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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NETWORK CAPITAL FUNDING CORPORATION,

Plaintiff and Respondent,

v.

ERIK PAPKE,

Defendant and Appellant.

G049172

(Super. Ct. No. 30-2013-00659735)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Reversed.

Righetti Glugoski, Matthew Righetti and John Glugoski for Defendant and Appellant.

Fisher & Phillips, Lonnie D. Giamela, Jimmie E. Johnson, and Wendy McGuire Coats for Plaintiff and Respondent.

* * *

Plaintiff and respondent Network Capital Funding Corporation (Network Capital) filed a declaratory relief action alleging its arbitration agreement with defendant and appellant Erik Papke required Papke to arbitrate his wage and hour claims on an individual basis rather than the classwide basis he sought in his pending arbitration proceeding. Papke petitioned the trial court to compel Network Capital to submit its declaratory relief claims to arbitration. According to Papke, the broad language in the parties' arbitration agreement required the arbitrator, not the court, to decide whether the agreement authorized class arbitration. The trial court denied Papke's petition, concluding it must decide whether the arbitration agreement authorized class arbitration, and in doing so found this particular agreement did not allow class arbitration. Papke challenges both these conclusions on appeal.

In a previous opinion we affirmed the trial court's order based on (1) the then existing uniform federal circuit court precedent holding a court should decide whether the parties agreed to class arbitration, and (2) the United States Supreme Court precedent holding an agreement to authorize class arbitration may not be inferred from the mere existence of an arbitration agreement, but rather the parties must expressly agree to class arbitration. The California Supreme Court granted Papke's petition for review and eventually transferred this case to us for reconsideration based on its subsequent decision in *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233 (*Sandquist*).

In *Sandquis*t, the Supreme Court addressed whether the court or the arbitrator must decide if the parties' arbitration agreement authorizes class arbitration. It concluded there is no universal rule allocating the decision to either the court or the arbitrator because the allocation of that decision is a matter of agreement between the parties. Accordingly, in each case, who decides whether the parties agreed to class arbitration turns on who the parties assigned that decision to under the terms of their contract.

As explained below, the *Sandquist* court interpreted the arbitration agreements in that case as assigning to the arbitrator the decision whether class arbitration was authorized. In doing so, the court rejected the contention California law presumes that courts rather than arbitrators decide the availability of class arbitration. Similarly, the court rejected the contention the Federal Arbitration Act (9 U.S.C. § 1 et. seq.; FAA) imposes a similar interpretative presumption in favor of courts deciding this question.

Here, we conclude the arbitration agreement between Papke and Network Capital is strikingly similar to the arbitration agreements at issue in *Sandquist*, and therefore the Supreme Court's reasoning compels the conclusion the arbitration agreement here allocated to the arbitrator the decision whether Papke and Network Capital agreed to class arbitration. Based on that conclusion, we reverse the trial court's order and remand with directions for the court to grant Papke's petition to compel arbitration. We therefore do not reach the issue whether Papke and Network Capital actually agreed to class arbitration.

I

FACTS AND PROCEDURAL HISTORY

In October 2011, Network Capital hired Papke as an employee. Papke signed the "Employment Acknowledgment and Agreement," which included the following binding arbitration provision (Arbitration Agreement): "I further agree and acknowledge that the Company and I will utilize binding arbitration to resolve all disputes that may arise out of or be related to my employment in any way. Both the Company and I agree that any claim, dispute, and/or controversy that either I may have against the Company (or its owners, directors, officers, managers, employees, agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act . . . . Included within the scope of

this Agreement are all disputes, whether based on tort, contract, statute . . . , equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as may otherwise be required by state or federal law."

In June 2013, Papke initiated arbitration proceedings against Network Capital by serving a demand for class arbitration. On behalf of all similarly situated current and former employees of Network Capital, Papke's demand alleged wage and hour claims under the Labor Code and the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.). Papke later served an amended class arbitration demand adding a representative claim under the California Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.).

After receiving Papke's demand, Network Capital told him the Arbitration Agreement did not authorize class arbitration. Network Capital also insisted the trial court must resolve any disagreement over the availability of class arbitration, not the arbitrator. Papke disagreed, arguing the Arbitration Agreement's broad language required the arbitrator to decide all claims, disputes, and controversies between the parties, including whether the Arbitration Agreement authorized class arbitration.

Based on this disagreement, Network Capital sought a judicial declaration that (1) it is the court's responsibility to decide whether the Arbitration Agreement authorized class arbitration, and (2) the Arbitration Agreement prohibited class arbitration. In August 2013, Network Capital sought a preliminary injunction enjoining Papke from seeking any class or representative relief in the pending arbitration proceedings. Papke opposed that motion, demurred to Network Capital's complaint, and petitioned for an order compelling Network Capital to submit their dispute to the arbitrator for resolution.

The trial court heard all three motions at the same time and took the matters under submission. A few days later, the court granted Network Capital the requested preliminary injunction, denied Papke's petition to compel arbitration, and overruled Papke's demurrer. The court explained, "the issue of whether the agreement requires arbitration of class actions is one for the court and the court determines that the agreement allows for the arbitration of Mr. Papke's personal claims, but does not address Mr. Papke asserting the claims of others, including class members."

In our original opinion, we acknowledged the unsettled nature of the law regarding whether the court or the arbitrator decides if the parties agreed to class arbitration. We affirmed the trial court's decision based on the only federal circuit court opinions that had confronted the question. (See, e.g., *Opalinski v. Robert Half Internat., Inc.* (3rd Cir. 2014) 761 F.3d 326, 332-335; *Huffman v. Hilltop Companies, LLC* (6th Cir. 2014) 747 F.3d 391, 398-399; *Reed Elsevier, Inc. ex rel. LexisNexis Division v. Crockett* (6th Cir. 2013) 734 F.3d 594, 597-599.) The Supreme Court granted Papke's petition for review and held this matter pending its decision in *Sandquist*. After the Supreme Court filed its *Sandquist* decision, it transferred this matter for us to reconsider in light of *Sandquist*.

II

DISCUSSION

The ultimate issue in this case is whether the parties' Arbitration Agreement allows Papke to pursue class and representative claims in arbitration, or requires him to arbitrate his claims on an individual basis only (sometimes, Class Arbitration Question). Before we reach that issue, however, we first must determine who decides that question (sometimes, Who Decides Question). If it is the arbitrator, we must reverse and remand for the arbitrator to decide the Class Arbitration Question in the first

instance. If it is the trial court, only then do we review whether the court properly determined the Arbitration Agreement did not authorize class arbitration.

A. *Standard of Review*

"'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed.'" (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.) Interpreting a written arbitration agreement is a question of law subject to de novo review when there is no conflicting extrinsic evidence on the document's meaning. (*Ibid*.) Because the parties offered no extrinsic evidence on the meaning of the Arbitration Agreement, we review the trial court's ruling under the de novo standard.

B. *The* Sandquist *Opinion*

In *Sandquist*, the Supreme Court confronted the Who Decides Question and concluded that "[n]o universal one-size-fits-all rule" allocates that question to either arbitrators or courts in every case. (*Sandquist*, *supra*, 1 Cal.5th at pp. 241, 243.) Rather, like the question whether the parties agreed to arbitrate a particular dispute, the Who Decides Question is a matter of party agreement: "[T]he question who has the power to decide the availability of class arbitration turns upon what the parties agreed about the allocation of *that* power." (*Id*. at p. 243.) The "mandatory starting point" therefore is the language of the parties' arbitration agreement. (*Ibid*.)

Sandquist involved an employer's efforts to compel its former employee to arbitrate his racial discrimination and harassment claims on an individual basis, rather than the classwide basis the employee sought. When the employee began working for the employer, he signed three separate arbitration agreements that shared the same basic structure and much of the same language. (*Sandquist*, *supra*, 1 Cal.5th at pp. 241-242,

245.) The Supreme Court therefore examined the language of these agreements, focusing on three provisions it found relevant to the Who Decides Question.

First, *Sandquist* examined the language that extended all three agreements to "'any claim, dispute, and/or controversy (including, but not limited to any [and all] claims of discrimination and harassment) which would otherwise require or allow resort to any court or other governmental dispute resolution forum, between [me/myself] and the Company.'" (*Sandquist, supra*, 1 Cal.5th at pp. 245-246.) The court found this language to be "comprehensive," and explained, "If a dispute or controversy is between [the employee] and [the employer], as the one before us surely is, and if it might otherwise be permissibly submitted to a court, as the question whether class arbitration is available surely could be, this portion of the arbitration clause suggests a choice to have the decision made by an arbitrator." (*Id*. at p. 246.)

Next, the court considered the language that extended the three agreements "to all claims 'arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise.'" (*Sandquist, supra*, 1 Cal.5th at p. 246, italics omitted.) *Sandquist* found the employee's discrimination and harassment claims plainly arose out of his employment with the employer, and "[t]he procedural question those claims present[ed]—whether [the employee] may pursue his claims on a class basis—directly [arose] from his underlying claims." (*Ibid*.) The court concluded this connection between the employee's employment and the Class Arbitration Question suggested a choice to have the arbitrator decide the Class Arbitration Question because that question easily satisfied the arbitration agreements' broad nexus requirement—that is, the Class Arbitration Question was covered by the arbitration agreements because it had some "'relationship or connection whatsoever'" with the employee's employment. (*Ibid*.)

Finally, the *Sandquist* court noted that two of the three agreements included a clause identifying specific disputes that otherwise were subject to arbitration, but expressly were defined as nonarbitrable. Specifically, two of the three agreements stated that all disputes described by the clauses discussed above were arbitrable "'with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims.'" (*Sandquist*, *supra*, 1 Cal.5th at p. 246.) The Supreme Court explained these clauses suggested the parties chose the arbitrator to decide the Class Arbitration Question because "[t]he drafter of these agreements might well have specified other matters not for the arbitrator, such as the availability of class arbitration at issue here, but did not [do so]." (*Ibid*.)

The *Sandquist* court determined, "These features of the arbitration clauses suggest the 'who decides' question is an arbitrable one, but they are by no means conclusive. In the presence of ambiguity, we turn to other principles applicable to the interpretation of arbitration clauses and contracts generally." (*Sandquist*, *supra*, 1 Cal.5th at p. 246.)

First, the court explained, "When construing arbitration provisions, we must consider the parties' likely expectations about allocations of responsibility," and "'[t]ypically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for *any* contact with the courts.'" (*Sandquist*, *supra*, 1 Cal.5th at pp. 246-247.) "[T]o resolve the 'who decides' question in favor of a court would contravene that expectation and impose substantial additional cost and delay," and therefore *Sandquist* stated it "[would] not lightly assume [the parties] would have expected or preferred a notably less efficient allocation of decisionmaking authority." (*Id*. at p. 247.)

Next, the court pointed out the longstanding presumption in favor of arbitration when an arbitration agreement is ambiguous: "[U]nder state law as under federal law, when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration. [Citations.] All else being equal, this presumption tips the scales in favor of allocating the class arbitration availability question to the arbitrator." (*Sandquist*, *supra*, 1 Cal.5th at p. 247.)

Finally, the Supreme Court turned to the interpretative principle that ambiguities in a written agreement are construed against the drafter, especially when the contract is a form contract: "Where the drafter of a form contract has prepared an arbitration provision whose application to a particular dispute is uncertain, ordinary contract principles require that the provision be construed against the drafter's interpretation and in favor of the nondrafter's interpretation." (*Sandquist*, *supra*, 1 Cal.5th at p. 248.) The court explained the employer had drafted the three arbitration provisions that failed to specify its preference for the court to decide the Class Arbitration Question, and therefore the employer could not claim the benefit of the ambiguity it created. (*Ibid*.)

Based on the language of the three agreements and the foregoing interpretation principles, the *Sandquist* court "conclude[d], as a matter of state contract law, the parties' arbitration provisions allocate the decision on the availability of class arbitration to the arbitrator, rather than reserving it for a court." (*Sandquist*, *supra*, 1 Cal.5th at p. 248.) In reaching this conclusion, the *Sandquist* court rejected the employer's contention California law presumes that courts, not arbitrators, should decide the availability of class arbitration. (*Id*. at pp. 249-250.) The Court also rejected the contention the FAA "imposes an interpretive presumption that, as a matter of federal law,

preempts state law rules of contract interpretation and alters the conclusion state law would otherwise reach here."[1] (*Sandquist*, at p. 251.)

C. *The Arbitrator Must Decide the Class Arbitration Question Based on the Language of the Arbitration Agreement*

Based on the striking similarities between the Arbitration Agreement Papke signed with Network Capital and the arbitration agreements in *Sandquist*, the Supreme Court's analysis in *Sandquist* applies with equal force here and compels us to conclude the arbitrator must decide the Class Arbitration Question in this case.

First, the arbitration agreements in *Sandquist* required arbitration of "'any claim, dispute, and/or controversy'" between the employee and employer (*Sandquist*, *supra*, 1 Cal.5th at pp. 245-246); the Arbitration Agreement here applies to "any claim, dispute, and/or controversy that either [Papke] may have against [Network Capital] . . . or [Network Capital] may have against [Papke]." Second, the arbitration agreements in *Sandquist* applied to all claims "'arising from, related to, or *having any relationship or connection whatsoever* with [the employee] seeking employment with, employment by, or other association with the [employer]" (*id*. at p. 246); the Arbitration Agreement here governs "all disputes that may arise out of or be related to [Papke's] employment *in any way*" (italics added). Third, like two of the three arbitration agreements in *Sandquist*, the Arbitration Agreement here provides, "The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development

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[1] *Sandquist* includes a lengthy discussion and a lengthy three-justice dissent regarding whether the FAA establishes a presumption that the courts should decide the availability of class arbitration. (*Sandquist*, *supra*, 1 Cal.5th at pp. 251-260, 261-268.) We do not address that question because the parties implicitly agree the issue here is strictly a matter of contract interpretation under state law.

Department Claims, or as may otherwise be required by state or federal law." Finally, like the arbitration agreements in *Sandquist*, the Arbitration Agreement here is a form contract drafted by Network Capital and imposed on Papke as a term of his employment.

Given these similarities, we see no basis for distinguishing *Sandquist* and concluding the Arbitration Agreement allocates the Class Arbitration Question to the court, not the arbitrator. Nonetheless, Network Capital contends the Arbitration Agreement's language is not similar to the language at issue in *Sandquist*, and therefore the court must decide the Class Arbitration Question.

First, Network Capital contends the Arbitration Agreement is silent on the availability of class arbitration and includes no express language delegating the Class Arbitration Question to the arbitrator. Although this is true, it is not a fact that distinguishes this case from *Sandquist* and permits a different outcome. The arbitration agreements in *Sandquist* also were silent on the availability of class arbitration and included no language expressly delegating the Class Arbitration Question to the arbitrator. (*Sandquist, supra*, 1 Cal.5th at pp. 244-245.) Nonetheless, the Supreme Court interpreted the arbitration agreements based on their broad language and the contractual interpretation principles discussed above to conclude the Class Arbitration Question was a dispute subject to arbitration under the parties' arbitration agreement. As stated above, we see no meaningful basis upon which to distinguish the Arbitration Agreement's language and the language of the arbitration agreements in *Sandquist*.

To support its contrary contention, Network Capital points to the United States Supreme Court decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 684, and its conclusion a party may not be compelled to submit to class arbitration unless there is an express contractual basis for concluding the party agreed to class arbitration. (See *id*. at p. 685 ["An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate"].) Network Capital misses the point. *Stolt-Nielsen*

addressed the Class Arbitration Question itself—that is, whether a party could be compelled to submit to class arbitration. The Supreme Court did not decide that question in *Sandquist* and we do not decide it here. Rather, we are deciding the antecedent question: who decides whether the parties agreed to class arbitration. Following our decision, the arbitrator will then apply *Stolt-Nielsen* and other relevant authority to decide the Class Arbitration Question.

Second, Network Capital contends the arbitration agreements in *Sandquist* were much broader because those agreements applied to claims "'having any relationship or connection whatsoever with [the employee's employment]'" (*Sandquist*, *supra*, 1 Cal.5th at p. 246, italics omitted), but the Arbitration Agreement here only applies to "all disputes that may arise out of or be related to my employment in any way." We disagree. Network Capital ignores the significance of the phrase "in any way" at the end of the clause in the Arbitration Agreement. Indeed, Network Capital fails to explain how the phrase "any relationship or connection whatsoever" is meaningfully different than "may arise out of or be related to . . . in any way." We see no significant difference.

Third, Network Capital contends the Arbitration Agreement here is distinguishable because it is limited to disputes that "may arise out of or be related to *my* employment." According to Network Capital, the singular possessive "my" limits the Arbitration Agreement to claims arising out of or relating to Papke's employment only, and therefore the Agreement cannot be extended to apply to claims involving the employment of any other employee. We disagree. The arbitration agreements in *Sandquist* similarly used the singular possessive "my" in applying the agreements to claims having any connection with "'*my* seeking employment with, employment by, or other association with the Company.'" (*Sandquist*, *supra*, 1 Cal.5th at pp. 244-245, italics added.) Moreover, class claims that Papke alleges as a class representative necessarily arise out of or relate to his employment because he cannot allege or pursue the claims unless he, as an individual, has claims that are typical of the class. (See *id*. at

p. 246 [whether class representative may pursue employment claims on a classwide basis relates to representative's employment and falls within scope of agreement requiring arbitration of employment related claims].)

In a variation of this same argument, Network Capital contends the Arbitration Agreement is distinguishable because it limits itself to claims that "[Papke] may have against [Network Capital], or [Network Capital] may have against [Papke]." Although the arbitration agreements in *Sandquist* do not include the same "have against" phrase, those agreements nonetheless speak in terms of claims "between [the employee] and the [employer]." (*Sandquist*, *supra*, 1 Cal.5th at pp. 244-245.) Moreover, Network Capital ignores the Arbitration Agreement's language stating Papke and Network Capital agree to "utilize binding arbitration to resolve all disputes that may arise out of or be related to my employment in any way." This is a separate sentence in the Arbitration Agreement that does not include the "have against" phrase on which Network Capital relies. The clear intent of the portion of the Arbitration Agreement Network Capital cites is to emphasize the Agreement applies to not only claims Papke may seek to assert, but also claims Network Capital may seek to assert. Nothing in the use of this language distinguishes the Arbitration Agreement from the agreements in *Sandquist*.

Finally, Network Capital contends the Arbitration Agreement here is distinguishable from the agreements in *Sandquist* because it does not include language expressly withdrawing from its scope National Labor Relations Act, California Workers' Compensation Act, and Employment Development Department claims. According to Network Capital, the absence of a clause withdrawing certain claims from the Arbitration Agreement's scope prevents us from drawing any inference from the lack of a clause excluding the Class Arbitration Question from the Arbitration Agreement's scope. The fatal flaw in this argument is that the Arbitration Agreement includes a clause excluding the same types of claims from the Arbitration Agreement; Network Capital simply stops its quotation of the Arbitration Agreement before it reached that point.

III

DISPOSITION

The order is reversed and we remand with directions for the trial court to grant Papke's petition to compel arbitration. Papke shall recover his costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.