No. S224086

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SHARON MCGILL,

Plaintiff and Respondent,

v.

CITIBANK, N.A.,

Defendant and Appellant.

After a Decision by the Court of Appeal, Fourth Appellate District, Division Three (Case No. G049838), From the Superior Court, County of Riverside (Case No. RIC1109398), Commissioner John W. Vineyard

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

The singular issue presented in this proceeding is whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"), as interpreted and applied by the United States Supreme Court, preempts California's state-law rule, set forth in *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066 (1999), and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303 (2003) (the *Broughton-Cruz* rule), that state-law claims for public injunctive relief are not arbitrable. The governing federal caselaw is unequivocal. In a series of recent decisions, the United States Supreme Court has repeatedly made absolutely clear that the FAA requires enforcement of arbitration agreements as written and that the FAA preempts state-law rules that would limit the enforceability of such agreements. Indeed, the Ninth Circuit has already ruled that the *Broughton-Cruz* rule is no longer good law. *See Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013). It is now time for this Court likewise to confirm that the FAA preempts the *Broughton-Cruz* rule.

Beginning with its 2011 decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1747 (2011), the United States Supreme Court declared, "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." In *Concepcion*, the Supreme Court expressly abrogated this Court's holding in *Discover Bank v. Superior*

Court, 36 Cal. 4th 148 (2005). *Concepcion*, 131 S. Ct. at 1744-45. Soon thereafter, the Supreme Court concluded that a West Virginia public policy prohibiting enforcement of arbitration agreements with respect to certain claims against nursing homes "is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012). In so ruling, the Supreme Court cited not only *Concepcion*, but also numerous prior decisions addressing the preemption issue.[1] Consistent with these decisions (and others following them), when the FAA applies to an arbitration agreement, as in the instant action, no state-law rule prohibiting arbitration of a particular type of claim or a particular form of remedy (even if based on public policy grounds) is valid. The *Broughton-Cruz* rule is no different from the *Discover Bank* rule or the West Virginia rule barring arbitration of claims against nursing homes, and it is preempted for the same reasons.

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[1] *See id.* (citing *Preston v. Ferrer,* 552 U.S. 346, 356 (2008) (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 56 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages); *Perry v. Thomas,* 482 U.S. 483, 491 (1987) (FAA pre-empts state-law requirement that litigants be provided a judicial forum for wage disputes); *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984) (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute).)

In this action, plaintiff Sharon McGill ("McGill") challenges Citibank's Credit Protector program ("Credit Protector"), an optional debt deferral/cancellation program provided by Citibank for the benefit of its credit card accountholders. All of the claims asserted by McGill—for violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (the "UCL"), the False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* (the "FAL"), the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (the "CLRA"), and California Insurance Code § 1758.9 *et seq.*—fall squarely within the scope of the arbitration agreement (the "Arbitration Agreement") contained in McGill's credit card agreement with Citibank (the "Card Agreement"). The Arbitration Agreement expressly provides that all claims are subject to arbitration, and that all remedies that may be sought in court are equally available in arbitration. The Arbitration Agreement's only requirement is that claims must be arbitrated, and awards must be made, only on an individual, non-class and non-representative basis.

Although the trial court correctly concluded that the Arbitration Agreement is valid and enforceable, and therefore granted Citibank's Motion to Compel Arbitration with respect to McGill's claims for monetary relief and restitution, the trial court denied the Motion as to McGill's claims for public injunctive relief under the UCL, FAL and CLRA. The trial court based its ruling on the *Broughton-Cruz* rule.

The Court of Appeal reversed the trial court's order as to the claims for public injunctive relief, correctly holding that the *Broughton-Cruz* rule is no longer viable in light of *Concepcion* and its progeny. As amply demonstrated below, this Court should affirm the decision of the Court of Appeal that, pursuant to settled principles of FAA preemption as articulated by the Supreme Court, the Arbitration Agreement here must be enforced as written as to all claims, with no exception for claims for public injunctive relief.

McGill wishes to avoid the inescapable conclusion that *Broughton* and *Cruz* are no longer good law. McGill therefore belatedly seeks to confuse the issue with a new argument that was never presented to the trial court and only presented to the Court of Appeal in a petition for rehearing after the Court of Appeal had issued its opinion. McGill argues that the Arbitration Agreement itself, rather than public policy as announced in *Broughton* and *Cruz*, is what precludes arbitration of her claims for public injunctive relief. This argument was not properly preserved for review here, but regardless it fails because a court may not avoid the FAA by applying state-law rules of contract interpretation to limit the scope of an agreement to arbitrate. Such interpretive games violate the FAA's mandate that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The FAA does not permit courts to invalidate arbitration agreements based on a fear that the procedures they require

might weaken the protections afforded in the substantive law. Accordingly, the Arbitration Agreement must be enforced as written. At a minimum, a determination whether injunctive relief is appropriate based on McGill's claims should be made by the arbitrator in the first instance.

Finally, McGill's arguments that this case should be remanded for a determination of whether the arbitration agreement is unconscionable, or that this Court should specify what procedures should apply post-arbitration, are equally without merit, as addressed below.

Accordingly, for the reasons discussed herein, the Court of Appeal's order directing the trial court to order all of McGill's claims to arbitration should be affirmed.

II. STATEMENT OF THE CASE

A. McGill's Account And The Binding Arbitration Agreement

McGill's Citibank credit card account ("Account") is subject to terms and conditions contained in the written Card Agreement, as amended from time to time. (Vol. 1 Clerk's Transcript ("CT") 96, 101-105.) The Card Agreement provides that the "terms and enforcement of this Agreement shall be governed by federal law and the law of South Dakota, where we are located." (Vol. 1 CT 104.) The Card Agreement expressly authorizes Citibank to change the terms of the Agreement, which changes are binding on cardmembers (the "Change-In-Terms Provision"). (Vol. 1 CT 104.) The Card Agreement provides that by using the Account, McGill

agrees to all of the Card Agreement's terms. (Vol. 1 CT. 101.) After being sent the Card Agreement in September 2001, McGill made purchases and payments on the Account, thereby agreeing to the Card Agreement's terms, including the Change-In-Terms Provision. (Vol. 1 CT 97.)

In October 2001, Citibank sent McGill a "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement" (the "2001 Change-in-Terms"). (Vol. 1 CT 96, 108-112.) The 2001 Change-in-Terms added the Arbitration Agreement to the Card Agreement. (*Id.*) The Arbitration Agreement provides that either party may elect mandatory binding arbitration as follows:

> ***ARBITRATION***
>
> **PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.**
>
> ***Agreement to Arbitrate:***
>
> Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").
>
> ***Claims Covered***
>
> - **What Claims are subject to arbitration?** All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation

of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

. . .

- **Broadest Interpretation.** Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

. . .

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

(Vol. 1 CT 108-110.) The Arbitration Agreement also includes terms: (1) excluding small claims court actions; (2) allowing for the parties to choose between nationally recognized arbitration firms, including the American

Arbitration Association; and (3) allowing for the reimbursement and/or advancement of arbitration fees. (*Id.*)

After mailing the 2001 Change-in-Terms, Citibank printed the following message (in all capital letters) on McGill's November 2001 billing statement, alerting her to the 2001 Change-in-Terms:

> WITHIN THE LAST 30 DAYS YOU SHOULD HAVE RECEIVED AN IMPORTANT NOTICE ABOUT ADDING BINDING ARBITRATION TO YOUR CITIBANK CARD AGREEMENT. IF YOU WOULD LIKE ANOTHER COPY PLEASE CALL THE CUSTOMER SERVICE NUMBER LISTED ABOVE.

(Vol. 1 CT 96, 113-114.) The 2001 Change-in-Terms also provided that the Arbitration Agreement would become effective on the day after the Statement/Closing date indicated on McGill's November 2001 billing statement. (Vol. 1 CT 97, 108-110.) The Statement/Closing date for McGill's November 2001 billing statement was November 29, 2001. (Vol. 1 CT 97, 113-114.) The Arbitration Agreement therefore became effective on November 30, 2001. (Vol. 1 CT 97.) After that date, McGill used and paid her Account. (*Id.*) Importantly, McGill had the opportunity to opt out of the Arbitration Agreement, but did not. (Vol. 1 CT 97, 108-110, 113-114. (*Id.*)

In February 2004, Citibank mailed McGill a complete copy of the Card Agreement, which included the Arbitration Agreement. (Vol. 1 CT 97-98, 117-126.) The Card Agreement states: "This Agreement is binding

on you unless you cancel your account within 30 days after receiving the card and you have not used or authorized use of your account." (Vol. 1 CT 118.) McGill used the Account after the Card Agreement was mailed to her. (Vol. 1 CT 98, 133-144.) In February 2005, Citibank mailed another change-in-terms notice, which further advised McGill of additional amendments to the Arbitration Agreement. (Vol. 1 CT 98, 127-129.) McGill also had the opportunity to opt out of these changes, but she did not do so and continued using the Account. (Vol. 1 CT 98, 133-144.) In January 2007, Citibank mailed McGill another complete copy of the Card Agreement, which again included the Arbitration Agreement. (Vol. 1 CT 98, 145-156.)

B. Credit Protector

On or about December 13, 2001, McGill enrolled by telephone in Credit Protector, an optional debt deferral/cancellation benefit program provided by Citibank. (Vol. 1 CT 98-99.) After she enrolled, Citibank sent McGill a "Welcome Kit" that contained, among other things, the terms and conditions governing Credit Protector. (Vol. 1 CT 98-99, 157-159.) The Credit Protector terms and conditions state, "All other provisions of your Cardholder Agreement remain in full force and effect, and are not amended by anything stated or implied by these Terms and Conditions." (Vol. 1 CT 158.)

C. The Underlying Action

On March 27, 2011, McGill filed this putative class action against Citibank, purportedly on behalf of all California residents holding Citibank credit cards who enrolled in Citibank's Credit Protector program. (Vol. 1 CT 1-25.) The Complaint alleges that when McGill enrolled in Credit Protector, all of the conditions regarding coverage and claims were not disclosed to her and no evaluation of her eligibility was performed, and that she subsequently was improperly denied benefits. (Vol. 1 CT 5-8, 10-23.) McGill alleges violations of: (1) the UCL; (2) the FAL; (3) the CLRA; and (4) California Insurance Code section 1758.9 *et seq.* (Vol. 1 CT 10-23.) On behalf of herself and a putative California class, McGill seeks restitution, compensatory, monetary and punitive damages, injunctive relief and attorneys' fees, among other things. (Vol. 1 CT 23-24.)

D. The Motion To Compel Arbitration And The Trial Court Order

On August 26, 2011, Citibank filed a Motion to Compel Arbitration (the "Motion"). (Vol. 1 CT 31-57.) In support of the Motion, Citibank submitted the Declaration of Cathleen A. Walters, attaching the Arbitration Agreement. (Vol. 1 CT 94-160.) McGill filed her brief opposing the Motion on September 30, 2011, without submitting a declaration or any evidence in opposition. (Vol. 3 CT 859-81.) On October 6, 2011, Citibank filed its reply in support of the Motion. (Vol. 4 CT 1016-30.) On November 15, 2011—the morning of the hearing on the Motion—McGill

filed a Notice of Supplemental Authority in opposition to the Motion, submitting to the trial court the decisions in *Ferguson v. Corinthian Colleges*, 823 F. Supp. 2d 1025 (C.D. Cal. 2011), and *In re DirecTV Early Cancellation Fee Marketing & Sales Practices Litigation*, 810 F. Supp. 2d 1060 (C.D. Cal. 2011). (Vol. 6 CT 1315-17.)[2] McGill asserted that *Ferguson* and *In re DirecTV* supported the argument that even after *Concepcion*, under the *Broughton-Cruz* rule, her claims for public injunctive relief under the UCL, FAL and CLRA are not subject to arbitration. (*Id.*) However, McGill never argued that the Arbitration Agreement should be construed in a manner that would preserve her ability to pursue such claims in court.

The trial court heard the Motion on November 15, 2011. (Reporter's Transcript ("RT") 1-18.) At the hearing, the trial court issued a tentative ruling granting the Motion as to McGill's claims for monetary relief, but denying the Motion as to McGill's claims for "public injunctive" relief under the UCL and CLRA. (RT 3:17-25, 4:2-6.) Following argument, the trial court took the Motion under submission. (RT 16:1-3, 25-26.) The trial court permitted Citibank to submit a brief responding to McGill's Notice of Supplemental Authority. (RT 16:26-17:6.) On November 21, 2011,

[2] The Ninth Circuit subsequently reversed *both* of the trial court decisions relied upon. See *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2013); *Lombardi v. DirecTV, Inc.*, 546 F. App'x 715 (9th Cir. 2013).

Citibank filed its supplemental brief, and the Motion was deemed submitted. (Vol. 6 CT 1393-1404; RT 17:5-6.)

On December 1, 2011, the trial court issued its ruling on the Motion:

> The Court has considered the supplemental briefing submitted by both parties. Based on *AT&T Mobility v. Concepcion* (2011) 131 S. Ct. 1740 and *KPMG LLP v. Cocchi* (2011) __ S. Ct. __, 2011 WL 5299457, the Court finds that the arbitration [agreement] at issue in this action is enforceable, and that certain of the claims asserted are subject to arbitration, the motion is granted in part.
>
> The claims for injunctive relief pursuant to B&P Code section 17200 and Civil Code section 1750 are not subject to arbitration, and the motion is denied as to those claims, which are hereby stayed pending completion of arbitration of the remaining claims.

(Vol. 6 CT 1406.) The Order did not reference McGill's FAL claim. (*Id.*) On January 6, 2012, Citibank filed and served a Notice of Entry of Order. (Vol. 6 CT 1409-15.)

On January 10, 2012, McGill filed an *ex parte* application to clarify that her claim for public injunctive relief under the FAL should have been referenced in the Order. (Vol. 6 CT 1422-58.) On January 11, 2012, the trial court held a hearing on the *ex parte* application and clarified that the December 2011 Order should have referenced McGill's claim for public injunctive relief under the FAL and that the FAL claim also is not subject to arbitration. (RT 19:23-20:9.) On February 2, 2012, the trial court issued a formal Order reflecting the clarification ruling. (Vol. 6 CT 1463-66.)

E. Citibank's Appeal And The Court of Appeal's Order

On January 27, 2012, Citibank filed its Notice of Appeal. (Vol. 6 CT 1460-1462.) Following briefing and argument, the Court of Appeal reversed the trial court's Order and remanded the action to the trial court to order all of McGill's claims to arbitration. *See McGill v. Citibank, N.A.*, 232 Cal. App. 4th 753, 181 Cal. Rptr. 3d 494, 510 (2014). On January 2, 2015, McGill filed a Petition for Rehearing, arguing that the Court of Appeal did not address whether the Arbitration Agreement itself prohibits arbitration of claims for public injunctive relief, an argument not previously advanced by McGill. On January 7, 2015, the Court of Appeal denied McGill's Petition for Rehearing. (Order Denying Petition for Rehearing, Jan. 27, 2015.)

McGill filed the instant Petition for Review on January 27, 2015, which this Court granted on April 1, 2015. *See McGill v. Citibank*, 345 P.3d 61 (2015).

III. STANDARD OF REVIEW

"'Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court.'" *Alan v. Super. Ct.*, 111 Cal. App. 4th 217, 223 (2003) (quoting *Brookwood v. Bank of Am.*, 45 Cal. App. 4th 1667, 1670 (1996)); *Boucher v. Alliance Title Co., Inc.*, 127 Cal. App. 4th

262, 266-67 (2005). McGill submitted no evidence in opposing the Motion. Because there is no conflicting evidence here, the Court must "review the trial court's ruling de novo." *Alan*, 111 Cal. App. 4th at 223-24 (citing *NORCAL Mut. Ins. Co. v. Newton*, 84 Cal. App. 4th 64, 71-72 (2000)); *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 551 (2004) (where the parties have introduced no extrinsic evidence, "the trial court's ruling regarding arbitrability is a conclusion of law, and we independently interpret the [c]ontract") (citations omitted). Indeed, whether the *Broughton-Cruz* rule survives recent FAA preemption decisions of the United States Supreme Court presents a pure question of law.

IV. ARGUMENT

A. Pursuant To The FAA And Extensive United States Supreme Court Precedent, The Arbitration Agreement Must Be Enforced As Written.

Pursuant to the FAA, arbitration agreements in contracts "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As explained by the Supreme Court in *Concepcion*, the FAA was enacted in response to "widespread judicial hostility to arbitration agreements" and "reflect[s] both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *Concepcion*, 131 S. Ct.

at 1745-46 (internal citations omitted). Thus, as directed by the Supreme Court, "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 131 S. Ct. 1745-46; *see also id.* at 1748 (stating that the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings").

It is well settled that state law regarding arbitration is preempted by the FAA unless "that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" the FAA. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions" because "Congress precluded States from singling out arbitration provisions for suspect status . . ."). A state law doctrine "normally thought to be generally applicable," that is "applied in a fashion that disfavors arbitration" or has a "disproportionate impact on arbitration agreements," plainly is preempted. *Id.* at 1747; *see also Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160 (9th Cir. 2012) (courts may not leverage "'the uniqueness of an agreement to arbitrate' to achieve a result that the state legislature cannot") (quoting

Concepcion, 131 S. Ct. at 1747). Thus, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747. In addition, "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are preempted by the FAA. *Id.* at 1746.

As set forth in *Concepcion* and repeatedly thereafter, the United States Supreme Court has made abundantly clear that the FAA requires enforcement of arbitration agreements as written and that the FAA preempts state law that would limit the enforceability of such agreements. Rejecting public policy arguments regarding the availability of a class remedy for small-dollar claims, the Supreme Court confirmed in *Concepcion* that agreements to arbitrate on an individual basis are fully enforceable, even if small-dollar claims may slip through the legal system. *See Concepcion*, 131 S. Ct. at 1753 (abrogating *Discover Bank*). Shortly after *Concepcion*, in *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24-25 (2011), the Supreme Court reaffirmed the "emphatic federal policy in favor of arbitral dispute resolution," directing that "[a]greements to arbitrate that fall within the scope and coverage of the [FAA] must be enforced in state and federal courts." And again, in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012), the Supreme Court rejected the argument that statutory class-action claims could not be compelled to individual arbitration, holding "that

contractually required arbitration of claims satisfies the statutory prescription of civil liability in court."

The immediately subsequent decision in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012), discussed in detail below, is particularly compelling here. In *Marmet*, the Supreme Court held that state laws that prohibit arbitration on "public policy" grounds are preempted by the FAA. And most recently, in *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013), the Supreme Court again emphasized the importance of enforcing arbitration agreements according to their terms, reiterating that the "text [of the FAA] reflects the overarching principle that arbitration is a matter of contract . . . [a]nd consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms, . . . including terms that 'specify with whom [the parties] choose to arbitrate their disputes' . . . and 'the rules under which that arbitration will be conducted'") (internal citations omitted).

B. The *Broughton-Cruz* Rule Does Not Survive *Concepcion* And Its Progeny.

The instant case squarely presents the question of whether the *Broughton-Cruz* rule remains viable in light of *Concepcion*, an issue that

this Court has not addressed.[3] Given the United States Supreme Court's emphatic direction in *Concepcion* and its progeny, the conclusion in *Broughton* and *Cruz*—that state-law claims seeking public injunctive relief are not subject to arbitration—simply does not survive.

The United States Supreme Court held in *Concepcion* that this Court's prior holding in *Discover Bank* improperly created an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and thus this Court's *Discover Bank* rule was preempted. *See Concepcion*, 131 S. Ct. at 1750, 1753. In so holding, the Supreme Court emphasized that "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Id.* at 1745 (citation omitted). Indeed, the United States Supreme Court is currently considering whether the FAA displaces state-law doctrines even when the arbitration agreement itself references state law. *See Imburgia v. DirecTV, Inc.*, 225 Cal. App. 4th 338, 343-45 (2014), *cert. granted*, No. 14-462 (U.S. Mar. 23, 2015).

Like the abrogation of Discover Bank in *Concepcion*, the Supreme Court's decision in *Marmet* confirms that the FAA's preemption extends to

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[3] In *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 924 (2015), this Court held that the CLRA's anti-waiver provision is preempted to the extent it bars class waivers in arbitration agreements covered by the FAA. *Sanchez* did not reach the issue of whether the *Broughton-Cruz* rule remains valid in light of *Concepcion*.

state public policy justifications, such as the *Broughton-Cruz* rule. In *Marmet*, the Supreme Court enforced an arbitration agreement between a nursing home and a patient's family member in a suit against the nursing home for personal injury or wrongful death, despite the West Virginia Supreme Court of Appeals' conclusion that arbitration of such claims offended that state's public policy. *See Marmet*, 132 S. Ct. at 1203-04. Because the public policy of West Virginia "prohibit[ed] outright the arbitration of a particular type of claim"—personal injury and wrongful death claims—that policy was "displaced by the FAA." *Id.* at 1203 (quoting *Concepcion*, 131 S. Ct. at 1747). Accordingly, the Supreme Court remanded the case with directions for the West Virginia court to evaluate the arbitration agreement at issue without considering state public policy. *Id.* at 1204.

Both the California Court of Appeal and the Ninth Circuit agree that the *Broughton-Cruz* rule does not survive *Concepcion.* In addition to the opinion of the Fourth District Court of Appeal in this case, in *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1135-36 (2012), *as modified on denial of reh'g* (Aug. 14, 2012), the First District Court of Appeal confirmed that "[u]nder *Concepcion*, the FAA preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally. Absolute prohibitions on the arbitration of particular kinds of

claims such as that reflected in *Broughton-Cruz* are the *clearest example of such policies*[.] . . . Since *Broughton-Cruz* prohibits outright the arbitration of claims for public injunctive relief, it is in conflict with the FAA." *Id.* (emphasis added).[4]

The Ninth Circuit similarly has made clear that the *Broughton-Cruz* rule is contrary to *Concepcion* and its progeny. In *Ferguson*, 733 F.3d 928, plaintiffs brought various claims against for-profit schools, asserting that defendants engaged in a deceptive scheme to procure enrollment of prospective students. *Id.* at 930. Among other things, plaintiffs sought injunctive relief under the UCL, FAL and CLRA. *Id.* Reversing the district court's decision declining to compel arbitration of claims seeking injunctive relief, the Ninth Circuit found the *Broughton-Cruz* rule "clearly irreconcilable" with the United States Supreme Court's decisions in *Concepcion* and *Marmet*. *Id.* at 934. As explained by the Ninth Circuit, the Supreme Court stated a simple rule: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* (quoting *Concepcion*, 131 S.

[4] Plaintiff in *Nelsen* asserted statutory wage claims and a UCL claim seeking, among other things, injunctive relief on behalf of a putative class of defendant's current and former employees. *See id.* at 1120-21. The Court of Appeal noted that the parties disputed whether the injunction sought was a "public" injunction under *Broughton* and *Cruz* and ultimately held that plaintiff had waived her argument that her claim for injunctive relief was inarbitrable under the *Broughton-Cruz* rule by failing to raise it in the trial court. *See id.* at 1136.

Ct. at 1747). The Ninth Circuit therefore concluded that: "By exempting from arbitration claims for public injunctive relief under the CLRA, UCL, and FAL, the *Broughton–Cruz* rule similarly prohibits outright arbitration of a particular type of claim." *Ferguson*, 733 F.3d at 934.

This Court has recently acknowledged the impact of *Concepcion* and its progeny. For example, in *Sonic-Calabasas A, Inc. v. Moreno (Sonic II)*, 57 Cal. 4th 1109 (2013), *cert. denied*, 134 S. Ct. 2724 (2014), this Court reconsidered its opinion in *Sonic–Calabasas A, Inc. v. Moreno (Sonic I)*, 51 Cal. 4th 659 (2011), which had established a "categorical rule" that it was contrary to public policy and unconscionable for an employment arbitration agreement to waive the employee's right to seek an informal hearing before the Labor Commissioner, a so-called "Berman" hearing. *Sonic II*, 57 Cal. 4th at 1124. The decision in *Sonic II* overturned this "categorical rule" in light of *Concepcion*, which this Court found to have "clarified the limitations that the FAA imposes on a state's capacity to enforce its rules of unconscionability on parties to arbitration agreements," explaining that "[w]here a state-law rule interferes with fundamental attributes of arbitration, the FAA preempts the state-law rule even if the rule is designed to facilitate prosecution of certain kinds of claims. *Concepcion* established this principle, *Italian Colors* reaffirmed it, and we apply it today to invalidate the categorical rule on waiving a Berman hearing that we adopted in *Sonic I*." *Sonic II*, 57 Cal. 4th at 1124, 1157.

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), this Court similarly reconsidered its earlier opinion in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). Overturning its earlier decision in *Gentry* declining to enforce an arbitration agreement, this Court concluded that "a state's refusal to enforce [a class] waiver on grounds of public policy or unconscionability is preempted by the FAA." *Iskanian*, 59 Cal. 4th at 360. This Court specifically reasoned that *Gentry* had been abrogated in this regard by recent United States Supreme Court precedent, including *Concepcion* and *Italian Colors*. *See id.* at 364.

As reflected in *Sonic II* and *Iskanian*, substantial United States Supreme Court authority requires that prior rulings regarding the enforceability of arbitration agreements be reassessed. There simply is no sound legal basis to distinguish between the *Broughton-Cruz* rule and the *Discover Bank* rule. Neither survives *Concepcion* and its progeny. Both are state-law rules that impermissibly prevent enforcing arbitration agreements according to their terms by "prohibit[ing] outright the arbitration of a *particular type of claim*." *Concepcion*, 131 S. Ct. at 1747 (emphasis added). Therefore, "the analysis is *straightforward*: The conflicting rule is *displaced* by the FAA." *Concepcion*, 131 S. Ct. at 1747 (emphasis added). Nor should this Court's FAA analysis be influenced by a belief that allowing a claim to be litigated will more effectively vindicate the substantive rights at issue. "[T]he high court has established that the

FAA does not permit courts to invalidate arbitration agreements based on the view that the procedures they set forth would weaken the protections afforded in the substantive law to would-be complainants." *Iskanian*, 59 Cal. 4th at 393 (Chen, J., concurring) (internal citation, alteration and quotation marks omitted).

For each of these reasons, this Court should make clear that the *Broughton-Cruz* rule is no longer good law in light of *Concepcion* and its progeny.

C. McGill's Contention That The Arbitration Agreement "Bans" Arbitration Of Her Claims For Public Injunctive Relief Is Without Merit.

1. McGill Did Not Properly Preserve This Argument For Review By This Court.

Attempting to avoid the conclusion that the *Broughton-Cruz* rule is no longer viable, McGill argues that the Arbitration Agreement itself, rather than public policy as announced in *Broughton* and *Cruz*, should be construed to permit litigation of her claims for public injunctive relief. (*See* Respondent's Opening Br. 18.)

As a threshold matter, McGill did not properly preserve this argument. Indeed, she presented the completely opposite position below. In the Court of Appeal, she maintained that "Citibank's arbitration agreement does *not* expressly bar Plaintiff from seeking public injunctive relief in arbitration," but that "due to limitations inherent in arbitration

(recognized in *Broughton*), an arbitrator cannot award such relief." (Pl.'s letter brief, July 23, 2014, at 7 (emphasis added).) She never argued, as she does now, that contractual restrictions on arbitrating these claims are the very things that save them from having to be arbitrated.[5] Accordingly, McGill's new (and contrary) argument should not be considered for the first time here. *See Flannery v. Prentice*, 26 Cal. 4th 572, 591, 28 P.3d 860 (2001) ("As a matter of policy, on petition for review, we normally do not consider any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal.")

2. The FAA Mandates Enforcement Of The Arbitration Agreement As Written, Regardless Of What It Says Or Implies About Claims Seeking Public Injunctive Relief.

As set forth above, the Arbitration Agreement specifically provides that claims "must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis" and that "the arbitrator may award relief only on an individual (non-class, non-representative) basis." (Vol. 1 CT 108-110.) Even if ambiguous or

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[5] McGill first advanced this argument in her Petition for Rehearing. The Court of Appeal correctly declined to entertain the argument, finding that McGill had waived the argument by failing to raise it below. (Order Denying Petition for Rehearing, Jan. 7, 2015, at 1-2.) That decision was correct, since it is well settled that arguments not presented in the briefs may not be raised for the first time either at oral argument or in a petition for rehearing. *See Acquire II, Ltd. v. Colton Real Estate Grp.*, 213 Cal. App. 4th 959, 978 n.12 (2013); *Gentis v. Safeguard Bus. Sys., Inc.*, 60 Cal. App. 4th 1294, 1308 (1998).

subject to reinterpretation, as now argued by McGill, neither of which is the case here, the FAA mandates that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Accordingly, a court may not avoid the FAA by applying state-law rules of contract interpretation to limit the scope of an agreement to arbitrate, as McGill proposes.

In *Imburgia v. DirecTV, Inc.*, 225 Cal. App. 4th 338, 343-45 (2014), the Second District Court of Appeal refused to enforce an arbitration agreement governed by the FAA by interpreting the contract language in a way that precluded arbitration of plaintiff's claims. In so deciding, the Court of Appeal created a conflict with the Ninth Circuit, which held that the same agreement was enforceable under *Concepcion*. *See Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1228 (9th Cir. 2013). *Imburgia* is now pending before the United States Supreme Court. Although the outcome in *Imburgia* cannot be predicted, the transcript of oral argument suggests that at least Chief Justice Roberts and Justices Alito, Scalia, Kagan and Breyer—a majority of the Supreme Court—would reject any state-law rule of contract interpretation that is applied to undermine the federal policy to enforce arbitration agreements as written. *See* Transcript of Oral Argument

at 8-9, 12, 29-31 34, 38-39, 45, 50-51, *DirecTV, Inc. v. Imburgia*, 135 S. Ct. 1547 (2015) (No. 14-462).

The FAA mandates enforcement of the Arbitration Agreement as written. The *Broughton-Cruz* rule necessarily complicates and interferes with efficient, streamlined arbitration proceedings, and accordingly is preempted. As explained in *Concepcion*, the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. As written, the Arbitration Agreement provides for streamlined proceedings by making clear that the arbitrator may award relief, including injunctive relief, only on an individual basis. In this regard, both this Court and the United States Supreme Court have held that requiring extensive judicial or administrative procedures in addition to the arbitration itself violates the FAA because the "prime objective" of "streamlined proceedings and expeditious results" would be defeated. *Id.* at 1749 (quoting *Preston*, 552 U.S. at 358 (holding that the FAA preempts a state law requiring an initial reference of the parties' dispute to the California Labor Commissioner, and that state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA)); *Sonic II*, 57 Cal. 4th at 1139 (holding that the FAA, as construed in *Concepcion*, preempts a state-law rule prohibiting waiver of a Berman hearing in arbitration agreements). For the same

reasons, requiring *post*-arbitration judicial or other procedures would equally violate the FAA's objectives. Accordingly, the proceedings necessary to modify or vacate an injunction, the need for continuing jurisdiction and the difficulties inherent in enforcing an arbitral injunction identified by this Court in *Broughton* would improperly "interfere[] with arbitration." *Concepcion*, 131 S. Ct. at 1750. Indeed, McGill herself recognizes that those procedures would be open-ended and burdensome. (*See* Respondent's Opening Br. 57.)[6] Because engrafting the procedures necessary for a public injunction would run afoul of the FAA's objectives, the Arbitration Agreement must be enforced as written.

McGill's reliance on *Iskanian* is wholly misplaced. In addition to overturning *Gentry*'s prohibition on class-action waivers, *Iskanian* addressed whether a ban on the right to bring a representative action under California's Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.* ("PAGA"), was similarly preempted. Under PAGA, which is specific to the employment context, individual citizens are "deputized" as

[6] The Court should decline McGill's invitation to determine what specific procedures might apply if a motion were to be brought in court to confirm an arbitration award that included injunctive relief, including whether it might be necessary for a court to enforce an injunction awarded by an arbitrator, since "[t]hose questions can be better addressed in the context of an actual case, with arguments directed more specifically to the questions raised in that case." *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1061 (9th Cir. 2013). They also are for the arbitrator to decide in the first instance. (*See* Vol. 1 CT 108-110.)

private attorneys general to enforce the California Labor Code to recover statutory civil penalties on behalf of California's Labor and Workforce Development Agency (the "LWDA"). *Iskanian*, 59 Cal. 4th at 382-84. Unlike the statutes at issue here, as explained by this Court, a PAGA claim "is a dispute between an employer and the *state*," and the "fact that any judgment in a PAGA action is binding on the government confirms that the state is the real party in interest," *id.* at 386-387 (emphasis in original), and that the claims are not subject to the FAA in the first instance. Critically, this Court was careful to limit its PAGA holding in *Iskanian* to the situation presented in that case, stressing, "Our FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought *by the state or its representatives*, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." *Id.* at 388 (emphasis added). McGill's claims as a party to a private contract therefore are wholly distinguishable from a claim, as in *Iskanian*, where the state is the real party in interest and has a pecuniary interest in the litigation's outcome. Here, by contrast, entry of an injunction would yield no financial benefit to the state, and the statutes upon which McGill sues are nothing like PAGA.

McGill's reliance on *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), is equally unavailing. In *Waffle House*, which also was an employment case, the Supreme Court held that the FAA did not affect the

EEOC's ability to assert its statutory authority because the EEOC was not a party to the arbitration agreement at issue and had not agreed to arbitrate its claims. *See Waffle House*, 534 U.S. at 294. While *Waffle House* may support this Court's holding in *Iskanian* regarding the arbitrability of PAGA claims, it does nothing to support McGill's argument here.

Despite McGill's assertions, *Italian Colors* utterly contradicts her argument. In *Italian Colors*, the Supreme Court enforced the arbitration agreement at issue, while observing that where an arbitration agreement prevented the "'effective vindication' of a federal statutory right," such as "a provision in an arbitration agreement forbidding the assertion of certain statutory rights," the FAA would not mandate enforcement of the provision. *Italian Colors*, 133 S. Ct. at 2310. Here, of course, McGill asserts only state-law, and not federal, statutory claims, and the Arbitration Agreement does not bar assertion of a CLRA, UCL or FAL claim in arbitration, but merely requires such a claim to be arbitrated on an individual basis. However, even if the Arbitration Agreement did bar such claims, which it does not if brought on an individual basis, the "effective vindication" (or "inherent conflict") exception articulated in *Italian Colors* would not apply because these exceptions apply only to federal laws, not state laws. *See Sonic II*, 57 Cal. 4th at 1155 (stating that "the 'effective vindication' exception in *Italian Colors*" is "a doctrine that guides the harmonization of

federal statutes") (italics in original). As explained by the Ninth Circuit in *Ferguson*:

> The effective vindication and inherent conflict exceptions are two sides of the same coin—the former turning on the ability to vindicate a statute, and the latter turning on the underlying purposes of a statute. Both exceptions are reserved for claims brought under federal statutes. They rest on the principle that other federal statutes stand on equal footing with the FAA. In both *Mitsubishi Motors* and *Italian Colors* the claims at issue were under the federal antitrust laws, and the argument was that the federal antitrust statutes modified the FAA. "In [the] all-federal context, one law does not automatically bow to the other." In contrast, as bluntly stated by Justice Kagan in her dissent in *Italian Colors*, "We have no earthly interest (quite the contrary) in vindicating" a state law.

Ferguson, 733 F.3d at 936 (citations omitted). In other words, the "inherent conflict" and "effective vindication" exceptions rest on the principle that other federal statutes stand on equal footing with and therefore *modify* the FAA, whereas a state law that is in conflict with the federal law is *preempted by* the FAA. *Id.*[7]

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[7] McGill cites one United States Supreme Court case and two Circuit Court cases for the proposition that "an enforceable arbitration agreement must permit effective vindication of state created rights." (Respondent's Opening Br. 36.) As the Court of Appeal correctly observed, however, neither *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), nor *Booker v. Robert Half International, Inc.*, 413 F.3d 77 (D.C. Cir. 2005), contain any analysis of the issue, and *Preston*, 552 U.S. 346, did not involve application of the "effective vindication" exception to state rather than federal law; it merely noted that the change of forum in that case did not affect the parties' substantive state-law rights. *See Preston*, 552 U.S. at 358-59. The remaining federal cases cited by McGill likewise do not further her argument, as they involve the arbitrability of federal, not state, statutory rights. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (Sherman Anti-Trust Act);

Finally, McGill's argument that the principle of "effective vindication" should apply to state as well as federal law because "the FAA itself does not provide for waiver of substantive rights," and that "when an arbitration clause imposes terms requiring a party to forgo substantive rights, it exceeds what the FAA requires courts to enforce" (Respondent's Opening Br. 38), entirely misses the point. When enforcing state substantive rights would interfere with the goals and purposes of the FAA, the state law is *preempted*. *See Concepcion*, 131 S. Ct. at 1747.[8] The FAA plainly does not permit courts to invalidate arbitration agreements based on the view that the procedures they set forth would weaken the protections afforded in the substantive law. *Iskanian*, 59 Cal. 4th at 393 (Chen, J., concurring).

Accordingly, the Arbitration Agreement, which precludes a party from seeking public injunctive relief or the arbitrator from awarding such relief, must be enforced as written.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (Age Discrimination in Employment Act of 1967); *Green Tree Fin. Corp.--Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (Truth in Lending Act); *Waffle House*, 534 U.S. at 295 (Americans with Disabilities Act).

[8] McGill's claim that "the Court of Appeal initially recognized that the rule that the FAA preempts state rules that prohibit outright arbitration of a private claim is 'well-established and has been repeatedly reaffirmed'" (Respondent's Opening Br. 42 n.9) is simply wrong. The Court of Appeal stated, instead, that "[t]he FAA's *displacement of state laws that interfere with its purpose* 'is now well-established . . . and has been repeatedly reaffirmed." (Slip. op. at 8 (italics added).)

3. The Decision As To Whether Injunctive Relief Is Available Here Rests With The Arbitrator.

McGill alternatively asks the Court to direct the arbitrator to determine whether the Arbitration Agreement allows the arbitrator to enter her proposed injunction. Citibank agrees that the arbitrator has a role to play here, but that role should be limited to determining whether injunctive relief in favor of McGill alone is appropriate based on McGill's claims. (*See* Vol. 1 CT 108-110.) There also is no need at this juncture to determine what procedures would apply upon confirmation of an arbitration award, if any. *See Kilgore*, 718 F.3d at 1061 (compelling arbitration of claims seeking public injunctive relief, without reaching the issue of whether the *Broughton-Cruz* remained viable after *Concepcion*, because defendant no longer engaged in the challenged conduct and injunctive relief would not benefit the general public).

D. McGill's Request That This Case Be Remanded For A Determination Of Whether The Arbitration Agreement Is Unconscionable Based Upon The Preclusion Of Public Injunctive Relief Should Be Denied.

McGill asserts that the decision below must be reversed because the Arbitration Agreement is unconscionable, including because she is supposedly "barred from benefiting from relief obtained by a third party against Citibank for the covered claims," including "recovering any settlement proceeds as an absent class member, or from enjoying injunctive relief against Citibank obtained by another plaintiff." (Respondent's

Opening Br. 55.) McGill argues that "[t]he matter should be remanded for further factual development based on *Sonic II*." (*Id.*) These arguments lack merit.

First, McGill did not preserve her new argument about somehow being barred from receiving benefits as a non-party in other litigation. Accordingly, she has waived it.

Second, the Arbitration Agreement's requirement that claims be arbitrated on an individual, non-class and non-representative basis cannot be found unconscionable because the only factor identified as creating unconscionability is the arbitration process itself. The FAA and *Concepcion* forbid a finding of unconscionability on that basis alone.

Third, nothing in *Sonic II* counsels for further factual development on remand here. While the petitioner in *Sonic II* contended at oral argument that the actual arbitration process used by petitioner included characteristics similar to those of a Berman hearing, because the facts about the arbitration process were not in the record and an unconscionability defense (other than one based on public policy) apparently had not been pursued in the lower courts, the Court held that evidence concerning these facts could be presented in a determination of unconscionability on remand. *See Sonic II*, 57 Cal. 4th at 1146-47. Here, unlike in *Sonic II*, McGill had the opportunity to present her unconscionability defense in the trial court, and she did so, contending that the Arbitration Agreement was

substantively unconscionable in that it "would require [her] to forfeit substantive rights" because "the CLRA, FAL and UCL each creates public rights that cannot be arbitrated." (Vol. 3 CT 872, 879.) If this Court holds, as it should, that the FAA and *Concepcion*, invalidate *Broughton* and *Cruz*, that holding should also necessarily resolve McGill's defense based on substantive unconscionability, without the need for any further factual development in the trial court.

For each of these reasons, remand for further analysis of McGill's unconscionability claim would not be appropriate.

V. CONCLUSION

For the foregoing reasons, Citibank respectfully requests that the Court of Appeal's Order directing the trial court to order McGill's claims in their entirety to arbitration be affirmed.

DATED: October 30, 2015 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. R. Ct. 8.204(c)(1))

The text of this Respondent's Brief consists of 8,226 words as counted by Microsoft Word 2010, the computer program used to generate the Brief, excluding the parts of the Brief exempted by Cal. R. Ct. 8.204(c)(3).

DATED: October 30, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Los Angeles, CA 90067-3086.

On October 30, 2015, I served the foregoing document(s) described as: **ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

See Attached Service List

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☐ **(VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth above.

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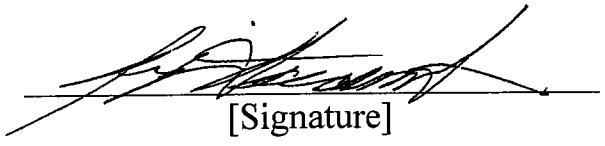
I declare that I am employed in the office of a member of the bar of this court, at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 30, 2015, at Los Angeles, California.

Regina Harcourt
[Type or Print Name]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