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

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SUPPLEMENTAL BRIEF OF CITIBANK, N.A. RE NEW AUTHORITY

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Pursuant to California Rule of Court 8.520(d), defendant-appellant Citibank, N.A. ("Citibank") hereby submits this Supplemental Brief regarding the December 14, 2015 decision of the United States Supreme Court in *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) ("*Imburgia*"), and the Supreme Court's recent action in *Ritz-Carlton Dev. Co. v. Narayan*, No. 15-378, 2016 WL 100316 (U.S. Jan. 11, 2016) ("*Narayan*"), neither of which was decided at the time of Citibank's Answer Brief on the Merits ("Answer Brief").[1] In the Answer Brief (at 25-26), Citibank expressly advised the Court of the pendency of *Imburgia* and its potential impact on this appeal. McGill also cites *Imburgia* in her Reply Brief on the Merits (at 14-15).

A. *DirecTV, Inc. v. Imburgia*

By the instant appeal, McGill seeks to avoid the inescapable conclusion that *Broughton* and *Cruz* are no longer good law, by arguing that the Arbitration Agreement itself precludes arbitration of her claims for public injunctive relief.[2] *Imburgia* mandates rejection of this purported contract interpretation argument, in which the Supreme Court once again made clear that a court may not avoid the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"), by applying state-law rules of contract interpretation

[1] Except as stated herein, capitalized terms have the same meaning as in the Answer Brief.

[2] This argument was not properly preserved for review here and should be rejected on this basis alone. *See* Answer Brief at 23-24.

to limit the scope of an agreement to arbitrate. Such an interpretation, as instructed by the Supreme Court in *Imburgia*, violates the FAA's mandate that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *See Imburgia*, 136 S. Ct. at 471.

In *Imburgia*, plaintiff sued DirecTV, seeking damages for early termination fees that allegedly violated California law. *Id.* at 466. DirecTV's service agreement included an arbitration agreement and class action waiver that provided that if the "law of your state" makes the waiver unenforceable, then the entire arbitration agreement is "unenforceable." *Id.* The Court of Appeal affirmed the trial court's denial of DirecTV's motion to compel arbitration, holding that the phrase "the law of your state" referred to "California law as it would have been without [the decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1747 (2011)] invaliding the *Discover Bank* rule." *Id.* at 467. In so deciding, the Court of Appeal created a conflict with the Ninth Circuit, which found the same agreement was enforceable under *Concepcion*. *See Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1228 (9th Cir. 2013).

Reversing, the Supreme Court assumed that the Court of Appeal had correctly stated California law – that "as a matter of contract law, the parties did mean the phrase 'law of your state' to refer to" the *Discover Bank* rule notwithstanding *Concepcion* – and limited its analysis to whether that state law was consistent with the FAA. *Imburgia*, 136 S. Ct. at 468.

Answering the question in the negative, the Supreme Court reasoned that other California courts "would not interpret contracts other than arbitration contracts the same way" and the Court of Appeal's interpretation was "unique, restricted to [arbitration agreements]." *Id.* at 469. The Supreme Court concluded that, under "present well-established law," the Court of Appeal's "interpretation of the phrase 'law of your state' does not place arbitration contracts 'on equal footing with all other contracts,'" and "does not give 'due regard ... to the federal policy favoring arbitration" and, therefore, the Court of Appeal's interpretation is preempted by the FAA. *Id.* at 471.

McGill makes a similar argument here that, as a matter of contract law, the Arbitration Agreement itself should be interpreted to permit litigation of her claims for public injunctive relief, notwithstanding *Concepcion*, so as to avoid waiver of her claims under California law. (*See* Respondent's Opening Br. 18; Respondent's Reply Br. 13.) Such an interpretation, as in *Imburgia*, arises solely from the fact that an arbitration agreement is at issue and, therefore, is preempted by the FAA. It therefore must be rejected.

B. *Ritz-Carlton Development Co. v. Narayan*

Further recent action of the Supreme Court confirms that *Imburgia* should be applied broadly. On January 11, 2016, the Supreme Court summarily granted a petition for writ of certiorari, vacating judgments of

the Supreme Court of Hawaii and remanding with a direction for reconsideration of its prior rulings in light of *Imburgia*. *See Ritz-Carlton Dev. Co. v. Narayan*, 2016 WL 100316, at *1. In *Narayan*, the Supreme Court of Hawaii affirmed a trial court's refusal to enforce an arbitration agreement based on an interpretation that the arbitration provision was ambiguous and, therefore, under Hawaii contract law, unenforceable. *See Narayan v. Ritz-Carlton Dev. Co.*, 135 Haw. 327, 335, 350 P.3d 995, 1003 (2015) *cert. granted, judgment vacated*, No. 15-406, 2016 WL 100318 (U.S. Jan. 11, 2016); *see also Narayan v. Marriott Int'l, Inc.*, 136 Haw. 23, 356 P.3d 1043 (2015) *cert. granted, judgment vacated sub nom. Ritz-Carlton Dev. Co. v. Narayan*, 2016 WL 100316 and *cert. granted, judgment vacated sub nom. Ritz-Carlton Dev. Co. v. Nath*, No. 15-379, 2016 WL 100317 (U.S. Jan. 11, 2016).

In seeking certiorari, the losing defendants argued that the Supreme Court of Hawaii's contractual interpretation analysis disadvantaged arbitration agreements and ran afoul of the FAA's requirement that arbitration agreements be placed on "equal footing" as other contracts. *See Ritz-Carlton Dev. Co. v. Nath*, No. 15-379, 2015 WL 5719840, at *3 (Petition for Writ of Certiorari) (U.S. Sept. 28, 2015); *see also Ritz-Carlton Dev. Co., Inc. v. Narayan*, No. 15-378, 2015 WL 5719839, at *3 (Petition for Writ of Certiorari) (U.S. Sept. 28, 2015). The order by the Supreme Court granting certiorari, vacating and remanding for further consideration

in response suggests that *Imburgia* should be construed broadly when, as here, state law rules of contract interpretation are used to uniquely disadvantage, and limit the scope of, arbitration agreements.

As *Imburgia* and *Narayan* make clear, arbitration agreements governed by the FAA, like the Arbitration Agreement here, must be enforced as written, and the FAA preempts any state law impediments to enforcing arbitration agreements according to their terms, even under the guise of generally applicable contract-interpretation principles. Thus, under *Imburgia* and *Narayan*, the Arbitration Agreement must be enforced as written, with no exception for claims for public injunctive relief under the UCL, FAL and CLRA. Quite simply, the *Broughton-Cruz* rule is no longer viable in light of comprehensive and consistent United States Supreme Court authority.

Accordingly, for the reasons discussed herein and in the Answer Brief, the Court of Appeal's order should be affirmed.

DATED: January 26, 2016 Respectfully submitted,

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By: _____
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CERTIFICATE OF WORD COUNT

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

The text of this Respondent's Brief consists of 1,089 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: January 26, 2016

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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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 January 26, 2016, I served the foregoing document(s) described as: **SUPPLEMENTAL BRIEF OF CITIBANK, N.A. RE NEW AUTHORITY** on the interested parties in this action as follows:

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Executed on January 26, 2016, at Los Angeles, California.

Regina Harcourt
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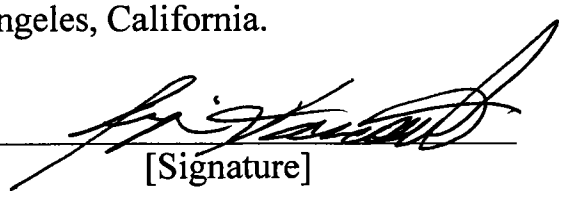
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