No. 06-1463

IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION

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Respondent Alex E. Ferrer ("Ferrer") has filed an Opposition, asking the Court to deny review. Petitioner respectfully submits the following rebuttal to Respondent's principal contentions.

ARGUMENT

1. The opening sentence of the Opposition asserts that "[t]he decision of the court below does not undermine the viability of arbitration provisions in contracts involving interstate commerce...." (Opp. at 1)

The fate of Petitioner's arbitration demand in this case belies that argument, since the hearing was scheduled for January 26, 2006 and this entire case would have been arbitrated 18 months ago, but for the Superior Court's December 7, 2005 *injunction halting the arbitration*, which remains in full force and effect. (Pet. App. 4a)

2. The Opposition downplays this case as "California-centric" (Opp. at 7), only of interest "to those who function in the California entertainment industry...." (Opp. at 6)

Actually, the California Labor Commissioner routinely asserts "long arm" jurisdiction over personal managers *nationwide.*

Breuer v. Top Draw Entertainment, Inc. (1996) TAC 18-95 (published at www.dir.ca.gov/dlse/DLSE-TACs.htm), is a case in point. In that case, the California Labor Commissioner assumed jurisdiction to determine the legality of a personal management contract between a New York manager and a New York artist, which was executed in New York. The ground cited for assuming jurisdiction was, the

New York manager, at one point in the relationship, escorted his New York client to California for an entertainment industry "showcase."

The Labor Commissioner did not balance the "governmental interests" of New York against California in *Breuer,* nor give any consideration to choice of law principles. Rather, the Commissioner applied the "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1946). Since the personal manager *briefly* conducted business in California, the Labor Commissioner assumed jurisdiction to determine the legality of the New York management contract.

Any successful entertainment career is likely to involve engagements in California sooner or later. Hence, the anti-arbitration holding in this case, taken together with the Labor Commissioner's use of "minimum contacts" as the standard for asserting jurisdiction over out-of-state personal managers, means that personal managers *nationwide* have been stripped of their right to arbitrate contract disputes with their clients.

In the present matter, the "Artist," Judge Ferrer, is a resident of Florida and tapes his television program in Texas. (Pet. App. 11a) Thus, when the Labor Commissioner held that she had jurisdiction to hear Mr. Ferrer's case (Pet. App. 10a), she was imposing the California Labor Code in a case where the "laborer" neither resided nor worked in California. The Court of Appeal expressly *affirmed* this aggressive, extraterritorial application of the California Labor Code. (Pet. App. 11a)

As such, this case is not as "California-centric" as Respondent asserts.

Moreover, the Opposition fails to properly address the argument that, if certiorari is denied, then *Ferrer v. Preston* (2006) 145 Cal.App.4th 440, 51 Cal.Rptr.3d 628 will be cited in other states to distinguish, and undermine, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006).

3. The Opposition argues that "the issue of whether the de novo hearing will be conducted by a court or an arbitrator has not yet been litigated...." (Opp. at 5)

Neither party has previously raised this "issue." Why not? Because the California statute is crystal clear: *de novo* appeals from the Commissioner are heard by the Superior Court. As stated in the California Talent Agencies Act, Labor Code §1700.44(a):

> "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, *to the superior court* where the same shall be heard de novo." (Emphasis added)

4. The Opposition republishes Mr. Ferrer's *ipse dixit* accusation that Mr. Preston acted illegally as a talent agent without a license. (Opp. at 3) Actually, personal managers do *not* need licenses in California, and Judge Ferrer has yet to adduce a scintilla of evidence that Mr. Preston has done anything unlawful.

The legal distinction between "personal managers" and "talent agents" was explained in *Styne v. Stevens* (2001) 26 Cal.4th 42, 50-51:

> "[The Talent Agencies] Act's definition of a talent agency is narrowly focused on efforts to secure professional 'employment or engagements' for an 'artist or artists.' (§1700.4, subd. (a).) Thus, it does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs)...nor does it govern assistance in an artist's business transactions other than professional employment." (Emphasis in original)

Mr. Preston is a *manager*. (Pet. App. 3a) Since California law does *not* require him to have a license to act in that role, Judge Ferrer alleged that Mr. Preston illegally solicited and procured employment for Ferrer (Opp. at 3), since those activities *do* require a talent agency license.

However, no evidence at all was adduced by Judge Ferrer in support of this bare allegation (Pet. App.17a), whereas Mr. Preston filed a declaration in the Superior Court *denying* under oath that he solicited or procured.

The *dearth of evidence* submitted by Mr. Ferrer was noted by Court of Appeal Justice Miriam Vogel in her *dissent:*

> "There is yet another reason to reverse. Ferrer established his 'colorable' defense under the Talent Agencies Act by argument, not by evidence, and the trial court then relied on the existence of this defense to support its decision to issue a preliminary injunction staying the arbitration proceedings. Put another way, there is no evidence at all to support issuance of the preliminary injunction, and this fact

> alone requires reversal. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 441-442 [a preliminary injunction must be supported by evidence establishing the moving party's probability of success on the merits]; *Higgins v. Superior Court, supra,* 140 Cal.App.4th at p. 1249 [the party opposing a petition to compel arbitration bears the burden of proving by a preponderance of evidence any facts necessary to his defense].)" (Pet.App. 17a)

The Opposition glosses over this aspect of the case by characterizing the accusation of illegal conduct as Mr. Ferrer's "*contention.*" (Opp. at 3) Having pointed the accusing finger at Mr. Preston, Judge Ferrer has yet to back it up with *any evidence at all.* As such, that is all it is: a naked accusation, with no evidence in the record to support it.

Since Petitioner's contractual right to arbitrate was negated by the California Courts without any evidence of illegality, a bad precedent was set, *a per se* rule that all an artist has to do is *accuse* the manager of violating the Talent Agencies Act and an arbitration can thereby be automatically *derailed for years*, while the matter works its way through the Labor Commissioner, the Superior Court, and the California appellate courts.

Since the California Labor Commissioner has, in effect, assumed a *nationwide jurisdiction* in this field, neither the personal manager nor the artist has to be from California for this tactic to work, and the public policy favoring arbitration of disputes has been undermined.

CONCLUSION

The Court of Appeal's decision in this case is directly at odds with *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006) and the Federal Arbitration Act.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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