Case No. S204032

IN THE SUPEME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

vs.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Div. Two, Case No. B235158

On Appeal From the Los Angeles Superior Court,
Hon. Robert Hess, Dept. 24, Case No. BC356521

APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT; AMICUS CURIAE BRIEF OF CALIFORNIA ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS

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IN THE SUPEME COURT
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Defendant and Respondent.

APPLICATION OF CALIFORNIA ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to California Rules of Court, rule 8.520(f), amicus curiae California Association of Public Insurance Adjusters ("CAPIA") applies for permission to file this amicus curiae brief in support of appellant Arshavir Iskanian.

CAPIA is a not-for-profit organization founded in 1978 to protect the interests of insured homeowners and businesses who have sustained a covered insurance loss. CAPIA is motivated to offer this brief to protect the millions of California insureds whose policies contain binding arbitration provisions.

Insurance policies in California are increasingly issued with arbitration provisions. This has allowed insurers in class actions to

engage in gamesmanship, by asserting these arbitration provisions in an attempt to dismiss policyholders' class claims and to force individual arbitration (after having litigated the merits and class issues in court for *years*). Under California law, such untimely motions to compel arbitration must be denied on grounds of waiver.

But the Court of Appeal's opinion below erroneously ignored California law, which does not recognize a "futility" defense to waiver of the right to arbitrate. Instead, the court below went out of its way to excuse defendant's waiver of the right to arbitrate. It did so by erroneously adopting federal Ninth Circuit law—which recognizes a "futility" defense—and vastly expanding the defense by redefining "futile" to mean "less likely to succeed." The opinion below, if it becomes law, could leave millions of California consumers without any adequate remedy, by requiring them to individually arbitrate millions of small claims even though this would be economically unfeasible to do.

May 10, 2013

ROSEN LAW FIRM, APC

By:

Glenn Rosen, Esq.
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California Association of Public Insurance Adjusters

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

AMICUS CURIAE BRIEF

INTRODUCTION

CLS Transportation litigated the merits and class issues in court for *years*. After the class was certified, shortly before trial, CLS belatedly moved to compel individual arbitration. The court below, however, granted the motion and dismissed all class claims, after holding that CLS's litigation conduct and delay in moving to compel arbitration was not a waiver of the right to arbitrate—because it supposedly would have been "futile" to move to compel arbitration prior *Concepcion*.

But California law, which governs the enforceability of arbitration provisions, does not recognize a "futility" defense. The court below therefore erred by ignoring California law, and instead applying Ninth Circuit law which does recognize a "futility" defense.

The court below further erred when it misapplied and vastly expanded the "futility" defense, by redefining "futile" to mean "less likely to succeed"—thereby making the "futility" defense available whenever a change in law makes it slightly more likely that a motion to compel arbitration will be granted. Such broad application of the "futility" defense will encourage tactical use of arbitration motions to get out of court and into arbitration whenever a litigant believes things are not going well in court.

If the "futility" rule announced below becomes law, numerous California class actions that have been litigated in court for years could be dismissed, leaving millions of California consumers and policyholders without any viable recourse.

LEGAL DISCUSSION

A. California law governs the enforceability of contractual arbitration provisions. By ignoring California law, and instead adopting Ninth Circuit waiver law, the court below committed legal error.

The court below ignored California law and instead, adopted Ninth Circuit law, which recognizes a "futility" defense to waiver. Under Ninth Circuit waiver law, delay in moving to compel arbitration may be excused if "an earlier motion to compel arbitration would have been futile." *Fisher v. A.G. Becker Paribas* (9th Cir. 1986) 791 F.2d 691, 695-697. This Ninth Circuit "futility" defense was the below court's sole legal basis for holding that CLS did not waive its right to arbitrate. (Slip. Op. at 19-20.)

In adopting the Ninth Circuit's "futility" defense the below court committed legal error, because the enforceability of CLS's arbitration provision is "governed by California law." *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138, 1141. "We apply California contract law principles in determining whether [the arbitration agreement] was enforceable." *Chan v. Drexel Burnham Lambert* (1986) 178 Cal.App.3d 632, 640. This is true "even when...the agreement is covered by the FAA." *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683. "State law is applicable if that law arose to govern issues concerning the validity and enforceability of contracts generally." *Perry v. Thomas* (1987) 482 U.S. 483, 492 fn. 9.

Waiver is a generally applicable contract defense. The right to arbitration "may be lost, *as any contractual right which exists in favor of a party may be lost* through a failure properly and timely to assert this right." *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425. Thus, California waiver law governs the enforceability of CLS's arbitration provision.

B. "Futility" is not a defense to waiver in California. This requires denial of CLS's motion to compel arbitration.

California law has long held that "futility" is not a defense to waiver of the right to arbitrate: "By not even submitting the question...and by litigating all counts [defendant] clearly waived the arbitration clause." *Bodine v. United Aircraft* (1975) 52 Cal.App.3d 940, 945. Thus, even where denial of the arbitration motion "would necessarily have been the only correct ruling," that is "irrelevant" as to waiver. (*Ibid.*) "[Defendant] cannot proverbially 'have its cake and eat it too.' If defendant wanted to arbitrate the dispute involving [plaintiff], it should have promptly invoked arbitration ***regardless of the validity of the...arbitration provision***." *Roberts v. El Cajon Motors* (2011) 200 Cal.App.4th 832, 846, fn. 10.

Importantly, under Ninth Circuit law, waiver requires action which is "inconsistent with a known existing right to arbitrate." *Fisher v. A.G. Becker Paribas* (9th Cir. 1986) 791 F.2d 691, 697.

In contrast, under California law: "Waiver of the right to arbitrate does not require a voluntary relinquishment of a known right.

For example, a party may waive the right by an untimely demand even without any intent to forgo the procedure. In this circumstance, waiver is similar to 'a forfeiture arising from the nonperformance of a required act'." *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1203. It is irrelevant "whether a defendant knew about the arbitration provision." *Zamora v. Lehman* (2 Dist. 2010) 186 Cal.App.4th 1, 20. "The absence of an intent to forego submission of a dispute to arbitration is not a legal excuse." *Platt Pacific v. Andelson* (1993) 6 Cal.4th 307, 311. "Although the statutes and case law speak in terms of 'waiver,' the term is used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost. This does not require a voluntary relinquishment of a known right; to the contrary, a party may be said to have 'waived' its right to arbitrate by an untimely demand, even without intending to give up the remedy." *Lewis v. Fletcher Jones Motor Cars* (2012) 205 Cal.App.4th 436, 444.

Therefore, in jurisdictions like California, where "intentional" or "voluntary relinquishment of a known right" is not an element of waiver, "futility" is not a defense to waiver. *Bodine, supra,* 52 Cal.App.3d at 945; *Roberts, supra,* 200 Cal.App.4th at 846, fn. 10.

C. Even assuming "futility" is a defense, the court below misapplied and vastly expanded the defense by redefining "futile" to mean "less likely to succeed." This requires denial of CLS's motion to compel arbitration.

In the below opinion, the Court of Appeal held that a party's "reasonable belief" that it was unlikely to succeed on a motion to compel arbitration is sufficient to excuse what would otherwise be waiver. (Slip. Op. at 20.) In other words, the court below held that the "futility" defense is available any time a party "reasonably believes" a change in law makes it more likely to successfully compel arbitration.

But a party's "reasonable belief" is irrelevant to the waiver analysis. Under Ninth Circuit waiver law, the "futility" defense is available only when a change in law creates a completely *new right* to arbitrate: "Until the Supreme Court's decision in *Byrd*, the arbitration agreement in this case was *unenforceable*." *Fisher v. A.G. Becker Paribas* (9th Cir. 1986) 791 F.2d 691, 695-697.

In December 2012, the Ninth Circuit confirmed that "futility" must be "clear cut," otherwise the defense is not available: "[Defendant] claims that any 'existing right' arose only after *Concepcion* and thus it did not act inconsistently with that 'existing right' because it would have been futile to seek arbitration earlier. *The futility of an arbitration demand, however, is not clear cut here*. In contemporaneous consumer litigation, litigants did succeed in compelling arbitration... [Therefore], a motion to compel arbitration was *not inevitably futile* under the prescribed case-by-case analysis." *Gutierrez v. Wells Fargo* (9th Cir. 2012) 704 F.3d 712, 721. Thus,

unless an earlier motion would have been "inevitably" futile, a party's delay in moving to compel arbitration will result in waiver and will not be excused.

Uncertainty about the outcome of a motion to compel arbitration does not establish futility: "[J]ust because defendant's victory was not assured does not mean that it lacked knowledge of a right to compel arbitration. Litigants may and often do assert claims and defenses even though it is *unclear* whether the claim or defense will be successful..." *Kingsbury v. U.S. Greenfiber LLC* (C.D.Cal., June 29, 2012) 2012 WL 2775022 *4-5. "While *Concepcion* may have strengthened [defendant's] chances for compelling arbitration, it does not mean [defendant] lacked knowledge of its potential right to pursue arbitration prior to that decision... [D]efendant does not have the right to reset the clock for arbitration based on changing subsequent law, as no party has a right to unfairly play a game of 'wait and see' and not assert its legal rights until and unless the law becomes more favorable to its position." *In re Toyota Motor Corp. Hybrid Brake Litigation* (C.D.Cal., Dec. 13, 2011) 828 F.Supp.2d 1150, 1163.

The court below therefore committed legal error by redefining "futile" to mean "less likely to succeed." As the Eleventh Circuit explained:

> "[A] motion to compel arbitration will almost never be futile... A party must move to compel arbitration whenever it should have been clear to the party that the arbitration agreement was at least *arguably* enforceable...

> The more lenient 'unlikely to succeed' standard that [defendant] proposes would only encourage litigants to delay moving to compel arbitration until they could ascertain how the case was going in federal court, and would undermine one of the basic purposes of arbitration: a fast inexpensive resolution of claims."

Garcia v. Wachovia Corp. (11th Cir. 2012) 699 F.3d 1273, 1278-1279.

Indeed, courts in California class actions repeatedly enforced class-action bans and granted defendants' motions to compel individual arbitration, despite *Gentry* and *Discover Bank*, thus proving that it was not "futile" to demand arbitration prior to *Concepcion*. See, e.g., *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1132; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497; *Borrero v. Travelers Indem. Co.* (E.D.Cal., Oct. 15, 2010) 2010 WL 4054114; *Walnut Producers v. Diamond Foods* (2010) 187 Cal.App.4th 634; *Dalie v. Pulte Home Corp.* (E.D.Cal. 2009) 636 F.Supp.2d 1025, 1027; *McCabe v. Dell* (C.D.Cal., April 12, 2007) 2007 WL 1434972; *Provencher v. Dell* (C.D.Cal. 2006) 409 F.Supp.2d 1196, 1202.

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the Court of Appeal, and remand with instructions to deny CLS's belated motion to compel arbitration.

May 10, 2013

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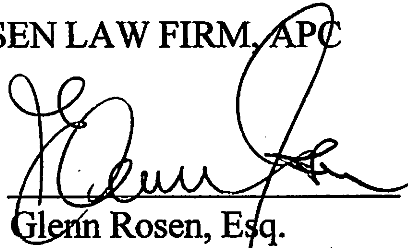

By: ______________________

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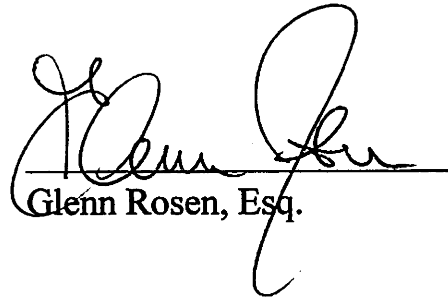
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned counsel certifies that the text of this brief contains 1,867 words as counted by the computer program used to generate the brief.

May 10, 2013



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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 1800 Century Park East, Suite 600, Los Angeles, California 90067.

On May 10, 2013, I served the foregoing document described as **APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT; AMICUS CURIAE BRIEF OF CALIFORNIA ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS** on the interested parties in this action by placing a true copy enclosed in a sealed envelope and addressed as follows:

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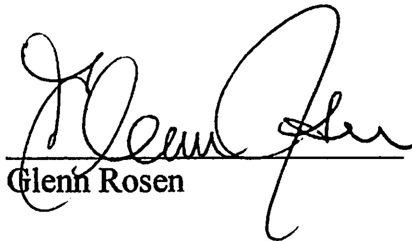

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