No. S224086

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SHARON MCGILL, an individual,
Plaintiff and Respondent,

v.

CITIBANK, N.A.,
Defendant and Appellant.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE G049838

FROM THE SUPERIOR COURT,
COUNTY OF RIVERSIDE,
CASE NO. RIC1109398, ASSIGNED FOR ALL PURPOSES
TO JUDGE PRO TEM JOHN W. VINEYARD,
DEPARTMENT 12

RESPONDENT'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF RE: NEW AUTHORITY

CAPSTONE LAW APC
GLENN A. DANAS (SBN 270317)
RYAN H. WU (SBN 222323)
LIANA CARTER (SBN 201974)
1840 CENTURY PARK EAST, SUITE 450
LOS ANGELES, CA 90067
TELEPHONE: (310) 556-4811
FACSIMILE: (310) 943-0396
GLENN.DANAS@CAPSTONELAWYERS.COM
RYAN.WU@CAPSTONELAWYERS.COM
LIANA.CARTER@CAPSTONELAWYERS.COM

Attorneys for Plaintiff and Respondent
SHARON MCGILL

On January 26, 2016, Citibank filed a supplemental brief discussing two new cases issued after the filing of its Answer Brief on the Merits. But neither *DirecTV, Inc. v. Imburgia* (2015) 136 S.Ct. 163 ("*Imburgia*") nor *Ritz-Carlton Development v. Narayan* (2016) 2016 WL 100316 ("*Narayan*") is relevant to the issues presented by this case, and this Court should disregard Citibank's attempt to manufacture a connection.

A. *DirecTV, Inc. v. Imburgia*

Citibank misreads *Imburgia*, which concerned a matter of contract interpretation. Specifically, the dispute centered on how to construe a choice-of-law term in an arbitration agreement providing that the "[i]f... the law of your state would find this agreement to dispense with class arbitration procedure unenforceable, then this entire Section 9 [the arbitration provision] is unenforceable." (*Imburgia, supra*, 136 S.Ct. at p. 466.) The state appellate court had construed that term to mean that the parties elected California law, including *Discover Bank v. Super. Ct.* (2005) 36 Cal.4th 148, even though that decision was subsequently abrogated by *AT&T Mobility v. Concepcion* (2011) 563 U.S. 333. The lower court found *Discover Bank*, which held that class waivers were unconscionable under California law, was incorporated into the parties' agreement by their reference to the law of the state and thus enforcement of the agreement's terms required the court to find that the parties had no agreement to arbitrate their dispute.

The United States Supreme Court reversed. Acknowledging that the state court is the ultimate authority on

matters of state contract law, the *Imburgia* majority concluded that the lower court's interpretation of the contract had flouted the Federal Arbitration Act's ("FAA") overarching principle "to place arbitration agreements 'on equal footing with all other contracts.'" (*Imburgia, supra,* 136 S. Ct. at p. 468 [citing *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443].) The Court concluded that the state court's decision violated this principle because, for a number of specific reasons, the Court did not believe that a California court would have interpreted a contract other than an arbitration contract the same way it interpreted the arbitration agreement at issue.

First, the *Imburgia* Court found that the disputed term was not ambiguous because, in its view, there was no plausible reading under which a choice-of-law provision would incorporate an invalid state law, such as *Discover Bank*. (*Id.* at p. 469.) Second, the Court found that, under California's general contract principles, contractual references to California law incorporate retroactive changes to state law. (*Id.*) Third, the Court could not find another California case that construed "'the law of your state' to encompass '*invalid* law of your state.'" (*Id.* [emphasis in original.]) Fourth, the state court's interpretation was phrased in a way applicable only to arbitration agreements, violating a fundamental precept of FAA preemption. (*Id.* at p. 470.)

Properly understood, *Imburgia* simply reaffirmed the settled principle that a court cannot discriminate against an arbitration agreement when interpreting its terms, but must instead place them on "equal footing with all other contracts."

(*Imburgia, supra*, 133 S.Ct. at p. 468.) *Imburgia* has no direct application to either of the two issues presented by this case.

First, Citibank's term foreclosing a consumer from pursuing private attorney general action (including public injunctive relief) *in any forum*,[1] is unlawful as a matter of California contract law. (See Civ. Code § 1668 [exculpatory contracts are illegal and unenforceable]; § 3513 [a law made for the public's benefit may not be prospectively waived]; see also, Reply Brf. at pp. 11-13 [discussing California case law applying generally applicable contract principles to arbitration agreements].) In other words, Citibank's representative action/public injunction waiver is unlawful whether it is contained within an agreement with an arbitration clause or one without. Thus, by invalidating this waiver, the Court would simply treat Citibank's arbitration agreements as it would any other agreement.[2]

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[1] (See 1 CT 110 ["Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will award relief for or against anyone who is not a party. If you or we require arbitrator of a Claim, neither you, we, nor any other person may pursue the Claims in arbitration as a class action, private attorney general action, or other representative action, nor may such Claim be pursued by your or our behalf in any litigation or in any court."].)

[2] As this Court held, certain state contract defenses cannot be invoked to the extent that, if applied to arbitration agreements, the effect would be to "interfere with the fundamental attributes of arbitration, such as speed, efficiency, and low cost." (See Reply Brf. at pp. 18-19.) However, Citibank does not argue that invalidation of the disputed waiver would undermine any fundamental attributes of arbitration.

In its Supplemental Brief, Citibank suggests that *Imburgia* stands for another proposition altogether: that arbitration agreements "must be enforced as written, and the FAA preempts any state law impediments to enforcing arbitration agreements according to their terms, even under the guise of generally applicable contract-interpretation principles." (App.'s Supp. Brf. at p. 5.) However, not only does that proposition appear nowhere in *Imburgia*, it is inconsistent with the "equal footing" principle. If anything, the principle that arbitration agreements must be treated with the same dignity as other agreements, as *Imburgia* emphasizes in two different passages (*Imburgia*, *supra*, 133 S.Ct. at pp. 468 & 471), cannot be reconciled with Citibank's stance that arbitration agreements are a special category of super-contracts that "must be enforced according to their terms" without exception.[3]

Second, *Imburgia* has no bearing on the *Broughton-Cruz* rule. As applied in this case, where the Agreement itself bars the arbitrator from authorizing public injunctive relief, the *Broughton-Cruz* rule is a general rule of applicability. (See Amicus Brief of Public Citizen, Inc. at pp. 4-5.) The *Broughton-Cruz*, as applied here, simply preserves the right of Respondent to pursue her unwaivable statutory right to pursue public injunctive relief in *some forum*. Moreover, the *Broughton-Cruz*

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[3] Notably, Citibank continues to hold fast to the notion that the FAA requires arbitration agreements to be enforced according to their terms, even though this position, as Respondent noted, was already rejected by this Court in *Sonic Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1151-52, 1167. (See Reply Brf. at pp. 18-19.)

rule does not express any perceived judicial hostility toward arbitration that lies at the core of the *Imburgia* decision. (See *Broughton v. Cigna Healthplans of Calif.* (1999) 21 Cal.4th 1066, 1083.)

Nothing in *Imburgia* can be read to support Citibank's position that the FAA mandates enforcement of all contractual terms in an arbitration agreement, even terms that operate to eliminate a claimant's right to pursue statutory remedies.

B. *Ritz-Carlton Development Co. v. Narayan*

This Court should also disregard Citibank's attempt to make hay of the United States Supreme Court's order granting a writ of certiorari of the Hawaii Supreme Court's decision in *Narayan*, vacating the decision below, and remanding for reconsideration of *Imburgia* ("GVR order").

It is settled law that a GVR order does "not amount to a final determination on the merits." (*Henry v. City of Rock Hill* (1964) 376 U.S. 776, 777.) Rather, a GVR order "simply indicate[s] that, in light of 'intervening developments', 'there is a reasonable probability' that the [lower court] would reject a legal premise on which it relied on which it relied and which may affect the outcome of the litigation." (*Tyler v. Cain* (2001) 533 U.S. 656, 666, fn.6.) A GVR decision does not suggest, or even indicate, that the United States Supreme Court believes the decision below to be erroneous. (See *Lawrence v. Chater* (1996) 516 U.S. 153, 178 (dis. opn. of Scalia, J.) [suggesting that the GVR ought to be termed "no fault V & R" because it represents a "vacation of a judgment and remand without any determination

of error in the judgment below"].)

Thus, a GVR order "does not even carry precedential weight." (*Gonzalez v. Justices Of Mun. Court Of Boston* (1st Cir. 2005) 420 F.3d 5, 7-8.) Consequently, lower courts "do not treat the Court's GVR order as a thinly-veiled direction to alter [] course." (*Id.*; see also, *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.* (6th Cir. 2013) 722 F.3d 838, 845 ("*Whirlpool*") ["A GVR order does not necessarily imply that the Supreme Court has in mind a different result in the case, nor does it suggest that our prior decision was erroneous."].) In both *Gonzalez* and *Whirlpool*, the respective courts, after considering the intervening decision, concluded that that its "original decision did [not] rest on a faulty premise" and reaffirmed that earlier decision. (*Gonzalez, supra*, 420 F.3d at 10; *Whirlpool, supra*, 722 F.3d at 861 [concluding that *Comcast Corp. v. Behrend* (2013) 133 S.Ct. 1426 did not alter its prior determination that the district court properly granted class certification].) Neither of those subsequent decisions was disturbed.

Under settled law, a GVR order is not precedential, and cannot be construed as having carried an implicit instruction to reverse the prior decision. The GVR order in *Narayan* thus indicates nothing more an instruction for the Hawaii Supreme Court to reconsider its decision in light of *Imburgia*. It cannot be inferred from the GVR order that United States Supreme Court implicitly instructed the *Narayan* court to reach a different conclusion.

The issues in the underlying *Narayan* decision are also far

afield from this one. That case concerned whether, under state law, the condominium owners unambiguously expressed their intent to arbitrate their claims against the developer given that the parties were given multiple documents containing different arbitration clauses. According to the Hawaii Supreme Court, there was no unambiguous intent to arbitrate because the multiple arbitration clauses presented contained conflicting language as to the venue and scope of arbitration, among other things. (See *Narayan v. Ritz-Carlton Dev. Co.* (2015) 135 Haw. 327, 335.) Nothing in *Narayan*, a case on contract formation, speaks to whether a term that prospectively forbids the assertion of a statutory remedy can be enforced—the issue presented in *this case*. Accordingly, this Court should disregard Citibank's improper attempt to read any meaning into the GVR order in *Narayan*.

Dated: February 12, 2016

Respectfully submitted,

Capstone Law APC

By: 

Glenn A. Danas
Ryan H. Wu
Liana Carter

Attorneys for Plaintiff and Respondent
SHARON MCGILL

CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed Respondent's Response to Citibank's Supplemental Brief Re New Authority was produced using 13-point Century Schoolbook type style and contains 1,684 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: February 12, 2016

Respectfully submitted,

Capstone Law APC

By: _____

Glenn A. Danas
Ryan H. Wu
Liana Carter

Attorneys for Plaintiff and Respondent
SHARON MCGILL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1840 Century Park East, Suite 450, Los Angeles, California 90067.

On **February 12, 2016**, I served the document described as: **RESPONDENT'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF RE: NEW AUTHORITY** on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof to interested parties as follows [or] as stated on the attached service list:

See attached service list.

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[☐] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[☐] **BY PERSONAL SERVICE:** I personally delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

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Executed on **February 12, 2016**, at Los Angeles, California.

Natalie Torbati
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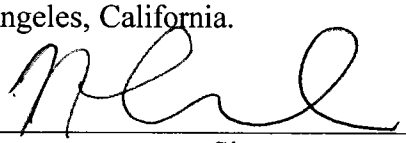

Signature

SERVICE LIST

Julia B. Strickland Marcos D. Sasso STROOCK & STROOCK & LAVAN LLP 2029 Century Park East, #1800 Los Angeles, CA 90067 *via FedEx*	**Attorneys for Defendant-Appellant Citibank, N.A.**
Honorable John W. Vineyard Department 12 c/o Clerk of the Court Riverside Superior Court Civil Department 4050 Main Street Riverside, CA 92501 *via U.S. mail*	**Trial Court**
The Honorable Richard M Aronson The Honorable William F. Rylaarsdam The Honorable David F. Thompson c/o Clerk of the Court California Court of Appeal 4th Appellate District Division 3 601 W. Santa Ana Blvd. Santa Ana, California 92701 *via U.S. mail*	**Court of Appeals**
Office of the District Attorney County of Riverside Appellate Division 3960 Orange Street Riverside, CA 92501 *via U.S. mail*	**Office of the District Attorney** Per Cal. Rules of Court 8.29; Business & Professions Code § 17209
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 South Spring Street Los Angeles, CA 90013 *via U.S. mail*	**Office of the Attorney General** Per Cal. Rules of Court 8.29; Business & Professions Code§ 17209