S284498

IN THE

SUPREME COURT OF CALIFORNIA

DANA HOHENSHELT
Plaintiff and Petitioner

SUPERIOR COURT OF LOS ANGELES COUNTY
Respondent

and

GOLDEN STATE FOODS CORP.
Defendant and Real Party in Interest

AFTER DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION EIGHT, CASE NO. B327524
LOS ANGELES SUPERIOR COURT, HON. THOMAS FALLS
CASE NO. 20PSCV00827

AMICUS CURIAE BRIEF OF PUBLIC INVESTORS ADVOCACY BAR ASSOCIATION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208(e)(3) of the *California Rules of Court*, the undersigned counsel for amicus curiae Public Investors Advocacy Bar Association ("PIABA") certify that PIABA is unaware of any person or entity that has a financial or other interest in the outcome of this proceeding that must be listed under Rule 8.208(e)(1) or (2).

Dated: February 7, 2025 *s/Melinda Jane Steuer*

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INTRODUCTION AND SUMMARY OF ARGUMENT

California *Code of Civil Procedure* §§ 1281.97, 1281.98, and 1281.99 are procedural rules which provide remedies to employees and consumers when a business with superior bargaining power games the system by requiring arbitration but then holds that process hostage by refusing to timely pay the arbitration fees. The foregoing statutes are essential to protect consumers from having their cases put on hold indefinitely by businesses who fail to pay the arbitration fees when due. Consumers are then cornered into a position where they either have to pay substantial arbitration fees which they cannot afford, or have their case remain in limbo indefinitely due to the business' failure to pay. If and when a consumer is ultimately forced to file a court petition to have the arbitration deemed waived and/or to enforce the obligation to pay fees, the business will often belatedly pay the fees and argue that the petition is moot. Such tactics allow businesses to successfully delay the proceedings for months and force the consumer to incur court costs simply so that they can proceed in the arbitration forum which the business imposed on the consumer.

The California Legislature appropriately enacted *C.C.P.* §§ 1281.97 through1281.99 to stop this abusive behavior, ensure that consumer and employee arbitrations proceed in an efficient and expeditious manner, and provide reasonable remedies to consumers and employees if the businesses which have imposed arbitration refuse to play by the rules and timely pay the arbitration fees.

Specifically, the Legislature enacted a bright line rule as to when a drafting party must pay arbitration fees before facing sanctions in order to prevent the abuse of consumers by drafting parties who force the consumers to relinquish their constitutional rights to trial by jury and require them to arbitrate their disputes, only to then delay their cases by not timely paying the arbitration fees. These statutes only seek to enforce the very arbitration agreements between the parties. The statutes also have the salutary effect of ensuring that the rights of consumers to have their case arbitrated in a timely fashion are not abrogated by the acts, errors, or omissions of the drafting parties. There is nothing untoward or unfair about these statutes. As in any instance in which there is a bright line deadline, there may be circumstances when the aggrieved party could argue that application of that rule could theoretically lead to a result it considers unjust (e.g., a lawyer gets into a fatal car accident on the way to the courthouse to file a notice of appeal). However, it is solely for the Legislature to make the determination as to whether a bright line rule or a more flexible rule should apply in a given circumstance. Here, the Legislature has spoken, and there is no basis for the Court to fail to uphold this legislative prerogative.

It is for these very reasons that the vast majority of California appellate courts who have considered this issue, including the appellate court in this matter, have correctly held that *C.C.P.* §§ 1281.97 through 1281.99 are not preempted by

the Federal Arbitration Act ("FAA"). As those courts have explained, *C.C.P.* §§ 1281.97 through 1281.99 are procedural statutes that do not impact the validity or enforceability of arbitration agreements. Rather, these statutes address a specific problem which occurs when businesses imposing arbitration choose to engage in conduct which prevents the arbitrations from proceeding. That is not hostility to arbitration. It is simply a mechanism to ensure that arbitration is the cost-effective and time-efficient means of resolving disputes that it is intended to be. These statutes appropriately promote good faith arbitration and discourage bad faith arbitration tactics.

The appellate court also correctly ruled, as the California Supreme Court has done on multiple occasions, that the California Arbitration Act ("CAA"), which includes *C.C.P.* §§ 1281.97 through 1281.99, applies to proceedings such as this that are venued in California state courts. For these reasons, and as further discussed below, this court should affirm the appellate court's decision in its entirety.

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LEGAL DISCUSSION

I. *C.C.P.* §§ 1281.97 THROUGH 1281.99 ARE NOT PREEMPTED BY THE FAA BECAUSE THEY ARE PROCEDURAL RULES WHICH PROVIDE REMEDIES FOR A BUSINESS' FAILURE TO TIMELY PAY ARBITRATOR FEES; NOT LAWS THAT PERTAIN TO THE VALIDITY OF THE ARBITRATION AGREEMENT ITSELF

Defendant and real party in interest Golden State Foods Corp. ("Golden State") argues that *C.C.P.* §§ 1281.97 through 1281.99 are preempted by the FAA because they treat arbitration agreements differently from other contracts and therefore conflict with the FAA. Appellant has misstated the standard for conflict preemption. The test is not whether *C.C.P.* §§ 1281.97 through 1281.99 contain terms different from the FAA or treats arbitration agreements differently from other contracts, but rather whether *C.C.P.* §§ 1281.97 through 1281.99 defeat or obstruct the FAA's purpose by limiting or preventing the formation or enforcement of arbitration agreements. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409-410; *Keeton v. Tesla* (2024) 103 Cal. App.5th 26, 40; *Gallo v. Wood Ranch US* (2022) 81 Cal. App.5th 621, 637-638; *Judge v. Nijar Realty, Inc.* (2014) 232 Cal. App.4th 619, 632; *Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal. App.4th 1085, 1092).) As the *Gallo* court explained, the "sin" which is *necessary for preemption* is the outright prohibition of arbitration or the

discouragement of arbitration. 81 Cal. App.5th at 641, emphasis in original. Simply put, state court litigation rules are not preempted by the FAA *so long as the basic policy upholding the enforceability of arbitration agreements remained in full force and effect*. (*Swissmex-Rapid S.A. de C.V. v. SP Systems, LLC* (2012) 212 Cal. App.4th 539, 546, emphasis in original.)

C.C.P. §§ 1281.97 through 1281.99 do not limit, prevent or discourage the formation of arbitration agreements, or bar certain claims from arbitration, or impose obstacles that make it harder to enter into an enforceable arbitration agreement, or in any way hinder arbitration agreements from being enforceable pursuant to *C.C.P.* § 1281.2. *C.C.P.* §§ 1281.97 through 1281.99 merely provide remedies to the non-drafting party if the drafting party breaches the arbitration agreement by failing to timely pay the required fees and costs. Since these provisions do not limit or prevent the formation or enforcement of arbitration agreements, there is no valid basis for finding them to be preempted by the FAA. Indeed, *C.C.P.* §§ 1281.97 through 1281.99 are no different from other procedural provisions in the CAA which are unique to arbitration and/or which materially differ from the FAA. For example, *C.C.P.* § 1281.2(c) allows trial courts to deny arbitration, despite the existence of an otherwise valid and enforceable arbitration agreement, in order to avoid conflicting rulings on common issues of law and fact amongst interrelated parties. That is a rule which is specific to arbitration,

sometimes results in cases involving otherwise enforceable arbitration agreements remaining in court, and is not contained in the FAA. Nonetheless, this Court has ruled that *C.C.P.* § 1281.2(c) does not contravene the letter or the spirit of the FAA because it is an evenhanded remedy designed to address a particular practical problem pertaining to arbitration, and not a provision that is designed to limit the rights of parties who choose to arbitrate or otherwise discourage the use of arbitration. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393)

Similarly, *C.C.P.* §§ 1281.97 through 1281.99 are evenhanded remedies which are designed to address a practical problem relating to arbitration, namely when a drafting party chooses to not timely pay the arbitration fees. It does not require or incentivize the non-drafting party to go to court, or prevent the parties from proceeding with arbitration, or impact the formation of a valid and enforceable arbitration agreement.

The CAA also contains many other provisions which are unique to arbitration and different from the FAA. For example, *C.C.P.* § 1294 prohibits immediate appeals of orders granting motions to compel arbitration, but the FAA does not. *C.C.P.* § 1294.4 provides for expedited appeals of orders denying arbitration for cases involving elders, which is not in the FAA or available for other types of orders. *C.C.P.* §§ 1288 and 1288.2 impose a strict 100-day time limit on serving

and filing a motion or request to vacate an arbitration award with no exceptions. *C.C.P.* § 1281.9 requires specific disclosures for proposed arbitrators. *C.C.P.* § 1281.91 gives parties the right to disqualify an arbitrator without cause upon receipt of their disclosures. *C.C.P.* § 1286.2 limits judicial review of arbitration awards. None of the foregoing rules have been held to be preempted by the FAA despite those rules being different from the rules found in the FAA. This is because it is well-settled that the California Legislature has the right to enact procedural rules governing arbitration so long as they do not prohibit or discourage the formation of a valid and enforceable arbitration agreement.

There is no valid basis to treat *C.C.P.* §§ 1281.97 through 1281.99 any differently from those other procedural rules. *C.C.P.* §§ Sections 1281.97 through 1281.99 certainly do not prohibit or discourage the formation of an enforceable arbitration agreement. Indeed, the provisions of *C.C.P.* §§ 1281.97 through 1281.99 only arise after the parties have commenced an arbitration proceeding pursuant to their enforceable arbitration agreement. These provisions merely address the untenable situation in which a non-drafting party is placed when the drafting party then decides to halt the arbitration process by its voluntary decision to not timely pay the required fees. These provisions facilitate arbitration by providing a compelling incentive for businesses to timely pay the fees so that arbitrations are not put on hold indefinitely.

Nonetheless, Golden State asserts that these rules unlawfully restrict its right to arbitration. This argument is without merit because the California courts have consistently held that a party may lose the right to arbitration by its litigation conduct on various grounds including waiver, estoppel, forfeiture, and timeliness. (See, *e.g.*, *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 583, 586-587 [holding that a party may waive the right to compel arbitration by choosing not to exercise its right to compel arbitration and instead defending itself in court; *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 29-30 [finding that the right to compel arbitration may be waived by failing to demand arbitration within the time frame provided by statute or in the contract]; *Chase v. Blue Cross of California* (1996) 42 Cal. App.4th 1142, 1151 [finding that a contractual right to arbitration may be lost as a penalty for the failure to perform an obligation under the contract].) *C.C.P.* §§ 1281.97 through1281.99 constitute a permutation of the fundamental principle that a party can forfeit a right to arbitration as a result of its own conduct. That is neither unusual nor an act of hostility to arbitration. As with other instances of waiver, estoppel or forfeiture, it is a matter that is entirely within the stronger party's control.

Most importantly, the statutes at issue are not concerned with a party's waiver or forfeiture of a right to **compel** arbitration. Indeed, these statutes only come into play once one of the parties has already filed for arbitration and the matter is **in**

arbitration. All the statutes do is provide a bright line rule for when the drafting party forfeits the right to proceed with an existing pending arbitration that the drafting party forced upon the consumer in the first instance. Such bright line forfeitures of rights for the failure to do some act within a statutory time period are replete throughout the California *Code of Civil Procedure*, including, among many others: forfeiting a right to bring an action if not commenced within the applicable period of limitations (*C.C.P.* § 312); forfeiting the right to appeal if a notice of appeal is not timely filed (California Rules of Court Rule 8.104, enacted pursuant to *C.C.P.* § 901); forfeiting a right to move a trial court for a new trial or to set aside and vacate a judgment if a notice of intention therefor is not timely filed (*C.C.P.* §§ 659 and 663a); forfeiting the right to set aside a default or default judgment if a motion is not timely filed (*C.C.P.* § 473(b)); and forfeiting the right to vacate an arbitration award if a petition or a request therefor is not timely filed and served (*C.C.P.* § 1286.4).

Indeed, in the recently decided case of *Colon-Perez v. Security Industry Specialists, Inc.* (January 29, 2025) 2025 Cal. App. LEXIS 40 at *22-25, the First Appellate District found that it was the Legislature's prerogative to enact an inflexible deadline for the payment of arbitration fees based on its desire to ensure that arbitration providers do not delay the collection of fees, and to encourage transparency around the due dates of the fees to prevent unnecessary delays. The

court also observed that statutes of limitations often have similarly inflexible provisions. *Id.* at *24-25.

Simply put, the Legislature was well within its rights to enact a bright line rule by which a business may forfeit the right to keep an action in arbitration if it fails to timely pay the arbitration fees. There is no valid basis to find that *C.C.P.* §§ 1281.97 through 1281.99 run afoul of the FAA because those statutes pertain to arbitration rather than to some other area of civil procedure. On the contrary, doing so would be at odds with this court's holding in *Quach*, *supra*, that arbitration agreements are not to be favored, but rather should be put on an equal footing with other contracts. (16 Cal.5th at 569.)

In short, there is good reason why the court below and every other California appellate court who has considered this issue, save one, has held that *C.C.P.* §§ 1281.97 through 1281.99 are not preempted by the FAA. As those courts have accurately explained, *C.C.P.* §§ 1281.97 through 1281.99 do not prohibit or discourage the formation and/or enforcement of arbitration agreements but rather merely provide remedies to the non-drafting party in situations where the drafting party has breached the agreement by failing to pay the required fees and costs. (*Keeton*, *supra*, 103 Cal. App.5th at 37-39; *Suarez v. Superior Court* (2024) 99 Cal. App.5th 32, 42-43; *Espinoza v. Superior Court* (2022) 83 Cal. App.5th 761, 771, 783-785; *Gallo*, *supra*, 81 Cal. App.5th at 641-643.) These holdings are consistent

with this court's holdings in *Cronus*, *supra*, which upholds the California Legislature's right to enact laws that address practical problems that may arise with respect to arbitrations in a manner that is consistent with the FAA's objectives of promoting arbitration as an efficient and speedy means to resolve claims. That is precisely what *C.C.P.* §§ 1281.97 through 1281.99 accomplish. These provisions address the delays and costs which businesses create for consumers when the businesses stop an arbitration in its tracks by failing to timely pay the arbitration fees.

Lastly, appellant's argument that *C.C.P.* §§ 1281.97 through 1281.99 are not necessary because the arbitration forums or the courts can address a party's failure to pay arbitration fees without those sections is irrelevant and disingenuous. It is irrelevant because the determinative issue is whether these sections are preempted by the FAA, not whether they are necessary. It is disingenuous because it ignores the reality that judges' decisions are not consistent, that it requires significant time and money to go to court and obtain a decision, that a business could cause that determination to become moot by paying the fees after the consumer has been forced to expend time and resources on a court petition, that a business could obtain an even longer delay by appealing an adverse decision, and that an arbitration forum has a powerful economic incentive to give a business an indefinite time to pay fees in order to keep the matter in the forum so it can receive those fees. The Legislature

is entitled to enact bright line rules that impose uniform deadlines and procedures to address the problems and delays which businesses have created for consumers by their failure to timely pay arbitration fees. That is precisely what it has done here.

II. THE CAA APPLIES BECAUSE THIS MATTER IS VENUED IN CALIFORNIA STATE COURT AND THE ARBITRATION AGREEMENT DOES NOT PROVIDE THAT THE FAA'S PROCEDURAL RULES SHALL APPLY TO COURT PROCEEDINGS

Golden State also argues that *C.C.P.* §§ 1281.97 through 1281.99 should not be enforced in a state court proceeding unless the arbitration agreement specifically refers to the CAA. Appellant's argument is contrary to California precedent. As this court recently affirmed, the CAA's procedural rules apply by default to cases brought in California courts, including cases involving interstate commerce in which the FAA governs the arbitrability of the controversy. (*Quach*, *supra*, 16 Cal.5th at 582.) The only exceptions are cases in which the parties have expressly agreed that the FAA's procedural rules apply or in which the CAA's procedural rules are preempted. (*Id.*; see also *Judge*, *supra*, 232 Cal. App.4th at 631; *Valencia v. Smyth* (2010) 185 Cal. App.4th 153, 177.)

Golden State argues that language in the agreement which states that the arbitration shall be governed by the FAA constitutes an express agreement to apply

the FAA's procedural rules in a California state court proceeding. This court has previously rejected that argument. Specifically, in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, the contracts at issue involved interstate commerce and provided that any arbitration conducted thereunder shall be governed by the FAA. The court held that this provision did not constitute an express agreement to apply the FAA's procedural rules in a court proceeding, and that the CAA applied because the case was venued in California state court. *Id.* at 1351-1352. The court also explained that the FAA only applied to the arbitration itself, and not to court proceedings. *Id.* at 1351, fn. 12.

Likewise, in *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 922, the court held that the procedural provisions of the CAA governed proceedings in California courts relating to the arbitration agreement, even though the arbitration agreement provided for the arbitration to be governed by the FAA. Many California appellate courts have similarly held that the CAA applies to cases venued in California state court which involve interstate commerce and contracts which state that the arbitration is governed by the FAA. (See, *e.g.*, *Los Angeles Unified School Dist. v. Safety National Casualty Corp.* (2017) 13 Cal. App.5th 471, 479, 482; *Judge*, *supra*, 232 Cal. App.4th at 630-632; *Mave Enters. v. Travelers Indem. Co.* (2013) 219 Cal. App.4th 1408, 1429-1430; *Swissmex*, *supra*, 212 Cal. App.4th at 545-546; *Valencia*, *supra*, 185 Cal. App.4th at 177-179; *SWAB Financial, LLC v.*

E-Trade Securities, LLC (2007) 150 Cal. App.4th 1181, 1195; *Muao*, *supra*, 99 Cal. App.4th at 1092.) As the authorities above hold, the CAA, including *C.C.P.* §§ 1281.97 through 1281.99, applies because this proceeding is venued in California state court.

CONCLUSION

For the foregoing reasons and authorities, this court should affirm the appellate court's decision in this matter and find that *C.C.P.* §§ 1281.97 through 1281.99 are not preempted by the FAA and that they apply in state court proceedings.

CERTIFICATION PURSUANT TO CRC 8.204(c) AND 8.486(a)(6)

The undersigned attorneys for amicus curiae certify that this brief contains no more than 3,902 words based upon the computer word count.

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PROOF OF SERVICE

I, the undersigned, say: I am employed in Los Angeles County, California. I am over the age of 18 years and am not a party to the within action. My business address is 11845 W. Olympic Boulevard, Suite 910W, Los Angeles, CA 90064.

On the date subscribed below, I served ***via TrueFiling*** the foregoing document titled **AMICUS CURIAE BRIEF OF PUBLIC INVESTORS ADVOCACY BAR ASSOCIATION** on all affected parties as follows:

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

Executed February 7, 2025, in Los Angeles County, California.

s/Leonard Steiner

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