S220812

In the

Supreme Court

of the

State of California

TIMOTHY SANDQUIST,

Plaintiff and Appellant,

v.

LEBO AUTOMOTIVE, INC. et al.,

Defendants and Respondents.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B244412
SUPERIOR COURT OF LOS ANGELES · HON. ELIHU M. BERLE · NO. BC476523

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Defendants' Petition for Review represents their latest effort to avoid accountability for their systemic racially-discriminatory employment practices. The Petition raises an issue of federal arbitration law[1] that is not apt for review by this Court and, accordingly, the Petition should be denied.

Upon granting Defendants' motion to compel their employee Plaintiff Sandquist into arbitration, the Superior Court went beyond simply holding that the parties' dispute must be arbitrated.[2] Over Plaintiff's objection, the Superior Court proceeded to direct the arbitrator as to what procedures should be applied to the conduct of the arbitration. More specifically, the Superior Court interpreted Defendants' arbitration provisions to prohibit class procedures and ordered that the arbitration proceed on an individual basis. The Second Appellate District reversed this aspect of the order, concluding that the question of what procedural form the arbitration should take – including whether the applicable arbitration clauses authorize class procedures – was reserved for the arbitrator.

Defendants challenge the appellate court's well-reasoned decision. But, reversing that court would contravene established precedent from the U.S. Supreme Court and California courts. Indeed, this Court has twice denied review of the specific issue raised by Defendants' Petition, including as recently as October 2012. Hence, the fact that the Petition not once mentions this Court's standard of review is unsurprising.

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[1] As noted below, the parties concur that the question at issue is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). The courts below engaged in an application of the FAA and corresponding case law.

[2] The Superior Court rejected Plaintiff's arguments that the (apparently conflicting) arbitration clauses imposed on him by Defendants were unconscionable and unenforceable. For purposes of the present Petition and Answer, Plaintiff does not contest this aspect of the Superior Court's order.

In a series of cases, the U.S. Supreme Court has held that substantive issues relating to an arbitration are presumptively for a court and that procedural issues are presumptively for the arbitrator. This means that questions pertaining to whether the dispute must be arbitrated or should remain in court (e.g.: whether the arbitration clause is unconscionable and thus unenforceable;[3] whether the arbitration clause is mandatory or permissive; whether the claims alleged by plaintiff come within the scope of the arbitration clause or remain free to be litigated[4]) are for the court to decide. By contrast, the U.S. Supreme Court has held that issues relating to the conduct of the arbitration once it is commenced (e.g.: whether a time-limit rule precludes a claim[5]; the application of procedural prerequisites and conditions precedent[6]) are within the power of the arbitrator. The Petition frames the issue as whether "arbitrators may determine their own jurisdiction," but that simplistic framing ignores the core distinction that the U.S. Supreme Court sets out. Sometimes issues going to the jurisdiction of an arbitrator are presumptively for a court (i.e., where the issues are substantive), and sometimes they are for the arbitrator. Petitioner ignores the full scope of the U.S. Supreme Court's many decisions in this field, to derive a rule that misses the Court's fundamental procedural/substantive distinction.

This distinction makes eminent sense in the practical context of litigation. A plaintiff who challenges the applicability or enforceability of an arbitration clause and maintains that the suit belongs in court would naturally file a civil action rather than an arbitration demand. If the court

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[3] *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63.

[4] *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938. See also *City of Los Angeles v. Superior Court* (Cal. 2013) 302 P.3d 194.

[5] *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 79.

[6] *BG Group, PLC v. Republic of Argentina* (2014) 134 S.Ct. 1198.

agrees with the plaintiff, the case will remain in court; otherwise, the court can compel arbitration. On the other hand, a plaintiff who concedes that the dispute belongs in arbitration would have no reason to initially file in court. An arbitrator would be fully able to decide all issues relating to the conduct of the proceedings, unless the parties "clearly and unmistakably" have agreed that these procedural issues are to be decided by a court. Bringing such issues to a court as a matter of course would undermine the purpose of arbitration as an expedient alternative to litigation.

Likewise, once a court determines that arbitration is required, it should refrain from addressing additional questions related to the conduct of that arbitration, barring a clear and unmistakable agreement to the contrary. The more issues consigned to the courts, the less efficacious arbitration is in bringing controversies entirely out of the judicial system. Further, divesting arbitrators of the power to determine procedural matters reflects a distrust toward arbitration that is anathema to the FAA.

Green Tree Fin. Corp. v. Bazzle (2003) 539 U.S 444 lies at the fulcrum of this body of precedent and represents the Supreme Court's most definitive pronouncement on the essential question raised by Defendants' Petition: Given that arbitration is a creature of contract, does the issue of whether the parties' agreement makes class procedures available lie within the power of the court or the arbitrator to decide? The plurality of the Court in *Bazzle* gave a clear answer: It is a procedural issue, relating to what the arbitration will look like, that is presumptively reserved for the arbitrator.

Following *Green Tree* and dozens of other decisions in this state and across the nation, the Second District held that the availability of class arbitration is a question of contract interpretation and arbitration procedure well-suited for the arbitrator. Accordingly, the Superior Court lacked the power to order the arbitrator to conduct an individual arbitration. Because the Superior Court impermissibly intruded upon the province of the

arbitrator, the Second District remanded with instructions to vacate the order dismissing the class claims and to submit the issue to the arbitrator.

Review of the Second District's decision is unnecessary because this area of law is not unsettled. The Supreme Court's plurality decision in *Bazzle* has not been overruled, and its persuasive analysis continues to drive decisions in this state and in the federal courts. Because California courts consistently follow the *Bazzle* plurality to hold that an arbitrator should be the one to determine whether an arbitration agreement allows for class procedures, there is no conflict for this Court to resolve. The only departures from *Bazzle* are a handful of decisions from the federal courts. The overwhelming majority of federal case law supports the Second District's holding, and any small rift among federal courts on an issue of federal law does not require intervention by this Court. To that end, this Court has twice declined to review this issue. *Nelsen v. Legacy Partners Residential, Inc.* (Cal. App. 2012) 144 Cal.Rptr.3d 198, review denied (Oct. 31, 2012) S204953, 2012 Cal. LEXIS 10188; *Yuen v. Superior Court* (Cal. App. 2004) 18 Cal.Rptr.3d 127, 129, review denied (Dec. 1, 2004) S128174, 2004 Cal. LEXIS 11370.[7]

As a secondary issue for review, Defendants assert that any error was harmless and non-prejudicial. Even if this issue had been properly presented,[8] it is not suitable for review. Upon holding that the Superior Court usurped the domain of the arbitrator by preordaining the procedural course of the arbitration, the Second District properly vacated the order below. The Superior Court's error was *per se* prejudicial, requiring vacatur.

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[7] In fact, the U.S. Supreme Court denied certiorari in one of Defendants' cited cases, *Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594, cert. denied, (2014) 134 S.Ct. 2291.

[8] Defendants did not argue harmless error below and, in any case, the doctrine is wholly inapplicable.

Finally, even if this Court determines that the Superior Court had the authority to construe the arbitration language at issue here, that court reached the wrong result. The textual and extrinsic evidence plainly demonstrate that the arbitration language authorizes class arbitration.

STANDARD OF REVIEW

This Court serves to promote state-wide harmony of decision by deciding important legal questions. Reflecting this purpose, the California Rules of Court provide for discretionary review in limited circumstances, such as when necessary to secure uniformity of decision or settle an important question of law. Cal. Rules of Court, Rule. 8.500(b)(1).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Underlying Dispute

Plaintiff Timothy Sandquist is an African-American employee who began working for Defendant Manhattan Beach Toyota in September 2000. 4 JA 781 ¶ 2. Seven years later, Defendants John Elway, Mitchell D. Pierce, Jerry L. Williams, and Darrell Sperber purchased the dealership. Under their management, Sandquist and other non-European Americans were subjected to rampant and unchecked racial discrimination and harassment. See, e.g., 1 JA 1-51. Defendant Sperber openly referred to employees of non-European descent as "dumb Mexicans," "goddamn Mexicans," "apes," "Aunt Jemimas," "camel people," and "slant eyes." 1 JA 55 ¶ 8. Defendants discriminatorily denied employees of non-European descent promotions, opportunities for advancement, and equal pay. See, e.g., 1 JA 1-51. Furthermore, Defendants retaliated against employees who complained about discrimination and harassment through a company hotline and third-party human resources consultant. *Id.* See also 5 JA 1185 ¶¶ 13-15; 5 JA 1192 ¶¶ 22, 28-29; 5 JA 1197 ¶¶ 7-21; 5 JA 1202 ¶ 8-13.

In February 2012, Defendants discriminatorily denied Sandquist a promotion and constructively discharged him from the dealership. In

response, Sandquist filed a class-action complaint in the Superior Court of Los Angeles County, on behalf of himself and other employees of color. 1 JA 1-51. He sought declaratory, injunctive, and other relief under the California Fair Employment and Housing Act, Cal. Gov. Code §§ 12900 *et seq.*, the California Unfair Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the common law. 1 JA 23-24.

II. Defendants' "Arbitration Acknowledgements"

Defendants responded by moving to compel arbitration, citing three conflicting and misleading Arbitration Acknowledgements that Defendants required Sandquist to hurriedly sign on his first day of work. 1 JA 194-201. These Acknowledgements were hidden in a new-hire packet numbering more than 100 pages, written in small and differing typefaces and given no particular prominence. 1 JA 776 ¶ 7; 1 JA 194-201; 4 JA 781 ¶¶ 6, 11; 4 JA 782 ¶¶ 16, 19. In relevant part, the Acknowledgements state:

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context...[A]ny claim, dispute, and/or controversy...arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory or equitable law or otherwise...shall be submitted to and determined exclusively by binding arbitration.

1 JA 194-201. None of the Acknowledgments contain a class waiver or inform employees that they relinquish their right to class or representative proceedings. *Id.* Under compulsion, Sandquist signed the new-hire paperwork as instructed because he needed the job. 4 JA 781 ¶ 14.

III. The Proceedings Below

Sandquist opposed Defendants' Motion to Compel Arbitration. The Superior Court heard oral argument and stated that it was inclined to grant the Motion. RT 341:15-342:16. Recognizing that a ruling dismissing the

class claims with prejudice could jeopardize the absent class members' ability to vindicate their rights, the Superior Court afforded Plaintiff's counsel time to amend the complaint with a class representative who had not signed an arbitration agreement. RT 342:24-343:21. It granted the Motion, ordered Sandquist into individual arbitration, and dismissed the class claims without prejudice. 6 JA 1373-1401. When Plaintiff's counsel was unable to locate a class plaintiff who had not signed an arbitration acknowledgement, the Superior Court finalized its order and dismissed the class claims with prejudice. 6 JA 1460-62.

Sandquist appealed, arguing that the Superior Court erred by failing to deem the Acknowledgements unenforceable.[9] Additionally, Sandquist argued, the court had usurped the role of the arbitrator by deciding that the Acknowledgements precluded class procedures and by ordering individual arbitration. The Second Appellate District agreed. Opinion at 11-15 (relying on *Bazzle* and its plethora of progeny). The Second District declined to interpret the Acknowledgements, leaving clause construction to the arbitrator in the first instance. *Id.* It reversed the order below dismissing the class claims and directed the Superior Court to enter a new order submitting the issue to the arbitrator. *Id.* at 16.

LEGAL DISCUSSION

I. It Is Unnecessary for This Court to Grant Review to Decide an Issue of Federal Law Upon Which the U.S. Supreme Court Has Directly Spoken

Review by this Court is limited and discretionary. Defendants neither acknowledge the Rules of Court nor address the standard of review set forth therein. Instead, Defendants manufacture a phantom conflict in

[9] The Second District did not address Sandquist's unconscionability arguments. Opinion at 8. Accordingly, Sandquist's arguments regarding unconscionability – which he does not waive – fall outside the scope of this Petition and Answer.

hopes of convincing this Court to reverse an unfavorable decision below. Review here is not necessary to secure uniformity of decision or settle an important question of law of which this Court is the ultimate arbiter. The U.S. Supreme Court's plurality decision in *Bazzle* remains good law and provides compelling precedent for the Second District's holding. California courts consistently adhere to *Bazzle*, holding that it is within the arbitrator's realm to interpret an arbitration agreement to determine whether it authorizes class (or similar) procedures. The fact that two federal Courts of Appeal have recently departed from *Bazzle* does not alter the balance of federal authority (several federal courts have already rejected these decisions) and does not require intervention by this Court.

A. The Substantive/Procedural Dichotomy

The U.S. Supreme Court has unequivocally stated a policy in favor of arbitration. See, e.g., *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 79. This policy has given rise to presumptions limiting the involvement of courts in matters of arbitration. Under these presumptions, so-called "substantive questions" are handled by the courts whereas "procedural questions" fall within the arbitrator's jurisdiction – unless the parties clearly and unmistakably provide otherwise. *Id.* at 83. Substantive questions are preliminary questions designed to avoid "the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84. By contrast, procedural questions are ones growing out of the dispute that the parties would expect the arbitrator to decide. *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 557.

1. Substantive Questions Concern Whether the Plaintiff's Claims Must Be Arbitrated or May Be Brought in Court

Two holdings exemplify the nature of substantive questions. In *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68-70, n.1, the Supreme Court firmly recognized that challenges to the validity of an

arbitration agreement – including on unconscionability grounds – are ordinarily substantive questions for the court.[10] In so holding, the Court cited to *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938. There, the Court held that courts should determine in the first instance whether substantive legal claims fall within the scope of an arbitration agreement, unless the agreement expressly provides otherwise. *Id.* at 943-45. Taken together, these cases define substantive questions as threshold issues concerning whether particular legal claims are subject to arbitration. See *Howsam*, 537 U.S. at 83-84. If they are not – whether because the arbitration clause is invalid or unenforceable as a whole or does not extend to the claims at issue – the dispute may proceed in court.

2. Procedural Questions Concern the Conduct of the Proceeding Once it is in Arbitration

Procedural questions are different. They include questions growing out of a dispute plainly within the arbitrator's jurisdiction. *John Wiley*, 376 U.S. at 557. Two Supreme Court rulings help define procedural questions.

In *Howsam*, the Court determined that the applicability of an arbitrator's time limit rule – precluding submission of any dispute six or more years after the events giving rise to that dispute – was a procedural question for the arbitrator. *Id.* at 83-85. Therefore, the district court lacked the power to enjoin any arbitration as untimely; the arbitrator had exclusive authority to interpret and apply the time limit rule. *Id.*

Earlier this year, the Supreme Court again classified an issue as procedural rather than substantive in *BG Group, PLC v. Republic of*

[10] However, in the case at hand in *Rent-A-Center*, the parties' contract "clearly and unmistakably" delegated "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement" to the arbitrator. This contractual term supplanted the usual default rule. Since the *Rent-A-Center* plaintiffs did not challenge the delegation clause itself, by virtue of the contract, the issue was one for the arbitrator. *Id.* at 71-73.

Argentina (2014) 134 S.Ct. 1198. It stated: "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *Id.* at 1207. Those procedural questions "include the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Id.* at 1207 (internal citations omitted). The Court set forth a simple rule: Substantive questions address "whether [arbitration] may occur or what its substantive outcome will be on the issues in dispute." *Id.*

B. *Bazzle*, Placing the Issue Here Clearly on the Procedural Side of the Coin, is Highly Persuasive Authority

In *Bazzle*, a four-justice plurality held that an arbitrator, not a trial judge, should decide in the first instance whether an arbitration agreement should be construed to permit class arbitration. 539 U.S. at 451-53. The plurality relied on the well-established rule that courts are only responsible for "certain gateway matters" regarding arbitration controversies. *Id.* at 452-54 (describing such matters "as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"). In contrast, whether arbitration agreements authorize class procedures is a procedural question. The plurality stated that the issue concerned neither the validity nor applicability of the arbitration clause; instead, it concerned the "*kind of arbitration proceeding* the parties agreed to." *Id.* at 452 (emphasis in original). Further, because this issue concerns contract interpretation and arbitration procedure, it is well-suited for an arbitrator. *Id.* Because deciding whether an agreement permits class arbitration "does not concern state statute or judicial procedures" but "concerns contract interpretation and arbitration procedures," *Bazzle* held that "[a]rbitrators are well situated to answer that question." *Id.* at 452-53.

Justice Stevens supplied a crucial fifth vote, agreeing: "Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court." *Id.* at 455 (citing *Howsam*). However, he declined to join the plurality "[b]ecause the decision to conduct a class-action arbitration was correct as a matter of law, *and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker.*" *Id.* (emphasis added). Nevertheless, Justice Stevens concurred in the judgment in order to create a controlling judgment and "because Justice Breyer's opinion expresses a view of the case close to [his] own." *Id.* This explanation makes evident that if the question of whether the decision had been diverted to the wrong decision-maker had been properly raised, Justice Stevens would have found remand to be warranted.

Bazzle has never been overturned. As the Second District points out, the Ninth Circuit recently indicated that *Bazzle* should be followed as "persuasive authority." *Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d 1109, 1127 n.5 (plurality opinions are persuasive authority). The Supreme Court's ruling in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, which Defendants claim topples *Bazzle*, does no such thing. See, e.g., *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.* (7th Cir. 2011) 671 F.3d 635; *Harrison v. Legal Helpers Debt Resolution, LLC* (D.Minn. Aug. 22, 2014) No. 12-2145 ADM/TNL, 2014 U.S. Dist. LEXIS 117154, at *12; *In re A2P SMS Antitrust Litig.* (S.D.N.Y. May 29, 2014) No. 12-CV-2656-AJN, 2014 U.S. Dist. LEXIS 74062, at *34-39.[11] Similarly, the recent California decisions on which Defendants rely

[11] *Stolt-Nielsen* suggests only that an arbitrator determining whether an arbitration agreement authorizes class proceedings must ground the ruling in contract interpretation or some applicable legal principle other than his or her own naked policy preferences.

specifically note that *Stolt-Nielsen* did not overrule *Bazzle*. See *Nelsen*, 144 Cal.Rptr.3d at 209 n.6; *Truly Nolen of Am. v. Superior Court* (Cal. App. 2012) 145 Cal.Rptr.3d 432, 452 n.4. *Bazzle* is still good law and, as courts have stressed, remains the Supreme Court's most definitive guidance. E.g. *Harrison*, 2014 U.S. Dist. LEXIS 117154, at *13-14 ("the plurality opinion dealt with precisely the same issue pending in the present motion, and no Supreme Court decision has subsequently offered clearer guidance...*Bazzle* guides the analysis here, and class arbitration is reserved as a matter for the Arbitrator to decide").

Bazzle's distillation and application of the substantive/procedural dichotomy remains in force. As one court recently summarized:

> Put succinctly, the question of the availability of class arbitration does not go to the power of the arbitrators to hear the dispute, but rather to an issue that simply pertains to the conduct of proceedings that are properly before the arbitrator.

In re A2P SMS Antitrust Litig., 2014 U.S. Dist. LEXIS 74062, at *32.[12]

C. The Law in California is Not Unsettled

In its attempt to manufacture a conflict, Defendants claim that the Second District overlooked this Court's supposedly "contradictory and controlling" decision in *City of Los Angeles v. Superior Court* (Cal. 2013) 302 P.3d 194. This was no oversight. An examination of the decision

[12] Bolstering this conclusion is precedent from the U.S. and California Supreme Courts characterizing the class action mechanism as a "procedural device." E.g. *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper* (1980) 445 U.S. 326, 331; *Duran v. U.S. Bank Nat. Assn.* (Cal. 2014) 325 P.3d 916, 935 (further emphasizing that "[c]lass actions are provided only as a means to enforce substantive law"). See also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* (2010) 559 U.S. 393, 407 (characterizing class actions as procedural, governing only "the manner and the means by which the litigants' rights are enforced," i.e. the "process for enforcing those rights") (citations omitted); *id.* at 399-401 (treating the issue of "eligibility" to pursue a class action as inseparable and equally procedural).

reveals that it has no bearing on the present dispute. Rather, it stands clearly on the substantive side of the dichotomy: when the issue is whether the parties are obligated to arbitrate their dispute (as opposed to remaining in court), the court presumptively decides. Further, a survey of California cases demonstrates that the law is uniform and settled.

Defendants lead their Petition with *City of Los Angeles*. That decision stands for the unremarkable proposition that the issue of "whether a party has a contractual duty to arbitrate a particular dispute" "is subject to judicial resolution." 302 P.3d at 198, 200. There, the parties contested whether the contract mandated arbitration of a particular type of substantive legal claim (relating to furloughs). As this disagreement concerned whether there was an obligation to arbitrate, it presented a question for the court. See also *Knutsson v. KTLA, LLC* (2014) 228 Cal.App.4th 1118, 1131-34 (whether there is an enforceable duty for the parties to arbitrate the claims is decided by the court; in contrast, "when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left for the arbitrator") (citation omitted).

The Second District was on solid ground in discussing on-point case law and "failing to mention" an opinion that makes not one single reference to class arbitration or to *Bazzle* or its progeny. The *City of Los Angeles* Court confronted an entirely different question than the one presented here: the procedures available once arbitration is commenced.

California courts which have reached the question at issue concur that the availability of class arbitration is a question of contract interpretation reserved for the arbitrator. Two appellate decisions underscore this uniformity of precedent. In *Garcia v. DirecTV, Inc.* (Cal. App. 2004) 9 Cal.Rptr.3d 190, the court held that *Bazzle* "plainly mandates a decision made in the first instance by the arbitrator, not a decision made by the trial court and imposed on the arbitrator." *Id.* at 195. Analogously, in

Yuen v. Superior Court (Cal. App. 2004) 18 Cal.Rptr.3d 127, the court considered the question of who should decide whether the parties' agreement permitted consolidation of claims. The court held that *Bazzle* "mandates" that the arbitrator decide: "under the line drawn by the Supreme Court...the court decides whether the matter should be referred to arbitration, but 'once a matter has been referred to arbitration, the court's involvement is strictly limited until the arbitration is completed.'" *Id.* (citing *Finley v. Saturn of Roseville* (Cal. App. 2004) 12 Cal.Rptr.3d 561, 565). Notably, this Court denied a petition for review in *Yuen*.

Defendants' reliance on *Nelsen* and *Truly Nolen* is misplaced. Far from showing that the law is unsettled, these cases are consistent with the rule that the issue of whether an arbitration agreement permits class procedures is presumptively for the arbitrator. They merely create a narrow exception that courts may step into the arbitrator's shoes when the parties agree to submit the issue to the court or a party waives the issue by failing to request that the court leave clause construction to the arbitrator. *Nelsen*, 144 Cal.Rptr.3d at 209; *Truly Nolen*, 145 Cal.Rptr.3d at 452.[13]

The California cases are consistent and harmonious, and they unmistakably demonstrate that the law in California is not unsettled.

D. Any Inconsistencies Occur Among the Federal District and Circuit Courts, Which Nonetheless Overwhelming Support the Appellate Court's Ruling Below

As the Second District notes, the clear majority of federal courts to confront this question hold that the arbitrator must determine the availability of class arbitration. Once Defendants' strained reading of *City of Los Angeles* is disposed of, their Petition is essentially grounded on an invitation to accept review in order to reverse the decision below based on

[13] Neither Defendants nor the courts below assert that Plaintiff Sandquist acquiesced to the Superior Court deciding the issue itself rather than leaving it for the arbitrator. Hence, these cases are inapposite.

countervailing rulings from the Third and Sixth Circuits.[14] In so doing, the Court would have to disregard the uniform conclusion of the U.S. Supreme Court, the California courts, and the vast preponderance of federal circuit and district courts. Defendants' argument exceeds the bounds of reasonableness and defies the circumscribed standard for review.

Several federal circuit courts have either decided the question at issue consistently with *Bazzle* and the Second District (*Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.* (5th Cir. 2003) 343 F.3d 355[15]) or have issued closely analogous decisions. See *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.* (1st Cir. 2012) 683 F.3d 18 (even after *Stolt-Nielsen*, whether agreement permitted franchise group's associational action was issue for arbitrator); *Anderson v. Comcast Corp.* (1st Cir. 2007) 500 F.3d 66, 71-72 (parties' agreement contained express class bar that would not apply if there was state law to the contrary; whether the agreement should be interpreted to permit class arbitration in light of applicable law was an issue for the arbitrator); *Blue Cross Blue Shield* (671 F.3d at 639-40, "The only question that a court should address before arbitration starts is whether the parties have agreed to arbitrate at all...the arbitrators themselves resolve procedural questions in the first instance (and usually the last instance)." Thus, whether the agreement permitted

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[14] *Opalinski v. Robert Half Int'l, Inc.* (3d Cir. July 30, 2014) No. 12-4444, 2014 U.S. App. LEXIS 14538; *Reed Elsevier*, 734 F.3d 594.

[15] Accord *Vaughn v. Leeds, Morelli & Brown, P.C.* (2d Cir. 2009) 315 F. App'x 327 (under *Bazzle*, court properly compelled arbitration on arbitrability of class claims); *Veliz v. Cintas Corp.* (9th Cir. 2008) 273 F. App'x 608 (where trial court improperly determined for the arbitrator whether class or collective proceedings were permissible, remanding so that arbitrator could decide issue in first instance). See also *Sanford v. Memberworks, Inc.* (9th Cir. 2007) 483 F.3d 956, 964 (characterizing *Bazzle* as holding "that the question whether a contract permits class arbitration is an issue for the arbitrator to decide").

consolidated arbitration was issue for arbitrator; analogizing to availability of class arbitration under *Stolt-Nielsen*); *Employers Ins. Co. of Wausau v. Century Indem. Co.* (7th Cir. 2006) 443 F.3d 573 (whether insurer could be required to participate in consolidated arbitration was an issue for the arbitrator).

A deluge of federal decisions accord with the view that an arbitrator must determine the availability of class arbitration. Just since *Oxford Health Plans LLC v. Sutter* (2013) 133 S.Ct. 2064, multiple courts have relied on *Bazzle* and its progeny to reach the same conclusion as the Second District below. See *Harrison*, 2014 U.S. Dist. LEXIS 117154, at *6-14 (rejecting *Opalinski* and *Reed Elsevier*); *In re A2P SMS Antitrust Litig.*, 2014 U.S. Dist. LEXIS 74062 (rejecting *Reed Elsevier*); *Lee v. JPMorgan Chase & Co.* (C.D.Cal. 2013) 982 F.Supp.2d 1109, 1114 (rejecting *Reed Elsevier*: "The only question, as in *Bazzle,* is the interpretive one of whether or not the agreements authorize Plaintiffs to pursue their claims on a class…basis. That question concerns the procedural arbitration mechanisms available to Plaintiffs, and does not fall into the limited scope of this Court's responsibilities in deciding a motion to compel arbitration."); *Jackson v. Home Team Pest Def., Inc.* (M.D.Fla. Nov. 15, 2013) No. 6:13-CV-916-ORL-22, 2013 U.S. Dist. LEXIS 163068, at *6-7 ("where the dispute is over the existence of a provision forbidding class arbitration, not its enforceability, precedent suggests that the necessary responsibility to interpret the contract's language rests with the arbitrator"; contentions that contractual language is ambiguous and authorizes collective proceedings "are classic arguments calling for contractual interpretation, not threshold questions that must be answered before the case can be submitted to arbitration"; *Sullivan v. PJ United, Inc.* (N.D.Ala. Sept. 10, 2013) No. 7:13-CV-1275-LSC, 2013 U.S. Dist. LEXIS 128698 (once determined that plaintiffs' claims belong in arbitration, arbitrator must decide applicability

of collective action waiver); *Planet Beach Franchising Corp. v. Zaroff* (E.D.La. 2013) 969 F.Supp.2d 658 (following *Bazzle* as persuasive authority and holding that parties' contract did not overcome presumption that issue to be decided by arbitrator); *Kovachev v. Pizza Hut, Inc.* (N.D.Ill. Aug. 15, 2013) No. 12-C-9461, 2013 U.S. Dist. LEXIS 115284.[16]

These decisions underscore the enduring force of *Bazzle* (and the substantive/procedural dichotomy) and demonstrate that the position Defendants advance is unambiguously in the minority. Where, as here, the decisions of the federal courts on a question of federal law are numerous and consistent, this Court "should hesitate to reject their authority." *Etcheverry v. Tri-Ag Serv., Inc.* (Cal. 2000) 993 P.2d 366, 368 (citations

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[16] Post *Stolt-Nielsen* alone, see also, e.g., *Cramer v. Bank of America, N.A.* (N.D.Ill. May 30, 2013) No. 12-C-8681, 2013 U.S. Dist. LEXIS 75592; *Price v. NCR Corp.* (N.D.Ill. 2012) 908 F.Supp.2d 935, 940-45; *Edinger v. Pizza Hut of Am., Inc.* (M.D.Fla. Oct 30, 2012) No. 8:12-cv-1863-T-23EAJ, 2012 U.S. Dist. LEXIS 161481; *Okechukwu v. DEM Enterprises, Inc.* (N.D.Cal. Sept. 27, 2012) No. C-12-03654, 2012 U.S. Dist. LEXIS 139540; *State Farm Fire & Cas. Co. v. Pentair, Inc.* (N.D.Ill. Sept. 7, 2012) No. 11-CV-06077, 2012 U.S. Dist. LEXIS 128299; *Brookdale Senior Living, Inc. v. Dempsey* (M.D.Tenn. Apr. 25, 2012) No. 3:12-cv-00308, 2012 U.S. Dist. LEXIS 57731; *Collier v. Real Time Staffing Servs., Inc.* (N.D.Ill. Apr. 11, 2012) No. 11-C-6209, 2012 U.S. Dist. LEXIS 50548, at *10-16; *Hesse v. Sprint Spectrum L.P.* (W.D.Wash. Feb. 17, 2012) No. C06-0592, 2012 U.S. Dist. LEXIS 20389; *Guida v. Home Sav. of Am., Inc.* (E.D.N.Y. 2011) 793 F.Supp.2d 611; *Zulauf v. Amerisave Mortg. Corp.* (N.D.Ga. Nov. 23, 2011) No. 1:11-cv-1784-WSD, 2011 U.S. Dist. LEXIS 156699; *Vazquez v. ServiceMaster Global Holding, Inc.* (N.D.Cal. June 29, 2011) No. C-09-05148-SI, 2011 U.S. Dist. LEXIS 69753, at *11-12 ("Here, however, the arbitration clause is enforceable regardless whether it permits or precludes class certification. The question is for the arbitrator to decide."); *Clark v. Goldline Int'l, Inc.* (D.S.C. Nov. 30, 2010) No. 6:10-cv-01884 (JMC), 2010 U.S. Dist. LEXIS 126192, at *21-22; *Smith v. Cheesecake Factory Rests., Inc.* (M.D.Tenn. Nov. 16, 2010) No. 3:06-00829, 2010 U.S. Dist. LEXIS 121930, at *7; *Fisher v. Gen. Steel Domestic Sales, LLC* (D.Colo. Sept. 22, 2010) No. 10-cv-1509-WYD-BNB, 2010 U.S. Dist. LEXIS 108223.

omitted).[17] Given the virtual unanimity of precedent, review is unnecessary.

E. *Reed-Elsevier* and *Opalinski* are Unpersuasive

The handful of courts that incorrectly classify the question presented by the Petition as a substantive one commit a common error: They improperly inject considerations relevant only to the merits of clause construction within the hands of the arbitrator into the analysis regarding who decides. For example, the Third and Sixth Circuits rely heavily on the Supreme Court's observations in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 that class proceedings transform the procedural nature of arbitration. They suggest that the significant differences between individual and class arbitration render the question of who decides substantive. See *Opalinski*, 2014 U.S. App. LEXIS 14538, at *16 ("Traditional individual arbitration and class arbitration are so distinct that a choice between the two goes, we believe, to the very type of controversy to be resolved"); *Reed Elsevier*, 734 F.3d at 599 ("the question whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally").

However, it is axiomatic that arbitration is contractual and that the parties may agree to make class procedures available. An arbitrator may take these types of observations into account when construing an employer's arbitration agreement to determine whether it provides for class arbitration. Hence, several courts respond to the *Reed Elsevier/Opalinski* rationale by pointing out that differences between individual and class proceedings are relevant not to the question of who decides but "only to explain why the standard for determining when parties have consented to

[17] After *Etcheverry*, the U.S. Supreme Court adopted the minority view on that controversy. Addressing that reversal, this Court stressed that "our general observations on the persuasive effect of a consensus among the lower federal courts on a question of federal law" remain "unaffected." *Barrett v. Rosenthal* (Cal. 2006) 146 P.3d 510, 531 n.18.

class arbitration is stringent." *Lee*, 982 F.Supp.2d at 1114. See also *Guida*, 793 F.Supp.2d at 619.

In re A2P SMS Antitrust Litig., 2014 U.S. Dist. LEXIS 74062, persuasively engages with this issue.

> -*Id.* at *21-22, describing the Supreme Court's "guideposts": "*Bazzle*, although non-binding, suggests that the arbitrator should decide the availability of class arbitration, whereas *Stolt-Nielsen* and *Concepcion* caution that classwide arbitration and individual arbitrations are very different procedures."
>
> -*Id.* at *36: The differences between bilateral and class arbitration "are primarily relevant to deciding the availability of such class arbitration, not the antecedent question of whether that decision is assigned to the Court or the arbitrator."
>
> -*Id.* at *37-38: Although these differences are significant and the concerns expressed in *Reed Elsevier* cannot be "entirely discounted": "none of these differences rebut the core point in *Bazzle* that the class of questions of arbitrability is a limited one, and that the availability of class arbitration pertains to the procedures to be employed at an arbitration, not whether an arbitration is permissible in the first instance."[18]

The appellate court below echoed the point, holding that "these concerns are more relevant to the issue of whether the parties agreed to class arbitration rather than the issue of whether the court or the arbitrator decides." Opinion at 14.

Smuggling such clause construction concerns into the analysis in order to wrest the decision from the arbitrator's purview reflects the kind of hostility and mistrust toward arbitrators repeatedly decried by the U.S. Supreme Court. See generally *Concepcion*, 131 S.Ct. at 1747. Similarly,

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[18] See further *Harrison*, 2014 U.S. Dist. LEXIS 117154, at *12-14 (holding that Supreme Court's "cautionary note" "regarding the practical differences between bilateral and class arbitration does not alter the outcome": "the parties will not be forced to arbitrate any substantive dispute they did not agree to arbitrate"; "more significantly," *Bazzle* continues to guide the analysis and dictate the result).

courts have expressed great reluctance to expand the category of substantive "arbitrability" questions beyond those identified by the Supreme Court. "Removing an issue from consideration by the arbitrator and assigning it to the courts to address through relatively formal procedures and multi-layered review tends to run counter to" the firmly-established policy in favor of arbitration as a means of "achieving streamlined proceedings and expeditious results." *In re A2P SMS Antitrust Litig.*, 2014 U.S. Dist. LEXIS 74062, at *33-34 (collecting cases). Accord, e.g., *Harrison*, 2014 U.S. Dist. LEXIS 117154, at *12.

II. The Superior Court's Error in Usurping the Role of the Arbitrator is *Per Se* Prejudicial, Requiring Vacatur

In its final push to disturb the Second District's holding below, Defendants claim that the Superior Court's error was harmless. After strenuously arguing for the first fifteen pages of the Petition that the question of who decides is critical, Defendants abruptly reverse course and argue that the identity of the decision-maker is irrelevant as long as he or she arguably got it right. Tellingly, Defendants fail to cite a single case for the proposition that courts may usurp the role of arbitrators to decide procedural matters without committing reversible error.

Contrary to Defendants' argument, consistent precedent provides that such error is automatically reversible. No courts engage in a secondary analysis of the prejudice stemming from the error; instead, they hold that the mere fact of the court's interference in a decision properly within the arbitrator's jurisdiction requires vacatur.

The U.S. Supreme Court explicitly rejects the analysis Defendants propose. In *Bazzle*, five justices agreed that the accuracy of a decision does not shield that decision from vacatur when made by the wrong decision-maker. The plurality held that it must refrain from interpreting the contract to determine whether it permitted class procedures "not simply because it is

a matter of state law, but also because it is a matter for the arbitrator to decide." *Bazzle*, 539 U.S. at 447. It reached this conclusion notwithstanding the fact that the South Carolina Supreme Court had unanimously held that the contracts were silent and thus authorized class arbitration. The plurality stated that it could not automatically accept the state court's resolution because "the question – whether the agreement forbids class arbitration – is for the arbitrator to decide." *Id.* at 451. Indeed, the plurality found it necessary to remand given "a strong likelihood...that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation." *Id.* at 454.

The U.S. Supreme Court has further emphasized that courts must not usurp the role of an arbitrator based on speculation regarding how the arbitrator might rule. For example, in *PacifiCare Health Systems, Inc. v. Book* (2003) 538 U.S. 401, the court cautioned:

> we should not, on the basis of "mere speculation" that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved. In short, since we do not know how the arbitrator will construe the remedial limitations...the proper course is to compel arbitration.

Id. at 406-07 (citations omitted).

Following the Supreme Court's lead, courts in this state do not review this type of error for prejudice. In *Cable Connection, Inc. v. DirecTV, Inc.* (Cal. 2008) 190 P.3d 586, this Court remanded a clause construction dispute concerning class arbitration to the panel of arbitrators. Notably, it refrained from expressing an opinion on the merits, and it did not direct the question to the trial court. Instead, it made a narrow ruling that the arbitration panel misapplied relevant rules and precedent, and sent the question of how to properly apply those authorities to the arbitration panel without further comment or judicial intervention. *Id.* at 607-08.

Intermediate appellate courts have likewise stressed that a decision must be made in the first instance by the arbitrator, and the possibility of harmless error does not preclude the need to vacate. See *Garcia*, 9 Cal.Rptr.3d at 194-95. *Garcia* flatly rejected the argument that remand was superfluous because it would be subject to review by a court that already analyzed the arbitration clause. Attacking that "imperfect syllogism," the Second District emphatically stated that "the issue must be decided by the arbitrator." *Id.* California appellate courts affirm a trial court's involvement only when neither party timely requests that the court leave the question of class arbitration to the arbitrator. See *Nelsen*, 144 Cal.Rptr.3d at 209; *Truly Nolen*, 145 Cal.Rptr.3d at 452. This case does not fall within that narrow exception.

Federal appeals courts confirm that trial court orders invading the purview of the arbitrator must be vacated regardless of their result. The First and Fifth Circuits have held that district court decisions like that of the Superior Court below must be vacated, notwithstanding their accuracy, because the court was the wrong decision-maker. See *Anderson*, 500 F.3d at 72 (vacating decision of district court analyzing class bar in arbitration agreement, leaving determination to arbitrator in first instance); *Pedcor*, 343 F.3d at 363 (vacating decision of district court certifying class for arbitration proceedings). The Seventh Circuit reached the same conclusion within the context of consolidation. See *Blue Cross Blue Shield*, 671 F.3d at 640 (parties to litigation may not litigate in advance whether arbitrators would exceed their powers if they reached a particular procedural decision, as such anticipatory review would entail an advisory opinion).

In short, there is no support for Defendants' argument that the Second District erred by failing to review the trial court's mistake for prejudice. The argument misses the fundamental point: when the trial court

traverses the authority of the arbitrator, that error is *per se* prejudicial.[19]

III. The Superior Court Reached the Wrong Result in its Clause Construction Analysis

Even assuming that a trial court is generally within its authority to interpret the parties' agreement relative to class procedures and to direct the arbitrator to conduct an individual arbitration, the Superior Court reached the wrong result here. The Superior Court rested its holding that Defendants' arbitration clauses precluded class proceedings on a misreading of the Supreme Court's *Stolt-Nielsen* decision and on two distinguishable California cases. Contrary to the Superior Court's holding, the Acknowledgements at issue here are broad in scope and permit class arbitration. The Superior Court failed to consider the totality of the textual and extrinsic evidence, which unmistakably authorizes class arbitration.

A. The Superior Court Blatantly Misread *Stolt-Nielsen*

The trial court held that *Stolt-Nielsen* directly prohibited class treatment of Sandquist's claims. It construed *Stolt-Nielsen* to hold that an arbitration clause imposed by an employer on its employees cannot permit class arbitration unless it expressly references "other employees, employee groups or employee members of a putative class." 6 JA 1395-96. This was reversible legal error.

In *Stolt-Nielsen*, the Supreme Court reviewed a district court's order vacating a maritime industry arbitration award involving two commercial entities with equal bargaining power. 559 U.S. at 666-70. One party argued that the arbitrators had disregarded the law and the established custom of bilateral arbitration in the maritime industry by construing the parties' fully-negotiated arbitration agreement as permitting class arbitration. *Id.* at

[19] In any case, under the discussion set forth below, the Superior Court's reading of the contract was fundamentally flawed. At a sheer minimum, the Acknowledgements do not unambiguously preclude class procedures and a reasonable arbitrator could well reach a contrary result.

672-74. The Supreme Court reversed the arbitrators' construction based on a crucial fact that Defendants conveniently omit from their Petition: both parties stipulated that their arbitration agreement was "silent" regarding the availability of class arbitration and that no meeting of the minds occurred on that question. *Id.* at 676. In light of that stipulation, the Supreme Court held that the arbitrators committed legal error by imposing their own bare policy preferences while making no attempt to ascertain the parties' intent or to ground their decision in the language of the parties' agreement, a rule derived from applicable law, or state contract law. *Id.* at 684.

Stolt-Nielsen stands for the proposition that silence on the question of class arbitration, in and of itself, cannot be taken as dispositive evidence of intent to allow class procedures. *Id.* On the other hand, the lack of explicit contractual language pertaining to class arbitration does not end the analysis: ordinary rules of contract interpretation apply. *Stolt-Nielsen* is distinguishable because the parties to this dispute have not stipulated that the Acknowledgements are "silent" regarding the availability of class arbitration and that no agreement was reached on the issue. Sandquist has argued at every stage of these proceedings that the Acknowledgements in fact authorize class arbitration. *Stolt-Nielsen* is therefore unhelpful in construing the Acknowledgements at issue here and certainly does not dictate the result. The Superior Court erred by holding otherwise.

B. The Broad Language of the Acknowledgements Permits Class Arbitration

Clause construction relies on ordinary canons of contract construction. Pursuant to those canons, the best evidence for construing any contract is its text. See *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.* (Cal. 1998) 959 P.2d 265, 272. The Acknowledgements here state:

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the

> employment context...[A]ny claim, dispute, and/or controversy...arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory or equitable law or otherwise...shall be submitted to and determined exclusively by binding arbitration.

1 JA 194-201. This expansive language plainly covers "any claim, dispute, and/or controversy" that an employee might bring – which would include individual or class claims – so long as there is "any relationship or connection whatsoever" to the employment. *Id.* Class claims are disputes that "may arise out of the employment context" because the employer may systematically engage in a pattern or practice of discrimination or other unlawful conduct against a class of employees. See, e.g., *Mork v. Loram Maint. of Way, Inc.* (D.Minn. 2012) 844 F.Supp.2d 950, 955 (no class waiver where the arbitration agreement applies to "claims or disputes of any nature arising out of or relating to the employment relationship").

The Acknowledgements do not exclude class claims. The text of the Acknowledgements also demonstrates that Defendants knew how to exclude particular categories of claims from arbitration. Specifically, Defendants exempted certain claims arising under the National Labor Relations Act and the California Workers' Compensation Act. 1 JA 196-97. Defendants called these "the sole exception" to its expansive language requiring arbitration of "any claim, dispute, and/or controversy." *Id.* The interpretation maxim *expressio unius est exclusio alterius* is instructive here: it provides that when exemptions are specified, other exemptions – such as the class waiver Defendants assert was inherent in the arbitration agreements – may not be implied.

Based on the all-encompassing language in the Arbitration Acknowledgments, and in light of well-entrenched California contract law

principles, the Superior Court should have found that the parties intended to permit, rather than preclude, class arbitration.

C. Extrinsic Evidence Reinforces This Interpretation

In addition to misconstruing the plain language of the Acknowledgements, the Superior Court disregarded extrinsic evidence that bolsters Sandquist's position. After Sandquist filed his class-wide administrative charge, Defendants abandoned the Arbitration Acknowledgments they required their employees to sign for nearly a decade, replacing them with new language containing an express class-action waiver. 1 JA 120. If the trial court's interpretation of the original language was correct, this move would have been unnecessary. Plainly, Defendants replaced the Arbitration Acknowledgments in order to plug a hole in the original language contemplating class arbitration.

D. *Nelsen* and *Kinecta* Are Distinguishable

Attempting to defend the Superior Court's clause construction, Defendants rely on two California appellate court decisions that neither apply to this dispute nor bind this Court. First, in *Nelsen v. Legacy Partners Residential, Inc*, the arbitration agreement lacked the expansive language at issue here. For example, it did not state that "the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context." 1 JA 194-95. Furthermore, *Nelsen* is distinguishable because the record in that case lacked extrinsic evidence bearing on the parties' intent to include or exclude class arbitration. 144 Cal.Rptr.3d at 210. Here, by contrast, Sandquist has produced precisely the sort of evidence the *Nelsen* court sought: "prelitigation conduct contradicting the position the parties are taking on that subject now." *Id.*

The second case Defendants champion is *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (Cal. App. 2012) 140

Cal.Rptr.3d 347. There, the court held that an arbitration agreement did not permit class arbitration. The court fixated on repeated bilateral language in the arbitration agreement that does not appear in the Acknowledgements at issue here. *Id.* at 356-57. Furthermore, the *Kinecta* agreement lacked the expansive language of the Acknowledgements quoted above. The Superior Court did not address these differences or how the "implicit ruling in *Kinecta*" applies notwithstanding them. 6 JA 1424. Thus, the trial court erred in relying upon this non-binding, distinguishable holding to read a class-action bar into the Acknowledgements.

CONCLUSION

Neither of the issues raised in the Petition are worthy of review by this Court. First, the prevailing law is clear that the availability of class procedures does not change whether the parties' dispute or particular substantive claims must be arbitrated. Once the Superior Court determined that Sandquist was bound to arbitrate his claims, the question of whether the arbitration clauses permitted class treatment was a procedural one for the arbitrator. The existence of two countervailing federal cases does not warrant intervention by this Court. Second, there is no need for review on the issue of whether the Superior Court's error in diverting this question from the arbitrator was harmless – an issue never raised until the present Petition. There is no conflicting precedent in this area. In any case, there is at least substantial room for an arbitrator to differ with the Superior Court's interpretation of the Arbitration Acknowledgments.

Accordingly, the Court should deny the Petition.

DATED: September 16, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 8.504(d)(1)

This brief complies with the length limitation of California Rule of Court 8.504(d)(1) because the brief contains 8,379 words, excluding the parts of the brief exempted by California Rule of Court 8.504(d)(3).

DATED: September 16, 2014 SANFORD HEISLER, LLP.

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