No. 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

APPLICATION OF PUBLIC CITIZEN, INC., FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT; AND AMICUS CURIAE BRIEF

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APPLICATION OF PUBLIC CITIZEN, INC., FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Public Citizen, Inc. respectfully requests leave to file the accompanying brief as amicus curiae in support of plaintiff-appellant Timothy Sandquist, addressing the question whether, as a matter of California procedural law under the California Arbitration Act, a court or an arbitrator should determine whether an arbitration agreement permits classwide proceedings.

INTEREST OF AMICUS CURIAE

Founded in 1971, Public Citizen is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Among Public Citizen's longstanding interests is the preservation of effective remedies for consumers and workers who are injured by violations of state and federal law. Public Citizen is concerned that arbitration, particularly arbitration in which classwide proceedings are unavailable, is often ineffective to provide such remedies and may be used as a means of denying access to justice rather than of resolving disputes fairly.

Public Citizen has therefore participated as amicus curiae in many cases in federal and state courts involving issues surrounding arbitration, and Public Citizen's attorneys have also been involved in such cases as counsel or co-counsel for parties. Relevant cases in which Public Citizen has been involved as

amicus curiae include *American Express Co. v. Italian Colors Restaurant* (2013) 133 S. Ct. 2304, and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, and pertinent cases where its lawyers have been counsel or co-counsel for parties include *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, *cert. denied* (2015) 135 S. Ct. 1155.

This case implicates concerns similar to those of other cases in which Public Citizen has been involved insofar as it ultimately involves whether the claims at issue may be pursued in arbitration on a classwide or purely individual basis. Proper resolution of the antecedent procedural question of who decides whether an agreement permits classwide proceedings is important to ensuring that that determination is made fairly and in a manner consistent with the intentions of the parties and the law concerning arbitration.

Public Citizen believes that its short brief will be helpful to the Court in considering a matter that the parties' briefs have not fully addressed: the impact of the arbitration agreement's choice of the California Arbitration Act to govern procedural matters on the Court's threshold determination of whether federal or California law controls the procedural issue in this case. The brief is aimed at explaining the significance of the contractual choice-of-law provision to the issue before the Court, and the resulting freedom of this Court to decide the issue as a matter of California's law and the policies that it reflects, without concern as to whether the same result would obtain if the parties had

selected the Federal Arbitration Act to govern procedural matters arising under their agreement. Under California law, we urge the Court to adopt the appellant's view that the decision whether the arbitration agreement permits class proceedings is one for the arbitrator, in view of the arbitrator's general authority over arbitration procedures and matters of construction of the parties' contract.

CERTIFICATION

No party or counsel for a party in this appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae or its counsel in the pending appeal.[1]

[1] We note that the California attorneys appearing in this Court on Public Citizen's behalf in this case, Glenn Danas and his firm Capstone Law APC, are also counsel for a party to another case that raises the same issue, *Rivers v. Cedars-Sinai Medical Care Foundation*, S224592, review granted and briefing deferred, April 1, 2015.

Dated: May 4, 2015

Respectfully submitted,

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ARGUMENT

This case presents the question whether a court or an arbitrator should decide whether classwide arbitration proceedings are permitted under the employment agreement at issue here. The plaintiff-appellant sensibly urges that because that issue is a matter of the procedures to be followed in the arbitration, and because it turns on construction of the parties' agreement, the arbitrator should be the decisionmaker because both arbitration procedures and the interpretation of the parties' contract are matters typically within the authority of arbitrators.

Although the plaintiff-appellant asks this Court to determine the allocation of decisional authority as a matter of federal law under the Federal Arbitration Act, a preferable basis for deciding the issue in his favor would be California law under the California Arbitration Act, as the arbitration agreement at issue here specifically calls for the application of California procedural law both to judicial proceedings that may precede and follow an arbitration and to the arbitration itself. The question of *who decides* whether the arbitration agreement permits class arbitration is undoubtedly procedural and hence, under the parties' agreement, governed by California law.

Specifically, the arbitration agreement in this case provides that it is governed by the Federal Arbitration Act *in conformity with the procedures of the California Arbitration Act,* Cal. Code. Civ. Proc. §§ 1280 *et seq*. The plain meaning of that language is that the Federal Arbitration Act governs as to the substantive issue of the enforceability of agreements to arbitrate—the subject generally addressed in 9 U.S.C. § 2—but that procedural matters

are controlled by the California Arbitration Act. Because the agreement specifies that the entirety of the California Arbitration Act controls procedural matters, it leaves no doubt that California procedural law governs judicial proceedings to compel arbitration, the procedures of the arbitration itself, and any post-arbitration proceedings in court, as the California Arbitration Act covers all those subjects.

The issue here—who decides whether a class arbitration is permissible—falls within the scope of procedural issues that the arbitration agreement makes subject to California law. Chapters 2 and 5 of the California Arbitration Act set forth provisions governing the procedures for judicial enforcement of arbitration agreements and the authority of courts with respect to proceedings to compel arbitration. *See* Cal. Code Civ. Proc. §§ 1281.1–1281.8, 1290–1293.3. Chapter 3 of the Act concerns procedures of the arbitration itself and the authority of the arbitrator, *see id.* §§ 1282–1284.3, including the arbitrator's authority over matters of procedure, *see id.* § 1282.2. Both the question whether a court or arbitrator decides if an arbitration may proceed on a classwide basis and the underlying question of whether classwide arbitration is permissible are quintessentially procedural matters within the scope of these provisions of the California Arbitration Act, which the parties here selected to govern.

It is hardly unusual that California law would govern procedural issues in cases where applications to compel arbitration are filed in California courts, even when the

substantive enforceability of an arbitration agreement is governed by the FAA. This Court has held that even when an agreement is silent as to the choice of procedural law, the California Arbitration Act presumptively governs the procedures to be followed by California courts in cases that involve arbitration agreements subject to the FAA, unless an arbitration agreement "*expressly* designate[s] that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." *See Cronus Investments, Inc. v. Concierge Servs.* (2005), 35 Cal. 4th 376, 394. Here, the agreement designates *state* rather than federal procedural law, reinforcing the background legal principle that state procedural law applies with an express contractual choice of state law.

The U.S. Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, confirms that the parties to agreements otherwise subject to the FAA may agree to incorporate state-law procedures into their agreements, and that if they do so courts must give effect to those choices even if federal law might otherwise require a different result. In *Volt*, the parties' agreement had a general choice-of-law provision calling for application of California law. The California Court of Appeal had construed that provision not only to select California law to govern substantive issues of contract construction, but also to call for application of the California Arbitration Act's procedures for enforcing the arbitration clause and for conducting

the resulting arbitration. *See id.* at 472. Accepting that construction of the agreement, the U.S. Supreme Court held that "[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA," *id.* at 477, even if the state procedural law calls for a result opposite to that which the procedural provisions of the FAA would, if applicable, command. *See id.*[2] Likewise here, even if the FAA would otherwise govern the question of who decides whether an arbitration agreement permits class proceedings, the contractual choice to have such procedural issues decided under the California Arbitration Act takes precedence.

The parties to this case have devoted little attention to the contractual provision stating that California law governs matters of procedure such as the "who decides" question, and this Court does not ordinarily decide cases on grounds not preserved or presented by the parties. But for this Court to opine in this case on what the FAA provides about whether construing an agreement to determine if it allows class arbitration is a job for

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[2] In *Volt*, the specific issue was whether an arbitration should be stayed pending litigation of related issues, as California procedural law required, or whether the litigation should be stayed pending arbitration, as section 3 of the FAA (9 U.S.C. § 3) would, if applicable, require. The Supreme Court held that even assuming section 3 would otherwise apply in a state court (which this Court has since held it does not, *see Cronus*, 35 Cal. 4th at 388–89), the parties' choice of state procedural law governs and is not preempted by the contrary terms of federal law. *Volt*, 489 U.S. at 477–79.

the arbitrator or the court would be to decide the case on a false premise given the clarity with which the agreement calls for application of California law to procedural issues. Deciding the case on the premise that the FAA provides the governing principles would also, potentially, embroil the Court in a conflict with federal appellate courts. It is undisputed that two federal circuits, the Third and Sixth, have held that determining whether an agreement permits class arbitration is, under the FAA, a job for the court, *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, while many other federal courts disagree. *See* Appellant's Answer Br. 23–27. Under these circumstances, whichever answer this Court gives to the question if it addresses it under the FAA may needlessly invite review by the U.S. Supreme Court, whereas this Court may provide a definitive answer under the law chosen by the contract: the California Arbitration Act.

Under California law, the answer to the "who decides" question should be the same one that the plaintiff advocates as a matter of federal law: the arbitrator. To be sure, this Court has held as a matter of California law that the court itself may order class arbitration if it determines that an arbitration agreement would be *unconscionable* if class proceedings were unavailable. *See Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal. 4th 1334, 1364–65 (citing *Keating v. Super. Ct.* (1982) 31 Cal. 3d 584 (overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 U.S. 1)). That authority, assuming it still exists under

California law,[3] rests on the court's power to determine whether an arbitration agreement is unenforceable because it is unconscionable, which is not at issue here.

In this case, the issue that must be decided either by the trial court or the arbitrator in the first instance is what arbitration procedures are within the scope of the parties' agreement. That issue is firmly within the power of arbitrators to consider as part of their authority to determine arbitration procedures in conformity with the intentions of the contracting parties. Indeed, this Court's remand to the arbitrators in *Cable Connection* to consider precisely that issue indicates that the issue is one for arbitral consideration in the first instance. *See* 44 Cal. 4th at 1366.[4] *Cable Connection* and the reasons offered by the appellant for allocating the decision whether class proceedings are permissible to the arbitrator strongly support the conclusion that, as a matter of California law under the

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[3] The U.S. Supreme Court has subsequently held that an arbitration agreement governed by the FAA cannot be held unconscionable because of its failure to provide for classwide proceedings. *See AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740. *Keating*'s holding, however, would presumably still be valid for arbitrations governed by the California Arbitration Act.

[4] As the plaintiff-appellant explains, this Court's holding that courts generally construe the arbitration agreement to determine whether a dispute is subject to arbitration under its terms, *see City of Los Angeles v. Super. Ct.* (2013) 56 Cal. 4th 1086, addresses a different issue and does not suggest that construing the agreement to determine the procedures under which a case will be arbitrated is similarly a matter for the court.

California Arbitration Act, the determination whether an arbitration agreement allows class proceedings is one for the arbitrator to determine, not for the court to decide in an order compelling arbitration under Chapter 2 of the Act.

CONCLUSION

The decision of the court of appeal should be affirmed.

Dated: May 4, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count feature of the program used to prepare this brief (Microsoft Word 2010), undersigned counsel certifies that this Brief of Amicus Curiae Public Citizen, Inc., was produced using a 13-point, Roman type font (Century Schoolbook BT) and contains 1,631 words.

Dated: May 4, 2015

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1840 Century Park East, Suite 450, Los Angeles, California 90067.

On **May 4, 2015**, I served the document described as: **APPLICATION OF PUBLIC CITIZEN, INC., FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT; AND AMICUS CURIAE BRIEF** on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof to interested parties as follows [or] as stated on the attached service list:

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

Executed this **May 4, 2015**, at Los Angeles, California.

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