation and the borrower as an individual. (1 AA 114.)

Finally, the Arbitrators cited CEO Zimmerman's testimony that the loan involved trust and estate litigation, where a loved one had died, and the people were dealing with grief and other very strong emotional issues. (1 AA 115.) Zimmerman had testified that trust and estate litigation is "not conducted by rational economic players that come up in a commercial lawsuit where there's a buyer and a seller." (1 AA 115.) Zimmerman's testimony indicated he knew the loan was a consumer loan and not a commercial loan. (See 8 AA 3279.)

The Arbitrators then found that for Key's consumer loan, compound interest was barred by Financial Code section 22309 and the loan-servicing fees were barred by Financial Code sections 22305 and 22306. (1 AA 115-116.) The Arbitrators also found that under

Financial Code section 22250, subdivision (b), "exempting the prohibitions on compounded interest and servicing fees in this case would undermine and evade the provisions of the California Financ[ing] Law." (1 AA 115.)

E. In Addition To The $2.4 Million Transferred To Her Attorneys That Key Repaid, The Arbitrators Award Lender Approximately $1.9 Million In Unlawful Interest, Attorneys' Fees, Costs And Expenses, Violating The Financing Law

Despite finding that Key's loan was a consumer loan and that Lender had charged impermissible compound interest and loan-servicing fees, the Arbitrators contravened the express provisions of Financial Code, section 22750, subdivision (a): "If any amount other than, or in excess of, the charges permitted by this division is willfully charged, contracted for, or received, the contract of loan is *void*, and *no person has any right to collect or receive any principal, charges, or recompense in connection with the transaction*." (Emphasis added.)

The Arbitrators thus violated the Financing Law in awarding Lender $787,340 in interest as of September 18, 2019 for breach of the Loan Agreement. (1 AA 61-63.) This amount included 1.53% per month interest and 0.5% per month default interest. (1 AA 61-63.) The Arbitrators also awarded Lender prevailing party attorneys' fees of $838,864 and costs of $83,083.39, and imposed the arbitration forum's administrative fees and expenses on Key of $29,400 and $173,683. (1 AA 61-62.) The total amount awarded against Key was approximately $1.9 million, when any award against Key based on

statutory public policy should have been zero.

The final arbitration award, as modified, was served on the parties on September 19, 2019. (1 AA 61-63, 106-123, 125-126.)

F. Lender Petitions To Confirm The Award And Key Seeks To Vacate The Award

On October 1, 2019 (12 days after service of the award), Lender filed its Petition to Confirm Arbitration Award, but did not obtain a hearing date. (1 AA 58; 9 AA 4249.) Lender petitioned the trial court to confirm the arbitration award that on its face violated Key's unwaivable statutory rights to a loan in compliance with the Financing Law and contravened public policy protecting borrowers from unfair lending practices. (1 AA 58, 113-116, 119, 122.)

On October 10, 2019 (21 days after service of the award), Lender and Key's counsel discussed (1) their mutual intent to disqualify the assigned trial judge, (2) Key's filing of a Petition to Vacate Arbitration Award, (3) Key's separate Response to Lender's Petition to Confirm, (4) coordination of the hearing date on the two competing petitions, and (5) a standard briefing schedule pursuant to section 1005, subdivision (b) based on the yet-to-be-obtained joint hearing date. (9 AA 4249.)

Key's counsel agreed that Key would waive personal service, Key's counsel would accept service of Lender's Petition to Confirm, and Key would file the disqualification motion (using Key's one peremptory challenge). (9 AA 4249-4250.) Counsel agreed that the briefing schedule for the two petitions would be jointly stipulated

with the same hearing date, and that this agreed schedule would extend the 10-day rule and replace the 100-day rule periods. (9 AA 4249-4250, 4275.) Lender agreed that Key would file her Petition to Vacate after a joint hearing date was set. (9 AA 4254, 4275.)

This discussion was confirmed in an October 10, 2019 email from Key's counsel to Lender's counsel: "Just to confirm. I will be filing a 170.6 affidavit regarding Judge Meiers no later than Monday morning. I will send the electronically filed document prior to noon on Monday. We will also agree to accept service on [Key's] behalf of the Petition to Confirm the Arbitration and related documents. We have agreed that the 10-day time period for filing a Petition to Vacate will not apply and that once the new judge is appointed, and we can find out when a hearing can be set pursuant to that judge's calendar, we will work backwards to come up with a briefing schedule for the Petition to Confirm and the Petition to Vacate that we will be filing. The briefing schedule will include oppositions and replies. Hopefully, this accurately sets forth our mutual understanding." (9 AA 4250, 4257.) Lender's counsel did not object to or contradict the agreement set out in the email. (9 AA 4250.) In accordance with their agreement, Key's counsel filed the disqualification affidavit and on October 11, 2019, he acknowledged receipt of Lender's Petition to Confirm. (1 AA 131.)

The matter was then assigned to a new judge and Lender's counsel informed Key's counsel he intended to disqualify the newly-assigned judge. (9 AA 4250.) The second judge was disqualified on November 14, 2019, and a third judge was assigned. (9 AA 4275.)

On December 10, 2019, Lender's counsel sent Key's counsel an email about coordinating hearings on the two petitions: "How about 2/20[/2020]? There are two hearing[s] available that day. We are reserving ours right now. Once you get yours[,] we can submit a stip[ulation] to move the C[ase] M[anagement] C[onference] to 2/20[/2020] to synch everything up. Will you please confirm for me when you get the date reserved?" (9 AA 4251, 4259.)

On December 12, 2019, Lender's counsel sent another email to Key's counsel with the subject "*Dueling Petitions*."

"Do you know when your substantive petition is due? I know we talked conceptually about timelines way back. I just don't know with the hearing date set for 2/20[/2020] whether we need to revisit that or, just go according to standard timing." (9 AA 4265.)

On that same date and well within 100 days, Key's counsel confirmed that Key would try to obtain the same hearing date as Lender. (9 AA 4262.)

On January 21, 2020, Key's counsel sent Lender's counsel an email: "We are getting our moving papers prepared. Looks like the last day to file and serve is January 27. Are you okay with electronic service of the papers on Monday[?] Also, we are putting together a compendium of exhibits, etc.[?] I think they [would] be filed electronically as well. I can certainly send you a hard copy by overnight mail if you would like. Just let me know on both." (9 AA 4253, 4267.)

On January 23, 2020, Key's counsel sent another email to

Lender's counsel: "Confirming our conversation of this morning, we have agreed to electronic service of all documents in this case. As mentioned, we will serve our Petition to Vacate and the compendium of exhibits by email to you on Monday. I will make sure that we separately serve them by email so that you don't need to rely on the court's electronic service. All other documents can be served similarly and can be served on the day that would otherwise be required for personal service. Let me know if I have understood any of our agreement incorrectly." (9 AA 4253, 4272.) Apparently, Lender did not correct him.

On January 23, 2020, Key received her first actual notice of a hearing date of February 20, 2020. (9 AA 4254.) Pursuant to the stipulated briefing schedule, Key filed her Petition to Vacate four days later on January 27, 2020 (16 court days before February 20, 2020, pursuant to section 1005, subdivision (b)). (1 AA 132-133.)

Key argued in her Petition that the Arbitrators had found: (1) the loan was a consumer loan, (2) Lender contracted for and charged compound interest and loan-servicing fees in violation of the Financing Law, (3) Lender included these provisions in the Loan Agreement intending to evade the Financing Law, but (4) the Arbitrators nonetheless concluded the Loan Agreement was binding and enforceable, when in fact it was void. (1 AA 132-152.) Key further argued that the Arbitrators exceeded their authority by awarding Lender interest and attorneys' fees violating Key's unwaivable statutory rights and contravening public policy, because, based on the Arbitrators' findings, no principal, interest or other

charges could be awarded against Key. (1 AA 132-152.)

On February 5, 2020, in accordance with the stipulated briefing schedule, Key timely filed her Response to Lender's Petition to Confirm (nine court days before February 20, 2020, pursuant to section 1005, subdivision (b)). (9 AA 4045.)

On that same date, also pursuant to the stipulated briefing schedule, Lender filed its Response to Key's Petition to Vacate, asserting for the first time that Key's Petition to Vacate was untimely, thus reneging on the stipulated scheduling agreement for which Lender had bargained. (8 AA 4021, 4027-4032.) The parties nonetheless continued to conform to the stipulated briefing schedule. (9 AA 4254.)

Lender argued that the Arbitrators did not exceed their powers by failing to apply provisions of the Financing Law, the award did not violate public policy, and the award did not violate any unwaivable statutory right of Key. (8 AA 4034-4039.) Specifically, Lender argued the Arbitrators did not exceed their powers merely by making factual or legal errors. (8 AA 4034-4035.)

On February 11, 2020, Key filed her Reply Brief in support of her Petition to Vacate and argued her Petition to Vacate and Response to Lender's Petition to Confirm were timely or Lender should be estopped from claiming they were untimely in light of counsel's agreement. (9 AA 4234-4247, 4254, 4276.) One of Key's counsel declared under oath: "[B]ased upon the multiple e-mail correspondence and the fact that counsel had agreed that we did not

need to file our Petition to Vacate until there was a hearing date set for the Petition to Confirm and according to a regular briefing schedule, [Lender] appears to be attempting to take advantage of a rule for which [it] agreed would not apply." (9 AA 4254.) Key's counsel continued, Lender "itself followed this briefing schedule when it filed its opposition that takes the position that Ms. Key's following the briefing schedule was untimely. [Lender] should be estopped from arguing that Key cannot file an opposition to the Petition to Confirm when [Lender] specifically replaced the 10-day period and agreed, by a writing, that all pleadings would be served in accordance with a standard briefing schedule, and when [Lender], itself, followed this briefing schedule." (9 AA 4254.)

Another of Key's counsel declared under oath: "Based on the written agreements between counsel it was clear to me that [Lender] agreed that, in exchange for Ms. Key accepting service of process of the Petition to Confirm through service on her attorneys …, LLP, [Lender] would waive enforcement of the 10-day response time under … § 1290.6 and the 100-day filing and service time under … § 1288.2." (9 AA 4275.) Key's counsel continued, "[b]ased on [Lender's counsel] and his client's agreements dating back to October 2019, I on behalf of my client, Ms. Key, relied on [Lender]'s consent to allow Ms. Key to respond to the Petition to Confirm and file her Petition to Vacate, beyond the 100-day period provided in … § 1288.2 and the 10-day response time under … § 1290.6. This reliance was reasonable, especially in light of the communications and consents by [Lender]." (9 AA 4276.)

Lender also filed its Reply in support of its Petition to Confirm on February 11, 2020, simply repeating arguments it had made in its Petition to Confirm and Response to Key's Petition to Vacate. (9 AA 4227-4231.) Lender did not substantively address Key's arguments concerning the Arbitrators' factual findings and the explicit legislative expression of public policy found in Financial Code section 22750, subdivision (a). And Lender did not submit any evidence controverting Key's evidence regarding briefing.

G. The Trial Court Denies Lender's Petition To Confirm And Vacates The Award Because It Violates Key's Unwaivable Statutory Rights And Contravenes An Explicit Legislative Expression Of Public Policy

The trial court vacated the award on February 20, 2020, on the ground it violated Key's unwaivable statutory rights and the public policy expressed in the Financing Law. (9 AA 4277, 4286.)

The trial court found that based on "the evidence and chronology Key submits regarding the parties' various communications," "Key's response is timely under 1290.6 and should be considered on the merits." (9 AA 4281-4282.)[3] The trial court also found good cause "to extend the time to the actual filing date to enable the court to decide the petition on its merits." (9 AA 4282.)

The trial court denied Lender's Petition to Confirm and vacated

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[3] This finding is supported by substantial evidence. Lender did not submit any declaration concerning the agreement to waive the statutory deadlines and presented no contradictory evidence. Thus, the declarations and evidence submitted by Key were uncontroverted.

the award on the ground the Arbitrators had exceeded their authority by issuing an award that violated Key's unwaivable statutory rights and contravened an explicit legislative expression of public policy encompassed within the Financing Law. (9 AA 4284-4285.) The trial court stated: "Key argues the award violates the express legislative public policies of the [Financing Law] because the arbitrators did not void the contract when they made the findings that required them to do so. Key contends the arbitrators made sufficient findings to require that they void the contract under the [Financing Law], specifically Finance Code section 22750." (9 AA 4286.)

Further, the trial court ruled: "Here, the arbitrators found that [Lender] violated Financial Code sections 22309 (impermissible compound interest) and 22306 (impermissible service fee). (Award ¶¶ 36-37.) Key establishes the requirements of Finance Code section 22750 [, subdivision] (a) are satisfied because [Lender] willfully charged or contracted for an amount in excess of what is permitted by the [Financing Law]. Section 22750[, subdivision] (a) renders the agreement void." (9 AA 4286.)

The trial court agreed with Key that the Arbitrators had exceeded their powers: "The arbitrators did not void the contract, but fashioned an alternative remedy. Key has shown that the arbitrators exceeded their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy." (9 AA 4286.)

H. Lender Appeals And The Court Of Appeal Reverses The Judgment

Lender appealed. (9 AA 4292.) The Court of Appeal reversed the trial court judgment and remanded to the trial court with directions to confirm the award. (Court of Appeal Opinion ("Opn." 22.) The Court of Appeal concluded Key's Petition to Vacate and Response to Lender's Petition to Confirm had been filed more than 100 days after service of the award. (Opn. 17-20; Order Modifying Opinion ("Mod.") 2-3.) The Court of Appeal held that these statutory time limits are jurisdictional and absolute, and are not subject to either equitable tolling or equitable estoppel. (Opn. 17-20; Mod. 2-3.) The Court of Appeal also held that these statutory time limits are applicable, though the arbitration award on its face violated public policy and contravened Key's unwaivable statutory rights, thereby ordering enforcement of an illegal contract. (Mod. 2.)

IV.
LEGAL ARGUMENT

Elevating procedure over substance, the Court of Appeal reversed the judgment based on a technical forfeiture that unjustifiably prevented a decision on the merits. In arriving at this conclusion, the Court of Appeal held that section 1288.2's 100-day time limit to file and serve a request to vacate an arbitration award in a response to a petition to confirm the award is jurisdictional and absolute. This faulty premise led to the Court of Appeal's erroneous holdings that section 1288.2 is not subject to equitable tolling or equitable estoppel, and that filing a response more than 100 days

after service of the award compels confirmation of public-policy-violative arbitration awards. Because section 1288.2 is not jurisdictional and not absolute, this Court should reverse the Court of Appeal judgment and order the trial court judgment affirmed. This Court also should reverse the judgment because Key's response to Lender's petition to confirm was timely under section 1290.6, regardless of whether it was filed more than 100 days after service of the award.

A. Equitable Tolling Applies To Section 1288.2's 100-Day Deadline To Serve And File A Request To Vacate An Arbitration Award In Response To A Petition To Confirm

As the California Arbitration Act provides, parties to arbitration awards may request a court to vacate an arbitration award by a petition to vacate (§ 1288) or by seeking vacatur in response to a petition to confirm (§ 1285.2). Sections 1288 (petition to vacate) and 1288.2 (response requesting vacatur) provide 100-day time limits for such requests. But section 1288.2's 100-day time limit for a response is not an absolute deadline. To the contrary, it is an ordinary statute of limitations subject to equitable tolling. Here, Key has satisfied the equitable tolling elements and her response should be deemed timely as the trial court found.

1. Statutory Time Limits Are Presumed Subject To Equitable Tolling

As this Court held in *Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 721 (*Saint Francis*), the availability of equitable tolling underlies the Legislature's adoption

of all limitation periods. "Equitable tolling is a judicially created, nonstatutory doctrine that suspend[s] or extend[s] a statute of limitations as necessary to ensure fundamental practicality and fairness. The doctrine applies occasionally and in special situations to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court. Courts draw authority to toll a filing deadline from their inherent equitable powers…." (*Id.* at p. 720, internal citations and quotation marks omitted.)

Equitable tolling applies generally to all statutory time limits. (*Saint Francis*, *supra*, 9 Cal.5th at pp. 717, 723, 730-731.) In fact, courts presume statutory time limits are subject to equitable tolling. (*Id.* at pp. 719-720 [30-day time limit in Government Code section 11523 to petition for writ of administrative mandate may be equitably tolled].)

A statute's filing deadline does not itself bar equitable relief. (*Saint Francis*, *supra*, 9 Cal.5th at p. 720.) Otherwise, every statutory time limit would be absolute. (*Ibid.*) Instead, a statutory deadline may reflect a goal for the time of filing without foreclosing equitable tolling. (*Id.* at p. 721.) Nor does the Legislature's provision for one type of statutory tolling foreclose general equitable tolling. (*Id.* at p. 722.)

Rather, in determining whether equitable tolling applies, the courts look to any statutory prohibitions, the deadline's length, the statutory context, and any legislative intent to bar equitable tolling. (*Saint Francis*, *supra*, 9 Cal.5th at pp. 719-724; see also *Ventura*

Coastal, LLC v. Occupational Safety and Health Appeals Bd. (2020) 58 Cal.App.5th 1, 42 (*Ventura Coastal*) [30-day time limit in Labor Code section 6627 to petition for writ of administrative mandate may be equitably tolled].) "[A]n ordinary statute of limitations governing the time for filing a pleading initiating an action is subject to the equitable tolling doctrine." (*Ventura Coastal*, *supra*, 58 Cal.App.5th at p. 36.)

As this Court underscored in *Saint Francis*, "Statutes of limitations serve important purposes: They motivate plaintiffs to act diligently and protect defendants from having to defend against stale claims. But equitable tolling plays a vital role in our judicial system, too: It allows courts to exercise their inherent equitable powers to excuse parties' failure to comply with technical deadlines when justice so requires." (9 Cal.5th at p. 730.) To balance these two competing goals, the Court recognized "the Legislature's ability to forbid equitable tolling in certain statutes…. For the doctrine to fulfill its purpose, however, we continue to presume that tolling is available in the absence of evidence to the contrary, and allow courts to determine on a case-by-case basis whether tolling is warranted under the facts presented, with careful consideration of the policies underlying the doctrine." (*Ibid*.)

Equitable tolling provides broad equitable relief where "technical forfeitures would unjustifiably prevent a trial on the merits." (*Saint Francis*, *supra*, 9 Cal.5th at pp. 724-725, internal quotation marks omitted.) To balance the injustice to a plaintiff arising from a statutory time limit, equitable tolling applies

whenever there is (1) timely notice, (2) lack of prejudice to the defendant, and (3) reasonable and good faith conduct by the plaintiff. (*Id*. at p. 724.) The doctrine also may apply to a reasonable and good faith mistake regarding a statutory deadline. (*Id*. at pp. 726-730.)

In *Saint Francis,* this Court held equitable tolling applied to Government Code section 11523's 30-day deadline to file a petition for writ of administrative mandate. (9 Cal.5th at p. 723.) The Court first examined the statute's language and structure: "Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered." (Gov. Code, § 11523.) The Court determined this language was similar to other statutes of limitations subject to equitable tolling. (*Saint Francis*, *supra*, 9 Cal.5th at p. 720.) "[T]he fact that section 11523 sets a deadline for filing a petition for a writ of administrative mandate does not, by itself, demonstrate that the Legislature sought to prohibit tolling." (*Ibid*.) "[T]he Legislature's adoption of the statute of limitations in section 11523 may very well have reflected a goal that petitions for a writ of administrative mandate be filed within 30 days—but it does not, by itself, give rise to the inference that the Legislature sought to foreclose equitable tolling." (*Id*. at p. 721.)

In addition, this Court explained that the statute's brief limitations period weighed in favor of tolling. (*Saint Francis*, *supra*, 9 Cal.5th at p. 720.) The Court then determined that although Government Code section 11523 tolled the statute in one situation, that statutory exception did not indicate a legislative purpose to bar

tolling in any other circumstance. (*Id.* at p. 722.) Finally, the Court determined the legislative history did not "reflect a clear intent" to foreclose equitable tolling. (*Ibid.*) In fact, the Legislature's willingness to extend the deadline in one circumstance indicated that it did not intend "the 30-day deadline to function as an austere, unforgiving limitation period, notwithstanding any equitable considerations buttressing the case for tolling." (*Id.* at p. 723.)

The Court concluded: "We cull little if any evidence from section 11523's text, context, and legislative history that the Legislature took a scalpel to equitable tolling under section 11523. Because we presume that statutes of limitations are ordinarily subject to equitable tolling, the paucity of evidence that the Legislature ruled it out compels the conclusion that the 30-day statute of limitations may be tolled." (*Saint Francis*, *supra*, 9 Cal.5th at p. 723.)

2. Section 1288.2's Time Limit To Request Vacatur In A Response To A Petition To Confirm Is Subject To Equitable Tolling

This Court's reasoning in *Saint Francis* is equally applicable to section 1288.2. In fact, the Ninth Circuit has applied that same reasoning to the Federal Arbitration Act's 90-day time limit for filing a motion to vacate an arbitration award and held equitable tolling applies. (*Move, Inc. v. Citigroup Global Markets, Inc.* (9th Cir. 2016) 840 F.3d 1152, 1156-1158 [motion to vacate filed more than four years after award issued was timely].)

a. Section 1288.2's Language Sets Forth An Ordinary Statute Of Limitations With No Language Indicating Legislative Intent To Foreclose Equitable Tolling

Section 1288.2 is a statute of limitations located in the part of an article of the California Arbitration Act entitled "Limitations of Time." (See *Humes v. Margil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 498-500 (*Humes*) [referring to section 1288.2 as a 100-day "statute of limitations"]; *DeMello v. Souza* (1973) 36 Cal.App.3d 79, 83, 85 (*DeMello*) [same]; *Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1192, fn. 10 (*Trabuco*) [same].) It provides in relevant part: "A response requesting that an award be vacated … shall be served and filed not later than 100 days after the date of service of a signed copy of the award…." (§ 1288.2.)

Section 1288.2's statute of limitations includes a deadline similar to other statutes of limitation for which this Court has allowed equitable tolling. (*Saint Francis*, *supra*, 9 Cal.5th at p. 720 [Gov. Code, § 11523 ("the petition shall be filed within 30 days after the last day on which reconsideration can be ordered")]; *Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 687-693 (*Prudential-LMI*) [Ins. Code, § 2071 ("No suit or action … shall be sustainable ... unless commenced within 12 months after inception of the loss")]; *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 106, 111 (*McDonald*) [Gov. Code, § 12960, subd. (d) ("no ... complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred")]; *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104, 107-109 (*Jones*) [Lab. Code, § 1197.5, subd. (h) (civil action "may

be commenced no later than two years after the cause of action occurs.")]; *Addison v. State of Cal.* (1978) 21 Cal.3d 313, 321 (*Addison*) [Gov. Code, § 945.6 (action "must be commenced … no later than six months after the date such notice is personally delivered or deposited in the mail")]; *Elkins v. Derby* (1974) 12 Cal.3d 410, 412 (*Elkins*) [§ 312 ("Civil actions, without exception, can only be commenced within the periods prescribed in this title"), preamble to former § 340, subd. 3 (one-year personal injury statute of limitations)].)[4]

And no statutory language indicates a clear legislative intent to foreclose equitable tolling. In contrast, the time limits for filing a notice of appeal are expressly not subject to equitable tolling. (*Hollister Convalescent Hospital, Inc. v. Rico* (1975) 15 Cal.3d 660, 666-674 (*Hollister*); *Estate of Hanley* (1943) 23 Cal.2d 120, 122-124.) "[A] notice of appeal must be filed on or before the earliest of [specified time limits].… [N]o court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal." (Cal. Rules of Court, rule 8.104(a) & (b); see also Cal. Rules of Court, rule 8.60(d) ["For good cause, a

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[4] The Courts of Appeal have also applied equitable tolling to similar statutes of limitations. (*Ventura Coastal*, *supra*, 58 Cal.App.5th at p. 36, 40 [Lab. Code, § 6627 ("The application for writ of mandate must be made within 30 days….")]; *Salmon Protection & Watershed Network v. County of Marin* (2012) 205 Cal.App.4th 195, 200-201 (*Salmon Protection*) [Pub. Resources Code, § 21167 (action "shall be commenced within 30 days")]; *Tarkington v. Cal. Unemp. Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1502, fn. 6 (*Tarkington*) [Unemp. Ins. Code, § 410 (right "shall be exercised not later than six months after")].)

reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a timely notice of appeal…."].) Furthermore, the statute allowing additional days to file pleadings served by a method other than personal service, is also expressly inapplicable to notices of appeal. (§ 1013, subds. (a), (c) & (e) ["the extension [for other than personal service] shall not apply to extend the time for filing … notice of appeal"].)

Similarly, the time limits for filing a notice of intent to move for new trial are expressly not subject to equitable tolling. (*Radford v. Crown City Lumber & Mill Co.* (1958) 165 Cal.App.2d 18, 20-21.) The time for filing a notice of intent to move for new trial "shall not be extended by order or stipulation or by those provisions of Section 1013 that extend the time for exercising a right or doing an act where service is by mail." (§ 659; see also § 1013, subds. (a), (c) & (e).)

The Legislature has further expressly precluded equitable tolling for legal malpractice actions, certain actions against deceased persons, and review of Workers' Compensation Appeals Board orders. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [equitable tolling prohibited in attorney malpractice limitations statute (§ 340.6) stating limitations period shall "in no event" be tolled except as specified]; *Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 847, superseded by statute on other grounds (*Battuello*) [equitable tolling prohibited in one-year limitations statute (§ 366.2) for survival action against deceased person, stating period "shall not be tolled or extended for any reason" except as specified]; Lab. Code, § 5810 ["within the time … specified and not otherwise"].) The Legislature

has not similarly preluded tolling for section 1288.2.

Unlike the notice of appeal rules and new trial statutes, section 1288.2 includes *no* language expressly prohibiting a court from extending its time limit, and the deadline to request vacatur of an arbitration award is also not expressly excluded from section 1013's service rule. Section 1288.2 further includes no strict language, such as "in no event," "for any reason," or "and not otherwise" barring tolling. As such, section 1288.2 is an ordinary statute of limitations governing the time for filing a pleading and should be subject to equitable tolling. (See *Ventura Coastal*, *supra*, 58 Cal.App.5th at p. 36.)

b. The 100-Day Statute Of Limitations Is Consistent With Equitable Tolling

Just as Government Code section 11523's 30-day deadline to file a petition for writ of administrative mandate is brief (*Saint Francis*, *supra*, 9 Cal.5th at p. 720), so too is section 1288.2's 100-day deadline to seek vacatur. This brief time period is similar to other statutes of limitations for which equitable tolling is allowed. (*Prudential-LMI*, *supra*, 51 Cal.3d at pp. 687-693 [Ins. Code, § 2071 (one year)]; *McDonald*, *supra*, 45 Cal.4th at pp. 106, 111 [Gov. Code, § 12960 (one year)]; *Jones*, *supra*, 27 Cal.3d at pp. 104, 107-109 [Lab. Code, § 1197.5, subd. (h) (two years)]; *Addison, supra,* 21 Cal.3d at p. 321 [Gov. Code, § 945.6 (six months)]; *Elkins*, *supra*, 12 Cal.3d at p. 412 [§ 335 (one year)]; *Ventura Coastal*, *supra*, 58 Cal.App.5th at p. 36 [Lab. Code, § 6627 (30 days)]; *Salmon Protection*, *supra*, 205 Cal.App.4th at p. 201 [Pub. Resources Code, § 21167 (30 days)];

Tarkington, *supra*, 172 Cal.App.4th at p. 1502, fn. 6 [Unemp. Ins. Code, § 410 (six months)].)

The brevity of the 100-day time limit is consistent with equitable tolling and does not demonstrate any legislative purpose to forbid it. (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 379 (*Lantzy*) [§ 337.15 (10-year statute of repose demonstrates legislative purpose to forbid equitable tolling)]; *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 179 [Civ. Code, § 3439.09, subd. (c) (seven-year statute of repose demonstrates legislative purpose to forbid equitable tolling)].)

c. The Inclusion Of An Extension Provision In Section 1290.6 Indicates A Legislative Intent That Section 1288.2's Time Limit Is Not To Be Treated As Absolute

A different statute in the California Arbitration Act, section 1290.6, provides that a response to a petition to confirm must be filed within 10 days after service of the petition. It allows the time to be extended by agreement of the parties or court order: "The time provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court." (§ 1290.6.)

That a related statute allows extension of its 10-day response time limit, does not foreclose equitable tolling for the 100-day time limit. (See *Saint Francis*, *supra*, 9 Cal.5th at pp. 721-722.) "The single exception … bears little relation to the purpose of equitable tolling: to excuse noncompliance with the statute of limitations in exceptional circumstances in which a party didn't act within the

limitations period because of an obstacle not acknowledged in the statute. We decline to infer from that single exception that it was within the ambit of the Legislature's purpose to bar tolling in any other circumstance." (*Id.* at p. 722.) Indeed, the Legislature's willingness to allow some leniency in the timing of arbitration award proceedings indicates it did not intend the time limits to function as "austere, unforgiving limitation period[s]." (*Id.* at p. 723; see also *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327, 341 [statutory excuse of other statutory requirements indicates legislative intent not to require strict enforcement of time limit].

d. The Legislative History Does Not Indicate Clear Legislative Intent To Preclude Equitable Tolling

Finally, section 1288.2's legislative history does not evidence clear legislative intent to foreclose equitable tolling. (See *Saint Francis*, *supra*, 9 Cal.5th at pp. 722-723.) To the contrary, the legislative history indicates a similar legislative intent to other statutes of limitations to which equitable tolling applies.

The California arbitration statutes were enacted in 1927. (Motion for Judicial Notice Exhibit 1 Recommendation ("MJN") 1.) The California Law Revision Commission undertook a study of arbitration and made a recommendation for moderate changes to the statutes in late 1960 and early 1961. (MJN 1-2.) The arbitration statutes, including section 1288.2, were repealed and reenacted in 1961. (Stats. 1961, Ch. 461.) Section 1288.2 has not been amended any time since.

The 1961 legislation, upon the recommendation of the California Law Revision Commission, increased the time to seek vacatur from 90 days to 100 days. (MJN 9.) If the Legislature did not think this extension would adversely affect the legislative purpose, "it seems harder still to conclude that it was within the ambit of the Legislature's purpose for the [100-day] deadline to function as an austere, unforgiving limitation period, notwithstanding any equitable considerations buttressing the case for tolling." (*Saint Francis*, *supra*, 9 Cal.5th 723.)

The legislative history of section 1288.2 is found in "The Recommendation of the Law Revision Commission Relating to Arbitration." (MJN 1.) The Recommendation indicates that, like other statutes of limitations, the deadline's purpose is to give the parties prompt notice of attacks on the award and to promptly settle the status of a challenged award. (MJN 9; *Saint Francis*, *supra*, 9 Cal.5th at p. 730 [statutes of limitations "motivate plaintiffs to act diligently and protect defendants from having to defend against stale claims"].) In short, nothing in the legislative history indicates clear legislative intent that the 100-day period be an absolute limit, not subject to equitable tolling.

Accordingly, section 1288.2's text, context, and legislative history support the conclusion the Legislature did not intend to foreclose equitable tolling of section 1288.2

3. The Undisputed Evidence Establishes Key's Response To Lender's Petition To Confirm Is Timely As Equitably Tolled

a. Key Satisfied The First Element Of Equitable Tolling: Notice

Key's counsel gave Lender notice on October 10, 2019 (only 21 days after the award's service) that Key intended to file a petition to vacate and also request vacatur in response to Lender's petition to confirm, and sent a confirming email that same day. (9 AA 4249-4250, 4257.) Pursuant to the agreed briefing schedule, Key's petition to vacate was filed only 130 days after she was served with the award, and her response was filed after only 139 days. (9 AA 4279-4282.)

Thus, Lender was fully notified within the 100 days that Key would challenge the award and this satisfied the notification purpose of section 1288.2. (See *Saint Francis*, *supra*, 9 Cal.5th at pp. 726-727.) Additionally, the petition to vacate and the response to the petition to confirm were promptly filed in accordance with the stipulated briefing schedule and any delay was minimal. In sum, the notice element was satisfied.

b. Key Satisfied The Second Element Of Equitable Tolling: Lack Of Prejudice

Lender was not prejudiced by the timing of the filings, as it agreed to the coordinated briefing schedule and filing dates, which likely accelerated rather than delayed the trial court's ruling on both petitions. (See *Saint Francis*, *supra*, 9 Cal.5th at p. 731.)

Furthermore, Lender used several benefits of the parties' agreement to its advantage. And Key's petition to vacate was filed only 30 days after the 100-day deadline, the response was filed only 39 days after the deadline, and the trial court heard the competing petitions concurrently on the first available hearing date. (1 AA 132-133; 9 AA 4045.)

Nothing about the brief delay affected Lender's ability to defend the award, particularly because Key filed the entire record of the arbitration proceedings in the trial court. (1 AA 157.) In fact, this brief delay pales in comparison with the parties' right to appeal the trial court's decision, which could postpone finality for years. Lender thus has not and cannot claim any prejudice from the brief delay.

c. Key Satisfied The Third Element Of Equitable Tolling: Subjective Good Faith And Objective Reasonableness

Subjective Good Faith. Equitable tolling requires subjective good faith—whether the late filing "was the result of an honest mistake or was instead motivated by a dishonest purpose." (*Saint Francis*, *supra*, 9 Cal.5th at p. 729.) Here, the undisputed evidence establishes that Key's counsel acted subjectively in good faith. He entered into a joint scheduling agreement with Lender's counsel in writing to accommodate two challenges to assigned judicial officers, the availability of a hearing date from the third assigned judge's calendar, and a coordinated hearing date for the competing petitions and their responses. (9 AA 4249-4275.) Moreover, Key's counsel asserted the issue of timeliness immediately once he learned Lender

had reneged on the agreement. (9 AA 4254; see *Saint Francis*, *supra*, 9 Cal.5th at p. 726.)

Lender presented no evidence that Key's counsel was motivated subjectively by any dishonest purpose—and in fact all evidence presented by Key's counsel demonstrated to the contrary. Most importantly, the trial court found the response timely based on the parties' agreement extending the statutory time limits and its extension of those deadlines for good cause. (9 AA 4281-4282.) Neither Lender nor the Court of Appeal ever suggested Key's counsel had not acted in good faith.

Objective Reasonableness. Equitable tolling also requires objective reasonableness. (*St. Francis*, *supra*, 9 Cal.5th at p. 729 ["whether that party's actions were fair, proper, and sensible in light of the circumstances"].) In light of the statutory language and existing case law, Key's counsel at a minimum acted objectively reasonably in agreeing with Lender to extend the deadlines and filing date for Key's response to Lender's petition to confirm.[5] The objective reasonableness is confirmed by the trial court ruling finding the parties had agreed to the extension, there was good cause to extend the deadline, and Key's response was timely. (9 AA 4282.)

As explained above, a party to an arbitration may request the

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[5] In Section IV.D, Key contends that where a petition to confirm an arbitration award is filed within 100 days of the award's service, the timeliness of a response seeking vacatur is governed by section 1290.6's 10-day period and not section 1288.2's 100-day period. In this section, Key argues that, at a minimum, it was objectively reasonable for Key's counsel to so believe.

court to vacate the award in response to a petition to confirm the award (§ 1285.2) filed within 100 days of service of the award (§ 1288.2). But section 1290.6 provides that a response to a petition to confirm should be filed within 10 days of service of the petition, and this period may be extended by party agreement or court order. Confusion has arisen when a petition to confirm is filed within 100 days of service of the award—in what circumstance does the 10-day or the 100-day time limit apply to any response? "For several decades, various Courts of Appeal have wrestled with squaring the 10[-]day deadline for filing a response and the 100[-]day deadline for filing a petition to vacate. The consensus is the 10[-]day deadline applies if the other side files a petition to confirm…." (*Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 66-67 (*Oaktree Capital*).)

This Court has never previously addressed that confusion. Before this case, the Courts of Appeal had never expressly addressed the question either. But Courts of Appeal have stated that where a petition to confirm an arbitration award is filed within 100 days of the award's service, the timeliness of a response seeking vacatur is governed by section 1290.6's 10-day period and not section 1288.2's 100-day period. (*Oaktree Capital*, *supra*, 182 Cal.App.4th at p. 66; *Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* (2015) 243 Cal.App.4th 538, 544 (*Santa Monica College*); *Coordinated Construction, Inc. v. Canoga Big "A," Inc.* (1965) 238 Cal.App.2d 313, 316-317 (*Coordinated Construction*) ["Thus, section 1290.6 limits the 100-day provision found in section 1288.2."'].)

Where a petition to confirm was filed within 100 days of the award, no case has ever disallowed as untimely a response seeking vacatur which complies with the 10-day rule. To the contrary, each case prohibiting vacatur as untimely involved situations where the party seeking vacatur failed to comply with the 10-day rule for filing a response or did not file a response at all. (*Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 743 (*Eternity Investments*) [response to petition to confirm filed a month after petition to confirm filed]; *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1204-1205 (*Abers*) [only petition to vacate filed; no response to petition to confirm filed]; *Santa Monica College*, *supra*, 243 Cal.App.4th at pp. 544-545 [appellant failed to comply with either 100-day or 10-day periods]; *Coordinated Construction*, *supra*, 238 Cal.App.2d at p. 315 [response to petition to confirm not filed within 10 days of petition]; *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1511 [only petition to vacate filed, no response to petition to confirm filed]; *Douglass v. Serenvision, Inc.* (2018) 20 Cal.App.5th 376, 382-383 [petition to confirm not filed within 100 days of award's service and response to petition to confirm not filed within 10 days of petition's service]; *Soni v. SimpleLayers, Inc.* (2019) 42 Cal.App.5th 1071, 1081 [response to petition to confirm not filed within 10 days of petition's service].)

As such, the 10-day rule reasonably appears to be an exception to the 100-day limitations period to respond to a petition to confirm an award seeking vacatur. (*DeMello*, *supra*, 36 Cal.App.3d at p. 83.) In light of the statutory language and the apparent concurrence of Courts of Appeal, it was at least reasonable for Key's counsel to conclude that where a petition to confirm is filed within 100 days of

service and a response to the petition is filed within the 10-day period, the response is timely irrespective of the 100-day limitations period. In stipulating to the joint briefing schedule with Key's counsel, Lender's counsel apparently shared this belief. (See *Saint Francis*, *supra,* 9 Cal.5th at p. 731.) And the trial court agreed. (9 AA 4282.)

Fundamental practicality and fairness demand that the 100-day limitations period be tolled under these circumstances. (See *Saint Francis*, *supra*, 9 Cal.5th at p. 724.) This Court should reverse and order the award vacated on this ground.

B. Lender Is Equitably Estopped From Claiming Key's Response to Its Petition To Confirm Was Untimely

In addition to equitable tolling of the statute of limitations, Lender is also equitably estopped from asserting the100-day limitations period against Key, due to its own conduct. (*So. Cal. Pipe Trades Dist. Council No. 16 v. Merritt* (1981) 126 Cal.App.3d 530, 541 (*So. Cal. Pipe Trades*) [equitable estoppel relieves party from failure to file response seeking vacatur within 100 days of service of award].)

1. A Party May Be Equitably Estopped From Asserting A Statutory Time Limit Even Where Equitable Tolling Does Not Apply

Statutes of limitations are subject to equitable principles, including equitable estoppel. (*Atwater Elementary School Dist. v. Cal. Dept. of General Services* (2007) 41 Cal.4th 227, 231-232 (*Atwater*).) Equitable tolling extends the running of the statute of limitations, while "[e]quitable estoppel ... comes into play only after

the limitations period has run and addresses ... the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period." (*Lantzy*, *supra*, 31 Cal.4th at p. 383, internal quotation marks omitted.) "To create an equitable estoppel, it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.... Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." (*Atwater*, *supra*, 41 Cal.4th at pp. 232-233, internal quotation marks omitted.) Equitable estoppel is established where a plaintiff actually and reasonably relies on the defendant's conduct. (*Lantzy*, *supra*, 31 Cal.4th at p. 385.)

Where the Legislature intends to foreclose equitable estoppel, it may so state. (*Atwater*, *supra*, 41 Cal.4th at p. 234.) But if the Legislature has not abrogated equitable estoppel, a statutory time limit is not absolute. (*Id*. at pp. 234-235.) "[E]quitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy*, *supra*, 31 Cal.4th at pp. 383-384; see also *McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 139-142 [equitable estoppel applicable to statute of limitations stating period "shall not be tolled or extended for any reason"]; *Battuello*, *supra*, 64 Cal.App.4th at pp. 847-848 [same]; *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 405-407 [same where legal malpractice statute of limitations provides "in no event shall the

time" exceed four years].)

As this Court explained in *Lantzy*: "Equitable tolling and equitable estoppel are distinct doctrines. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended...." (31 Cal.4th at p. 383.) "Equitable estoppel, however, ... comes into play only after the limitations period has run and addresses ... the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period." (*Ibid.*) Equitable estoppel "is wholly independent of the limitations period itself and takes its life ... from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." (*Ibid.*)

Equitable estoppel prevents a party from taking a position in court about which the party has deliberately misled the opposing party. "As our Supreme Court has repeatedly emphasized, a finding of estoppel requires some act or representation by the party to be estopped, on which the party seeking estoppel has relied to its detriment: '[t]he doctrine of equitable estoppel is founded on concepts of equity and fair dealing.'" (*Abers*, *supra*, 217 Cal.App.4th at p. 1209.) ""The essence of an estoppel is that the party to be estopped has by false language or conduct "led another to do that which he [or she] would not otherwise have done and as a result thereof that he [or she] has suffered injury."" (*Ibid.*; see also *Steinhart v. County of*

Los Angeles (2010) 47 Cal.4th 1298, 1315.) Equitable estoppel relieves a party from the failure to file a response seeking vacatur within 100 days of service of an arbitration award. (*So. Cal. Pipe Trades*, *supra*, 126 Cal.App.3d at p. 541.)

2. Section 1288.2's 100-Day Time Limit Is Subject To Equitable Estoppel

Until the Court of Appeal's Opinion in this case, no case had held that a court was foreclosed from exercising its inherent power to afford equitable relief from section 1288.2's 100-day time limit. (Opn. 20.) And this Court has never decided the issue. Two Court of Appeal decisions have loosely used the word "jurisdictional" when referring to sections 1288 and 1288.2 (Opn. 17, citing *Santa Monica College*, *supra*, 243 Cal.App.4th at pp. 544-545; *Abers*, *supra*, 217 Cal.App.4th at pp. 1203, 1211.) But *Santa Monica College* did not address equitable relief and *Abers* considered equitable relief on the merits, before determining the trial court had not abused its discretion in denying relief based on case-specific facts. (*Santa Monica College*, *supra*, 243 Cal.App.4th at pp. 544-545; *Abers*, *supra*, 217 Cal.App.4th at pp. 1208-1210.)

Indeed, in addition to *Abers*, every Court of Appeal confronted with this question has decided on the merits whether equitable relief from the 100-day time limit applies in that particular case. (*Coordinated Construction*, *supra*, 238 Cal.App.2d at pp. 318-320 [court has discretion to order equitable relief from section 1288.2 but did not abuse discretion in denying relief]; *DeMello*, *supra*, 36 Cal.App.3d at pp. 84-85 [court may grant relief from section 1288.2

under section 473 or inherent equitable power to afford relief for extrinsic fraud or mistake]; *So. Cal. Pipe Trades*, *supra*, 126 Cal.App.3d at p. 541 [applied equity to prevent unfairness and provide relief from section 1288.2]; *Elden*, *supra*, 53 Cal.App.4th at p. 1512 [section 473 could provide relief from 100-day rule but section 473 motion itself was untimely]; *Eternity Investments*, *supra*, 151 Cal.App.4th at p. 746, internal citations omitted ["Of course, a party with a reasonable excuse for failing to comply with the 100-day time limit may obtain relief in a trial court under section 473, subdivision (b) … [and] a trial court may exercise its equitable power to grant relief if the deadline expires due to extrinsic mistake or fraud."]; see also *Lovret v. Seyfarth* (1972) 22 Cal.App.3d 841, 855-856 (*Lovret)* [section 1288.2's provisions waivable]; *Trabuco*, *supra*, 96 Cal.App.4th at p. 1192, fn. 10 [section 1288.2 may be forfeited on appeal by failure to raise in trial court]; *Shepherd v. Greene* (1986) 185 Cal.App.3d 989, 993 (*Shepherd*) [100-day time limit tolled by trial de novo provisions of mandatory-fee-arbitration rules].)

Section 1288.2 is subject to equitable estoppel. No statutory language forecloses equitable estoppel. Section 1288.2 states only that a response requesting an arbitration award be vacated "shall be filed and served not later than 100 days after the date of service of a signed copy of the award." As this Court's precedent makes clear, that language does not foreclose application of equitable estoppel.

Additionally, section 1288.2 was enacted in 1961 (Stats. 1961, Ch. 461) and has not been amended, despite numerous appellate decisions indicating equitable relief from the 100-day time limit is

available. (*Coordinated Construction*, *supra*, 238 Cal.App.2d at pp. 318-320; *DeMello*, *supra*, 36 Cal.App.3d at pp. 84-85; *So. Cal. Pipe Trades*, *supra*, 126 Cal.App.3d at p. 541; *Elden*, *supra*, 53 Cal.App.4th at p. 1512; *Eternity Investments*, *supra*, 151 Cal.App.4th at p. 746; *Lovret*, *supra*, 22 Cal.App.3d at p. 856; *Shepherd*, *supra*, 185 Cal.App.3d at p. 993; see also *Saint Francis*, *supra*, 9 Cal.5th at p. 723.)

Thus, noncompliance with section 1288.2's 100-day time limit is subject to equitable estoppel. (See *Humes*, *supra*, 174 Cal.App.3d at pp. 499-500.) Unlike other time periods for which equitable relief is expressly foreclosed, like notices of appeal, section 1288.2's 100-day limitations period to respond to a petition to confirm by requesting vacatur contains no language that the deadline is not subject to equitable estoppel. (See, e.g., *Hollister*, *supra*, 15 Cal.3d at pp. 666-667 [courts cannot extend time to file notice of appeal by inherent power nor can relief be conferred by stipulation, waiver or estoppel]; *Marriage of Eben-King* (2000) 80 Cal.App.4th 92, 114.) As explained above, section 1288.2 is an ordinary statute of limitations subject to the doctrines of equitable tolling and estoppel. (See *Humes*, *supra*, 174 Cal.App.3d at pp. 498-500; *DeMello*, *supra*, 36 Cal.App.3d at pp. 83, 85; *Trabuco*, *supra*, 96 Cal.App.4th at p. 1192, fn. 10.)

3. Under The Undisputed Facts And The Trial Court's Findings, Lender Is Equitably Estopped From Asserting Section 1288.2's Time Limit

Here, the equitable estoppel facts are undisputed. After Lender filed its Petition to Confirm, Key's counsel gave Lender's

counsel notice Key intended to seek vacatur of the award. (9 AA 4249-4250.) Both counsel agreed in writing that they would obtain the same hearing date for Lender's Petition to Confirm and Key's Petition to Vacate. (9 AA 4250-4259, 4275.) Both counsel also agreed in writing that they would set the briefing schedule for the two petitions based on the same hearing date, they would utilize section 1005's general motion-briefing schedule by working backward from the hearing date, and the agreed schedule would take the place of the statutory arbitration petition and response deadlines. (9 AA 4249-4259, 4272-4276.) Lender agreed Key would file her Petition to Vacate after a joint hearing date had been set. (9 AA 4251-4254, 4265-4267, 4275-4276.)

The parties not only agreed to this procedure, they relied upon and followed it, and Lender took advantage of it. (9 AA 4249-4254, 4265, 4275-4276.) It was only after 100 days had elapsed that Lender first asserted the 100-day limitations period was jurisdictional and Lender could not agree to extend that limitations period.

Key's counsel was induced to refrain from filing Key's Petition to Vacate and response to Lender's Petition to Confirm within 100 days of the award by Lender's agreement to (1) concurrent hearing dates for the two petitions, (2) a briefing schedule for the Petition to Vacate, responses to the petitions, and replies based on that hearing date, (3) extension of the statutory deadlines, and (4) selection of the February 20 hearing date. As such, delay in filing Key's response was induced by Lender. Lender could not then also avail itself of the

100-day time limit as a defense. (See *Lantzy*, *supra*, 31 Cal.4th at p. 384.) Key's counsel actually and reasonably relied on Lender's conduct and Lender is equitably estopped from asserting the 100-day time limit. (*Id*. at p. 385.)

Although Lender knew within three weeks of service of the award that Key intended to file a timely Petition to Vacate, its counsel deliberately misled Key's counsel by agreeing the Petition to Vacate would be filed after obtaining a joint hearing date for the two petitions, and responses would be due in accordance with normal motion procedures rather than under the statutory limitations for arbitration proceedings. (9 AA 4249-4254, 4265, 4275-4276.) Lender's counsel's representation induced Key's counsel to wait to file Key's Petition to Vacate until the joint hearing date was obtained, and wait to file the Response to Lender's Petition to Confirm in accordance with the stipulated briefing schedule, causing injury to Key in the form of her detrimental reliance on Lender's misrepresentation that it would treat Key's filings as timely filed.

Because Lender's misrepresentations led Key's counsel to wait first to file Key's Petition to Vacate and then separately to file Key's Response to Lender's Petition to Confirm until the 100-day limitations period had passed, this Court should hold that Lender is equitably estopped from asserting that Key's Response to Lender's Petition to Confirm is untimely. Key raised equitable estoppel in the trial court, Lender had every opportunity to address the issue and did not submit any contradictory evidence, and the trial court determined the issue as a matter of fact. (8 AA 4021, 4028-4032; 9

AA 4227-4247, 4254, 4276, 4281-4282.)

There is no question Key was prepared to seek vacatur of the award within 100 days and promptly notified Lender's counsel. Nor is there any question that Lender's counsel agreed to extend the motion time frame for its own benefit and to take advantage of Key's substantial concessions. Lender's counsel misled Key's counsel and induced him to wait to file Key's pleadings until the 100-days had elapsed. It was not until then and after Key had filed her Response to the Petition to Confirm within the agreed period, that Lender's counsel for the first time attempted to renege on the agreement he had induced. Lender's counsel took the benefits of this agreement, while inequitably attempting to bar Key from receiving the same. Such conduct by Lender's attorney should not be countenanced or rewarded by this Court.

Lender is equitably estopped from raising section 1288.2's 100-day time limit. This Court should order the award vacated on this ground.

C. Because The Arbitration Award Violates Public Policy And Contravenes Unwaivable Statutory Rights, The Courts May Not Confirm The Award

Loan agreements violating the Financing Law are void, precluding recompense to the lender. (Fin. Code, § 22750, subd. (a) ["If any amount other than, or in excess of, the charges permitted by this division is willfully charged, contracted for, or received, the contract of loan is void, and no person has any right to collect or receive any principal, charges, or recompense in connection with the

transaction."].) Not only is such a loan agreement void, it could subject a lender to criminal and other civil penalties and loss of its license. (Fin. Code, §§ 22713-22714, 22753.)

As such, the arbitration award on its face violates the express public policy of the Financing Law "to protect borrowers against unfair practices by some lenders" (Fin. Code, § 22001, subd. (a)(4)), and contravenes Key's unwaivable statutory rights to a loan compliant with the statute (*Brack v. Omni Loan, Co. Ltd.* (2008) 164 Cal.App.4th 1312, 1327). The Arbitrators found Lender's loan to Key was a consumer loan that impermissibly included compound interest and servicing fees prohibited by the Financing Law. (1 AA 113, 115-116; see Fin. Code, § 22309 [impermissible compound interest], § 22306 [impermissible service fees].) Where a lender wrongfully charges compound interest or servicing fees, the Financing Law imposes mandatory "Consumer Loan Penalties" (Fin. Code, § 22750 et seq.) that *cannot* be waived.

Because the Loan Agreement is void under Financial Code section 22750, subdivision (a), as violating public policy and contravening Key's unwaivable statutory rights, it is an unenforceable illegal contract and the award enforcing it must be vacated. (*Brown v. TGS Management Co., LLC* (2020) 57 Cal.App.5th 303, 317-319 [confidentiality provisions in employment agreement violate Bus. & Prof. Code, § 16600 and are void and unenforceable; arbitration award must be vacated]; see also *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 31-32 ["the rules which give finality to the arbitrator's determination of ordinary

questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award"]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 101 ['it is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights"]; *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 676 ["an arbitrator whose legal error has barred an employee subject to a mandatory arbitration agreement from obtaining a hearing on the merits of a claim based on [an unwaivable statutory] right has exceeded his or her powers within the meaning of [section 1286.2, subdivision (a)(4)], and the arbitrator's award may properly be vacated"]; *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1353, fn.14 [unwaivable statutory rights require review "'sufficient to ensure that arbitrators comply with the requirements of the statute"'].)

Despite the statute's clear public policy directive, the Arbitrators enforced the illegal Loan Agreement. And, compounding the Arbitrators' error, the Opinion held that their award enforcing Lender's void and illegal Loan Agreement must be confirmed solely because Key assertedly missed section 1288.2's deadline. (Mod. 2.) In so holding, the Opinion enforces an illegal contract and conflicts with this Court's decision in *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 607, 609, 611-612 (*Loving*).

Decades ago, this Court unequivocally held that void and illegal contracts are not enforceable in court: "'[A] contract made

contrary to the terms of a law designed for the protection of the public and prescribing a penalty for violation thereof is illegal and void, and no action may be brought to enforce such contract.'" (*Loving*, *supra*, 33 Cal.2d at pp. 607, 609, 611-612 [reversing order confirming award enforcing void contract in violation of Bus. & Prof. Code, § 7031].)

The same rule applies to requests to confirm arbitration awards where a party seeks to use court processes to obtain confirmation of an award enforcing an illegal contract: "A claim that cannot be made the basis of a suit cannot be made the basis of arbitration. The mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality.'" (*Loving*, *supra*, 33 Cal.2d at p.611.) "It seems clear that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which rights might arise." (*Id*. at p. 610.) If a party seeks to confirm an illegal contract, the court should deny confirmation and vacate the award. (*Id*. at pp. 610-611.)

Although courts cannot vacate arbitration awards for mere legal error, arbitration does not transform enforcement of an illegal contract into an arbitrator's mere legal error confirmable by a court. "'The laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration, and neither will persons with a claim forbidden by the laws be permitted to enforce it through the transforming process of arbitration.' To hold otherwise would be tantamount to giving judicial approval to acts which are

declared unlawful by statute." (*Loving*, *supra*, 33 Cal.2d at pp. 611-612, internal citations omitted.) "If this were not the rule, courts would be compelled to stultify themselves by lending their aid to enforcement of contracts which have been declared by statute to be illegal and void." (*Id.* at p. 614.)

Under the law, a court is not authorized to confirm an arbitration award enforcing an illegal contract. "[C]ourts may, indeed must, vacate an arbitrator's award when it violates a party's statutory rights or otherwise violates a well-defined public policy." (*Dept. of Personnel Admin. v. Cal. Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200; *Bd. of Educ. v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 272; *Jordan v. Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443; *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 330.) "[I]t would violate public policy to allow a party to do through arbitration what it cannot do through litigation." (*Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892.)

A court simply may not confirm an arbitration award in violation of public policy. If the contract upon which an award is based is void, it "cannot be ratified either by right, by conduct or by stipulated judgment." (*South Bay Radiology Medical Associates v. Asher* (1990) 220 Cal.App.3d 1074, 1080.) "Where a contract is void as against public policy, no rights 'can arise and no power can be conferred upon the arbitrator to determine such nonexistent rights.'" (*Ibid.*) "In sum, the illegality [appellant] has raised, were it to be established, would constitute a defect in the arbitrator's award which

would not be waived by failure to petition to vacate the award within 100 days as required by Code of Civil Procedure section 1288. Rather, under *Loving & Evans v. Blick*, [appellant] was free to raise the alleged violation of [the statute] in response to [respondent's] petition to confirm." (*Id*. at p. 1081.)[6]

Based on this Court's rulings, confirming an award enforcing an illegal contract solely because of section 1288.2's 100-day time limit would allow the confirmation hearing to proceed as an uncontested matter by default judgment. (*Humes*, *supra*, 174 Cal.App.3d at p. 498.) The courts cannot permit a party to be so deprived of her day in court. (*Ibid*.) Such a default judgment would be unjust, and must be supplanted by equity. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 578-579.) And as Key's statutory rights are unwaivable under the Financing Law, they certainly cannot be waived by any technical failure to comply with section 1288.2's 100-day time limit.

In addition to the fact that Key's response was timely filed under the doctrine of equitable tolling and that Lender is equitably estopped from asserting the 100-day time limit as a bar to Key's response, the Loan Agreement is a void, illegal and unenforceable contract. Accordingly, the courts cannot confirm the award enforcing

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6 See also *United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1581-1582 [appellant may challenge arbitrator's jurisdiction to make award despite failure to timely request vacatur in trial court]; *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 817 [minor entitled to disaffirm arbitration award after deadline to seek vacatur].)

it. (*Loving*, *supra*, 33 Cal.2d at pp. 611-612, 614.)

D. When A Petition To Confirm An Award Is Filed Within 100 Days Of Service Of The Award, Section 1290.6's 10-Day Deadline Replaces Section 1288.2's 100-Day Deadline

As noted in Section IV.A.3.c, the California Arbitration Act includes two sections relating to the timing of requests to vacate awards in response to a petition to confirm. Section 1288.2 provides that such a request be filed within 100 days of the award's service and section 1290.6 provides that such a response be filed within 10 days of the petition's service or by agreement of the parties or for other good cause. When a petition to confirm is filed within 100 days of service of the award, the Court of Appeal erroneously concluded that both statutory time limitations apply at the same time (Opn. 8-15).

The purpose of these statutes is (1) to have the proceeding to vacate the award commenced within 100 days, (2) to have requests to confirm and vacate heard at the same time, (3) to have any challenge to the award heard while the evidence is fresh and witnesses are available, and (4) to conserve the use of judicial resources. (MJN 9; *Coordinated Construction*, *supra*, 238 Cal.App.2d at p. 317; *Eternity Investments*, *supra,* 151 Cal.App.4th at p. 746.) The 100-day time period ensures that judicial proceedings to vacate cannot be brought in response to petitions to confirm indefinitely, but only in response to those petitions to confirm brought within 100 days. (See *Douglass*, *supra*, 20 Cal.App.5th at p. 385.)

Although this Court has not addressed the issue, Courts of

Appeal have regularly stated: "To [section 1288.2's 100-day rule] there is only one exception. When the party *petitions the court to confirm the award before the expiration of the 100-day period*, respondent may seek vacation or correction of the award by way of response only if he serves and files his response within 10 days after the service of the petition." (*DeMello*, *supra*, 36 Cal.App.3d at p. 83, emphasis added.) "[W]here a petition for confirmation has been served and filed and the requisite notice of hearing served and filed, the time for filing a response is *governed by section 1290.6 and not section 1288.2*." (*Lovret, supra,* 22 Cal.App.3d at p. 856, emphasis added.) "Thus, section 1290.6 limits the 100-day provision found in section 1288.2.... [T]he 100-day limit applies only when the other party to the arbitration does not file a petition to confirm the award." (*Coordinated Construction*, *supra*, 238 Cal.App.2d at pp. 316-317.)

Put another way, when a party petitions to confirm an arbitration award within the 100-day period, this changes "the timing of the events." (*Oaktree Capital*, *supra*, 182 Cal.App.4th at p. 66.) "If a party requests confirmation, within the 100 days specified in section 1288 [and 1288.2], a response may be filed seeking vacation of the award. *Any such response must, however, be filed within 10 days of the date the petition to confirm is served*." (*Ibid*., citations and internal quotation marks omitted, emphasis added.) Moreover, "[b]ecause appellant filed his response within '10 days' when one allows for the extra days for overnight mail and his temporary removal to federal court, appellant's response was timely *irrespective of the 100-day deadline, which case law establishes did not apply here*." (*Ibid*., citations and internal quotation marks

omitted, emphasis added.)

Therefore, "[a]s a general matter, a party seeking to vacate an arbitration award must either (1) file and serve a petition to vacate that award 'not later than 100 days after the date of service of a signed copy of the award,' *or* (2) file and serve a timely response (that is, within 10 days) to the other party's petition to confirm that award, which seeks to vacate that award." (*Santa Monica College*, *supra*, 243 Cal.App.4th at p. 544, internal citations omitted, emphasis added.)

This approach to the interplay of sections 1288.2 and 1290.6 makes sense. Where a petition to confirm is filed within the 100-day limitations period, permitting a response under the 10-day rule accomplishes all of the purposes of the 100-day limitations period. The presentation of all issues relating to the award would be decided at the same time. (MJN 9.) The *proceeding* to which the defense of vacating the award is a response, will have been brought within 100 days. (*Coordinated Construction*, *supra*, 238 Cal.App.2d at p. 317.) And the challenge to the award will have been made while the evidence is fresh and the witnesses available. (*Eternity Investments*, *supra,* 151 Cal.App.4th at p. 746.) Additionally, a petition to confirm will have been filed, so judicial enforcement of the award will have already been requested. (*Ibid)*

The Court should hold Key's response seeking vacatur to Lender's petition to confirm timely filed (as the trial court found) because the petition to confirm was filed within 100 days of the award's service and Key's response seeking vacatur was filed in

compliance with section 1290.6.

V.
CONCLUSION

For each of these reasons, the Court should reverse the judgment of the Court of Appeal and order the trial court judgment affirmed and the award vacated.

DATED: January 10, 2022 GRIGNON LAW FIRM LLP

By /s/ Margaret M. Grignon
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CRC Rule 8.520(c)

On behalf of Sarah Plott Key, I, Margaret M. Grignon, certify that in compliance with California Rules of Court, rule 8.520(c), the above brief is comprised of 13,937 words. To verify this number, I employed the word count feature made part of the Microsoft Word processing program used by my firm's offices.

DATED: January 10, 2022 /s/ Margaret M. Grignon
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/s/ *Tiffany Singer*
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