No. S224086

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHARON MCGILL, an individual
Plaintiff and Respondent,

v.

CITIBANK, N.A.
Defendant and Appellant.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE
Case G049838, FROM THE SUPERIOR COURT
COUNTY OF RIVERSIDE, CASE NO. RIC1109398,
ASSIGNED FOR ALL PURPOSES
TO JUDGE PRO TEM JOHN W. VINEYARD
DEPARTMENT 12

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE
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FROM THE SUPERIOR COURT
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APPLICATION OF AARP FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND RESPONDENT SHARON MCGILL AND [PROPOSED] BRIEF IN SUPPORT OF PLAINTIFF SHARON MCGILL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

California Statutes

Federal Statues

Secondary Authorities

APPLICATION OF AARP FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND RESPONDENT SHARON MCGILL AND [PROPOSED] BRIEF IN SUPPORT OF PLAINTIFF SHARON MCGILL.

TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rules of Court, rule 8.520(f), AARP respectfully applies to this Court for leave to file the accompanying Brief in support of Plaintiff and Respondent Sharon McGill.[1]

AARP has a strong interest in preserving consumers access to statutory remedies that serve to police the marketplace. AARP has an interest in stopping the many unfair and deceptive practices perpetrated by a wide range of companies because many of them have a disproportionate impact on older people. AARP regularly advocates for the protection of older individuals from fraudulent, abusive, deceptive, and unfair and illegal business practices. AARP is familiar with all the briefs previously filed in this case and previously served as amicus curiae in *Cruz v. Pacificare Health Systems, Inc.* (2003) 30 Cal.4th 303.

No party or counsel for any party authored any portion of the brief, Additionally, no person or entity other than amicus curiae, their members and their counsel made a monetary contribution intended to fund the

[1] This Court's caption reflects McGill's status as Plaintiff and Respondent in the Court of Appeal. McGill is the Petitioner in this Court.

preparation or submission of the brief. (Cal. Rules of Court, rule 8.520(f)(4)).

STATEMENT OF INTEREST

AARP is a nonprofit, nonpartisan organization, with a membership of more than 37 million, that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment security, retirement planning and protection from financial abuse.

AARP is greatly concerned with fraudulent, deceptive, unfair, and discriminatory corporate practices, many of which have a disproportionate impact on older members of our community. While many people lose large amounts of money to such practices, others lose relatively small amounts. These losses are nevertheless significant. Even small losses may accumulate into huge ill-gotten gains for corporations which may have thousands or even millions of customers, each subject to the same practices. Ineffective enforcement of statutory remedies removes important incentives a business may have to avoid engaging in fraudulent, unfair, or deceptive practices. AARP is interested in the Court's ruling in this case because of the impact the ruling will have on the enforcement of statutory remedies to combat unfair business practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Consumer fraud is a significant problem in California and throughout the nation. A recent survey by the Federal Trade Commission found that during 2011, an estimated 10.8 percent of U.S. adults were victims of one or more types of fraud. (Fed. Trade Comm. Staff Report, Consumer Fraud in the United States: The Third FTC Survey, 101 (2013), http://1.usa.gov/20aSCzO.)

Defendant Citibank (hereafter "Defendant") argues that the Federal Arbitration Act (FAA) requires enforcement of its arbitration clause despite the fact that enforcement will result in the complete elimination of Plaintiff's public injunctive claims, not in the arbitration of those claims. The U.S. Supreme Court has affirmed that, even in light of the FAA, courts will not enforce "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." (*American Express Co. v. Italian Colors Rest.* (2013) 570 U.S. ___, 133 S.Ct. 2304, 2310.) If the Court embraces Defendant's arguments, statutes intended by the legislature to protect weaker parties against stronger parties will essentially be gutted.

California law provides a non-waivable right of action by individuals who act as private attorneys general to seek injunctive relief to prevent the general public from being harmed. (Cal. Bus. & Prof. 17535.). Even when parties agree to arbitrate a statutory claim they do not forgo the substantive rights afforded by the statute; they only submit to resolve the claim in an

arbitral, rather than a judicial forum. (*Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628.)

This Court should strike Defendant's contractual ban on public injunctive relief under the principles articulated by this Court in *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348. Alternatively, this Court should hold that the Plaintiff's public injunction claim must remain available in some forum, so that the trial court, or the arbitrator, if appropriate, can decide whether McGill's proposed injunctive relief would be within the arbitrator's powers to grant.

ARGUMENT

I. CONTRACT TERMS THAT CREATE AN ABSOLUTE BAN ON PUBLIC INJUNCTIVE RELIEF ARE UNENFORCEABLE

Imbedded in the arbitration agreement at issue in this case is an absolute ban on the pursuit of *public* injunctive relief in any forum. (Opn. Br. at pp. 18-20; 1 CT 109-110.) If the Court of Appeal's decision is accepted, Plaintiff will not be allowed to seek public injunctive relief in arbitration because the arbitration agreement itself only allows individual injunctive relief. (*Ibid.*) Public injunctive relief is a critical tool in protecting California consumers under California's Unfair Competition Law (the "UCL" Bus. & Prof. Code 17200, *et seq.*), California's False Advertising Law (the "FAL," Cal. Bus. & Prof. Code 17500, *et seq.*), and

the Consumer Legal Remedies Act ("CLRA," Cal. Civ. Code sections 1750, *et seq.*).

As correctly argued by McGill, the FAA does not require enforcement of contract terms that are invalid under principles of state contract law, including terms that eliminate statutory claims and remedies. (Opn. Br. at pp.13-15.) Importantly, the FAA requires enforcement of agreements to *resolve disputes* by arbitration, not enforcement of agreements that *foreclose* assertion and resolution of legal claims.

The U.S. Supreme Court repeatedly has affirmed that even in light of the FAA, courts will not enforce "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." (*American Express Co., supra,* 133 S.Ct. at page 2310; see also, *Mitsubishi Motors, supra,* 473 U.S. at page 628.) Because Citibanks arbitration agreement prohibits McGill's pursuit of a public statutory remedy, the Court should find it unenforceable under the FAA.

II. PUBLIC INJUNCTIONS ARE DIFFERENT FROM CLASS ACTIONS AND CANNOT BE WAIVED

Injunctive relief designed to protect the public presents a narrow exception to the rule that the Federal Arbitration Act requires state courts to honor arbitration agreements. (*Cruz, supra,* 30 Cal.4th at page 312.) In a public injunctive action, plaintiff acts "in the purest sense as a private attorney general." (*Ibid.*) As this Court noted in *Broughton*, nothing "in

the legislative history of the FAA suggests that Congress contemplated 'public injunction' arbitration within the universe of arbitration agreements that it was attempting to enforce." (*Broughton*, *supra,* 21 Cal. 4th at pages 1083-84.) Because public injunctions involve a "public statutory purpose," they transcend the private interests that the FAA was designed to resolve.

The Supreme Court in *Concepcion* did not address the public injunction at issue before this Court *AT&T Mobility v. Concepcion*, (2011) 563 U.S. 333. The Supreme Court in *Concepcion* was concerned with the legality of class action waivers. This Court in *Cruz* held that class damage claims were fully arbitrable. (*Cruz, supra,* 30 Cal. 4th at page 303.) A public injunctive claim, the purest form of private attorney general relief, is **not** a class claim covered by the FAA. (*Ibid.*; see also, *Iskanian* 59 Cal. 4th at page 348.) Congress recognizes that class actions are inherently different from public injunctions. As an example, the federal Class Action Fairness Act (CAFA), 28 U.S.C. § 1332, *et seq.* excludes public injunctive claims from its coverage. (28 U.S.C. §1332(d)(11) (B)(ii) (III) (claims brought on behalf of the general public, as opposed to individual or mass actions, are not covered by CAFA.) This Court, likewise, should recognize the distinction between class claims and public injunctive relief.

The FAA does not purport to include public injunctive relief or immunize arbitration provisions from all state interests. A violation of

public policy is grounds for the revocation of any contract. (*See, e.g.*, Rest. 2d Contracts § 178(1) (1981)). Section 2 of the FAA makes arbitration provisions specifically enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2 *et seq.*; see also, Aragaki, *Arbitration's Suspect Status* (2011) 159 U. Pa. L. Rev. 1233, 1281("[T]he well-established public policy defense to contract formation constitutes a ground for the revocation of 'any contract.' It follows that courts should be entitled to apply this defense without offending the FAA."); Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts* (2004) 83 Or. L. Rev. 541, 557 ("state legislatures' sovereign prerogative to declare public policy has always provided a basis 'at law' for 'the revocation of any contract.'"). After all, a non-arbitration agreement that prospectively waives statutory claims and relief would be held unenforceable as illegal and contrary to public policy. (Cal. Civ. Code §§ 1668; 3513.) "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law" violates California law. (Cal. Civ. Code, § 1668.) Section 1668 further codifies the general principle that agreements exculpating a party for violation of the law are unenforceable. Additionally, section 3513 codifies the general principle that a law established for a public reason may not be contravened by private agreement. (Cal. Civ. Code, § 3513.). As McGill

lacks the ability to waive or compromise the public's rights under section 17535, the Court should reverse the Court of Appeals.

III. THE PUBLIC HAS A STRONG INTEREST IN ENSURING THAT UNFAIR BUSINESS PRACTICES ARE ENJOINED.

Public injunction remedies were enacted by the California legislature as part of an overall package of remedies designed to protect the general public from *future* harm. Public injunctions are essential to protect consumers in the marketplace because robust law enforcement is necessary to stop and deter illegal practices and states lack sufficient resources to guard against them fully. Consumers benefit from such deterrence, because stopping illegal business practices that provide an unfair competitive advantage to honorable businesses reduces the risk that individual consumers will be harmed. The public clearly has a strong interest in "ensuring that fraudulent business practices are enjoined." (*Sanchez v Valencia Holding Co.* (2015) 61 Cal. 4th 899, 917.) "Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area." (*Smiley v. Citibank* (1995) 11 Cal. 4th 138, 148. States have long been the front line defenders of their citizens through state consumer protection laws, and the presumption against preemption applies with full force here. The presumption has always been against the preemption of state laws. (*Bates v. Dow Agrosciences* (2005) 544 U.S. 431, 449.)

The preservation of public injunctive relief is particularly important since unfortunately most consumers are "generally unaware of whether their credit card contracts include arbitration clauses." (Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028 (c) at p. 11 § 1.4.2 (Mar. 2015) hereafter "CFPB")).[2] Most consumers impacted by arbitration agreements likewise, are, unaware that they have given up their right to sue. (*Ibid.*) A 2015 New York Times investigation found that "banks, car dealers, online retailers, cellphone service providers and scores of other companies have insulated themselves from challenges to illegal or deceptive business practices" with the use of arbitration clauses. (Silver-Greenberg & Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. Times (Dec. 23, 2015), http://nyti.ms/1S7y3Sx). "By inserting arbitration clauses into the fine print of consumer contracts, they have found a way to block access to the courts..." (*Ibid.*) The Times investigation found that debt collectors have used the courts against unsophisticated borrowers while invoking

[2] The federal Consumer Financial Protection Bureau's multi-year study is believed to be the most comprehensive empirical study of consumer financial arbitration agreements to date. (CFPB at p. 2.) A copy of the full CFPB report can be found at: http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

arbitration to prevent those same consumers from using the courts to challenge the companies' tactics. (*Ibid.*)

Consumer fraud remains a significant problem. During 2011, an estimated 10.8 percent of U.S. adults – those at least 18 years of age – were victims of one or more of the types of fraud. This implies that 25.6 million U.S. adults were victims of these frauds during 2011. (Fed. Trade Comm. Staff Report, Consumer Fraud in the United States: The Third FTC Survey, 101 (2013)). Preclusion of a public injunction in any forum effectively immunizes corporations from liability and improperly precludes California from protecting its residents.

CONCLUSION

For the foregoing reasons, amicus curiae AARP respectfully requests that this Court reverse the Court of Appeal's decision, hold that contract terms that prospectively waive public injunction claims are unenforceable, and order further proceedings consistent with that ruling.

Dated: January 19, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed Amicus Brief was produced using Times New Roman 13-point type style and contains 1,893 words including footnotes. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: January 19, 2016

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PROOF OF SERVICE

I, Donna J. Wolf, am employed in the city of Cincinnati, Ohio. I am over the age of 18 and not a party to the within suit; my business address is 8790 Governor's Hill Drive, Suite 102, Cincinnati, Ohio 45249.

On January 19, 2016, I served the document described as: **Application of AARP for Leave to file Amicus Curiae Brief in Support of Plaintiff and Respondent Sharon McGill and [Proposed] brief in support of Plaintiff Sharon McGill** on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [√] a true copy thereof to interested parties as follows [or] as stated on the attached service list.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 19, 2016 in - Cinncinati, Ohio

Donna J. Wolf
Declarant

_____
Signature