No. 21-55484

In the United States Court of Appeals for the Ninth Circuit

TEQUILLA TOLBERT and KARA WALDRON-PARODI,
Plaintiffs-Appellees,

v.

SISYPHIAN, LLC and BRAD BARNES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:19-cv-10414-CBM-JPR (The Hon. Consuelo B. Marshall)

BRIEF OF AMICI CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTERESTS OF THE AMICI AND CONSENT TO FILE

Amici California Employment Lawyers Association (CELA) and Consumer Attorneys of California (CAOC) submit the following *Amicus Curiae* brief in an effort to provide the Court with further perspective regarding the importance of Senate Bill 707, Leg., Reg. Sess. (Cal. 2019) (SB 707). In particular, CELA and CAOC seek to share their viewpoint regarding the serious problem that SB 707 remedies, as well as why the statute is not preempted.

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions, many of which are resolved through arbitration. CELA has a substantial interest in protecting the statutory rights of California workers and ensuring the vindication of the public policies embodied in California employment laws.

CELA has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before the U.S. Court of Appeals for the Ninth Circuit and the California Supreme Court in employment rights cases such as *Ayala v. U.S. Xpress Enterprises, Inc*., 851 F. App'x 53 (9th Cir. 2021); *Chamber of Com. of United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021); *Salazar v. McDonald's Corp*., 944 F.3d 1024 (9th Cir. 2019); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th

1094 (2007); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014); and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014).

CELA is a non-profit organization of attorneys and is not a party to this action.

CAOC, founded in 1962, is a voluntary non-profit membership organization of more than 6,000 consumer attorneys dedicated to preserving and protecting the rights of ordinary consumers and employees, championing the cause of those who deserve redress for injury to person or property, and resisting efforts to curtail the rights of such injured persons.

CAOC has taken a leading role in advancing and protecting the rights of injured Californian's in both the courts and the Legislature. In particular, among other activities, CAOC has submitted amicus briefs in Ninth Circuit cases such as *Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955 (9th Cir. 2020); *Ass'n for Accessible Medicines v. Becerra*, 822 F. App'x 532 (9th Cir. 2020); and *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020).

CAOC has a substantive and abiding interest in ensuring that California employees and consumers are provided access to justice. This includes working to ensure that claims are determined on their merits, the rule of law is followed,

thereby enhancing judicial efficiency, and conserving judicial resources. Accordingly, CAOC has a substantive and abiding interest in ensuring the enforcement of SB 707, to eliminate gamesmanship, and fill the glaring loop hole that existed before its enhancement.

CAOC is a non-profit organization of attorneys and is not a party to this action.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E): (i) this brief was not authored, in whole or in part, by either party's counsel; (ii) no party or party's counsel has contributed money that was intended to fund preparing or submitting the brief; and (iii) no person, other than the authors of this brief, contributed money that was intended to fund preparing or submitting this brief.

All parties to this appeal have consented to the filing of this brief.

ARGUMENT

SB 707 provides a pro-arbitration solution to a serious structural problem that is baked into arbitrations for employees and consumers in California: Prior to SB 707, companies could force such individuals into private arbitration and then strategically choose not to pay the arbitrator's fees. That type of gamesmanship was leaving employees and consumers in legal limbo, unable to proceed in court or arbitration.

SB 707 resolves this problem by providing a set of remedies designed to make arbitration speedier and more efficient. In particular, SB 707 provides a bright-line rule that will eliminate any confusion regarding the deadline for paying an arbitrator's fees. That deadline will ensure that companies do not delay in making those payments. As a result, arbitrations will move forward without delay, as Congress intended.[1]

SB 707 also eliminates the need for any satellite litigation regarding what should happen if a party fails to pay the arbitrator's fees in a timely manner. That will also streamline arbitration and ensure that it is focused on the claims at issue.

Contrary to the arguments raised by Defendants-Appellants Sisyphian, LLC and Brad Barnes, as well as Amicus Curiae California Employment Law Council (CELC), the FAA does not preempt SB 707. That is because SB 707 does not invalidate arbitration agreements. Furthermore, SB 707 encourages the timely and efficient resolution of arbitrations. As such, it does not run afoul of the FAA.

[1] When enacted, Congress expected that the Federal Arbitration Act (FAA) would be more efficient in time and costs. *See* S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and little business alike, . . . corporate interests [and] . . . individuals"). Since then, Congress has affirmed its intent that arbitration under the FAA will be more efficient. See, e.g., H.R.Rep. No. 97–542, p. 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation. . . .").

A. SB 707 Was Enacted to Eliminate Gamesmanship and to Remedy a Glaring Loophole in the Arbitration System

SB 707 was enacted in response to a glaring loophole that existed because of the mandatory arbitration agreements that increasing numbers of companies require their employees or customers to sign: Companies could choose to game the system by not paying the arbitrator's fees at different points throughout the proceeding, thus resulting in lengthy delays and/or gaining a tactical advantage. Because it is generally companies that must pay the arbitrator's fees in order for the arbitration to proceed, only companies could take advantage of that loophole.

Companies have typically exploited this loophole at one of two stages in the arbitration process. In some instances, companies refused to pay the initial filing fee, which prevented the arbitration proceedings from commencing. This caused lengthy delays that jeopardized individuals' ability to find evidence and witnesses. It also prevented injured employees and consumers from recovering damages for their injuries. *See id.* at 7 ("Paradoxically, by refusing to pay the arbitration costs and fees as required by law, Uber and other similarly situated companies are managing to delay the adjudication of claims and postpone the payment of any potential judgments against the company . . . .").

In other cases, companies refused to pay fees during the pendency of the arbitration proceedings—often to prevent the setting of a hearing or the release of a judgment or award favorable to the employee or consumer. Stalling the arbitration

in this scenario can be even more damaging and prejudicial, as the employee or consumer has likely already invested significant resources to develop their case.

The problems created by this loophole are not hypothetical. The following examples from actual cases demonstrate how, prior to SB 707's enactment, companies used it in order to gain strategic advantages over employees and consumers.

Chipotle. In 2014, about ten thousand employees filed a class action lawsuit against Chipotle regarding wage theft. *Turner et al v. Chipotle Mexican Grill, Inc.*, No. 1:14-cv-02612-JLK (D. Colo.). Like many in the modern workforce, these employees were forced to sign arbitration provisions with class action waivers as a condition of their employment. *See* Def.'s Reply ISO Stay at 4, ECF No. 209. Thus, when they tried to bring a class action lawsuit to vindicate their rights, Chipotle compelled them to proceed with individual arbitrations. *See* Def.'s Opp. to Pls.' Mot. for Conditional Collective Action Cert. at 5, ECF No. 80.

Rather than giving up their respective claims, the employees then filed thousands of individual arbitration claims against Chipotle.[2] Though Chipotle was the party that had imposed the arbitration forum, the company argued that defending all of the claims in arbitration would cause "irreparable harm." Def.'s

[2] *See Chipotle's Mandatory Arbitration Agreements are Backfiring Spectacularly*, HUFFPOST, https://www.huffpost.com/entry/chipotle-mandatory-arbitration-agreements_n_5c1bda0de4b0407e90787abd (Dec. 21, 2018, 3:09 PM).

Reply ISO Stay at 17, ECF No. 209. Chipotle then refused to pay the initiation fees for the arbitrations, further delaying the proceedings and leaving the employees' claims stuck in limbo.[3]

Uber and Lyft. Facing arbitration claims by thousands of their employees, Uber and Lyft have delayed paying the initiation fees for those claims, contending without support that the workers could not all intend to proceed with the arbitrations. In Uber's case, when more than 12,000 drivers filed demands for arbitration to resolve their misclassification claims, Uber paid the required filing fees for fewer than 300 of those cases. *Abadilla v. Uber Technologies, Inc*., No. 4:18-cv-07343-KAW (N.D. Cal.), Pet. for Order Compel. Arb. at 1, ECF No. 1.

Arbitration generally cannot commence until the employer pays their portion of the filing fees. *See, e.g.*, JAMS Empl. Arb. R. & P. 5(b), 6(c) (2021).[4]

Because Uber refused to pay the filing fees, the drivers were forced to file a motion seeking to force Uber to do so. Pet. for Order Compel. Arb. at 1, ECF No. 1. In response, in an effort to further delay the arbitration proceedings, Uber claimed that it should not have to remit any additional fees until disputes regarding the disqualification of the drivers' attorneys were resolved. No. 3:18-cv-07343-EMC, Memo. in Opp'n to Pet'rs' Mot. to Compel Arb. at 11, ECF No. 53.

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[3] *See* HUFFPOST, *supra* note 2.

[4] https://www.jamsadr.com/rules-employment-arbitration.

Likewise, in *Abarca v. Lyft*, No. 3:18-cv-7502 (N.D. Cal.), over 3,000 Lyft drivers attempted to arbitrate their respective misclassification claims against the company. Those drivers found themselves forced to petition the court to compel arbitration when Lyft refused to pay its fees, thus blocking them from accessing the sole forum in which they were able to bring their claims. Pet. for Order Compel. Arb. at 1, ECF No. at 1. As to the first 1,123 demands for arbitration, Lyft failed to pay the filing fees necessary to commence arbitration by the deadline imposed by the American Arbitration Association (AAA). *Id.* As to the remaining arbitration demands, the AAA refused to provide an invoice for the filing fees necessary to commence those arbitrations until Lyft paid its initial invoice. *Id.*

CoreLogic. In *Mitchell v. CoreLogic, Inc. et al.*, No. 8:17-cv-02274-DOC-DFM (C.D. Cal.), CoreLogic's refusal to pay arbitration fees brought proceedings to a halt. When employees alleged wage and hour violations against CoreLogic, the company filed a motion to compel arbitration, seeking to force each plaintiff who had signed an arbitration agreement to arbitrate their claims. Def.'s Mot. to Compel Arb., ECF No. 128. The court granted the motion on April 4, 2019, and Plaintiffs then began to file demands in late April 2019. See Pls.' Memo. ISO Mot. for Order of Default at 3, ECF No. 273-1.

CoreLogic then began to engage in conduct aimed at disrupting the very arbitrations that it had insisted upon. For example, CoreLogic refused to pay any

further fees in arbitrations in four different states until certain legal issues were resolved. *See* Pls.' Mot. at 6, ECF No. 273-1. CoreLogic subsequently demanded the return of all filing and administrative fees that it had paid unless these alleged threshold issues were resolved. *See id.* at 7. In October 2019, the AAA began closing cases as a result of CoreLogic's failure to pay filing fees.[5] *See id.*

Gamesmanship in Individual Arbitrations. Conduct of this sort has not been limited to mass arbitrations. In testimony before the California Senate Judiciary Committee, attorney Noah Lebowitz described one employee's experience in a recent arbitration. There, the employer used delayed payment of fees to strategically get what it could not get on the merits from the arbitrator: a continuance of the adjudicatory hearing. *See The Arbitration Accountability Act of 2019: Hearing on S.B. 707 Before the S. Comm. on the Judiciary*, 2019 Leg., 2019-20 Sess. (Cal. 2019) (statement of Noah Lebowitz, Att'y).[6] The employee in that case sought to bring a simple claim for breach of a written employment contract. He was required to proceed in arbitration by virtue of a mandatory pre-dispute arbitration agreement that he had signed as a condition of his employment.

[5] The AAA sent letters notifying parties that it was closing a total of 110 cases because CoreLogic had "confirmed they [would] not remit payment for arbitrator compensation." *See id*.

[6] https://www.senate.ca.gov/media/senate-judiciary-committee-20190423/video, at 6:03:40.

However, the employer delayed paying the initiation fee to JAMS for tactical reasons: because it did not want the employee to be able to get any discovery before an already-scheduled mediation. When the case did not resolve at the mediation, the employer paid the fee, and JAMS set an initial status conference.

Seven months later, the employer asked the arbitrator to continue a pending hearing. The arbitrator denied the request. The employer then strategically failed to pay the deposit required by JAMS to cover the arbitrator's fee for the hearing. The employer's tactics were successful; the arbitrator took the case off calendar.

The employee then had to pay $9,000 in order for the arbitrator to hear a motion for default. However, the arbitrator denied the motion on several grounds, including that the California Arbitration Act did not have a provision for default. While the motion was pending, the employer paid the hearing fee, and the arbitrator allowed the company to continue in the arbitration. The employer thus manipulated JAMS' policy of not administering cases without advance payment—twice in one case—without consequence.

These cases are not outliers. Absent SB 707, the structural realities of arbitration in the employment and consumer context would encourage companies

to continue to game the system and seek significant advantages through the strategic non-payment of arbitrator's fees.[7]

B. SB 707 Favors Arbitration and Enhances Judicial Economy

As a preliminary matter, SB 707 does not run afoul of Section 2 of the FAA because it does not invalidate arbitration agreements.[8] Instead, SB 707 encourages the prompt enforcement of arbitration agreements by clarifying the remedies available when a company fails to pay the arbitrator's fees on time. *See* Cal. Civ. Proc. Code § 1281.97(a)-(d); *Postmates Inc. v. 10,356 Individuals*, No. CV202783PSGJEMX, 2021 WL 540155, at *7 (C.D. Cal. Jan. 19, 2021).

Furthermore, SB 707 does not automatically render any arbitration agreements unenforceable. Instead, if the company fails to pay the arbitrator's fees within 30 days of the due date, it provides employees and consumers with the choice between compelling arbitration and litigating their claim in a court of

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[7] This Court has recognized the problems inherent in such a "perverse incentive scheme" that encourages companies "to refuse to arbitrate claims brought by employees in the hope that the frustrated employees would simply abandon them." *Brown v. Dillard's, Inc.* 430 F.3d 1004, 1012 (9th Cir. 2005).

[8] Section 2 of the FAA (9 U.S.C. §2) provides as follows:

> 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.

appropriate jurisdiction. Cal. Civ. Proc. Code § 1281.97(b). SB 707 therefore clarifies the remedies available to employees and consumers when companies delay the arbitration process and refuse to pay required fees. *Id*. at § 1281.97(a)-(d).

There is a difference between laws that invalidate arbitration agreements and laws that codify remedies in an effort to encourage arbitration. Numerous statutes provide for the specific performance of arbitration agreements. *See, e.g., id*. at § 1281.2. These statutes could be said to "single out" arbitration clauses, since damages are the default remedy for breach of contract. However, no court has struck down these laws as preempted by Section 2 because they encourage arbitration. *Postmates*, 2021 WL 540155, at *8.

The same is true of the California law providing for a stay of litigation pending arbitration, which has no analog for other contractual breaches. Cal. Civ. Proc. Code § 1281.4. The FAA does not preempt state laws that make arbitration more effective by providing targeted remedies in aid of arbitration. In fact, federal preemption doctrine routinely allows additional state remedies for violations of arbitration agreements. *See, e.g.*, *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990).

SB 707 is thus different from state laws that render certain arbitration agreements invalid. For example, in *Doctor's Associates, Inc. v. Casarotto*, 517

U.S. 681, 687 (1996), the Montana statute at issue provided that arbitration clauses were unenforceable where they were included in contracts that did not meet certain notice requirements. In *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), the Kentucky rule at issue invalidated arbitration provisions signed through power of attorney. And in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the California law before the Court invalidated arbitration provisions with class waivers. These laws all explicitly invalidated certain types of arbitration agreements. As such, they were subject to the preemption tests to determine their validity.

Here, however, SB 707 does not require courts to render arbitration agreements invalid. Therefore, "there is no need to apply the saving clause tests because there is no conflict." *Postmates*, 2021 WL 540155, at *7.

C. SB 707 Encourages the Timely and Efficient Resolution of Arbitrations and Discourages Gamesmanship

The FAA preempts state laws that disfavor arbitration. However, it does not preempt state laws that make arbitration more effective and efficient. *Postmates*, 2021 WL 540155, at *8.

SB 707 makes arbitration more effective and efficient by eliminating delays due to the company's failure to pay the arbitrator's fees. By providing a bright-line rule it also eliminates satellite litigation regarding whether a company's late payment is material or not. To those ends, the law provides clear guidance for

determining when a company is in breach. It also sets forth a set of remedies that apply when a breach occurs. *See* Cal. Civ. Proc. Code § 1281.97(a)-(d). All of this ensures (1) that companies know exactly when their late payments will violate the statute (i.e., more than 30 days after the due date);[9] and (2) that companies know exactly what the consequences of a delay in payment will be.

SB 707's remedies are aimed at companies because under the arbitration framework, the company pays the arbitrator's fees (except for a small case initiation fee). *See, e.g.,* AAA Employment Workplace Fee Schedule at 1.[10] Therefore there is virtually no scenario in which an employee could delay arbitration by failing to pay the arbitrator's fees.

Furthermore, SB 707's framework is firmly grounded in both the FAA and in Ninth Circuit case law. Under the FAA, courts can stay proceedings that are being arbitrated only if "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C.A. § 3. In other words, when a party is in default in an arbitration proceeding, the FAA recognizes that the action should proceed in court.

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[9] SB 707 provides a 30-day grace period within which to pay the costs of arbitration. Failure to pay those costs within that 30-day time period is therefore antagonistic and hostile to the original intent of Congress when it enacted the FAA in 1924. Conversely, upholding the time period provided by SB 707 is entirely consistent and in harmony with the speed and efficiency Congress originally intended.

[10] https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

Ninth Circuit case law is in accord, finding that companies that refuse or delay payment in arbitration are in default and can no longer compel the claimant to proceed in arbitration. Specifically, in *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197 (2003) and *Brown v. Dillard's, Inc.*, 430 F.3d 1004 (2005), the Ninth Circuit established that non-payment of arbitration fees is a material breach of the party's obligations under the agreement and puts that party in default of the arbitration.

In *Brown*, the Court observed that allowing a party to compel arbitration notwithstanding its breach of the arbitration agreement would set up a perverse incentive scheme. *Brown*, 400 F.3d at 1012. That scheme would enable employers to "have an incentive to refuse to arbitrate claims brought by employees in the hope that the frustrated employees would simply abandon them." *Id.* Similarly, in *Sink*, the Court explained that the same offending party could default a second time if compelled back to arbitration, and that this cycle could continue, "resulting in frustration of the aggrieved party's attempts to resolve its claims." *Sink*, 352 F3d. at 1201.

SB 707 thus encourages the timely and efficient resolution of arbitrations by providing clear remedies in aid of arbitration. *Postmates*, 2021 WL 540155, at *8. It does not discourage or discriminate against arbitration. *Cf. Kindred Nursing Centers*, 137 S. Ct. at 1426. Accordingly, SB 707 passes muster under the disfavored treatment theory.

D. SB 707 Supports Arbitration and In No Way Stands as an Obstacle to the FAA's Objectives

A state law may be preempted if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives" and "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 343-44; *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 825-26 (9th Cir. 2019). In other words, a state law may be preempted if it would "undermine the goals and policies of the FAA." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-78 (1989). Two of the goals of the Arbitration Act are "[1] enforcement of private agreements and [2] encouragement of efficient and speedy dispute resolution." *Concepcion*, 563 U.S. at 345.

As explained above, SB 707 supports the enforcement of private agreements by ensuring that employers comply with their obligations to timely pay arbitration fees arising from the forum that the employers have selected. It also encourages efficient and speedy dispute resolution in two ways. First, it ensures that arbitrations will not be delayed by strategic decisions not to pay arbitration fees. Second, by creating a bright-line rule, it eliminates the need for any satellite litigation over whether an employer's payment of those fees is timely and/or material.

The *Amicus Curiae* Brief filed by CELC contends wrongly that SB 707 will discourage the "formation, performance, and enforcement of arbitration agreements." CELC Brief at 9. As to the formation of arbitration agreements, SB 707 will not discourage employees and consumers from entering into such agreements. To the contrary, by ensuring that companies cannot delay the process by choosing not to pay the arbitrator's fees, it will encourage employees and consumers to agree to arbitrate. As for companies, those that intend to pay the arbitrators' fees on time will not be discouraged from entering into arbitration agreements.

Furthermore, as explained above, standard procedures that govern arbitration proceedings for employers and consumers require companies to pay the arbitrator's fees. SB 707 encourages the performance and enforcement of arbitration agreements that adopt these procedures by ensuring that companies actually comply with these obligations.

CELC also errs in contending that the California Legislature intended to discourage companies from "entering into and enforcing arbitration agreements." CELC Brief at 11. CELC bases this contention on part of one sentence taken from the analysis of the California Assembly Committee on Judiciary Analysis. *Ibid.* However, the full sentence, taken in context, shows that the Legislature was not seeking to use SB 707 to discourage employers from entering into arbitration

agreements. Rather, it was merely pointing out that if employers were concerned about their ability to pay for arbitration proceedings they should consider how they structure their arbitration agreements:

> Perhaps, in order to lessen their risk of sanctions, drafting parties should reconsider their liberal use of binding arbitration provisions in contracts, or at a minimum, consider drafting these agreements in a manner that provides all parties increased access to the court system in the event circumstances arise that warrant adjudicating disputes in court. Cal. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 707 (2019-2020 Reg. Sess.) as amended May 20, 2019, p. 10.

CELC further complains about "mass arbitrations," in which many employees file individual demands for arbitration, causing administrative burdens for employers. CELC Brief at 13. This is a strange complaint, given that the reason for the multiplicity of demands in mass arbitrations is that companies have required their employees to forgo the ability to proceed in class actions (which would eliminate this concern altogether). Any employer that is concerned about having to process multiple individual demands for arbitration can easily opt to allow its employees to proceed in class arbitration.

CELC's brief refers to one example of a case in which the court applied section 1291.98 in a manner not to its liking: *Murrain v. Tesla, Inc.*, Santa Clara Superior Court Case No. 18CV33486. But that case demonstrates the need for SB 707, not any problems with it. In *Murrain*, on May 15, 2020, the arbitrator set November 24, 2020, as the date for Tesla's motion for summary adjudication

(MSA) to be heard. At that time, the arbitrator also notified all parties that payment for the motion had to be received by September 21, 2020, some four months later. See Plaintiff Fernando Murrain's Reply in Support of Motion to Vacate Order Staying Proceedings at 2:11-15.

Tesla filed its MSA on September 8, 2020. However, it did not pay the invoice by September 21, as instructed. Instead, it waited for almost three months until November 30, 2020—after the plaintiff had filed his opposition to the MSA, and 6 days after the hearing on the MSA was supposed to have been held—to pay. *Id.*, at 5:20-23. As a result of Tesla's delay, the arbitrator suspended the arbitration proceedings and canceled the MSA, but not before the plaintiff's attorneys had spent over 50 hours opposing Tesla's motion. *Id.*, at 3:5-7; 2:24-26. Tesla's gamesmanship, as well as the resulting delays and harm it caused to the plaintiff, are exactly why the Legislature needed to enact SB 707.[11]

[11] CELC contends that the court in *Murrain* "expressed concern" about the termination of arbitration in that case. (CELC 14) That is wrong. Instead, the court merely noted Tesla's "perspective" that the result in that case seemed unfair. The court's actual language is as follows:

> The Court understands that from Defendant's perspective, this result seems disproportionately harsh for a supposed administrative mistake/delay. But section 1291.98's language is crystal-clear."

Minute Order (12/17/2020) at 2.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the district court's order vacating its previous stay of litigation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,923 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Hunter Pyle
Hunter Pyle
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December 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature */s/ Hunter Pyle* **Date** December 23, 2021