SERVICE ON ATTORNEY GENERAL AND DISTRICT ATTORNEY REQUIRED BY BUS. & PROF. CODE, §17209 AND CAL. RULES OF COURT, RULE 8.29

S199119

COPY

IN THE SUPREME COURT OF CALIFORNIA

GIL SANCHEZ,
Plaintiff and Respondent,

v.

VALENCIA HOLDING COMPANY, LLC,
Defendant and Appellant.

SUPREME COURT
FILED

OCT 10 2012

Frank A. McGuire Clerk

Deputy

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B228027

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF APPELLANT VALENCIA HOLDING COMPANY, LLC

HORVITZ & LEVY LLP
LISA PERROCHET (BAR NO. 132858)
FELIX SHAFIR (BAR NO. 207372)
JOHN F. QUERIO (BAR NO. 235524)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
fshafir@horvitzlevy.com
jquerio@horvitzlevy.com

RECEIVED

OCT 01 2012

CLERK SUPREME COURT

ATTORNEYS FOR AMICUS CURIAE
CALIFORNIA NEW CAR DEALERS ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

IN THE SUPREME COURT OF CALIFORNIA

GIL SANCHEZ,
Plaintiff and Respondent,

v.

VALENCIA HOLDING COMPANY, LLC,
Defendant and Appellant.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, the California New Car Dealers Association requests permission to file the attached amicus curiae brief in support of appellant Valencia Holding Company, LLC.

The California New Car Dealers Association (CNCDA) is a California non-profit mutual benefit corporation chartered to advance the interests of the new motor vehicle dealer industry in California. Of the more than 1,200 new vehicle dealers in California, more than 1,000 are members of the CNCDA.[1] The

---

1 Appellant Valencia Holding Company, LLC is a member of the CNCDA, but neither it nor any other party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule (continued...)

CNCDA routinely advocates the interests of new car dealers in courts across the state by filing amicus curiae briefs in cases involving issues of vital concern. In fulfilling that role, the CNCDA has appeared multiple times before this court and the California Courts of Appeal.

The CNCDA's new car dealer members negotiate retail installment sale contracts that include arbitration provisions allowing for a predictable and expeditious resolution of future disputes between the parties. The arbitration clause held to be unconscionable in this case is used by a majority of the CNCDA's members and governs innumerable purchase transactions. The Court of Appeal's holding creates significant legal uncertainty regarding the continued use of this arbitration clause, affects the legality of millions of car purchase contracts in this state, and is accordingly of great interest and concern to the CNCDA's members and the car-buying public.

The CNCDA is thus deeply interested in how this court decides the questions presented in this case, especially the effect of the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740, 179 L.Ed.2d 742] on California unconscionability law and whether the arbitration clause at issue falls afoul of state unconscionability principles. The CNCDA believes this court would benefit from additional briefing

---

(...continued)
8.520(f)(4)(A).) The CNCDA certifies that no person or entity other than the CNCDA and its counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4)(B).)

on those questions, and respectfully requests that it accept and file this amicus curiae brief addressing them.

September 27, 2012

HORVITZ & LEVY LLP
LISA PERROCHET
FELIX SHAFIR
JOHN F. QUERIO

By: ______________________
John F. Querio

Attorneys for Amicus Curiae
CALIFORNIA NEW CAR DEALERS ASSOCIATION

AMICUS CURIAE BRIEF

INTRODUCTION

In refusing to enforce the parties' agreement to arbitrate disputes over auto purchase transactions, the Court of Appeal really had to squint to arrive at the blurred conclusion that the agreement must be invalidated on unconscionability grounds. The Court of Appeal's analysis, in addition to being clearly preempted by the Federal Arbitration Act (FAA), fails to properly apply longstanding principles of state unconscionability law.

The arbitration clause at issue in this case establishes a balanced dispute resolution process that provides for an appeal to a three-arbitrator appellate panel where the result exceeds the reasonable expectations of the parties to an automobile sales transaction (i.e., where the initial arbitration awards the claimant either nothing or an amount exceeding $100,000, or where the award includes injunctive relief). As is the case with appellate litigation, the clause also requires an appealing party on either side of a dispute to advance the costs of an arbitral appeal—but even this advance is subject to reapportionment by the arbitral appellate panel as it deems fair.

Notwithstanding the mutuality of both the appeal right and cost advancement provisions, the Court of Appeal invalidated this provision as substantively unconscionable because the court found it established a dispute resolution process that was disproportionately favorable to car dealers over buyers. As discussed below, this conclusion is incorrect. Even if it were correct, however, the FAA does not allow states to weigh contracting parties' relative interests in the contract terms as a basis for determining the enforceability of the contract. And even if the FAA did not preempt the court's holding, its analysis fails to meet the unconscionability standard established by this court, described most recently in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223 (*Pinnacle*). The Court of Appeal's holding improperly endorses an extreme version of state unconscionability law requiring strict bilaterality of benefits and burdens between the parties as to *each contractual term* in isolation, rather than following long-established legal principles whereby the contract as a whole is analyzed in the context of the commercial realities of the relevant marketplace.

FAA Preemption

The United States Supreme Court's recent landmark opinion in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*) flatly holds that the FAA's primary purpose of ensuring "the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" requires state courts to enforce arbitration agreements as written. (*Id.* at p. 1748.) Crucial to the present dispute, *Concepcion* further concludes that, notwithstanding the FAA's saving clause (9 U.S.C.A. § 2) that preserves generally applicable state law defenses (like unconscionability), such defenses are preempted if they stand as an obstacle to the accomplishment of this Congressional purpose (*Concepcion*, at p. 1748) and may not be "applied in a fashion that disfavors arbitration." (*Id.* at p. 1747.) In other words, state courts may not " 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.' " (*Ibid.*, quoting *Perry v. Thomas* (1987) 482 U.S. 483, 493, fn. 9 [107 S.Ct. 2520, 96 L.Ed.2d 426].)

The Court of Appeal here found the monetary and injunctive relief triggers for the three-arbitrator appeal provision, along with the cost advancement procedure, to unduly favor car dealers over buyers. In doing so, the court interfered with the parties' protected choice of dispute resolution procedures under the guise of an unconscionability analysis. *Concepcion* specifically condemned this type of meddling because, in practice, it has "a disproportionate impact on arbitration agreements" in direct contravention of the FAA's purpose. (*Concepcion*, *supra*, 131 S.Ct. at p. 1747.) Accordingly, the FAA requires the enforcement of the three-arbitrator appeal provision as written.

Unconscionability

Even if the FAA did not preempt the Court of Appeal's unconscionability analysis, and even if (in some circumstances, depending upon the facts underlying a future case) the arbitration agreement provided a dispute resolution process that favored the dealer, the Court of Appeal was wrong to apply unconscionability principles to invalidate the three-arbitrator appeal provision. An arbitration clause—like any other contract—may be found unconscionable only where it is " 'so one-sided as to "shock the conscience" ' " (*Pinnacle*, *supra*, 55 Cal.4th at p. 246); the mere fact that it gives one party a somewhat greater benefit than the other is insufficient.

The Court of Appeal based its unconscionability analysis on some fundamental misconceptions about the nature of the car sales market at issue. Car buyers like Mr. Sanchez have become quite sophisticated and take full advantage of price competition among dealers, which leaves dealers with a very slim profit margin. Car dealers are generally small, family-owned businesses with modest profit and net worth. They also face a maze of complex regulations mandating what auto sales contracts must contain, thus requiring the use of standardized form contracts like the one at issue here. When disputes arise, they generally involve small amounts of money and are highly fact-intensive, making full-blown litigation too expensive for both buyer and dealer. The arbitration clause at issue allows speedy, informal resolution of such disputes, and was specifically crafted with this commercial context in mind. Furthermore, with the average selling price of a new vehicle in California at a little over $30,000, and buyer complaints in this area generally arising out of defects in the car, flawed repairs, or miscalculated finance charges, the vast majority of disputes involve amounts under $100,000.

In light of this commercial context, the three-arbitrator appeal provision does not meet the high threshold this court has required for a finding of unconscionability.[2] The Court of Appeal greatly emphasized the language in the arbitration clause allowing either party to appeal to a three-arbitrator panel an initial arbitration award exceeding $100,000. The court completely disregarded the fact that the same provision also allowed either side to appeal an initial award of $0. Properly viewed in context, this agreement simply allows a losing party to appeal outlier awards in a manner that benefits both buyer and dealer. For the vast majority of cases—those falling between the $0 and $100,000 marks—both parties benefit from the finality that will attend the single arbitrator's award. Contrary to the unfounded assumptions of the Court of Appeal, buyers as well as dealers stand to benefit from the appeal option. Buyers who lose their claims against dealers—recovering $0—may seek appellate review. Given the amounts at issue when a buyer is sued for nonpayment of a vehicle loan (including interest, costs, and attorney fees), buyers occasionally face awards exceeding $100,000, and thus benefit from the option to appeal such outlier awards. Meanwhile, buyers accused of nonpayment can feel reassured that they will not have to respond to an appeal seeking a higher award in those cases where

---

[2] This brief focuses on the errors in the Court of Appeal's analysis of the three-arbitrator appeal provision in the arbitration clause. Other aspects of the court's holding (e.g., the purported unconscionability of the exclusion of self-help remedies from arbitration) are addressed in the amicus brief submitted by the American Financial Services Association, California Financial Services Association, and California Bankers Association, as well as in the merits briefs of Valencia Holding Company, LLC. (See OBOM 47-48; RBOM 22-25.)

only a nominal or very moderate amount is assessed against the buyer. The Court of Appeal neglected this side of the equation when assessing whether the arbitration clause was sufficiently bilateral.

The Court of Appeal likewise held that the right of either party to seek appellate review before a three-arbitrator panel when the initial arbitration yields an award of injunctive relief is impermissibly one-sided and substantively unconscionable. The court concluded that the provision "unduly burdens the buyer because the buyer, not the car dealer, would be the party obtaining an injunction." (Typed opn., p. 22.) This conclusion incorrectly assumes that the only injunctive relief available in this type of case favors buyers (e.g., by prohibiting improper collection activities). The Court of Appeal disregarded the fact that courts frequently award injunctive relief *against buyers*—requiring the turnover of vehicles by buyers who resist the exercise of self-help repossession rights by keeping the vehicle in a garage where repossession cannot legally take place. Under the three-arbitrator appeal provision, therefore, *each* side has the opportunity to appeal injunctive awards arising out of the car purchase transaction. The Court of Appeal simply refused to acknowledge any aspects of the three-arbitrator appeal provision that offer benefits to buyers facing injunctive relief.

Lastly, the Court of Appeal found the provisions in the arbitration clause requiring the appealing party to advance the filing fee and other costs of an arbitral appeal (subject to a reapportionment by the arbitrators as they deem fair) to be substantively unconscionable. The court evidently decided to disregard the fact that cost allocation procedures such as this are common both in civil appeals in court and in arbitrations generally. The court below overlooked the fact that the arbitration clause requires the dealer to pay the buyer's share of the costs of an initial arbitration, up to a $2,500 limit, thereby providing a significant benefit to the buyer. And the court engaged in precisely the sort of speculative reasoning that the United States Supreme Court has condemned when it surmised that buyers might not be able to afford the costs of an arbitral appeal. (See *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 91-92 [121 S.Ct. 513, 148 L.Ed.2d 373] (*Green Tree*).)

If arbitration agreements continue to face frequent rejection under California law notwithstanding *Concepcion*, new car dealers and other small businesses in this state will in turn face increased operational expenses in a highly competitive industry, and will suffer a disadvantage relative to out-of-state rivals. Crucially, dealers take into account anticipated dispute resolution expenses when establishing an acceptable selling price for a vehicle. Thus, litigation increases the cost of a vehicle to consumers. By contrast, establishing streamlined dispute resolution procedures through the use of an arbitration clause allows a dealer to sell vehicles at a lower cost. Rejection of this arbitration agreement will therefore harm not only the dealers, but also their employees[3], customers[4],

---

[3] In 2011, California new car dealers employed over 117,000 full- and part-time individuals, accounting for 7.3 percent of statewide retail employment.

and the state economy as a whole[5]. This court should reverse the judgment of the Court of Appeal and remand for entry of an order compelling arbitration in accordance with the parties' agreement.

(...continued)

[4] The average selling price of a new vehicle in California was $32,068 in 2011, compared with the $30,659 average national selling price of a new vehicle in 2011 (Nat. Automobile Dealers Assn., NADA DATA State-of-the-Industry Report 2012 (2012) p.9 <http://www.nada.org/NR/rdonlyres/C1C58F5A-BE0E-4E1A-9B56-1C3025B5B452/0/NADADATA2012Final.pdf> [as of September 27, 2012]). Increased dispute resolution costs will only exacerbate this existing price discrepancy.

[5] California's new car dealers generated over $6.3 billion in sales, payroll, and property taxes in 2011.

LEGAL ARGUMENT

I. UNDER *CONCEPCION*, THE FAA PREEMPTS STATE UNCONSCIONABILITY RULES—LIKE THOSE APPLIED IN THIS CASE—THAT INVALIDATE ARBITRATION AGREEMENTS BASED ON PERCEIVED DEFICIENCIES IN THE AGREED-UPON ARBITRATION PROCEDURE.

In *Concepcion*, the United States Supreme Court addressed the operation of FAA preemption when a general contract law defense, such as unconscionability, is used to invalidate an arbitration clause because of a perceived deficiency in the arbitral procedures to which the parties agreed. While the saving clause in section 2 of the FAA (9 U.S.C.A. § 2) "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability' " (*Concepcion, supra,* 131 S.Ct. at p. 1746), the high court held that the FAA nevertheless preempts such defenses if they interfere with the fundamental attributes of arbitration or the primary purpose of Congress in enacting that statute—the enforcement of arbitration agreements according to their terms. (*Id.* at pp. 1746-1749, 1753.)

Concepcion thus determined that "court[s] may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.' " (*Concepcion*, *supra*, 131 S.Ct. at p. 1747.) As an illustration of such a prohibited unconscionability standard, *Concepcion* disapproved state judicial rules finding unconscionable agreed-upon arbitration procedures that "would be of greater benefit" to the defendant than to the plaintiff. (*Ibid.*) *Concepcion* pointed out that while such a mutuality rule would nominally be a generally applicable contract defense in that it applies to " 'any' contract," the rule would "[i]n practice . . . have a disproportionate impact on arbitration agreements . . . ." (*Ibid.*; see also *id.* at pp. 1748-1749 [recognizing that the FAA protects parties' right to limit the issues to be arbitrated, to arbitrate according to specific rules, and to limit with whom they will arbitrate].) *Concepcion* pointed out that such an example was "not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' " and that "California's courts" in particular "have been more likely to hold contracts to arbitrate unconscionable than other contracts."[6] (*Id.* at p. 1747.)

---

6 Based on his empirical study of California's unconscionability jurisprudence—a study and corresponding conclusions that were cited by the United States Supreme Court (see *Concepcion*, *supra*, 131 S.Ct. at p. 1747)—one commentator has explained that "California courts are clearly biased against arbitration as an alternative means of dispute settlement" and "[t]heir disdain manifests" in the standard they apply to assess whether arbitration agreements are enforceable. (Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act* (2006) 3 Hastings Bus. L.J. 39, 41.) This study confirms that the unconscionability standard used by the Court of Appeal in this case (continued...)

The Court of Appeal here relied on *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) to conclude that the arbitration agreement at issue in this case could not be enforced. (Typed opn., pp. 11-12.) *Armendariz* states that a provision in an arbitration agreement is unconscionable and unenforceable if (1) the arbitration agreement is a contract of adhesion, and (2) the agreement is one-sided in that it utilizes certain arbitration procedures that benefit one party without mutually benefiting the other. (*Armendariz*, at pp. 113-117.) The Court of Appeal concluded here that an arbitration provision allowing the losing party to appeal certain outlier awards to a three-arbitrator panel is unconscionable absent a showing that both sides have virtually the exact same *degree* of potential benefit from the ability to appeal. (Typed opn., pp. 18-27.) But after *Concepcion*, any unconscionability standard requiring such bilaterality in every provision is preempted by the FAA. (*Concepcion, supra,* 131 S.Ct. at p. 1747 [state courts may not use unconscionability doctrine to impose particular arbitral procedures because of perception that they will prevent one party from having an undue advantage in arbitration over the other].)

The FAA preemption principles laid down by *Concepcion* cannot be squared with the unconscionability test applied by the Court of Appeal in this case because that test allows courts to

(...continued)
imposes "arbitration-specific" requirements and that, under California's jurisprudence predating *Concepcion*, " 'unconscionable' means something quite different when the validity of an arbitration agreement is at issue." (*Id.* at pp. 53-55, 67-68.)

substitute their own judgment for the parties' assessment of the relative burdens and benefits of particular procedures in an arbitration agreement. Just as *Concepcion* held the *Discover Bank* rule was preempted insofar as it applied the unconscionability doctrine to invalidate a particular type of arbitration procedure—there, the class action waiver—any defense to enforcement of arbitration agreements that turns on finding the appeal provision in the agreement here "unconscionably" benefits one party over another is likewise preempted. Put simply, the unconscionability standard the Court of Appeal followed in this case is preempted by the FAA "[b]ecause it 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' " (*Concepcion, supra*, 131 S.Ct. at p. 1753) which, in the context of the FAA, are primarily focused on ensuring "the enforcement of arbitration agreements *according to their terms* so as to facilitate streamlined proceedings." (*Id.* at p. 1748, emphasis added; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30 [111 S.Ct. 1647, 114 L.Ed.2d 26] [holding that "challenges to the adequacy of arbitration procedures" in arbitration agreements governed by the FAA were "insufficient to preclude arbitration of statutory claims"]; accord, *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 258 [129 S.Ct. 1456, 173 L.Ed.2d 398] [same].)

This does not mean, of course, that the FAA wholly preempts California's unconscionability doctrine or that the FAA's saving clause has no real force. The general rules governing unconscionability continue to apply to all contracts, including arbitration clauses. For example, a state may refuse to enforce an arbitration agreement, like any other contract, because it is written in an unreadable font size. (See, e.g., *Conservatorship of Link* (1984) 158 Cal.App.3d 138, 141, fn. 1 [citing examples of font-size rules for contracts under the Civil Code]; see also *Concepcion, supra,* 131 S.Ct. at p. 1750, fn. 6 [permitting states to regulate the format of contracts]; *Ilkhchooyi v. Best* (1995) 37 Cal.App.4th 395, 410 [clause in commercial contract found procedurally unconscionable where it was "buried in diminutive print in the middle of one of five lengthy paragraphs"].)

Likewise, a state may continue to invalidate arbitration clauses that expressly and completely strip one party of substantive rights or remedies, as distinct from any purported right to particular arbitral procedures (which is preempted by the FAA after *Concepcion*). (See, e.g., *Armendariz, supra,* 24 Cal.4th at p. 121 [finding arbitration clause unconscionable partly because it restricted damages one party could recover, without imposing any similar restriction on the other party].) It is only those specific unconscionability rules that " 'rely on the uniqueness of an agreement to arbitrate' " that are preempted by the FAA. (*Concepcion*, supra, 131 S.Ct. at p. 1747.) In other words, what unconscionability doctrine may not do is interfere with or second-guess the parties' choice of arbitral procedures because that choice is precisely what is protected by the FAA. (*Id.* at p. 1748 [principal purpose of FAA is to ensure that arbitration agreements are enforced according to their terms].)

In short, the Court of Appeal applied exactly the type of proscribed unconscionability rule that relies on the uniqueness of an agreement to arbitrate. Its specific standard for evaluating unconscionability turns on whether the arbitration clause is fully bilateral in each of its provisions, in the court's assessment. Accordingly, in light of *Concepcion*, the unconscionability standard followed by the Court of Appeal in this case is preempted by the FAA.

II. EVEN IF THE COURT OF APPEAL'S UNCONSCIONABILITY ANALYSIS WERE NOT PREEMPTED BY THE FAA AFTER *CONCEPCION*, THE THREE-ARBITRATOR APPEAL PROVISION IN THIS CASE WOULD STILL BE ENFORCEABLE UNDER CALIFORNIA LAW.

A. A contract term must shock the judicial conscience before it can be deemed substantively unconscionable.

The doctrine of unconscionability provides that a contract term may be found unenforceable if elements of both procedural and substantive unconscionability are sufficiently present. (*Armendariz, supra*, 24 Cal.4th at p. 114.) While procedural unconscionability focuses on "oppression or surprise due to unequal bargaining power," substantive unconscionability focuses on whether an agreement's terms are "overly harsh or one-sided." (*Pinnacle, supra*, 55 Cal.4th at p. 246.) In analyzing whether a contract term is substantively unconscionable, a court may not undertake the sort of provision-by-provision fine tuning approach the Court of Appeal followed here to invalidate the parties' agreement. Instead, an arbitration clause is substantively unconscionable "not . . . when it merely gives one side a greater benefit" (*ibid.*), but only when it is " 'so one-sided as to "shock the conscience" ' " (*ibid.*, quoting *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213).

Even in *Armendariz* itself this court held that only a " 'modicum of bilaterality' " is required for a contract to avoid unconscionability—absolute mutuality or parity is not required. (*Armendariz, supra*, 24 Cal.4th at p. 117.) Indeed, even unreasonableness is not sufficient to satisfy the very strict standard for a finding of substantive unconscionability. (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1322-1323 [" 'shock the conscience' " is not equivalent to "unreasonable," as that would "inject an inappropriate level of subjectivity into the analysis" and "thrust [courts] in[to] the paternalistic role of intervening to change contractual terms that the parties have agreed to"].) Thus, an arbitration clause may provide some benefit to one side over the other and yet not be deemed unconscionable.

Moreover, a contractual term may be found unconscionable under this standard only after viewing it in the context of the contract as a whole and in light of the entire contract's overall effect on each party's interests. (Civ. Code, § 1670.5, subd. (b) [court may find contract term unconscionable only after giving the parties a "reasonable opportunity to present evidence as to [the provision's] commercial setting, purpose, and effect to aid the court" in its decision].) Again, this court explained in *Armendariz* that a contract may be denied enforcement only if, considered in its context, it is unconscionable. (*Armendariz, supra,* 24 Cal.4th at p. 113; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820 [same].)

As we now explain, the Court of Appeal departed from these principles in invalidating the three-arbitrator appeal provision in this case. (Typed opn., pp. 18-27.) Without acknowledging the commercial realities underlying car purchase transactions, and without deferring at all to the contracting parties' intent as expressed in their agreement, the court inappropriately concluded that aspects of the appeal provision would at least to some extent benefit car dealers over buyers. Then, without applying the demanding "shocks the conscience" test for unconscionability, the court invalidated the agreement based on a perceived lack of strict bilaterality.

B. The arbitration clause in this case is well-suited to the needs of both car buyers and dealers in resolving disputes between them.

Buying a car has become a fairly routine event for adults in California, and many car purchasers—especially purchasers of high-end luxury vehicles like Mr. Sanchez—have become quite sophisticated in these dealings. They generally have a fixed amount they choose to spend on their purchase, and they use internet resources to take full advantage of the fierce competition among car dealers to obtain a price that leaves a very slim profit margin.

Consumers also prefer an expedited, inexpensive resolution, in a less-than-formal setting, of disputes arising out of their purchases.

Dealers are predominantly family-owned businesses. Over the past several years, average annual dealership profits nationwide have ranged between approximately $277,000 and $786,000, and average dealership net worth has ranged between approximately $2.2 million and $2.8 million.[7] With very low profit margins (ranging from 1 percent to 2.3 percent[8]) on high-value vehicles, California dealers, who are subject to a broad array of statutes and regulations dictating their conduct throughout the car sales process (see, e.g., 15 U.S.C.A. §§ 1601 et seq.; Civ. Code, §§ 2981 et seq.; Veh. Code, §§ 11700 et seq.), have every interest in keeping that process running smoothly, without adding undue transaction costs to address disputes with consumers.

Because of the many intricate statutory and regulatory requirements governing auto contracts, car dealers must use standardized forms. California car dealers have used the Law Printing form containing the arbitration clause at issue in this case for many years. Last year, approximately 1.3 million new car transactions were consummated in this state, most using the arbitration clause at issue here. Millions more, involving used cars,

---

7 See Nat. Automobile Dealers Assn., NADA DATA State-of-the-Industry Report 2012 (NADA 2012) p. 3 <http://www.nada.org/NR/rdonlyres/C1C58F5A-BE0E-4E1A-9B56-1C3025B5B452/0/NADADATA2012Final.pdf> (as of Sept. 27, 2012). (Hereafter NADA DATA).

8 See NADA DATA, *supra*, at p. 3.

motor homes, trailers, and off-road vehicles, also use this standard purchase agreement and arbitration clause.

While disputes are not the norm, they do arise on occasion, and in the context of car sales, arbitration is a fair and efficient alternative to dispute resolution through the courts. The arbitration clause contained in the Law Printing auto purchase agreement was specially designed for auto purchase transactions and is well-suited to the type of disputes that arise in this area. The arbitration clause is carefully crafted to give both car buyers and dealers the benefits of arbitration for everyday disputes as well as protection against outlier results.

Most disputes regarding cars involve small-dollar litigation. Arbitration before the American Arbitration Association (AAA) offers informal resolution of such disputes, most of which are fact-intensive but too small to justify a full-blown trial under strict rules of evidence. Informality aids car buyers because it makes proceeding under these circumstances less of a challenge. Arbitration is also comparatively quick, which is especially important now that the state's budget crisis is lengthening delays in court. Dealers and their customers benefit from the speedy resolution of their grievances afforded by this procedure.

Furthermore, with the average new vehicle selling price of $32,068, and the average used vehicle selling price of $21,650, the vast majority of buyer-dealer disputes fall within the $0 to $100,000 range for which the arbitration clause allows no appeal. In those situations, the agreement provides a simple, straightforward, one-round arbitration that produces a final award and a quick resolution. For the outlier cases where the claimant receives $0 or is awarded over $100,000, or where the claimant secures injunctive relief, the clause provides for a special three-arbitrator review, but still subject to the basic rules of the AAA. Those outlier cases, although infrequent, carry the potential for a more severe economic impact for the dealer and the buyer, both of whom are guaranteed this appeal right.

Accordingly, the arbitration clause at issue in this case provides benefits to both buyer and dealer in resolving their disputes, which more than satisfies the required " 'modicum of bilaterality' " (*Armendariz, supra,* 24 Cal.4th at p. 117) and—if it favors one party at all—does not do so nearly enough to "shock the conscience" (*Pinnacle, supra,* 55 Cal.4th at p. 246).

C. Against the backdrop of the contract as a whole, the three-arbitrator appeal provision is not substantively unconscionable.

1. The dollar triggers for appeal do not unduly favor car dealers over buyers.

The Court of Appeal found the arbitral review provision unconscionable in large part because it allowed a losing party to appeal only where the damages awarded are $0 or in excess of $100,000. (Typed opn., pp. 21-22.) It considered this unfair to the buyer because "if the buyer prevails but believes the award is too low, the arbitration is at an end unless the buyer recovers nothing;

if the buyer prevails and recovers a substantial sum, the car dealer can start anew before a three-member panel if the award exceeds what the dealer considers too high. A truly bilateral clause would allow a *buyer* to appeal an award *below $100,000*." (Typed opn., p. 22.)

This reasoning inaccurately characterizes the three-arbitrator appeal provision. That clause certainly does not allow a car dealer to appeal any award it considers too high, nor does it allow a buyer to seek review only of a zero dollar award. Instead, these monetary award thresholds make sense for both parties. They bracket a range of awards that are not subject to internal arbitral review at either party's request—no matter whether the dealer or the buyer thinks the award excessive or inadequate.

Most buyer-dealer litigation arises from alleged defects in the car, flawed repairs, or miscalculated fees or finance charges, and thus rarely involves claims or awards exceeding $100,000.[9] Thus, the vast majority of awards in these types of disputes will fall within the range for which no internal arbitral review is allowed, thereby ensuring quick, cheap, and final resolution by a single arbitrator's award.

---

[9] Reported decisions of lawsuits by car buyers against dealers or finance companies show that awards in excess of $100,000 are extraordinary and infrequent. (See, e.g., *Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24; *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1099-1100; *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 4; see also *Dominguez v. American Suzuki Motor Corp.* (2008) 160 Cal.App.4th 53, 56.)

Only outlier awards may be appealed. A buyer who asserts a claim and receives nothing can appeal. Buyers facing claims for nonpayment sometimes face judgments of more than $100,000, especially when interest and attorney fee awards are considered; buyers may likewise appeal such awards. Similarly, the dealer who receives nothing, or against whom an award of over $100,000 is returned, may appeal. The three-arbitrator appeal provision offers both sides protection against unjust awards outside the normal range.

With the *average* price of a new vehicle in California at over $30,000, the parties to the contract can rationally agree that a provision limiting appeals to awards of $0 or awards greater than $100,000 protects against outlier awards, while avoiding extra costs for predictable, mid-range awards. There is a good business justification for allowing review of awards exceeding $100,000 since an award of that size could financially devastate either a buyer or a dealer. (*Ante*, p. 20 [average annual car dealership profits between $277,000 and $786,000, and average dealership net worth between $2.2 million and $2.8 million, in recent years].)

These commercial realities serve to distinguish the arbitration clauses struck down in *Saika v. Gold* (1996) 49 Cal.App.4th 1074 and *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*) from the one at issue here. In both of those cases, courts found that the party with the weaker bargaining position would rarely, if ever, be able to invoke the right to relitigate the claim in court (*Saika*) or seek arbitral review (*Little*) because an award over the trigger amount would virtually never be entered against the weaker party. (*Saika*, at pp. 1079-1080; *Little*, *supra*, 29 Cal.4th at pp. 1073-1074.)

Indeed, the standardized clause containing the bracketed threshold approach to arbitral appellate review at issue here was spurred by this court's opinion in *Little*, where an employer's arbitration clause was found unconscionable because it allowed an appeal in the event of an award exceeding $50,000. (*Little*, at pp. 1071-1074.) This court found that, in the context of *that* case, the appeal procedure would benefit only the employer, which typically would have no occasion to seek significant monetary remedies against the employee. (*Id.* at pp. 1073-1074.) Unlike the situation in *Little*, buyers often owe significant amounts on their car loans. Dealers should be able to rely on this court's implication in *Little* that the analysis would be different if an appeal were allowed (presumably, by the employee—or here, the buyer) in the event of a zero award. (*Id.* at p. 1073). Thus, the arbitration clause at issue here allows the plaintiff to obtain internal arbitral review in precisely the situation *Little* identified—a zero dollar award on what the plaintiff had deemed a valid, substantial claim.

Taking the commercial realities of these types of disputes into account, the three-arbitrator appeal provision in this case does not solely or even disproportionately benefit car dealers. Protection against an outlier award at either end of the spectrum is a legitimate commercial need for both buyer and dealer, while for the vast majority of awards within the $0 to $100,000 range, the provision benefits both parties by sparing them the time, cost, and uncertainty of appellate review. The appeal provision is certainly not so one-sided as to *shock the conscience*, as this court recently reaffirmed is the necessary standard for substantive unconscionability. (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.)

2. The injunctive relief trigger for appeal does not unduly favor car dealers over buyers.

The Court of Appeal also found the three-arbitrator appeal provision unconscionable because it allows a losing party to appeal an award of injunctive relief. (Typed opn., pp. 22-24.) The court below assumed this provision "unduly burdens the buyer because the buyer, not the car dealer, would be the party obtaining an injunction." (Typed opn., p. 22.)

That assumption is incorrect. In non-class arbitration, a car buyer will rarely seek or obtain injunctive relief regarding the dealer's business practices since the car buyer cannot show a risk that he or she will be affected by the same practice in the future. (See *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 464-465.) Awards in individual arbitrations are much more likely to involve injunctions against repossession of the car or the buyer's transferring or concealing it. (See Code Civ. Proc., § 513.020.) A buyer is more likely than a dealer to face that form of injunctive relief, and when a temporary restraining order, preliminary injunction, or writ of possession requires a buyer to return the car under state claim and delivery laws, the *buyer* may invoke the injunction appeal clause. (See Code Civ. Proc., §§ 511.010 et seq.)

Moreover, even if one assumed that most injunctions targeted dealers, the clause should not be invalidated. It is consistent with the overall principle of fairness and efficiency dictating that extreme awards for or against *either side* are subject to review by a three-arbitrator panel, while more routine monetary remedies become final without further review. Injunctions are, by nature, granted as an extraordinary remedy. They are therefore on par with the very high and very low monetary awards as to which appellate review is available. And as explained *ante*, pages 17 to 19, California law does not require perfect parity or mutuality, but only a " 'modicum of bilaterality' " (*Armendariz*, *supra*, 24 Cal.4th at p. 117), and does not deem an arbitration clause unconscionable unless it is " 'so one-sided as to "shock the conscience' ' " (*Pinnacle*, *supra*, 55 Cal.4th at p. 246). The injunctive relief trigger for an arbitral appeal does not run afoul of those limits.

3. Requiring the appealing party to advance the costs of the arbitral appeal is not unconscionable.

The Court of Appeal also found the three-arbitrator appeal provision unconscionable because it requires the appealing party to advance the filing fee and other costs of the arbitral appeal, subject to the three-arbitrator appellate panel's power to reapportion those costs as it deems fair. (Typed opn., pp. 24-27.) The court concluded that "the arbitration provision leaves the buyer in the dark as to the amount to be paid in advance, creating the possibility that the buyer may have to advance unaffordable expenses, [thereby] discourag[ing] buyers from pursuing an appeal and enforcing their rights under the [Consumers Legal Remedies Act]." (Typed opn., p. 26.)

But placing the costs of appeal, at least initially, on the appealing party is neither unusual nor unfair. Appellants must advance all costs of appeal under California's rules governing ordinary civil appeals. (See Cal. Rules of Court, rules 8.100(b)(1)-(2), 8.122(c), 8.130(b); see also Code Civ. Proc., § 116.760 [appeals from small claims court].) Moreover, no authority holds that all costs must be evenly shared or advanced, as long as the consumer is not *required* to pay all costs if he or she does not prevail.[10] (Code Civ. Proc., § 1284.3, subd. (a).) California's arbitration statute contemplates that the parties are free to allocate costs as they see fit, stating that *absent an agreement to the contrary*, each party pays a pro rata share of costs. (Code Civ. Proc., § 1284.2.)

The costs provision must also be viewed in the context of the arbitration clause as a whole, particularly the provision requiring the car dealer to advance all costs of the initial arbitration (up to a $2,500 limit) even where it is initiated by the buyer. (OBOM 48.) It is hardly unfair to ask a car buyer, who has already received the benefit of $2,500 in arbitration costs paid by the dealer, to pay the

---

10 Contrary to Sanchez's characterization of the arbitration clause at issue (ABOM 50), the mere *possibility* that an arbitrator may exercise his or her discretion to order reimbursement of arbitration fees does not run afoul of California's statutory prohibition against *requiring* a consumer to pay all costs of an arbitration if he or she does not prevail.

additional cost of the *buyer's* arbitral appeal, subject to reapportionment if the equities require.

Furthermore, requiring the appealing party to advance the initial costs of an arbitral appeal serves the salutary purpose of discouraging such appeals, thus promoting the arbitration's goal of speedy and inexpensive dispute resolution. The Court of Appeal failed to recognize this point. Instead, it criticized the three-arbitrator appeal provision for purportedly allowing car dealers a one-sided escape from unfavorable arbitral awards on the unfounded assumption that the appealing party would almost always be the car dealer. This criticism is entirely inconsistent: a cost advancement provision discouraging arbitral appellate review in the circumstances the Court of Appeal described would work to buyers' *benefit*, not harm.

The Court of Appeal also criticized the cost advancement provision for its lack of any cost waiver procedure in the case of an indigent appealing party, while noting that AAA rules provide such a procedure for initial arbitrations. (Typed opn., pp. 25-26.) But the arbitration clause itself grants the arbitral appellate panel full discretion to grant such a waiver in the interest of fairness. Furthermore, California law already *requires* private arbitration services to waive fees and costs for indigent consumers. (Code Civ. Proc., § 1284.3, subd. (b).)

Moreover, this criticism fails to acknowledge California cases describing the flexibility that arbitrators have in shaping procedures to fill gaps in the arbitral rules. (See *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831 ["parties to a private arbitration need not, and sometimes may not, specify every detail, characteristic, and consequence of the proceeding they contemplate"]; *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1450-1456 [arbitrators have authority to interpret arbitral rules to fashion a fair procedure for the arbitration, even where rules may be silent or ambiguous].) It would not be difficult for a AAA three-arbitrator appellate panel to adapt the indigency cost waiver procedure from the initial arbitration to the appellate arbitration context in accordance with state law, even if AAA rules do not expressly provide for this.

Finally, in faulting the cost advancement provision for unduly burdening buyers with possibly prohibitive expenses of an arbitral appeal, the Court of Appeal engaged in exactly the sort of speculation and conjecture that is forbidden by United States Supreme Court precedent. In *Green Tree*, 531 U.S. at pages 90 - 92, the high court foreclosed such an analysis, holding that the party seeking to avoid arbitration bears the burden of showing that prohibitive arbitral expenses do, in practice, preclude resort to the arbitral forum—mere speculation as to inordinate expenses is insufficient to meet this burden. Nothing in this case suggests that Mr. Sanchez ever demonstrated the lack of a cost-waiver provision would preclude his resort to an arbitral appeal with respect to his purchase of a $53,000 Mercedes luxury vehicle. Nor did the Court of Appeal's analysis account for the recognized fact that costs of litigation, such as arbitration fees, are typically borne by plaintiffs' *counsel*, not by the plaintiffs themselves, under standard contingency fee agreements. (See *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 733.)

Accordingly, the three-arbitrator appeal provision's cost advancement procedure is not unduly one-sided, is consistent with existing law, and is well-suited to the interests of both buyers and dealers in securing streamlined and inexpensive resolution of their disputes.

CONCLUSION

For the foregoing reasons, in addition to those set forth in Valencia Holding Company, LLC's briefs on the merits, the Court of Appeal's decision should be reversed. The parties should be compelled to arbitrate their dispute in accordance with the arbitration clause in their agreement.

September 27, 2012

HORVITZ & LEVY LLP
LISA PERROCHET
FELIX SHAFIR
JOHN F. QUERIO

By: ______________________
John F. Querio

Attorneys for Amicus Curiae
CALIFORNIA NEW CAR DEALERS ASSOCIATION

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 6,668 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: September 27, 2012

John F. Querio

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On September 27, 2012, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF APPELLANT VALENCIA HOLDING COMPANY, LLC** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 27, 2012, at Encino, California.

Kathy Turner

Kathy Turner

SERVICE LIST
SANCHEZ v. VALENCIA HOLDING COMPANY, LLC
SUPREME COURT CASE NO.: S199119

Individual / Counsel Served	Party Represented
CALLAHAN THOMPSON SHERMAN & CAUDILL, LLP Robert W. Thompson, Esq. Charles S. Russell, Esq. 2601 Main Street, Suite 800 Irvine, California 92614 (949) 261-2872 • FAX: (949) 261-6060	Appellant VALENCIA HOLDING COMPANY, LLC d.b.a. Mercedes-Benz of Valencia
GREINES, MARTIN, STEIN & RICHLAND LLP Robert A. Olson, Esq. Edward L. Xanders, Esq. 5900 Wilshire Boulevard, 12th Floor Los Angeles, California 90036 (310) 859-7811 • FAX: (310) 276-5261	Appellant VALENCIA HOLDING COMPANY, LLC d.b.a. Mercedes-Benz of Valencia
ROSNER & MANSFIELD, LLP Hallen David Rosner, Esq. Christopher Patrick Barry, Esq. Angela Jean Smith, Esq. 10085 Carroll Canyon Road, Suite 100 San Diego, California 92131	Plaintiff and Respondent GIL SANCHEZ
ROMANO STANCROFF & MIKHOV, PC Steve Borislav Mikhov, Esq. 640 S. San Vicente Boulevard, Suite 350 Los Angeles, California 90048	Plaintiff and Respondent GIL SANCHEZ
UNIVERSAL SHANNON & WHEELER LLP Jon David Universal, Esq. 2240 Douglas Boulevard, Suite 290 Roseville, California 95661	Defendant and Appellant MERCEDES-BENZ USA, LLC

Individual / Counsel Served	Party Represented
SEVERSON & WERSON Jan T. Chilton, Esq. One Embarcadero Center, 26th Floor San Francisco, California 94111	Depublication Requestor AMERICAN FINANCIAL SERVICES ASSOCIATION
McKENNA LONG & ALDRIDGE LLP J. Alan Warfield, Esq. 300 s. Grand Avenue, 14th Floor Los Angeles, California 90071	Amicur Curiae ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL
SHEPPARD MULLIN RICHTER & HAMPTON LLP Matthew Martin Sonne, Esq. Karen Dougan Vogel, Esq. Richard J. Simmons, Esq. 650 Town Center Drive, 4th Floor Costa Mesa, California 92626	Amicus Curiae EMPLOYERS GROUP
PACIFIC LEGAL FOUNDATION Deborah Joyce Lafetra, Esq. 930 "G" Street Sacramento, California 95814-1802	Amicus Curiae PACIFIC LEGAL FOUNDATION
PILLSBURYWINTHROP SHAW PITTMAN, LLP Richard Mark Segal, Esq. Nathaniel Robert Smith, Esq. 501 W. Broadway, Suite 1100 San Diego, California 92101	Amicus Curiae NISSAN MOTOR ACCEPTANCE CORPORATION
LITTLER MENDELSON Henry D. Lederman, Esq. Alexa L. Woerner, Esq. 1255 Treat Boulevard, Suite 600 Walnut Creek, California 94597	Amicus Curiae VOLT MANAGEMENT CORPORATION and VOLT INFORMATION SCIENCES, INC.

Individual / Counsel Served	Party Represented
SIMPSON, CAMERON, MEDINA & AUTREY Irina Marie Nemirovsky, Esq. 2401 N. Glassell Avenue Orange, California 92865	Amicus Curiae VOLT MANAGEMENT CORPORATION and VOLT INFORMATION SCIENCES, INC.
Deputy Attorney General State of California, Dept. of Justice 300 S. Spring Street, 5th Floor Los Angeles, California 90013	Served per Business & Professions Code § 17209 and California Rules of Court, rule 8.29
Office of the District Attorney Appellate Division 320 West Temple Street, Suite 540 Los Angeles, California 90012-3266	Served per Business & Professions Code § 17209 and California Rules of Court, rule 8.29
Clerk to the Hon. Rex Heeseman Los Angeles Superior Court 111 North Hill Street, Dept. 19 Los Angeles, California 90012	LASC Case No. BC433634
Clerk California Court of Appeal Second District, Division One 300 S. Spring Street Los Angeles, California 90013	Court of Appeal Case No. B228027