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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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Deputy

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

LEBO AUTOMOTIVE, INC.'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

In his *Answer Brief,* Plaintiff and Appellant Timothy Sandquist ("Appellant") concedes that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *Answer Brief,* at 11 [quoting *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 945]. He similarly concedes that the Court in *First Options* "established a presumption that courts determine whether a dispute must be sent to arbitration; this presumption spares unwilling parties from 'arbitrat[ing] a matter they reasonably would have thought a judge, not an arbitrator, would decide.'" *Answer Brief,* at 11 [quoting *First Options,* at 945]. Yet, he then spends the remainder of his brief arguing that an arbitrator nonetheless should decide whether Defendants and Respondents ("Respondents") should be forced to arbitrate a class action when there is no evidence that they ever agreed to do so.

Appellant's facile arguments ignore the stark difference between arbitrating an individual claim and arbitrating a class action. Classwide arbitration is not merely a type of legal procedure. It is so fundamentally different than individual arbitration that unless the parties specifically vest the arbitrator with the power to order classwide arbitration, that decision must remain with the court. As the United States Supreme Court recognized in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 685, "class action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their dispute to an arbitrator."

For the reasons set forth in the *Opening Brief*, and expanded upon below, the question of whether Respondents in this case may be compelled to arbitrate on a classwide basis is a decision for the court. The Superior Court below correctly decided the question, and decided the question correctly.

LEGAL DISCUSSION

I. APPELLANT INCORRECTLY ASSERTS THAT CONTROLLING LAW GIVES AUTHORITY TO ARBITRATORS TO DECIDE WHETHER TO PERMIT CLASS ARBITRATION

A. *First Options* Provides the Framework for Determining the Question of Who Decides Arbitrability

Appellant seems to agree that the United State Supreme Court's decision in *First Options* provides the framework for determining the question of who decides arbitrability, but in many respects Appellant misinterprets that case. *Answer Brief*, at 11-13. The Court in *First Options* was emphatic: "[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." 514 U.S. at 943 [emphasis in original]. "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts." *Id.*, at 944.

As further discussed in *First Options*, there is very limited federal common law regarding the interpretation of arbitration agreements – state law provides the heavy lifting in this area. The limited federal common law that does exist prohibits

courts from interpreting arbitration agreements as authorizing arbitrators to decide "questions of arbitrability" unless such authorization from the parties is "clear and unmistakable." *First Options, supra,* at 944-945 [citing *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 649]. "In this manner the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable...." *Id.,* at 944 [emphasis in original]. Thus, if under state law the arbitration agreement is silent or ambiguous on the question of who should decide a question of arbitrability, federal law requires that the court make that determination, versus giving 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." *Id.,* at 945.[1] In most other circumstances, however, state law controls the interpretation of arbitration agreements. *Id.,* at 944-945.

Appellant relies upon four cases which he contends stands for the proposition that only federal law should be considered when determining questions of arbitrability, and that state law is entirely irrelevant – *First Options; Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79; *Buckeye Check Cashing, Inc. v.*

[1] As discussed in the *Opening Brief,* the plurality opinion in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 451-453 would limit even the scope of this federal common law to questions of arbitrability concerning an arbitrator's jurisdiction to hear particular types of merit-based claims (i.e., contract claims, tort claims, statutory claims, etc.) – not an arbitrator's jurisdiction to hear class claims. *Opening Brief,* at 9.

Cardegna (2006) 546 U.S. 440; and *Rent-A-Center v. Jackson* (2010) 561 U.S. 63. *Answer Brief*, at 9-10. As already examined in detail above, *First Options* does anything but stand for the proposition that state laws of contract interpretation are irrelevant. Indeed, *First Options* directs courts to interpret the language of the underlying arbitration agreement using state law rules of contract interpretation. 514 U.S. at 944-945.

Howsam is no more helpful to Appellant. In *Howsam,* the United States Supreme Court reviewed the National Association of Securities Dealers' ("NASD") Code of Arbitration § 10304. 537 U.S. at 81. That provision set a statute of limitations for certain claims. *Ibid.* The Tenth Circuit Court of Appeals previously held that disputes over whether the provision barred particular arbitration claims was a question of arbitrability, presumptively for the court. *Id.*, at 82. Only that "presumption" question was later reviewed by the United States Supreme Court. *Id.,* at 82-83. Upon review, finding that statute of limitations questions were in fact "procedural," the Federal High Court held "that the applicability of the NASD time limit rule is a matter *presumptively* for the arbitrator, not for the judge." *Id.,* at 82, 84-86 [emphasis added]. The Court never considered state laws of contract interpretation in *Howsam* because only the question of presumption was at issue – not whether the particular arbitration agreement in question included language counteracting that presumption.

Finally, *Buckeye* and *Rent-A-Center* are entirely inapposite to the instant appeal. In *Buckeye*, the United States Supreme Court considered whether a party

could enforce an arbitration provision within an omnibus contract when the legality of the omnibus contract was challenged but not the legality of the arbitration provision itself. 546 U.S. at 442-443. The Court held that an unchallenged arbitration provision was enforceable in such circumstances. *Id.*, at 445-449. A few years later in *Rent-A-Center*, the Federal High Court completed the circle by finding that if a party challenged the legality of the arbitration provision itself, such questions were for the court to decide. 561 U.S. at 70-72. Whereas the questions raised in *Buckeye* and *Rent-A-Center* concerned general arbitration law, not the specifics of the particular arbitration agreements in question, no interpretation of those agreements was appropriate.

In short, pursuant to controlling federal law, this Court must interpret the parties' arbitration agreement to determine if it authorizes an arbitrator to determine whether a class arbitration may proceed. This Court may only find that an arbitrator is to determine that question if the parties' agreement provides *clear and unmistakable* authorization for an arbitrator to decide that question. In doing so, as set forth in *First Options*, this Court must employ the contract interpretation rules of this State. 514 U.S. at 944-945.

B. Under California's Contract Interpretation Rules the Arbitration Agreement at Issue Does Not Empower an Arbitrator to Decide to Impose Class Arbitration

The parties' arbitration agreement reads in pertinent part: "…I and the Company both agree that any claim, dispute, and/or controversy … between myself

and the Company … arising from … my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise… shall be submitted to and determined exclusively by binding arbitration." 1 JA 195. Appellant contends that the "any claim, dispute, and/or controversy" language empowers the arbitrator to determine questions of arbitrability, including the availability of class arbitration. *Answer Brief*, at 41-42. Astonishingly, the only authorities Appellant cites for this proposition are federal cases from Minnesota and various other states. *Answer Brief*, at 41-42, fn. 20. Appellant does not explain how out-of-state contract rules of interpretation have any bearing in this matter. Indeed no reasonable explanation exists.

As discussed in the *Opening Brief*, this Court recently determined that the "any dispute" language does not empower an arbitrator to determine questions of arbitrability. *Opening Brief*, at 10-11. In *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1091-1093, this Court reviewed 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. [Emphasis added, parenthetical in original omitted]. Despite the contractual language reading that "*any dispute*" fell within the arbitrator's jurisdiction, this Court 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. 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." *Id.,* at 1096.

Appellant argues that *City of Los Angeles* is not applicable to the instant case because it only addressed authorization over "substantive questions" (i.e., "questions of arbitrability"). *Answer Brief*, at 33-34. *That is exactly the point.* Pursuant to the binding precedent of *Stolt-Nielsen*, further discussed below, the availability of class arbitration is indeed a question of arbitrability. 559 U.S. at 687. Therefore, *City of Los Angeles* does indeed apply in this circumstance, and under California rules of contract interpretation, the parties' agreement cannot be read as conferring to the arbitrator authority to decide whether classwide arbitration is available.

C. Appellant Incorrectly Identifies the Decision Whether to Allow Classwide Arbitration as a Mere Matter of Procedure

Appellant's position in this appeal is based on the argument that the decision whether to allow classwide arbitration is not a question of arbitrability but merely a matter of procedure to be determined by an arbitrator. *Answer Brief*, at 11-34. This argument is incorrect.

As set forth in the *Opening Brief*, the Federal High Court declared in *Stolt-Nielsen* that "we see the question [of the availability of class arbitration] as being whether the parties *agreed to authorize* class arbitration." 559 U.S. at 687 [emphasis in original]; *Opening Brief*, at 12-13. This "agreed to authorize" language is critically important because the United States Supreme Court has long 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]. In other words, without expressly so stating, the Federal High Court has determined that the availability of class arbitration is a question of arbitrability by defining both the availability of class arbitration and questions of arbitrability in the same manner – namely, that they both concern whether the parties "agreed to authorize" the dispute to arbitration.

In addition, the *Stolt-Neilsen* Court roundly rejected the notion that whether classwide arbitration is available is merely a matter of procedure. The majority in *Stolt-Neilsen* criticized the dissenting Justices for "characterizing the question before the arbitrators in that case as being merely what 'procedural mode' was available to present AnimalFeeds' claims." 559 U.S. at 687. The Court noted, "[if] the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. But the FAA requires more. 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." *Ibid.* [emphasis in original; citation omitted].

Appellant attempts to minimize *Stolt-Nielsen* – without ever addressing the foregoing language directly, decrying that the Court's analysis "does not address the 'who decides' question…." *Answer Brief* at 22. *That is not the point.* Has the Federal High Court expressly determined whether the availability of class arbitration is a question of arbitrability? No. Indeed, the United States Supreme Court confirmed in *Oxford Health Plans, LLC v. Sutter* (2013) 133 S.Ct. 2064, 2068 fn. 2,

that it has not yet expressly resolved the question. However, has the Federal High Court signaled that it would reach that conclusion by describing the availability of class arbitration in the same language as that used to define questions of arbitrability, and by rejecting the notion that the availability of classwide arbitration is merely a matter of procedure? Yes. This is exactly what the Sixth Circuit Court of Appeals meant when it explained, "the [United States Supreme] Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question" – requiring judicial resolution – "rather than a subsidiary one." *Reed Elsevier, Inc. v. Crockett* (6th Cir. 2013) 734 F.3d 594, 597-598.

D. Appellant Also Ignores the Fact that Classwide Arbitration Would Force Non-Parties to the Agreement to Engage in Arbitration

It is important to remember that Appellant and Respondents are the only parties to the arbitration agreement in this case. 1 JA 195. Yet, as illustrated in the *Opening Brief*, imposing classwide arbitration would necessarily compel the claims of non-parties to arbitration. *Opalinski v. Robert Half Intern. Inc.* (3rd Cir. 2014) 761 F.3d 326, 332-333; *Reed, supra,* 734 F.3d at 598; *Oxford, supra,* 133 S.Ct. at 2071-2072 [J. Alito concurring]; *Opening Brief,* at 14-15. The United States Supreme Court has long held that determining whose claims are subject to an arbitration agreement is a question of arbitrability presumptively for the courts to decide. *John Wiley & Sons v. Livingston* (1964) 376 U.S. 543, 546-547.

Appellant does not offer any direct response to this point. Rather, he challenges Respondents as "feign[ing] concern[2] for the due process rights of absent class members.... [A]rbitrators are fully capable of preserving those rights...." *Answer Brief,* at 32. However, the point is not whether an arbitrator can adequately protect due process rights. Nowhere in the *Opening Brief,* the *Opalinski* and *Reed* opinions, nor in Justice Alito's concurring *Oxford* opinion are due process rights ever addressed.[3] Rather, the concern addressed in these cases is whether an arbitrator has the authority to consider the claims of absent class members based upon the language of a bilateral arbitration agreement to which they were not a party. *Opalinski, supra,* 761 F.3d at 332-333; *Reed, supra,* 734 F.3d at 598; *Oxford, supra,* 133 S.Ct. at 2071-2072 [J. Alito concurring]. This is a question of arbitrability. *John Wiley, supra,* 376 U.S. at 546-547.

Appellant's argument that "arbitrators are fully capable of preserving those [due process] rights through carefully defining the class and issuing the best

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[2] Apparently, the Third and Sixth Circuit Courts of Appeals were also "feigning concern" when they found the availability of class arbitration a question of arbitrability for this very reason. *Opalinski, supra,* 761 F.3d at 332-333; *Reed, supra,* 734 F.3d at 598. Apparently, so too, was Justice Alioto "feigning concern" when he raised this same analysis in his *Oxford* concurring opinion. 133 S.Ct. at 2071-2072 [J. Alito concurring]. Finally, numerous district courts have apparently also "feigned concern" when adopting this same analysis. *See e.g., Chesapeake Appalachia v. Scout Petroleum* (M.D.Pa. Dec. 19, 2014) Case No. 4:14-CV-0620, at **7-27; *Chico v. Hilton Worldwide* (C.D.Cal. Oct. 7, 2014) Case No. 14-5750, at *12.

[3] It appears Appellant confuses this argument with the discussion in *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, 1751-1752 that class procedures in arbitration are ill-suited to protect the due process rights of absent class members.

practicable notice," epitomizes the problem. "[A]rbitration 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." *Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 582. If arbitrators decide in the first instance whether the claims of absent class members will be included in a class action – the claims of those absent class members have *already* been arbitrated to a degree, and those absent members included within any final class are further required to *proactively* opt out of the litigation to stop even further arbitration. For this very reason, an arbitrator can *never* consider the availability of class arbitration, and can *never* determine which absent parties are eligible to become part of any class, regardless of the language of a bilateral arbitration agreement. Otherwise, parties who have not previously agreed to arbitration will be forced to submit their claims to such litigation to some degree.

E. Appellant Mischaracterizes *Bazzle* as "Precedent" When It Is Not

In his *Answer Brief*, Appellant mischaracterizes *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444 as "precedent." *Answer Brief*, at 22. Appellant contends that: (1) the *Bazzle* plurality decided that arbitrators are to determine the availability of class arbitration in all circumstances; (2) the *Bazzle* plurality analysis was adopted by a majority of the Court; and (3) the United States Supreme Court has not yet overturned the *Bazzle* plurality opinion. *Answer Brief*, at 19-27. This argument is meritless on every point.

First and foremost, as detailed in the *Opening Brief*, the *Bazzle* plurality based its decision primarily upon a contract interpretation analysis. *Opening Brief*, at 8-10.

The *Bazzle* plurality emphasized that the question before it was primarily one of interpreting the specific arbitration agreement in question:

> Under the terms of the parties' contracts, the question — whether the agreement forbids class arbitration — is for the arbitrator to decide. The parties agreed to submit to the arbitrator *"[a]ll* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." And the dispute about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute "relating to this contract" and the resulting "relationships." Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.

539 U.S. at 451-452 [internal citations omitted].

In doing so, the plurality chided the dissent for employing its own federal common law standard of statutory interpretation, rather than the applicable state law for resolving the question:

> The Chief Justice believes that Green Tree is right; indeed, that Green Tree is so clearly right that we should ignore the fact that state law, not federal law, normally governs such matters.

Bazzle, supra, 539 U.S. at 450 [internal citations omitted].

Appellant attempts to sweep this entire analysis aside in a footnote, arguing that "[t]he plurality citied multiple reasons for its holding, including U.S. Supreme

Court precedent on the substantive/procedural dichotomy and policy consideration regarding the fitness of arbitrators to resolve the relevant issues." *Answer Brief*, at 21 fn. 9. Respondents do not dispute that other factors played minor roles in the plurality decision. Indeed, if arbitrators were unfit to decide arbitrability questions, any contractual provision authorizing arbitrators to determine such questions would be void. Likewise, whether the question is "procedural" or "substantive" (i.e., a question of arbitrability), affects the manner in which the court will interpret the contractual language. For instance, if the question is substantive, the language conferring authorization to the arbitrator must be express. *First Options, supra,* 514 U.S. at 944-945; *City of Los Angeles, supra,* 56 Cal.4th at 1096 ["[U]nless an arbitration agreement expressly provides otherwise, a dispute regarding the scope of a contractual duty to arbitrate is subject to judicial resolution"]. However, at the end of the day, the question is still primary resolved by employing state rules of contract interpretation to determine what the parties agreed upon.

Appellant also contends that Respondents have not provided a sufficient reason for why the arbitration agreement here should be interpreted differently than the arbitration agreement in *Bazzle*. The reason is simple – *Bazzle* was a case from South Carolina employing South Carolina rules of contract interpretation, whereas the arbitration agreement here must be interpreted under California rules of interpretation. *Bazzle, supra,* 539 U.S. at 447. As discussed above, under California law, terms such as "any dispute," are insufficient to confer arbitrators with authority

over questions of arbitrability. Unlike South Carolina law, the authorization must be express under the laws of this State. *City of Los Angeles, supra,* 56 Cal.4th at 1096.

Next, Appellant argues that Justice Stevens adopted the plurality's analysis in his concurrence – thus rendering the analysis a majority opinion. This notion is expressly rejected by the concurring opinion itself. Justice Stevens' concurrence notes that while "arguably" the arbitrator may have been the correct authority to determine the availability of class arbitration in that particular case, that question was moot "[b]ecause the decision to conduct a class-action arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision." *Bazzle, supra,* 539 U.S. at 455 [J. Stevens concurring]. Because the "arguable" error was moot, "there is no need to remand the case to correct that *possible* error. [¶] I would simply affirm the judgment of the Supreme Court of South Carolina." *Ibid.* [emphasis added].

To re-emphasize the fact that he was not adopting the plurality opinion's analysis, Justice Stevens then explained, "Were I to adhere to my preferred disposition of the case, however, there would be no controlling judgment of the Court. In order to avoid that outcome, and because Justice Breyer's opinion expresses a view of the case *close* to my own, I concur *in the judgment*." *Bazzle, supra,* 539 U.S. at 455 [J. Stevens concurring; emphasis added].

Lastly, throughout his *Answer Brief*, Appellant repeatedly heralds that "*Bazzle* has never been overturned." *See e.g., Answer Brief* at 21. This argument presupposes that *Bazzle* is binding authority until it is "overturned." It is not. As the

Court in *Stolt-Neilsen* remarked, the parties in that case appeared to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. "In fact, however," the Court pointed out, "only the plurality decided that question." 559 U.S. at 680.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States* (1977) 430 U.S. 188, 193 [internal quotations and citation omitted]; *see also Texas v. Brown* (1983) 460 U.S. 730, 737 [a plurality opinion is "not a binding precedent."]. In other words, where there is no overlap between the various concurring opinions in analysis, but only in judgment, there is no binding precedent. Indeed, because of the lack of overlap between the plurality and concurring opinions in *Bazzle*, the United States Supreme Court has expressly advised, *twice*, that *Bazzle* offers no binding precedent. Once in *Stolt-Neilsen*, as noted above, and again in *Oxford, supra,* 133 S.Ct. at 2068 fn. 2: "*Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability."

Appellant astonishingly attempts to mischaracterize the *Stolt-Nielsen* Court as choosing not to overturn the *Bazzle* "precedent." *Answer Brief*, at 22. In fact, however, *Stolt-Nielsen* expressly found that there was no "precedent" to overturn. 559 U.S. at 680.

F. *Garcia* Establishes that Traditional California Law Provides for Courts to Determine the Availability of Class Arbitrations

Appellant inundates this Court with a self-described "deluge" of unpublished federal district court opinions which misinterpret *Bazzle* as providing that the availability of class arbitration is, by law, a procedural question for the arbitrator to decide. *Answer Brief*, at 26-27 fn. 12.[4] Aside from the fact that district court opinions are not precedential – especially when unpublished, *Camreta v. Greene* (2011) 131 S.Ct. 2020, 2033 fn. 7, these cases merely re-confirm what the United States Supreme Court recognized in *Stolt-Nielsen* – namely, that a great percentage of the legal community mistook *Bazzle* as requiring an arbitrator to decide whether an agreement permits class arbitration. *Stolt-Nielsen, supra,* 559 U.S. at 680. A

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[4] Appellant also cites a handful of Circuit Court of Appeals decisions for this same purported proposition. *Answer Brief*, at 23-25. However, with the exception of *Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d 1109, 1127 n. 5 and *Blue Cross Blue Shield of Mass. v. BCS Ins. Co.* (7th Cir. 2011) 671 F.3d 635, 639, all of these cases pre-date *Stolt-Nielsen*. Moreover, *Thalheimer* merely provides that plurality opinions are "persuasive authority." It has no connection with the question presented in this appeal. *Thalheimer,* at 1127 n. 5. Finally, *Blue Cross* dealt with a consolidated action of multiple individual actions – not a class claim. 671 F.3d at 636-637. Even *Blue Cross* recognized that class actions are different than consolidated actions because consolidated actions "do[] not change the stakes" like class actions. *Id.,* at 640. Consolidated actions concern parties who already exist, and do not require specialized procedures. They merely combine pre-existing litigation for the sake of efficiency. Class actions, on the other hand, require specialized procedures and concern additional parties who are not yet part of the litigation, who may not want to be part of the litigation, and who have certainly not agreed to the arbitrator in question. *Id.,* at 639-640. The only two Circuit Court cases to consider the "who decides" issue after *Stolt-Nielsen* in connection with class actions have been the Third Circuit in *Opalinski, supra,* 761 F.3d at 332-334, and the Sixth Circuit in *Reed Elsevier, supra,* 734 F.3d at 597-599 – both of which found the availability of class arbitration to be a question of arbitrability presumptively for the courts to decide absent contractual language to the contrary.

number of California state courts made this same mistake as well. In particular, in *Garcia v. Direct TV* (2004) 115 Cal.App.4th 297, 298 the appellate court was confronted with the very question of whether arbitrators are empowered to determine their own authority to hear class claims. Citing both California Supreme Court and Court of Appeal precedent, the *Garcia* court acknowledged that "California law... vests jurisdiction in our trial courts to determine whether" there is an "absence of a class action waiver" in the underlying arbitration agreement; and if so, whether the arbitrator is empowered to hear a class action. *Ibid.*

However, misconstruing the plurality opinion in *Bazzle*, as well as its lack of binding effect, the *Garcia* court then stated: "...[B]ut no longer. The [United States] Supreme Court has spoken, and the foundational issue – whether a particular arbitration agreement prohibits class arbitrations – must (in FAA cases) henceforth be decided by the arbitrators, not the courts. (*Green Tree Financial Corp. v. Bazzle* [].)" 115 Cal.App.4th at 298. Accordingly, as the *Garcia* court recognized, California law empowered courts to determine an arbitrator's authority to hear class claims prior to *Bazzle* – and still do in non-FAA matters.

Moreover, as noted above, the United States Supreme Court has since advised, *twice*, that the *Bazzle* plurality opinion was in fact not binding authority. *Stolt-Nielsen, supra,* 559 U.S. at 680; *Oxford, supra*, 133 S.Ct. at 2068, fn 2. In turn, the First Appellate District in *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1129, fn. 6, and Division One of the Fourth Appellate District in *Truly Nolen of America v. San Diego County* (2012) 208 Cal.App.4th 487, 515 fn. 4,

have both rightfully rejected *Garcia* for its belief that *Bazzle* was controlling precedent. Thereafter, both *Garden Fresh Restaurant Corporation v. Superior Court* (2014) 231 Cal.App.4th 678, and *Network Capital Funding Corporation v. Papke* (2014), 230 Cal.App.4th 503 [depublished pending review in this Court] have returned California jurisprudence back to its prior stance – that courts must determine the availability of class arbitration absent contractual language to the contrary.

In short, while *Bazzle* may have "baffled" many federal and state courts alike, in recent cases the California Courts have returned to the pre-*Bazzle* rule that courts must determine the availability of class arbitrations.

II. THIS APPEAL DOES NOT ATTACK THE INSTITUTION OF ARBITRATION BUT RATHER RECOGNIZES THE UNITED STATES SUPREME COURT'S FINDING THAT ARBITRATORS ARE NOT WELL-SUITED TO DETERMINE THEIR OWN SCOPE OF AUTHORITY

As discussed in the *Opening Brief*, one of the reasons that questions of arbitrability are presumptively for judicial resolution is that arbitrators have an inherent, financial conflict-of-interest toward expanding the scope of the arbitration beyond the bounds contemplated by the parties. *Opening Brief* at 15-16. Moreover, the arbitrability determinations influenced by such financial interests are not subject to any judicial review. *Oxford, supra,* 133 S.Ct. at 2068-2071.

Appellant dismisses the importance of this issue by characterizing it as simply the type of "mistrust of arbitrators and their ability to procedurally manage important

cases" previously rejected by the FAA. *Answer Brief* at 1-2.[5] Like his other arguments, this one is entirely inaccurate and meritless. Concerns over financial conflicts-of-interest transcend both civil courts and arbitrations. For example, *Code of Civil Procedure* section 170.1, subdivision (a)(3)(A), disqualifies any judge who has a financial interest in a civil court proceeding. *Code Civ. Proc.,* § 170.1, subd. (a)(3)(A). Such rules against financial self-interest "are intended to … protect the right of the litigants to a fair and impartial adjudicator." *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1070. They are also intended to ensure public confidence in the impartial resolution of claims. *People v. Thomas* (1972) 8 Cal.3d 518, 520.

As this Court observed long ago:

> In *Meyer* v. *City of San Diego* [121 Cal. 102], the [California Supreme] court quoted, with approval, the language of Lord Mansfield in *Hesketh* v. *Braddock,* 3 Burr. 1856, as follows: "There is no principle in the law more settled than this, that any degree, even the smallest degree, of interest in the question depending, is a decisive objection to a witness, and much more so to a juror or to the officer by whom the juror is returned. If, therefore, the sheriff, a juror, or a witness be in any sort interested in the matter to be tried, the law considers him as under an

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[5] In doing so, Appellant offers, "By enacting the FAA, Congress recognized the value of arbitration as an expedient alternative to litigation." *Answer Brief* at 2. However, as the United States Supreme Court opined in *Concepcion, supra,* 131 S.Ct. at 1750-1752, class claims undermine the expediency of arbitration due to the formal requirements of any collective action.

> influence which may warp his integrity or pervert his judgment, and therefore will not trust him. The minuteness of the interest won't relax the objection, for the degrees cannot be measured. No line can be drawn but that of a total exclusion of all decrees whatsoever." And the court added that "while in terms this case does not include the judge as coming within the principle of disqualification, it is not to be doubted that it applies with equal strength, and with more reason, to such an officer."

Lindsay-Strathmore I. Dist. v. Superior Court (1920) 182 Cal. 315, 330-331.

Moreover, it was the concern about an arbitrator's potential self-interest that led the United States Supreme Court to offer that "[t]he willingness of parties to enter into [arbitration] 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 and citation 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 and citation omitted].

Accordingly, regardless of whether the availability of class arbitration is considered a "question of arbitrability" or not, the public policy concerns over arbitrators deciding issues in which they have a financial conflict of interest should compel this Court to adopt a rule that arbitration agreements must be interpreted as

conferring jurisdiction over the such questions to courts absent "clear and unmistakable" contractual language to the contrary.

III. IF THE SUPERIOR COURT ERRED IN DECIDING TO REJECT CLASS ARBITRATION, THAT ERROR WAS HARMLESS

A. Appellant Is the Party Who Wanted the Court to Hear His Case

Appellant admits that he executed multiple arbitration agreements with Respondent Lebo Automotive. *Answer Brief,* at 5-7. Despite these arbitration agreements, Appellant filed his lawsuit in court. *Answer Brief,* at 7-8. Now, however, that the Superior Court has determined that he must prosecute his claims in arbitration on an individual basis – a decision he does not like – Appellant ironically complains to the appellate courts that the Superior Court should not have decided that his case could not proceed as a class arbitration.

B. The Plurality *Bazzle* Opinion Did Not Consider Whether This Question Was Subject to a Harmless Error Standard

Appellant objects that any purported "procedural" error by the Superior Court is not subject to "harmless error" review. In support of this contention, Appellant points to the fact that the *Bazzle* plurality and a handful of other federal and state court cases have never considered such an analysis. *Answer Brief* at 36-38. This argument fails for the obvious reason that case law is never authority for contentions not considered. *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1268. Neither the *Bazzle* plurality opinion, nor any of the other cases cited by Appellant,

considered and rejected a "harmless error" analysis. *See e.g., Bazzle, supra,* 539 U.S. at 450-454. The contention was never raised.

However, Justice Stevens' concurring opinion in *Bazzle* did in fact engage in a "harmless error" analysis. *Bazzle, supra,* 539 U.S. at 454-455 [J. Stevens concurring]. Justice Stevens rejected the plurality's reasoning, asserting that while "arguably" the arbitrator should have interpreted the arbitration agreement, resolution of that question was unnecessary because (1) "the decision [by the lower court] to conduct a class action arbitration was correct as a matter of law", and (2) the defendant did not object to the court making that decision. *Id.,* at 455. "[T]here is no need to remand the case to correct that possible error. [¶] I would simply affirm the judgment of the Supreme Court of South Carolina." *Ibid.* Importantly, as exemplified by the plurality decision, if Justice Stevens believed that the lower court had overstepped its authority by considering the question, the Court had a responsibility to vacate that order regardless of whether the petitioner had raised the issue in its papers. *Id.,* at 450-454; *see also Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 502-509 [court has authority to *sua sponte* consider improper forum questions]. Accordingly, the basis for Justice Stevens' concurrence rests upon his finding that the lower court correctly interpreted the agreement causing no prejudice to the petitioner.

In short, both the California Constitution and statutory law *require* a harmless error analysis by the reviewing court whenever reversal is sought for a purported "procedural" transgression. Cal. Const. Art. VI, § 13; *Code Civ. Proc.,* § 475.

Additionally, Justice Stevens' concurring opinion in *Bazzle*, the only opinion identified to have addressed the issue of harmless error, adopted such an analysis in rendering his concurring opinion. *Bazzle, supra,* 539 U.S. at 455 [J. Stevens concurring]. Yet, Appellant asks this Court to ignore that constitutional, statutory, and case law authority, and create new law asserting that parties have a right to seek a new and potentially erroneous decision by an arbitrator where the correct determination has already been made by the court. The argument is meritless.[6]

C. Appellant Does Not Challenge the Court of Appeal's Determination that the "Between Myself and the Employer" Language Limits the Scope of Arbitration to Bilateral Disputes Only

Finally, Appellant argues that the Superior Court incorrectly determined that the arbitration agreement does not provide for class arbitration. *Answer Brief*, at 39-44. As discussed in the *Opening Brief*, both the First and Second District Courts of Appeal found that arbitration agreements nearly identical to the one executed in this matter did *not* provide for class arbitration because the language "between myself and [the employer]" indicated an intent to limit the agreement to bilateral disputes only. *Nelsen, supra,* 207 Cal.App.4th at 1128-1131; *Kinecta Alternative Financial*

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[6] Appellant further argues that the deferential standard for reviewing arbitration awards supports his contention that the harmless error analysis is inapplicable. *Answer Brief*, at 38-39. This argument is equally meritless. The question before the Court does not concern a Superior Court reviewing an arbitration award. The question before the Court is whether a correct decision by a court should be ignored (raising the possibility of that correct decision being supplanted by an incorrect determination in arbitration), assuming the court mistakenly interpreted the arbitration agreement as authorizing it to consider the question.

Solutions, Inc. v. Superior Court (2012) 205 Cal.App.4th 506, 517; *Opening Brief,* 19-21. Appellant does not dispute the correctness of these Court of Appeal decisions. Rather, he merely points to a handful of distinctions that have no bearing on the "between myself and [the employer]" analysis.

For instance, Appellant attempts to distinguish this matter from *Kinecta* based upon the fact that *Kinecta* repeated the bilateral limitation rather than just stating it once. *Answer Brief,* at 43. Equally unavailing, Appellant attempts to distinguish *Nelsen* based upon the fact that (1) the arbitration agreement in the instant matter includes a preamble acknowledging that the employer uses alternative dispute resolution for all subject claims; and (2) Appellant has proffered purportedly admissible extrinsic evidence that Respondents have since changed their arbitration agreement. *Answer Brief,* at 43. However, review of subsequent acts as extrinsic evidence is only appropriate where those proffered acts concern how the parties performed their obligations under the contract in question – not how the parties acted in the creation of a subsequent, separate agreement. *See e.g., Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 751-754. Tellingly, Appellant fails to cite any authority for his proposed, expanded use of subsequent acts as extrinsic evidence. Indeed, the subsequent acts proffered by Appellant establish nothing more than Respondents' intent to avoid similar costly litigation over contract interpretation in the future.

Again, Appellant does not challenge the Court of Appeal's determination that the "between myself and [the employer]" terminology limits the scope of arbitration

to bilateral claims only, and none of the distinctions raised by Appellant affect that analysis in the instant matter. Accordingly, the Superior Court did in fact correctly determine that the parties' arbitration agreement did not provide for class arbitrations.

CONCLUSION

For the reasons set forth above and in the *Opening Brief*, 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: April , 2015

Respectfully submitted

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By: ______________________

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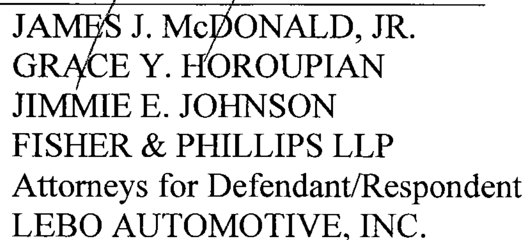
CERTIFICATE OF COMPLIANCE WITH RULE 8.520(c)(1)

This brief complies with the length limitation of California Rule of Court 8.520(c)(1) because this brief contains 6,400 words, excluding the parts of the brief exempted by California Rules of Court 8.520(c)(3).

DATED: April 1, 2015 FISHER & PHILLIPS LLP



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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 **LEBO AUTOMOTIVE, INC.'S REPLY BRIEF ON THE MERITS** as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 1, 2015 at Irvine, California.

SUSAN JACKSON

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