S220812

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TIMOTHY SANDQUIST,
Plaintiff and Appellant,

vs.

LEBO AUTOMOTIVE, INC., et al.
Defendants and Respondents.

Appeal from the Superior Court for the County of Los Angeles
Case No. BC476523
The Honorable Elihu M. Berle
After Review by the Court of Appeal,
Second Appellate District, Division Seven
Case No. B244412

OPENING BRIEF ON THE MERITS

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1. Did the Second District Court of Appeal ("Second District") erroneously determine that an arbitrator, not a court, should determine the scope of the arbitrator's own jurisdiction to hear class claims absent authorizing language in the arbitration agreement?

2. Even if the Superior Court of California for the County of Los Angeles ("Superior Court") erred by determining itself whether the arbitrator had jurisdiction to hear class claims, was that error harmless given that the Superior Court correctly determined that the arbitration agreements did not authorize the arbitrator to hear class claims?

INTRODUCTION

Plaintiff and Appellant TIMOTHY SANDQUIST ("Appellant") filed a civil action in the Superior Court against his former employer, Defendant and Respondent LEBO AUTOMOTIVE, INC. dba JOHN ELWAY'S MANHATTAN BEACH TOYOTA ("Lebo Automotive"), as well as his former supervisor, Defendant and Respondent DARRELL SPERBER, and Lebo Automotive's former corporate shareholders, Defendant and Respondents JOHN ELWAY, MITCHELL PIERCE, and JERRY WILLIAMS (collectively, "Respondents"). The operative First Amended Complaint ("FAC") includes a mix of both class and individual claims.

Appellant previously had entered into several arbitration agreements with Lebo Automotive. Based upon those agreements, Respondents moved the Superior Court to compel arbitration of all causes of action. In addition, because the arbitration agreements did not authorize the arbitrator to hear class claims, Respondents included within their motion a request that the Superior Court strike the

class allegations and compel Appellant to arbitrate his causes of action on an individual basis only.

The Superior Court granted Respondents' motion to compel the FAC to arbitration, and further ordered that Appellant could prosecute his causes of action on an individual basis only. Appellant appealed both aspects of the order.

On appeal, the Second District affirmed the order compelling arbitration of the FAC but reversed that part of the order requiring Appellant to prosecute his claims on an individual basis. On the latter issue, the Second District held that the question of whether an arbitration agreement empowers an arbitrator to hear class claims is for the arbitrator decide, not the courts. In this regard, however, the Second District diverted from the clear path taken by the United States Supreme Court and other California and federal courts on this issue. E.g., *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* (2010) 559 U.S. 662; *Oxford Health Plans, LLC v. Sutter* (2013) 133 S. Ct. 2064; *Network Capital Funding Corporation v. Papke* (4th Dist. App. Ct., Oct. 9, 2014), Case No. G049172 [certified for publication]; *Garden Fresh Restaurant Corporation v. Superior Court* (4th Dist. App. Ct., Nov. 17, 2014), Case No. D066028 [certified for publication]; *Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594, 597-598; *Huffman v. Hilltop Companies, LLC* (6th Cir. 2014) 747 F.3d 391, 398-399; *Opalinski v. Robert Half International Inc.* (3rd Cir. 2014) 761 F.3d 326, 332-336. As the Sixth Circuit observed: "Although the Supreme Court's puzzle of cases on this issue is not yet complete, the Court has sorted the border pieces and filled in much of the background. ... [R]ecently the Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one" requiring judicial resolution. *Reed Elsevier, supra,* at 597-598.

Accordingly, this Court should reverse that part of the Second District's order below holding that the issue of whether the parties agreed to arbitrate class claims must be decided by the arbitrator.

STATEMENT OF THE CASE

A. The Parties

According to the allegations set forth in the FAC, Lebo Automotive is an automobile dealership located in Manhattan Beach, California. 1 JA 56-57. Lebo Automotive employed Appellant as a sales manager from September 2000 until Appellant's voluntary resignation on January 7, 2011. 1 JA 52-80. Respondent Sperber is the General Manager of Lebo Automotive, and has an ownership interest in the dealership. 1 JA 57. The remaining Respondents co-owned and operated Lebo Automotive during the applicable period. 1 JA 57.

B. The Parties' Arbitration Agreements

At the beginning of his employment with Lebo Automotive, Appellant signed an arbitration agreement that reads in pertinent part:

> 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. ... I and the Company both agree that any claim, dispute, and/or controversy ... which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) 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, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . . . . Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to, notions of "just cause") other than such controlling law.

1 JA 195. That same day, Appellant signed two additional arbitration agreements with Lebo Automotive containing similar language. 1 JA 197-198, 200-201.

C. Procedural History

On January 9, 2012, Appellant filed a putative class action complaint in the Superior Court against Respondents. 1 JA 1-51. Soon thereafter, on February 1, 2012, Appellant filed his FAC. 1 JA 52-107. The FAC alleges four causes of action: (1) class-wide unlawful discrimination against Lebo Automotive, (2) class-wide unlawful harassment against all Respondents, (3) class-wide violations of *Business & Professions Code* section 17200 against Lebo Automotive, and (4) individual unlawful termination in violation of public policy against Lebo Automotive. 1 JA 52-80.

On March 20, 2012, Respondents filed a motion in the Superior Court to compel arbitration of all claims in the FAC, and to strike the class allegations. 1 JA 176-177, 179-189. On August 14, 2012, the Superior Court granted the motion to compel arbitration of the FAC, and additionally dismissed without prejudice Appellant's class claims because there was no contractual basis for compelling class arbitration. 6 JA 1373-1401 [discussion of individual arbitration issue at pp. 1393-1396]. The Superior Court granted Appellant until September 18, 2012 to amend his pleadings by naming a new class representative who had not signed an arbitration agreement. 6 JA 1373-1401 [discussion of leave to amend at pp. 1398-1399]. On October 5, 2012, Appellant having failed to name such a new class representative, the Superior Court dismissed the class claims with prejudice. 6 JA 1460-1462.

That same day, Appellant filed a Notice of Appeal challenging the Superior Court's order. 6 JA 1463. On June 25, 2014, the Second District issued an opinion reversing and remanding that part of the Superior Court's decision striking the class allegations. The Second District held that the arbitrator, not the Superior Court,

should have determined his or her own jurisdiction to hear Appellant's class claims. *Opn.*, at 9-15. On July 22, 2014, the Second District published its opinion. *Order Modifying Opinion and Certifying for Publication, No Change in Document* (2nd Dist. Ct. App., Jul 22, 2014), Case No. B244412.

On August 26, 2014, Respondents filed in this Court a petition for review of the Second District's opinion. *Dkt., Petition for review filed* (Aug. 27, 2014). On November 12, 2014, this Court granted the petition. *Dkt., Petition for review granted* (Nov. 12, 2014).[1]

LEGAL DISCUSSION

I.

The Courts Are to Determine Whether an Arbitration Agreement Authorizes an Arbitrator to Hear Class Claims

A. Arbitration Is a Matter of Consent, Not Coercion, and Allowing Arbitrators to Require Parties to Arbitrate Class Actions When They Never Agreed To Do So Would Violate Well-Established United States Supreme Court Precedent

In *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 474, a party asked the United States Supreme Court to void certain provisions of an arbitration agreement as purportedly inconsistent with the Federal Arbitration Act ("FAA"), and inferentially institute alternate provisions that were not a part of the original agreement. 489 U.S. at 468-469. The Court soundly rejected the suggestion that the FAA empowered courts to mandate provisions not contained within the original agreement. "Arbitration under the [FAA] *is a matter of consent, not coercion*, and parties are generally free to structure their

[1] Appellant did not seek review of that part of the Second District's opinion upholding the order to compel arbitration of the FAC.

arbitration agreement as they see fit." *Id.* at 479 (emphasis added). *Volt* was not the Court's first pronouncement on the issue. As early as *Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, the Court maintained that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 582.

Later, in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* (2010) 559 U.S. 662, the Court rejected a proposed presumption that arbitrators had the jurisdiction to hear class actions where the underlying agreement was silent on the issue. The Court explained that a party may not be compelled to submit to arbitration of a matter unless there is a contractual basis for concluding that the party agreed to do so. *Id.* at 684. "Nothing in the FAA authorizes a court to compel arbitration of any issues ... that are not already covered in the agreement." *Id.* at 683 [quoting *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 289; internal parentheticals omitted]. "Arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id.* at 682-683 [quoting *AT&T Technologies*, *supra*, 475 U.S. at 648-649; internal parentheticals omitted]. "Arbitration is simply a matter of contract *between the parties;* it is a way to resolve those disputes – but only those disputes – that the *parties* have agreed to submit to arbitration." *Id.* at 684 [quoting *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943; emphasis on original; internal parentheticals omitted].

"[A] party can be forced to arbitrate *only* those issues it specifically has agreed to submit to arbitration." *First Options of Chicago, supra,* 514 U.S. at 945 [emphasis added]. A presumption that arbitrators may determine their own jurisdiction absent contractual language to the contrary would potentially force a party to arbitrate an issue it never agreed to arbitrate – a result the United States Supreme Court has repeatedly rejected. As the Court in *First Options* explained:

"[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Ibid.*

The Second District below ignored this important principle in holding that, without any authority to do so vested in them by the parties, arbitrators may nonetheless require parties to arbitrate class action claims where they did not previously agree to arbitrate such claims.

B. The Second District Below Erred in Finding *Bazzle* to Be Persuasive

The Second District noted that *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, because it was only a plurality decision, was not binding authority. It nonetheless found it to be persuasive authority, leading it to conclude that an arbitrator as opposed to a court should decide whether parties agreed to class arbitration. *Opn.* at 13-15. The Second District's reliance on *Bazzle* was erroneous.

1. The U.S. Supreme Court Has Twice Distanced Itself from *Bazzle*

In two subsequent cases, the United States Supreme Court went out of its way to distance itself from the plurality opinion in *Bazzle*. In *Stolt-Neilsen, supra,* the Court noted that the parties apparently had been "baffled" by *Bazzle*, having believed that it requires an arbitrator, not a court, to decide whether a contract permits class arbitration. The Court admonished: "In fact, however, only the plurality decided that question." 559 U.S. at 680. Likewise, in *Oxford Health Plans, LLC v. Sutter* (2013) 133 S. Ct. 2064, the Court reiterated that *Bazzle* was merely a plurality decision. *Id.* at 2068 fn. 2. Given the Court's efforts to distance itself from *Bazzle*, the Second

District erred in finding *Bazzle* to be persuasive and this Court should not attribute any persuasive value to it.

2. The Plurality Opinion in *Bazzle* Was Based on the Language of the Arbitration Agreements at Issue There Which Differs from the Language in the Agreements Here

In *Bazzle*, the four-Justice plurality[2] addressed whether the South Carolina Supreme Court had correctly determined that the arbitration agreements in question empowered the arbitrator to hear class claims. The *Bazzle* plurality first determined that the question is primarily a question of contractual interpretation subject to the rules of the applicable state law. 539 U.S. at 447, 450; see also 539 U.S. at 454-455 [J. Stevens concurring]; In other words, the plurality maintained, courts should first look to the arbitration agreement itself, employing the applicable state rules of interpretation, to determine who decides the question.

The arbitration agreement in *Bazzle* read, in pertinent part: "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract" would be subject to arbitration. 539 U.S. at 451. The plurality determined, based upon South Carolina rules of interpretation, that "whether [the arbitration agreement] forbids the use of class arbitration procedures[] is a dispute 'relating to this contract' and the resulting 'relationships.'" *Ibid.* Based upon this interpretation of contract language under state law, the *Bazzle* plurality opined: "Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question." *Id.* at 451-452. The *Bazzle* plurality emphasized that it was the arbitration contracts' *"sweeping language concerning the scope of the questions committed to arbitration"* that led it to conclude that this matter of contract interpretation should be for the arbitrator, not the courts, to decide. *Id.* at 452-453

[2] Justices Souter, Breyer, Scalia, and Ginsburg. *Bazzle, supra,* 539 U.S. at 447.

[emphasis added]. The arbitration agreement in this case, by contrast, does not contain such "sweeping language." It does not authorize the arbitrator to determine all disputes relating to the agreement itself. It authorizes the arbitrator only to resolve employment disputes between the parties. This substantial difference in language further undercuts the persuasive value of *Bazzle* here.

Next, the *Bazzle* plurality responded to an argument that its contractual interpretation analysis ran afoul of a federal rule previously established by the United States Supreme Court in *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, and other cases. *Bazzle, supra,* 539 U.S. at 452; 456-457 [C.J. Rehnquist dissenting, raising similar argument citing *First Options of Chicago, supra,* 514 U.S. at 945]. *AT&T Technologies* held, in pertinent part, that courts shall presume that the parties intended for the courts to determine jurisdictional questions in the absence of "clear and unmistakable" evidence within the arbitration agreement to the contrary – a standard the language analyzed by the *Bazzle* plurality did not satisfy. 475 U.S. at 649. While recognizing the precedential authority of *AT&T Technologies*, the *Bazzle* plurality opined that the strong presumption discussed in that case only applied to controversies concerning an arbitrator's jurisdiction to hear the underlying substantive claims – not an arbitrator's jurisdiction to hear those substantive claims as class actions. 539 U.S. at 452-453.

However, the plurality's finding that the *AT&T Technologies* presumption did not apply to an arbitrator's authority to hear class claims does not equate to a determination that an equal but opposite presumption exists that arbitrators should determine their own such jurisdiction. As discussed above, such a presumption would contradict the well-established rule that arbitration "is a matter of consent, not coercion," and that a party may not be compelled to submit to arbitration unless that party previously agreed to it. *Volt, supra,* 489 U.S. at 479; *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83. Rather, the *Bazzle* plurality opinion merely

provides that (1) the language of the specific arbitration agreement in that case, as interpreted under South Carolina law, provided that the arbitrator could determine the scope of his authority to hear class claims; and (2) the federal law presumption discussed in *AT&T Technologies* does not supersede the primacy of state rules of interpretation when resolving such disputes.

3. This Court Recently Determined that California Contract Law Requires Courts to Decide the Scope of an Arbitrator's Authority Absent an "Express" Delegation of Such Authority in the Underlying Arbitration Agreement

As noted above, the *Bazzle* plurality maintained that state law rules of contractual interpretation primarily determine if an arbitration agreement authorizes the arbitrator to determine his own authority to hear class claims. *Bazzle, supra,* 539 U.S. at 447, 450, 454-455 [J. Stevens concurring]. In *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1091-1093, this Court determined that under California law any such delegation must be express.

In *City of Los Angeles*, this Court was presented an arbitration agreement which authorized the arbitrator to determine "*any dispute* concerning the interpretation or application of this written MOU [which included the arbitration agreement], or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this MOU." 56 Cal.4th at 1093 [emphasis added, parenthetical in original omitted]. The parties disagreed as to whether this language encompassed disputes over furloughs. *Id.* at 1091-1092. Despite the contractual language stating that "*any dispute* concerning the interpretation or application" fell within the jurisdiction of the arbitrator, this Court nonetheless found, "[h]ere, because the parties' MOU did not expressly authorize the arbitrator to determine whether particular disputes were subject to arbitration, that determination was for the court to make." *Id.* at 1093.

In *City of Los Angeles* this Court was clear: "[U]nless an arbitration agreement expressly provides otherwise, a dispute regarding the arbitrability of a particular dispute is subject to judicial resolution." 56 Cal.4th at 1096. In other words, this Court holds that under state contract law there is a strong presumption that courts should determine the jurisdiction of arbitrators. Pursuant to *City of Los Angeles*, for a party to overcome this strong presumption it would need to identify language in the text of the arbitration agreement which expressly states to the effect: "The parties agree that the arbitrator shall have the authority to determine the scope of his or her own jurisdiction over class claims." Even language reading "*any dispute* concerning the interpretation or application of the arbitration agreement," is insufficient. 56 Cal.4th at 1093. The arbitration agreements in this case come nowhere near providing such an express delegation. 1 JA 195, 197-198, 200-201. *City of Los Angeles* provides yet another reason for this Court not to follow *Bazzle* here.

C. The Question of Whether the Parties Have Agreed to Arbitrate Class Actions Is Not a "Procedural Question"

To date, the United States Supreme Court has endorsed only one presumption in favor of arbitrator authority – namely that "parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement." *Stolt-Nielsen, supra,* 559 U.S. at 684-685. The Second District below mis-cited *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 331; *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 33-34; and *Sky Sports, Inc. v. Superior Court* (2011) 201 Cal.App.4th 1363, 1369, for the purported proposition that "a class action is a procedural device." *Opn.,* at p. 13. In actuality, *Deposit Guaranty* and *Duran* stand for the proposition that a *class certification motion* – i.e., decisions of whether a plaintiff may proceed as a class based upon the plaintiff satisfying the requirements of commonality, adequate representation, etc.; and in what manner the plaintiff may present class-wide issues at

trial – is a procedural question. *Deposit Guaranty*, at 331; *Duran*, at 33-34. Nowhere does *Deposit Guaranty* or *Duran* analyze whether the jurisdictional question – i.e., whether the arbitrator can hear a class certification motion in the first place – is procedural. Indeed, neither *Deposit Guaranty* nor *Duran* involve arbitrations at all. Both cases involved class actions heard by courts. *Deposit Guaranty,* at 327-331; *Duran,* at 12-24.

Similarly, in *Sky Sports*, the California Court of Appeal merely cited that part of *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 715-716 & fn. 4 which held that the determination of whether an individual plaintiff has satisfied the general certification standards to proceed with a claim on a class basis, and whether the claims of the different class members will be consolidated into a class action, is a procedural question. 201 Cal.App.4th at 1369. Importantly, the *Vernon* court further observed that even procedural certification questions such as whether a party "can fairly and adequately protect that class rests in the sound discretion of the trial court," not the arbitrator. 52 Cal.App.3d at 715, fn 4.

On the other hand, the United States Supreme Court has expressly defined a "question of arbitrability" as "[t]he question *whether the parties have submitted a particular dispute to arbitration.*" *Howsam, supra,* 537 U.S. at 83 [emphasis added, emphasis in original omitted]. Such "questions of arbitrability" are "for judicial determination unless the parties clearly and unmistakably provide otherwise." *Ibid.* [quoting *AT&T Technologies, supra,* 475 U.S. at 649; parenthetical marks in original omitted].

In turn, the United States Supreme Court has also determined that the question of whether parties have agreed to permit the arbitrator to determine his or her own jurisdiction over class actions is a question of arbitrability. As the Court explained in *Stolt-Nielsen, supra,* "[t]he dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what 'procedural

mode' was available to present [the plaintiff's] claims. ... Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration." 559 U.S. at 687 [emphasis in original]; *see also Opalinski v. Robert Half International Inc.* (3rd Cir. 2014) 761 F.3d 326, 332-334.

This question is one of arbitrability rather than procedure because the transition from individual to class arbitration changes the nature and scope of the arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. *Stolt-Nielsen, supra,* 559 U.S. at 685-687. As the *Stolt-Neilsen* Court observed: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But," noted the Court, "the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 685-686. Likewise, in *AT&T Mobility v. Concepcion* (2011) 131 S. Ct. 1740, the Court similarly recognized that class arbitration "significantly increases risks to defendants." It noted that "[i]nformal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration since their impact is limited to the size of individual disputes...." On the other hand, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *Id.* at 1752.

The Second District ignored that part of *Stolt-Nielsen* holding that the question of whether class actions are available in arbitration is not an issue of "procedural mode" – but rather, is a matter of "whether the parties *agreed to*

authorize class arbitration." *Stolt-Nielsen, supra,* 559 U.S. at 687 [emphasis in original]. As recently recognized by the California Court of Appeal in both *Papke, supra,* and *Garden Fresh Restaurant, supra,* after a close examination of *Stolt-Nielsen* and *AT&T Mobility,* that the question is one of arbitrability, not procedure. *Papke, supra,* at **12-14; *Garden Fresh Restaurant, supra,* at **8-15. In *Papke*, the court concluded that "[a]llowing an arbitrator to decide this issue threatens the consensual nature of arbitration and the rule that parties may be compelled to arbitrate only those issues they agreed to arbitrate." *Papke, supra,* at *17. Similarly, the court in *Garden Fresh Restaurant* held that "[u]nlike the question whether, say, one party to an arbitration agreement has waived his claim against the other—which of course is a subsidiary question—the question whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may well not have agreed to arbitrate, but thousands of them." *Garden Fresh Restaurant, supra,* at *11 [quoting *Reed Elsevier, supra,* 734 F.3d at 598]; internal quotation and parenthetical marks omitted].

D. Determining Whether an Arbitrator Can Hear Class Actions Also Affects Whose Claims Are Subject to Arbitration

The United States Supreme Court has long held that the question of *whose claims* an arbitrator is authorized to hear is also a gateway arbitrability question for the courts. *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 546-547. In relation to class claims, the Third Circuit recently explained: "By seeking classwide arbitration,... [plaintiffs] contend that their arbitration agreements empower the arbitrator to resolve not only their personal claims *but the claims of additional individuals not currently parties to this action.* The determination whether [the defendant] must include absent individuals in its arbitrations with [plaintiffs] affects

whose claims may be arbitrated and is thus a question of arbitrability to be decided by the court." *Opalinski, supra,* 761 F.3d at 332-333 [emphasis added]. Indeed, "as Justice Alito warned in his concurrence in *Oxford Health* [*Plans LLC v. Sutter* (2013) 569 U.S. ___, 133 S.Ct. 2064], the courts should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent." *Id.* at p. 333 [citing *Oxford Health, supra,* 133 S.Ct. at 2071-2072].

Given the avalanche of United States Supreme Court authority rejecting any presumption in favor of arbitrators determining their own jurisdiction, it was error for the Second District below to reach that conclusion.

E. Arbitrators Should Not Decide Their Own Jurisdiction over Class Actions Because They Have an Inherent Conflict of Interest

The United States Supreme Court has counseled against allowing arbitrators to determine their own jurisdiction because they have an inherent conflict of interest to expand the scope of their powers beyond that actually provided in the underlying arbitration agreement. "The willingness of parties to enter into agreements would be drastically reduced ... if a labor arbitrator had the power to determine his own jurisdiction...." *AT&T Technologies, supra,* 475 U.S. at 651 [internal quotes omitted]. "Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.* [internal quotes omitted].

Class arbitrations carry the potential of far greater revenue for arbitrators than do single-plaintiff cases. This creates an inherent bias on the part of the arbitrator. Moreover, an arbitrator's decision regarding his or her own jurisdiction that is colored by such bias would not be not subject to any judicial review. *Oxford Health,*

supra, 133 S.Ct. at 2068-2071 [decisions by an arbitrator regarding his or her own jurisdiction are not subject to judicial review]. Accordingly, to preserve the legitimacy of the arbitration process, the courts must determine the scope of an arbitrator's authority to hear class claims absent an express delegation in the arbitration agreement to the contrary.

F. The Second District's Ruling Below Is Inconsistent With the Law and Must Be Reversed

The Second District's holding that the question whether the parties agreed to class arbitration is for the arbitrator and not the court to decide was error for the reasons demonstrated above. The Second District ignored the fundamental principle that arbitration is a matter of consent, not coercion and that parties may not be compelled to arbitrate matters that they never agreed to arbitrate.

Bazzle is not binding precedent, and its persuasive value is severely limited by the United States Supreme Court's more recent efforts to distance itself from the case. It also relied heavily on state law rules of contract interpretation and the language of the contracts at issue. California applies its own (and a different) rule of contract interpretation where an arbitration agreement is silent on the arbitrator's authority, as this Court recognized in *City of Los Angeles,* and the language of the arbitration agreements here do not contain a broad grant of authority to the arbitrator to interpret the arbitration provision as was the case in *Bazzle*.

The question of whether parties have agreed to arbitrate class actions is not a "procedural" question for the arbitrator to determine. Rather, it is a fundamental issue of arbitrability for the court to decide. Class arbitration differs in many significant respects from individual arbitration, and a defendant may not be deemed to have agreed to class arbitration absent express language in the arbitration agreement. Finally, the inherent bias that might cause arbitrators to choose to allow

arbitration of more lucrative class claims make arbitrators particularly poorly-suited to make such a determination.

For all of these reasons the Second District's decision below should be reversed.

II.

Whereas The Superior Court Correctly Determined that the Arbitrator Had No Authority to Hear a Class Arbitration, Any Purported Error by the Superior Court Choosing to Make that Correct Decision Itself Was Harmless

A. Harmless Errors Are Not Grounds for Reversal

Even assuming *arguendo* that the Second District correctly determined that questions regarding the scope of an arbitrator's own authority to hear class claims are "*procedural*," and that therefore the Superior Court should have submitted the request to strike the class claims to the arbitrator, the appellate court still erred by reversing the Superior Court's order without an analysis of whether the trial court's failure was prejudicial or harmless. Article VI, Section 13 of the California Constitution expressly provides that "[n]o judgment shall be set aside ... on the ground of ... any error as to any matter of *procedure*, unless, after an examination of the entire cause, including the evidence, the [reviewing] court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Emphasis added. As this Court held in *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, a "miscarriage of justice" will be declared only when the reviewing court, after examining the entire case, is of the opinion that "it is reasonably probable that a result *more favorable* to the appealing party would have been reached in the absence of the error." [Emphasis added.] Even "substantial" errors by a trial court are considered harmless if the record demonstrates that no other ultimate decision could have been properly rendered. *County of Monterey v. W.W. Leasing Unlimited* (1980)

109 Cal.App.3d 636, 642 [citing Witkin, Cal. Procedures (2d ed. 1971) Appeal, § 315, p. 4293].

Likewise, *Code of Civil Procedure* section 475 provides: "The [reviewing] court must ... disregard any error, improper ruling, instruction, or defect, in the ... proceedings which, in the opinion of said [reviewing] court, does not affect the substantial rights of the parties. ... *There shall be no presumption that error is prejudicial, or that injury was done if error is shown.*" [Emphasis added.] Reviewing courts cannot classify errors as "prejudicial" in the abstract. "No precise formula can be drawn for deciding whether there has been a miscarriage of justice." *Alarid v. Vanier* (1958) 50 Cal.2d 617, 625. "Accordingly, errors in civil trials require that [reviewing courts] examine each individual case to determine whether prejudice actually occurred in light of the entire record." *Cassim, supra,* 33 Cal.4th at 801-802 [internal quotation marks omitted].

On the question of harmless error, it is important to note that arbitration agreements are considered types of forum selection clauses. *Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 519. In turn, forum selection clauses do not divest a court of jurisdiction that it otherwise holds. *M/S Bermen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 12; *Silva v. Encyclopedia Britannica Inc. et al.* (1st Cir. 2001) 239 F.3d 385, 388 fn. 6. "[T]he parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented." *William H. Muller & Co. v. Swedish American Line Limited* (2nd Cir. 1955) 224 F.2d 806, 808. Thus, in short, the Superior Court did have jurisdiction to determine whether the arbitrator's scope of authority included class claims regardless of whether the underlying arbitration agreements set forth a preference by the

contracting parties to have that question resolved by the arbitrator. Assuming *arguendo* that the arbitration agreement did in fact establish such an intent by the parties for the arbitrator to determine the issue, the question is whether the Superior Court caused Appellant prejudice by deciding the issue – not whether the trial court had jurisdiction to consider the question.

Accordingly, after the Second District below determined that questions regarding the scope of an arbitrator's authority to hear class claims are "procedural" issues for the arbitrator to decide, the State Constitution, the *Code of Civil Procedure*, and the binding precedents of this Court all required the appellate court to analyze if the purported procedural error of the Superior Court was harmless before ordering a reversal. Indeed, Appellant does not have a right to an erroneous decision by an arbitrator. While parties to an arbitration agreement voluntarily bear the *risk* of the arbitrator making a legal error, *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11-12, that assumption of risk is a far cry from the parties purposely *seeking* to have their disputes resolved by legal errors. If the Superior Court correctly decided the ultimate question that the arbitration agreements did not empower the arbitrator to hear class claims, Appellant did not suffer any "miscarriage of justice" simply because the Superior Court made the correct decision rather than the arbitrator.

B. The Superior Court Correctly Determined that the Arbitration Agreements Did Not Authorize the Arbitrator to Hear Class Claims

In *Nelsen, supra,* 207 Cal.App.4th at 1128-1131, the First District Court of Appeal held, correctly, that where an arbitration agreement is silent on class arbitration, and the arbitration agreement limits the scope of arbitrability to disputes between the employee and the employer, the agreement does not provide for class arbitration. In that case, the employees (who were referred to as "team members") signed an arbitration agreement which read, in pertinent part:

> "I agree that any claim, dispute, or controversy ... which would otherwise require or resort [sic] to any court ... *between myself and [the employer]* (or its owners, partners, directors, officers, managers, team members, agents related companies, and parties affiliated with its team member benefit and health plans) ... shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act..."

207 Cal.App.4th at 1120 [emphasis added]. Finding that the language "between myself and [the employer]" only addressed bilateral actions between the contracting parties, the *Nelsen* court correctly held that the agreement did not authorize class arbitrations. *Id.* at pp. 1129-1130. The Second District came to a similar conclusion in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 517.

The arbitration agreements in the present case employ language nearly identical to that in *Nelsen*. The agreements at issue read, in pertinent part:

> "... I and the Company both agree that any claim, dispute, and/or controversy ... which would otherwise require or allow resort to any court . . . *between myself and the Company* (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) ... shall be submitted to and determined exclusively by binding arbitration."

1 JA 195 [emphasis added]. Thus, consistent with the decisions in *Nelsen* and *Kinecta*, the Arbitration Agreements in the instant matter likewise do not authorize class arbitration because the language "between myself and the Company" only addresses bilateral disputes between the contracting parties. *Nelsen, supra*, 207 Cal.App.4th at 1129-1130; *Kinecta, supra,* 205 Cal.App.4th at 517.

In short, the Superior Court correctly determined that the Arbitration Agreements between the parties do not authorize the arbitrator to hear class claims. Thus, even assuming *arguendo* that the Superior Court erred by not submitting the question to the arbitrator, that purported error was harmless and not grounds for

reversal. The Superior Court did not engage in a "miscarriage of justice" by denying Appellant the opportunity for an alternative, erroneous decision by the arbitrator.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court reverse that part of the Second District's decision below directing the Superior Court to submit a new order tendering the issue of whether the parties agreed to arbitrate class claims to the arbitrator.

DATED: January 9, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 8.520(c)(1)

This brief complies with the length limitation of California Rule of Court 8.520(c)(1) because this brief contains 6,310 words, excluding the parts of the brief exempted by California Rules of Court 8.520(c)(3).

DATED: January 9, 2015

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State of California)
County of Irvine) **DECLARATION OF SERVICE**

I, the undersigned, declare that I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action. I am employed with the law office of Fisher & Phillips LLP, and my business address is 2050 Main Street, Suite 1000, Irvine, CA 92614.

On the below date, I caused to be served the attached **OPENING BRIEF ON THE MERITS** as follows:

Janette Wipper Felicia Medina SANFORD HEISLER LLP 555 Montgomery Street, Suite 1206 San Francisco, CA 94111 Ph: (415) 795-2020 Fax: (415) 795-2021 Attorney for Plaintiff/Appellant - Timothy Sandquist **Copy (1) U.S. Mail**	Clerk for the Hon. Elihu Berle SUPERIOR COURT OF CALIFORNIA County of Los Angeles (Central District) Central Civil West Courthouse 600 South Commonwealth Avenue Los Angeles, California 90005 Trial Court Judge **Copy (1) U.S. Mail**
Office of the Clerk SUPREME COURT OF CALIFORNIA 350 McAllister Street San Francisco, California 94102-4797 **Original delivered via Federal Express**	Clerk of the Court California Court of Appeal Second Appellate District, Division Seven Ronald Reagan State Building 300 South Spring Street, Second Floor Los Angeles, CA 90013 **Copy (1) U.S. Mail**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 9, 2015 at Irvine, California.

SUSAN JACKSON
[PRINT NAME]

[SIGNATURE]