S220812

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TIMOTHY SANDQUIST,
Plaintiff and Respondent,

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CLERK SUPREME COURT

vs.

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

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

PLAINTIFF'S NOTICE OF ERRATA REGARDING ANSWER BRIEF ON THE MERITS

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TO THE HONORABLE FRANK MCGUIRE, CLERK OF THE CALIFORNIA SUPREME COURT:

It has come to Respondent's attention that there were a few errors in the Answer Brief filed with this Court on March 13, 2015 in the above-referenced matter. The corrections are indicated below.

On page 12, the following sentences "The court held … *See id.* at pp. 71-73." were amended as indicated in this chart:

Original Text	Corrected Text
The court held that, under the facts presented, the unconscionability defense was an issue for a court to decide. In doing so, the Court determined that whether an arbitration clause is unconscionable – and thus unenforceable – is a substantive "gateway" question unless there is an express contractual provision "clearly and unmistakably" delegating the issue to the arbitrator. *See id.* at pp. 71-73.	The Court began from the premise that the issue of whether an arbitration clause is unconscionable – and thus unenforceable – is presumptively a substantive "gateway" matter for a court. *See id.* at pp. 69 n.1. This presumption is only overcome (as in *Rent-A-Center* itself) when the parties' contract "clearly and unmistakably" delegates the issue to the arbitrator. *Ibid.*

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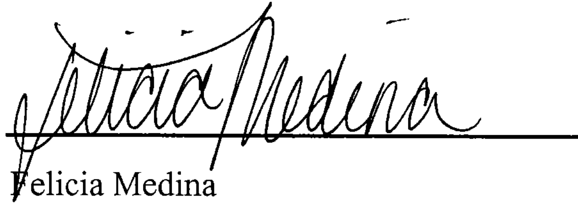
On pages 23 and 24, the paragraph "In sum, … available in arbitration." was amended as indicated in this chart:

Original Text	Corrected Text
In sum, *Stolt-Nielsen* and *Oxford Health* deal with very different issues than *Bazzle. Stolt-Nielsen* and *Oxford Health* "caution that classwide arbitration and individual arbitrations are very different *procedures*." *Williams-Bell*, *supra,* 2015 U.S. Dist. LEXIS 2033 at *21. *Bazzle*, in contrast, squarely addresses the question of **who** is to decide the *procedural* matter of whether the class mechanism is available in arbitration.	In sum, *Stolt-Nielsen* and *Oxford Health* deal with very different issues than *Bazzle. Stolt-Nielsen* "caution[s] that classwide arbitration and individual arbitrations are very different *procedures*." *Williams-Bell*, *supra,* 2015 U.S. Dist. LEXIS 2033 at *21. *Bazzle*, in contrast, squarely addresses the question of **who** is to decide the *procedural* matter of whether the class mechanism is available in arbitration. *Oxford Health*, in turn, concerns only the highly deferential and circumscribed standard of review that courts apply to arbitrators' actual clause construction determinations.

Respondent is enclosing in this submission the original and eight (8) copies of pages 12, 23, and 24 from the brief upon which the corrected sections appear. Respondent apologizes for any inconvenience this may have caused the Court.

Dated: March 17, 2015

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1)

Even with the corrections referenced above, this brief complies with the length limitation of California Rule of Court 8.204(c)(1). With corrections, the Answer Brief now has a total of 13,362 words, excluding the parts of the brief exempted by the aforementioned rule. The Notice of Errata contains 407 words, excluding those parts of the notice exempted by the aforementioned rule.

DATED: March 17, 2015 **SANFORD HEISLER KIMPEL, LLP**

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CORRECTED PAGES 12, 23, AND 24

TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

Court determined that the court was the proper party to decide whether the claims against the Kaplans in their individual capacities were subject to arbitration. *Id.* at p. 947. *First Options* thus creates a presumption that courts, and not arbitrators, decides substantive questions, including whether parties who did not sign an arbitration agreement were nonetheless bound to submit to arbitration.

The Court's subsequent holding in *Rent-A-Center*, *supra*, 561 U.S. 63, added unconscionability defenses to the set of substantive issues presumptively within the authority of the courts to decide. *Rent-A-Center* involved an employment discrimination suit. When the employer moved to compel arbitration, the employee argued that the arbitration agreement was unconscionable under state law. Thus, the employee contended, the parties' dispute could not be arbitrated and belonged in court. The Court began from the premise that the issue of whether an arbitration clause is unconscionable – and thus unenforceable – is presumptively a substantive "gateway" matter for a court. *See id.* at pp. 69 n.1. This presumption is only overcome (as in *Rent-A-Center* itself) when the parties' contract "clearly and unmistakably" delegates the issue to the arbitrator. *Ibid.*

Taken together, *First Options* and *Rent-a-Center* help define substantive questions as threshold issues concerning whether an enforceable arbitration agreement exists or whether particular legal claims are subject to arbitration. *See also AT&T Techs. v. Communs. Workers of Am.* (1986) 475 U.S. 643, 651-52 (holding that courts presumptively resolve disagreements about whether an arbitration clause in a concededly-binding contract applies to a particular type of controversy).[5] These

[5] Defendants erroneously contend that *AT&T Technologies* creates a presumption that courts should determine "jurisdictional questions." Defs.' Br. at p. 9. The Court's actual holding was much narrower: "It is the court's duty to interpret [a collective bargaining] agreement and to determine

Accordingly, nothing in the *Stolt-Nielsen* or *Oxford Health* holdings themselves strikes at the underpinnings of *Bazzle's* "who decides" rule, and it would be improper for this Court to read such muddled tea leaves. The Ninth Circuit has recently reaffirmed that U.S. Supreme Court plurality opinions should be followed as "persuasive authority." *Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d 1109, 1127 n.5. Indeed, the recent California decisions on which Defendants have relied specifically note that *Stolt-Nielsen* did not overrule *Bazzle. See Nelsen v. Legacy Partners Residential Inc.* (2012) 144 207 Cal.App.4th 1115, 1129 n.6; *Truly Nolen of Am. v. Superior Court* (2012) 208 Cal.App.4th 487, 515 n.4. *Bazzle* is therefore still good law and, as courts have stressed, remains the U.S. Supreme Court's most definitive guidance on the question at issue here. *See, e.g., Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.* (7th Cir. 2011) 671 F.3d 635, 639 (rejecting arguments that *Stolt-Nielsen* overturned *Bazzle*); *Harrison, supra*, 2014 U.S. Dist. LEXIS 117154 at *13-14 ("the plurality opinion dealt with precisely the same issue pending in the present motion, and no Supreme Court decision has subsequently offered clearer guidance . . . *Bazzle* guides the analysis here, and class arbitration is reserved as a matter for the Arbitrator to decide").[10]

In sum, *Stolt-Nielsen* and *Oxford Health* deal with very different issues than *Bazzle. Stolt-Nielsen* "caution[s] that classwide arbitration and

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[10] *See also In re A2P SMS Antitrust Litig., supra*, 2014 U.S. Dist. LEXIS 74062 at *34-39 (emphasizing that the differences between individual and class arbitration discussed in *Stolt-Nielsen* do not "rebut the core point in *Bazzle* that the class of questions of arbitrability is a limited one, and that the availability of class arbitration pertains to the procedures to be employed at an arbitration, not whether an arbitration is permissible in the first instance"); *Williams-Bell v. Perry Johnson Registrars Inc.* (N.D.Ill. Jan. 8, 2015, No. 14-C-1002) 2015 U.S. Dist. LEXIS 2033 at *16 (*Bazzle*, while a plurality opinion, is the only Supreme Court decision "directly on point").

individual arbitrations are very different *procedures*." *Williams-Bell*, *supra*, 2015 U.S. Dist. LEXIS 2033 at *21. *Bazzle*, in contrast, squarely addresses the question of **who** is to decide the *procedural* matter of whether the class mechanism is available in arbitration. *Oxford Health*, in turn, concerns only the highly deferential and circumscribed standard of review that courts apply to arbitrators' actual clause construction determinations.

F. Dozens of State and Federal Decisions Accord with *Bazzle*

1. <u>A Distinct Majority of Federal Courts Follow *Bazzle*, Even After *Stolt-Nielsen*</u>

Plaintiff acknowledges that two federal Circuit courts have recently broken from *Bazzle* and sided with Defendants on this issue. *Opalinski v. Robert Half Int'l, Inc.* (3d Cir. 2014) 761 F.3d 326; *Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594. Yet, Defendants create a misperception that these opinions represent a newly-emergent consensus or supersede dozens of decisions adhering to *Bazzle*. As discussed above in Section I(E), none of the Supreme Court's intervening decisions – including *Stolt-Nielsen* and *Oxford Health* – warrant departure from *Bazzle*. Further, the fact that *Opalinski* and *Reed-Elsevier* are more recent than certain others cases in the "who decides" jurisprudence cannot salvage the fundamentally-flawed logic that animates the two opinions. As discussed below in I(G), the Third and Sixth Circuits have conflated the fact that a plaintiff's ability to proceed on a class basis is highly consequential to a case with the imperative that a court (*only*) decides *substantive* questions of "arbitrability."

Notwithstanding the Third and Sixth Circuits' missteps, *Bazzle*'s distillation and application of the substantive/procedural dichotomy remain in force. Further, numerous federal Circuits have adopted the sound reasoning that undergirds *Bazzle*, making clear that Defendants' position is