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,
NO. G049838

FROM THE SUPERIOR COURT, COUNTY OF RIVERSIDE,
NO. RIC1109398, ASSIGNED FOR ALL PURPOSES TO
JUDGE PRO TEM JOHN W. VINEYARD, DEPARTMENT 12

APPLICATION OF PUBLIC CITIZEN, INC., FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-RESPONDENT SHARON MCGILL; AND AMICUS CURIAE BRIEF

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**APPLICATION OF PUBLIC CITIZEN, INC.,
FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENT**

Public Citizen, Inc. respectfully requests leave to file the accompanying brief as amicus curiae in support of plaintiff-respondent Sharon McGill, addressing the question whether the Federal Arbitration Act (FAA) preempts the application to the circumstances of this case of the principles of *Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal. 4th 303.

INTEREST OF AMICUS CURIAE

Founded in 1971, Public Citizen is a non-profit consumer advocacy organization with members and supporters nationwide, including in California. Public Citizen advocates before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Among Public Citizen's longstanding interests is the preservation of effective remedies for consumers and workers injured by violations of state and federal law. Public Citizen is concerned that arbitration is often ineffective to provide such remedies and may be used as a means of denying access to justice rather than of resolving disputes fairly. Those problems are heightened when, as in this case, an arbitration agreement specifically denies the arbitrator the power to grant relief to which the

plaintiff is entitled as a matter of substantive law—here, public injunctive relief if the plaintiff proves her claims.

Public Citizen has therefore participated as amicus curiae in many cases in federal and state courts involving issues surrounding arbitration, and Public Citizen's attorneys have also been involved in such cases as counsel or co-counsel for parties. Relevant cases in which Public Citizen has been involved as amicus curiae include *Sandquist v. Lebo Automotive, Inc.*, No. S220812 (pending in this Court), *DIRECTV, Inc. v. Imburgia* (2015) 136 S. Ct. 469, *American Express Co. v. Italian Colors Restaurant* (2013) 133 S. Ct. 2304, and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662. Pertinent cases in which its lawyers have been counsel or co-counsel for parties include *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, *cert. denied*1 (2015) 35 S. Ct. 1155, and *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740.

This case implicates concerns similar to those of other cases in which Public Citizen has participated, particularly *Iskanian*. That case, like this one, concerned in part whether the FAA requires enforcement of an arbitration agreement that precludes the assertion of claims for relief available under state substantive law. Public Citizen believes that its short brief in this case will be helpful to the Court in focusing on the specific issue that the circumstances of this case present: whether the *Broughton-Cruz* principle—that agreements to arbitrate claims for public injunctive

relief that arbitrators lack the power to grant are unenforceable—is preempted as applied to an arbitration agreement that explicitly denies the arbitrator the power to grant such relief. The brief argues that the Court need not reach broader issues—such as whether arbitration is inherently unsuited to cases involving public injunctive relief—and that the answer to the narrower question actually presented is that FAA does not preempt the application of *Broughton-Cruz* to an agreement that purports to waive the plaintiff's substantive right to pursue public injunctive relief.

CERTIFICATION

No party or counsel for a party in this appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae or its counsel in the pending appeal.

Dated: January 22, 2016

Respectfully submitted,

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Of Counsel:
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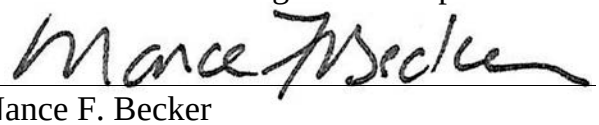
Public Citizen Litigation Group

By: 

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ARGUMENT

Defendant-appellant Citibank asserts that the "singular issue" this case presents is whether the Federal Arbitration Act (FAA) "preempts California's state-law rule, set forth in *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066(1999), and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303 (2003) (the *Broughton-Cruz* rule), that state-law claims for public injunctive relief are not arbitrable." Citibank Ans. Br. 1. As plaintiff-respondent Sharon McGill's brief demonstrates, whether the *Broughton-Cruz* preemption question is the "singular" issue this case presents is disputed. Even aside from that point, however, Citibank's description of the *Broughton-Cruz* issue this case presents is imprecise at best. A more accurate statement would be that the case presents the question whether the application of the *Broughton-Cruz* principle *to the circumstances of this case* is preempted. The answer to that question is no.

I. The essence of the *Broughton-Cruz* principle is that a plaintiff cannot be compelled to arbitrate a claim for public injunctive relief before an arbitrator who lacks the power to grant such relief.

The fundamental principle animating *Broughton* and *Cruz* is that a plaintiff must be permitted to litigate a claim for injunctive relief in court, rather than through arbitration, when the injunction sought is "beyond the arbitrator's power to grant," *Broughton*, 21 Cal. 4th at 1079, because forcing arbitration in such a case would have the effect of "vitiat[ing] through arbitration … the substantive right[]" to the injunction. *Id*. at 1083.

Where a conflict exists "between arbitration and a statutory injunctive relief remedy designed for the protection of the general public," *id*., "arbitration is not a suitable forum" for a claim to relief that the arbitration proceeding cannot provide. *Id*. at 1080.

Broughton went on to state that claims for public injunctive relief—that is, injunctive relief aimed at protecting the general public from the defendant's unlawful conduct rather than merely the individual plaintiff—are "inherently" unsuitable for arbitration because of the institutional limitations of arbitration. Citibank takes aim at that aspect of the *Broughton-Cruz* rule, arguing that it evinces hostility to arbitration and improperly "prohibits outright the arbitration of a particular type of claim." Citibank Ans. Br. 1 (quoting *AT&T Mobility v. Concepcion*, 563 U.S. 333, 341 (2011) ["*Concepcion*"]). This Court need not address here whether public injunctions are inherently beyond the power of arbitrators to issue, because, in *this* case, the arbitrator would indisputably lack power to issue a public injunction.

II. The arbitration agreement at issue explicitly forbids the arbitrator to grant public injunctive relief.

The arbitration agreement in this case provides: "the arbitrator may award relief only on an individual (non-class, non-representative) basis;" all claims "must proceed on an individual … bases;" the "arbitrator will not award relief for … anyone who is not a party;" and a claimant may not

"pursue" any claim "as a … private attorney general action or other representative action." Citibank Ans. Br. 7 (quoting Arbitration Agreement). Those terms plainly bar the issuance of public injunctive relief as this Court defined it in *Broughton* and *Cruz*: relief that "is for the benefit of the general public rather than the party bringing the action," *Broughton*, 21 Cal. 4th at 1082, and that is sought by a plaintiff "playing the role of a bona fide private attorney general," *id*. at 1080. *See also Cruz*, 30 Cal. 4th at 316 (referring to a claim for public injunctive relief as one "designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff").

Citibank's brief concedes that the agreement denies the arbitrator authority to issue a public injunction. Specifically, Citibank states that, "[a]s written, the Arbitration Agreement … mak[es] clear that the arbitrator may award relief, including injunctive relief, only on an individual basis." Citibank Ans. Br. 26; *see also id*. at 24 (quoting agreement's provisions for "relief only on an individual … basis"). There can thus be no doubt that under the agreement, public injunctive relief is "beyond the arbitrator's power to grant." *Broughton*, 21 Cal. 4th at 1079.

Application of the *Broughton-Cruz* principle to these circumstances therefore does not depend on the conclusion that public injunctive relief is *inherently* beyond the power of any arbitrator; rather, it rests on the undisputed fact that *Citibank's agreement* places the issuance of such relief

beyond the arbitrator's power. And under *Broughton* and *Cruz*, arbitration is not suitable where the arbitrator lacks the authority to grant public injunctive relief that the plaintiff is entitled to obtain under substantive law. *See Broughton*, 21 Cal. 4th at 1079-83. Compelling arbitration in such circumstances would "permit the vitiation through arbitration of the substantive rights afforded by [the] legislation" that provides for public injunctive relief. *Id*. at 1083.

III. The FAA does not preempt a state law that denies enforcement to an arbitration agreement that bars public injunctive relief.

This Court's decision in *Cruz* makes clear that the applicability of the principles established by *Broughton* may depend on the circumstances of particular cases. *See Cruz*, 30 Cal. 4th at 315 (holding *Broughton* applicable "under the circumstances of the present case"). Likewise, whether the application of the *Broughton-Cruz* principle to a particular case is preempted by the FAA is a question that should be determined based on the circumstances that justify its application. Thus, here, the issue is whether the FAA preempts the application of *Broughton* and *Cruz* to prohibit enforcement of an arbitration agreement that would require arbitration of claims for public injunctive relief under the Unfair Competition Law and Consumer Legal Remedies Act before an arbitrator who, under the agreement, *cannot grant such relief*. Whether *Broughton* and *Cruz* may be preempted in other circumstances—such as where an

arbitration agreement does not itself prohibit public injunctive relief but the plaintiff argues that an arbitrator is inherently incapable of adjudicating such claims—should be reconsidered, if at all, only in a case that actually requires resolution of that issue.

The assertion that *Broughton* and *Cruz* are preempted as applied in a case where an arbitration agreement expressly prohibits public injunctive relief is unpersuasive. Applying *Broughton* and *Cruz* in such circumstances does not reflect any generalized hostility to arbitration, nor does it amount to "prohibit[ing] outright the arbitration of a particular type of claim." *Concepcion*, 563 U.S. at 341. Rather, applying *Broughton* and *Cruz* here is fully consistent with the settled principle that the FAA does not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Iskanian v. CLS Transp. Los Angeles*, 59 Cal. 4th 348, 395 (2014) (Chin, J., concurring) (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)). An agreement that simultaneously purports to require arbitration of claims for public injunctive relief and forbids the granting of such relief by the arbitrator precludes the plaintiff from "asserting his statutory right[s]" to such relief "in any forum," and applying the *Broughton-Cruz* principle to foreclose arbitration of the claims under such circumstances "does not run afoul of the FAA." *Id.*

There are three fundamental reasons why the FAA does not preempt principles of state law that prohibit enforcement of arbitration agreements that do not permit claimants to assert substantive statutory rights to relief. First, the FAA itself provides for the enforcement of agreements to resolve disputes by arbitration, *see* U.S.C. § 2; it does not require enforcement of an agreement that *waives* substantive claims rather than genuinely providing for their arbitration. *See, e.g.*, *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 & n.19 (1985). Not enforcing an illusory agreement to arbitrate that is in fact an express waiver of substantive rights thus does not conflict with the FAA commands and cannot be preempted.

Second, the California-law principle that a waiver of the substantive right to seek a public injunction is unenforceable—and does not become enforceable merely because it is incorporated in an arbitration clause—is not a "state law[] applicable only to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), nor one "that takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Rather, it is an application of the general state-law principle that a right conferred to benefit the public may not be waived by contract. *Iskanian*, 59 Cal. 4th at 382-83. A California court would deny enforcement of a contract that purported to contain an anticipatory waiver of the right to seek public injunctive relief

not only when the waiver was incorporated in an arbitration clause, but also "in any context other than arbitration." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015). Such a legal rule of general applicability, which "places arbitration contracts 'on equal footing with all other contracts,'" *id*. at 468 (citation omitted), falls within the FAA's "savings clause," which provides that arbitration agreements may be set aside "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Applying *Broughton* and *Cruz* to hold as unenforceable an agreement to arbitrate a claim for public injunctive relief when the arbitration agreement expressly waives the right to seek such relief is fully consistent with that principle, incorporated in the text of the FAA itself.

Third, prohibiting arbitration of claims that an arbitrator lacks substantive authority to grant is not preempted on the ground that it grants litigants procedural rights that are "incompatible with arbitration." *Concepcion*, 563 U.S. at 351. The Supreme Court in *Concepcion* held that state laws that prescribe such procedural rights "interfere[] with fundamental attributes of arbitration: and thus conflict with the FAA's "overarching purpose" of "allow[ing] for efficient streamlined procedures tailored to the type of dispute." *Id*. at 344. This Court has, since *Concepcion*, repeatedly held that state laws the impose procedures incompatible with arbitration are subject to FAA preemption. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 913, 923 (2015); *Iskanian*, 59

Cal. 4th at 362-67; *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1143 (2013).

Although the FAA precludes states from granting procedural rights that are incompatible with the contractual choice of arbitration under the FAA, neither this Court nor the United States Supreme Court has ever held that the FAA prevents a state from protecting *substantive* rights that a particular arbitration agreement (or even arbitration agreements in general) may not allow a party to assert. The goals of the FAA, as described in *Concepcion*, 563 U.S. at 344-51, have nothing to do with fostering waivers of substantive rights; indeed, the goal of allowing parties to devise procedures "tailored to the type of dispute," *id*. at 344, is antithetical to the enforcement of an agreement that denies the exact remedy provided for by law for a particular dispute.

In sum, the essence of the *Broughton-Cruz* rule is that California law does not allow the enforcement of an arbitration agreement when it would result in a waiver of a party's right to obtain public injunctive relief under a California statute providing for such relief. Here, because the contract expressly bars such relief, it is unnecessary to consider whether *Broughton* and *Cruz* retain their authority as applied to arbitration agreements that do not expressly disallow public injunctive relief (or that expressly authorize its issuance). The FAA does not preempt California from declining to

enforce an agreement that does not permit the assertion of a non-waivable right to substantive relief. *Iskanian*, 59 Cal. 4th at 394-95.

IV. Whether the FAA preempts the application of *Broughton* and *Cruz* to the circumstances of this case is properly before this Court.

Citibank asserts that Ms. McGill waived the argument set forth in this brief by not presenting it below. But Citibank concedes that Ms. McGill has, throughout this case, sought the application of the *Broughton-Cruz* rule and argued that it is not preempted by the FAA. Citibank's waiver argument rests on the misunderstanding that the argument presented to this Court by Ms. McGill (and highlighted in this amicus brief) rests on a fundamentally different basis from that of *Broughton* and *Cruz*. Not so. The argument rests on the application of the principles of *Broughton* and *Cruz* and FAA preemption to the particular circumstances of this case, where the arbitration agreement expressly prohibits public injunctive relief. That Ms. McGill argued more broadly below should not bar her from making a nuanced argument in this Court for the application and non-preemption of *Broughton* and *Cruz* in this case, nor should this Court feel compelled to decide this case on a basis broader than necessary.

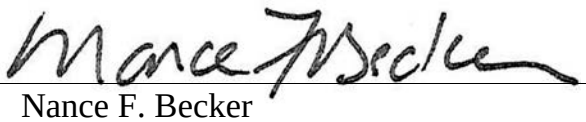
CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: January 22, 2016

Respectfully submitted,

Chavez & Gertler LLP
Of Counsel:
Scott L. Nelson
Public Citizen Litigation Group

By: 

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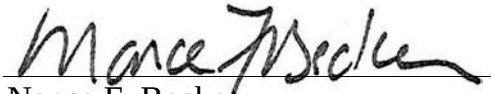
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count feature of the program used to prepare this brief (Microsoft Word 2010), undersigned counsel certifies that this Brief of Amicus Curiae Public Citizen, Inc., was produced using a 13-point, Roman type font (Century Schoolbook BT) and contains 2,109 words.

Dated: January 22, 2016

Respectfully submitted,

Chavez & Gertler LLP

By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MARIN

I am employed in the State of California, County of Marin. I am over the age of 18 and not a party to the within suit; my business address is 42 Miller Avenue, Mill Valley, CA 94941.

On **January 22, 2016**, I served the document described as: **APPLICATION OF PUBLIC CITIZEN, INC., FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-RESPONDENT 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:

See attached service list.

[☒] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[☐] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[☐] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

[☐] **BY PERSONAL SERVICE:** I personally delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[☐] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

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

Executed on **January 22,** 2016, at Mill Valley, California.

Patricia Pomerantz
Type or Print Name

Patti Pomerantz
Signature

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The Honorable Richard M Aronson The Honorable William F. Rylaarsdam The Honorable David F. Thompson c/o Clerk of the Court California Court of Appeal 4th Appellate District Division 3 601 W. Santa Ana Blvd. Santa Ana, California 92701 *via US mail*	**Court of Appeals**
Office of the District Attorney County of Riverside Appellate Division 3960 Orange Street Riverside, CA 92501 *via US mail*	**Office of the District Attorney** Per Cal. Rules of Court 8.29; Business & Professions Code § 17209
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 South Spring Street Los Angeles, CA 90013 *Via US mail*	**Office of the Attorney General** Per Cal. Rules of Court 8.29; Business & Professions Code§ 17209