No.

In the Supreme Court of the United States

E. & J. GALLO WINERY, a California corporation; STAR H-R, INC., a California corporation,

Petitioners,

v.

REFUGIO ARREGUIN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California (First Appellate District)

PETITION FOR A WRIT OF CERTIORARI

JENNIFER E. DOUGLAS
DICKENSON, PEATMAN & FOGARTY, P.C.
100 B Street
Suite 320
Santa Rosa, CA 95401
jdouglas@dpf-law.com
(707) 524-7000

Counsel for Petitioner
STAR H-R, INC.

NANCY L. ABELL
PAUL W. CANE, JR.
Counsel of Record
DEBORAH S. WEISER
PAUL HASTINGS LLP
101 California Street
48th Floor
San Francisco, CA 94111
paulcane@paulhastings.com
(415) 856-7000

Counsel for Petitioner
E. & J. GALLO WINERY

QUESTION PRESENTED

This case presents a Federal Arbitration Act question that:

- this Court was unable to resolve definitively in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *see id.* at 447-54 (plurality opinion of Breyer, J.);

- this Court twice thereafter has noted remains open, *see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013); and

- the California Supreme Court now has resolved contrary to the decisions of five United States circuit courts of appeals.

The question: Whether a court, or an arbitrator, decides whether an arbitration agreement permits class arbitration.

The California Supreme Court assigned the question to the arbitrator. By contrast, the Third, Fourth, Sixth, Eighth and Ninth circuits have held that the FAA assigns the question to the court as a "gateway" question of arbitrability.

This Court should grant certiorari to resolve the conflict in the cases on an important question under the FAA.

RULE 29.6 STATEMENT

All parties to this case are listed in the caption.

E. & J. Gallo Winery is privately owned. Star H-R, Inc. also is privately owned. No publicly traded company owns any of the stock of either petitioner.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(*cont'd*)

Page

TABLE OF APPENDICES

Page

TABLE OF APPENDICES
(*cont'd*)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF CITED AUTHORITIES
(*cont'd*)

Page

Statutory Provisions

TABLE OF CITED AUTHORITIES
(*cont'd*)

Page

Rules

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the California Court of Appeal is not officially reported. It is reproduced in the Appendix at Pet. App. 1a and reported unofficially at 2018 Cal. App. Unpub. LEXIS 2153 (March 28, 2018).

The decision of the California Supreme Court denying discretionary review is not officially reported. It is reproduced in the Appendix at Pet. App. 23a and reported unofficially at 2018 Cal. LEXIS 5085 (July 11, 2018).

The decision of the trial court is not officially or unofficially reported. It is reproduced in the Appendix at Pet. App. 24a.

JURISDICTION

E. & J. Gallo Winery and Star H-R, Inc. timely petition this Court within 90 days of the California Supreme Court's order denying discretionary review. S. Ct. R. 13.1.

This Court has jurisdiction under 28 U.S.C. section 1257(a) to resolve whether the availability of class arbitration is a gateway question of arbitrability for the court under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*.

STATUTORY PROVISIONS INVOLVED

The FAA provides, in relevant part:

Section 2 [9 U.S.C. § 2]. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * * *

Section 4 [9 U.S.C. § 4]. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court

> which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

STATEMENT OF THE CASE

This case presents the question whether a court or an arbitrator decides whether an arbitration agreement permits class litigation. The undisputed facts here squarely present that question.

1. Star H-R, Inc. provided staffing services to various businesses, including E. & J. Gallo Winery. Plaintiff Refugio Arreguin is a former employee of Star.

2. Arreguin and Star jointly agreed to submit to binding arbitration "all disputes that may arise out [of], or be related to . . . employment." Arreguin received and signed the arbitration agreement ("Agreement") in Spanish (his preferred language) at the time he was hired. The English translation of the Agreement is reproduced at Pet. App. 31a. The

Agreement said nothing one way or the other about class-action litigation.

3. Star assigned Arreguin to a warehouse operated by Gallo, where he worked briefly from August 2013 to October 2013. Star's services for Gallo in general, and Arreguin's work in particular, involved the handling of wine sold in interstate commerce.

4. Arreguin sued in derogation of his promise to arbitrate, alleging both individual and class-based wage-hour claims. Gallo and Star moved to compel arbitration. They contended that the Agreement was enforceable; that both companies were entitled to invoke it; and that Arreguin under the FAA had to arbitrate his claims individually rather than in a class action. Gallo and Star contended that the FAA made it a gateway question of arbitrability for the court — not a question for the arbitrator — whether the Agreement permitted class litigation.[1]

5. The trial court denied the motion to compel arbitration by written order dated June 10, 2015. Pet. App. 24a. Because the trial court believed the

---

[1] For example, the motion to compel arbitration (March 20, 2015), argued that, under the FAA, "This Court, not an arbitrator, decides whether an arbitration agreement permits class actions." Pet. App. 33a. The reply brief in support of the motion (May 22, 2015) similarly argued "'Class arbitrability' is a 'gateway' issue for the Court." Pet. App. 37a (capitalization modified).

Agreement was not enforceable, it did not reach the question of the propriety of class arbitration.

6. The California Court of Appeal (1st Dist., Div. 2) reversed on March 28, 2018. Pet. App. 1a. The court held that the Agreement was enforceable and that Gallo could enforce the arbitration agreement along with Star. Pet. App. 2a, 5a-17a, 20a-21a.

7. The Court of Appeal did not, however, compel Arreguin to *individual* arbitration. Gallo and Star continued to assert that, under the FAA, the court, not an arbitrator, decides whether an arbitration agreement permits class actions.[2] The Court of Appeal, however — by that point constrained by the California Supreme Court's intervening 4-3 decision in *Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233 (2016) — held that "the arbitrator will decide whether the class claims can proceed, and that decision will be subject only to limited judicial review."[3] Pet. App. 17a-20a.

---

[2] Opening Brief (Aug. 24, 2015), Pet. App. 42a-44a; Reply Brief (January 26, 2016), Pet. App. 46a-50a.

[3] In dictum, the Court of Appeal volunteered that "[W]e lament . . . the recent march of our nation's jurisprudence toward eliminating the right to a jury trial (or any trial) in a large number of civil cases by its ever-extending embrace of arbitration." Pet. App. 17a (citation omitted). *Cf. Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam) (summarily reversing West Virginia Supreme Court, which had labeled United States Supreme Court arbitration decisions "tendentious" and "created from whole cloth").

8. Gallo and Star timely petitioned the California Supreme Court for review. They contended that *Sandquist* was incorrectly decided under the FAA and should be overruled, and that a court must decide the gateway question of the availability of class arbitration. Gallo and Star demonstrated that *Sandquist* conflicts with the decisions of five United States circuit courts of appeals. Petition for Review (May 1, 2018), Pet. App. 59a-63a.

9. The California Supreme Court denied review on July 11, 2018. Pet. App. 23a. Gallo and Star now timely petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF THE FEDERAL ARBITRATION ACT CONFLICTS WITH THAT OF FIVE U.S. CIRCUIT COURTS OF APPEALS

Allow *respondent Arreguin* to explain why certiorari should be granted. He did just that in briefing to the California Supreme Court, urging that court not to overrule *Sandquist*. Arreguin then explained that "the federal appellate courts are just about evenly split" on the FAA question presented. Answer to Petition for Review (May 21, 2018), Pet. App. 65a; *accord id.* ("[T]he courts are evenly split . . . .").

This Court should grant certiorari to resolve the conceded conflict in the cases under the FAA.

A. California In Applying The Federal Arbitration Act Assigns To The Arbitrator Whether An Agreement Permits Class Arbitration.

Sandquist v. Lebo Automotive was an employment-discrimination class action. Plaintiff had entered into an arbitration agreement that said nothing one way or the other about the availability of classwide relief. The company contended that the silent agreement could not be construed to allow class actions; plaintiff argued otherwise.

A threshold question was who — an arbitrator, or the court? — should make that determination. The company argued that the FAA made it a gateway question of arbitrability for the court, but a 4-3 California Supreme Court majority disagreed. The majority followed the plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). "The plurality . . . allocat[ed] the class arbitration availability question to the arbitrator," the majority noted. 1 Cal. 5th at 251. Because nothing "persuade[s] us the [*Bazzle*] plurality was wrong," the California court said, "we agree with the plurality that the determination whether a particular agreement allows for class arbitration is precisely the kind of contract interpretation matter arbitrators regularly handle." *Id*. at 260. "Along with the [*Bazzle*] plurality, we find nothing in the FAA or its underlying policies to support the contrary presumption, that this question should be submitted to a court rather than an arbitrator unless

the parties have unmistakably provided otherwise." *Id*.

Three justices dissented, in an opinion by Justice Kruger. She demonstrated that the availability of class arbitration was a gateway question of arbitrability for the court. Class arbitration, she explained, is not merely a procedural device to which parties may implicitly agree by simply entering into an arbitration agreement. Rather, it is a different type of proceeding that requires a showing of consent by the parties. The reasoning of recent U.S. Supreme Court cases therefore makes the availability of class and/or representative arbitration a question of arbitrability, a gateway issue for a court to decide. She concluded: ". . . I would follow where the [U.S. Supreme] [C]ourt has led." *Id*. at 268.

In the instant case the California Court of Appeal necessarily applied the holding of the *Sandquist* majority, Pet. App. 17a-20a.[4] The Court of Appeal decision here therefore is this Court's vehicle to review *Sandquist* itself (in which no petition for certiorari was filed).

---

[4] In California, "all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962).

B. California's Application Of The Federal Arbitration Act Conflicts With Decisions From Five U.S. Circuit Courts Of Appeals.

The California rule, treating the *Bazzle* plurality opinion as authoritative, conflicts with decisions from the federal courts of appeals.

1. Courts decide gateway questions of arbitrability.

Absent clear and unmistakable evidence indicating the parties intended otherwise, questions of arbitrability are decided by the court. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (courts will not assume that the parties agreed to arbitrate gateway matters "unless there is 'clea[r] and unmistakabl[e]' evidence" to that effect) (citation omitted).

2. Because a class action fundamentally modifies the scope of arbitration, the class-action issue is a gateway question of arbitrability for the court.

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), this Court held that federal law preempted a California doctrine that deemed unenforceable a class-action waiver in an arbitration agreement. That state-law rule "stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress" and thus "is preempted by the FAA." *Id.* at 352 (citation and quotation marks omitted). The reason is that class arbitration "sacrifices the principal advantage of arbitration," is "poorly suited to the higher stakes of class litigation," forces defendants to "bet the company with no effective means of review," and is "not arbitration as envisioned by the FAA." *Id.* at 348, 350, 351. This Court held that California must enforce arbitration agreements even if such agreements require that claimants arbitrate their claims individually, instead of on a class basis. Parties to arbitration agreements have "discretion in designing arbitration processes," because "[a]rbitration is a matter of contract and the FAA requires courts to honor parties' expectations." *Id.* at 344, 351.

Concepcion dealt with an *express* class-action waiver, but *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), explained how courts should deal with arbitration agreements, like the one at issue here, that are *silent* on the issue. This Court held that when an arbitration agreement is governed by the FAA, classwide arbitration is forbidden unless the parties have affirmatively agreed to it. The "differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with . . . the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to

realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* at 685. The "shift from bilateral arbitration to class-action arbitration" brings about "fundamental changes," because an arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties," *id.* at 686, and yet "the scope of judicial review is much more limited," *id.* at 687. Because the "relative benefits of class-action arbitration are much less assured," there is "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration" where an agreement does not *specifically* authorize it. *Id.* at 685-86.

These post-*Bazzle* cases inform whether it is for the arbitrator, or a gateway question of arbitrability for the court, whether a silent agreement contemplates class actions. This Court's decisions emphasize the substantial differences between individual arbitration and classwide arbitration. By emphasizing those differences, "the Supreme Court 'has given every indication, short of an outright holding, that class-wide arbitrability is a gateway question' for the court." *Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 876 (4th Cir. 2016) (citation omitted).

3. Five federal circuits disagree with California's interpretation of the FAA.

California applies the *Bazzle* plurality opinion, but *Bazzle* was decided 15 years ago. Since then, as noted above, this Court has decided several key arbitration cases. In those cases, the Court has pointedly noted that the *Bazzle* plurality resolved nothing. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 680 (2010), the Court explained that the *Bazzle* plurality was not authoritative. Then, in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013), this Court emphasized that it "has not yet decided" whether class arbitration is a gateway question of arbitrability for the court.[5]

---

[5] This Court appeared poised to resolve the question in *Oxford Health*, but it was unable to do so because of that company's procedural error. At issue was whether the arbitration agreement did or did not permit class actions. Oxford Health asked the arbitrator to decide that question — "not once, but twice," 569 U.S. at 569 n.2 — and turned to the courts only when Oxford Health did not like the answer the arbitrator provided. In such circumstances, this Court held, "The arbitrator's construction holds, however good, bad, or ugly" it might be. *Id.* at 573. "We would face a different issue," the Court explained, "if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability,'" a "'gateway matter[]' . . . for courts to decide." *Id.* at 569 n.2 (citation omitted). Gallo and Star did exactly that, as shown *ante* at 4-6 & nn.1-2, so no issue of waiver is presented here.

Five U.S. courts of appeals, informed by *Stolt-Nielsen*, *Concepcion*, and *Oxford Health*, reject the *Bazzle* plurality. Those courts hold that this Court's recent teaching makes the class-action issue a gateway question of arbitrability for the court.

The Sixth Circuit considered the issue in *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013). Citing the profound differences between a class action and individualized arbitration, the court held that "whether an arbitration agreement permits classwide arbitration is a gateway matter" presumptively "for judicial determination." *Id.* at 599 (citation omitted). Plaintiff invoked the *Bazzle* plurality, but the Sixth Circuit found that the plurality's reasoning succumbed to this Court's later teaching in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). 734 F.3d at 598-99.

The Third Circuit agreed in *Opalinski v. Robert Half International Inc.*, 761 F.3d 326 (3d Cir. 2014). The court held that the availability of class arbitration was a gateway question of arbitrability. "Traditional individual arbitration and class arbitration are so distinct that a choice between the two goes, we believe, to the very type of controversy to be resolved." *Id.* at 334. The availability of class arbitration therefore presented a gateway question of arbitrability for the court. *Id.* Here again plaintiff relied on the *Bazzle* plurality, but the Third Circuit joined the Sixth in holding that this Court's "line of

post-*Bazzle* opinions" renders the plurality obsolete. *Id.* at 335.

The Fourth Circuit took up the issue in *Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016). The trial court there had held, as did *Sandquist*, "that . . . whether an arbitration clause permits class arbitration[] is procedural and therefore for the arbitrator." *Id.* at 873. "We disagree," the Fourth Circuit said. *Id.* The court declined to follow "the thin reed that is now *Bazzle*," *id.* at 877, and held "that whether an arbitration clause permits class arbitration is a gateway question of arbitrability for the court," *id.* at 873. "[T]he [Supreme] Court has highlighted the significant distinctions between class and bilateral arbitration, and these fundamental differences confirm that whether an agreement authorizes the former is a question of arbitrability," the court reasoned. *Id.* at 875. "The[] benefits [of arbitration] . . . are dramatically upended in class arbitration, which brings with it higher risks for defendants." *Id.* Court litigation affords appellate rights unavailable in arbitration. The possibility of arbitral error "is a cost that '[d]efendants are willing to accept' in bilateral arbitration[,] . . . [b]ut 'bet[ting] the company' without effective judicial review is a cost of class arbitration that defendants would not lightly accept." *Id.* (quoting *Concepcion*, 563 U.S. at 351). "It is not surprising then that those circuit courts to have considered the question have concluded that, 'unless the parties clearly and unmistakably provide otherwise,' whether an arbitration agreement

permits class arbitration is a question of arbitrability for the court." 817 F.3d at 876 (quoting *Reed Elsevier*, 734 F.3d at 597-99). "On remand," therefore, "the district court" — not an arbitrator — "shall determine whether the parties agreed to class arbitration." 817 F.3d at 877.

The Third Circuit returned to the issue in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016). That court previously had held, in *Opalinski*, that this Court's later decisions eclipsed the reasoning of the *Bazzle* plurality, and that whether an arbitration agreement permitted a class action was a gateway question of arbitrability for the court. In *Chesapeake Appalachia*, however, plaintiff advanced a new argument: that even if *Opalinski* was correctly decided, an agreement's incorporation by reference of the AAA Rules delegated that question to the arbitrator, because the AAA Rules so state. The Third Circuit rejected that argument. "[T]he availability of classwide arbitration constitutes a question of arbitrability" for the court, because "it implicates whose claims the arbitrator may adjudicate as well as what types of controversies the arbitrator may decide." *Id*. at 756 (citations and internal quotation marks omitted). The incorporation by reference of rules does not change that, the Third Circuit held. Plaintiff faces "the onerous burden" of producing "clear[] and unmistakabl[e]" evidence "overcoming the presumption" in favor of judicial resolution of the question of class arbitration, and the incorporation of

the AAA Rules does not suffice. *Id.* at 754, 758, 761. Plaintiff's rules-incorporation argument rests on "a daisy-chain of cross-references," nothing clear and unmistakable, the court held. *Id.* at 761, 763. Plaintiff argued that the agreement should be construed against the defendant as its drafter, but the Third Circuit rejected that argument, too. Any ambiguity in the agreement simply indicates that the "clear and unmistakable" test is not met, the court concluded. *Id.* at 763.

In *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017), the Eighth Circuit joined these other circuits in holding that "the question of class arbitration belongs with the courts as a substantive question of arbitrability." *Id.* at 972. "In [its] later cases, however, the Supreme Court disavowed the *Bazzle* plurality's decision," the court explained. *Id.* at 971. Plaintiff, however, made the same argument that plaintiff had made in *Chesapeake Appalachia*: that the incorporation of the AAA Rules had the effect of delegating the question to the arbitrator. The Eighth Circuit rejected that argument, just as the Third Circuit had done. "To overcome the presumption [that the question belongs with the court], the parties must clearly and unmistakably delegate the question to an arbitrator," and "[i]ncorporation of AAA Rules by reference is insufficient evidence that the parties intended for an arbitrator to decide the substantive question of class arbitration." *Id.* at 972, 973.

Most recently, the Ninth Circuit without discussion treated the class-action issue as a gateway question of arbitrability for the court in *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017).[6]

In sum, California treats the *Bazzle* plurality as authoritative; five federal circuits reject the *Bazzle* plurality as inconsistent with this Court's later cases. That conflict alone warrants granting certiorari.

4. Four courts of appeals have allowed the arbitrator to decide class arbitrability.

Decisions from four federal circuits are arguably consistent with the California rule. They are:

- *Fantastic Sams Franchise Corp. v. FSRO Association Ltd.*, 683 F.3d 18 (1st Cir. 2012) (arbitrators may decide whether claims can be consolidated and heard together);

- *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018) (parties may, and here did, delegate to the arbitrator the class-action

[6] The Ninth Circuit in that case ruled, 2-1, that the agreement permitted class arbitration because it required arbitration of claims over "any right" and supplanted "any and all lawsuits." This Court granted certiorari in that case on April 30, 2018, to decide "[w]hether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements." Petition for Certiorari at i, *Lamps Plus, Inc. v. Varela* (No. 17-988).

question); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011) (reinstating arbitrator's decision finding that the arbitration agreement permitted a class action);

- *Robinson v. J & K Administrative Management Services, Inc.*, 817 F.3d 193 (5th Cir. 2016) (referring to the arbitrator the class-action question); and

- *Blue Cross Blue Shield v. BCS Insurance Co.*, 671 F.3d 635, 638-39 (7th Cir. 2011) (*Stolt-Nielsen* did not overrule prior circuit precedent allowing an arbitrator to resolve the availability of class arbitration).

As noted above, respondent Arreguin cited these cases to assure the California Supreme Court that "the federal appellate courts are just about evenly split" on the question presented. Pet. App. 65a.

Those cases, however, either pre-date (or were constrained by circuit precedent pre-dating) this Court's more-recent teaching, or turn on case-specific facts. Nonetheless, the conflict in the circuit cases will not disappear without this Court's intervention. The California Supreme Court is entrenched in its position (having declined in this case the opportunity to reconsider *Sandquist*), and the other circuits could reconsider their positions over time only if each of the four takes up the issue en banc. Because the split is insoluble without this Court's intervention,

the existing conflict among the circuits is further reason for the Court to grant certiorari.

II. ALTERNATIVELY, THE COURT SHOULD DEFER THIS PETITION PENDING THE DECISION IN *LAMPS PLUS, INC. v. VARELA* (No. 17-988)

On April 30, 2018, this Court granted certiorari in *Lamps Plus* from the Ninth Circuit. 701 F. App'x 670 (9th Cir. 2017). *See* note 6 *supra*. The 2-1 per curiam opinion (per Reinhardt & Wardlaw, JJ.) had held that the bare-bones arbitration agreement there in issue permitted class actions. Judge Fernandez dissented. He wrote very simply: "[T]he Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen* . . . ." 701 F. App'x at 673.

In deciding *Lamps Plus*, this Court presumably will be construing the arbitration contract, and doing so itself, rather than assigning the question to an arbitrator. The decision in *Lamps Plus* at a minimum will inform, and may determine, the proper disposition of the instant case. Accordingly, if for any reason certiorari were not granted here, this petition should be held pending the disposition of *Lamps Plus* and then considered either for a plenary grant of certiorari or alternatively for a grant, vacate, and remand order.

CONCLUSION

The petition for certiorari should be granted, because the California Supreme Court's interpretation of the FAA conflicts with that of five U.S. circuit courts of appeals.

Respectfully submitted.

JENNIFER E. DOUGLAS
DICKENSON, PEATMAN & FOGARTY, P.C.
100 B Street
Suite 320
Santa Rosa, CA 95401
jdouglas@dpf-law.com
(707) 524-7000

Counsel for Petitioner
STAR H-R, INC.

NANCY L. ABELL
PAUL W. CANE, JR.
Counsel of Record
DEBORAH S. WEISER
PAUL HASTINGS LLP
101 California Street
48th Floor
San Francisco, CA 94111
paulcane@paulhastings.com
(415) 856-7000

Counsel for Petitioner
E. & J. GALLO WINERY

September 6, 2018

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO, FILED MARCH 28, 2018

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

A145553

REFUGIO ARREGUIN,

Plaintiff and Respondent,

v.

E. & J. GALLO WINERY, *et al.*,

Defendants and Appellants.

(Sonoma County Super. Ct. No. SCV 256487)

March 28, 2018, Opinion Filed

Appellant Star H-R, Inc. (Star) is a labor contractor that hired respondent Refugio Arreguin to work in a warehouse for one of its clients, appellant E. & J. Gallo Winery (Gallo). In applying for the job with Star, Arreguin signed an arbitration agreement, but he later brought individual and class-based claims against Star and Gallo in superior court. This case requires us to

determine whether the arbitration agreement between Star and Arreguin is enforceable and, if it is, whether Arreguin's class-action claims and claims against Gallo must also go to the arbitrator. The trial court found that the arbitration agreement was procedurally and substantively unconscionable and refused to compel arbitration. We agree that the agreement is procedurally unconscionable but find no substantive unconscionability, and so reverse the order denying appellants' motions to compel arbitration. We conclude that the entire case, including the question whether Arreguin may prosecute class claims, should proceed to arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

On August 5, 2013, Arreguin walked into a Star office and applied for a job. He was handed some paperwork, which he was told he had to complete on-site in order to get an interview, and when he asked a question about the papers he was told no Star employee could assist him. Undeterred, Arreguin filled out a Spanish-language application form, was interviewed and asked about his availability to work at a Gallo facility in Healdsburg, and was hired on the spot. Nobody in the hiring process explained anything about arbitration to Arreguin, and he was never given a copy of the rules mentioned in the arbitration agreement that the company asked him to sign. Nor was he given a copy of the arbitration agreement or other employment paperwork as he left the hiring office. Arreguin worked for Star at Gallo for a period of three months and, after leaving, filed this case.

Appendix A

Arreguin's complaint alleges on behalf of himself and other hourly, non-exempt employees that Star, Gallo, and unnamed Doe defendants violated California wage and hour laws. He brings causes of action under minimum wage, overtime, and other sections of the Labor Code, and Business & Professions Code section 17200, et seq. Arreguin alleges that Star and Gallo "have acted as joint employers" and "are jointly and severally liable as employers" because they "each exercised sufficient control over the wages, hours, working conditions, and employment status of" class members. Mostly, the complaint addresses the conduct of "Defendants" collectively, rather than distinguishing between the actions of Star and Gallo.

Star and Gallo moved to compel arbitration. They pointed out that Arreguin's employment application includes an arbitration agreement that Arreguin had signed. The agreement, translated from the Spanish, reads as follows (with grammatical irregularities preserved):

APPLICANT'S ACCEPTANCE OF
ARBITRATION AGREEMENT

> As a condition of my employment with Star Staffing, I consent that all disputes that may arise out, or be related to my employment, be arbitrated under the National Rules for the Resolution of Employment disputes of the American Arbitration Association in San Francisco . . . or any other respectable referral service for arbitration.

> The claims subject to arbitration shall include, but are not limited to a specific or implicit contract. These claims may be damages of any type, as well as claims based on state, federal or local regulations or decrees, only with the exception of claims under laws pertaining to workers compensation insurance and unemployment. Therefore, claims regarding sexual discrimination, sexual harassment, age discrimination and discrimination based on disability will be subject to arbitration.
>
> FURTHERMORE, I UNDERSTAND THAT AS A RESULT OF THIS ARBITRATION AGREEMENT, THE COMPANY AND I AGREE TO WAIVE ANY RIGHT WE MAY HAVE TO HAVE A JURY TRIAL.

On blank lines under this pre-printed text, Arreguin initialed and signed his name. No representative of Star or Gallo signed the document, nor is there a blank line for such a signature.

The trial court found that the agreement was unconscionable, and thus unenforceable. Addressing procedural unconscionability, the court observed that the arbitration agreement was a pre-employment contract involving parties of unequal bargaining power, that it was a contract of adhesion, and that Arreguin was never given a copy of the arbitral rules. With regard to substantive unconscionability, the court found that the arbitration agreement lacks mutuality and binds only the employee.

By written order filed June 10, 2015, the trial court denied the motions to compel arbitration.

On June 23, 2015, both Star and Gallo appealed.

DISCUSSION

An order denying a motion to compel arbitration may be appealed, and the legal question is subject to de novo review. (Code Civ. Proc., § 1294, subd. (a); *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 959, 13 Cal. Rptr. 3d 562.) In particular, de novo review of an order refusing to enforce an arbitration agreement is appropriate where, as here, "'"'"no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court."'"'" (*Brown v. Ralphs Grocery, Inc.* (2011) 197 Cal. App.4th 489, 497, 128 Cal. Rptr. 3d 854; see also *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 267, 25 Cal. Rptr. 3d 440.)

I. The Arbitration Agreement Is Enforceable

A

"California law, like federal law, favors enforcement of valid arbitration agreements," allowing that they "may only be invalidated for the same reasons as other contracts." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97-98, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (*Armendariz*).) This principle applies even where the agreement to arbitrate is part of an employment contract. (*Id.* at p. 98 [interpreting California

Arbitration Act]; *Circuit City Stores v. Adams* (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 [interpreting Federal Arbitration Act].) Thus, the enforceability of this arbitration agreement rests on ordinary principles of California contract law, although "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." (*Armendariz, supra*, at p. 119.)

California law provides that an agreement may be unenforceable if it is both procedurally and substantively unconscionable. (*Armendariz, supra*, 24 Cal.4th at p. 114.) Procedural unconscionability involves """oppression or surprise due to unequal bargaining power."" (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243, 200 Cal. Rptr. 3d 7, 367 P.3d 6 (*Baltazar*).) It exists where there is """""an absence of meaningful choice on the part of one of the parties""""" to a contract, such as with a contract of adhesion. (*Ibid.*) Substantive unconscionability describes a contract whose terms are overly harsh or unfairly one-sided. (*Armendariz*, at p. 114; *Baltazar*, at p. 1243.) Not every bad bargain or one-sided contractual provision is substantively unconscionable. (*Ibid.*) The question is whether a contract is "'sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.'" (*Baltazar*, at p. 1245.) Courts will consider the two kinds of unconscionability together on a "'sliding scale,'" but only if both are present. (*Armendariz*, at p. 114.)

B

We find the procedure whereby Star procured Arreguin's consent to the arbitration agreement unconscionable. At the outset, we note that a contract of adhesion imposed by a party with superior bargaining power is procedurally unconscionable. (*Baltazar, supra*, 62 Cal.4th at pp. 1244-1245.) Unquestionably this was a contract of adhesion, in that Star presented it to Arreguin as a document he must sign without discussing its content with a Star representative, if he wanted to be considered for employment. Star's take-it-or-leave-it approach is evidence that Arreguin had no bargaining power. Pointing in the same direction is the fact that Arreguin was applying for work as a forklift operator, instead of for a position that required very specialized and sought-after skills. (Cf. *Brookwood v. Bank of America* (1996) 45 Cal. App.4th 1667, 1671, 53 Cal. Rptr. 2d 515.) As our Supreme Court noted in discussing another pre-employment arbitration contract, "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz, supra*, 24 Cal.4th at p. 115.)

These facts alone suffice to establish at least some degree of procedural unconscionability, but the procedural unconscionability in this case goes further. There is an element of duress in Star's refusal to answer questions that Arreguin had about the paperwork while, at the

same time, effectively obstructing steps that Arreguin could have taken to get answers elsewhere. By insisting that Arreguin fill out the arbitration agreement without taking any of the paperwork home first, Star prevented him from consulting anyone else who could have answered his questions before he signed the document. By failing to give him a copy of the agreement as he left the office, Star made it difficult for Arreguin to research the commitment Star had extracted from him before he showed up to begin working at Gallo. For these reasons, the procedural unconscionability is greater here than in *Baltazar*. Not only did Star fail to give Arreguin a copy of the AAA rules, but it failed to give him a copy of the arbitration agreement from which he might have been able to find the applicable rules himself (although Star placed an additional hurdle there, too, by misidentifying the applicable AAA rules). (Cf. *Baltazar, supra*, 62 Cal.4th at p. 1246.)

In spite of this procedural unconscionability, California law requires that we enforce the arbitration agreement unless we also find it substantively unconscionable (*Baltazar, supra*, 62 Cal.4th at p. 1243), so we now turn to that subject.

C

Arreguin argues, and the trial court found, that the arbitration agreement is substantively unconscionable because it does not bind or impose mutual obligations on Star, but requires only Arreguin to submit disputes to arbitration. Star counters that, although it did not sign the document, the agreement binds Star and should

be construed as requiring both Star and Arreguin to submit to arbitration all employment-related disputes. Under controlling principles of California contract law, we conclude that Star has the better argument.

(1)

A "writing memorializing an arbitration agreement need not be signed by both parties in order to be upheld as a binding arbitration agreement." (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 176, 185 Cal. Rptr. 3d 151 (*Serafin*).) California contract law requires that the parties communicate to each other their mutual assent to be bound by an agreement, but words and acts can be enough to demonstrate this assent. (*Id.* at p. 173.) Where one party has not signed an arbitration agreement, the party's assent can be inferred from conduct implying acceptance or ratification. (*Id.* at p. 176; see also Civ. Code, § 3388 ["A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part . . . "].)

Here, Star demonstrated its intent to be bound by the arbitration agreement through the agreement's language and its central role in hiring Arreguin. A Star representative offered the form agreement to Arreguin as part of the employment application he needed to fill out if he wanted a job interview. The title characterizes the document as an applicant's "ACCEPTANCE OF" an arbitration "AGREEMENT," suggesting the document is a unilateral offer that need only be accepted to become

binding. (See *Donovan v. RRL Corp.*, 26 Cal.4th 261, 270-271, 109 Cal. Rptr. 2d 807, 27 P.3d 702.) Although this arbitration agreement is not printed on letterhead, there is no ambiguity as to the identity of the offering party. The agreement appears on the third page of a three-page employment application that has "Star H-R, Inc." emblazoned on the first page, and a reference to "Star HR dba Star Staffing" on the second page. The third page—the "APPLICANT'S ACCEPTANCE OF ARBITRATION AGREEMENT"—then declares, in its first line, that Arreguin's consent is "a condition of . . . employment with Star Staffing." The agreement by its terms expressly requires Star, as well as Arreguin, to waive its right to a jury trial. Star offered this arbitration agreement, and Arreguin accepted the agreement by signing the form and returning it to the Star representative. The fact that there is no signature line for Star only confirms that no decision remained pending on the company's part as to whether it would accept its own proposed arbitration agreement. At the latest, the company manifested its intent to be bound when it proceeded to employ Arreguin.

Other California courts have enforced arbitration agreements in similar contexts, even when they were signed by only one party. In *Serafin*, plaintiff employee signed a document acknowledging the employer's "MANDATORY ARBITRATION POLICY," which the employer did not sign, but after a thorough analysis the court found that the agreement was binding on both parties. (*Serafin, supra*, 235 Cal.App.4th at pp. 176-177.) Similarly, in *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 183 Cal. Rptr. 3d 17 the court found that the defendant employer evidenced

an intent to be bound by an arbitration agreement signed only by the plaintiff employee under circumstances similar to those in our case. The employer printed an agreement on its company letterhead, submitted it to candidates for employment as part the employment application, and used language in the document purporting to obligate both parties to arbitrate disputes. (*Id.* at pp. 397-399.) We find the logic of *Serafin* and *Cruise* persuasive, and conclude that under settled principles of California contract law Star and Arreguin exhibited their mutual assent to the arbitration agreement.

Arreguin points to two cases involving arbitration agreements in an employment context that reach a contrary conclusion, but neither is persuasive in the context of this case. *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 171 Cal. Rptr. 3d 42 states that an employee who initialed a clause requiring arbitration was "[t]he only party clearly agreeing to the clause," but the court finds a fatal lack of mutuality only after proceeding to analyze other language in the contract that reserves, for disputes that only the employer would initiate, a choice between court and arbitration. (*Id.* at pp. 79, 86.) In Star's agreement there is no similar class of employer claims excluded from the scope of mandatory arbitration, so *Carmona* is easily distinguished. Arreguin also points to *Sullenberger v. Titan Health Corp.* (E.D. Cal., May 20, 2009, No. CIV. S-08-2285) 2009 U.S. Dist. LEXIS 46586, whose facts are closer to our case, but in this unpublished opinion there is no analysis of the relevant principles of California contract law at all. (*Id.* at p. *17.) *Sullenberger* merely cites to *Higgins v. Superior Court*

(2006) 140 Cal.App.4th 1238, 1254, 45 Cal. Rptr. 3d 293, another case in which the court analyzed the language of the agreement to conclude that the defendants' arbitration clause allowed the defendants, but not the plaintiffs, to compel arbitration. That the defendants did not sign the agreement (until after the motion to compel was filed) merited no more than a footnote in *Higgins*. (*Id.* at p. 1254, fn. 11.) Since neither of Arreguin's cases dissuades us from the view that Star and Arreguin are both bound by the arbitration agreement (if it is enforceable), we turn now to examine whether the terms of that agreement are appropriately bilateral.

(2)

An arbitration agreement is substantively unconscionable if it is not, to a certain degree, bilateral. (*Armendariz, supra*, 24 Cal.4th at p. 117.) "[T]he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." (*Id.* at p. 118.) We conclude that this arbitration agreement escapes unconscionability only because its terms compel Star, as well as Arreguin, to arbitrate all their employment-related disputes. In reaching that conclusion, we start with the language of the agreement.

The first paragraph contains broad language that defines the agreement's basic scope: "all disputes that may arise out [of], or be related to [Arreguin's] employment" must "be arbitrated." Arreguin expressly "consent[s]"

to this scope by signing the agreement. Star implicitly consents to this scope by presenting the agreement to Arreguin and insisting he sign it. The language of this first paragraph is in no way limited to only those disputes that Arreguin initiates, nor to certain categories of complaints that an employee is more likely than an employer to bring. "*[A]ll disputes*" related to Arreguin's employment at Star are included under the broad language of the first paragraph.

Roman v. Superior Court (2009) 172 Cal.App.4th 1462, 92 Cal. Rptr. 3d 153 construed similar language, reaching the same conclusion. The arbitration clause in *Roman* had the employee undertake, essentially, this: "'I agree, in the event I am hired by the company, that all disputes and claims that might arise out of my employment with the company will be submitted to binding arbitration.'" (*Id.* at p. 1466.) No mirror-image language specified what the employer was agreeing to, but the court nonetheless found that the agreement imposed bilateral obligations. "[T]he use of the 'I agree' language in an arbitration clause that expressly covers 'all disputes' creates a mutual agreement to arbitrate all claims arising out of the applicant's employment." (*Ibid.*) Because the employee's assent created an obligation that was mutual, the agreement was not substantively unconscionable. (*Ibid.*)

The second paragraph of Star's arbitration agreement gives examples of the kinds of disputes the agreement covers, but does not limit the kinds of claims that must be arbitrated, with two specific exceptions. The paragraph begins expansively: "The claims subject to arbitration

shall include, but are not limited to . . . ." It specifies that "claims based on state, federal or local regulations or decrees" are included, except that the agreement expressly exempts workers' compensation insurance and unemployment claims. The paragraph then gives examples of claims based on state and federal law that do fall within the scope of the arbitration agreement, such as sexual discrimination and harassment claims. As in *Baltazar*, this "illustrative list of claims subject to the agreement is just that; . . . the list is not intended to be exhaustive" and "casts no doubt on the comprehensive reach of the arbitration agreement" as outlined in the agreement's first paragraph. (*Baltazar, supra*, 62 Cal.4th at p. 1249.)

The third paragraph of the agreement confirms that Star and Arreguin are both giving up the right to take employment-related disputes to court. In all capital letters it announces, "AS A RESULT OF THIS ARBITRATION AGREEMENT, THE COMPANY AND I AGREE TO WAIVE ANY RIGHT WE MAY HAVE TO HAVE A JURY TRIAL." This language is louder (because capitalized) but in some ways less precise than the two paragraphs that precede it. It warns employees of a particularly important "result" of the arbitration agreement outlined in the two preceding paragraphs, namely that the parties are giving up their right to a jury trial. In emphasizing this consequence of the agreement, the third paragraph neglects to mention that, also as a result of the arbitration agreement, both sides are waiving their right to a bench trial. The third paragraph also does not specify that the waiver of rights to a jury trial applies only to those disputes that relate to Arreguin's

employment with Star, a restriction that is nonetheless clear from the two earlier paragraphs. But on one point, the third paragraph is arguably clearer than what comes before it. Whereas the first paragraph requires, passively, "that all disputes [relating to Arreguin's employment] be arbitrated," the third paragraph spells out *who* must waive legal rights to make this happen. It spells out what is only implicit earlier on, that the company and Arreguin *both* waive their rights to take disputes relating to Arreguin's employment to court. Read this way, the third paragraph is consistent with and confirms the broad mutual promise in the first paragraph, to arbitrate all of Arreguin's and Star's employment-related disputes (with two exceptions not relevant here).

Arreguin construes the agreement differently. He argues that if the agreement binds Star at all, it compels Star to forgo only a jury trial, rather than all resort to the courts. We think this interpretation is difficult to square with the broad language in the first paragraph (requiring that "all disputes . . . be arbitrated") and with the introductory language in the third paragraph characterizing the mutual waiver of the jury trial right as a "RESULT OF" the arbitration agreement. But in any event, to the extent Arreguin's construction is plausible and would render the contract so one-sided as to be unconscionable, that construction is disfavored. Where a contract is ambiguous, the law requires that we choose an interpretation that renders it "lawful, operative . . . and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643; see also *id.*, § 3541 ["An interpretation which gives

effect is preferred to one which makes void"].) This is a rule of general applicability that our Supreme Court has applied specifically in construing an arbitration clause. "When an arbitration provision is ambiguous, we will interpret that provision, if reasonable, in a manner that renders it lawful . . . ." (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682, 108 Cal. Rptr. 3d 171, 229 P.3d 83; see also *Roman, supra*, 172 Cal. App.4th at p. 1473.)

We acknowledge that another canon of construction, one requiring us to construe ambiguity in an adhesion contract against the drafter, points in the opposite direction. (See *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248, 205 Cal. Rptr. 3d 359, 376 P.3d 506 (*Sandquist*).) But this canon, codified in section 1654 of the Civil Code, must give way to the canon preferring a construction that renders the contract enforceable. Section 1654 directs an interpretation against the party whose drafting work causes the uncertainty, but only "[i]n cases of uncertainty not *removed by the preceding rules*." (Civ. Code, § 1654, italics added.) Section 1643, favoring a construction that renders the contract enforceable, precedes section 1654 in the statute book and therefore takes precedence over it. Applying section 1643 removes any ambiguity in this arbitration agreement, obviating the need for section 1654.

In sum, we conclude that (1) the agreement binds Star as well as Arreguin even though no representative of Star signed the document, and (2) the language of the agreement requires Star, as well as Arreguin, to submit

all employment-related disputes to arbitration. Because this agreement imposes mutual obligations on employer and employee, it is not substantively unconscionable. (See *Armendariz, supra*, 24 Cal.4th at p. 117.) We therefore conclude that in spite of the procedural unconscionability, Star may enforce this arbitration agreement. With our colleague on the Second District Court of Appeal, we lament "that our decision today continues the recent march of our nation's jurisprudence toward eliminating the right to a jury trial (or any trial) in a large number of civil cases by its ever-extending embrace of arbitration." (*Saheli v. White Memorial Medical Center* (Mar. 14, 2018, B283217, 2018 Cal. App. LEXIS 205) (Rubin, J., concurring) [2018 Cal. App. LEXIS 205 at *41, 2018 WL 1312501, at p. *14].) At least to the extent that this case involves Arreguin's individual claims against Star, we hold that the dispute must be arbitrated.

II. All Claims Must Go to Arbitration

Because this case involves more than Arreguin's individual claims against Star, two issues remain. First, may Arreguin pursue claims on behalf of a class of employees in his arbitration against Star? Second, must Arreguin's claims against Gallo also go to arbitration? For the reasons explained below, we hold that the availability of class claims in arbitration is for the arbitrator to decide, and that Arreguin's claims against Gallo must be arbitrated.

Appendix A

A

On the question of class claims, the California Supreme Court's recent decision in *Sandquist* controls. *Sandquist* is an employment class action case that holds whether the court or an arbitrator decides the availability of class procedures depends on the intent of the parties, as their contract is construed under state law. (*Sandquist, supra*, 1 Cal.5th at p. 241.) Nothing in the California Arbitration Act (CAA) or the Federal Arbitration Act (FAA) requires otherwise, the court determined. (*Sandquist*, at pp. 250, 260.) Although some federal appellate courts have reached a contrary conclusion, *Sandquist* follows the plurality in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 in leaving to the arbitrator the question whether claims can be litigated on behalf of a class, where an arbitration clause is broad but does not expressly mention class claims. (*Sandquist*, at pp. 251-260.) Like the *Green Tree* plurality, *Sandquist* concludes that "nothing in the FAA subjects the 'who decides' question to any contrary pro-court presumption." (*Sandquist*, at pp. 251, 260.)

Construing the contract before it, the *Sandquist* court begins with the arbitration agreement's broad language. One clause requires the parties to arbitrate "all claims 'arising from, related to, or having any relationship or connection whatsoever with" the employee's "'association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise.'" (*Sandquist, supra*, 1 Cal.5th at p. 246, italics omitted.) The court reasons that Sandquist's class claims "plainly arise from"

his employment, and "[t]he procedural question those claims present—whether Sandquist may pursue his claims on a class basis—directly arises from his underlying claims." (*Ibid.*) Therefore, the procedural issue also appears to satisfy the agreement's nexus requirement. (*Ibid.*) Based on the language of the agreement alone, the court concludes "the 'who decides' question" is likely arbitrable. (*Ibid.*)

But because the language of the agreement was not conclusive, the court goes on to discuss three other considerations, all of which point toward allowing the arbitrator to decide the availability of class claims. First is "the parties' likely expectations about allocations of responsibility." (*Sandquist, supra*, 1 Cal.5th at p. 246.) Given the "substantial additional cost and delay" associated with a rule that would require class claims to begin with a judicial determination of their arbitrability, the court expresses reluctance to assume the parties "expected or preferred a notably less efficient allocation of decisionmaking authority." (*Id.* at p. 247.) Second is the preference under state and federal law that "when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor or arbitration." (*Ibid.*) And third, given that the plaintiff employee was seeking to have the availability of class claims arbitrated, is the canon that "ambiguities in written agreements are to be construed against their drafters," a rule that "'"applies with peculiar force in the case of a contract of adhesion."'" (*Id.* at pp. 247-248.) All three of these principles as well as the court's initial review of the language of the arbitration agreement supported the same result, namely that the

availability of class procedures in the arbitration is for the arbitrator to decide.

We reach the same result in this case, and for the same reasons. The language of Star's arbitration agreement is broad, requiring "all disputes that may arise out" of or "be related to" Arreguin's employment, to "be arbitrated." The dispute as to whether Arreguin may bring claims on behalf of a class that includes other employees is, at least arguably, a claim that "arise[s] out" of and is "related to" his employment. In the face of ambiguity as to the precise reach of this language, we resort to the same principles the *Sandquist* court found dispositive, construing the arbitration agreement in favor of sending the procedural dispute to arbitration and against the party that drafted the adhesion contract. (See *Sandquist, supra*, 1 Cal.5th at pp. 247-248.) (In its briefing, Star requests that we determine the class claims do not survive referral to arbitration.) Under *Sandquist* all of Arreguin's claims against Star, the class claims as well as the individual claims, must go to arbitration, where the arbitrator will decide whether the class claims can proceed, and that decision will be subject only to limited judicial review. (See, e.g., *Oxford Health Plans LLC v. Sutter* (2013) 569 U.S. 564, 133 S. Ct. 2064, 186 L. Ed. 2d 113.)

B

As for Arreguin's claims against Gallo, Arreguin argues that Gallo has not proven it is entitled to enforce the arbitral agreement, to which it is not a signatory. Specifically, Arreguin argues that Gallo bears the

burden of proof, and that Gallo fails to discharge that burden because it has not introduced evidence that (a) it is the alter ego of Star, (b) it had a pre-existing agency relationship with Star that allowed Star to enter into an arbitration agreement on its behalf, (c) it is an intended third-party beneficiary of Star's contract with Arreguin, or (d) Arreguin is otherwise estopped from litigating his claims against Gallo in court.

These are arguments that Arreguin failed to make in the trial court, where he defended Gallo's motion to compel arbitration only with the same arguments that he deployed against Star's motion, namely that the arbitration agreement between Star and Arreguin was substantively and procedurally unconscionable. Because Arreguin did not argue in the trial court that Gallo was not entitled to enforce an agreement to which it was not a party, we will not consider that argument here. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847, 60 Cal. Rptr. 2d 780 [parties may not adopt new theories on appeal, as that is """not only . . . unfair to the trial court, but manifestly unjust to the opposing litigant"""].) Considering a new argument for the first time on appeal is especially inappropriate here, where Arreguin challenges the sufficiency of the evidence, rather than raising a pure point of law. (*Ibid.*) As a result, Arreguin's claims against Gallo, like its claims against Star, must be arbitrated.

DISPOSITION

The decision of the trial court is reversed, and the case is remanded for further proceedings in accordance

with this opinion. In the interests of justice, each party is to bear its own costs on appeal.

TUCHER, J.*

We concur:

KLINE, P. J.

MILLER, J.

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B — DENIAL OF PETITION FOR REVIEW BY THE SUPREME COURT OF CALIFORNIA, FILED JULY 11, 2018

IN THE SUPREME COURT OF CALIFORNIA

S248545

REFUGIO ARREGUIN,

Plaintiff and Respondent,

v.

E. & J. GALLO WINERY, *et al.*,

Defendants and Appellants.

Court of Appeal, First Appellate District,
Division Two-No. A145553

En Banc

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX C — ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA, FILED JUNE 10, 2015

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

Case No. SCV-256487

REFUGIO ARREGUIN, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED AND AS AN AGGRIEVED EMPLOYEE PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT ("PAGA"),

Plaintiff,

v.

E. & J. GALLO WINERY, *et al.*,

Defendants.

ORDER AFTER HEARING ON DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND STAY ACTION PENDING COMPLETION OF ARBITRATION

Defendant E. &. J. Gallo Winery's Motion to Compel Arbitration and Stay Action pending Completion of Arbitration, and Defendant Star H-R, Inc.'s Motion to Compel Arbitration of Individual Claims, Dismiss Class

Action Claims, and Stay Action Pending Completion of Arbitration came on regularly for hearing on May 29, 2015, before the Hon. Gary Nadler, Judge Presiding. Counsel Bevin Allen Pike was present on behalf of Plaintiff. Counsel Steven C. Mitchell and Paul W. Cane, Jr. were present on behalf of Defendant E. &. J. Gallo Winery. Counsel Jennifer D. Phillips was present on behalf of Defendant Star H-R, Inc.

Upon consideration by the court of the papers and evidence filed in support of and in opposition to the motions, and having heard and considered oral argument of counsel, the court makes the following ruling:

Plaintiff does not dispute that he signed the agreement, in both the English and Spanish versions, or that its language covers the claims he raises here. The agreement in question states, in pertinent part, that

> "I consent that all disputes that may arise out [sic], or be related to[,] my employment, be arbitrated ...."
>
> "The claims subject to arbitration shall include, but are not limited to [sic][,] a specific or implicit contract. These claims may be damages of any type, as well as claims based on state, federal or local regulations or decrees, only with the exception of claims under laws pertaining to workers compensation insurance and unemployment. Therefore, claims regarding sexual discrimination, sexual harassment, age

> discrimination and discrimination based on disability will be subject to arbitration."

Under Civil Code section 1670.5, a court may refuse to enforce an unconscionable contract or clause. "Unconscionability" requires both procedural and substantive unconscionability. See *Lagatree v. Luce, Forward, Hamilton & Scripps (*1999) 74 Cal.App.4th 1105; *24 Hour Fitness, Inc. v. Sup. Ct.* (1998) 68 Cal.App.4th 1199, 1212-1213. Unconscionability is generally recognized as including "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *A&M Produce* Co. *v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486. Thus, procedural unconscionability exists when the contract is one of adhesion, when unequal bargaining power or surprise prevents real bargaining or informed assent, while substantive unconscionability is present when the terms are one-sided or oppressive. See *Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519, 1530.

Plaintiff argues that the agreement is procedurally unconscionable because it is a contract of adhesion: it was forced on Plaintiff as a take-it-or-leave-it condition of obtaining an interview in order to seek employment; it is ambiguous as to the rules, and it fails to include a copy of the rules.

When Plaintiffs attended their job interview, they were provided with a stack of papers, informing Plaintiffs that they needed to fill out every one in order to obtain an interview; they were not allowed to take the paperwork

out of the office; and they were required to fill it out the papers immediately. Plaintiff was informed that nobody was available to answer any questions he had about the papers. When Plaintiff did ask one Star employee a question, the employee said that he had to fill out the papers on his own without any assistance from any employees. Nobody described the documents to him, or explained what arbitration actually meant or where he could find the arbitration rules; and he was not provided a copy of any of the papers or arbitration rules afterwards. Arreguin Declaration. Star's own papers admit that it was not negotiable. Points and Authorities, 8:7-8.

Clearly, the parties were in extremely unequal positions and in general, pre-employment contracts involve such unequal bargaining power and pressure that the mere relationship may be a basis for inferring procedural unconscionability. *Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1166; *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 283. Failure to provide a copy of the rules or the agreement itself may be a basis for finding procedural unconscionability. *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393; *Carmona v. Lincoln Millenium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 84.

Star's reply attacks each one of these issues and correctly argues that cases have found each one to be inadequate to demonstrate unconscionability but what it fails to take into account is the aggregate combined with the sliding scale. In this case, Plaintiff has demonstrated not only adhesion or unequal bargaining power or failure

to provide the rules, etc., but all of these combined. Defendants point to *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1470-1471, where the court found that failure to include the AAA rules did not alone make the agreement "per se procedurally unconscionable ...." That was the only basis which the plaintiff raised for procedural unconscionability and court found argued that it was error for the trial court to find that this single factor made the agreement "per se procedurally unconscionable ...." In addition, the only basis for substantive unconscionability which the plaintiff cited was that it contained a provision allowing the employer to modify the terms, which again the court found to be insufficient, in of itself, to demonstrate unconscionability.

With regard to the issue of substantive unconscionability, the terms may be unconscionable if a party is unaware of them and they are outside the reasonable expectations of a reasonable person or if they are unduly oppressive and burdensome. The court in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 102-103, added that in order to be enforceable, the arbitration must include (1) neutral arbitrators; (2) adequate discovery; (3) a written decision that allows limited judicial review; (4) all types of relief available in court without any limitation; and (5) the employer must pay all costs unique to arbitration when the agreement covers statutory claims and the employee must not pay any "unreasonable" expenses. Although *Armendariz* dealt specifically with an employment contract, the ruling on the factors making a contract's terms unconscionable seems to be generally applicable to all arbitration agreements.

Appendix C

Defendants rely, inter alia, on *Serafin v. Balco Props. Ltd.* (2015) 235 Cal.App.4th 165, 176, for the proposition that an arbitration agreement may be binding and mutual even if the employer has not signed it. Defendants are correct that *Serafin,* and other decisions, have ruled that an arbitration agreement may be binding, mutual, and not necessarily unconscionable even if the employer has not signed it, but only where other factors indicate that it is to be mutual and binding on the employer despite lacking a signature. Courts have upheld a finding that the agreement was mutual despite the lack of signature. In *Serafin,* the plaintiff argued that it was error for the trial court to find the agreement to be mutual even though the employer did not sign the agreement and the appellate court rejected this.

The subject agreement is more vague and equivocal, and in general, more sloppily worded, than the agreement in *Serafin.* This is hardly a very strong factor in Plaintiff's favor, but the wording does more strongly support a finding that the agreement lacks mutuality than does the wording in *Serafin.* Although not dispositive here, this is just another factor indicating that the entire purpose of this agreement is to bind only the employee. As such, the agreement is substantively unconscionable.

Due to several factors showing both procedural and substantive unconscionability, including an intent to bind only the employee in a deceptive manner, the agreement is unconscionable and is not enforceable.

Appendix C

As this court has determined that arbitration shall not be compelled, the request for a stay is moot.

IT IS SO ORDERED.

DATED: June 10, 2015

/s/_____
GARY NADLER
Judge of the Superior Court

APPENDIX D — ENGLISH TRANSLATION OF ARBITRATION AGREEMENT

APPLICANT'S ACCEPTANCE
OF ARBITRATION AGREEMENT

As a condition of my employment with Star Staffing, I consent that all disputes that may arise out, or be related to my employment, be arbitrated under the National Rules for the Resolution of Employment disputes of the American Arbitration Association in San Francisco (National Rules for the Resolution of Employment disputes of the American Arbitration Association in San Francisco), or any other respectable referral service for arbitration.

The claims subject to arbitration shall include, but are not limited to a specific or implicit contract. These claims may be damages of any type, as well as claims based on state, federal or local regulations or decrees, only with the exception of claims under laws pertaining to workers compensation insurance and unemployment. Therefore, claims regarding sexual discrimination, sexual harassment, age discrimination and discrimination based on disability will be subject to arbitration.

FURTHERMORE, I UNDERSTAND THAT AS A RESULT OF THIS ARBITRATION AGREEMENT, THE COMPANY AND I AGREE TO WAIVE ANY RIGHT WE MAY HAVE TO HAVE A JURY TRIAL.

/s/ _____ /s/ _____
Signature Name (print)

8/5/13 _____
date

APPENDIX E — EXCERPTS OF MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SONOMA, FILED MARCH 20, 2015

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SONOMA

CASE NO. SCV 256487

REFUGIO ARREGUIN, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED,

Plaintiff,

vs.

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, A CALIFORNIA CORPORATION; AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants.

STAR H-R, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL ARBITRATION OF INDIVIDUAL CLAIMS, DISMISS CLASS ACTION CLAIMS, AND STAY PROCEEDINGS PENDING COMPLETION OF ARBITRATION

[CLASS ACTION — Not Yet Certified]

Appendix E

Date: May 29, 2015
Time: 10:00
Place: Department 17

(Unlimited Civil Case)
Hon. Gary Nadler

Complaint Filed: 12/17/2014
1st Am. Complaint Filed: 2/17/2015
Trial Date: Not Yet Set

* * *

2. This Court, not an arbitrator, decides whether an arbitration agreement permits class actions.

Arreguin may contend that this Court should allow the arbitrator to decide whether a class arbitration can occur. If so, Arreguin would be incorrect.

Whether an arbitration agreement authorizes class arbitration is a "question of arbitrability" that presumptively is to be resolved by the court. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). In the absence of a clear indication that the parties intended otherwise, it is for the court to determine, as a "gateway" issue, whether an arbitration agreement permits class arbitration.

Appendix E

Garden Fresh Restaurant Corp. v. Superior Court, 231 Cal. App. 4th 678, 685-86 (2014), is directly on point. In *Garden Fresh*, the court held that the trial court erred in asking the arbitrator whether a class action was permitted under an arbitration agreement silent on that issue. *Garden Fresh* cited the differences between classwide and individual arbitration: "[T]he *Stolt-Nielsen* court concluded that class arbitration is not merely a procedural device to which parties may implicitly agree by simply entering into an arbitration agreement, but, rather, that it is a different type of proceeding that requires a showing of consent by the parties." *Id.* at 686. *Garden Fresh* continued:

> Our reading of recent United States Supreme Court precedent persuades us that the availability of class and/or representative arbitration is a question of arbitrability, and is therefore a gateway issue for a court to decide, in the absence of a clear indication that the parties intended otherwise, rather than a subsidiary one for an arbitrator to decide.

Id. at 685-86. It concluded:

> [W]hether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may well not have agreed to arbitrate but thousands of them.

Id. at 687 (citation, quotation marks, and alteration omitted). *Accord Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 334 (3d Cir. 2014) (the availability of class arbitration was a gateway question of arbitrability for court to decide; "Traditional individual arbitration and class arbitration are so distinct that a choice between the two goes, we believe, to the very type of controversy to be resolved."), *cert. denied*, No. 14-625, 2015 WL 998611 (Mar. 9, 2015); *Reed Elsevier v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) ("[W]hether an arbitration agreement permits classwide arbitration is a gateway matter" that is presumptively "for judicial determination[.]") (citation and quotation marks omitted), *cert. denied*, 134 S. Ct. 2291 (2014); *Chico*, 2014 WL 5088240, at *11 (granting motion to compel individual arbitration and dismiss class claims; agreeing with and adopting the reasoning of the courts in *Opalinski* and *Reed*, noting that they are the only two circuits to squarely address the issue).

* * * *

APPENDIX F — EXCERPTS OF REPLY BRIEF IN SUPPORT OF MOTION IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SONOMA, FILED MAY 22, 2015

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SONOMA

CASE NO. SCV 256487

REFUGIO ARREGUIN, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED,

Plaintiff,

vs.

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, A CALIFORNIA CORPORATION; AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants.

STAR H-R, INC.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO COMPEL ARBITRATION OF INDIVIDUAL CLAIMS, DISMISS CLASS ACTION CLAIMS, AND STAY PROCEEDINGS PENDING COMPLETION OF ARBITRATION

[Putative Class Action — Not Yet Certified]

Appendix F

Date: May 29, 2015
Time: 10:00 AM
Place: Department 17

(Unlimited Civil Case)
Hon. Gary Nadler

Complaint Filed: 12/17/2014
1st Am. Complaint Filed: 2/17/2015
Trial Date: Not Yet Set

* * *

III. THE COURT SHOULD ORDER PLAINTIFF TO INDIVIDUAL ARBITRATION

A. "Class Arbitrability" Is A "Gateway" Issue For The Court.

Absent clear and unmistakable evidence indicating the parties intended otherwise, questions of arbitrability are decided by the court. *See First Options of Chi., Inc. v. Kaplan,* 514 U.S. 938, 944-47 (1995). Because "class" arbitration fundamentally modifies the scope and procedures of arbitration, class arbitrability is a "gateway" question. Plaintiff here has nothing to say about *Garden Fresh Restaurant Corp. v. Superior Court,* 231 Cal. App. 4th 687 (2014); *Reed Elsevier, Inc. v. Crockett,* 734 F.3d 594, 598-99 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 2291 (2014); or *Opalinski v. Robert Half Int'l Inc.,* 761 F.3d 326, 334-35 (3d Cir. 2014), all of which so hold.

Those cases follow from recent Supreme Court precedent.[8] Under the FAA, class arbitration cannot be imposed absent affirmative evidence that the parties agreed to permit it. *Stolt-Nielsen,* 559 U.S. at 684-87. As *Garden Fresh* explained: "We agree . . . that 'recently the [United States Supreme] Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one.'" 231 Cal. App. 4th at 687 (citation omitted). "Indeed, the *Stolt-Nielsen* court concluded that class arbitration is not merely a procedural device to which parties may implicitly agree by simply entering into an arbitration agreement, but, rather, that it is a different type of proceeding that requires a showing of consent by the parties." *Id.* at 686.

Plaintiff contends that the mere incorporation of the AAA Rules means that the arbitrator is entitled to decide whether an agreement allows class actions.[9] He cites one

---

8. Plaintiff disingenuously contends that *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003) controls this issue. In *Stolt-Nielsen S.A.* v. *Animal Feeds Int'l Corp.,* 559 U.S. 662, 668 (2010), the Court was not required to resolve the "who decides" question based on the case's procedural posture, but made clear that *Bazzle* was not precedential on this point because "only the plurality decided that question." *Id.* at 680.

9. While the incorporated AAA Employment Rules say nothing about the issue, Plaintiff contends that because AAA also has "Supplemental Rules for Class Arbitration" (which provide for class clause construction) the parties intended class arbitration proceedings. The parties no more intended to apply AAA's Supplemental Rules for Class Arbitration than they did the AAA Rules for Construction or Real Estate. The Supplemental Rules

case that adopted this position, without acknowledging that the First District has said otherwise. *Compare Universal Protection Service v. Superior Court,* 234 Cal. App. 4th 1128, 1141 (2015) *with Ajamian v. CantorC02e, L.P.,* 203 Cal. App. 4th 771, 789 (2012) ("[W]e seriously question how [incorporation of AAA Rules] provides clear and unmistakable evidence that an employer and an employee intended to submit the issue . . . to the arbitrator, as opposed to the court. There are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties' motivation was to announce who would decide threshold issues of enforceability.'").

Ajamian is the better-reasoned case. In that case, as in *Reed Elsevier* and *Opalinski,* the arbitration clauses incorporated the general rules of the AAA, did not reference the AAA's Supplementary Rules on class arbitration, and did not make any reference to class arbitration. These courts found no evidence indicating the parties agreed to send the issue of class arbitrability to the arbitrator. *See Reed Elsevier,* 734 F .3d at 599-600 ("[A]t best, the agreement is silent or ambiguous as to whether an arbitrator should determine the question of classwide arbitrability; and that is not enough to wrest that decision from the courts."); *Opalinski,* 761 F.3d at 335 ("Nothing . . . suggests that the parties agreed to submit questions

---

were adopted in response to the uncertainty created by the *Bazzle* plurality decision and specifically provide that the existence of those rules, or any other AAA rules, shall not be a factor in determining whether the parties intended to permit class arbitration. (Rule 3 of AAA Supplemental Rules for Class Arbitration.)

of arbitrability to the arbitrator. Thus, . . . the District Court had to decide whether the arbitration agreements permitted classwide arbitration.").[10]

* * * *

10. *Ajamian* supplies still another reason to reject Plaintiff's argument. That arbitration agreement invoked the arbitration rules of the AAA, National Association of Securities Dealers, or the rules of "[an]other alternative dispute resolution organization" later to be designated. 203 Cal. App. 4th at 789. Here, similarly, while the AAA Rules supplied the default set, the Agreement expressly allowed for the possibility of using a different set of rules. Therefore, as in *Ajamian,* the parties' reference to the AAA Rules could not possibly have effectuated "a clear and unmistakable delegation [to the arbitrator]" of deciding whether the parties agreed to class arbitration. *Id.*

APPENDIX G — EXCERPTS OF OPENING BRIEF IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION 2, FILED AUGUST 24, 2015

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 2

No. A145553

REFUGIO ARREGUIN, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED,

Plaintiff/Respondent,

vs.

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, INC., A CALIFORNIA CORPORATION; AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants/Appellants.

On Appeal From the Superior Court of California
County of Sonoma
The Honorable Gary Nadler
Case No. SCV 256487

Appendix G

APPELLANT STAR H-R, INC.'S OPENING BRIEF

* * *

VI. THE COURT SHOULD ORDER ARREGUIN TO ARBITRATE HIS CLAIMS ON AN INDIVIDUAL BASIS

Arreguin purports to assert class claims, but the Court should compel him to arbitrate his individual claims only.[17]

A. The Court, Not An Arbitrator, Decides Whether An Arbitration Agreement Permits Class Actions.

Absent clear and unmistakable evidence indicating the parties intended otherwise, questions of arbitrability are decided by the court. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-47 (1995). Because "class" arbitration fundamentally modifies the scope and procedures of arbitration, class arbitrability is a "gateway" question of arbitrability for the court.

---

17. Upon enforcing the parties' Agreement, this Court could remand to the trial court to resolve issues that the trial court previously did not reach, including whether the Agreement authorized class actions without saying so. Alternatively, in the interest of expeditious resolution of this case, the Court could rule itself in the first instance on the legal questions remaining. The remainder of this brief assumes that this Court will do the latter.

Appendix G

Garden Fresh Restaurant Corp. v. Superior Court, 231 Cal. App. 4th 678, 685-86 (2014), is directly on point. In *Garden Fresh*, the court held that the trial court erred in asking the arbitrator whether a class action was permitted under an arbitration agreement silent on that issue. *Garden Fresh* cited the differences between classwide and individual arbitration: "[T]he *Stolt-Nielsen* court concluded that class arbitration is not merely a procedural device to which parties may implicitly agree by simply entering into an arbitration agreement, but, rather, that it is a different type of proceeding that requires a showing of consent by the parties." *Id.* at 686. *Garden Fresh* continued:

> Our reading of recent United States Supreme Court precedent persuades us that the availability of class and/or representative arbitration is a question of arbitrability, and is therefore a gateway issue for a court to decide, in the absence of a clear indication that the parties intended otherwise, rather than a subsidiary one for an arbitrator to decide.

Id. at 685-86. It concluded:

> [W]hether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may well not have agreed to arbitrate but thousands of them.

Id. at 687 (citation, quotation marks, and alteration omitted).

Federal appellate cases to the same effect include *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 334 (3d Cir. 2014) (the availability of class arbitration was a gateway question of arbitrability for court to decide; "Traditional individual arbitration and class arbitration are so distinct that a choice between the two goes, we believe, to the very type of controversy to be resolved."), and *Reed Elsevier v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) ("[W]hether an arbitration agreement permits classwide arbitration is a gateway matter" that is presumptively "for judicial determination[.]") (citation and internal quotation marks omitted). *See also Chico v. Hilton Worldwide, Inc.*, 2014 WL 5088240, at *11 (C.D. Cal. Oct. 7, 2014) (granting motion to compel individual arbitration and dismiss class claims; agreeing with and adopting the reasoning of the courts in *Opalinski* and *Reed Elsevier*, noting that they are the only two circuits to squarely address the issue); *Chesapeake Appalachia, LLC v. Suppa*, 2015 U.S. Dist. LEXIS 26166, at *29 (N.D. W. Va. March 5, 2015) ("[T]he Court . . . , not an arbitrator, will decide whether the parties agreed to classwide arbitration . . . .).[18]

* * * *

18. The California Supreme Court may address this issue, albeit in a case involving inapposite contract language, in *Universal Protection Service, L.P. v. Superior Court*, No. S225450 (review granted June 10, 2015). That case is being held pending decision in *Sandquist v. Lebo Automotive*, No. S220812 (review granted Nov. 12, 2014).

APPENDIX H — EXCERPTS OF REPLY BRIEF IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION 2, FILED JANUARY 27, 2016

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 2

No. A145553

REFUGIO ARREGUIN, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED,

Plaintiff/Respondent,

vs.

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, INC., A CALIFORNIA CORPORATION; AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants/Appellants.

On Appeal From the Superior Court of California,
County of Sonoma
Honorable Gary Nadler
Case No. SCV 256487

Appendix H

REPLY BRIEF FOR APPELLANT STAR H-R, INC.

* * *

III. THE COURT SHOULD ORDER ARREGUIN TO ARBITRATE HIS CLAIMS ON AN INDIVIDUAL BASIS

Arreguin's discussion of class-action issues:

- Ignores on-point cases;
- Relies on depublished authority; and
- Misstates what the cited cases and rules actually say.

Star explains below.

A. The Court, Not An Arbitrator, Decides Whether An Arbitration Agreement Permits Class Actions.

Star's Opening Brief (at pages 41-42) cited on-point cases holding that it is gateway question of arbitrability for this Court to decide whether the parties' Agreement was intended to permit class actions: *Garden Fresh Restaurant Corp. v. Superior Court*, 231 Cal. App. 4th 678, 685-86 (2014); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 334 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015); *Reed Elsevier v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014); *Chico*

v. Hilton Worldwide, Inc., 2014 WL 5088240, at *11 (C.D. Cal. Oct. 7, 2014); *Chesapeake Appalachia, LLC v. Suppa*, 91 F. Supp. 3d 853, 864 (N.D. W. Va. March 5, 2015). Arreguin did not even attempt to explain away or distinguish those cases; he ignored them.

To the same effect is another very recent U.S. court of appeals case, *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, ___ F.3d ___, 2016 U.S. App. LEXIS 42 (3d Cir. Jan. 5, 2016). "[T]he availability of class arbitration constitutes a 'question of arbitrability' to be decided by the courts — and not the arbitrators — unless the parties' arbitration agreement 'clearly and unmistakably' provides otherwise," the court held. *Id.* at *1 (citation omitted). "[W]e . . . emphasize the onerous nature of overcoming the presumption in favor of judicial resolution of such questions of arbitrability," the court continued. *Id.* at *18. "[E]xpress and unambiguous contractual language of delegation, as opposed to mere silence or ambiguous contractual language," is required for arbitrators to wrest the issue from the courts. *Id.*

Lacking on-point authority, Arreguin does four things:

- Arreguin cites the obsolete plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which the Supreme Court itself[1]

1. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010) (*Bazzle* was a nonauthoritative plurality decision); *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S. Ct. 2064, 2068 n.2 (2013) (the Supreme Court "has not yet decided" the question).

and numerous other courts[2] have said is not authoritative.

- Arreguin cites the 2003 AAA's Supplementary Rules for Class Arbitration, which (i) Star's Agreement did not adopt,[3] (ii) are based on the *Bazzle* plurality opinion, and therefore have no greater significance than that opinion,[4] and (iii) have been held irrelevant to whether the parties intended to strip from a court to gateway function of determining whether a class arbitration may proceed.[5]

---

2. *E.g.*, *Opalinski*, 761 F.3d at 331-35 (whether a class action is available presents a gateway question of arbitrability for the court; declining to follow the *Bazzle* plurality); *Reed Elsevier*, 734 F.3d at 559 (same); *Garden Fresh*, 231 Cal. App. 4th at 685-86 (same).

3. *See* AA 92.

4. The Supplementary Rules were adopted in October 2003, a few months after *Bazzle*. "AAA's class arbitration policy is based on the *Bazzle* decision." *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1365 & n.23 (2008).

5. *E.g.*, *Chesapeake Appalachia*, 2016 U.S. App. LEXIS 42, at *37-38, *40 (rejecting contention that invoking the AAA Rules "clearly and unmistakably delegate[s] the question of class arbitrability to the arbitrato[r]"; where a contract incorporates AAA rules, and those rules in turn incorporate other AAA rules, and those other rules purport to assign a question to an arbitrator, the court has nothing more than "a daisy chain of cross-references"; "[W]e must construe ambiguity against [delegation of the question to the arbitrator] because '[i]t is presumed that courts must decide questions of arbitrability "unless the parties clearly and unmistakably provide otherwise."'") (citation omitted); *accord*

- Arreguin relies on numerous cases pre-dating, and therefore overcome by, the more-recent cases (including U.S. Supreme Court cases) Star cited.[6]

- Arreguin relies on depublished cases, in violation of California Rule of Court 8.1115(a).[7]

- Arreguin neglected to disclose that this District, in *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771 (2012), "seriously question[ed]" whether the incorporation of AAA rules into an agreement provided clear and unmistakable evidence that an employer and employee intended to submit a gateway question to an arbitrator. *Id.* at 790. *Ajamian*'s reasoning on this point is particularly instructive. The agreement in that case invoked the arbitration rules of the AAA, the National Association of Securities Dealers, or of "[an]other alternative dispute resolution organization" later to be designated. *Id.* at 788. Here, similarly, while the AAA Rules supplied the default set, the Agreement expressly allowed

---

Reed Elsevier, 734 F.3d at 599 (an arbitration clause providing for resolution under AAA rules did not clearly and unmistakably assign to an arbitrator the question of whether the agreement permitted classwide arbitration); *see Opalinski*, 761 F.3d at 335 ("Nothing . . . suggests that the parties agreed to submit questions of arbitrability to the arbitrator. Thus, . . . the District Court had to decide whether the arbitration agreements permitted classwide arbitration.").

6. *See* RB 28, 30-31 n.8.

7. *See* RB 27 n.5, 31.

for the possibility of using a different set of rules. Therefore, as in *Ajamian*, the parties' reference to the AAA Rules could not possibly have effectuated "a clear and unmistakable" delegation to an arbitrator of anything. *See id.*

* * * *

APPENDIX I — EXCERPTS OF BRIEF IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION 2, FILED AUGUST 24, 2015

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 2

No. A145553

REFUGIO ARREGUIN, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED,

Plaintiff/Respondent,

vs.

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, INC., A CALIFORNIA CORPORATION; AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants/Appellants.

On Appeal From the Superior Court of California,
County of Sonoma, Honorable Gary Nadler
Case No. SCV 256487

Appendix I

BRIEF FOR APPELLANT E. & J. GALLO WINERY

* * *

I. INTRODUCTION

The appellate brief of Star H-R, Inc. demonstrates that plaintiff Refugio Arreguin formed a valid arbitration agreement with Star. This brief for co-defendant E. & J. Gallo Winery demonstrates that Gallo is entitled to enforce the agreement along with Star.

II. GALLO ADOPTS STAR H-R'S BRIEF AND INCORPORATES IT BY REFERENCE

Pursuant to California Rule of Court 8.200(a)(5), Gallo incorporates by reference Star's appellate brief.

III. THE ALLEGATIONS IN ARREGUIN'S COMPLAINT ENTITLE GALLO, ALTHOUGH NOT ITSELF A SIGNATORY, TO INVOKE THE ARBITRATION AGREEMENT

Gallo is not a signatory to Arreguin's arbitration agreement, but Gallo nevertheless is fully entitled to invoke it, for the reasons set forth below.

Appendix I

A. Arreguin Asserts Against Gallo And Star Identical Wage/Hour Claims And Pleads The Two Companies To Be Joint Employers And Agents And Alter Egos Of Each Other.

Star is a labor contractor that provides staffing services to various businesses. (AA 40.) Arreguin and Star jointly agreed to submit claims to binding arbitration. (AA 88, 90-92.) In the arbitration agreement, Arreguin promised to arbitrate "all disputes that may result from or be related to my employment" (with exceptions not applicable here). Star assigned Arreguin to work for one of its clients, Gallo, where he worked from August 2013 to October 2013. (AA 40.)

Arreguin's Complaint alleges state-law wage-hour claims covered by the arbitration agreement, all arising out of his employment with Star and assignment to work at Gallo. He further alleges that "each and all of the acts and omissions alleged herein was performed by, or is attributable to, GALLO WINERY, STAR H-R . . . , each acting as the agent . . . of . . . each of the other co-Defendants." (AA 35.) Arreguin alleges that Gallo and Star "are jointly and severally liable as employers . . . because they each have exercised sufficient control of the wages, hours, working conditions, and employment status of Plaintiff," such that they are "joint employers of Plaintiff." (AA 35-36.) The nexus between Gallo and Star was so close, Arreguin alleges, that the two entities were "alter ego[s]" of each other. (AA 35.)

B. Gallo Is Entitled To Stand In Star's Shoes And Enforce The Arbitration Agreement.

For several reasons Gallo, though not itself a signatory to the agreement, is entitled to enforce it along with Star.

1. Arreguin did not oppose Gallo's motion in the trial court, so Arreguin cannot contend now that Gallo is not entitled to enforce the agreement along with Star.

Star moved to compel arbitration in the trial court (AA 59-205); Gallo joined in that motion and explained why it, along with Star, was entitled to enforce the agreement (AA 206-216). Arreguin opposed *Star's* motion (AA 217-236) but did not oppose *Gallo's*. Arreguin therefore has waived any contention that, once the agreement is found to be valid, Gallo is entitled to enforce it.

2. Even if Arreguin were held not to have waived any argument about Gallo's rights under the agreement, under the law Gallo is equally entitled to enforce it.

Two separate doctrines give Gallo the right to enforce the agreement along with Star.

a. Gallo is entitled to enforce the agreement as Star's alleged agent and alter ego.

Because Arreguin alleged Gallo to be Star's agent and alter ego, Gallo has the same rights as Star to enforce the agreement.

This District considered this precise scenario in *Rowe v. Exline*, 153 Cal. App. 4th 1276 (2007). Plaintiff Rowe entered into an arbitration agreement with his employer, Initiatek. Rowe later sued the corporation and two individuals, alleging that they were the corporation's alter egos. All defendants moved to compel arbitration. The trial court denied the motion as to the individuals, because they were not parties to the arbitration agreement. But this District reversed. It cited the doctrine of equitable estoppel, which the Court said applied equally in cases under the Federal Arbitration Act and the California Arbitration Act: "By suing [the nonsignatories] . . . on the ground that they are Initiatek's alter egos, . . . [the nonsignatories] are 'entitled to the benefit of the arbitration provisions,'" the Court held. *Id.* at 1285 (citation omitted).

The next year, this District ruled similarly in *RN Solution, Inc. v. Catholic Healthcare West*, 165 Cal. App. 4th 1511 (2008), again holding that a nonsignatory defendant could enforce an arbitration agreement. In that case plaintiff Woo (an executive of RN Solution) alleged that he was harassed by one Robertson (an executive of Catholic Healthcare West). When Woo sued both Robertson and CHW, both defendants moved to compel arbitration. The trial court ruled against them, but the court of appeal reversed. Robertson was not a signatory to the arbitration agreement that Woo had signed, but "[t]he complaint alleges that [Robertson] was a managing agent and vice-president of human resources [of CHW]," so he too was entitled to invoke it based on Woo's allegation of agency. *Id.* at 1520.

* * * *

APPENDIX J — EXCERPTS OF PETITION FOR REVIEW IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, FILED MAY 1, 2018

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

S248545

REFUGIO ARREGUIN, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED,

Plaintiff/Respondent,

vs.

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, INC., A CALIFORNIA CORPORATION; AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants/Appellants.

California Court of Appeal No. A145553
Sonoma County Superior Court No. SCV 256487
Hon. Gary Nadler

Appendix J

PETITION FOR REVIEW

* * *

1. Gateway questions of arbitrability are decided by courts.

Absent clear and unmistakable evidence indicating the parties intended otherwise, questions of arbitrability are decided by the court. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (courts will not assume that the parties agreed to arbitrate gateway matters "unless there is 'clea[r] and unmistakabl[e]' evidence" to that effect) (citation omitted).

2. Because a class action in arbitration fundamentally modifies the scope and procedures of arbitration, the class-action issue is a gateway question of arbitrability for the court.

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court held that federal law preempted a California doctrine that deemed unenforceable a class-action waiver in an arbitration agreement. That state-law rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and thus "is preempted by the FAA." *Id.* at 352 (citation and quotation marks omitted). The reason is that class arbitration "sacrifices the principal advantage of arbitration," is "poorly suited to the higher stakes of class litigation," forces defendants to "bet the company with no effective means of review," and is "not arbitration

as envisioned by the FAA." *Id.* at 348, 350, 351. The Court held that California must enforce arbitration agreements even if such agreements require that claimants arbitrate their claims individually, instead of on a class basis. Parties to arbitration agreements have "discretion in designing arbitration processes," because "[a]rbitration is a matter of contract [and] the FAA requires courts to honor parties' expectations." *Id.* at 344, 351.

Concepcion dealt with an *express* class-action waiver, but *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684-85 (2010), explained how courts should deal with arbitration agreements, like the one at issue here, that are *silent* on the issue. The Court held that when an arbitration agreement is governed by the FAA, classwide arbitration is forbidden unless the parties have affirmatively agreed to it. The "differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with . . . the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* at 685. The "shift from bilateral arbitration to class-action arbitration" brings about "fundamental changes," because an arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties," *id.* at 686, and yet "the scope of judicial review is much

more limited," *id.* at 686-87. Because the "relative benefits of class-action arbitration are much less assured," there is "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration" where an agreement does not *specifically* authorize it. *Id.* at 685-86.

The Supreme Court's cases inform whether it is for the arbitrator, or a gateway question of arbitrability for the court, to decide whether a silent agreement contemplates class actions. The Court's decisions emphasize the substantial differences between individual arbitration and classwide arbitration. By emphasizing those differences, "the Supreme Court 'has given every indication, short of an outright holding, that classwide arbitrability is a gateway question' for the court." *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 876 (4th Cir. 2016) (citation omitted). In her *Sandquist* dissent, Justice Kruger put it even more simply: ". . . I would follow where the [U.S. Supreme] [C]ourt has led." 1 Cal. 5th at 268.

3. *Sandquist* conflicts with the decisions of at least five U.S. courts of appeals.

The *Sandquist* majority acknowledged that it was parting company with decisions from two U.S. circuit courts of appeals: *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013), and *Opalinski v. Robert Half International Inc.*, 761 F.3d 326 (3d Cir. 2014). *See Sandquist*, 1 Cal. 5th at 255-57. Now, however, the *two* circuits have become *five*; the Fourth, Eighth, and Ninth circuits have aligned themselves with the Third and Sixth. As a result, *Sandquist* increasingly is an outlier.

Dell Webb is the first such case.[4] The trial court had held, as did *Sandquist*, "that . . . whether an arbitration clause permits class arbitration is procedural and therefore for the arbitrator." 817 F.3d at 873. "We disagree," the Fourth Circuit said, "and hold that whether an arbitration clause permits class arbitration is a gateway question of arbitrability for the court." *Id.* "[T]he [Supreme] Court has highlighted the significant distinctions between class and bilateral arbitration, and these fundamental differences confirm that whether an agreement authorizes the former is a question of arbitrability," the court reasoned. *Id.* at 875. "The benefits [of arbitration] . . . are dramatically upended in class arbitration, which brings with it higher risks for defendants." *Id.* Court litigation affords appellate rights unavailable in arbitration. The possibility of arbitral error "is a cost that '[d]efendants are willing to accept' in bilateral arbitration[,] . . . [b]ut 'bet[ting] the company' without effective judicial review is a cost of class arbitration that defendants would not lightly accept." *Id.* (quoting *Concepcion*, 563 U.S. at 351). "It is not surprising then that those circuit courts to have considered the question have concluded that, 'unless the parties clearly and unmistakably provide otherwise,' whether an arbitration agreement permits class arbitration is a question of arbitrability for the court." 817 F.3d at 876 (quoting *Reed Elsevier*, 734 F.3d at 597-99). "On remand," therefore, "the district court" — not an arbitrator — "shall determine whether the parties agreed to class arbitration." *Id.* at 877.

---

4. *Dell Webb* actually was decided shortly before *Sandquist* issued, but the *Sandquist* majority did not discuss *Dell Webb*.

The Third Circuit returned to the issue in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016). That court previously had held, in *Opalinski*, that whether an arbitration agreement permitted a class action was a gateway question of arbitrability for the court. In *Chesapeake Appalachia*, however, plaintiff advanced a new argument: that even if *Opalinski* was correctly decided, an agreement's incorporation by reference of the AAA Rules delegated that question to the arbitrator, because the AAA Rules so state. The Third Circuit rejected that argument. "[T]he availability of classwide arbitration constitutes a question of arbitrability" for the court, because "it implicates whose claims the arbitrator may adjudicate as well as what types of controversies the arbitrator may decide." *Id.* at 756 (citations and internal quotation marks omitted). The incorporation by reference of rules does not change that, the court held. Plaintiff faces "the onerous burden" of producing "clear[] and unmistakabl[e] evidence overcoming the presumption in favor of judicial resolution of the question of class arbitration," and the incorporation of the AAA Rules does not suffice. *Id.* at 754, 758, 761. Plaintiff's rules-incorporation argument rests on "a daisy-chain of cross-references," nothing clear and unmistakable, the court held. *Id.* at 761, 763. Plaintiff argued that the agreement should be construed against the defendant as its drafter, but the Third Circuit rejected that argument, too. Any ambiguity in the agreement simply indicates that the "clear and unmistakable" test is not met, the court concluded. *Id.* at 763.[5]

---

5. Along similar lines, the court of appeal in *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 790 (2012), "seriously

Appendix J

In *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017), the Eighth Circuit joined the other circuits in holding that "the question of class arbitration belongs with the courts as a substantive question of arbitrability." *Id.* at 972. Plaintiff there made the same argument that plaintiff had made in *Chesapeake Appalachia*: that the incorporation of the AAA Rules had the effect of delegating the question to the arbitrator. The Eighth Circuit rejected that argument, just as the Third Circuit had done. "To overcome the presumption [that the question belongs with the court], the parties must clearly and unmistakably delegate the question to an arbitrator," and "[i]ncorporation of AAA Rules by reference is insufficient evidence that the parties intended for an arbitrator to decide the substantive question of class arbitration." *Id.* at 972, 973.

Finally, the Ninth Circuit without discussion treated the issue as a gateway question of arbitrability for the court in *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017).[6]

---

question[ed]" whether the incorporation of AAA rules into an agreement provided clear and unmistakable evidence that an employer and employee intended to submit a gateway question to an arbitrator.

6. The Ninth Circuit in that case ruled, 2-1, that the agreement did permit class arbitration because it required arbitration of claims over "any right" and supplanted "any and all lawsuits." The Supreme Court yesterday granted *certiorari* in that case to decide "[w]hether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration

In sum, the recent cases apply the reasoning of Justice Kruger in her *Sandquist* dissent. There now is an even-more-fully ripened split in the appellate cases, with the *Sandquist* majority standing alone against five U.S. courts of appeals.[7]

---

agreements." Petition for Certiorari at i, *Lamps Plus, Inc. v. Varela* (No. 17-988).

7. In *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018), the Second Circuit assumed (without deciding) that the decisions cited above correctly hold that the class-action issue normally is a gateway question of arbitrability for a court. *Id.* at 394-95. *Wells Fargo* (applying Missouri law) held, however, that aspects of the drafting of those particular arbitration agreements had the effect of assigning the question to the arbitrator. *Id.* at 396-99.

APPENDIX K — EXCERPTS OF ANSWER TO PETITION FOR REVIEW IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, FILED MAY 21, 2018

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CASE NO. S248545

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, INC.; A CALIFORNIA CORPORATION; AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants and Petitioners,

REFUGIO ARREGUIN, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,

Plaintiff and Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION TWO
CASE A145553

FROM THE SUPERIOR COURT
OF SONOMA COUNTY
THE HON. GARY NADLER, PRESIDING
CASE NO. SCV 256487
COURTROOM 15 (707) 521-6726

B. *Sandquist* Does Not "Stand Alone" in Finding that an Arbitrator May Decide Whether an Arbitration Agreement Implicitly Allows for Class Arbitration

Petitioners claim that *Sandquist* should be reversed because it "stands alone" against "at least" five U.S. Circuits.[1] (Pet., at pp. 9 & 12.) This is not true. Far from "standing alone" in its conclusion, the federal appellate courts are just about evenly split on the issue, with the First, Second, Fifth and Seventh Circuits siding with this Court in *Sandquist* in finding that, depending on the at-issue arbitration agreement's language, the arbitrator may properly decide whether the parties implicitly agreed to class arbitration. Moreover, the Petitioners erroneously count the Ninth Circuit as the fifth court that has found the court should decide when, in fact, the decision Petitioners cite never even addressed the "who decides" issue, let alone designated it categorically as a "gateway" that must be decided by the court. (*Varela v. Lamps Plus, Inc.* (9th Cir. 2017) 701 Fed.Appx. 670, 671 (*Lamps Plus*), *cert. granted* (Apr. 30, 2018) 17-988.) Thus, the courts are evenly split with four circuits on each side of the issue.

* * * *

1. Petitioners contend that the Third, Fourth, Sixth, Eighth and Ninth Circuits uniformly hold that the court, rather than the arbitrator, properly decides the availability of class arbitration as a gateway issue.