S204032

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO, CASE NO. B235158

FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HON. ROBERT HESS, CASE NO. BC356521, DEPT. 24

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

United Policyholders ("UP") respectfully requests permission to file the accompanying amicus curiae brief in support of plaintiff and appellant, Arshavir Iskanian.

UP is a not-for-profit corporation founded in 1991 to educate the public, the judiciary and elected officials on insurance issues and the rights of policyholders. UP is based in Northern California, but operates across the United States. The organization is tax-exempt under Internal Revenue Code section 501(c)(3), and is funded by donations and grants from individuals, businesses and foundations. UP is governed by an eight-member Board of Directors. Much of the organization's work takes place in communities that have been hit by natural disasters, giving rise to large numbers of insurance claims and resulting consumer confusion and frustration.

As part of its mission to advance and protect the rights of policyholders, UP monitors legal and marketplace developments that impact policyholders, operates an Amicus Project, participates in forums and conferences where public policy on insurance is formulated, compiles survey and other data, provides information to the media, and provides post-disaster on-the-ground services, training, self-help materials and advice for victims of natural disasters who are making insurance claims. UP testifies at legislative and other public hearings, and participates in regulatory proceedings on rate and policy issues. UP also responds to marketplace developments—such as sudden price increases, unavailability and large-scale non-renewals—by educating the public on consumer options. UP has appeared as amicus curiae in over 300 cases throughout the United States.[1]

Policyholders have a special interest in class action litigation because many insurance billing, marketing and underwriting practices involve damages to policyholders that are too small to warrant individual action. Increasingly, insurance policies in California are issued with binding arbitration provisions. And increasingly, insurers are engaging in game-playing by attempting to use these arbitration provisions to extinguish class members' claims after years of litigating in court and even after class being certified.

For example, UP is aware of dozens of class actions brought by California consumers in which the defendant, post-*Concepcion*, moved to compel individual arbitration and to dismiss class claims *after* litigating the merits and class issues in court (often for years).

[1] For a more complete description of UP and its work, see the "About" page of UP's website at: www.uphelp.org/about/mission.

Some of these class actions were filed as far back as 2005, and in some a class was already certified, but that has not stopped defendants from belatedly moving to compel arbitration. In these cases alone, the rights of millions of California policyholders and other consumers are at stake.

The opinion below, by ignoring long established California precedent (which does not recognize a "futility" defense to waiver of the right to arbitrate) and instead erroneously adopting and misapplying federal Ninth Circuit law (which does recognize the "futility" defense), would force California consumers to individually arbitrate millions of small claims even though this would be economically unfeasible to do, rather than allow them to continue to be putative members of class actions which have already been actively litigated in court for years. If the opinion below becomes law, millions of California consumers could be left without any adequate remedy.

Accordingly, UP requests permission to file the following amicus curiae brief.

Dated: May 10, 2013 UNITED POLICYHOLDERS

By: _____
Amy Bach
Attorney for Amicus Curiae,
UNITED POLICYHOLDERS

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
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v.

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Defendant and Respondent.

AMICUS CURIAE BRIEF

INTRODUCTION

This case addresses an issue affecting the rights of millions of California consumers: Can a class action defendant's waiver of the right to arbitrate through years of litigating the merits and class issues in state court be excused under the Ninth Circuit's "futility" defense to waiver, a contractual defense which California law does not recognize?[2]

On the eve of trial, *after* litigating the merits and class issues for years and *after* the class was certified, defendant CLS Transportation

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[2] The identical issue is before this Court in two other cases: *Reyes v. Liberman Broadcasting* (2012) 208 Cal.App.4th 1537 (review granted Dec. 12, 2012) and *Flores v. West Covina Auto Group* (2013) 212 Cal.App.4th 895 (review granted April 10, 2013). This Court is holding *Reyes* and *Flores* pending its decision in this case.

moved to compel individual arbitration. The Court of Appeal below held that CLS's litigation conduct did not constitute waiver of the right to arbitrate because moving to compel arbitration prior to the Supreme Court's decision in *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, supposedly would have been "futile." Based on this finding of no waiver, the Court of Appeal granted CLS's motion to compel individual arbitration, and dismissed all class claims.

In doing so, the court below committed legal error, twice. First, the court below erred by ignoring California waiver law (which does not recognize "futility" as a defense), and instead applying federal Ninth Circuit law (which does recognize the "futility" defense, at least to a degree). Second, the court below misapplied and substantially broadened the Ninth Circuit "futility" defense, by measuring the "futility" of a motion using a subjective "reasonable belief" standard. Essentially, the court below unilaterally redefined "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 would encourage much gamesmanship, with litigants using any slight change in the law as an excuse to get out of court and into arbitration if they feel things are not going well for them in court.

Through these two errors, the court below extinguished all class claims, and ordered the class members to instead each pursue their own personal claim in individual arbitration. If these errors are not corrected and the "futility" rule announced below becomes law, numerous California class actions that have been vigorously litigated

in court for *years* could be dismissed. As a result, millions of California consumers (including hundreds of thousands of policyholders) would be left without any viable recourse after enduring years of costly litigation.

ARGUMENT

A. The court below relied solely on the federal Ninth Circuit "futility" defense to excuse CLS's waiver of the contractual right to arbitrate.

"A trial court shall refuse to compel arbitration if it determines the right to compel arbitration has been waived by the petitioner." *Engalla v. Permanente Med. Group* (1997) 15 Cal.4th 951, 982. Nonetheless, the court below held that CLS's years-long litigation in court of the merits as well as class issues was not waiver, because it supposedly would have been "futile" under *Gentry* for CLS to move to compel arbitration prior to the U.S. Supreme Court's decision in *Concepcion*. This "futility" defense was the Court of Appeal's sole legal basis for holding that CLS did not waive its right to arbitrate. (Slip. Op. at 19-20.)[3]

In so holding, the court below adopted the federal Ninth Circuit waiver test, which recognizes a "futility" defense to waiver of a contractual right to arbitrate. Under the Ninth Circuit's waiver test, delay in moving to compel arbitration may be excused if "an earlier

[3] Citations to the Court of Appeal's opinion in this case are in the form of "Slip. Opp. at __."

motion to compel arbitration would have been futile." *Fisher v. A.G. Becker Paribas* (9th Cir. 1986) 791 F.2d 691, 695-697.

B. California contract law governs the enforceability of arbitration provisions. Thus, the court below erred by ignoring California law (which does not recognize the "futility" defense), and instead adopting Ninth Circuit law (which does recognize the defense).

The court below erred by ignoring California law and instead, importing and adopting, wholesale, Ninth Circuit "futility" law. (Slip. Op. at 19-20.)[4]

The enforceability of an arbitration provision is "governed by California law." *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138, 1141 (petition for review denied). "The *existence* of a valid agreement to arbitrate involves general contract principles, and state law governs disposition of that question... We therefore apply California contract law principles in determining whether [the arbitration provision] was enforceable." *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 640. "The question of whether the parties agreed to arbitrate is answered by applying *state contract law* even when…the agreement is covered by the FAA." *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683.

[4] Moreover, the court below went far *beyond* what Ninth Circuit law allows. (See Argument, Section D, *infra*.)

As the U.S. Supreme Court held: "*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. "Generally applicable [state law] contract defenses...may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687.

Waiver of a contractual right is a generally applicable contract defense. As this Court recognized more than 30 years ago, 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. Therefore, California waiver law—not federal waiver law—governs the enforceability of CLS's arbitration provision.

C. Under California law, "futility" is not a defense to waiver. This requires denial of CLS's motion to compel arbitration.

As explained above, the Court of Appeal's sole legal basis for holding that CLS did not waive the right to arbitrate was the supposed "futility" of moving to compel arbitration prior to *Concepcion*. The Court of Appeal relied exclusively on federal Ninth Circuit waiver law, which recognizes a "futility" defense to waiver. (Slip. Op. at 19-20.)

But California law expressly rejects the Ninth Circuit waiver test: "The Ninth Circuit's test represents the minority position...while

the [California Supreme Court's] *St. Agnes* test is consistent with the majority position." *Lewis v. Fletcher Jones Motor Cars* (2012) 205 Cal.App.4th 436, 445 fn. 2; see, e.g., *Zamora v. Lehman* (2 Dist. 2010) 186 Cal.App.4th 1, 21.

Under long-standing California law, "futility" is not a defense to waiver. Thus, even where denial of the arbitration motion "would necessarily have been the only correct ruling," that fact is "irrelevant" as to waiver. "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.

Consistent with this established precedent, recent California appellate court decisions have also rejected the "futility" defense: "[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; see, e.g., *Lewis v. Fletcher Jones Motor Cars* (2012) 205 Cal.App.4th 436, 447 ("We reject [defendant's] futility argument..."). Thus, the Ninth Circuit's "futility" defense is not applicable in California state court.

Tellingly, the court below did not and could not cite a single published California appellate opinion which recognizes "futility" as a defense to waiver.[5] Instead, ignoring California precedent to the

[5] CLS's Answer Brief also relies on federal case law regarding "futility" (see Answer Brief at pp. 32-34), with the exception of one recent state opinion, *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 748. That case is easily distinguished. In *Phillips*, defendant Sprint in

contrary and relying solely on two federal opinions (Slip. Op. at 19-20), the court below adopted the Ninth Circuit's "futility" defense. This was legal error. (See Argument, Section B, *supra*.)

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 sharp 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.

Under California law, it is irrelevant "whether a defendant knew about the arbitration provision." *Zamora v. Lehman* (2 Dist. 2010) 186 Cal.App.4th 1, 20. "Although the statutes and case law

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2006 promptly moved to compel arbitration, at the outset of litigation. The trial court denied the motion based on *Discover Bank*. In 2010, when the U.S. Supreme Court granted certiorari in *Concepcion*, Sprint asked for and received a trial court stay. After *Concepcion* overruled *Discover Bank*, Sprint renewed its motion to compel arbitration, which was granted under the "change in law" provision of Code of Civil Procedure section 1008(b). *Phillips* merely held that Sprint did not waive the right to arbitrate "by not appealing the denial of its original motion." *Id.* at 773. *Phillips* does not help CLS, because: (1) CLS did not lose a prior motion to compel arbitration; (2) CLS continued to litigate rather than ask for a stay while *Concepcion* was pending before the U.S. Supreme Court; and (3) CLS cannot rely on the "change in law" provision of Code of Civil Procedure section 1008(b) because the trial court did not deny a prior motion by CLS.

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, citing *Burton v. Cruise* (2010) 190 Cal.App.4th 939.

In 1993, this Court summarized: "We have examined the California decisions stating that a party may 'waive' its right to arbitrate by failing to timely demand arbitration. We conclude that those decisions use the word 'waiver' in the sense of the loss or forfeiture of a right resulting from failure to perform a required act." *Platt Pacific v. Andelson* (1993) 6 Cal.4th 307, 315. "The absence of an intent to forego submission of a dispute to arbitration *is not a legal excuse*." *Id.* at 311.

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

D. Even if "futility" were a defense, the court below misapplied and broadened the doctrine by unilaterally redefining "futile" to mean "less likely to succeed."

The court below erroneously held that a party's "reasonable belief" that it is unlikely to succeed on a motion to compel arbitration

is sufficient to excuse delay in demanding arbitration. (Slip. Op. at 20.) By making the "futility" defense available any time a party "reasonably believes" a change in law makes it more likely to succeed on a motion to compel arbitration, the court below misapplied and substantially broadened the defense.

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

The Ninth Circuit recently confirmed that the "futility of an arbitration demand" must be "clear cut"—a party's delay in moving to compel arbitration will result in waiver and will not be excused unless an earlier motion would have been "inevitably" futile:

> [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, <u>is not clear cut here</u>. In contemporaneous consumer litigation, litigants <u>did</u> succeed in compelling arbitration despite the existence of the *Discover Bank* rule... [Therefore], a motion to compel arbitration was <u>not inevitably futile</u> under the prescribed case-by-case analysis.

Gutierrez v. Wells Fargo (9th Cir. 2012) 704 F.3d 712, 721 (held that Wells Fargo waived the right to arbitrate because even under *Discover Bank* a motion to compel arbitration "was not inevitably futile").

This is consistent with the plain and ordinary meaning of futile. Merriam-Webster defines "futile" as "frivolous" or "serving no useful purpose." In other words, by definition, the "futility" defense is only available to a litigant in federal court for whom arbitration was foreclosed because it would have been "frivolous" to demand arbitration prior to a change in law.

Mere *uncertainty* about the outcome of a motion to compel arbitration does not establish futility: "[J]ust because defendant's victory was not assured [due to *Discover Bank*] 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… Although *Concepcion* clarified [defendant's] right to compel arbitration, this does not mean that [defendant] was unaware of that right prior to that decision." *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 Ninth Circuit's decision in *Gutierrez* undermines defendant's claim that it was precluded by *Gentry* from exercising its right to arbitrate this dispute." *Ontiveros v. Zamora* (E.D.Cal., Feb. 14, 2013) 2013 WL 593403 *9-10.

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, accord *In re Mirant Corp.* (5th Cir. 2010) 613 F.3d 584, 590, and *Southeastern Stud and Components Inc. v. American Eagle Design Build Studios LLC* (8th Cir. 2009) 588 F.3d 963, 967.

So the court below not only completely ignored California law by erroneously adopting the Ninth Circuit's "futility" defense to waiver, it also ignored federal precedent and dramatically broadened the defense by redefining "futile" to mean "less likely to succeed."

E. Numerous courts in California class actions *granted* defendants' pre-*Concepcion* motions to compel individual arbitration, despite supposed "bars" to arbitration like *Gentry* and *Discover Bank*. Thus, even if "futility" were a defense (which it is not), it does not help CLS.

Here, the supposed "bar" to arbitration is *Gentry v. Superior Court* (2007) 42 Cal.4th 443. In other cases, the supposed "bar" was *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. But despite these supposed "bars" to arbitration, courts in California class actions repeatedly *granted* defendants' motions to compel individual arbitration and to dismiss class claims. Thus, courts repeatedly enforced class-action bans and required individual arbitration, despite *Gentry* and *Discover Bank*, demonstrating that it was not "futile" to demand individual arbitration pre-*Concepcion*. For example:

- Court of Appeal granted defendant's motion to compel individual arbitration, because plaintiff failed to meet her burden under *Gentry* to make a factual "showing." *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1132.

- Court of Appeal granted defendant's motion to compel individual arbitration, because plaintiff failed to meet her burden to making a "factual showing" establishing each element of the *Gentry* "four-factor test." *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497.

- California district granted defendant's motion to compel individual arbitration, because plaintiff failed to establish any of the four *Gentry* factors. *Borrero v. Travelers Indem. Co.* (E.D.Cal., Oct. 15, 2010) 2010 WL 4054114.

- Court of Appeal granted defendant's motion to compel individual arbitration, because plaintiff failed to make the factual showing required by *Gentry* and *Discover Bank*. *Walnut Producers v. Diamond Foods* (2010) 187 Cal.App.4th 634.

- California district court granted defendant's motion to compel individual arbitration, because plaintiff failed to establish the four *Discover Bank* elements. *Dalie v. Pulte Home Corp.* (E.D.Cal. 2009) 636 F.Supp.2d 1025, 1027 ("under California law a class action waiver is only unenforceable in a narrow set of circumstances").

- California district court granted defendant's motion to compel individual arbitration, because one of the required *Discover Bank* elements was not present. *McCabe v. Dell* (C.D.Cal., April 12, 2007) 2007 WL 1434972.

- California district court granted defendant's motion to compel individual arbitration, distinguishing *Discover Bank*. *Provencher v. Dell* (C.D.Cal. 2006) 409 F.Supp.2d 1196, 1202.

Thus, even assuming *Concepcion* overruled *Gentry* (it did not) and is therefore a change in law (it is not), *Gentry* was never a categorical "bar" to arbitration. So *Gentry*'s purported repeal does not create a new right to arbitrate. It therefore would not have been "futile" for CLS to demand arbitration prior to *Concepcion*.

CONCLUSION

The below opinion ignores California waiver law. Instead, it relies on (and misapplies) the body of conflicting federal Ninth Circuit waiver law. If the below opinion is affirmed, hundreds of state court class actions—filed and even certified years before *Concepcion* was decided—could be dismissed. Moreover, most consumers will never even learn of the unlawful business practices, and those few that do will almost invariably decide not to pursue individual arbitration because its costs far outweigh the relatively small dollar amounts involved. This would effectively leave millions of California consumers without any practical remedy and allow consumer abuses to continue unabated.

For the foregoing reasons, this Court should reverse the holding of the court below, and remand with instructions to deny CLS's motion to compel arbitration—on the ground that CLS waived any right it had to arbitrate.

Dated: May 10, 2013 UNITED POLICYHOLDERS

By: _____
Amy Bach
Attorney for Amicus Curiae,
UNITED POLICYHOLDERS

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 3,716 words as counted by the computer program used to generate the brief.

Dated: May 10, 2013

_____

Amy Bach

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is: 381 Bush Street, 8th Floor, San Francisco, California 94104.

On May 10, 2013, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT** on the interested parties in this action by placing a true copy enclosed in a sealed envelope and addressed as follows:

SEE ATTACHED SERVICE LIST

[X] **(BY MAIL)** I am readily familiar with United Policyholders' practice of collection and processing correspondences for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on May 10, 2013, at San Francisco, California.

_____

Amy Bach

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***Iskanian v. CLS Transportation Los Angeles, LLC*, S204032**

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