S224086

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Sharon McGill,

Plaintiff and Respondent,

v.

Citibank, N.A.,

Defendant and Appellant.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three
Case No. G049838

Riverside County Superior Court, Case No. RIC1109398,
Commissioner John W. Vineyard

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND APPELLANT CITIBANK, N.A.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Under rule 8.520(f) of the California Rules of Court, the International Association of Defense Counsel (IADC) requests permission to file the attached *Amicus Curiae* Brief in support of defendant and respondent Citibank, N.A.

INTEREST OF *AMICUS CURIAE*; HOW THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The IADC's abiding interest in the benefits of arbitration, as well as its concern regarding attempts to frustrate the purpose of the Federal Arbitration Act, 9 U.S.C. sect. 1, et seq. (FAA), is exemplified by its amicus participation in several cases involving federal arbitration law, including *American Express Co. v. Italian Colors Restaurant* (2013) 133 S. Ct. 2304, *DIRECTV, Inc. v.*

Imburgia (2105) 136 S. Ct. 463, *MHN Government Services, Inc. v. Zaborowski*, U.S. Supreme Court Case No. 14-458, and *Dickey's Barbecue Restaurants, Inc. v. Chorley Enterprises, Inc.*, U.S. Supreme Court Case No. 15-719 (cert. petition pending).

In this case the Court has agreed to determine the continued viability of the "*Broughton-Cruz*" rule (see *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303), which carves out California statutory claims for public injunctive relief from arbitration and the preemptive effect of the FAA. As we explain in the accompanying brief, the *Broughton-Cruz* rule is irreconcilable not only with the FAA and the courts' consistent application of its underlying principles but with the Supremacy Clause, and cannot stand. The arguments we present are complementary to, but not duplicative of, Citibank's briefing.

NO PARTY OR COUNSEL FOR A PARTY AUTHORED OR CONTRIBUTED TO THIS BRIEF

The IADC provides the following disclosures required by rule 8.520(f)(4) of the California Rules of Court: (1) no party or counsel for a party in this appeal authored or contributed to the funding of this brief, and (2) no one other than *amicus curiae* or

its counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, the IADC requests that the Court permit the filing of the attached *Amicus Curiae* Brief in support of defendant and respondent Citibank, N.A.

DATED: January 15, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP

By: _____
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International Association of
Defense Counsel

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AMICUS CURIAE BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND APPELLANT CITIBANK, N.A.

INTRODUCTION

As the parties' briefs on the merits explain, Sharon McGill opened a credit card account with Citibank and later purchased a "Credit Protector" plan for that account. (1 Clerk's Transcript ("CT") 98–99.) The operative "Citibank Card Agreement" included

an arbitration clause providing that "[a]ll [c]laims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek." (1 CT 108-110.)

Despite the arbitration clause, McGill filed this purported class action against Citibank, urging that Citibank's marketing of the Credit Protector plan and its administration of McGill's claim under the plan violated (1) the Unfair Competition Law ("UCL"); (2) the False Advertising Law ("FAL"); (3) the Consumer Legal Remedies Act ("CLRA"); and (4) Insurance Code § 1758.9 *et seq.* (1 CT 10–23.) McGill sought a variety of remedies on behalf of herself and the class, including up to $5 million in restitution, disgorgement of profits, punitive damages, attorneys' fees, and injunctive relief. (1 CT 23-24.) Citibank immediately moved to compel arbitration. (1 CT 31–57.) The trial court granted the motion as to all claims except those for public injunctive relief. (6 CT 1406, 1463-66.)

The Court of Appeal reversed and remanded for the trial court to order *all* of McGill's claims to arbitration, including the public injunction claims. The court of appeal "join[ed] several federal court decisions in concluding" that the FAA preempts the

Broughton-Cruz rule, reasoning that "[i]n *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. [333] [131 S. Ct. 1740], the United States Supreme Court unmistakably declared the FAA preempts all state-law rules that prohibit arbitration of a particular type of claim because an outright ban, no matter how laudable the purpose, interferes with the FAA's purpose, and interferes with the FAA's objective of enforcing arbitration agreements according to their terms. The *Broughton-Cruz* rule falls prey to *AT&T Mobility*'s sweeping directive because it is a state-law rule that prohibits arbitration of UCL, FAL, and CLRA injunctive relief claims brought for the public's benefit." (Typed opn., pp. 2-3.)

The appellate court was correct.

The *Broughton-Cruz* rule, under which claims for public injunctions are deemed non-arbitrable as a matter of state policy, is preempted by the FAA for two separate and independent reasons.

First, the FAA forbids states from prohibiting arbitration of a particular type of claim. (See, e.g., *Marmet Health Care Ctr., Inc. v. Brown* (2012) 132 S. Ct. 1201, 1204 (per curiam); *Concepcion,* 131 S. Ct. at p. 1747 ["When state law prohibits outright the arbitration of a particular type of claim, the analysis

is straightforward: The conflicting rule is displaced by the FAA"].) Just as particular types of claims cannot be carved out from arbitration, neither can particular types of remedies. Otherwise one could attach an arbitration-exempt remedy to any type of claim and thereby insulate it from arbitration, a result that would violate the FAA's purpose of enforcing arbitration agreements according to their terms, and put arbitration agreements on different footing than other kinds of agreements.

Second, state public policies, whether originating from the courts or the legislature, cannot override federal law. The U.S. Supreme Court's decision in *Concepcion* "rejected th[e] premise" that plaintiffs can avoid agreements to arbitrate on the ground that their state law claims "cannot be vindicated effectively" in arbitration, because state law cannot override federal law. (*Coneff v. AT&T Corp.* (9th Cir. 2012) 673 F.3d 1155, 1159.) Under the Supremacy Clause, state "policy concerns, however worthwhile, cannot undermine the FAA." (*Id.)* Only Congress itself can craft explicit exceptions to the FAA), and it has not created a public injunction exception. (See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628; accord, e.g., *CompuCredit Corp. v. Greenwood* (2012) 132 S. Ct.

665, 669; *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 29 (*Gilmer*); *American Express Co. v. Italian Colors Restaurant* (2013) 133 S. Ct. 2304, 2311 (*American Express*).)

LEGAL DISCUSSION

A. The FAA Precludes States from Declaring Particular Types of Claims (or Remedies) Categorically Off Limits to Arbitration.

"Congress enacted the FAA in response to widespread judicial hostility to arbitration." (*American Express, supra*, 133 S. Ct. at pp. 2308-09.) The FAA was "designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,' and place such agreements 'upon the same footing as other contracts.'" (*Volt Info. Sciences v. Leland Stanford Jr. University* (1989) 489 U.S. 468, 474 (citations omitted) (*Volt*); see also *Gilmer, supra,* 500 U.S. at p. 24.) The FAA also declared "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24 (*Moses H. Cone*); see also *Perry v. Thomas* (1987) 483 U.S. 483, 489.) Thus, under the FAA, "as a matter of federal law, any doubts concerning the scope of

arbitrable issues should be resolved in favor of arbitration." (*Moses H. Cone*, *supra*, 460 U.S. at pp. 24-25 & fn.32.)

This Court has concluded that U.S. Supreme Court precedent concerning the scope of FAA preemption compels invalidating other state law rules designed to protect consumers and employees from arbitration agreements. (See, e.g., *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1141 (*Sonic II*); *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, 364.) It should reach the same conclusion here about the *Broughton-Cruz* rule.

Where, as here, "state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Concepcion*, *supra*, 563 U.S. at p. 341.) "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at p. 1753; see also *DIRECTV v. Imburgia* (2015) 136 U.S. 463, 468, ["The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every state must follow it."].) The *Broughton-Cruz* rule is a state law rule that categorically prohibits arbitration of

certain types of claims, i.e., requests for a public injunction, and is therefore preempted by the FAA.[1] Indeed, as one commentator has observed, "*Broughton* and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date." (Christopher R. Drahozal, *Federal Arbitration Act Preemption* (2004) 79 Ind. L.J. 393, 416.)

[1] The Ninth Circuit, and the vast majority of district courts within the circuit, have already reached this conclusion. See, e.g., *Ferguson v. Corinthian Colleges* (9th Cir. 2013) 733 F.3d 928, 934-937; *Brown v. DIRECTV, LLC* (C.D. Cal. June 26, 2013) 2013 WL 3273811, at *11 (Gee, J.); *Miguel v. JP Morgan Chase Bank, N.A.* (C.D. Cal. Feb.5, 2013) 2013 WL 452418, at *10 (Gutierrez, J.); *Meyer v. T-Mobile USA Inc.* (N.D. Cal. 2011) 836 F. Supp. 2d 994, 1005-06 (Breyer, J.); *Hendricks v. AT&T Mobility LLC* (N.D. Cal. 2011) 823 F. Supp. 2d 1015, 1024 (Breyer, J.); *Kaltwasser v. AT&T Mobility LLC* (N.D. Cal. 2011) 812 F. Supp. 2d 1042, 1050-51 (Fogel, J.); *Nelson v. AT&T Mobility LLC* (N.D. Cal. Aug. 18, 2011) 2011 WL 3651153, at *1-4 (Henderson, J.); *In re Gateway LX6810 Computer Prods. Litig.* (C.D. Cal. July 21, 2011) 2011 WL 3099862, at *1-3 (Tucker, J.); *In re Apple & AT&T iPad Unlimited Data Plan Litig.* (N.D. Cal. July 19, 2011) 2011 WL 2886407, at *4 (Whyte, J.); *Arellano v. T-Mobile USA, Inc.* (N.D. Cal. May 16, 2011) 2011 WL 1842712, at *1-2 (Alsup, J.).

B. The Supremacy Clause Recognizes That State Policy is Not a Valid Ground for Declaring Certain Types of Claims or Remedies to be Non-Arbitrable; After All, the Effective Vindication Doctrine Applies Only to Federal Statutory Rights.

Broughton relied, in part, on the principle that subjecting statutory claims to arbitration would prevent the effective vindication of an underlying right to an injunction. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1082-1083.) But the effective vindication exception applies only to federal, not state, statutes. (See *Mitsubishi Motors*, *supra*, 473 U.S. at pp. 627–28 ["Just as it is the *congressional* policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the *congressional* intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."] (emphases added); *Gilmer*, *supra*, 500 U.S. at p. 29; *Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 82.)

Under the Supremacy Clause, only Congress may create an effective vindication exception to the FAA's coverage; a state

legislature lacks the authority to do so. U.S. Const., art. VI, cl. 2 ("the laws of the United States . . . shall be the supreme law of the land . . .); *Volt, supra,* 489 U.S. at p. 477 ("to the extent [a state law] 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[, it is preempted]'").). Thus, the "effective-vindication rule comes into play only when the FAA is alleged to conflict with another federal law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them." (*American Express, supra,* 133 S. Ct. at p. 2320 (Kagan, J. dissenting); see also *Stutler v. T.K. Constructors, Inc.* (6th Cir. 2006) 48 F.3d 343, 346.) Even with respect to claims under federal law, though, an "effective vindication" challenge to an arbitration agreement can only succeed where there is an express and "contrary congressional command," not an implied one. (*American Express, supra,* 133 S. Ct. at pp. 2309-2310.)

Although the dissent in *American Express* would have recognized a broader effective vindication exemption for federal statutory claims, it too recognized that "standard preemption principles" apply, in contrast, when a state rule allegedly

conflicts with the FAA; if the state law "frustrates the FAA's purposes and objectives," "the Supremacy Clause requires [the state rule's] invalidation." (*American Express, supra,* 133 S. Ct. at p. 2320 (Kagan, J. dissenting); see also *Ferguson v. Corinthian Colleges, Inc., supra,* 733 F.3d at p. 936 [the effective vindication doctrine "rest[s] on the principle that other federal statutes stand on equal footing with the FAA. . . . 'In [the] all-federal context, one law does not automatically bow to the other.'"]; *American Express, supra,* 133 S. Ct. at p. 2320 (Kagan, J., dissenting) ["If the state rule [frustrates the FAA's purposes and objectives,] . . . the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law."].)

The effective vindication doctrine therefore cannot be used to validate the *Broughton-Cruz* doctrine either.

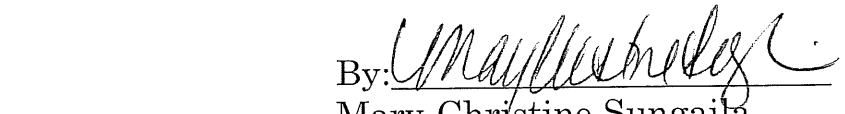
CONCLUSION

For the foregoing reasons, and those expressed by defendant and respondent Citibank, N.A., in the merits briefing, this Court should uphold the Court of Appeal and remand this matter for the trial court to order all claims to arbitration.

Dated: January 15, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP

By: 
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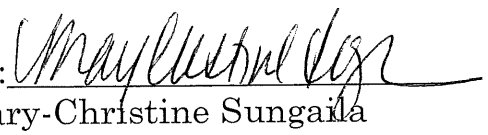
CERTIFICATE OF WORD COUNT

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 1,845 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

DATED: January 15, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP

By: 

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Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 700, Costa Mesa, CA 92626.

On January 15, 2016, I served, in the manner indicated the foregoing document described as **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND APPELLANT CITIBANK, N.A.** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ (BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

☐ (BY ELECTRONIC DELIVERY) I served a true and correct copy of such document by electronic delivery pursuant to C.R.C. rule 8.212 (c)(2)(A)), calling for agreement to accept service by electronic delivery, to the interested party in this action as indicated below.

☐ (BY FACSIMILE) I served a true and correct copy of such document by facsimile pursuant to C.C.P. 1013(e)(f) to the facsimile numbers listed below. The transmission reports indicated that each transmission was complete and without error.

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that practice such correspondence will be deposited at a facility or pick-up box regularly maintained by Federal Express for receipt on the same day in the ordinary course of business with delivery fees paid or provided for in accordance with ordinary business practices.

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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 on January 15, 2016, at Costa Mesa, California.

Breean Cordova

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