S220812

In the

Supreme Court

of the

State of California

TIMOTHY SANDQUIST,

Plaintiff and Appellant,

v.

LEBO AUTOMOTIVE, INC. et al.,

Defendants and Respondents.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B244412
SUPERIOR COURT OF LOS ANGELES · HON. ELIHU M. BERLE · NO. BC476523

ANSWER BRIEF ON THE MERITS

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QUESTION PRESENTED

Federal arbitration law provides that procedural issues regarding an arbitration are the province of the arbitrator. Similarly, interpretation of the parties' contracts is generally reserved for the arbitrator. Here, Defendants imposed an arbitration clause on Plaintiff Sandquist as a condition of employment. 1 JA 194-201. The agreement does not contain a class-action waiver and, under ordinary principles of contract interpretation, reflects an agreement to authorize class arbitration.

Upon compelling arbitration, was the trial court required to leave to the arbitrator the issue of whether the parties' agreement permits the procedural mechanism of class arbitration?

ANSWER

Yes. The U.S. Supreme Court in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 452-53, and the California Court of Appeal on remand from *Bazzle* in *Garcia v. DirecTV, Inc.* (2004) 115 Cal.App.4th 297, held that the issue should be decided by the arbitrator. The Court of Appeal below faithfully followed these precedents. Consequently, the order challenged on appeal was correct and should not be overturned.

INTRODUCTION

In this action, Plaintiff Timothy Sandquist alleges that Defendants subjected him and a class of similarly-situated employees of color to pervasive race discrimination. 1 JA 1-51. In litigating this appeal, Defendants have advanced arguments betraying another kind of unlawful hostility: mistrust of arbitrators and their ability to procedurally manage important cases. Defendants contend that arbitrators cannot be trusted to

determine whether the parties' contract provides for the availability of class arbitration. Defs.' Br. at p. 7. Such contentions are wrong.

Ninety years ago, Congress rejected the suspicion and hostility undergirding Defendants' appeal. The Federal Arbitration Act of 1925, 9 U.S.C. §§ 1 *et seq*. ("FAA"), placed arbitration clauses on equal footing with other contracts. By enacting the FAA, Congress recognized the value of arbitration as an expedient alternative to litigation. In line with this congressional purpose, the U.S. Supreme Court has flatly rejected challenges to arbitration that are premised on outmoded and unfounded beliefs about the motivations and capacities of arbitrators.

Yet Defendants attempt to resurrect those arguments here, claiming that courts must not allow arbitrators to resolve questions regarding the *procedures* for conducting arbitration – such as the availability of class arbitration. Defendants ask this Court to dramatically expand the narrow set of "threshold" arbitration-related questions that the U.S. Supreme Court has reserved for courts. Under a long line of U.S. Supreme Court precedent, courts are limited to determining *substantive* questions that largely concern whether the parties entered into a valid and enforceable agreement to arbitrate in the first place – the appropriate forum for resolving the dispute, not the form of the proceedings within that forum. (The only exception is when the parties' agreement "clearly and unmistakably" trumps this presumption.) However, Defendants fail to meaningfully engage with the entrenched substantive/procedural dichotomy. The precedents in this area lead to the unavoidable conclusion that the availability of class arbitration is a procedural question. Absent a clear and unmistakable agreement to the contrary, federal law entrusts such *procedural* questions to arbitrators.

From a practical standpoint, delegating substantive issues to courts to decide (for example, whether an enforceable agreement to arbitrate exists) and procedural issues to arbitrators to decide (what form the

proceedings should take, including the availability of class procedures) makes eminent sense. A plaintiff who challenges the applicability or enforceability of an arbitration clause and maintains that the suit belongs in court would naturally file a civil action rather than an arbitration demand. If the court agrees with the plaintiff, the case will remain in court; otherwise, the court can compel arbitration.[1] On the other hand, a plaintiff who concedes that the dispute belongs in arbitration would have no reason to initially file in court. An arbitrator would then have authority to decide all issues relating to the conduct of the proceedings. In the absence of a clear and unmistakable agreement to the contrary, having courts opine on procedural issues, as championed by Defendants, would undermine the purpose of arbitration as an expedient alternative to litigation.

In accordance with the substantive/procedural distinction, once a court determines that arbitration is required, it should refrain from addressing additional questions related to the conduct of that arbitration. For this reason, the Superior Court erred when it went beyond compelling arbitration to dictate the procedures the arbitrator must apply. That court construed Defendants' arbitration provisions to prohibit class procedures, dismissed Plaintiff's class claims with prejudice, and ordered that the arbitration proceed on an individual basis.

The Second District correctly reversed this aspect of the Superior Court's order, concluding that the question of what procedural form the arbitration should take – including whether the arbitration provisions authorize class procedures – was reserved for the arbitrator. In so holding, the appeals court below properly relied on the U.S. Supreme Court's only direct pronouncement on the essential question raised by this appeal, *Green*

[1] This is precisely why Sandquist initially filed this case in court: he asserted that the arbitration clause is invalid and that the case belongs in court. 1 JA 1-51.

Tree Fin. Corp. v. Bazzle (2003) 539 U.S 444. As noted by the Second District, a plurality of the *Bazzle* Court held that it presumptively falls on the arbitrator to decide procedural issues such as the availability of class arbitration. *Bazzle* remains the most definitive and persuasive precedent distilling the binding *substantive*/*procedural* dichotomy and applying it to the issue at hand. A phalanx of case law in this state and across the nation accords with *Bazzle's* sound reasoning.[2]

Contrary to Defendants' suggestion, the appellate court did not compel them into class arbitration. Instead, before the arbitration proceeds on a class basis, at least two things must happen. First, the arbitrator must actually find that the parties' arbitration clause authorizes class arbitration. Second, following a period of class discovery, Plaintiff must establish that class certification is warranted in this case.

Likewise, Defendants' suggestion that the court below improperly permitted the arbitrator to "determine the scope of [his or her] [] own jurisdiction" is misplaced. The Court of Appeal did not upset the Superior Court's finding that the case is arbitrable, holding that question unsuitable for interlocutory review. The question reserved for the arbitrator is not jurisdictional – it concerns only the procedural matter of what the proceedings will look like in the arbitral forum.

Hence, this Court should uphold the Court of Appeal's decision and permit this matter to proceed to arbitration.

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[2] Plaintiff recognizes that two recent federal Circuit decisions provide otherwise. *See* discussion at Section G.1. *See 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. These cases misapply governing U.S. Supreme Court precedent, elevating the perceived importance of a question regarding an arbitration over the substantive versus procedural nature of that question.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Underlying Dispute

Plaintiff Timothy Sandquist is an African-American employee who began working for Defendant Manhattan Beach Toyota in September 2000. 4 JA 781 ¶ 2. Seven years later, Defendants John Elway, Mitchell D. Pierce, Jerry L. Williams, and Darrell Sperber purchased the dealership. Under their management, Sandquist and other non-European Americans were subjected to rampant and unchecked racial discrimination and harassment. 1 JA 1-51. Defendant Sperber openly referred to employees of non-European descent as "dumb Mexicans," "goddamn Mexicans," "apes," "Aunt Jemimas," "camel people," and "slant eyes." 1 JA 55 ¶ 8. Defendants discriminatorily denied employees of non-European descent promotions, opportunities for advancement, and equal pay. 1 JA 1-51. Furthermore, Defendants retaliated against employees who complained about discrimination and harassment through a company hotline and third-party human resources consultant. *Ibid.*; *see also* 5 JA 1185 ¶¶ 13-15; 5 JA 1192 ¶¶ 22, 28-29; 5 JA 1197 ¶¶ 7-21; 5 JA 1202 ¶¶ 8-13.

In 2011, Defendants discriminatorily denied Sandquist a promotion and constructively discharged him from the dealership. 1 JA 8-11 ¶¶ 39-52. In response, Sandquist filed a class-action complaint in the Superior Court of Los Angeles County, on behalf of himself and other employees of color. 1 JA 1-51. He sought declaratory, injunctive, and other relief under the California Fair Employment and Housing Act, Cal. Gov. Code §§ 12900 *et seq.*, the California Unfair Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the common law. 1 JA 23-24.

II. Defendants' "Arbitration Acknowledgements"

Defendants responded by moving to compel arbitration, citing three conflicting and misleading Arbitration Acknowledgements that Defendants presented on a take-it-or-leave-it basis to Sandquist on his first day of work.

1 JA 194-201. These Acknowledgements were hidden in a new-hire packet numbering more than 100 pages, written in small and differing typefaces, and given no particular prominence. 1 JA 776 ¶ 7; 1 JA 194-201; 4 JA 781 ¶¶ 6, 11; 4 JA 782 ¶¶ 16, 19. In relevant part, the Acknowledgements broadly encompass all potential disputes between the parties, subject to specifically designated exceptions:

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve ***all disputes*** which may arise out of the employment context… I and the Company both agree that ***any claim, dispute, and/or controversy*** (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, as well as other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, ***or having any relationship or connection whatsoever*** with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory or equitable law or otherwise, (with the ***sole exception*** of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) ***shall be submitted to and determined exclusively by binding arbitration***.

1 JA 194-201 (emphasis added). The Acknowledgements provide that the arbitration be controlled by the FAA, in conformity with the procedures of the California Arbitration Act, Cal. Code Civ. Proc. §§ 1280 *et seq*. *Ibid.* None of the Acknowledgments contain a class waiver or inform employees

that they relinquish their right to class or representative proceedings. *Ibid.* Under compulsion, Sandquist signed the new-hire paperwork as instructed because he needed the job. 4 JA 781 ¶ 14.

III. The Proceedings Below

On January 9, 2012, Sandquist filed a class-action complaint in the Superior Court. 1 JA 1-51. On March 20, 2012, Defendants moved to compel individual arbitration. Sandquist opposed the motion. 1 JA 176-89. The Superior Court heard oral argument and stated that it was inclined to grant the motion. RT 341:15-342:16. Recognizing that a ruling dismissing the class claims with prejudice could jeopardize the absent class members' ability to vindicate their rights, the Superior Court afforded Plaintiff's counsel time to amend the complaint with a class representative who had not signed an arbitration agreement. RT 342:24-343:21. It then granted the motion, ordered Sandquist into individual arbitration, and dismissed the class claims without prejudice. 6 JA 1373-1401. When Plaintiff's counsel was unable to locate a class plaintiff who had not signed an Arbitration Acknowledgement, the Superior Court finalized its order and dismissed the class claims with prejudice. 6 JA 1460-62.

Sandquist appealed, arguing that the Superior Court erred by finding the Acknowledgements enforceable.[3] 6 JA 1463. Additionally, Sandquist argued, the court usurped the role of the arbitrator by deciding that the Acknowledgements precluded class procedures and by mandating individual arbitration. The Second District agreed and held that "the question whether the parties agreed to class arbitration was for the arbitrator to decide, and that the trial court erred by deciding that issue in this case." Opinion at pp. 11-15 (relying on *Bazzle* and progeny). It declined to

[3] The Second District did not address Sandquist's unconscionability arguments. Opinion at p. 8. Accordingly, these arguments – which Sandquist does not waive – are not at issue in the instant appeal.

interpret the Acknowledgements, leaving the arbitrator to decide the merits of whether Defendants' arbitration provisions permit class arbitration. *Ibid.* It reversed the order below dismissing class claims and directed the Superior Court to enter a new order submitting the issue to the arbitrator. *Id.* at p. 16. Defendants now appeal the Second District's decision.

LEGAL DISCUSSION

I. Federal Law Cloaks Arbitrators with Authority to Determine Whether an Arbitration Agreement Permits Class Arbitration

The Federal Arbitration Act and related federal case law control the question presented by this appeal. Binding U.S. Supreme Court precedent interpreting the FAA draws a bright line between questions for courts and questions for arbitrators: courts decide substantive questions about whether the claims must be arbitrated, whereas arbitrators decide procedural questions regarding the conduct of arbitration itself. The question presented here – whether an arbitration clause permits class arbitration – falls on the procedural side of the line.

The only Supreme Court case to consider this question, *Bazzle*, produced a plurality decision clearly confirming that arbitrators should decide procedural questions. Until it is overturned, *Bazzle* remains highly persuasive. Dozens of state and federal decisions accord with *Bazzle*. In comparison, contrary holdings conflate the issue of "who decides" with questions pertinent only to the merits of clause construction. Defendants' reliance on this Court's supposedly "contradictory and controlling" decision in *City of Los Angeles v. Superior Court* is misplaced, as that decision fits neatly into the substantive/procedural dichotomy that drove the appellate court's well-reasoned decision below. (2013) 56 Cal.4th 1086.

A. The Federal Arbitration Act and Related Federal Case Law Controls

Despite conceding below that federal law controls the question presented by this appeal, Defendants now argue that state law applies, or they present an undifferentiated mass of state and federal law. However, the issue confronting the Court is governed by federal law, and more specifically by substantive federal arbitration law developed by the U.S. Supreme Court. In developing this body of law, the Supreme Court has emphasized that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24 ("as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

In a series of cases stretching back decades, the U.S. Supreme Court has applied substantive federal arbitration law to resolve the question of who decides certain issues involving arbitration agreements. In *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, the Court defined the respective roles of federal and state law in this domain. The Court relied on the FAA and the case law interpreting it to determine whether an arbitrator or a court had jurisdiction over a particular issue. *Id.* at pp. 942-44. *First Options* set forth the following paradigm: federal arbitration law governs the initial question of who decides an arbitration-related issue (court or arbitrator); then, the relevant decision-maker may apply substantive state contract law in determining that issue. *Id.* at pp. 944-45.

Since deciding *First Options*, the U.S. Supreme Court has consistently turned to federal arbitration law, not state law, to determine whether a particular issue is for the arbitrator or a court. For example, in *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, the Court held that federal law controlled the issue of whether courts or arbitrators had

authority to interpret and apply a time limit rule.[4] In *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, the Court applied federal law to determine whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality. *Id.* at p. 442. The Court stressed that "the FAA 'created a body of federal substantive law,' which [i]s 'applicable in state and federal courts.'" *Id.* at p. 445 (citation omitted). It denounced the view that state law should govern the issue, "even in the context of state-law claims brought in state court." *Id.* at pp. 445-46. Finally, in *Rent-A-Center, W., Inc. v. Jackson* (2010) 561 U.S. 63, the Court invoked federal law and the FAA to decide whether a particular unconscionability challenge should be posed to the arbitrator or the court. *See also id.* at pp. 79-80 (Stevens, J., dissenting) (reaching differing conclusion but still applying substantive federal arbitration law).

This binding authority leaves no doubt that the question presented to this Court – who decides, a court or an arbitrator – finds its answer in federal arbitration law. California law will aid the decision-maker in its clause construction analysis, but plays little role in identifying the proper decision-maker. Defendants have posed questions of federal law in this appeal, and answering these questions requires a careful engagement with applicable U.S. Supreme Court precedent. Under that body of law, the decision of the Court of Appeal below must be affirmed.

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[4] Justice Thomas filed a separate opinion concurring in the judgment. He stood alone in his belief that state law principles should guide the analysis. *Id.* at p. 87 (Thomas, J., concurring in judgment). The remaining seven justices who took part in deciding the case agreed that federal law controlled. *Id.* at pp. 84-86.

B. U.S. Supreme Court Precedent Interpreting the FAA Draws a Bright Line Between Questions for Arbitrators and Questions for Courts

The U.S. Supreme Court, in interpreting and applying the FAA, has developed presumptions limiting the involvement of courts in matters of arbitration. These presumptions divide questions related to arbitration into two camps: substantive and procedural. Unless the parties clearly and unmistakably provide otherwise, these presumptions call for courts to decide substantive questions and arbitrators to decide procedural ones. *Howsam, supra,* 537 U.S. at p. 83.

1. Substantive Questions Concern Whether the Parties Validly Agreed to Arbitrate the Claims at Issue

The Court laid the groundwork of the substantive/procedural distinction in *First Options, supra*, 514 U.S. 938. There, First Options sought to compel the defendants – Manuel Kaplan, his wife, and their wholly-owned firm – into arbitration. But the individual defendants had not signed the arbitration agreements and claimed the dispute against them was not subject to arbitration. The case reached the U.S. Supreme Court on the question of whether the court or the arbitrator has authority to decide if the parties agreed to arbitrate a particular dispute. *Id.* at pp. 941-42. In resolving this question, the Court emphasized that arbitration is a matter of contract (*id*. at p. 943) and that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *Id.* at p. 945.

The Court 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." *Id.* at p. 944. To overcome this rule, parties must clearly and unmistakably signal their agreement to resolve arbitrability in arbitration rather than in court. *Ibid.* In *First Options*, the

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 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.

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

questions of arbitrability" are critical threshold questions about whether the parties must arbitrate their dispute in the first place as opposed to litigating in court. As the appellate court correctly held, these types of substantive questions are ones the parties would reasonably expect a court to resolve. *See Sandquist v. Lebo Auto., Inc.* (2014) 228 Cal. App. 4th 65, 76. (citing *Howsam*, *supra*, 537 U.S. at 83-84).

2. Procedural Questions Concern the Conduct of the Actual Arbitration

Procedural questions grow out of disputes plainly within the arbitrator's jurisdiction. *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 557. Unlike threshold questions regarding whether parties agreed to arbitrate, these questions concern the procedures applied to an arbitrable dispute. Two Supreme Court rulings illustrate the distinction.

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duty to interpret [a collective bargaining] agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a 'lack of work' determination by the Company." *AT&T Techs.*, *supra*, 475 U.S. at p. 651. That holding would be applicable here if, for example, the parties agreed they had a binding arbitration agreement but disputed whether it covered Sandquist's FEHA claims. But, the issue presented here is not whether the Acknowledgements submit certain substantive legal claims to arbitration, as opposed to court litigation; thus, Defendants' reliance on *AT&T Technologies* is inapposite. Notably, if this case were governed by *AT&T Technologies*, *Bazzle* would clearly have been as well; but, the *Bazzle* plurality decided otherwise, while citing *AT&T Technologies* for the principle that issues for courts to decide:

> include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. *See generally*… *AT&T*, *supra*, at 651-652 (whether a labor-management layoff controversy falls within the scope of an arbitration clause).

Bazzle, *supra*, 539 U.S. at p. 452. In any event, even under their own rubric, Defendants cannot establish that the availability of class procedures constitutes a "jurisdictional question."

First, in *Howsam*, *supra*, 537 U.S. 79, the U.S. Supreme Court held that an arbitrator was the appropriate party to apply time limit rules in an arbitral forum. More specifically, in *Howsam*, the applicable arbitration forum imposed a six-year limit on the arbitration of any dispute. After plaintiff initiated arbitral proceedings, defendant brought a preemptive suit in federal district court, asking the court to deem the dispute "ineligible for arbitration" based on the time limitation. The district court dismissed the action, holding that the arbitrator and not the court should interpret and apply the time limitation. The appellate court reversed, and the U.S. Supreme Court granted certiorari to resolve a Circuit split on this question. *Id.* at pp. 81-83.

In reaching its decision, the Supreme Court emphasized that the class of "questions of arbitrability" for courts to resolve is limited. *Id.* at pp. 83-84. As opposed to this narrow set of gateway issues, *Howsam* held that a time limit rule is akin to the prerequisites and procedures of arbitration and is presumptively for arbitrators to decide. *Id.* at p. 85. The Court cited several reasons for situating this question within the arbitrator's domain, including the language and comments of the Revised Uniform Arbitration Act, the federal policy favoring arbitration, and the comparative expertise of arbitrators to interpret and apply their own rules. *Id.* at pp. 83-86.

The Supreme Court provided another example of a procedural issue last year in *BG Group, PLC v. Republic of Argentina* (2014) 134 S.Ct. 1198. There, the arbitration clause at issue contained a local litigation requirement allowing arbitration to proceed only after eighteen months had elapsed from the time the dispute was submitted to a competent tribunal. *Id.* at pp. 1204-05. BG Group sought arbitration prematurely, and Argentina argued that the arbitrators therefore lacked jurisdiction. After an adverse ruling in arbitration, Argentina sought judicial review. *Id.* at pp. 1204-05. The case reached the Supreme Court on the question of "who—the court or

an arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy." *Id.* at p. 1204.

The Court explained that "[i]f the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration, courts determine the parties' intent with the help of presumptions." *Id.* at p. 1206. In the context of procedural preconditions, courts presume that the parties intend arbitrators to decide. *Ibid.* This presumption extends to matters such as waiver, delay, or a like defense to arbitration, as well as conditions precedent to an obligation to arbitrate such as time limits, notice, laches, and estoppel. *Ibid.* The court reasoned that the local litigation requirement should receive this presumption, describing the requirement as "a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute." *Id.* at p. 1207. *BG Group* is the Court's latest and clearest explanation of the substantive/procedural distinction: once it is determined that a case must be submitted to arbitration, the role of the court is complete and the arbitrator is to decide all procedural issues.

3. Summary of Substantive Versus Procedural Issues

A large body of federal case law confirms Plaintiff's reading of the U.S. Supreme Court's precedent in this area. These cases hold that, when determining whether to compel arbitration, a court considers only "gateway" matters unless the contract expressly provides otherwise. Put differently, a court decides "such issues as are essential to defining the nature of the forum in which a dispute will be decided" – i.e., court litigation versus arbitration. *See Harling v. ADO Staffing, Inc.* (M.D.Fla.

Feb. 21, 2014, 3:13-cv-1113-J-34JRK) 2014 U.S. Dist. LEXIS 50421, at *8-9 (citations omitted).[6]

Hence, in the Ninth Circuit (and elsewhere), a court is "limited" to determining (1) whether a valid agreement to arbitrate exists and (2) whether it covers the substantive dispute at issue. *Stirrup v. Educ. Mgmt. LLC* (D.Ariz. Sept. 16, 2014, No. CV-13-01063) 2014 U.S. Dist. LEXIS 130366, at *5. *See also CardioVascular BioTherapeutics, Inc. v. Jacobs* (D.Nev. Feb. 19, 2015, No. 2:14-CV-1965 JCM (PAL)) 2015 U.S. Dist. LEXIS 20745, at *5-6 (reiterating the established two-step test for determining whether a party should be compelled to arbitrate).

In contrast, a court does not venture into questions concerning the conduct of the arbitration itself. *See e.g. McNeil v. Haley South, Inc.* (E.D.Va. Sept. 13, 2010, No. 3:10-CV-192) 2010 U.S. Dist. LEXIS 95658, at *14 ("The question of what kind of arbitration proceedings are required under the arbitration clause is not a gateway issue for a court to decide.")[7] As recently synthesized by the Second Circuit:

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[6] *See also Atlantica Holdings, Inc. v. BTA Bank JSC* (S.D.N.Y. Jan. 12, 2015, No. 13-CV-5790 (JMF)) 2015 U.S. Dist. LEXIS 3209, at *17 (threshold question of "arbitrability" concerns "whether the matter is subject to arbitration at all"); *Grant-Fletcher v. Collecto, Inc.* (D.Md. May 9, 2014, No. RDB-13-3505) 2014 U.S. Dist. LEXIS 64163, at *12 (court is limited to deciding "the gateway dispute about whether the parties are bound by a given arbitration clause."); *Smith v. Smith* (D.Or. Sept 16, 2014, No. 3:14-CV-00707-ST) 2014 U.S. Dist. LEXIS 153472, at *13 ("whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination . . . ") (citing *Howsam*).

[7] *See also Brown v. Brown-Thill* (8th Cir. 2014) 762 F.3d 814, 819 ("it was for arbitrator McLeod to decide in the first instance procedural questions such as whether the dispute was properly submitted, whether mediation was required, and whether specific arbitration procedures needed to be established…"); *AVIC Int'l US, Inc. v. Tang Energy Group, Ltd.* (N.D.Tex. Feb. 5, 2015, No. 3:14-CV-2815-K) 2015 U.S. Dist. LEXIS 13968, at *11 (challenges to the arbitrator selection process "essentially go to the

> The FAA's framework ... authorizes the federal courts to conduct only a limited review of discrete issues before compelling arbitration, leaving the resolution of all other disputes to the arbitrators … In addition to manifesting a policy strongly favoring arbitration ... the FAA establishes a "body of federal substantive law of arbitrability[] applicable to any arbitration agreement within coverage of the Act," and also "supplies ... a procedural framework applicable in federal courts." Under this framework, most disputes between parties to a binding arbitration agreement are "arbitrable," meaning that they are to be decided by the arbitrators, not the courts. There is one exception to this general rule: unless the parties "unmistakably" provide otherwise, courts are to decide question[s] of arbitrability. Such questions include disputes "about whether the parties are bound by a given arbitration clause" or "disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." All other "questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." "[A]ny 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."

Citigroup, Inc. v. Abu Dhabi Inv. Auth. (2d Cir. Jan. 14, 2015, No. 13-4825-CV) 2015 U.S. App. LEXIS 549, at *7-9 (citations omitted).

C. The Availability of Class Arbitration Falls on the Procedural Side of the Substantive/Procedural Line

U.S. Supreme Court precedent regarding the substantive/procedural distinction commands a conclusion that the question presented here is a procedural one and therefore is presumptively for the arbitrator to decide. This binding precedent cautions that there are few substantive questions of

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procedure of arbitration" and are "for an arbitrator to decide."); *CRT Capital Group v. SLS Capital, S.A.* (S.D.N.Y. Dec. 4, 2014, No. 14-CV-7243 (JGK)) 2014 U.S. Dist. LEXIS 168260, at *30-11 ("standing" is regarded as procedural issue for the arbitrator); *Masco Corp. v. Prostyakov* (7th Cir. 2014) 558 F.App'x. 685, 688 (decision to apply res judicata is regarded as procedural issue for arbitrator).

arbitrability. Within this narrow set of threshold issues are basic questions about whether arbitration may take place at all – namely, whether parties agreed to arbitrate, whether that agreement is valid and enforceable, and whether it encompasses a particular substantive claim.

The availability of class arbitration does not fit the thin bill of issues reserved for the courts to decide. Defendants do not raise a dispute regarding the existence or validity of an agreement to arbitrate, nor a dispute regarding the substantive legal claims that fall within a valid arbitration agreement. If Plaintiff Sandquist had not raised an unconscionability challenge and had instead initially filed his claim in arbitration, it would clearly be the province of the arbitrator to determine the applicability of class procedures during the course of the arbitration.[8] Defendants would not be able to initiate a court proceeding to contest whether Sandquist's claims belonged in arbitration.

Applying the definition supplied by the U.S. Supreme Court in *BG Group*, it is manifest that class treatment neither affects whether arbitration may occur or what its substantive outcome will be. *BG Group*, *supra*, 134 S.Ct. at p. 1207. As one federal court recently summarized:

> Put succinctly, the question of the availability of class arbitration does not go to the power of the arbitrators to hear the dispute, but rather to an issue that simply pertains to the conduct of proceedings that are properly before the arbitrator.

In re A2P SMS Antitrust Litig. (S.D.N.Y. May 29, 2014, No. 12-CV-2656-AJN) 2014 U.S. Dist. LEXIS 74062, at *32.

Bolstering this conclusion is precedent from the U.S. and California Supreme Courts characterizing the class action mechanism as a "procedural device." *See, e.g., Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper* (1980)

[8] This would apply both to the *Stolt-Nielsen S.A v. AnimalFeeds Int'l Corp.* clause construction question at issue here, and to whether the standard for class certification is met under the applicable forum rules.

445 U.S. 326, 331; *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 34 (further emphasizing that "[c]lass actions are provided only as a means to enforce substantive law"). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*. (2010) 559 U.S. 393, 407 (characterizing class actions as procedural, governing only "the manner and the means by which the litigants' rights are enforced," *i.e.,* the "process for enforcing those rights") (citations omitted); *id.* at pp. 399-401 (treating the issue of "eligibility" to pursue a class action as inseparable and equally procedural).

Further, courts have expressed great reluctance to expand the category of substantive "arbitrability" questions beyond those specifically identified by the Supreme Court. Removing an issue from consideration by the arbitrator and assigning it to the courts to address through relatively formal procedures and multi-layered review tends to run counter to the firmly-established policy in favor of arbitration as a means of "achieving streamlined proceedings and expeditious results." *In re A2P SMS Antitrust Litig.*, 2014 U.S. Dist. LEXIS 74062, at *33-34 (collecting cases). *Accord, e.g., Harrison v. Legal Helpers Debt Resolution, LLC* (D.Minn. Aug. 22, 2014, No. 12-2145 ADM/TNL) 2014 U.S. Dist. LEXIS 117154, at *12.

D. The *Bazzle* Plurality Decision Confirms This Presumption

Only one case has required the U.S. Supreme Court to consider the question presented here. In *Green Tree Fin. Corp. v. Bazzle* (2003) 539 U.S 444, five justices agreed that an arbitrator should decide in the first instance whether an arbitration clause permits class arbitration.

Bazzle involved two class arbitrations against a commercial lender. Both arbitrations resulted in class awards, which were confirmed by the trial court. The lender appealed, asserting that the agreements barred class arbitration. *Id.* at pp. 448-49. A four-justice plurality applied the substantive/ procedural distinction to hold that the arbitrator, not a trial judge, should have decided in the first instance whether the agreements

authorized class arbitration. *Id.* at pp. 451-53. The plurality relied on the well-established rule that courts are only responsible for "certain gateway matters" regarding arbitration controversies. *Id.* at pp. 452-54 (describing such matters "as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"). In contrast, whether arbitration agreements authorize class procedures is a procedural question. *Id.* at pp. 452-53. The plurality stated that the issue concerned neither the validity nor applicability of the arbitration clause; instead, it concerned the "*kind of arbitration proceeding* the parties agreed to." *Id*. at pp. 452 (emphasis in original). Further, because this question concerns contract interpretation and arbitration procedure, *Bazzle* held that "[a]rbitrators are well situated to answer [it]." *Id.* at pp. 452-53.

Justice Stevens supplied a crucial fifth vote, agreeing: "Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court." *Id*. at p. 455 (citing *Howsam*). However, he declined to join the plurality "[b]ecause the decision to conduct class arbitration was correct as a matter of law, *and because petitioner has merely challenged the merits of that decision* ***without claiming that it was made by the wrong decisionmaker***." *Ibid.* (emphasis added). Nevertheless, Justice Stevens concurred in the judgment in order to create a controlling decision given that the plurality opinion "expresse[d] a view of the case close to [his] own." *Ibid*. As the concurrence demonstrates, had the question of whether the decision was diverted to the wrong decision-maker been properly raised, Justice Stevens

would have joined the plurality and found vacatur and remand to be warranted.[9]

E. Unless Overturned by the U.S. Supreme Court, *Bazzle* Remains Highly Persuasive Authority

Contrary to Defendants' insinuations, *Bazzle* has never been overturned. Citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662 and *Oxford Health Plans, LLC v. Sutter* (2013) 133 S.Ct. 2064, Defendants suggest that the U.S. Supreme Court has gone "out of its way to distance itself" from *Bazzle*. Defs.' Br. at p. 7. Not so. *Bazzle* remains highly persuasive authority, notwithstanding *Stolt-Nielsen* and *Oxford Health.*

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[9] Defendants urge that *Bazzle* should be distinguished based on purportedly "sweeping language" in the *Bazzle* arbitration contracts. Defs.' Br. at p. 8-9. First, Defendants overstate the role of this language in *Bazzle*. The plurality cited multiple reasons for its holding, including U.S. Supreme Court precedent on the substantive/procedural dichotomy and policy considerations regarding the fitness of arbitrators to resolve the relevant issues. *Bazzle, supra*, 539 U.S. at p. 452-53. Second, Defendants provide no support for their assertion that the scope of the language in *Bazzle* differs meaningfully from the language at issue here or the arbitration agreements in numerous court decisions adhering to *Bazzle*. In *Bazzle*, the contract required arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." *Id.* at p. 448. Here, the Acknowledgements cover "any claim, dispute, and/or controversy... arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory or equitable law or otherwise." 1 JA 194-201. Defendants' claim that this language limits the arbitrator to substantive "employment disputes" (Defs.' Br. at p. 9) is refuted by the actual text of the Acknowledgments which provides a broad mandate to the arbitrator. There is no language clearly and unmistakably contradicting the presumption that procedural issues relating to the conduct of the arbitration itself are reserved for the arbitrator. Moreover, any such contention is waived: Defendants have never argued that the Acknowledgments contain "clear and unmistakable" language supplanting any presumption of arbitrability.

Stolt-Nielsen stands for the proposition that arbitrators cannot impose class arbitration as a matter of personal preference but must attempt to ascertain the parties' intent or to ground their decision in the language of the parties' agreement, a rule derived from applicable law, or state contract law. 559 U.S. at p. 684. The *Stolt-Nielsen* majority discussed *Bazzle* in detail, yet never overturned that precedent. In essence, *Stolt-Nielsen* stands for the proposition that arbitrators cannot impose class arbitration as a matter of personal preference, but instead must attempt to ascertain the parties' intent. 559 U.S. at p. 684. It does not address the "who decides" question in *Bazzle*. In fact, the Court expressly declined to revisit the holding of *Bazzle*. *See Stolt-Nielsen*, *supra*, 559 U.S. at p. 680 ("we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible"). In order to claim that the *Stolt-Nielsen* Court "distanced itself from *Bazzle*," Defendants invoke Justice Alito's statement that *Bazzle* "resulted in a plurality decision." Defs.' Br. at p. 7. It is unclear how recounting the procedural history and outcome of a case constitutes a statement of intent to overrule that case.

Similarly unavailing is Defendants' citation to a stray footnote in *Oxford Health* indicating (in parentheticals) the status of *Bazzle* as a plurality opinion. In *Oxford Health*, as in *Stolt-Nielsen*, the Court explicitly acknowledged that the issue it confronted differed from *Bazzle*. Consistent with *Bazzle* and other prevailing law, the *Oxford Health* parties stipulated that the arbitrator should determine whether their contract authorized class procedures. *Oxford Health*, 133 S.Ct. at p. 2068 n.2. Defendants would thus have this Court infer deep reservations about the vitality of *Bazzle* from nothing more than the U.S. Supreme Court's proper adherence to the Bluebook citation system.

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* and *Oxford Health* "caution that classwide

[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").

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.

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

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

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 in the minority. *See Veliz v. Cintas Corp.* (9th Cir. 2008) 273 F.App'x 608, 609 (where trial court improperly determined for the arbitrator whether class or collective proceedings were permissible, remanding so that arbitrator could

decide in first instance); *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.* (5th Cir. 2003) 343 F.3d 355; *Vaughn v. Leeds, Morelli & Brown, P.C.* (2d Cir. 2009) 315 F.App'x 327, 239 (under *Bazzle*, court properly compelled arbitration on the arbitrability of class claims). *See* also *Sanford v. Memberworks, Inc.* (9th Cir. 2007) 483 F.3d 956, 964 (characterizing *Bazzle* as holding "that the question whether a contract permits class arbitration is an issue for the arbitrator to decide").

Other courts have issued closely analogous decisions. *See Blue Cross Blue Shield, supra*, 671 F.3d at p. 639 ("The only question that a court should address before arbitration starts is whether the parties have agreed to arbitrate at all . . . the arbitrators themselves resolve procedural questions in the first instance (and usually the last instance)."); *Anderson v. Comcast Corp.* (1st Cir. 2007) 500 F.3d 66, 71-72 (parties' agreement contained express class action bar that would not apply if there was state law to the contrary; whether the agreement should be interpreted to permit class arbitration in light of applicable state law was an issue for the arbitrator); *Employers Ins. Co. of Wausau v. Century Indem. Co.* (7th Cir. 2006) 443 F.3d 573 (whether party could be required to participate in consolidated arbitration was an issue for the arbitrator); *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.* (1st Cir. 2012) 683 F.3d 18 (whether agreement permitted franchise group's associational action was issue for arbitrator).[11]

[11] Attempts to distinguish such cases on the grounds that class arbitrations are different from consolidated or associational arbitrations ultimately ring hollow. Both class and consolidated proceedings are methods of conducting an arbitration that are *procedurally* different than individual one-on-one arbitration. However profound, the variances between consolidated, class, and other group or representative arbitration vis-à-vis individual arbitration are differences of degree, not of kind – i.e. differences in procedure, not the substantive issue of whether the parties' claims must be arbitrated at all. Under cases such as *Stolt-Nielsen*, arbitrators are charged to take these

Likewise, a deluge of federal district court decisions hold that an arbitrator must determine the availability of class arbitration. Since *Oxford Health* alone, multiple courts have relied on *Bazzle* and its progeny to reach the same conclusion as the Second District below. *See, e.g., Williams-Bell, supra,* 2015 U.S. Dist. LEXIS 2033 at *13-23; *Holden v. Raleigh Rest. Concepts, Inc.* (E.D.N.C. Nov. 20, 2014, No. 5:14-CV-348-F) 2014 U.S. Dist. LEXIS 163676 at *10-11; *Harrison, supra,* 2014 U.S. Dist. LEXIS 117154 at *6-14; *In re A2P SMS Antitrust Litig., supra,* 2014 U.S. Dist. LEXIS 74062 at *31-32; *Lee v. JPMorgan Chase & Co.* (C.D.Cal. 2013) 982 F.Supp.2d 1109, 1114 ("The only question, as in *Bazzle*, is the interpretive one of whether or not the agreements authorize Plaintiffs to pursue their claims on a class . . . basis. That question concerns the procedural arbitration mechanisms available to Plaintiffs, and does not fall into the limited scope of this Court's responsibilities in deciding a motion to compel arbitration."); *Jackson v. Home Team Pest Def., Inc.* (M.D.Fla. Nov. 15, 2013, No. 6:13-CV-916-ORL-22) U.S. Dist. LEXIS 163068 at *6-7 ("where the dispute is over the existence of a provision forbidding class arbitration, not its enforceability, precedent suggests that the necessary responsibility to interpret the contract's language rests with the arbitrator"; contentions that contractual language is ambiguous and authorizes collective proceedings "are classic arguments calling for contractual interpretation, not threshold questions that must be answered before the case can be submitted to arbitration"); *Sullivan v. PJ United, Inc.* (N.D.Ala. Sept. 10, 2013, No. 7:13-CV-1275-LSC) 2013 U.S. Dist. LEXIS 128698 at *4 (once determined that a plaintiff's claims belong in arbitration, arbitrator must decide applicability of collective action waiver); *Planet Beach Franchising Corp. v. Zaroff* (E.D.La. 2013) 969 F.Supp.2d 658 (following

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procedural distinctions into account when interpreting the parties' agreement. They are fully capable of doing so.

Bazzle as persuasive authority and holding that parties' contract did not overcome presumption that issue is to be decided by arbitrator); *Kovachev v. Pizza Hut, Inc.* (N.D.Ill. Aug. 15, 2013, No. 12-C-9461) 2013 U.S. Dist. LEXIS 115284.[12]

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[12] Post *Stolt-Nielsen, see also Cramer v. Bank of America, N.A.* (N.D.Ill. May 30, 2013, No. 12-C-8681) 2013 U.S. Dist. LEXIS 75592 at *5; *A-1 A-lectrician, Inc. v. Commonwealth Reit* (D.Haw. 2013) 943 F.Supp.2d 1073, 1079-80 (whether arbitrations may be consolidated is a "procedural" question "about *how* the arbitration should be conducted" that is typically reserved for the arbitrator); *Price v. NCR Corp.* (N.D.Ill. 2012) 908 F.Supp.2d 935, 940-45; *Edinger v. Pizza Hut of Am., Inc*. (M.D.Fla. Oct 30, 2012, No. 8:12-cv-1863-T-23EAJ) 2012 U.S. Dist. LEXIS 161481; *Okechukwu v. DEM Enterprises, Inc*. (N.D.Cal. Sept. 27, 2012, No. C-12-03654) 2012 U.S. Dist. LEXIS 139540; *State Farm Fire & Cas. Co. v. Pentair, Inc.* (N.D.Ill. Sept. 7, 2012, No. 11-CV-06077) 2012 U.S. Dist. LEXIS 128299; *Rame, LLC v. Popovich* (S.D.N.Y. 2012) 878 F.Supp.2d 439, 446-47; *Brookdale Senior Living, Inc. v. Dempsey* (M.D.Tenn. Apr. 25, 2012, No. 3:12-cv-00308) 2012 U.S. Dist. LEXIS 57731; *Collier v. Real Time Staffing Servs., Inc.* (N.D.Ill. Apr. 11, 2012, No. 11-C-6209) 2012 U.S. Dist. LEXIS 50548 at *10-16; *Hesse v. Sprint Spectrum L.P.* (W.D.Wash. Feb. 17, 2012, No. C06-0592) 2012 U.S. Dist. LEXIS 20389; *Guida v. Home Sav. of Am., Inc.* (E.D.N.Y. 2011) 793 F.Supp.2d 611; *Zulauf v. Amerisave Mortg. Corp.* (N.D.Ga. Nov. 23, 2011, No. 1:11-cv-1784-WSD) 2011 U.S. Dist. LEXIS 156699; *Vazquez v. ServiceMaster Global Holding, Inc*. (N.D.Cal. June 29, 2011, No. C-09-05148-SI) 2011 U.S. Dist. LEXIS 69753 at *11-12 ("Here, however, the arbitration clause is enforceable regardless whether it permits or precludes class certification. The question is for the arbitrator to decide."); *Clark v. Goldline Int'l, Inc.* (D.S.C. Nov. 30, 2010, No. 6:10-cv-01884JMC), 2010 U.S. Dist. LEXIS 126192 at *21-22; *Smith v. Cheesecake Factory Rests., Inc*. (M.D.Tenn. Nov. 16, 2010, No. 3:06-00829) 2010 U.S. Dist. LEXIS 121930 at *7; *Fisher v. Gen. Steel Domestic Sales, LLC* (D.Colo. Sept. 22, 2010, No. 10-cv-1509-WYD-BNB) 2010 U.S. Dist. LEXIS 108223.

2. Most California Courts are in Agreement With *Bazzle's* Interpretation of the FAA

Several California courts have likewise held that the availability of class arbitration is a question of contract interpretation reserved for the arbitrator. For example, prior to *Bazzle*, the Second District initially held in *Garcia v. DirecTV, Inc.* that clause construction determinations should be made by the trial court, not the arbitrator. The U.S. Supreme Court vacated that opinion in light of *Bazzle* and remanded *Garcia* for further consideration. The California Court of Appeal then reversed its prior ruling, concluding, "[t]he Supreme Court has spoken [in *Bazzle*], 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." *Garcia v. DirecTV, Inc.* (2004) 115 Cal.App.4th 297, 298, 302-303. In *Cable Connection*, this Court extended *Garcia* to the context of the California Arbitration Act (CAA), remanding a clause construction dispute to the party-selected arbitrators for their reconsideration. 44 Cal.4th at 1354-66.

Analogously, in *Yuen v. Superior Court* (2004) 121 Cal.App.4th 1133, the court considered the question of who should decide whether the parties' agreement permitted consolidation of claims. The court held that *Bazzle* "mandates" that the arbitrator decide: "under the line drawn by the Supreme Court…the court decides whether the matter should be referred to arbitration, but 'once a matter has been referred to arbitration, the court's involvement is strictly limited until the arbitration is completed.'" *Id.* at p. 1139 (citing *Finley v. Saturn of Roseville* (2004) 117 Cal.App.4th 1253, 1259).

Therefore, the Second District was in good company when it drew upon *Bazzle* in holding that arbitrators and not courts determine the procedures for arbitration, including the availability of class proceedings.

Courts in this state and across the country continue to rely on *Bazzle*'s logic to hold that the availability of class arbitration is a question for arbitrators.

G. *Opalinski* and *Reed-Elsevier* Conflate the "Who Decides?" Inquiry with Questions Pertinent Only to the Merits of Clause Construction

1. Under the U.S. Supreme Court Jurisprudence Discussed Above, the Fact that Class Procedures Can Be Fundamental to the Conduct of the Arbitration Does Not Make the Question of Their Availability Any Less Procedural in Nature

Decisions such as *Opalinki* and *Reed-Elsevier* that incorrectly classify the "who decides" question as substantive share a fatal error: They improperly inject considerations relevant to the merits of the clause construction analysis into the baseline inquiry of who decides. In particular, they conflate significance and substance, simplistically asserting that a question is substantive if it is sufficiently important. Yet importance has never been the dividing line of the Supreme Court's substantive/procedural dichotomy. The fact that a question is important – even dispositive – does not render it substantive.[13] The difference between substantive and procedural is instead one of kind: substantive "arbitrability" questions concern *where* the case may initially be brought. Procedural questions concern *how* the case proceeds once it is in arbitration.

For example, the Third and Sixth Circuits relied heavily on the Supreme Court's observations in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, that class proceedings transform the *procedural* nature of arbitration. *See Opalinski*, *supra*, 761 F.3d at p. 334 ("Traditional

[13] *See, e.g.*, *Howsam, supra*, 537 U.S. at p. 85 (leaving it to the arbitrator to apply a time limit rule that could extinguish the plaintiff's claims entirely); *BG Group, supra*, 134 S.Ct. at pp. 1206-08 (reaffirming that a whole host of conditions precedent to arbitration – many of which could result in a complete dismissal of claims – fall within the province of the arbitrator).

individual arbitration and class arbitration are so distinct that a choice between the two goes, we believe, to the very type of controversy to be resolved."); *Reed Elsevier*, *supra*, 734 F.3d at p. 599 ("the question whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally"). But the differences between the procedural mechanisms of individual and class arbitration do not render the question of who decides substantive. The fundamental question is not how subjectively "important" an issue is, or how much it will affect the arbitral proceedings, but whether it is one within the purview of the arbitrator or court.[14]

It is axiomatic that arbitration is contractual and that the parties may agree to make class procedures available. An arbitrator may take *Concepcion's* observations into account when construing an arbitration agreement to determine whether it provides for class arbitration. Hence, several courts respond to the *Reed Elsevier/Opalinski* rationale by pointing out that differences between individual and class proceedings are relevant not to the question of who decides but "only to explain why the standard for determining when parties have consented to class arbitration is stringent." *Lee*, *supra*, 982 F.Supp.2d at p. 1114. *See also Guida*, *supra*, 793 F.Supp.2d at p. 619.

In re A2P SMS Antitrust Litig., 2014 U.S. Dist. LEXIS 74062 at *21-38, persuasively engages with this issue. As the court intimates, *Bazzle* suggests that the arbitrator should decide the availability of class arbitration, whereas *Stolt-Nielsen* and *Concepcion* caution that classwide

[14] Similarly, due to the importance of class certification, interlocutory appeal of a class certification decision may be warranted. *See, e.g.*, Committee Note to 1998 Amendments to Rule 23, Subdivision 23(f). Yet, as far as Plaintiff is aware, no federal court has suggested that a court rather than an arbitrator must decide class certification. The fact that it is a defining moment in the litigation is not enough.

arbitration and individual arbitrations are very different procedures. Further, the differences between bilateral and class arbitration "are primarily relevant to deciding the availability of such class arbitration, not the antecedent question of whether that decision is assigned to the Court or the arbitrator." *Id*. at *36. Although these differences are significant, they 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." *Id*. at *37-38.[15]

The Second District echoed this point, holding that "these concerns are more relevant to the issue of whether the parties agreed to class arbitration rather than the issue of whether the court or the arbitrator decides." Opinion at p. 14. At bottom, the parties' dispute will be sent to arbitration regardless of whether class procedures are available, and the propriety of class treatment is an issue of how the case will be conducted once in arbitration.

2. Arbitrators are Fully-Equipped to Decide Clause Construction Issues Without Undue Court Interference

As stated above, *Bazzle* held that arbitrators are well-positioned to interpret the applicable contract and determine whether it authorizes class arbitration. In wresting such procedural determinations from the arbitrator, the few decisions which reject *Bazzle* reflect the very hostility to arbitration

[15] *See also Harrison, supra*, 2014 U.S. Dist. LEXIS 117154 at *12-14 (holding that Supreme Court's "cautionary note" "regarding the practical differences between bilateral and class arbitration does not alter the outcome"; "the parties will not be forced to arbitrate any substantive dispute they did not agree to arbitrate"; "more significantly," *Bazzle* continues to guide the analysis and dictate the result); *Williams-Bell, supra*, 2015 U.S. Dist. LEXIS 2033.

that the FAA condemns – carving out a sphere of questions too important for an arbitrator to decide. The differences between individual and class proceedings may be appropriate considerations at the clause construction phase, but they are premature at this juncture. Smuggling such clause construction concerns into the "who decides" analysis in order to usurp the arbitrator's authority reflects the kind of hostility and mistrust toward arbitrators repeatedly decried by the U.S. Supreme Court. *See generally Concepcion, supra,* 131 S.Ct. at p. 1747. Skepticism regarding the ability of arbitrators to handle potentially complex procedures distorts the FAA – principally concerned with expedient alternatives to judicial resolution, and firmly committed to minimal judicial involvement – beyond recognition.

Defendants also feign concern for the due process rights of absent class members, arguing that arbitrators should not make decisions that implicate class members' rights. Defendants offer no evidence for the claim that class arbitration would trounce the rights of absent class members. Like courts, arbitrators are fully capable of preserving those rights through strict adherence to class action protocols, including carefully defining the class and issuing the best practicable notice. *See, e.g.*, *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-12 (describing constitutionally adequate notice).[16] The related argument that the question at bar is substantive because it concerns *whose* claims are subject to arbitration falters for

[16] Arguments to the contrary fail on their face and are particularly abhorrent where, as here, the arbitration clauses require the parties to arbitrate before a retired California Superior Court judge subject to the disqualification rules of that court. *See* 1 JA 194-201. Moreover, generally speaking, arbitrators are routinely entrusted with the management and resolution of large and complex class actions. *See*, e.g., *Jock v. Sterling Jewelers Inc.* (2d Cir. 2011) 646 F.3d 113, *cert. denied*, 132 S.Ct. 1742 (rejecting attempt by district court to second-guess decision of arbitrator to permit class arbitration and entrusting conduct of class arbitration proceedings in large nationwide employment discrimination dispute to arbitrator).

similar reasons. Each prospective class member signed the same Arbitration Acknowledgements; those who elect not to opt out following provision of notice are properly subject to the arbitral decision.[17]

H. Defendants' Reliance on *City of Los Angeles* is Inapposite

Defendants wrongly claim that the Second District overlooked this Court's supposedly "contradictory and controlling" decision in *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086. This was no oversight. The *City of Los Angeles* decision has no bearing on the present dispute. Rather, it stands squarely on the substantive side of the substantive/procedural dichotomy in holding that when the issue is whether the parties are obligated to arbitrate their dispute (as opposed to remaining in court), the court presumptively decides.

In *City of Los Angeles,* the parties contested whether their contract mandated arbitration of a particular type of substantive legal claim related to furloughs. This Court drew upon a body of law unique to the labor and collective bargaining context. It held that because the parties' disagreement concerned "whether a party has a contractual duty to arbitrate a particular dispute," it was "subject to judicial resolution." 56 Cal.4th at pp. 1093, 1095.

City of Los Angeles addressed the gateway question of whether the parties agreed to arbitration in the first place. It stands for the unremarkable proposition that "unless an arbitration agreement expressly provides otherwise, a dispute regarding the *arbitrability of a particular dispute* is

[17] By taking their argument to its logical conclusion, Defendants only prove Plaintiff's point. Defendants essentially assert that, before compelling arbitration, courts must not only determine clause construction but also adjudicate the propriety of class certification. This would trample upon the sphere of the arbitrator and undermine the FAA's purpose to take cases completely out of the judicial system. It could easily take a year or more of full-on litigation before class certification is ripe for decision on the merits.

subject to judicial resolution." 56 Cal.4th at p. 1096 (emphasis added). The *City of Los Angeles* Court confronted an entirely different question than the one presented here: the procedures available *once arbitration is commenced*. *See Knutsson v. KTLA, LLC* (2014) 228 Cal.App.4th 1118, 1131-34 (whether there is an enforceable duty for the parties to arbitrate the claims is decided by the court; in contrast, "when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left for the arbitrator") (citation omitted). The Second District was on solid ground in discussing on-point case law and "failing to mention" an opinion that makes not one single reference to class or collective arbitration or to *Bazzle* or its progeny.

II. Because Courts That Usurp the Role of the Arbitrator By Deciding the Procedural Matter of Clause Construction Commit *Per Se* Reversible Error, the Second District Correctly Refrained From Determining Whether the Superior Court Was Correct on the Merits

Defendants also boldly argue that, even if arbitrators are supposed to determine a particular question, courts may substitute their judgment for that of arbitrators so long as the courts arguably got it right on the merits. Defendants go so far as to argue that courts may decide a particular question "regardless of whether the underlying arbitration agreements set forth a preference by the contracting parties to have that question resolved by the arbitrator." Defs.' Br. at p. 18. Defendants' bizarre position stands in disregard of an entire body of binding U.S. Supreme Court precedent on the issue at hand of "who decides." Significantly, Defendants are unable to cite any authority supporting its core premise that the Second District should have followed the harmless error doctrine when considering the division of decision-making authority between courts and arbitrators (or even to other decision-making bodies such as judges and juries or coordinate branches of government).

"Harmless error" does not apply to this appeal. This doctrine presupposes that the identity of the decision-maker is irrelevant so long as the subsequent decision-making body (an appellate court) believes that its decision was the correct one, regardless of its authority to make that decision. The harmless error doctrine expressed in the California Constitution and Code of Civil Procedure section 475 is properly applied to challenges to verdicts and judgments on the basis of errors in pretrial or trial decisions. In civil appeals the doctrine may bar reversal when an appellant fails to persuade that an error prejudiced the verdict. *See, e.g.*, *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 787, 801 (restating the rule that not every trial error justifies reversal if there is no actual prejudice and declining to overturn trial verdict based on potentially improper closing argument). Defendants fundamentally misapply the doctrine to this appeal. While harmless error doctrine asks whether the verdict was likely to have been different, the dispositive question here is whether the court or arbitrator was the proper decision-maker on the clause construction issue. Once the Second District decided that it was the arbitrator who had the authority to decide clause construction, it correctly refrained from reviewing the merits of the clause construction performed by the Superior Court.

A. The Law is Clear that the Arbitrator Must Decide Clause Construction in the First Instance, Regardless of Whether the Superior Court Decided the Issue Correctly

When courts intrude on the province of arbitrators, their error is automatically reversible. The mere fact of the court's interference in a decision properly within the arbitrator's jurisdiction requires vacatur. Thus, it is unsurprising that Defendants fail to identify a single court that has engaged in a secondary analysis of the prejudice stemming from the error.

The Supreme Court has explicitly rejected Defendants' proposed mode of analysis. In *Bazzle*, five justices agreed that the accuracy of a decision does not shield that decision from vacatur when made by the wrong decision-maker. The plurality held that it must refrain from determining whether the contracts permitted class procedures "not simply because it is a matter of state law, but also *because it is a matter for the arbitrator to decide*." 539 U.S. at p. 447 (emphasis added). It reached this conclusion notwithstanding the fact that the South Carolina Supreme Court unanimously held that the contracts authorized class arbitration. The plurality stated that it could not accept the state court's resolution because "the question – whether the agreement forbids class arbitration – is for the arbitrator to decide." *Id.* at p. 451. Indeed, the plurality found it necessary to remand given "a strong likelihood…that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation." *Id.* at p. 454. Whether the interpretation was correct on the merits did not figure into the analysis.

The U.S. Supreme Court has repeatedly cautioned that courts must not usurp the role of an arbitrator based on speculation regarding how the arbitrator might rule. For example, in *PacifiCare Health Systems, Inc. v. Book* (2003) 538 U.S. 401, the Court warned:

> we should not, on the basis of "mere speculation" that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved. In short, since we do not know how the arbitrator will construe the remedial limitations…the proper course is to compel arbitration.

Id. at pp. 406-07 (citations omitted). Yet the logic behind Defendants' position would require reviewing courts to opine on questions designated for the arbitrator, in order to determine whether any error by the trial court was prejudicial. This approach not only wastes judicial resources but also

results in an advisory opinion that threatens the independence of arbitrators in deciding questions committed to them in the first instance. It would invite trial courts to go ahead and decide issues reserved for the arbitrator, knowing they are unlikely to be reversed.

Federal appeals courts as well confirm that district court orders invading the arbitrator's jurisdiction must be vacated regardless of the result. *See Anderson*, *supra*, 500 F.3d at 72 (vacating decision of district court analyzing class bar in arbitration agreement, leaving determination to arbitrator in first instance); *Pedcor*, *supra*, 343 F.3d at p. 363 (vacating decision of district court certifying class for arbitration proceedings). *See also Blue Cross Blue Shield*, *supra*, 671 F.3d at p. 640 (in context of consolidation: parties to litigation may not litigate in advance whether arbitrators would exceed their powers if they reached a particular procedural decision, as such anticipatory review would entail an advisory opinion).

Similarly, courts in this state do not review this type of error for prejudice. In *Cable Connection, Inc. v. DirecTV, Inc.* (2008) 44 Cal.4th 1334, this Court remanded a clause construction dispute concerning class arbitration to the panel of arbitrators. Notably, it refrained from expressing an opinion on the merits, and it did not direct the question to the trial court. Instead, it made a narrow ruling that the arbitration panel misapplied relevant rules and precedent. It then sent the question of how to properly apply those authorities to the arbitration panel. *Id.* at pp. 607-08.

California appellate courts have likewise stressed that a decision must be made in the first instance by the arbitrator, and that the possibility of harmless error does not preclude the need to vacate. *See Garcia*, *supra*, 115 Cal.App.4th at pp. 301-02. *Garcia* rebuffed the argument that remand was superfluous because the arbitrator's ruling would be subject to review by a court that had already analyzed the arbitration clause. Attacking that

"imperfect syllogism," the Second District emphatically stated that "the issue must be decided by the arbitrator." *Id.* at p. 302. It stated, in part, that *Bazzle* "quite plainly mandates a decision made in the first instance by the arbitrator, not a decision made by the trial court and imposed on the arbitrator." *Ibid*.[18]

B. This Conclusion is Bolstered By the Highly Deferential Standard of Review for Arbitrators' Decisions

Notably, on judicial review from an arbitrator's clause construction decision, a court does not determine whether the arbitrator reached the correct result but only whether he or she was "arguably construing" the contract. *Oxford Health*, *supra*, 133 S.Ct. at 2070 (unless arbitrator completely abandoned the task of construing the contract, even "grave error" not reversible). *See also Smith v. Servicemaster Holding Corp*., (W.D.Tenn. May 21, 2013, No. 2:11-CV-02943-JPM-DKV) 2013 U.S. Dist. LEXIS 71661 at *15-16 (only issue is whether there is any "plausible" legal basis for arbitrator's award). Given this highly deferential standard of review, it is reversible error not to allow the arbitrator to decide in the first instance. Put simply, it does not matter what the court thinks about how it would resolve the issue if it were the decision-maker.

In short, there is no support for Defendants' argument that the Second District erred by failing to review the trial court's mistake for prejudice or harmless error. The argument misses the fundamental point:

[18] California appellate courts accept a trial court's involvement only when neither party timely requests that the court leave the question of class arbitration to the arbitrator. *See Nelsen*, 207 Cal.App.4th at p. 1129 n.6; *Truly Nolen*, 208 Cal.App.4th at p. 515. This case does not fall within that exception, as Plaintiff has not agreed to or acquiesced in the trial court deciding clause construction and has contested the trial court's authority at every stage of these proceedings.

when the trial court trespasses upon the authority of the arbitrator, that error is *per se* prejudicial. Vacatur of decisions made by overreaching courts – regardless of their result – is paramount to maintaining the proper relationship between arbitrators and courts, thereby safeguarding the independence arbitrators must have and the deference the FAA demands of reviewing courts. *See BG Group*, *supra*, 134 S.Ct. at p. 1206.

III. The Superior Court Erred in Its Clause Construction Analysis

Even if Plaintiff were in fact required to establish that the Superior Court's error in clause construction was prejudicial, Sandquist is more than able to do so here. The trial court reached the wrong result.[19] It held that the language of the Arbitration Acknowledgements precluded class arbitration, resting its holding on a misreading of *Stolt-Nielsen* and a misunderstanding of the textual and extrinsic evidence. Contrary to the Superior Court's holding, the Acknowledgements at issue here are expansive in scope and permit class arbitration.

A. The Superior Court Blatantly Misread *Stolt-Nielsen*

The trial court held that *Stolt-Nielsen* directly prohibited class treatment of Sandquist's claims. It construed *Stolt-Nielsen* to hold that an arbitration clause imposed by an employer on its employees cannot permit class arbitration unless it expressly references "other employees, employee groups or employee members of a putative class." 6 JA 1395-96. This, in itself, was reversible legal error.

In *Stolt-Nielsen*, the Supreme Court reviewed a district court's order vacating a maritime industry arbitration award involving two commercial entities with equal bargaining power. 559 U.S. at pp. 666-70. One party argued that the arbitrators had disregarded the law and the established

[19] At a minimum, the Acknowledgements do not unambiguously preclude class procedures and a reasonable arbitrator could easily reach a contrary result.

custom of bilateral arbitration in the maritime industry by construing the parties' fully-negotiated arbitration agreement as permitting class arbitration. *Id.* at pp. 672-74. The Supreme Court reversed the arbitrators' construction based on a crucial fact that Defendants conveniently omit: both parties stipulated that their arbitration agreement was "silent" regarding the availability of class arbitration and that no meeting of the minds occurred on that question. *Id.* at p. 676. In light of that stipulation, the Supreme Court held that the arbitrators committed legal error by imposing their own bare policy preferences while making no attempt to ascertain the parties' intent or to ground their decision in the language of the parties' agreement, a rule derived from applicable law, or state contract law. *Id.* at p. 684.

Stolt-Nielsen stands for the proposition that silence on the question of class arbitration, in and of itself, cannot be taken as dispositive evidence of intent to allow class procedures. *Ibid.* On the other hand, the lack of explicit contractual language pertaining to class arbitration does not end the analysis. Rather, ordinary rules of contract interpretation apply. *See, e.g.*, *Jock v. Sterling Jewelers Inc.* (2d Cir. 2011) 646 F.3d 113, 124, *cert. denied*, 132 S.Ct. 1742 (*Stolt-Nielsen* "did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration"); *Sutter v. Oxford Health Plans LLC* (3d Cir. 2012) 675 F.3d 215, 222 *aff'd*, 131 S.Ct. 2064; *Yahoo! Inc. v. Iversen* (N.D.Cal. 2011) 836 F.Supp.2d 1007, 1011-13.

Stolt-Nielsen is distinguishable because the parties here have not stipulated that the Acknowledgements are "silent" on the availability of class arbitration. The parties never reached an agreement on the issue of whether the Acknowledgments are silent. Sandquist has argued at every stage of these proceedings that the Acknowledgements in fact authorize

class arbitration. *Stolt-Nielsen* is therefore unhelpful in construing the Acknowledgements at issue here and certainly does not dictate the result. The Superior Court erred by holding otherwise.

B. The Broad Language of the Acknowledgements Permits Class Arbitration

Clause construction relies on ordinary canons of contract interpretation. The first canon counsels that the best evidence for construing any contract is its text. *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 869. The Acknowledgements here state:

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context…[A]ny claim, dispute, and/or controversy…arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory or equitable law or otherwise…shall be submitted to and determined exclusively by binding arbitration.

1 JA 194-201. This expansive language plainly covers "any claim, dispute, and/or controversy" that an employee might bring – which would include individual or class claims – so long as there is "any relationship or connection whatsoever" to the employment. *Ibid.* Class claims are disputes that "may arise out of the employment context" because the employer may systematically engage in a pattern or practice of discrimination or other unlawful conduct against a class of employees. *See, e.g.*, *Mork v. Loram Maint. of Way, Inc.* (D.Minn. 2012) 844 F.Supp.2d 950, 955 (arbitration agreement applying to "claims or disputes of any nature arising out of or relating to the employment relationship" authorized class arbitration).[20]

[20] *See also Southern Communs. Servs. v. Thomas* (11th Cir. 2013) 720 F.3d 1352, 1359-60 (upholding arbitrator's ruling in favor of class arbitration where agreement provided for arbitration of "any disputes"); *Jock, supra,*

The Acknowledgements do not exclude class claims. The text of the Acknowledgements also demonstrates that Defendants knew how to exclude particular categories of claims from arbitration. Specifically, Defendants exempted certain claims arising under the National Labor Relations Act and the California Workers' Compensation Act. 1 JA 196-97. Defendants called these "the sole exception" to its expansive language requiring arbitration of "any claim, dispute, and/or controversy." *Ibid.* The maxim *expressio unius est exclusio alterius* is instructive here. It provides that when exemptions are specified, other exemptions – such as the purported class waiver – may not be implied. *See, e.g.*, *Mork*, *supra*, 844 F.Supp.2d at p. 955 (where agreement excludes certain types of claims or proceedings from arbitration, by negative implication, the fact that class claims are not excluded means they are presumably covered).

Based on the all-encompassing language in the Arbitration Acknowledgments, and in light of well-entrenched California contract law principles, the Superior Court should have found that the parties intended to permit, rather than preclude, class arbitration.

C. Extrinsic Evidence Reinforces This Interpretation

In addition to misconstruing the plain language of the Acknowledgements, the Superior Court disregarded extrinsic evidence that bolsters Sandquist's position. After Sandquist filed his class-wide

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646 F.3d at p. 124 (confirming arbitrator's ruling that class arbitration was permitted based on clause requiring arbitration of "any dispute, claim or controversy…which could have been brought before an appropriate government or administrative agency or in a[n] appropriate court"); *Sutter*, *supra*, 675 F.3d at p. 224 (affirming arbitrator's ruling that class arbitration is permitted and noting that "where, as here, the parties' intent with respect to class arbitration is in question, the breadth of their arbitration agreement is relevant to the resolution of that question"). Indeed, the Fifth Circuit has held that when an arbitration clause references "any dispute," it is "difficult to imagine broader language." *In re Complaint of Hornbeck Offshore Corp*. (5th Cir. 1993) 981 F.2d 752, 755.

administrative charge, Defendants abandoned the Arbitration Acknowledgments they required their employees to sign for nearly a decade, replacing them with new language containing an express class-action waiver. 1 JA 120. If the trial court's interpretation of the original language was correct, this move would have been unnecessary. Plainly, Defendants replaced the Arbitration Acknowledgments in order to plug a hole in the original language contemplating class arbitration.

D. *Nelsen* and *Kinecta* Are Distinguishable

Attempting to defend the Superior Court's clause construction, Defendants rely on two California appellate court decisions that neither apply to this dispute nor bind this Court.

First, in *Nelsen*, the arbitration agreement lacked the expansive language at issue here. For example, it did not state that "the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context." 1 JA 194-95. Furthermore, *Nelsen* is distinguishable because the record in that case lacked extrinsic evidence bearing on the parties' intent to include or exclude class arbitration. 207 Cal.App.4th at p. 1129. Here, by contrast, Sandquist has produced precisely the sort of evidence the *Nelsen* court sought: "prelitigation conduct contradicting the position the parties are taking on that subject now." *Ibid.*

The second case Defendants champion is *Kinecta Alternative Financial Solutions, Inc. v. Super. Ct.* (2012) 205 Cal.App.4th 506. There, the court held that an arbitration agreement did not permit class arbitration. The court fixated on repeated bilateral language in the arbitration agreement that does not appear in the Acknowledgements at issue here. *Id.* at pp. 356-57. Furthermore, the *Kinecta* agreement lacked the expansive language of the Acknowledgements quoted above. The Superior Court did not address these differences or how the "implicit ruling in *Kinecta*" applies

notwithstanding them. 6 JA 1424. Thus, the trial court erred in relying upon this non-binding, distinguishable holding to read a class-action bar into the Acknowledgements.

CONCLUSION

The Superior Court committed reversible error by invading the jurisdiction of the arbitrator. The Second District appropriately remanded the matter to that court with instructions to vacate and submit the issue to the arbitrator. The FAA and related U.S. Supreme Court precedent govern the questions presented for review and compel this result. The position Defendants urge this Court to adopt would contravene binding precedent and distort federal arbitration law and policy beyond recognition.

Respectfully submitted,

DATED: March 13, 2015

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

This brief complies with the length limitation of California Rule of Court 8.204(c)(1) because the brief contains 13,346 words, excluding the parts of the brief exempted by that rule.

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