No. S220812

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**TIMOTHY SANDQUIST**
Plaintiff – Respondent

vs.

**LEBO AUTOMOTIVE, INC., et al.**
Defendants – Appellants

Appeal from the Superior Court for the County of Los Angeles
Case No. BC476523
The Honorable Elihu M. Berle

After Review by the Court of Appeal,
Second Appellate District, Division Seven
Case No. B244412

# (1) APPLICATION OF DRI-THE VOICE OF THE DEFENSE BAR AND THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND (2) *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS


*JAMES W. MICHALSKI
HOLLAND & KNIGHT LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
213-896-2585 (phone)
213-896-2450 (fax)
JAMES.MICHALSKI@HKLAW.COM

JERROLD J. GANZFRIED
(*PRO HAC VICE APPLICATION PENDING*)
HOLLAND & KNIGHT LLP
800 17th St., NW, Suite 1100
Washington, D.C. 20006
202-469-5151 (phone)
JERRY.GANZFRIED@HKLAW.COM

*Counsel for Amici Curiae*

## APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS

DRI—The Voice of the Defense Bar ("DRI") and The Association of Southern California Defense Counsel ("ASCDC") respectfully apply, pursuant to California Rules of Court, rule 8.520(f), for permission to file the attached brief as *amici curiae*. Good cause exists to permit DRI and ASCDC to file the *amici* brief at this time.

This case presents a critical question concerning the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, namely, whether courts or arbitrators should determine whether the parties to a contract have agreed to class-wide arbitration. The Court of Appeal held in this case that the question whether an arbitration agreement empowers an arbitrator to hear class claims is for the arbitrator to decide. That result conflicts with federal authorities and with decisions of other California state courts. The United States Supreme Court has explained why class-wide arbitration is fundamentally and qualitatively different from bilateral

arbitration and, hence, is not to be imposed by arbitrators on parties that have not agreed to this form of dispute resolution.

Based on a review of the briefs filed in this case and the extensive experience of its members in this field of practice, *amici* DRI and ASCDC believe they can add a unique perspective on the legal issues presented in this case. Accordingly, *amici* respectfully submit that they can contribute in a meaningful way to the review of the issues before the Court and be helpful to the Court in its disposition of issues that will have broad practical repercussions.

### A. INTERESTS OF DRI AND ASCDC

DRI is an international organization that includes more than 22,000 attorneys involved in defending civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI addresses issues germane to defense attorneys, promotes the role of the defense lawyer, and strives to improve the civil justice system. DRI has long been a voice in making the civil justice system fairer, more efficient and — where issues of national interest are involved — more consistent. To promote these objectives, DRI participates as

*amicus curiae* in cases raising issues important to its members, their clients, and the judicial system. DRI's *amicus* participation in California courts includes briefs on the merits in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 and *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096.

DRI members often advise or represent clients in drafting contracts containing arbitration provisions and in subsequent proceedings to resolve contractual disputes. Based on the informed interest and relevant experience of its members, DRI has submitted *amicus* briefs to the United States Supreme Court in recent years in several leading cases presenting issues under the Federal Arbitration Act. *E.g., Oxford Health Plans LLC v. Sutter* (2013), 133 S.Ct. 2054; *Am. Express Co. v. Italian Colors Restaurant* (2013), 133 S.Ct. 2064; *AT&T Mobility LLC v. Concepcion* (2011), 131 S.Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662. DRI members therefore have a direct interest in the issues presented in this case.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil

actions. It is comprised of over 1,000 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members, and provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC has participated as *amicus curiae* in numerous cases before this Court, including some involving issues related to arbitration. *See, e.g., Sanchez v. Valencia Holding Co. LLC*, S199119. Its members are regularly involved in the defense of civil actions, including class actions, and therefore ASCDC has an interest in this matter.

### B. THE AMICI BRIEF WILL ASSIST THE COURT IN DECIDING A CRITICAL ISSUE FOR THE DEFENSE BAR CONCERNING THE AVAILABILITY OF CLASS-WIDE ARBITRATION

As does the opinion of the Court of Appeal in this case, the brief of the plaintiff-respondent places principal reliance on the plurality opinion in *Green Tree Financial v. Bazzle* (2003) 539 U.S. 444. But the United States Supreme Court has more

recently acknowledged that *Bazzle* generated confusion among parties to subsequent arbitration and litigation. *See Stolt-Nielsen,* 559 U.S. 662. In these circumstances, *amici* submit that the Court would benefit from further examination of what actually was (and was not) decided in *Bazzle,* as well as the experience of DRI and ASCDC members and their clients who have contended with the confusion sown by *Bazzle* and its aftermath. Accordingly, DRI and ASCDC respectfully request permission to file the proposed *amici curiae* brief.

### C. NO ASSISTANCE FROM ANY OTHER PARTY TO THIS APPEAL OR THEIR COUNSEL

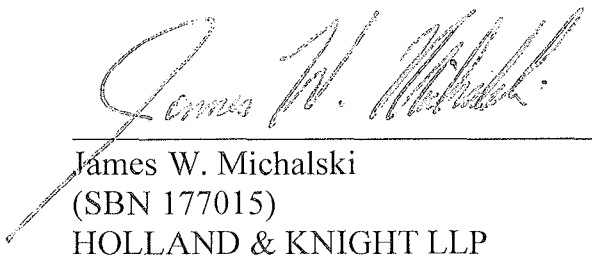
Pursuant to California Rule of Court 8.520(f), this certifies that no party or any counsel for a party in the pending appeal, other than counsel for *amici curiae* DRI and ASCDC, has authored the proposed *amici* brief in whole or in part, and that no party or

any counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief.

Of Counsel:

Jerrold J. Ganzfried
(Pro hac vice application pending)
HOLLAND & KNIGHT LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
202-469-5151
jerry.ganzfried@hklaw.com

Respectfully submitted,



James W. Michalski
(SBN 177015)
HOLLAND & KNIGHT LLP
400 South Hope Street, Suite 800
Los Angeles, CA 90071
213-896-2585
james.michalski@hklaw.com

## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**



**Federal Rules of Civil Procedure**

**Arbitration Cases**



**Other Authorities**

**Law Reviews and Legal Periodicals**

## INTRODUCTION AND SUMMARY OF ARGUMENT

Arbitration is favored under federal law, and under California law, because it is inexpensive, streamlined, and efficient. Class arbitration, by contrast, is a structurally different form of dispute resolution that offers none of these advantages. It is costly, cumbersome, inefficient, and involves substantial judicial oversight — the very attributes that generally motivate parties to choose traditional arbitration over litigation in the first place. Indeed, as the United States Supreme Court has repeatedly observed, class arbitration is so fundamentally different from both individual arbitration and class action litigation in a judicial forum, that it is unavailable as a matter of law unless the parties have expressly agreed. Unfortunately, and based largely on misapprehension of the plurality decision in *Green Tree Fin. Corp. v. Bazzle* (2003) 539 U.S. 444. Some courts and arbitrators have too easily imposed class arbitration on parties who had not agreed to that form of dispute resolution.

Class arbitration simultaneously removes the protections — including Constitutional due process requirements — afforded parties in class action litigation and

eliminates the traditional advantages of arbitration. In fundamental respects, class arbitration runs directly counter to the stated objectives of arbitration. Where arbitration promotes informal decision-making by experts in the substantive field at issue, class-wide proceedings require strict adherence to procedural regularity in order to protect the rights of absent class members. And, there is no assurance that arbitrators in such proceedings have any experience, much less expertise, in conducting the process in a way that adequately protects the rights of all potentially affected participants and non-participants.

Equally as important, a highly valued attribute of single party v. single party arbitration is its confidentiality. That benefit, too, is lost in class arbitration since such proceedings result in publicly available awards.

Perhaps most important of all is the uncertainty surrounding the finality of any result in a class arbitration. Unlike a traditional, single party v. single party arbitration that can be reduced to an enforceable, confirmed judgment under the Federal Arbitration Act ("FAA"), class arbitrations do not provide absent parties — or the arbitral respondent — any

certainty of finality or repose. In short, class arbitration is not an inherently desirable process and should not be imposed on parties who have not expressly agreed to it.

Consistent with these principles, recent decisions of the United States Supreme Court have addressed — and sought to remedy — deleterious ramifications of the confusion that *Bazzle* unleashed. This *amici* brief will focus on (1) the reality of what *Bazzle* did and did not decide, (2) the practical consequences that flowed from the misperceptions of *Bazzle,* and (3) the legal and practical reasons that require judicial determination of the availability of class arbitration.

## ARGUMENT

### I. Misperception of the Supreme Court's Decision in *Bazzle* Created a Mistaken Foundation for the Recent Growth of Class Arbitration

#### A. The Fragmented, Largely Inconclusive Disposition in *Bazzle*

Because the decision of the Court of Appeal and plaintiff–respondent's brief urging affirmance of that decision depend so emphatically on the plurality decision in *Bazzle,* 539

U.S. 444, a thorough understanding of how *Bazzle* has been misperceived is essential to the correct disposition of this case.

Prior to *Bazzle,* it was generally agreed that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from . . . requir[ing] consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." *Champ v. Siegel Trading Co., Inc.* (7th Cir. 1995) 55 F.3d 269, 274-75 (citing numerous circuit decisions holding same).

After *Bazzle* — and based on multiple misperceptions of the disposition of the United States Supreme Court — some courts concluded that class arbitration could proceed as long as the contract did not "forbid" class arbitration. In other words, class arbitration proceeded if the agreement was merely "silent" on the issue. *See, e.g., Shroyer v. New Cingular Wireless Servs.* (9th Cir. 2007) 498 F.3d 976, 992 (reading *Bazzle* to be an "implicit endorsement" of class arbitration); *Trumper v. Travelers Indem. Co.* (S.D. Tex. Jan. 9, 2006, No. CIVA H–04–4157) 2006 WL 6553086, at *1 ("class arbitration

is permissible under the FAA wherever the governing contract does not expressly prohibit such arbitration," citing *Bazzle*).

To understand how this misimpression arose and was perpetuated, it is helpful to return to the source of that confusion: the proceedings in *Bazzle.* The cases that eventually made their way to the United States Supreme Court in *Bazzle* arose in the context of contracts between a commercial lender and its customers. The contracts expressly provided for arbitration of all contract-related disputes. *Bazzle, supra*, 539 U.S. at 447. After plaintiffs filed suit in South Carolina state court and sought class certification, defendant sought to stay the court proceedings and compel arbitration. Class-wide arbitration was conducted, resulting in awards of statutory damages, plus attorney's fees.[1] On appeal, the South Carolina Supreme Court held "that the contracts were silent in respect to class arbitration, that they consequently authorized

---

[1] In fact...two cases were filed by different plaintiffs. Each case followed a separate procedural path in the early stages: in one, the trial court initially certified a class action and compelled arbitration; in the other case, the arbitrator certified the class. But both cases were eventually decided by the same arbitrator and, on appeal, the South Carolina Supreme Court consolidated the proceedings. *Id.* at 449-50.

class arbitration, and that arbitration had properly taken that form." *Id.* at 450.

The United States Supreme Court granted *certiorari*, vacated the judgment of the South Carolina Supreme Court and remanded for further proceedings. *Id.* at 454. No opinion garnered a majority of the Court. Justice Breyer authored a plurality opinion, which was joined by Justices Scalia, Souter and Ginsburg. Justice Stevens filed an opinion concurring in the judgment and dissenting in part. Chief Justice Rehnquist filed a dissenting opinion, in which Justices O'Connor and Kennedy joined. Justice Thomas filed a separate dissenting opinion. In short, the Court was deeply divided and no portion of Justice Breyer's plurality opinion is designated the "Opinion of the Court."

In light of the procedural history of the case and the contentions of the parties, Justice Breyer's plurality opinion turned first to the question whether the contracts were silent on class arbitration or — as defendant contended — the contracts forbade class arbitration. Accordingly, the analysis highlighted the question "whether the contracts forbid class arbitration." *Id.* at 452; *see also, id.* at 451, 453. Since, in the

view of the plurality, that was a question of contract interpretation to be decided initially by the arbitrator (which, in the convoluted procedural history of the case, the plurality concluded had not occurred), the judgment of the South Carolina Supreme Court was vacated.[2]

In his separate opinion concurring in the judgment and dissenting in part, Justice Stevens observed that the defendant challenged only the merits of the class-action determination "without claiming that it was made by the wrong decisionmaker." *Id.* at 455. Since, in his view, the class-action certification was correct (without regard to the identity of the decisionmaker), Justice Stevens' preferred disposition was to "simply affirm the judgment of the South Carolina Supreme Court." *Id.* But, as that would leave "no controlling judgment of the Court," Justice Stevens concurred only in the result. *Id.*

---

[2] Although the arbitrator had, in fact, made that determination in one of the two later-consolidated cases, he did so only after a state court had ruled in the other case. *See supra* note 1. Accordingly, as Justice Breyer's plurality opinion noted, "there is at least a strong likelihood ... that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation." *Id.* at 454.

The dissenting opinion of Chief Justice Rehnquist (joined by Justices O'Connor and Kennedy) stressed several points: first, that the substantive question is whether the contracts "by their terms permit class arbitration;" second, that this determination is for the courts, not the arbitrator; and third, that "the holding of the Supreme Court of South Carolina contravenes the terms of the contracts and is therefore pre-empted by the FAA." *Id.* at 455. His dissent favored reversal of the judgment.

Justice Thomas also dissented, but on different grounds. Based on his belief that the FAA does not apply to proceedings in state courts, he would have left the judgment "undisturbed." *Id.* at 460.

### B. The Confusing Aftermath of *Bazzle*

The Supreme Court's fragmented, largely inconclusive disposition in *Bazzle* generated considerable befuddlement and misunderstanding for a decade. In some quarters, the plurality opinion was mistakenly viewed as a green light for class-wide arbitration.

In relatively short order, the American Arbitration Association ("AAA") and the Judicial Arbitration & Mediation Services ("JAMS") implemented class arbitration procedures for the first time. *See* AAA Supp. Rules for Class Arbitrations (eff. Oct. 8, 2003), *available at* http://adr.org/sp.asp?id=21936; JAMS Class Action Procedures (eff. May 1, 2009), *available at* http://www.jamsadr.com/rules_class_action_procedures.[3] As a mechanism for arbitrators to decide the availability of class arbitration in a given case, both the AAA and JAMS procedures call for a "clause construction" award that determines not whether the parties actually "agreed" to class arbitration, but merely whether the contract "permits" class arbitration (AAA), or "can proceed on behalf of a class" (JAMS). *See* AAA Supplementary Rules for Class

---

[3] *See, e.g.,* the policy statement on the AAA website, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840:

> On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle,* the American Arbitration Association issued its Supplemental Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In *Bazzle,* the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court must decide whether class relief is permitted.

Arbitrations, Rule 3; JAMS Class Action Procedures, Rule 2. In short, the AAA Supplementary Rules provided for judicial review at three separate points in the arbitration process: (1) when the arbitrator determines whether the parties' agreement permits class-wide arbitration; (2) when the arbitrator determines whether a class should be certified; and (3) when the arbitrator determines the merits of the dispute.

Since class-wide arbitration was virtually non-existent prior to *Bazzle,* there was no need for contracts even to address the subject. For the most part, therefore, contracts with arbitration provisions were silent with respect to class-wide arbitration. Unfortunately, in the confusion generated by *Bazzle* many courts and arbitrators, viewing their initial task as solely to determine whether the arbitration agreement *did not forbid* class actions (and thereby "permitted" them by default), interpreted silent arbitration agreements to "permit" class actions. Post-*Bazzle* decisions reflected two related mistakes: (1) they were too quick to deem a contract "silent" on class arbitration even in the face of provisions flatly incompatible with such mass arbitration, and (2) they were too quick to

conclude that such silence is tantamount to acquiescence in class arbitration.

In short, in the wake of *Bazzle*, arbitrators issuing "clause construction" decisions overwhelmingly favored class arbitration — even where there was no evidence the parties intended to allow it. A study found that as of August 2008, 65 out of 67 silent arbitration agreements — or 97% — had been interpreted by arbitrators to authorize class arbitration. Baker, *Class Action Arbitration* (2009) 10 Cardozo J. of Conflict Resol. 335, 348. To the same effect, the AAA *amicus* brief in *Stolt-Nielsen* reported that in 102 "clause construction awards" where the parties contested whether class arbitration was permitted, class arbitration prevailed in 95 cases. Brief of AAA at 22, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, No. 08-1198, *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1198_NeutralAmCuAAA.authcheckdam.pdf; *see also* Brief of CTIA - The Wireless Association at 11 & Appendix, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, No. 08-1198, *available at*

http://www.abanet.org/publiced/preview/briefs/pdfs/07-08_08-1198_ PetitionerAmCuCTIA.authcheckdam.pdf.

AAA issued a written policy stating that, pursuant to *Bazzle*, it would administer class arbitrations if the agreement incorporates AAA rules and if "the agreement is silent with respect to class claims, consolidation or joinder of claims." AAA Policy on Class Arbitrations (July 14, 2005), *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840; *accord* Clancy, *Re-Evaluating Bazzle: The Supreme Court's Celebrated 2003 Decision Says Much Less About Class Action Arbitration Than Many Assume*, 7 Class Action Lit. Rpt. (BNA) 649, 2 (2006) (noting that arbitrators issuing decisions overwhelmingly favor class arbitration – even where there is no evidence the parties intended to allow it).

### C. In *Stolt-Nielsen* the Supreme Court Seeks to Dispel the Confusion *Bazzle* Generated

1. These misperceptions of *Bazzle* permeated the legal landscape until the Supreme Court explained in *Stolt-Nielsen* that

> [A] party may not be compelled under the FAA to submit to class arbitration unless there is a

> contractual basis for concluding that the party *agreed* to do so. . . . The critical point, in the view of the arbitration panel, was that petitioners did not establish that the parties to the charter agreements intended to *preclude* class arbitration. . . . [T]he panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

559 U.S. at 684 (emphasis in original; internal quotations and citations omitted).

*Stolt-Nielsen* makes it perfectly clear that the Supreme Court's divided disposition in *Bazzle* had been misunderstood. As the Court observed: "Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration." *Stolt-Nielsen,* 559 U.S. at 693. That pivotal sentence, which speaks directly to the issue in this case, eviscerates plaintiff–respondent's reliance on *Bazzle* for his key proposition. [4]

---

[4] *See also id.* at 673 (referencing "post-*Bazzle* arbitral decisions that 'construed a wide variety of clauses in a wide

*Stolt-Nielsen* explained in considerable detail precisely what was decided — and what was *not decided* — in the multiple, disparate opinions the Justices issued in *Bazzle*. There is no Opinion of the Court in *Bazzle* because, as *Stolt-Nielsen* observed, "no single rationale commanded a majority." 559 U.S. at 663. Rather, the Supreme Court's disposition of *Bazzle* resulted in four opinions that collectively addressed three questions: (1) "which decision maker (court or arbitrator) should decide whether the contracts in question were 'silent' on the issue of class arbitration"? (2) "what standard the appropriate decision maker should apply in determining whether a contract allows class arbitration"? and (3) "whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand"? *Id.* at 664. But,

---

variety of settings as allowing for class arbitration'") (internal citations omitted), and 12 ("The arbitration panel thought that *Bazzle* 'controlled' the 'resolution' of the question whether the [contract] 'permits[s] this arbitration to proceed on behalf of a class,' ... but that understanding was incorrect") (internal citation omitted)). *Cf. Oxford Health Plans LLC v. Sutter,* 133 S.Ct. 2054, 2063, n.2 ("*Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability").

*Bazzle* did not yield a majority decision on any of the three questions. *Id.*

Based on the misimpression that *Bazzle* had resolved important threshold issues, the parties in *Stolt-Nielsen* "entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators." *Id.* at 662; *see id.* at 668. And, the arbitrators eventually concluded that class arbitration was permissible.[5] But, for reasons that are directly applicable here, the Court held in *Stolt-Nielsen* that it is inconsistent with the FAA to impose class arbitration on parties whose arbitration clauses are silent on that issue. Moreover, the Court explained, no remand was necessary. The issue was one that could be, and was, decided by the Court.

2. Although the *Stolt-Nielsen* decision in 2010 put to rest the principal misperceptions of *Bazzle,* deleterious ramifications continued to resonate from the

---

[5] The parties in *Oxford Health Plans* operated under a similar misimpression. 133 S.Ct. at 2065 ("The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did"); *id.* at 2063, n.2.

misunderstandings that informed judicial and arbitral decisions in the intervening years. For example, arbitrators found that class-action arbitration could proceed even where otherwise "silent" contracts contained provisions that were incompatible with class-wide proceedings, such as confidentiality provisions (*Terrapin Express v. Airborne Express, Inc.* (Am. Arb. Ass'n May 9, 2006) AAA No. 11 199 01536 05 (Hodge, Longhofer & Farber, Arbs.) (Clause Construction Award), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002633&revision=latestreleased, at 6 (failure to expressly exclude class arbitration "signifie[d]... that the intention of the parties was to permit class arbitration"));[6] provisions giving "each party" the right to select an arbitrator (*Anderson v. Check 'N Go of Cal., Inc.* (Am. Arb. Ass'n June 20, 2005) AAA No. 11 160 03021 04 (Slater, Arb.) (Partial Final Clause Construction Award of Arbitrator),

---

[6] Confidentiality, a hallmark of arbitration, is inconsistent with class arbitration: "The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitration. All class arbitration hearings and filings may be made public...." *See* AAA Supplementary Rule 9(a).

*available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002677&revision=latestreleased, at 8).[7]

The reality of how arbitrators totally misunderstood *Bazzle* is all the more problematic because arbitral mistakes are often not subjected to searching substantive review. As a consequence, the losing party is relegated to a complex, high-stakes, class arbitration procedure to which it never actually agreed (although contractual agreement to arbitrate is supposedly the cornerstone on which the entire arbitration system rests) and in which it is deprived of substantial rights, including the benefits of finality and repose even if it wins on the merits (although class-wide finality and repose are

---

[7] These examples do not exhaust the list of contractual provisions that should preclude class arbitration. Other illustrations include contracts that expressly incorporate the rules of organizations that, in turn, either bar or make no provision for class arbitration; contracts that place a monetary cap on disputes subject to arbitration; contracts that specify arbitration will be held near a customer's residence; contracts that exclude from arbitration certain remedies that make it unlikely that class-wide determination was acceptable to the parties; contracts that provide for fee-shifting, since it would be impossible for a prevailing defendant to collect fees from absent class member; and contracts that describe anticipated arbitral proceedings in ways that are not suited to class-wide disposition.

supposedly principal attributes of class action procedures in litigation).

## II. Whether the Parties Agreed to Class Arbitration is a Gateway Issue to be Determined by the Court

### A. The Fundamental Differences Between Class Arbitration and other Forms of Alternate Dispute Resolution Should Inform the Requisite Judicial Analysis

Because class-wide arbitration is so structurally different from single party v. single party arbitration, the determination whether the parties agreed to class-wide arbitration falls outside the category of "procedural" decisions that the plaintiff-respondent contends should be within the purview of the arbitrator. Practical experience with class-wide arbitration, governing authorities, and the history of applicable legislation confirm that the decision whether parties have agreed to submit a dispute to class-wide arbitration is a question to be decided by a court.

During Congressional hearings on the FAA (four decades before amendments to Fed. R. Civ. P. 23 created the

modern class action), witnesses testifying in favor of arbitration touted its inherent advantages. These included the "prompt, inexpensive, and procedurally streamlined" nature of arbitration, and the "face-to-face" component which encouraged an atmosphere of conciliation. David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History" (Nov. 2007) 63 Bus. Law. 55, 58-61. The Senate Judiciary Committee described arbitration, as anticipated under the FAA, as follows:

> In contrast with the long time required by courts with their congested calendars to settle a dispute, the records of the [AAA] show that the average arbitration required but a single hearing and occupied but a few hours of the time of disputants, counsel and witnesses...

*Id.* at 61-62 (quoting S. Rep. No. 68-536, at 3 (1924)). Consistent with the clearly expressed legislative understanding, the United States Supreme Court has acknowledged that parties choosing arbitration "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500

U.S. 20, 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 637).

Class-wide arbitration provides none of these advantages. First, class arbitration can be as costly as class action litigation — indeed, even more expensive. Unlike litigation, class arbitration imposes on parties the additional cost of paying the often substantial fees of an arbitrator — or a panel of arbitrators — stretching over many hearings on clause construction, on class certification, on the merits of class-wide claims, and on claims administration. With "millions of dollars and perhaps the company's future...at risk," and absent "the safeguards litigation provides[,]... the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *supra*, at 71, 73-74 (internal citations omitted). Moreover, one right that parties commonly bargain for in arbitration agreements is the right to choose the arbitrator, or to choose one or more arbitrators in a panel. Yet, for all parties, this right is fundamentally inconsistent with class arbitration. Absent class members by definition do not participate in arbitrator selection. Imposing class arbitration, in which only one or a few plaintiffs choose the arbitrator, in spite of contract provisions giving each

prospective claimant the right to do so, would violate the absent plaintiffs' due process rights. *See* Anderson, AAA No. 11 160 03021 04, at 8 (ignoring the arbitrator selection provisions in order to construe the clause in favor of class arbitration). The defendant is also deprived of its contractual right to participate in the selection of arbitrators with respect to claims by absent class members.

Another right that parties to arbitration expect is the right to have their disputes resolved confidentially. Typically, arbitration awards are confidential; indeed, arbitrators are generally discouraged from writing opinions explaining the rationale for their awards. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, 598; Domke on Commercial Arbitration § 29:06 (G. White rev. ed. 1984). But class arbitration is antithetical to confidentiality, and in AAA class arbitrations the parties can expect their demands and all rulings will be publicly posted on the Internet. *See generally* AAA Searchable Class Arbitration Docket, *available at* http://www.adr.org/aaa/faces/serv. Thus, again, class arbitration is very different from individual arbitration

and should not be imposed on parties who did not expressly choose it.

For all of these reasons, this Court should refrain from endowing arbitrators with the authority to make what is essentially a policy judgment to favor class arbitrations.

### B. The Fundamental Differences between Class Arbitration and Class Action Litigation in Courts Should Also Inform the Requisite Judicial Analysis

Class action litigation with the judicial oversight of the courtroom guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms, such as motions to dismiss to end meritless and frivolous litigation before discovery or trial. Plaintiffs — particularly absent class members — benefit from due process rights designed to protect their interests. Both sides benefit from full, substantive appellate review. None of these protections is assured in arbitration, and some are nonexistent.

### 1. Class Arbitration Provides No Guaranteed Opportunities to Cut Short Meritless Claims, Creating Improper Pressure for Defendants to Settle

With particular reference to the potential abuses of class action litigation, the United States Supreme Court has been alert to require safeguards that prevent defendants from facing the inordinate risks and expense of defending against nonmeritorious claims. *Bell Atl. Corp. v. Twombly* (2007) 550 U.S. 544, 557 (finding that to avoid a motion to dismiss, the plaintiffs' class action complaint must "possess enough heft to show that the pleader is entitled to relief") (internal quotations omitted); *see also Ashcroft v. Iqbal* (2009) 556 U.S. 662; *Reiter v. Sonotone Corp.* (1979) 442 U.S. 330, 345 ("District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements..."); *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 168 (noting that adoption of a rule that defendants must pay to notify class members would "encourag[e] frivolous class actions" and cause defendants to pass defense costs on to their customers) (citation omitted). Indeed, the development of the class action device in litigation has always been accompanied by such safeguards, lest the

sheer magnitude of potential financial exposure coerce settlement of baseless suits. Thus, in litigation, motions to dismiss and motions for summary judgment are common methods defendants and courts employ to dispose of legally and factually deficient lawsuits short of trial. *See, e.g.,* Fed. R. Civ. P. 12(b)(6), 56.

But in arbitration, most defendants lack the right to be heard on a motion to dismiss. Dispositive motions in arbitration are not encouraged and are rarely granted.[8] In fact, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, "Employment Arbitration and Workplace Justice" (Fall 2003) 38 U.S.F.L. Rev. 105, 113. In individual arbitration, the absence of such motions practice serves one of the primary purposes of

---

[8] *See* David Sherwyn, "Because it Takes Two: Why Post Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication," 1 Berkeley J. Emp. & Lab. L. 1, 27 & n. 122 (2003); Marc I. Steinberg, "A Decade After McMahon: Securities Arbitration: Better for Investors Than the Courts?" 62 Brooklyn L. Rev. 1503, 1513-14 & n.56 (Winter 1996); *Cf.* Jill I. Gross, "McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration," 76 U. Cin. L. Rev. 493, 496-97 (Winter 2008) (noting that the SEC amended its Code of Arbitration Procedure for Customer Disputes (Customer Code) to authorize dispositive motions practice).

arbitration — simplification of proceedings. And that absence can be justified in individual arbitration as a tradeoff by the parties to achieve the goal of quicker, less expensive, less formal proceedings that provide an opportunity for face-to face presentations to the ultimate decisionmakers.

Those justifications are incompatible with the practical demands of class arbitration. The unavailability of pre-hearing dispositive motions for class-wide claims submitted to arbitration unnecessarily and unfairly prolongs cases that are devoid of legal or factual merit. As the United States Supreme Court has explained, the requirements of Federal Rule of Civil Procedure 8(a) are designed to prevent "a plaintiff with 'a largely groundless claim' [from] 'tak[ing] up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.'" *Twombly,* 550 U.S. at 557-58 (quoting *Dura Pharms., Inc. v. Broudo* (2005) 544 U.S. 336, 347-48); *see In re Rhone-Poulenc Rorer, Inc.* (7th Cir. 1995) 51 F.3d 1293, 1298-99 (defendants had prevailed in 92.3% of individual cases (12 of 13 prior cases) alleging liability for the same products, but faced potential liability of $25 billion and almost certain bankruptcy if they

lost at trial in a putative class action: "They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle"); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (3d Cir. 2001) 259 F.3d 154, 168 (noting that "granting [class] certification may generate unwarranted pressure to settle nonmeritorious or marginal claims"); *Szabo v. Bridgeport Machs., Inc.* (7th Cir. 2001) 249 F.3d 672, 675 (reversing class certification where a $200,000 dispute was transformed into a $200 million dispute, which "puts a bet-your-company decision to [defendant's] managers and may induce a substantial settlement even if the customers' position is weak"); *Castano v. Am. Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746 ("Class certification magnifies and strengthens the number of unmeritorious claims.... [This] creates insurmountable pressure on defendants to settle.... The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citations omitted)). Absent the procedural mechanisms to end meritless class claims at a pre-trial stage or on appeal, defendants will be under even greater pressure to settle class arbitration than class action litigation.

### 2. Absent Class Members Do Not Have the Same Due Process Rights in Arbitration as in Litigation

The United States Supreme Court has been vigilant to observe that absent class members in litigation have certain due process rights guaranteed by the Fourteenth Amendment. Specifically, the Due Process Clause mandates that absent class members cannot be bound by any judgment in a class action unless they have had notice that describes the action and the parties' rights in it, an opportunity to opt out of the class, and adequate representation of their interests by the named class member(s) and their counsel. *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-12. If the parties to a class action settle, the court must review and approve that settlement to ensure fairness to absent class members. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval"); *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591, 627 (reversing certification along with settlement that failed to provide any "structural assurance of fair and adequate representation" for all plaintiffs).

Congress has singled out particular types of settlements that it deems improper, including those where most or all the money is paid to class counsel rather than to class members, or where class members receive only a "coupon" for products or services. S. Rep. No. 109-14, at 15 (2005), *reprinted in* 2005 U.S.S.C.A.N. 3, 16 (Leg.Hist.) (Class Action Fairness Act of 2005). It is only because such procedural due process protections are provided that an absent class member "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips Petroleum,* 472 U.S. at 810. These safeguards are critical because, unlike in typical litigation, where "the judicial system itself bears no responsibility for the protection of the parties," in a class action "[j]udges effectively serve as guardians of the interests of absent class members ... assuring that their interests are not sacrificed." Carole J. Buckner, "Due Process in Class Arbitration," 58 Fla. L. Rev. 185, 196 (Jan. 2006).

Absent class members have no assurance that these minimal — yet essential — due process rights will be safeguarded in arbitration. Indeed, federal courts have

consistently held that arbitration does not constitute state action, which is a prerequisite for Constitutional due process rights. *See, e.g., Smith v. Am. Arbitration Ass'n* (7th Cir. 2000) 233 F.3d 502; *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.* (2d Cir. 1999) 191 F.3d 198, 206; *Davis v. Prudential Sec., Inc.* (11th Cir. 1995) 59 F.3d 1186, 1190-91. In short, due process rights that must assiduously be provided in litigation are relegated in class arbitration to the less rigorous, less formal, and less accountable procedures established by arbitrators who are not necessarily lawyers or judges and who lack experience with the constitutional requirements for class-wide disposition of claims.[9]

The absence of such constitutional protection is of concern not only to absent class members, but also to arbitral

---

[9] For example, the AAA website lists qualifications for its arbitrators, which include a "[m]inimum of 10 years of senior-level business or professional experience or legal practice." *See* Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878. While the AAA has a separate roster of class arbitrators and requires that at least one arbitrator in each class arbitration panel be chosen from that roster (*see* AAA Supplementary Rule 2(a)), the AAA provides no separate qualifications for its class arbitrators.

respondents who are subjected to proceedings that, at best, provide questionable finality and repose with respect to absent class members. At the end of the day, the arbitral respondent has been deprived of important procedural and substantive rights, without receiving the supposedly reciprocal benefit of terminating claims expeditiously – or at all. And this is true whether the respondent wins, loses, or settles the class arbitration.

### 3. The Finality of a Class Arbitration Award is Highly Questionable, and There is Limited Judicial Review

The absence of adequate protection for absent class members means there is necessarily considerable doubt that a class-wide arbitration award would be — or could be — binding and final with respect to absent class members.[10] Defendants

---

[10] Moreover, because arbitration agreements are binding only on parties, any potential class members who have no arbitration agreements, or whose agreements do not cover the dispute at issue, will likely be unaffected by the arbitrator's final award. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983) 460 U.S. 1, 20, the Supreme Court held that where a party has related disputes with two different parties – one with an arbitration agreement and one without – each case must proceed in a separate forum. It is well-settled,

could still face additional litigation — even class litigation — by purported class members, particularly absent class members with arbitration agreements who did not receive the full panoply of due process notice and procedural regularity that must precede judgments in class action litigation.

Likewise, the restrictions on judicial review associated with class-wide arbitration are indefensible if imposed on parties who did not contemplate this specialized process. The FAA provides that a court may vacate an arbitrator's substantive award of relief on the merits only in the event of fraud, corruption, bias, misconduct or misbehavior by the arbitrators, or where the arbitrators exceeded their powers or failed to make a "final and definite" award. 9 U.S.C. § 10(a). Courts' powers to modify such an arbitration award are limited to cases involving material miscalculations or mistakes, errors in form, and rulings on issues not before the arbitrator. 9 U.S.C. § 11. These grounds for review may not be expanded by

---

moreover, that a contract cannot bind a non-party. *See, e.g., EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279. And even contractual parties can be required to arbitrate a given matter only when they have agreed to do so. *See First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943-44.

agreement of the parties. *Hall Street Assoc's v. Mattel, Inc.* (2008) 552 U.S. 576.

Limitations on judicial review raise serious questions of fairness for all parties to class arbitration. For example, this feature appears to have emboldened some plaintiffs' attorneys to think they have a limitless license in class arbitration to pressure defendants. As one stated, "[f]irst and foremost, a decision by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable...a feature which terrifies corporate defendants." Clancy & Stein, *supra,* at 71 (quoting Gary W. Jackson, "Prosecuting Class Actions in Arbitration," 2006 ATLA Ann. Convention Reference Materials 829). Defendants' concerns regarding the coercive impact of a class certification award are entirely understandable.

For all of these reasons, it would be a profound mistake to permit class arbitration to proceed on the largely unreviewable determination of an arbitrator. The rationale for this conclusion in the context of domestic contracts and disputes is even more compelling in the context of

transnational contracts. [11] Under the FAA, international arbitration contracts are subject to treaties and multilateral agreements such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. But, there is serious question whether class arbitration could satisfy even the most elementary requirements for an enforceable award under international standards to which the United States is a signatory. For example, the Rules of the Inter-American Commercial Arbitration Commission require that a request for arbitration must contain the names and addresses of the parties. Inter-American Commercial Arbitration Commission Rules, at

---

[11] *See, e.g., Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 516 (holding that adherence to contractual choice-of-law and choice-of-forum provisions was "an almost indispensable precondition to . . . orderliness and predictability essential to any international business transaction"); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer* (1995) 515 U.S. 528, 537 (enforcing foreign forum selection clause in international arbitration and noting the practical need to "give way to contemporary principles of international comity and commercial practice"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 629 ("concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context").

Art. 3 (amended Apr. 1, 2002), *available at* http://www.sice.oas.org/dispute/comar. Class arbitration fails that basic test.

## III. Availability of Class-Wide Arbitration is a Gateway Issue to be Decided by the Court

By its very nature, class-wide arbitration is so inherently, fundamentally and structurally different from bilateral arbitration that the decision to send a class-wide claim to arbitration is a gateway issue to be determined by a court, not an arbitrator. Subsequent to *Stolt-Nielsen,* the federal appellate courts that addressed this issue have been unanimous in so ruling. *See Opalinski v. Robert Half Int'l Inc.* (3d Cir. 2014) 761 F.3d 326, *cert. denied* (2015) 135 S.Ct. 1530; *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett* (6th Cir. 2013) 734 F.3d 594, 598, *cert. denied sub nom, Crockett v. Reed Elsevier, Inc.* (2014) 134 S.Ct 2291 ("recently the [Supreme] Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one").

That conclusion flows comfortably and directly from the Supreme Court's repeated and express recognition that "the 'changes brought about by the shift from bilateral arbitration to class action arbitration' are 'fundamental.'" *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1750, *quoting Stolt-Nielsen,* 559 U.S. at 686. And, such fundamental matters are regarded as gateway disputes that raise a question of arbitrability for a court to decide. *See Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84; s*ee also BG Group PLC v. Republic of Argentina* (2014) 134 S.Ct. 1198, 1213 ("gateway" questions of arbitrability are presumptively for the courts to decide).

Finally, that conclusion flows also from the critical switch in emphasis from the plurality opinion in *Bazzle* (which focused on whether the contract *forbids* class-wide arbitration) to the Opinion of the Court in *Stolt-Nielsen* (which focused on whether the contract *permits* class-wide arbitration). That change in focus is pivotal because, as the Court explained in *First Options,* 514 U.S. at 945:

> [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can

> understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

These factors all lead ineluctably to the conclusion that — unless a contract expressly provides for an arbitrator to determine whether class-wide arbitration is permitted — the availability of class-wide arbitration is an issue to be decided by a court.

## CONCLUSION

This Court should reverse the portion of the ruling by the Court of Appeal, Second District, that commits to the arbitrator the issue whether the parties agreed to arbitrate class claims.

Respectfully submitted.

April 30, 2015

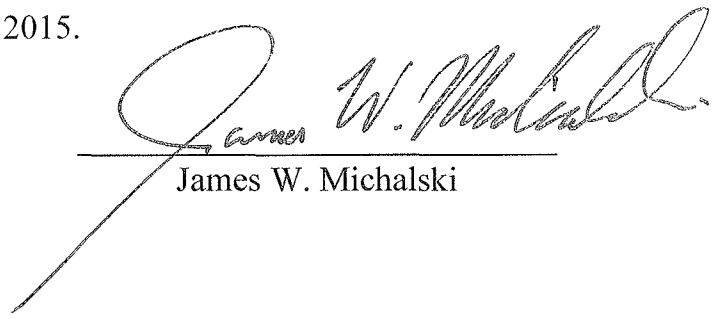
JAMES W. MICHALSKI
HOLLAND & KNIGHT LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
213-896-2585
JAMES.MICHALSKI@HKLAW.COM

JERROLD J. GANZFRIED
HOLLAND & KNIGHT LLP
800 17th Street NW, Suite 1100
Washington, D.C. 20006
202-469-5151
JERRY.GANZFRIED@HKLAW.COM

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 13 point Times New Roman typeface. According to the "Word Count" feature in Microsoft Word for Windows software, this brief contains 8038 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 30, 2015.



James W. Michalski

## PROOF OF SERVICE

I, the undersigned, declare that I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. I am employed with the law office of Holland & Knight, LLP, 400 South Hope Street, 8th Floor, Los Angeles, CA 90071.

On the date below, I caused to be served the attached **BRIEF AMICI CURIAE OF DRI-THE VOICE OF THE DEFENSE BAR AND THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL** as follows:

Office of the Clerk
Supreme Court of California
350 McAllister St., Rm 1295
San Francisco, CA 94102-4797

**Original delivered via Federal Express**

F. Paul Bland, Esq.
Public Justice, P.C.
1825 K Street, N.W., #200
Washington, D.C. 20006

Attorneys for
Timothy Sandquist

Janette Wipper, Esq.
Felicia Medina, Esq.
Sanford Heisler Kimpel, LLP
555 Montgomery St., #1206
San Francisco, CA 94111

Attorneys for
Timothy Sandquist

James T. McDonald, Jr., Esq.
Grace Y. Horoupian, Esq.
Jimmie E. Johnson, Esq.
Fisher & Phillips LLP
2050 Main St., #1000
Irvine, CA 92614

Attorneys for
Lebo Automotive, Inc.

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

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

Bobbette Mack

Bobbette Mack