No. S 199119

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GIL SANCHEZ, Plaintiff and Respondent vs. VALENCIA HOLDING COMPANY, LLC, Defendants and Appellant.	B228027 (Los Angeles County Super. Ct. No. BC433634)

PETITION FOR REVIEW

California Court of Appeal, Second District, Division One
Case No. B228027
Los Angeles Superior Court Case No. BC433634
Honorable Rex Heeseman

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INTRODUCTION

The Court of Appeal held unenforceable as substantively unconscionable the arbitration provision in a standard auto dealer sales contract used by many of the over 1,200 dealerships throughout the State in a substantial portion of the million-plus new and dealer used car transactions yearly. The broad impact of that decision on California small and medium sized businesses and consumers alone warrants this Court's attention.

But the issues presented are even broader than that. From a legal perspective the fundamental question is the reach of *AT&T Mobility v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] in restraining California courts in invalidating arbitration provisions as substantively unconscionable. *Concepcion* would appear to bar a court from striking, as the Court of Appeal did here, facially neutral procedures and processes agreed to by the parties as tailored to the particular type of transaction. The Court of Appeal here invalidated the arbitration provision because, in hindsight, it judged the parties' agreed-upon procedures and processes as not as "fair" as (or "harsher" than) it would have liked. It engaged in just the sort of sweeping, detailed, dissection of arbitration terms that is contrary to both *Concepcion*'s express language and its spirit.

The Court of Appeal sidestepped *Concepcion* by reading it as having no impact beyond arbitral class action waivers. Other courts have disagreed with such a reading. Already, the scope of *Concepcion* is engendering conflict in decisional law.

Along those lines is the conflict in authorities over whether *Concepcion* has superseded *Broughton v. Cigna Health Plans of Cal.* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, regarding the non-arbitrability of statutory injunction actions. Recognizing continuing *Broughton-Cruz* vitality, the Opinion here held that those decisions, at a minimum, inform and support a substantive unconscionability determination.

But even were *Concepcion*'s impact not at issue, review would be necessary. The Court of Appeal's opinion is groundbreaking in holding an evenhanded, tailored arbitration provision substantively unconscionable. Without any prior trial court ruling, it conducted a searching after-the-fact fairness inquiry into facially neutral terms. The provision allowed for an internal arbitral appeal of awards greater than $100,000 and for injunctive relief, but at the same time it afforded the same appeal right for a $0 award. In the context of automobile purchase disputes, most disputes would fall well within the $0 to $100,000 first level arbitration range. The provision, thus, allowed only an appeal of *outlier* awards affecting *either* party. It excluded self-help remedies from arbitration (something only two of the three justices found problematic) but it also excluded small claims court cases, a benefit to consumers.

Unless the rule is that consumer arbitration must be full, one-shot, arbitration of all possible issues at no expense to the consumer – a rule that *Concepcion* undoubtedly rejects – the question arises of where is the line of what is allowable or not? If this provision's process is invalid, what other

process short of a *Concepcion*-barred all-or-nothing requirement can suffice? Businesses throughout this State (from the more than a 1,200 new car dealers to thousands of other businesses) are entitled to know what arbitration provisions short of all-or-nothing arbitration of all issues can be enforceably entered into. Does this one Court of Appeal opinion, indeed, vacate millions of arbitration clauses and foreclose future use of that provision when other courts have validated it?

The uncertainty created by the Court of Appeal's decision is compounded here by significant issues regarding the appropriate appellate role. The Court of Appeal made its unconscionability and no-severance findings without the trial court ever having passed on the issues or having made any predicate factual findings or having exercised any discretion. In addition to unconscionability, it found that *as a matter of law* no court could find severability even though this Court has found severability in a remarkably similar instance. That process raises serious issues – and conflicting appellate approaches – about the proper roles of trial and appellate courts in addressing unconscionability and severability.

Review should be granted. This Court needs to resolve the post-*Concepcion* California substantive unconscionability standard for attacks on arbitration provisions beyond class action waivers. And, it needs to provide guidance as to just when and how businesses can tailor arbitration provisions to their particular circumstances. Until it does so, confusion will reign, both judicially and in the business community.

Alternatively, review should be granted and the case held pending the outcome in *Sonic-Calabasas A, Inc. v. Moreno*, No. S174475.

ISSUES FOR REVIEW

1. Does *AT&T Mobility v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740], constrain California courts outside of the class action waiver context in passing, under the guise of substantive unconscionability, on the procedures and processes that the parties have chosen in tailoring an arbitration provision to particular types of disputes? Must such arbitration procedures afford exact equality of procedural advantage to all parties in all cases? This issue is directly related to that pending before this Court on remand from the United States Supreme Court in *Sonic-Calabasas A, Inc. v. Moreno*, No. S174475.

2. Has *AT&T Mobility v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740], displaced the bar to arbitration of statutory injunctive claims in *Broughton v. Cigna Healthplans of Cal.* (1999) 21 Cal.4th 1066, and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, as several federal district courts have held or does the *Broughton-Cruz* bar to statutory injunctive relief arbitration retain vitality after *Concepcion*, as the Court of Appeal here appears to have assumed and two federal district courts have held?

3. Is the arbitration provision in the standard auto sales contract unconscionable, as a matter of law, (A) whenever a plaintiff claims to have not read it even though the contract, on its face, just above a signature line in all capital letters references an arbitration provision set out in a large box

on the back of the one-page document and (B) because (1) it allows for an internal arbitral appeal process for extreme, outlier bilateral results ($0, >$100,000, injunctive relief), (2) requires the losing party to advance the costs of an internal arbitral appeal, and (3) excludes from arbitral issues self-help relief that, by definition, is not part of any court process? In that regard, the present Opinion's unconscionability holding would appear to be at odds with *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 831, fn. 4, 845, fn. 21, which addressed the *identical* provision, finding it "clearly bilateral, and not unconscionable."

4. Where the trial court has never passed on unconscionability or severability, can the appellate court determine those issues in the first instance (as in this case) or is remand to the trial court required for it to find facts and exercise its discretion in the first instance as held in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 504? The Court of Appeal's decision here is in direct conflict with *Brown* on this score. It also appears at odds with *Little v. Auto-Steigler, Inc.* (2003) 29 Cal.4th 1064, which found a comparable internal arbitration appeal mechanism severable and *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, which found the same small claims/self-help exception bilateral and not unconscionable.

STATEMENT OF THE CASE

A. The Complaint.

Plaintiff Gil Sanchez alleges that he bought a "certified" used Mercedes Benz for just under $54,000. (Opn. at 3-4.) He alleges various problems with the transaction, from representations made to fees charged to the actual condition of the vehicle. (*Ibid.*) He filed suit purporting to allege a class-action seeking damages, rescission, civil penalties, punitive damages and attorneys fees. (*Id.* at 5-6.)[1]

B. The Sale Contract.

In purchasing the vehicle, Sanchez executed a standard, preprinted Retail Installment Sale Contract. (*Id.* at 3-4.) The contract form was produced by an industry source, not the individual dealership. (*Id.* at 4, fn. 2.) The contract is 26 inches long by a standard 8½ inches wide, printed on both sides. (*Id.* at 8.) Statutorily required language and font size accounts for 24 inches of that length (back and front). (California Attorney General Opinion 08-804, 92 Ops.Cal.Atty.Gen. 97 1 at *2-3 (2009); Rehearing Petn. at 3.)

Plaintiff signed the document multiple times on the front of the contract. (Opn. at 8.) Above one set of signature lines (for both "buyer" and "co-buyer") is a box notice of "No Cooling-Off Period" and next to it,

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[1] As unconscionability is determined at the time of contracting (Civ. Code, § 1670.5), the specifics of plaintiff's claim are irrelevant at this juncture.

in all capitals, the following language acknowledging the arbitration provision:

> "YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT"

(AA 276; see Opn. at 18; Rehearing Petn. at 1-2.) A replica copy of the contract (submitted to the Court of Appeal at its request) appears as Appendix C to this petition. (See Docket, No. B228027, entry dated November 16, 2011.)

C. The Arbitration Provision.

The referenced arbitration provision appears on the back of the contract in a large black box. (Opn. at 8; App. C.) The arbitration provision calls for binding arbitration before a single arbitrator (required to be attorneys or retired judges) under the auspices of two nationally recognized organizations (one of which later withdrew from consumer arbitrations) *or* any other organization chosen by the consumer (subject to the dealer's approval). (Opn. at 6-7 & 8, fn. 3.) Self-help remedies (e.g., repossession) and small claims actions are excluded from arbitration. (*Id.*

at 7.) Class-action arbitration is waived. (*Ibid.*) The dealer is to advance up to $2,500 of the buyer's initial arbitration fees. (*Ibid.*)

In the event of an arbitration award of (a) $0, (b) in excess of $100,000, or (c) for injunctive relief, the aggrieved party may obtain a new three-person arbitration. (*Ibid.*) The "appealing" party is to initially bear the expense of the new arbitration round (subject to the three-person panel's ultimate allocation). (*Ibid.*)

The arbitration provision makes severable any unenforceable portion, other than the class action waiver. (App. C.)

D. The Motion To Compel Arbitration.

Petitioner Valencia Holding Company, LLC moved to compel arbitration. (Opn. at 6.) In opposing arbitration, plaintiff claimed (contrary to the representation in the contract itself) that he did not read the contract before signing it, that he was unaware that there was an arbitration provision on the back of the contract, and that no one at the dealership had pointed out the arbitration provision to him. (Opn. at 9.)

E. The Trial Court Refuses To Compel Arbitration Because Of The Class-Action Waiver.

The trial court denied the motion to compel arbitration because of the class-action waiver provision, relying on *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601, which, in turn, relied on *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. (Opn. at 10;

App. B.) The trial court did not reach the issues of unconscionability or severability. (App. B; Rehearing Petn. at 10-11.)

F. The Court of Appeal Affirms On A Different Ground: Unconscionability.

In the wake of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740], overruling *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, the Court of Appeal did not address the class-action waiver ground relied upon by the trial court. Instead, it affirmed in a published opinion on a different ground, unconscionability. (Opn. at 11.)

Concepcion. The Opinion read *Concepcion* as limited to the application of the unconscionability doctrine "'to *class-action waivers* in arbitration agreements'" and to States "'[r]equiring the availability of *classwide arbitration* . . . .'" (*Id.* at 12, quoting *Concepcion*, 131 S.Ct. at pp. 1746 & 1748, italics added by Court of Appeal.) According to the Court of Appeal, "[w]ith the exception of the *Discover Bank* rule, the court acknowledged in *Concepcion* that the doctrine of unconscionability remains a basis for invalidating arbitration provisions." (Opn. at 12.) Thus, per the Court of Appeal, *Concepcion* did not change that yardstick by which substantive unconscionability is measured for arbitration agreements governed by the Federal Arbitration Act but rather carved out one, narrow exception – class-action waivers – to States' broad unconscionability powers to disapprove arbitration provisions.

De Novo Appellate Unconscionability Determination. The Court of Appeal then proceeded to analyze the arbitration agreement, de novo, for unconscionability. It held that it could "resolve [unconscionability] in the first instance, without remand to the trial court" to have an initial opportunity to pass on the issue. (Opn. at 10.) It reasoned that "[w]hether an arbitration provision is unconscionable is ultimately a question of law. . . . On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability." (Opn. at 10, internal quotation marks and citations omitted.) The Court of Appeal viewed plaintiff's bare assertion that he had not read the contract or been aware of the arbitration provision as undisputed despite the conflicting representation immediately preceding his signature. (See Rehearing Petn. at 11.)

Procedural Unconscionability. The Court of Appeal majority found procedural unconscionability *as a matter of law* premised upon the facts that (1) the contract was long, (2) the plaintiff claimed not to have read the agreement that he signed and (3) the front-of-the-form, large, all-capital-letters reference to the arbitration provision (which is in a distinctive box on the back of the long form) is to the right of the "no cooling off period" box, immediately over any co-buyer's signature. (Opn. at 15-18.)

Substantive Unconscionabilty. Turning to substantive unconscionability, the Court of Appeal majority found such from what it viewed as an overly harsh or one-sided arbitration process. Specifically, the Court of Appeal majority found fault with (1) the fact that either party could

"appeal" to a three-arbitrator rearbitration if the award exceeded $100,000, was for $0, or included injunctive relief, (2) that any "appealing" party seeking such a rearbitration had to bear the initial cost of such a second round without a mechanism for waiving such fees and (3) *self*-help remedies not being subject to arbitration. (Opn. at 18-30.) The Court of Appeal further found the provision unconscionable in requiring arbitration of Consumers Legal Remedies Act injunctive relief. (Opn. 28-30.)

Severance. Finally, the Court of Appeal majority held that it could determine de novo that the supposedly offending provisions could not be severed. It recognized that severance is an issue that is within the trial court's *discretion* such that the appellate court "typically would remand the case to the trial court, allowing it, as a discretionary matter, to decide whether the doctrine of severability should apply." (Opn. at 32, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 122, 124.) It decided, however, that "it would be pointless to remand the case when only one outcome is proper." (Opn. at 32.) It concluded that it would be impossible to strike the offending portions of the arbitration agreement because, to be valid, any arbitration agreement must "establish a procedure or criteria for determining how much [a consumer] can afford" before admitting even the prospect that the consumer may bear arbitration fees. (Opn. at 31.)

The Concurring Opinion. Justice Rothschild concurred. She found procedural unconscionability, more broadly than the majority, from the mere fact that the contract is one of adhesion. On the other hand, she

limited the basis for substantive unconscionability to her view that "(1) the provision making monetary awards of exactly $0 or more than $100,000 appealable is unfairly one-sided; and (2) the provision requiring the appealing party to advance all costs of the appeal is unfairly one-sided." (Opn., Rothschild, J., concurring at 1.)

G. The Court of Appeal Grants Rehearing On Its Own Motion Issuing The Current Opinion.

Petitioner sought rehearing. The Court of Appeal denied the rehearing petition but granted rehearing on its own motion, issuing the current published opinion, modified from the original opinion in multiple respects, on November 23, 2011.

WHY REVIEW IS NECESSARY

I. Whether *AT&T Mobility v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] Restrains California Courts From Declaring Arbitration Clauses Substantively Unconscionable Beyond The Class-Action Waiver Context (The Opinion Holds That It Does Not) Presents An Important, Unresolved Issue Posing An Already Nascent Danger Of Conflicting Authority.

The Opinion here undertakes a searching, exhaustive dissection of the agreed-upon arbitration procedures to determine if some circumstance might plausibly exist whereby the party opposing arbitration might be at a tactical disadvantage. In doing so, the Court of Appeal majority finds fault with four arbitration-process specific details – (1) the potential for a party on the wrong end of a $100,000 single arbitrator award to appeal to a three arbitrator review panel (the party on the wrong end of a $0 award has the same right), (2) the same internal arbitral appeal right as to an award of injunctive relief, (3) that the party so "appealing" has to initially pay the additional arbitration expense, at least without a mechanism for waiving such fees and (4) the exclusion of self-help remedies from arbitration. (Opn. at 18-19.) Concurring Justice Rothschild agreed only as to first and third points. In either event, though, the unconscionability analysis was a searching review of how the parties had tailored the arbitration process.

In *AT&T Mobility v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct.1740], the United States Supreme Court disapproved just such judicial

vetting of the precise arbitration procedures agreed upon by the parties. *Concepcion* specifically disapproved this Court's holding in *Discover Bank v. Superior Court*, *supra*, 36 Cal.4th 148, which had found the waiver of a class action in arbitration to be unconscionable. *Concepcion* held that courts cannot under the guise of substantive unconscionability judicially negate the "parties[']discretion in designing arbitration processes . . . to allow for efficient, streamlined procedures *tailored to the type of dispute*." (131 S.Ct. at p. 1749, emphasis added.) *Concepcion*, at heart, rejects the idea that courts can use substantive unconscionability as a mechanism to void arbitration provisions based on *the process* agreed upon by the parties. (See *id.* at p. 1747, citing 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; see also 131 S.Ct. at pp. 1753, 1754-1755 (conc. opn. of Thomas, J.) [defenses to arbitration limited to fraud or duress, i.e., *not* including unconscionability].) At a minimum, *Concepcion* creates a strong presumption that the particular procedures agreed to by the parties are to be honored. (See *id.* at pp. 1748-1749.)

Concepcion reaffirms that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced *according to their terms*.' [Citations.] . . . [In that regard,] parties may agree to *limit the issues subject to arbitration*, [citation], *to arbitrate according to specific rules*, [citation], and to limit *with whom* a party will arbitrate its disputes, [citation]." (*Id.* at pp. 1748-1749, emphasis added.) In particular,

Concepcion holds that the parties may limit the risks associated with outlier results or "high stakes" arbitral determinations. (*Id.* at p. 1748 [parties may exclude class actions from arbitration because the higher stakes involved are not appropriate for arbitration].) They may account for the fact that "[a]rbitration is poorly suited to the higher stakes . . . litigation." (*Id.* at p. 1752.)

Concepcion is clear: Courts may not, under the guise of unconscionability, judge the supposed fairness in general of the *process* that the parties have agreed to. (See 131 S.Ct. at p. 1747 [providing examples of arbitration-process "unconscionability" evaluations (ranging from discovery to evidentiary requirements) that the Federal Arbitration Act precludes]; see *ibid.* [parties properly should be allowed to tailor arbitration to nature of likely disputes and to alleviate arbitration risks].) Nor can courts second-guess the parties' attempts to lessen the impact of outlier results. (131 S.Ct. at p. 1753 ["The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. (Citation.) But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"].)

The Opinion ignored these directives. It relied on language in *Concepcion* that the Federal Arbitration Act's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that

an agreement to arbitrate is at issue." (*Concepcion*, 131 S.Ct. at p. 1746, citations omitted; see Opn. at 12-13.)

Rather than apply *Concepcion*, the Opinion read it as limited to class-action waivers (and undefined "judicially imposed procedure[s] that [are] inconsistent with the arbitration provision and the purposes of the Federal Arbitration Act") and as not affecting arbitral substantive unconscionability analysis generally, even when that analysis is premised on the challenged provision's characteristics as an agreed-upon arbitration process. (Opn. at 13.)

With a sweep of the judicial hand, the Opinion here instructs California trial courts to ignore *Concepcion* except on the issue of class-action waivers in arbitration agreements. In doing so, the Opinion assumes a free hand to invalidate the arbitration provision at issue *because* it is tailored to specific disputes – e.g., here, auto purchase disputes for which the most likely results are going to fall within the $0 to $100,000 range. It does so even though limiting arbitration risks may be reasonable given the limited resources of most automobile dealerships, discussed below, and the threat that outlier awards could well cripple the business. It ignores that the grounds on which it refused to enforce the agreed-upon arbitral process "derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion*, 131 S.Ct. at p. 1746.)[2]

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[2] To the extent that the Opinion analyzes the arbitration provision through the lense of the particular dispute here (see Opn. at 20), it is inconsistent with the statutory direction that a contract provision's

(continued...)

At least one set of commentators has criticized the Opinion as engaging in the precise micro-management of allowable arbitration procedures that *Concepcion* decries. (Petersen & Anderson, *The California Court of Appeal Disagrees With The U.S. Supreme Court On The Enforceability of Arbitration Agreements*, Class Action Defense Strategy Blog (Nov. 2, 2011) <http://documents.jdsupra.com/5dd8091d-b120-4ef9-a1dd-a64d54572ec9.pdf> [as of Dec. 29, 2011].) The United States Supreme Court, too, would appear to disagree that *Concepcion* is limited to class-action waivers in arbitration agreements as it granted certiorari, vacated and remanded this Court's decision in *Sonic-Calabasas A, Inc. v. Moreno*, a case *not* involving a class action waiver in arbitration, for reconsideration in light of *Concepcion*. (*Sonic-Calabasas A, Inc. v. Moreno* (2011) ___ U.S. ___, 2011 WL 2148616, vacating *Sonic–Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659.) So, too, a number of federal district courts in California have declined to read *Concepcion* as limited to arbitration agreement class action waivers. (*Meyer v. T-Mobile USA, Inc.* (N.D. Cal. Sep. 23, 2011) No. 10-05858, 2011 WL 4434810 at *8; *Nelson v. AT&T Mobility LLC* (N.D. Cal. Aug. 18, 2011) No. 10-4802, 2011 WL

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[2] (...continued)
unconscionability, if any, is to be determined as of "the time it was made." (Civ. Code, § 1670.5.) Applying a dispute-specific analysis to the unconscionability of arbitration provisions undoubtedly would violate *Concepcion* and the Federal Arbitration Act's requirement that arbitration provisions be treated no differently than other contract clauses. And, to the extent unconscionability under such a dispute-specific analysis is to vary from car purchase (the $50,000 luxury car here) to car purchase (a used $10,000 Dodge Neon), it is a prescription for inconsistency and confusion.

3651153 at *2; *In re Apple and AT&T iPad Unlimited Data Plan Litigation* (N.D. Cal. July 19, 2011) No. 10-2553, 2011 WL 2886407 at *4; *Kaltwasser v. AT&T Mobility LLC* (N.D. Cal. Sept. 20, 2011) No. 07-00411, 2011 WL 5417085, all quoting *Concepcion,* 131 S. Ct. at p. 1747.)

Both state and federal courts are bound to follow *Concepcion.* The Opinion here has already set up a conflict. It governs California state trial courts. But federal district courts are required to follow *Concepcion* over anything a California Court of Appeal may hold, including the California Court of Appeal's interpretation of *Concepcion.* Thus, there already exists a lack of uniformity in the law as to *Concepcion*'s impact between state and federal courts in California. That chasm is likely to only widen. Forms that are used statewide (as here) may be unconscionable in state court but enforceable in federal court.

The issue, *Concepcion*'s impact beyond class action waivers, is already framed before this Court in *Sonic-Calabasas A, Inc. v. Moreno.* At a minimum review should be granted pending the outcome in that case. But, if anything, the issue is even more clearly framed in this case – the Court of Appeal having expressly declined to apply *Concepcion.*

Thus, even if *Sonic-Calabasas A* were not before this Court, the breadth of *Concepcion*'s analysis as it applies here to substantive unconscionability attacks on arbitration agreements would be of great and unresolved importance. To say that unconscionability attacks on arbitration provisions are prevalent is an understatement. (See, e.g., *Broughton v.*

Cigna Health Plans of Cal., *supra*, 21 Cal.4th 1066; *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th 303; *Little v. Auto-Steigler, Inc.*, *supra*, 29 Cal.4th 1064; *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83; *Discover Bank v. Superior Court*, *supra*, 36 Cal.4th 148.) And even the United States Supreme Court has suggested that California's history of voiding arbitration clauses under the unconscionability doctrine has been improper. (*Concepcion*, 131 S.Ct. at p. 1747, citing Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, *supra*, Hastings Bus. L. J. 39.)

Concepcion has undoubtedly changed the playing field regarding unconscionability attacks. How much so is unknown. Our research shows over 100 citations to *Concepcion* in its nine-month life. Most, though, are in federal district court opinions. Few are in appellate decisions, let alone controlling ones. The Opinion here suggests one judicial reaction to *Concepcion* – ignore it. Unless this Court intervenes, lower courts will be left to stumble their way through *Concepcion*'s meaning and application to agreed-upon arbitration structures beyond class-action waivers.

II. Whether The Rule Of *Broughton v. Cigna Healthplans of Cal.* (1999) 21 Cal.4th 1066, And *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, That Statutory Injunctive Claims May Not Be Arbitrated Survives *AT&T Mobility v. Concepcion* Is An Important Legal Question On Which There Is A Conflict In Authority.

Citing *Broughton v. Cigna Healthplans of Cal.*, *supra*, 21 Cal.4th 1066, the Opinion holds the arbitration provision substantively unconscionable because "the requirement that the buyer seek injunctive relief from the arbitrator is inconsistent with the [California Legal Remedies Act]." (Opn. at 28; *id.* at 28-30.) But whether *Broughton* remains good law after *AT&T Mobility v. Concepcion* is an open question, and an important one.

Through its reliance on *Broughton*, the Court of Appeal here suggested that *Broughton* remains good law. (The Opinion equivocates a bit on the issue, see Opn. at 23, fn. 5 & at 30, fn. 6, but ultimately seems to conclude that even if *Broughton* [and its progeny *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th 303] is no longer good law it nonetheless can compel a finding of substantive unconscionability. That an opinion's unconscionability holding might be both preempted by federal law according to the United States Supreme Court and still afford a basis for finding unconscionability would appear to be a novel twist on the Supremacy Clause.) Two federal district courts appear to agree. (*Ferguson v. Corinthian Colleges* (C.D. Cal. Oct. 6, 2011) Nos. 11-0127, 11-0259,

2011 WL 4852339; *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litigation* (C.D. Cal. Sept. 6, 2011) No. 09-2093, 2011 WL 4090774 at * 9-10.)

But at least four federal district courts disagree, holding that *Concepcion* has superseded *Broughton* and *Cruz* as improperly amounting to "state law prohibit[ing] outright the arbitration of a particular type of claim." (*Meyer v. T-Mobile USA, Inc.*, *supra*, No. 10-05858, 2011 WL 4434810 at *8; *Nelson v. AT&T Mobility LLC*, *supra*, No. 10-4802, 2011 WL 3651153 at *2; *In re Apple and AT&T iPad Unlimited Data Plan Litigation*, *supra*, No. 10-2553, 2011 WL 2886407 at *4; *Kaltwasser v. AT&T Mobility LLC*, *supra*, No. 07-00411, 2011 WL 5417085, all quoting *Concepcion,* 131 S. Ct. at p. 1747.) If *Concepcion* teaches anything, it is that states cannot do under the guise of judicial unconscionability determinations what they could not do through legislative prohibition.

The law as it currently stands, thus, is in complete disarray as to whether statutory injunctive relief can be subject to arbitration and, if so, whether that makes an arbitration provision substantively unconscionable as the Opinion here holds. The law may be different between state and federal courts and amongst state courts depending on which federal district court precedent they follow. That is a recipe for confusion and inconsistency.

III. The Validity Of The Arbitration Provision In A Standard Automobile Sales Contract That Is Used In Hundreds Of Thousands Or Millions Of Transactions Annually, In And Of Itself, Presents An Important Legal Question For This Court To Resolve.

According to plaintiff's counsel's website, the Opinion means that "*millions* of California vehicle contracts have illegal arbitration clauses." (<`http://www.calemonlawblog.com/category/arbitration-2/> [as of Dec. 29, 2011], emphasis added.) That is consistent with the more than one million new cars and light trucks that are sold annually in California. (See California New Car Dealers Assn., *California Auto Outlook*, Third Quarter 2011, at p. 1 <http://www.cncda.org/secure/GetFile.aspx?ID=2215> [as of Dec. 29, 2011].) The Opinion itself notes that the form used is not dealer-generated, but rather is purchased from a third-party source and hence generally available and used in the industry. (Opn. at 4, fn. 2.)

The validity of the form's arbitration provision is of crucial importance to not only car buyers but also to the more than 1,200 new car automobile dealers in California. (See <http://www.cncda.org/membership/membership.html> [as of Dec. 29, 2011].) Automobile dealerships are quintessential family businesses. Most are individually or family owned. They are typically not large businesses. Nationally, average dealership profits have ranged from roughly $277,000 to $642,000 and net worths have ranged between $2.2 million and $2.6 million over the past several years. (See *NADADATA 2011 State of the Industry Report*, at p. 3, NADA

(2011) <http://www.nada.org/NR/rdonlyres/0798BE2A-9291-44BF-A126-0D372FC89B8A/0/NADA_DATA_08222011.pdf> [as of Dec. 29, 2011].) Runaway litigation expenses can easily be fatal to such businesses. And, even continuing to use an industry standard form poses great legal risk to these businesses, as including an unconscionable provision in a contract, in and of itself, violates the Consumers Legal Remedies Act. (Civ. Code, § 1770, subd. (a)(19).) The validity of the arbitration provision in the standard new car auto sales contract, thus, is of great importance to not only millions of California consumers, but to thousands of small and medium size California businesses.

Not only is the issue important, but it presents crucial legal questions. As the Opinion itself holds, unconscionability is ultimately a question of law. (Opn. at 10.) If having an all capitalized reference to an arbitration provision on the front of the form isn't enough to avoid undue surprise, what is? Can the dealer be charged with procedural unconscionability because of the length and complexity of the form when more than 90 percent of that length and complexity (24 out of 26 linear inches) is, according to the Attorney General, statutorily mandated? (See 92 Ops. Cal.Att.Gen. 97 at *2-3.) The Ninth Circuit has now vacated the federal district court opinion, *Smith v. Americredit Financial Services, Inc.* (S.D.Cal. 2009) 2009 U.S. Dist. Lexis 115767, that the Opinion relied on (Opn. at 15-16) as the basis for finding procedural unconscionability. (*Smith v. Americredit Financial Services, Inc.* (9th Cir. Dec. 13, 2011)

No. 09-57016, 2011 WL 6170545.) It remanded for reconsideration in light of *Concepcion* (and, circularly, the Opinion here). (*Ibid.*)

That leaves substantive unconscionability. Even without the *Concepcion* overlay, the substantive unconscionability issues here are important and far ranging. Is a mechanism for waiving fees at any stage a necessary component of any consumer arbitration provision as the Opinion appears to hold? Can an arbitration provision provide for additional *arbitral* review on appeal of outlier results where it does so on both sides of the spectrum? Does arbitration have to include all possible issues or exclude statutory injunctive relief to be valid? These are crucial questions going far beyond this case or even this one form for which there are presently no definitive answers.

In this regard, the Opinion here directly conflicts with *Arguelles-Romero*, *supra*, 184 Cal.App.4th 825. Addressing the *identical* arbitration provision, *id.* at p. 831, fn. 4, *Arguelles-Romero* held "the arbitration clause . . . clearly bilateral, and not unconscionable," especially the exclusion of self-help remedies and small claims court actions, *id.* at p. 845, fn. 21.

In other regards, too, the arbitration provision here is bilateral and balanced. It affords *both* consumers and dealers an internal arbitral "appeal" of outlier results – $0, greater than $100,000 – that reasonably can be expected to disadvantage *either* side. The dealer pays for the initial arbitration (up to $2,500 for the consumer), if the dealer "appeals" it bears that cost too. The consumer has to bear costs (and then only as an initial

matter) only if he or she loses the first round and wishes to "appeal." If such a balanced approach is invalid, businesses need direction as to just how they can draft a valid arbitration provision to be included in a standard contract. The promise of the Federal Arbitration Act, repeatedly reaffirmed by the United States Supreme Court, is that arbitration provisions will be enforced according to their terms. The reality is that one is hard pressed to find a California published appellate decision in the last decade enforcing an arbitration provision in a consumer or employment contract while the cases invalidating such provisions are legion. This disconnect between promise (and United States Supreme Court precedent) and judicial reality itself is an important discontinuity requiring this Court's attention.

IV. Whether Unconscionability And Severability Are Matters On Which A Trial Court Must Pass In The First Instance Or, Instead, May Be Determined In The First Instance On Appeal Presents An Important Issue On The Respective Roles Of Trial And Appellate Courts On Which There Is A Split In Authority.

Unconscionability is ultimately a question of law. But does that mean that an appellate court gets to decide unconscionability without the trial court ever passing on the subject? The Opinion here appears to be unique in doing so. Although ultimately a question of law, unconscionability determinations have previously been viewed as depending on predicate *trial court* factual findings. Because "numerous

factual issues may bear on" the unconscionability question trial courts "resol[ve] conflicts in the evidence, or [make] factual inferences which may be drawn therefrom," which, in turn, appellate courts review "in the light most favorable to the court's determination" and "for substantial evidence." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89.) The Opinion disposes of this process, creating a new rule allowing appellate courts to take on the role of factfinder.

It purports to do so on the basis that the evidence was "undisputed" that the plaintiff (based on the plaintiff's own say so) did not read the contract and did not understand that there was an arbitration provision. But the plaintiff's declaration – that in making a $54,000 purchase, he did not even read what he was signing – is not automatically credible. Nor is it undisputed. In the contract itself, plaintiff represented that he was aware of the arbitration provision and had read it. Documentary evidence is no less persuasive than testimonial evidence. (See *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065, fn. 3 [suggesting that sometimes documentary evidence is more persusasive].) A factfinder need not believe a declaration over a contrary writing. Yet, the Opinion appears to create a new rule that the word of someone opposing enforcement of arbitration must, as a matter of law, be taken over the plain language of an indisputably executed document. Such a rule, in and of itself, would uniquely disadvantage arbitration provisions, thereby violating the Federal Arbitration Act.

Likewise, the Opinion breaks new and controversial ground on the appellate courts' role in determining severability. The Opinion recognizes,

as it must, that "the determination of whether to sever an invalid contract provision is committed to the discretion of the trial court." (*Brown v. Ralphs Grocery Co.*, *supra*, 197 Cal.App.4th at p. 503, citing *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at pp. 121–122; see Opn. at 32.) It then ignores that rule and determines severability in the first instance.

In doing so, it directly conflicts with *Brown*. There (as here) the trial court had erroneously found an arbitration class-action waiver to be unconscionable, but the appellate court found the arbitration provision otherwise unenforceable to some extent (there, to the extent that it conflicted with the Private Attorney General Act of 2004). (197 Cal.App.4th at p. 504.) Rather than determining severability in the first instance, *Brown* held that it was required to remand the severability issue to the trial court. (*Id.* at p. 503.)

The Opinion's excuse is essentially that no court could sever the offending elements, despite the express severability clause in the arbitration provision. It found particularly nonseverable fault in the failure to afford the opportunity for a hypothetical party to seek waiver of the internal arbitration appeal fees. But there was never a showing here that *this* plaintiff or any car-purchasing party might need such a waiver. (*Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 90-91 [speculative risk that party might be saddled with prohibitive costs cannot justify invalidating arbitration provision].) In any event, there is a simple severability solution that the Court of Appeal never considered: strike the

supposedly offending internal arbitral "appeal" clause. *Little v. Auto-Stiegler, Inc.*, *supra*, 29 Cal.4th 1064, found a comparable arbitration "appeal" provision *severable* as a matter of law. Yet, the Court of Appeal holds an indistinguishable provision here unseverable by any court.

Likewise, a court could strike any clause saying that self-help remedies are not arbitrated (leaving the default circumstance – that a party can engage in self-help without the assistance of any court or arbitrator) if it disagreed with *Arguelles-Romero*, *supra*, 184 Cal.App.4th at p. 845, fn. 21, that the identical provision "is clearly bilateral and not unconscionable."

But the Opinion never addresses any of this. It just simply creates a new rule, at odds with *Brown* and *Armendariz*, that an appellate court can declare whether offending provisions are severable without first allowing a trial court to exercise its discretion. And, its finding that, as a matter of law, offending provisions for internal arbitral appeals and non-arbitration of self-help remedies are not severable directly conflicts with this Court's contrary determination in *Little* and the Court of Appeal's determination in *Arguelles-Romero.*

Review, thus, should also be granted to resolve the proper roles of trial and appellate courts in determining issues of unconscionability and severability.

CONCLUSION

Unconscionability attacks on arbitration provisions remain prevalent, even post-*Concepcion*. Courts and litigants need to know how such challenges are to be judged in light of *Concepcion*, including how *Concepcion* has affected the analysis beyond class-action arbitration waivers.

The provision in this particular contract affects a wide swath of California automobile sales raising important legal questions of how much balance suffices to avoid unconscionability. The combination of important legal issues and widespread practical impact counsels for this Court's involvement.

Review should be granted.

Dated: January 3, 2012 Respectfully submitted,

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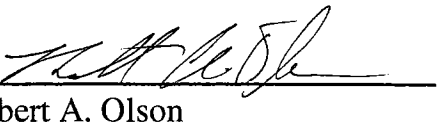
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **PETITION FOR REVIEW** contains **6,582** words, not including the tables of contents and authorities, the caption page, this Certification page and appendices.

Dated: January 3, 2012



Robert A. Olson

APPENDIX A: COURT OF APPEAL OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GIL SANCHEZ, Plaintiff and Respondent, v. VALENCIA HOLDING COMPANY, LLC, Defendant and Appellant.	B228027 (Los Angeles County Super. Ct. No. BC433634)

APPEAL from an order of the Superior Court of Los Angeles County, Rex Heeseman, Judge. Affirmed.

Tharpe & Howell, Christopher S. Maile, Soojin Kang; Greines, Martin, Stein & Richland and Robert A. Olson for Defendant and Appellant.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Angela J. Smith for Plaintiff and Respondent.

Plaintiff, a car buyer, filed this class action against a car dealer, alleging violations of the Consumers Legal Remedies Act (CLRA) (Civ. Code, §§ 1750–1784), the Automobile Sales Finance Act (ASFA) (Civ. Code, §§ 2981–2984.6), the unfair competition law (UCL) (Bus. & Prof. Code, §§ 17200–17210), the Song-Beverly Consumer Warranty Act (Song-Beverly Act) (Civ. Code, §§ 1790–1795.8), and the California Tire Recycling Act (Tire Recycling Act) (Pub. Resources Code, §§ 42860–42895).[1]

The car dealer filed a motion to compel arbitration pursuant to a provision in the sales contract, which also contained a class action waiver. The trial court determined that the class action waiver was unenforceable on the ground that a consumer is statutorily entitled to maintain a CLRA suit as a class action. (See Civ. Code, § 1781.) The arbitration provision in the sales contract stated that if the class action waiver was declared unenforceable, the entire arbitration provision was not to be enforced. Pursuant to this "poison pill" clause, the trial court denied the petition to compel arbitration. The car dealer appealed.

We affirm but for a different reason. We conclude that the arbitration provision is unconscionable: The provision is adhesive — involving oppression and surprise — and contains harsh one-sided terms that favor the car dealer to the detriment of the buyer. Because the provision contains multiple invalid clauses, it is permeated by unconscionability and unenforceable. We cannot sever all of the offending language. Thus, regardless of the validity of the class action waiver, the trial court properly declined to compel arbitration.

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[1] The Tire Recycling Act requires a person buying a *new* tire to pay a California tire fee of $1.75. If the seller of the tire knowingly makes a false statement that the tire is new, it is liable for a civil penalty not to exceed $25,000. (Pub. Resources Code, § 42885, subds. (b), (e).)

I

BACKGROUND

The allegations and facts in this appeal are taken from the pleadings and the exhibits submitted in connection with the petition to compel arbitration.

A. Complaint

Plaintiff, Gil Sanchez, filed this class action in March 2010. Two months later, Sanchez filed a first amended complaint (complaint). It alleged as follows.

On August 8, 2008, Sanchez went to a car dealer, Mercedes-Benz of Valencia — a fictitious business name for defendant Valencia Holding Company, LLC (Valencia) — and expressed an interest in buying a certified pre-owned Mercedes. A salesman showed him a 2006 Mercedes-Benz S500V with an advertised price of around $48,000. Sanchez said he wanted to trade in his 2004 Cadillac Deville because he was "upside down" on it — he owed more than the car was worth. The salesman told Sanchez they could probably "make the deal work," depending on how much Sanchez could afford as a down payment.

After a test drive, the salesman told Sanchez that Valencia would give him $6,000 for his Cadillac, on which Sanchez still owed approximately $20,800, creating a negative equity of $14,800. Sanchez made a down payment of $10,000. The salesman said Sanchez might be required to make a higher down payment, but it could be paid over time.

Valencia informed Sanchez that he had to pay $3,700 to have the Mercedes-Benz "certified" to qualify for an interest rate of 4.99 percent. That statement was false. The $3,700 payment was actually for an extended limited warranty, which was optional and unrelated to the interest rate. Sanchez agreed to the additional payment, believing it was a certification fee required to obtain the offered rate.

Sanchez met with Valencia's finance manager, who completed all of the financial information on the sales documents, including a preprinted "Retail Installment

Sale Contract" (Sale Contract).[2] The total sales price was $53,498.60. The amount financed was $47,032.99, with a monthly payment of $888.31. The Sale Contract listed a charge of $347 for "license fees" and "N/A" for registration, transfer, and titling fees. It included a $28 "Optional DMV Electronic Filing Fee," but Valencia never discussed the fee with Sanchez or asked if he wanted to opt out of it. The Sale Contract also charged Sanchez new tire fees of $8.75 — a new tire fee of $1.75 for each new tire, including the spare. But not all of the tires were new. Last, the contract showed a down payment of $15,000 instead of the $10,000 Sanchez had just paid.

Valencia represented that the vehicle was "certified," meaning it had been through a "rigorous inspection and certification process" in which any deficiencies were "repaired, replaced, or reconditioned." A certified vehicle comes with a 12-month limited warranty. As alleged, the "certified" classification and the certification program were "intentionally fraudulent." Nothing was done to improve the condition or operation of a certified vehicle. A CARFAX vehicle history report — which would have disclosed prior accidents and damage — is supposed to accompany every certified vehicle, but Sanchez did not receive one.

Sanchez executed the Sale Contract and took possession of the vehicle on August 8, 2008. A few days later, Valencia called him and said he owed more toward the down payment. On August 15, 2008, Sanchez went to the dealership and wrote a check for $3,000. Sometime thereafter, Sanchez received another call, telling him he owed still more on the down payment. He went to the dealership and wrote a check for $2,000, bringing the total down payment to $15,000.

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[2] The Reynolds and Reynolds Company (<http://www.reyrey.com/solutions/document_solutions/index.asp>) [as of Nov. 23, 2011]) produces and sells the preprinted contract, which in this case was designated Form No. 553-CA-ARB, effective May 2008.

Sanchez soon experienced problems with the vehicle, including malfunctions with various electrical systems, water leaks inside the passenger cabin and the trunk, engine failures, and errors with the warning and indicator lights. Sanchez took the vehicle to authorized repair facilities on several occasions, including Valencia, but they were unable to repair the vehicle. Eventually, Valencia accused Sanchez of having tampered with or wrecked the vehicle, told him it would cost $14,000 to make the repairs, and said the warranties would not apply. The accusation against Sanchez was false. Sanchez then had the vehicle inspected elsewhere and learned it had been in an accident or had been inadequately repaired before he bought it.

Sanchez alleges that Valencia violated several California laws by: (1) failing to separately itemize the amount of the down payment that is deferred to a date after the execution of the Sale Contract; (2) failing to distinguish registration, transfer, and titling fees, on the one hand, from license fees, on the other hand; (3) charging buyers the Optional DMV Electronic Filing Fee without discussing it or asking the buyer if he or she wanted to pay it; (4) charging new tire fees for used tires; and (5) telling Sanchez to pay $3,700 to have the vehicle certified so he could qualify for the 4.99 percent interest rate when that payment was actually for an optional extended warranty unrelated to the rate.

The complaint alleged that a class action was appropriate based on the numerosity of putative class members, the predominance of common questions of law and fact, the typicality of the claims, and the superiority and benefits of class litigation. Four distinct classes were proposed based on the particular violations committed by Valencia.

Fifteen causes of action were alleged. The first one, for violation of the CLRA, was premised on Valencia's false representations and sought injunctive relief and damages, including punitive damages. Of the remaining 14 causes of action — alleging violations of the CLRA, ASFA, UCL, Song-Beverly Act, or Tire Recycling Act — 12 sought injunctive relief, rescission of the Sale Contract, restitution, or some combination thereof, but no damages. The other two, alleging violations of the Tire

Recycling Act and the Song-Beverly Act, sought civil penalties or damages. Under the Tire Recycling Act, Sanchez sought a civil penalty not exceeding $25,000 for new tire fees charged for used tires. (See Pub. Resources Code, § 42885, subds. (b). (e).) As provided in the Song-Beverly Act, he sought general and consequential damages plus a civil penalty up to two times actual damages. (See Civ. Code, § 1794.) The complaint also prayed for an award of attorney fees.

B. Motion to Compel Arbitration

On June 7, 2010, Valencia filed a motion to compel arbitration pursuant to an arbitration provision in the Sale Contract. The provision stated: "1. Either you or we may choose to have any dispute between us decided by arbitration and not in court or by jury trial.

"2. If a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations.

"3. Discovery and rights to appeal in arbitration are generally more limited than in a lawsuit, and other rights that you and we would have in court may not be available in arbitration.

"Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship . . . shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. . . . Any claim or dispute is to be arbitrated *by a single arbitrator* on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the *National Arbitration Forum* . . . (www.arbforum.com), the *American Arbitration Association* . . . (www.adr.org), or any other organization that you may choose subject to our approval. . . .

"Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside .... We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be *final and binding* on all parties, *except* that in the event the arbitrator's award *for a party is $0* or *against a party is in excess of $100,000*, or includes an award of *injunctive relief against a party*, that party may request *a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party* requesting new arbitration shall be responsible for *the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs*. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration.

"You and we retain any rights to *self-help remedies, such as repossession.* You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. *If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations*

have been made, the remainder of this Arbitration Clause shall be unenforceable." (Italics added, some capitalization omitted.)[3]

In anticipation of Sanchez's contentions, Valencia asserted in its moving papers that: (1) the arbitration provision was not procedurally or substantively unconscionable under the principles set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 at page 114 (*Armendariz*); and (2) the class action waiver was not invalid under *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, which was later overruled in *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740] (*Concepcion*). This second point was of special importance because the arbitration provision contained a "poison pill" clause — if the class action waiver was found to be unenforceable, the entire arbitration provision was unenforceable, and the case would be adjudicated in a court of law.

The Sale Contract is a preprinted document consisting of *one page*, 8½ inches wide and 26 inches long. There are provisions on *both* sides that occupy the entire document, leaving little in the way of margins. Sanchez signed or initialed the *front* in eight places, each related to a different provision. No signatures, initials, or other handwriting appears on the *back*. The arbitration provision, entitled "**ARBITRATION CLAUSE,**" is on the *back* at the bottom of the page, outlined by a black box. It is the *last* provision of the Sale Contract concerning the purchase transaction; a provision related to the assignment of the contract appears below it. The buyer's *final* signature appears near the bottom on the *front* side.

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[3] The National Arbitration Forum (NAF), one of the two arbitration organizations named in the Sale Contract, no longer handles consumer disputes. (See NAF, File A Claim <http://www.arbforum.com/main.aspx?itemID=1529&hideBar=False&navID=175&news=3> [as of Nov. 23, 2011].) The NAF stopped accepting new consumer claims in July 2009. (See American Bar Association, Litigation News, Future of Mandatory Arbitration of Consumer Disputes in Doubt (Aug. 19, 2009) <http://apps.americanbar.org/litigation/litigationnews/top_stories/arbitration-consumer-disputes.html> [as of Nov. 23, 2011].)

In his opposition papers, Sanchez disagreed with Valencia's legal points. He also submitted a declaration, stating: ". . . When I signed the documents related to my purchase of the Subject Vehicle, I was presented with a stack of documents, and was simply told by the Dealership's employee where to sign and/or initial each one. All of the documents (including the purchase contracts) were pre-printed form documents. When I signed the documents, I was not given an opportunity to read any of the documents, nor was I given an opportunity to negotiate any of the pre-printed terms. The documents were presented to me on a take-it-or-leave-it basis, to either sign them or not buy the car. . . . There was no question of choice on my part or of my being able to 'negotiate' anything. And I had no reason to suspect that hidden on the back of the contracts . . . was a section that prohibited me from being able to sue the Dealership in court if I had a problem.

". . . When I signed the purchase contract and related documents, the Dealership did not ask me if I was willing to arbitrate any disputes with it, did not tell me that there was an 'arbitration clause' on the back side of the purchase contract, and I did not see any such clause before I signed the documents. The Dealership did not explain to me what an arbitration clause was. I was not given any opportunity at any time during my transaction with [the] Dealership to negotiate whether or not I would agree to arbitrate any potential disputes. I was not given an option whether to sign a contract with an arbitration clause or one without.

". . . Prior to the filing of [Valencia's motion to compel arbitration], I had never heard of the National Arbitration Forum or American Arbitration Association. Nor was I aware that there was a clause in my contract with the Dealership supposedly requiring me to go to arbitration if I had a dispute with the Dealership and that I had to read the rules of those organizations before signing my purchase contracts. No one at the Dealership turned my purchase contract over and showed me the writing on the back or asked me to sign any sections on the back of the contract where I have now learned the arbitration clause is located.

". . . At no point during my transaction with the Dealership was I presented with a separate arbitration agreement to review and sign.

". . . On both occasions when I was at the Dealership and signed purchase contracts, I did not have, nor was I given, an opportunity to use a computer to download any information about arbitration organizations, including their procedures or rules, nor was I aware that I could or should have done this."

The motion to compel was heard on August 19 and September 13, 2010. At the September 13 hearing, the trial court stated it was denying the motion and would issue a written order within a week. On September 14, the trial court issued an order denying the motion. The court explained that the CLRA expressly provides for class actions and declares the right to a class action to be unwaivable. (See Civ. Code, §§ 1781, 1751.) As a consequence, the class action waiver in the arbitration provision was unenforceable. Further, in accordance with the poison pill clause, the unenforceability of the class action waiver made the entire arbitration provision unenforceable. The trial court therefore denied the motion. Valencia appealed.

II

DISCUSSION

"'"'Whether an arbitration provision is unconscionable is ultimately a question of law.'" . . . 'On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability.'" (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1511–1512, citations omitted; accord, *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.) Because this appeal presents a question of law, we may resolve it in the first instance, without remand to the trial court. "'We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.'" (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.)

The parties disagree as to whether the class action waiver is unenforceable under the CLRA, thereby making the entire arbitration provision unenforceable under the poison pill clause. They also dispute whether the arbitration provision is procedurally

and substantively unconscionable and whether the provision is permeated by unconscionability, rendering it unenforceable.

We do not address whether the class action waiver is unenforceable. Rather, we conclude the arbitration provision as a whole is unconscionable: The provision is procedurally unconscionable because it is adhesive and satisfies the elements of oppression and surprise; it is substantively unconscionable because it contains harsh terms that are one-sided in favor of the car dealer to the detriment of the buyer. Because the provision contains multiple invalid terms, it is permeated by unconscionability and unenforceable. Severance of the offending language is not appropriate. It follows that the case should be heard in a court of law.

A. General Principles of Unconscionability

As explained in *Armendariz, supra*, 24 Cal.4th 83: "In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. . . . As section 1670.5, subdivision (a) states: 'If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which . . . provides that arbitration agreements are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (9 U.S.C. § 2), recognized that 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements . . . .' . . .

". . . '[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results. . . . 'The prevailing view is that

[procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' . . . But they need not be present in the same degree. . . . [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra*, 24 Cal.4th at p. 114, citations omitted; accord, *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1288–1289.)

Before applying *Armendariz* to the present case, we note that *Concepcion, supra*, 131 S.Ct. 1740, does not preclude the application of the unconscionability doctrine to determine whether an arbitration provision is unenforceable. *Concepcion* disapproved the "*Discover Bank* rule," stating: "In *Discover Bank*, the California Supreme Court applied [the doctrine of unconscionability] to *class-action waivers* in arbitration agreements and held as follows: [¶] '[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.'" (*Concepcion*, at p. 1746, italics added.) The court in *Concepcion* ultimately concluded that "[r]equiring the availability of *classwide arbitration* interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id.* at p. 1748, italics added.)

With the exception of the *Discover Bank* rule, the court acknowledged in *Concepcion* that the doctrine of unconscionability remains a basis for invalidating arbitration provisions: "The final phrase of [title 9, United States Codes, section 2] . . . permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits

agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion, supra*, 131 S.Ct. at p. 1746, italics added; accord, *Kanbar v. O'Melveny & Myers* (N.D.Cal. 2011) 2011 U.S. Dist. Lexis 79447, pp. *15–*16, *23–*24, 2011 WL 2940690, pp. *6, *9; see *In re Checking Account Overdraft Litigation* (S.D.Fla. 2011) 2011 U.S. Dist. Lexis 118462, p. *46, 2011 WL 4454913, p. *4 ["*Concepcion* did not completely do away with unconscionability as a defense to the enforcement of arbitration agreements under the FAA"].) Significantly, in *Rent-A-Center, West, Inc. v. Jackson* (2010) ___ U.S. ___ [130 S.Ct. 2772], an employment case decided less than a year before *Concepcion*, the question before the court was whether an arbitrator or a court should decide whether the doctrine of unconscionability — where the arbitration agreement was allegedly too one-sided and overly favorable to the employer — precluded arbitration. (*Id.* at pp. 2780–2781.) Given the clear and unmistakable language authorizing the arbitrator to decide the "enforceability" of the arbitration agreement, the court held that the arbitrator should decide whether the agreement was unconscionable and therefore unenforceable.

Thus, *Concepcion* is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1–16). (See *Concepcion, supra*,131 S.Ct. at pp. 1748–1753.) *Concepcion* "concerns the preemption of unconscionability determinations for *class action waivers* in consumer cases[,] . . . specifically . . . with the rule enunciated in *Discover Bank* . . . ." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 499, italics added.) The unconscionability principles on which we rely govern *all* contracts, are not unique to arbitration agreements, and do not disfavor arbitration. (See *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1158–1159 & fn. 4; see also *Concepcion*, at p. 1747 [unconscionability is "a doctrine normally thought to be generally applicable" to all

contracts but cannot be invoked to disfavor arbitration or applied based on uniqueness of arbitration]; *id.* at p. 1748 [FAA "preserves generally applicable contract defenses" to arbitration].)

Our conclusion today does not undermine the purpose of the FAA: "to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*" (*Concepcion, supra*, 131 S.Ct. at p. 1748, italics added) or, as otherwise phrased, the "'enforcement of private agreements and *encouragement of efficient and speedy dispute resolution*'" (*id.* at p. 1749, italics added). On the contrary, as we discuss below (see pt. II.C., *post*), the arbitration provision itself sacrifices efficient and speedy resolution through the adoption of harsh, one-sided terms in an effort to ensure that the car dealer will be the prevailing party.

B. Procedural Unconscionability

"'The procedural element of unconscionability focuses on two factors: oppression and surprise. . . . "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'" . . . "'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." . . .'" (*Bruni v. Didion, supra*, 160 Cal.App.4th at p. 1288.)

In *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77 (*Gutierrez*), the plaintiff leased a vehicle pursuant to a contract virtually identical to the one here and signed it under similar circumstances. The Court of Appeal had no difficulty concluding the arbitration provision was procedurally unconscionable, saying: "The trial court's implicit conclusion that the arbitration clause in the automobile lease is adhesive is supported by substantial evidence. The lease was presented to plaintiffs for signature on a 'take it or leave it' basis. Plaintiffs were given no opportunity to negotiate any of the preprinted terms in the lease. The arbitration clause was particularly inconspicuous, printed in eight-point typeface on the opposite side of the signature page of the lease. [The plaintiff] was never informed that the lease contained an arbitration clause, much less offered an opportunity to negotiate its inclusion within

the lease or to agree upon its specific terms. He was not required to initial the arbitration clause. . . . He either had to accept the arbitration clause and the other preprinted terms, or reject the lease entirely. Under these circumstances, the arbitration clause was procedurally unconscionable." (*Id.* at p. 89, citation omitted; accord, *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 722–723.)

As a federal court explained in finding the arbitration provision in a Sale Contract to be procedurally unconscionable: "[The buyer] asserts the Contract was presented to him on a 'take-it-or-leave-it' basis, . . . and he did not have an opportunity for meaningful negotiation. [The lender] disputes this assertion . . . . [The buyer] has submitted a declaration describing the circumstances under which he signed the Contract. According to [him], he was not provided an opportunity to read the Contract prior to signing it. . . . Instead, the finance person simply 'held the contract flat on the desk with one hand and with the other pointed to the various places on the front of the contract for [the buyer] to sign that [were] marked in yellow.' . . . [The buyer] 'was not allowed to read the back of the contract [where the Arbitration Clause is located], or asked to sign anywhere on the back of the contract. The finance person did not turn the contract over at all during the signing.' . . . No one pointed out the Arbitration Clause or discussed it with [the buyer] at any time. . . . These circumstances are sufficient to . . . support a finding of oppression. [¶] . . . [¶]

"Oppression, however, is only one factor in the procedural unconscionability analysis. The other factor is surprise, and on this factor, [the buyer] asserts the Arbitration Clause was hidden in the lengthy form contract. [The lender] disputes this assertion, and points out that the Arbitration Clause is located within a box entitled '**ARBITRATION CLAUSE,**' under which reads '**PLEASE REVIEW — IMPORTANT — AFFECTS YOUR LEGAL RIGHTS.**' However, the border and heading typeface do not change the location of the Arbitration Clause, which is found at the end of the Contract. [The lender does] not dispute [the buyer's] assertion that he 'did not know there was any arbitration clause until [his] attorney told [him that the lender] is trying to force arbitration.' . . . Based on this evidence, the Court finds [that

the buyer] has demonstrated surprise. Combined with the finding of oppression, [the buyer] has shown the Arbitration Clause is procedurally unconscionable." (*Smith v. Americredit Financial Services, Inc.* (S.D.Cal. 2009) 2009 U.S. Dist. Lexis 115767, pp. *13–*16, 2009 WL 4895280, pp. *5–*6.)

Even the California Attorney General has commented that the lengthy one-page Sale Contract is problematic, describing it as "an unwieldy size for a business document, and incompatible with standard office printing and reproduction machines. This incompatibility leads to significant trouble and expense for automobile dealers, as well as for those consumers who need to make or transmit copies of their sales contracts." (92 Ops.Cal.Atty.Gen. 97, 98 (2009).) The Attorney General has advised that a Sale Contract need not be a single page but may consist of multiple pages fastened together and sequentially numbered. (*Id.* at pp. 100–101.) As the Attorney General explained, the use of multiple pages, as opposed to a single page, will "facilitat[e] . . . the consumer's review of all of the parties' agreements before the consumer signs the sale or lease contract, so that the consumer has complete and accurate information. The [multiple-page] rule also helps to avert later disputes about the terms of the parties' final agreement." (*Id.* at p. 100.)

For its part, Valencia argues procedural unconscionability is lacking because Sanchez could have gone elsewhere to buy a Mercedes-Benz from a dealer who did not require arbitration. But "absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives. . . . [C]ourts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market." (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 585, fn. omitted; see *id.* at pp. 583–585 [discussing cases].) "The California Court of Appeal has rejected the notion that the availability in the marketplace of substitute employment, goods, or services *alone* can defeat a claim of procedural unconscionability." (*Nagrampa v. MailCoups, Inc.* (9th Cir. 2006) 469 F.3d 1257, 1283 (en banc).) And here, there is no evidence Sanchez could have purchased a

Mercedes-Benz from a dealer who did not mandate arbitration. Far from it, in arguing the arbitration provision involved no surprise, Valencia relies on case authority for the proposition "arbitration per se may be within the reasonable expectation of most consumers." (*Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1665; accord, *Gutierrez, supra*, 114 Cal.App.4th at p. 90.) If that is true, a potential buyer would reasonably believe that *all* Mercedes-Benz dealers insist on arbitration and that there are no market alternatives. But a buyer would not expect to be bound by a provision as harsh and one-sided as the one here.

Valencia also contends that, on the front page of the Sale Contract, Sanchez signed off on a provision stating: "You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You acknowledge that you have read both sides of this contract, including the arbitration clause on the reverse side, before signing below. You confirm that you received a completely filled-in copy when you signed it." (Capitalization omitted.) This provision is located 22 inches from the top of the front page and flush to the *right margin* in a space measuring about 2¼ inches wide and 1⅛ inches high. To the immediate left of the provision is boxed text discussing the lack of a cooling-off period; it is approximately 5⅞ inches wide and 1⅛ inches high. A signature line for the *buyer* appears flush to the *left margin* directly below the *boxed text about cooling off*; that is the last signature line for the buyer in the contract. The only signature directly below the provision that mentions the "arbitration clause" is that of the car dealer's manager — the last signature on the front page and in the contract.

Spacing aside, Sanchez stated in his declaration he was not given an opportunity to read the contract. Rather, the finance manager simply told him where to sign or initial and did not turn the contract over, which would have revealed a full page of additional provisions. Sanchez did not know the contract contained an arbitration provision by way of either the two-word reference on the front side or the full arbitration provision on the reverse side. As one court has explained in similar circumstances: "[P]laintiffs are claiming that they never knowingly agreed to the

arbitration provision[]. As in most, if not all, adhesion contract cases, they deny ever reading [it]. The general rule '"that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it"' applies only in the absence of '"overreaching"' . . . or '""imposition'"" . . . . Thus, it does not apply to an adhesion contract. . . . Indeed, failure to read the contract helps 'establish actual surprise . . . .'" (*Bruni v. Didion, supra*, 160 Cal.App.4th at pp. 1290–1291, citations omitted.) And even if Sanchez had read the pertinent provision on the *front* and seen the words "arbitration clause" buried therein, he still would have been surprised almost two years later, when he first learned that the arbitration provision, located on the *back*, was overly harsh and one-sided in favor of the car dealer.

In short, the arbitration provision satisfies the two elements of procedural unconscionability: oppression and surprise. Its location at the bottom on the back of the Sale Contract made it unnoticeable to a buyer who was not given time to read the contract.

C. Substantive Unconscionability

"Of course, simply because a provision within a contract of adhesion is not read or understood by the nondrafting party does not justify a refusal to enforce it. The unbargained-for term may only be denied enforcement if it is also *substantively* unreasonable. . . . Substantive unconscionability focuses on whether the provision is overly harsh or one-sided and is shown if the disputed provision of the contract falls outside the 'reasonable expectations' of the nondrafting party or is 'unduly oppressive.' . . . Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (*Gutierrez, supra*, 114 Cal.App.4th at p. 88, citations omitted.)

We conclude that four clauses in the arbitration provision are unconscionable. First, a party who loses before the single arbitrator may appeal to a panel of three arbitrators if the award exceeds $100,000. Second, an appeal is permitted if the award includes injunctive relief. Third, the appealing party must pay, in advance, "the filing

fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs." Fourth, the provision exempts repossession from arbitration while requiring that a request for injunctive relief be submitted to arbitration. Although these provisions may appear neutral on their face, they have the effect of placing an unduly oppressive burden on the buyer. In assessing unconscionability, we focus on the practical effect of a provision, not a facial interpretation. (*Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1079–1080 (*Saika*).)

1. Award Exceeding $100,000

Either party may appeal an initial decision exceeding $100,000. As courts have recognized, this type of provision, though seemingly neutral, has the effect of benefiting the party with superior bargaining power, here, the car dealer.

In *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*), an employment case, the arbitration provision allowed either party to appeal an initial award to a second arbitrator if it exceeded $50,000. The Supreme Court found the provision unconscionable, stating: "[The employer] and its amici curiae . . . claim that the arbitration appeal provision applied evenhandedly to both parties and that . . . there is at least the possibility that an employer may be the plaintiff, for example in cases of misappropriation of trade secrets. . . . But if that is the case, they fail to explain adequately the reasons for the $50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants. Given the fact that [the employer] was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant.

"Although parties may justify an asymmetrical arbitration agreement when there is a 'legitimate commercial need' . . . , that need must be 'other than the employer's desire to maximize its advantage' in the arbitration process. . . . There is no such justification for the $50,000 threshold." (*Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at p. 1073, citations omitted; accord, *Gibson v. Nye Frontier Ford, Inc.* (Alaska 2009) 205 P.3d 1091, 1098 & fn. 26.)

Little relied in part on *Saika*, *supra*, 49 Cal.App.4th 1074. In *Saika*, a patient signed a "Patient-Physician Arbitration Agreement" before undergoing a chemical skin peel of her face. The agreement provided that if an award exceeded $25,000, either party could request a trial de novo in superior court, and the arbitration award would be null and void. (*Id.* at p. 1077.) After the medical procedure, the patient filed a civil suit against the physician, alleging medical malpractice based on severe burns. The physician successfully moved to compel arbitration. The arbitrators awarded $325,000. The patient sought to strike the trial de novo clause and confirm the award; the physician countered with a request for a trial de novo. The trial court ruled in favor of the physician.

The Court of Appeal reversed, stating: "A trial de novo clause within the arbitration agreement purportedly allows either party to disregard the results of the arbitration and litigate in the courts when the arbitration award *exceeds* $25,000, but . . . the practical effect of the clause is to tilt the playing field in favor of the doctor. By making arbitration virtually illusory as far as one side is concerned, the clause contravenes the strong public policy favoring arbitration." (*Saika*, *supra*, 49 Cal.App.4th at pp. 1076–1077.)

The court realized that an arbitration award in favor of a patient in a malpractice case typically exceeds $25,000 by such a substantial amount that only the *physician* would invoke the trial de novo clause. In contrast, a claim by a physician against a patient, most likely a billing matter, would rarely result in an award exceeding $25,000, especially if the patient had private health insurance or was covered by some type of governmental assistance program. As the court explained: "True, there is a theoretical

class of cases where the trial de novo clause could arguably benefit a patient — namely, situations where the initial arbitration award *exceeds* $25,000 but is *still so low* that it represents an injustice. . . . For example, the case before us appears to involve facial disfigurement. The arbitrators handed down what appears, at least insofar as the record discloses, an appropriately large award. Had they only given [the patient] $25,001, the trial de novo clause would . . . have been of some benefit to her.

"But . . . [a]s a practical matter, the benefit which the trial de novo clause confers on patients is nothing more than a chimera. The odds that an award will *both* (a) clear the $25,000 threshold but (b) *still* be so low that the *patient* would *want* to have a trial de novo are so small as to be negligible. . . . [T]he cases where the trial de novo clause could possibly benefit the patient are going to be rare indeed.

". . . [W]hile the trial de novo clause in the present case purports to apply to both parties, it is the same 'heads I win, tails you lose' proposition that the court condemned in [prior case law.] [¶] . . . [¶]

". . . [P]ublic confidence in arbitration in large part depends on the idea that arbitration provides a *fair* alternative to the courts. That confidence is manifestly undermined when provisions in arbitration clauses provide that when one side wins the game doesn't count. . . . Alternative dispute resolution must be a genuine *alternative* to litigation in the courts, not a sham process by which one party to an agreement can increase the total costs of making a claim against it." (*Saika*, *supra*, 49 Cal.App.4th at pp. 1080–1081, citation omitted.)

The same analysis applies here. The buyer will rarely benefit from the clause permitting an appeal of an award exceeding $100,000 because the buyer, not the dealer, is more likely to recover an award of that size and be satisfied with it; the car dealer would appeal it. Under the Sale Contract, Sanchez is obligated to make monthly payments totaling less than $50,000. In comparison, Valencia's obligations under the Sale Contract and California law are to sell a vehicle in working condition, to avoid making misleading or false representations, and to comply with various consumer laws, the violation of which could result in substantial damages, including punitive damages.

If Sanchez succeeds in obtaining rescission, he is almost half way to a $100,000 award. And given the allegations concerning Valencia's violations of the consumer laws and the way in which Valencia responded to the reported defects in the vehicle, an award in Sanchez's favor could easily exceed $100,000.[4] In short, there is no justification for the $100,000 threshold, other than to relieve the car dealer of liability it deems excessive.

Valencia emphasizes that an appeal of the initial award is permitted if *either party* brings a claim and recovers nothing. By providing an appeal where the arbitrator awards nothing, one party is not favored over the other. We cannot say that one of the parties is more likely to lose regardless of which party is the claimant or the respondent in the arbitration. Nevertheless, under the appeal clauses, 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.*

2. Appeal of Award that Includes Injunctive Relief

The arbitration provision allows an appeal by either party if an award against it contains injunctive relief. This type of appeal unduly burdens the buyer because the buyer, not the car dealer, would be the party obtaining an injunction.

"[I]mmediate injunctive relief [is often] essential to protect consumers against further illegal acts of the defendant." (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 20.) In litigation by consumers, "the importance of providing an

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[4] This potential recovery does not include any civil penalties under the Tire Recycling Act ($25,000 per violation). It is not evident the act may be privately — as opposed to administratively — enforced. The parties did not brief that issue, and we express no view on the subject.

effective injunctive remedy becomes manifest." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 107.)

Preliminary injunctive relief is appropriate only if two interrelated factors are present: (1) the plaintiff is likely to prevail on the merits at trial; and (2) the interim harm the plaintiff is likely to sustain in the absence of an injunction is greater than the harm the defendant will probably suffer if an injunction is issued. (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 433.) A consideration of interim harm includes the inadequacy of other remedies, including damages, and the degree of irreparable injury the denial of the injunction would cause. (*Id.* at p. 435; *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352; 5 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 337, p. 282.)

Preliminary injunctions are of particular importance in protecting the interests of consumers. (See, e.g., *Regents of University of California v. ABC* (9th Cir. 1984) 747 F.2d 511, 521; *Sanderson Farms, Inc. v. Tyson Foods, Inc.* (D.Md. 2008) 547 F.Supp.2d 491, 508–509; *R.L. Polk & Co. v. INFOUSA, Inc.* (E.D.Mich. 2002) 230 F.Supp.2d 780, 796–797; *F.T.C. v. Staples, Inc.* (D.D.C. 1997) 970 F.Supp. 1066, 1091–1092; see also *Vo v. City of Garden Grove*, *supra*, 115 Cal.App.4th at p. 435 [one factor weighing against issuance of preliminary injunction is any adverse effect it would have on public interest].)[5]

Not surprisingly, it is the buyer, not the car dealer, who would be seeking preliminary or permanent injunctive relief, primarily to enforce consumer laws like the

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[5] Our Supreme Court has held that, because injunctive relief sought under the CLRA and the UCL prevents future deceptive practices on behalf of the general public, a request for an injunction under those acts is not arbitrable. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079–1080 [CLRA]; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315–316 [UCL].) Valencia contends *Broughton* and *Cruz* were implicitly overruled by *Concepcion*, *supra*, 131 S.Ct. 1740, but does not address how the injunction exception, if still valid, would affect the alleged unconscionability of the arbitration provision.

CLRA. If an interim award (preliminary injunction) or final award (permanent injunction) is issued against the car dealer, the arbitrator has favorably reviewed the merits of the buyer's claims and determined that the interests of consumers will be irreparably injured without injunctive relief.

Nevertheless, here, the arbitration provision's appeal clauses allow the car dealer to delay the effect of an injunction by way of appellate review before a three-member arbitration panel. By subjecting injunctive relief to an appeal process, only the car dealer is benefited, making the clause one-sided and undermining the purpose of the CLRA to protect consumer rights.

In addition, the arbitration provision is silent as to the procedure for taking an appeal. Presumably, if the arbitrator issues a *preliminary* injunction in the form of an *interim* award, the car dealer may appeal at that time, putting the entire case, including the injunction, on hold pending a decision by the three-member appellate panel. This delay is inconsistent with the enforcement of consumer rights laws and the expediency of the arbitration process.

Thus, when it serves the car dealer's interests — if an award against it is *less than* $100,000 — the buyer cannot appeal, and the car dealer touts the benefits of mandatory arbitration: "efficient, streamlined procedures[,] . . . the informality of arbitral proceedings . . . , reducing the cost and increasing the speed of dispute resolution." (*Concepcion, supra*, 131 S.Ct. at p. 1749.) But when those factors do not benefit the car dealer — if injunctive relief is issued against it — then delay, complexity, and higher costs take precedence, and the buyer is subjected to another level of arbitral review — by three arbitrators this time — denying the weaker party of the benefits of arbitration.

3. Advance Payment of Fees and Costs on Appeal

As provided in the arbitration provision, if either party recovers nothing, it "may request a new arbitration under *the rules of the arbitration organization* by a *three*-arbitrator panel. The *appealing party* requesting new arbitration shall be responsible

for the *filing fee and other arbitration costs* subject to a *final determination* by the arbitrators of a fair apportionment of costs." (Italics added.)

Yet the AAA rules do not mention arbitration costs where a consumer appeals an initial award to a three-member panel. Nor do they permit any kind of appeal, to a three-member panel or otherwise. (See AAA, Consumer Procedures <http://www.adr.org/sp.asp?id=29466> [as of Nov. 23, 2011]; Consumer-Related Disputes Supplementary Procedures <http://www.adr.org/sp.asp?id=22014> [as of Nov. 23, 2011]; see also AAA, Commercial Arbitration Rules and Mediation Procedures (eff. June 1, 2009) <http://www.adr.org/sp.asp?id=36905> [as of Nov. 23, 2011].) And the appeal clauses in the Sale Contract require the appealing party to advance the fees and costs for *both* parties.

The CLRA confers unwaivable statutory rights on consumers and accords them some of the rights set forth in *Armendariz*, *supra*, 24 Cal.4th at pages 103–113. (See *Gutierrez*, *supra*, 114 Cal.App.4th at p. 95 & fn. 14; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 854–855 [discussing *Gutierrez*].) One of those rights limits the payment of arbitral expenses by the consumer.

Under the CLRA, a consumer does not have to pay arbitration costs or arbitrator fees (arbitral expenses) that he or she cannot afford or that are prohibitively high. (See *Gutierrez*, *supra*, 114 Cal.App.4th at pp. 82–83, 89–90, applying *Armendariz*, *supra*, 24 Cal.4th at pp. 110–111, and *Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90 [121 S.Ct. 513].) Yet the appeal clauses mandate that the appealing party bear the arbitral expenses for *both* parties in advance, subject to reallocation between the parties at the end of the proceeding. But reapportionment *at the conclusion* of the arbitration is inadequate. (*Gutierrez*, at p. 90.) "[That] possibility . . . provides little comfort to consumers . . . who cannot afford to initiate the [appeal] process in the first place." (*Ibid.*) Items covered by an advance payment on appeal include, as stated in the Sale Contract, "the filing fee and other arbitration costs." Arbitrator fees in Los Angeles average around $450 per hour. (See ADR Services, Inc., Southern California Mediation & Arbitration Panel <http://www.adrservices.org/

pdf/JAMP%20(SOCAL)%20fees%208.07.pdf> [as of Nov. 23, 2011].) Hearing room rental costs and the arbitrator's travel expenses may also be included. (See *D.C. v. Harvard Westlake School, supra*, 176 Cal.App.4th at p. 849, fn. 4.)

Because 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, the provision discourages buyers from pursuing an appeal and enforcing their rights under the CLRA. Although the AAA consumer rules ensure that a consumer does not have to advance an exorbitant sum at the beginning of the *single-arbitrator* process, the rules, as noted, do not address or permit an appeal. (See AAA, Consumer Arbitration Costs <http://www.adr.org/sp.asp? id=22039> [as of Nov. 23, 2011]; AAA, Administrative Fee Waivers and Pro Bono Arbitrators <http://www.adr.org/sp.asp?id=22040> [as of Nov. 23, 2011.) The requirement that the appealing party pay the filing fee and arbitration costs of *both* parties *in advance* puts an unduly harsh burden on a consumer.

That is not to say a consumer must be allowed to pursue an appeal without paying anything up front. But the arbitration provision in this case provides no procedure or criteria for determining how much the consumer can afford. As the court explained in *Gutierrez*: "Unconscionability is determined as of the time the contract is made. . . . The flaw in this arbitration agreement is readily apparent. Despite the potential for the imposition of a substantial [advance of appellate costs], there is no effective procedure for a consumer to obtain a [cost] waiver or reduction. A comparison with the judicial system is striking. . . . [T]he judicial system provides parties with the opportunity to obtain a judicial waiver of some or all required court fees.

"The Government Code prescribes a tripartite means test for litigants seeking such a waiver. . . . The first two tests automatically exempt a party who receives certain designated governmental benefits . . . or who falls below a designated poverty limit . . . . Under the third test, courts have discretion to exempt litigants 'unable to proceed without using money which is necessary for the use of the litigant or the litigant's

family to provide for the common necessaries of life.' . . . The Judicial Council, at the Legislature's direction, has provided a set of forms and rules that supplement the Government Code statute. . . . These rules detail the application form . . . , the procedure for determining the application . . . , and when a hearing is required . . . . Denial of the application, in whole or in part, 'shall include a statement of reasons.' . . .

"In contrast, the [arbitration provision here does not indicate] . . . how this process is begun, or who makes the determination, or what criteria are utilized to decide if [costs] should be reduced or deferred. . . .

"We do not mean to suggest that an arbitration agreement requiring the posting of [costs] to initiate the [appeal] process must provide a cost-waiver procedure that duplicates the judicial waiver procedure. But the agreement must provide some effective avenue of relief from unaffordable fees. This one does not." (*Gutierrez, supra*, 114 Cal.App.4th at pp. 91–92, citations omitted.) Nor does the arbitration agreement in this case.

4. Remedies Exempt from Arbitration

The arbitration provision expressly exempts self-help remedies including repossession, which is perhaps the most significant remedy from the car dealer's perspective. The buyer has no effective self-help remedies against a car dealer, and none of the buyer's remedies is exempt. Yet one of the most important remedies to a consumer — injunctive relief — is subject to arbitration. While a buyer is likely to seek an injunction against a car dealer — 10 of the 15 causes of action in this case do — we cannot conceive of a situation where the dealer would be requesting that type of relief against a buyer.

In *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, the plaintiffs obtained a reverse mortgage on their home. The loan agreement contained an arbitration clause requiring the arbitration of all controversies with the exception of self-help remedies, stating: "'[T]his Section does not limit [the lender's] right to foreclose against the Property (whether judicially or non-judicially by exercising [its] right of sale or otherwise), to exercise self-help remedies such as set-off, or to obtain

. . . appointment of a receiver from any appropriate court, whether before, during or after any arbitration.'" (*Id.* at p. 850.) The plaintiffs filed suit against the lender, alleging fraud, unfair business practices, and violation of the CLRA. The lender moved to arbitrate the case. The trial court denied the motion. The Court of Appeal affirmed, stating that "[a]s a practical matter, by reserving to itself the remedy of foreclosure, [the lender] has assured the availability of the only remedy it is likely to need. . . . The clear implication is that [the lender] has attempted to maximize its advantage by avoiding arbitration of its own claims." (*Id.* at p. 855; see also *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 845, fn. 21 [car buyer misinterpreted arbitration provision to allow car dealer to seek deficiency judgment in court instead of arbitration].)

By exempting repossession — to which only the car dealer would resort — from arbitration, while subjecting a request for injunctive relief — the buyer's comparable remedy — to arbitration, the Sale Contract creates an unduly oppressive distinction in remedies. This is especially so given that the California Arbitration Act (Code Civ. Proc., §§ 1280–1294.2) exempts preliminary injunctions from arbitration, allowing an application for "provisional" remedies to be filed directly in court (*id.*, § 1281.8). Nevertheless, the Sale Contract dictates otherwise. As several courts have held, arbitration provisions are unconscionable if they provide for the arbitration of claims most likely to be brought by the weaker party but exempt from arbitration claims most likely to be filed by the stronger party. (See, e.g., *Armendariz, supra*, 24 Cal.4th at p. 119; *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 896; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 724–725.)

Finally, the requirement that the buyer seek injunctive relief from the arbitrator is inconsistent with the CLRA. As our Supreme Court has explained: "[T]he purpose of arbitration is to voluntarily resolve private disputes in an expeditious and efficient manner. . . . Parties to arbitration voluntarily trade the formal procedures and the opportunity for greater discovery and appellate review for '"the simplicity, informality, and expedition of arbitration."' . . .

"On the other hand, the evident purpose of the injunctive relief provision of the CLRA is not to resolve a private dispute but to remedy a public wrong. Whatever the individual motive of the party requesting injunctive relief, the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered. . . . In other words, the plaintiff in a CLRA damages action is playing the role of a bona fide private attorney general. . . .

"In addition to the fact that the injunction is for the public benefit, we are cognizant of the evident institutional shortcomings of private arbitration in the field of such public injunctions. . . . [C]ourts that have generally affirmed the ability of arbitrators to issue injunctions acknowledge that the modification or vacation of such injunctions involves the cumbersome process of initiating a new arbitration proceeding. . . . While these procedures may be acceptable when all that is at stake is a private dispute by parties who voluntarily embarked on arbitration aware of the trade-offs to be made, in the case of a public injunction, the situation is far more problematic. The continuing jurisdiction of the superior court over public injunctions, and its ongoing capacity to reassess the balance between the public interest and private rights as changing circumstances dictate, are important to ensuring the efficacy of such injunctions. In some cases, the continuing supervision of an injunction is a matter of considerable complexity. . . . Indeed, in such cases, judges may assume quasi-executive functions of public administration that expand far beyond the resolution of private disputes. . . . Arbitrators, on the other hand, in addition to being unconstrained by judicial review, are not necessarily bound by earlier decisions of other arbitrators in the same case. Thus, a superior court that retains its jurisdiction over a public injunction until it is dissolved provides a necessary continuity and consistency for which a series of arbitrators is an inadequate substitute. [¶] . . . [¶]

"In short, there are two factors taken in combination that make for an 'inherent conflict' between arbitration and the underlying purpose of the CLRA's injunctive relief remedy. First, that relief is for the benefit of the general public rather than the

party bringing the action. . . . Second, the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators." (*Broughton v. Cigna Healthplans, supra,* 21 Cal.4th at pp. 1080–1082, citations & fn. omitted.)[6]

D. Severance or Nonenforcement

"'If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' [(Civ. Code, § 1670.5, subd. (a).)] The trial court has discretion under this statute to refuse to enforce an entire agreement if the agreement is 'permeated' by unconscionability. . . . An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision. . . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.' . . . 'The overarching inquiry is whether "'the interests of justice . . . would be furthered'" by severance.'" (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826.)

The arbitration provision in the Sale Contract suffers from four defects, all of which tilt the arbitration decidedly in favor of the car dealer. First, the dealer may appeal to a three-member panel an adverse *monetary* award that only the buyer is likely to receive — an award exceeding $100,000. While the car dealer, when sued, may appeal an adverse award it considers too high, the buyer, when the claimant, cannot

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[6] Assuming that, as Valencia contends, the FAA preempts *Broughton*'s holding (see fn. 5, *ante*), the court's observations about arbitral injunctions under the CLRA remain accurate.

appeal a monetary award it considers too low, other than a total loss. Second, the car dealer may appeal an award of injunctive relief — a remedy only the buyer would seek — to a three-member panel, undermining the urgency of that type of remedy and the goals of arbitration itself: speedy, inexpensive relief to enjoin unlawful conduct affecting numerous consumers. Third, the advance payment of arbitral expenses on appeal requires the buyer, when appealing, to pay the expenses of both parties even though he or she may not be able to afford them, discouraging enforcement of the CLRA and violating the buyer's right to avoid paying exorbitant arbitral expenses. Fourth, the remedy of most importance to the dealer — repossession — is exempt from arbitration, but one of the buyer's most significant remedies —injunctive relief — is not exempt. These defects lead us to conclude that the arbitration provision is permeated by unconscionability.

In addition, not all of the offending clauses can be cured by striking them. The unconscionable taint of the clause requiring an advance payment of both parties' arbitral expenses in the event of an appeal cannot be cleansed by some type of judicial restriction or deletion. The vice of the clause is not that the buyer, when the appellant, has to pay *some* of the costs of appeal in advance. Rather, the clause fails because it does not establish a procedure or criteria for determining how much the buyer can afford. (See *Gutierrez, supra*, 114 Cal.App.4th at pp. 91–92.) "[T]here is no *single* [clause] a court can strike or restrict in order to remove the unconscionable taint from the [arbitration provision]. Rather, the court would have to, in effect, reform the [provision], not through severance or restriction, but by augmenting it with additional terms. Civil Code section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute. Code of Civil Procedure section 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the [arbitration provision] to make it lawful. Nor do courts have any such power under their inherent limited authority to reform contracts. . . . Because a court is unable to cure this unconscionability through severance or restriction and is not permitted to cure it through reformation and augmentation, it must void the entire [arbitration

provision]." (*Armendariz, supra*, 24 Cal.4th at pp. 124–125, citations omitted, italics added.)

Having found that the arbitration provision is permeated by unconscionability, we typically would remand the case to the trial court, allowing it, as a discretionary matter, to decide whether the doctrine of severability should apply. (See *Armendariz, supra*, 24 Cal.4th at pp. 122, 124.) Valencia argues we have no choice but to do so. Yet "an arbitration agreement permeated by unconscionability, or one that contains unconscionable aspects that cannot be cured by severance, restriction, or duly authorized reformation, should not be enforced." (*Armendariz, supra*, 24 Cal.4th at p. 126.) That is precisely what the record establishes here. Thus, it would be pointless to remand the case when only one outcome is proper. Under these circumstances, a remand is unnecessary. (See *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 122; *First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1575–1576; *Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 390; *John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1536, fn. 13.)

Accordingly, we conclude the arbitration provision is procedurally and substantively unconscionable. The provision is permeated by unconscionability that cannot be removed through severance or restriction. The trial court properly denied the motion to compel arbitration.

III

DISPOSITION

The order is affirmed.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

I concur:

JOHNSON, J.

ROTHSCHILD, J., Concurring.

I agree that the arbitration agreement is unconscionable for the following reasons: First, it is procedurally unconscionable because it is a contract of adhesion. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1280 & fn. 11.) Second, it is substantively unconscionable because (1) the provision making monetary awards of exactly $0 or more than $100,000 appealable is unfairly one-sided; and (2) the provision requiring the appealing party to advance all costs of the appeal is unfairly one-sided. Third, the unconscionable aspects of the agreement are not severable or susceptible of reformation. I therefore concur in the judgment.

ROTHSCHILD, J.

APPENDIX B: SUPERIOR COURT ORDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FILED
LOS ANGELES SUPERIOR COURT
SEP 14 2010
JOHN A. CLARKE, CLERK
BY J.L. SNYDER, DEPUTY

GIL SANCHEZ,

Plaintiff,

vs.

VALENCIA HOLDING CO., LLC, et al.,

Defendants.

Case No. BC433634

ORDER DENYING MOTION TO COMPEL ARBITRATION

Plaintiff Gil Sanchez, individually and behalf of others similarly situated ("Plaintiff"), commenced this action, alleging various violations of the Consumer Legal Remedies Act ("CLRA"). Plaintiff alleges that, when he purchased a vehicle from Defendant Valencia Holding Co., LLC dba Mercedes-Benz of Valencia ("MBV") in August 2008, MBV failed to properly disclose and/or itemize certain charges and fees on the retail installment contract.

MBV moves to compel arbitration and dismiss or, alternatively, stay the proceedings. Plaintiff opposes.

MBV requests judicial notice of Plaintiff's First Amended Complaint ("FAC"). Plaintiff requests the Court to take judicial notice of the notice of tentative ruling in Case No. E047802, and the July 20, 2009 press release from the office of the Minnesota Attorney General. The

Court takes judicial notice of the FAC and tentative ruling per C.E.C. section 452(d). It does not take judicial notice of the press release.

Plaintiff and MBV object to the evidence supplied by the parties. This court rules as follows:

Plaintiff's Objections to Scharge Declaration: 1) Overrule; 2) Overrule.

MBV's Objection to Request for Judicial Notice, Exh. 2: Moot.

MBC's Objections to Plaintiff's Evidence: 1) Overrule; 2) Overrule; 3) Overrule; 4) Overrule; 5) Sustain; 6) Overrule; 7) Overrule; 8) Overrule; 9) Overrule; 10) Overrule; 11) Overrule; 12) Overrule; 13) Overrule; 14) Overrule; 15) Overrule; 16) Overrule; 17) Overrule; 18) Overrule.

C.C.P. section 1281 provides that a written agreement to submit to arbitration an existing controversy is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. C.C.P. section 1281.2 provides that a court shall order arbitration of a controversy if the court determines that an agreement to arbitrate the controversy exists, unless the right to compel arbitration has been waived by the moving party. California law incorporates many of the basic policy objectives contained in the Federal Arbitration Act, including a presumption in favor of arbitrability. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 971 72.

MBV moves to compel Plaintiff to submit all claims to binding arbitration pursuant to the arbitration clause in the retail installment sale contract. MBV submits a copy of the contract which has Plaintiff's signature. Schrage Decl., Exh. A. The contract contains a clause which provides that any claim or dispute arising out of the contract shall, at buyer or seller's election, be resolved by a neutral, binding arbitration and not by a court action, and such arbitration may be conducted by the National Arbitration Forum or the American Arbitration Association. Schrage Decl., Exh. A, p. 2, Arbitration Clause. This clause also provides that Plaintiff expressly waives any right to arbitrate a class action. Schrage Decl., Exh. A, p. 2, Arbitration Clause.

Plaintiff contends that MBV has failed to provide admissible evidence of an agreement to arbitrate because the contract is not authenticated. However, MBV provides the declaration of Schrage, the general manager of MBV, who declares that he has personal knowledge of the matters asserted and attached to the declaration is a true and correct copy of the retail installment sale contract. Schrage Decl., ¶¶ 1-2. As a general manager of MBC, Schrage had sufficient personal knowledge to authenticate the contract. The contract is therefore properly authenticated.

This clause provides that, if the waiver of class action rights is deemed unenforceable, the entire clause shall be unenforceable (i.e., a so-called "poison pill"). Schrage Decl., Exh. A, Arbitration Clause. Emphasizing *Fisher v. DCH Temecula Imports LLC*, 2010 DJDAR 12715, Plaintiff contends that, if this waiver is invalid, the entire clause falls.

The CLRA provides that any consumer entitled to bring an action may do so on behalf of himself/herself and others similarly situated, thus permitting consumers to bring class actions. C.C.C. § 1781. The CLRA further provides that any waiver of the CLRA provisions is contrary to public policy and is thus unenforceable and void. C.C.C. §1751.

California courts refuse to uphold contractual terms that require a party to forego unwaivable statutory rights. *Gutierrez v. Autowest, Inc.* (2003) 114 Cal. App. 4th 77, 94. A CLRA non-waiver provision can be a basis for affirming a denial of a motion to compel arbitration. *Fisher* and *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal. App. 4th 571, 588 n.10.

As the CLRA contains a right to bring class actions, a waiver of such right is contrary to public policy and is unenforceable. See, e.g., *Fisher.* Thus, the class action waiver herein is unenforceable. As such, the entire clause is unenforceable, as specifically provided for in that clause.

Accordingly, under *Fisher* and other case law, the motion to compel arbitration is denied.

DATED: September 14, 2010

Judge of the Superior Court

APPENDIX C: REPLICA COPY OF SUBJECT SALES CONTRACT

RETAIL INSTALLMENT SALE CONTRACT – SIMPLE FINANCE CHARGE

Dealer Number [illegible] Contract Number 20177 R.O.S. Number 3850411 Stock Number 52744

Buyer Name and Address (Including County and Zip Code)	Co-Buyer Name and Address (Including County and Zip Code)	Creditor-Seller (Name and Address)
[illegible] 3420 SYLMAR AVE APT 317 VAN NUYS, CA 91401 LOS ANGELES		MERCEDES-BENZ OF VALENCIA 23520 VALENCIA BLVD SANTA CLARITA, CA 91355

You, the Buyer (and Co-Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Creditor - Seller (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below. We will figure your finance charge on a daily basis. The Truth-In-Lending Disclosures below are part of this contract.

New Used	Year	Make and Model	Odometer	Vehicle Identification Number	Primary Use For Which Purchased
USED	2004	MERCEDES-BENZ S500V	28168	WDBNG75J64A[illegible]	☒ personal, family or household ☐ business or commercial

FEDERAL TRUTH-IN-LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your down payment of $ [illegible] is
4.99 %	$ 6265.81 (e)	$ 47032.99	$ 53298.80 (e)	$ 53[illegible] (e)

(e) means an estimate

YOUR PAYMENT SCHEDULE WILL BE:

Number of Payments	Amount of Payments	When Payments Are Due
One Payment of	N/A	N/A
One Payment of	N/A	N/A
59 Payments	888.31	Monthly, Beginning 05/13/20[illegible]
N/A Payments	N/A	Monthly, Beginning N/A
One Final Payment	888.01	03/13/201[illegible]

Late Charge. If payment is not received in full within 10 days after it is due, you will pay a late charge of 5% of the part of the payment that is late.
Prepayment. If you pay off all your debt early, you may be charged a minimum finance charge.
Security Interest. You are giving a security interest in the vehicle being purchased.
Additional Information: See this contract for more information including information about nonpayment, default, any required repayment in full before the scheduled date, minimum finance charges, and security interest.

ITEMIZATION OF THE AMOUNT FINANCED (Seller may keep part of the amounts paid to others.)

1. **Total Cash Price**
   - A. Cash Price of Motor Vehicle and Accessories $ 39798.34 (A)
     1. Cash Price Vehicle $ 39798.34
     2. Cash Price Accessories $ N/A
     3. Other (Nontaxable)
        - Describe N/A $ N/A
        - Describe $ N/A
   - B. Document Preparation Fee (not a governmental fee) $ 55.00 (B)
   - C. Smog Fee Paid to Seller $ N/A (C)
   - D. (Optional) Theft Deterrent Device (to whom paid) $ N/A (D)
   - E. (Optional) Theft Deterrent Device (to whom paid) $ N/A (E)
   - F. (Optional) Theft Deterrent Device (to whom paid) $ N/A (F)
   - G. (Optional) Surface Protection Product (to whom paid) $ N/A (G)
   - H. (Optional) Surface Protection Product (to whom paid) $ N/A (H)
   - I. Sales Tax (on taxable items in A through H) $ 3287.90 (I)
   - J. Optional DMV Electronic Filing Fee $ 28.00 (J)
   - K. (Optional) Service Contract (to whom paid) N/A $ N/A (K)
   - L. (Optional) Service Contract (to whom paid) [illegible] $ 3700.00 (L)
   - M. (Optional) Service Contract (to whom paid) N/A $ N/A (M)
   - N. (Optional) Service Contract (to whom paid) N/A $ N/A (N)
   - O. (Optional) Service Contract (to whom paid) N/A $ N/A (O)
   - P. Prior Credit or Lease Balance paid by Seller to [illegible] $ 0.00 (P)
     (see downpayment and trade-in calculations) N/A
   - Q. (Optional) Gap Contract (to whom paid) $ N/A (Q)
   - R. (Optional) Used Vehicle Contract Cancellation Option Agreement N/A $ N/A (R)
   - S. Other (to whom paid) $ N/A (S)
     For N/A

   Total Cash Price (A through S) $ 46869.24 (1)
2. **Amounts Paid to Public Officials** Estimated
   - A. License Fees $ 547.00 (A)
   - B. Registration/Transfer/Titling Fees $ N/A (B)
   - C. California Tire Fees N/A $ 8.75 (C)
   - D. Other $ N/A (D)

   Total Official Fees (A through D) $ 555.75 (2)
3. **Amount Paid to Insurance Companies**
   (Total premiums from Statement of Insurance column a + b) $ N/A (3)
4. ☐ **Smog Certification or** ☐ **Exemption Fee Paid to State** $ 8.00 (4)

STATEMENT OF INSURANCE

NOTICE. No person is required as a condition of financing the purchase of a motor vehicle to purchase or negotiate any insurance through a particular insurance company, agent or broker. You are not required to buy any other insurance to obtain credit. Your decision to buy or not buy other insurance will not be a factor in the credit approval process.

Vehicle Insurance

		Term	Premium
$ N/A Ded. Comp., Fire & Theft		N/A Mos.	$ N/A
$ N/A Ded. Collision		N/A Mos.	$ N/A
Bodily Injury	$ N/A Limits	N/A Mos.	$ N/A
Property Damage	$ N/A Limits	N/A Mos.	$ N/A
Medical	N/A	N/A Mos.	$ N/A
	N/A	N/A Mos.	$ N/A
Total Vehicle Insurance Premiums			$ N/A (a)

UNLESS A CHARGE IS INCLUDED IN THIS AGREEMENT FOR PUBLIC LIABILITY OR PROPERTY DAMAGE INSURANCE, PAYMENT FOR SUCH COVERAGE IS NOT PROVIDED BY THIS AGREEMENT.

You may buy the physical damage insurance this contract requires (see back) from anyone you choose who is acceptable to us. You are not required to buy any other insurance to obtain credit.

Buyer X

Co-Buyer X

Seller X [signature] [illegible]

If any insurance is checked below, policies or certificates from the named insurance companies will describe the terms and conditions.

Application for Optional Credit Insurance

☐ Credit Life: ☐ Buyer ☐ Co-Buyer ☐ Both
☐ Credit Disability (Buyer Only)

	Term	Exp.	Premium
Credit Life	N/A Mos.		$ N/A
Credit Disability	N/A Mos.		$ N/A
Total Credit Insurance Premiums			$ N/A (b)

Insurance Company Name N/A

Home Office Address N/A
N/A

Credit life insurance and credit disability insurance are not required to obtain credit. Your decision to buy or not buy credit life and credit disability insurance will not be a factor in the credit approval process. They will not be provided unless you sign and agree to pay the extra cost. Credit life insurance is based on your original payment schedule. This insurance may not pay all you owe on this contract if you make late payments. Credit disability insurance does not cover any increase in your payment or in the number of payments. Coverage for credit life insurance and credit disability insurance ends on the original due date for the last payment unless a different term for the insurance is shown above.

You are applying for the credit insurance marked above. Your signature below means that you agree that: (1) You are not eligible for insurance if you have reached your 65th birthday. (2) You are eligible for disability insurance only if you are working for wages or profit 30 hours a week or more on the Effective Date. (3) Only the Primary Buyer is eligible for disability insurance. DISABILITY INSURANCE MAY NOT COVER CONDITIONS FOR WHICH YOU HAVE SEEN A DOCTOR OR CHIROPRACTOR IN THE LAST 6 MONTHS (Refer to "Total Disabilities Not Covered" in your policy for details).
You want to buy the credit insurance.

Date ______ X ______ Buyer Signature ______ Age

Date ______ X ______ Co-Buyer Signature ______ Age

OPTIONAL GAP CONTRACT. A gap contract (debt cancellation contract) is not required to obtain credit and will not be provided unless you sign below and agree to pay the extra

5. Subtotal (1 through 4)

6. Total Downpayment

A. Agreed Trade-In Value Yr. 2004 Make CADILLAC $ 8000.00 (A)

Model DEVILLE Odom. 107093

VIN 1G6KD54Y84U205772 Odometer

B. Less Prior Credit or Lease Balance $ 20800.00 (B)

C. Net Trade-In (A less B) (indicate if a negative number) $ <12800.00> (C)

D. Deferred Downpayment $ N/A (D)

E. Manufacturer's Rebate $ N/A (E)

F. Other N/A $ N/A (F)

G. Cash $ 13000.00 (G)

Total Downpayment (C through G) $ 200.00 (6)

(If negative, enter zero on line 6 and enter the amount less than zero as a positive number on line 1P above)

7. Amount Financed (5 less 6) $ 47632.99 (7)

in item 1Q of the Itemization of Amount Financed. See your gap contract for details on the terms and conditions it provides. It is a part of this contract.

Term N/A Mos. N/A

Name of Gap Contract

I want to buy a gap contract.

Buyer Signs X

OPTIONAL SERVICE CONTRACT(S) You want to purchase the service contract(s) written with the following company(ies) for the term(s) shown below for the charge(s) shown in item 1K, 1L, 1M, 1N, and/or 1O.

1K Company N/A

Term N/A Mos. or N/A Miles

1L Company [illegible]

Term N/A Mos. or N/A Miles

1M Company N/A

Term N/A Mos. or N/A Miles

1N Company N/A

Term N/A Mos. or N/A Miles

1O Company N/A

Term N/A Mos. or N/A Miles

Buyer X

SELLER ASSISTED LOAN

BUYER MAY BE REQUIRED TO PLEDGE SECURITY FOR THE LOAN, AND WILL BE OBLIGATED FOR THE INSTALLMENT PAYMENTS ON BOTH THIS RETAIL INSTALLMENT SALE CONTRACT AND THE LOAN.

Proceeds of Loan From: N/A

Amount $ N/A Finance Charge $ N/A

Total $ N/A Payable in N/A

Installments of $ N/A $

from this Loan is shown in item 6D.

AUTO BROKER FEE DISCLOSURE

If this contract reflects the retail sale of a new motor vehicle, the sale is not subject to a fee received by an autobroker from us unless the following box is checked:

☐ **Name of autobroker receiving fee, if applicable:** N/A

HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to the contract must be in writing and both you and we must sign it. No oral changes are binding.

Buyer Signs X

Co-Buyer Signs X

SELLER'S RIGHT TO CANCEL If Buyer and Co-Buyer sign here, the provisions of the Seller's Right to Cancel section on the back giving the Seller the right to cancel if Seller is unable to assign this contract to a financial institution will apply.

X Buyer X Co-Buyer

OPTION: ☐ You pay no finance charge if the Amount Financed, item 7, is paid in full on or before N/A, Year ____ SELLER'S INITIALS ____

THE MINIMUM PUBLIC LIABILITY INSURANCE LIMITS PROVIDED IN LAW MUST BE MET BY EVERY PERSON WHO PURCHASES A VEHICLE. IF YOU ARE UNSURE WHETHER OR NOT YOUR CURRENT INSURANCE POLICY WILL COVER YOUR NEWLY ACQUIRED VEHICLE IN THE EVENT OF AN ACCIDENT, YOU SHOULD CONTACT YOUR INSURANCE AGENT.

WARNING:

YOUR PRESENT POLICY MAY NOT COVER COLLISION DAMAGE OR MAY NOT PROVIDE FOR FULL REPLACEMENT COSTS FOR THE VEHICLE BEING PURCHASED. IF YOU DO NOT HAVE FULL COVERAGE, SUPPLEMENTAL COVERAGE FOR COLLISION DAMAGE MAY BE AVAILABLE TO YOU THROUGH YOUR INSURANCE AGENT OR THROUGH THE SELLING DEALER. HOWEVER, UNLESS OTHERWISE SPECIFIED, THE COVERAGE YOU OBTAIN THROUGH THE DEALER PROTECTS ONLY THE DEALER, USUALLY UP TO THE AMOUNT OF THE UNPAID BALANCE REMAINING AFTER THE VEHICLE HAS BEEN REPOSSESSED AND SOLD.

FOR ADVICE ON FULL COVERAGE THAT WILL PROTECT YOU IN THE EVENT OF LOSS OR DAMAGE TO YOUR VEHICLE, YOU SHOULD CONTACT YOUR INSURANCE AGENT.

THE BUYER SHALL SIGN TO ACKNOWLEDGE THAT HE/SHE UNDERSTANDS THESE PUBLIC LIABILITY TERMS AND CONDITIONS.

s/s X X

Representations of Buyer: Seller has relied on the truth and accuracy of the information provided by you in connection with the Trade-In Vehicle. You represent that you have given a true payoff amount on the vehicle traded in. If the payoff amount is more than the amount shown above in item 6B as "Prior Credit or Lease Balance," you must pay Seller the excess on demand. If the payoff amount is less than the amount shown above in item 6B as "Prior Credit or Lease Balance," Seller will refund the difference to you.

Buyer X Co-Buyer X

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.

If you have a complaint concerning this sale, you should try to resolve it with the seller.

Complaints concerning unfair or deceptive practices or methods by the seller may be referred to the city attorney, the district attorney, or an investigator for the Department of Motor Vehicles, or any combination thereof.

After this contract is signed, the seller may not change the financing or payment terms unless you agree in writing to the change. You do not have to agree to any change, and it is an unfair or deceptive practice for the seller to make a unilateral change.

Buyer Signature X **Co-Buyer Signature X**

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge.

THERE IS NO COOLING-OFF PERIOD UNLESS YOU OBTAIN A CONTRACT CANCELLATION OPTION

California law does not provide for a "cooling-off" or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud. However, California law does require a seller to offer a 2-day contract cancellation option on used vehicles with a purchase price of less than $40,000, subject to certain statutory conditions. This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle, or an off-highway motor vehicle subject to identification under California law. See the vehicle contract cancellation option agreement for details.

YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT.

Buyer Signature X Date 08/08/08 Co-Buyer Signature X Date

Co-Buyers and Other Owners — A co-buyer is a person who is responsible for paying the entire debt. An other owner is a person whose name is on the title to the vehicle but does not have to pay the debt. The other owner agrees to the security interest in the vehicle given to us in this contract.

Other Owner Signature X Address

GUARANTY: To induce us to sell the vehicle to Buyer, each person who signs as a Guarantor individually guarantees the payment of this contract. If Buyer fails to pay any money owing on this contract, each Guarantor must pay it when asked. Each Guarantor will be liable for the total amount owing even if other persons also sign as Guarantor, and even if Buyer has a complete defense to Guarantor's demand for reimbursement. Each Guarantor agrees to be liable even if we do one or more of the following: (1) give the Buyer more time to pay one or more payments; (2) give a full or partial release to any other Guarantor; (3) release any security; (4) accept less from the Buyer than the total amount owing; or (5) otherwise reach a settlement relating to this contract or extend the contract. Each Guarantor acknowledges receipt of a completed copy of this contract and guaranty at the time of signing.

Guarantor waives notice of acceptance of this Guaranty, notice of the Buyer's non-payment, non-performance, and default; and notices of the amount owing at any time, and of any demands upon the Buyer.

Guarantor X N/A Date N/A Guarantor X N/A Date N/A

Address N/A Address N/A

Seller Signs MERCEDES-BENZ OF VALENCIA Date 08/08/08 By X Title MANAGER

[illegible]

LAW FORM NO. 553-CA-ARB

DEALER COPY

OTHER IMPORTANT AGREEMENTS

1. **FINANCE CHARGE AND PAYMENTS**
   a. **How we will figure Finance Charge.** We will figure the Finance Charge on a daily basis at the Annual Percentage Rate on the unpaid part of the Amount Financed. Creditor-Seller may receive part of the Finance Charge.
   b. **How we will apply payments.** We may apply each payment to the earned and unpaid part of the Finance Charge, to the unpaid part of the Amount Financed and to other amounts you owe under this contract in any order we choose.
   c. **How late payments or early payments change what you must pay.** We based the Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it is due. Your Finance Charge, Total of Payments, and Total Sale Price will be more if you pay late and less if you pay early. Changes may take the form of a larger or smaller final payment or, at our option, more or fewer payments of the same amount as your scheduled payment, with a smaller final payment. We will send you a notice telling you about these changes before the last scheduled payment is due.
   d. **You may prepay.** You may prepay all or part of the unpaid part of the Amount Financed at any time. If you do so, you must pay the earned and unpaid part of the Finance Charge and all other amounts due up to the date of your payment. As of the date of your payment, if the minimum finance charge is greater than the earned Finance Charge, you may be charged the difference. The minimum finance charge is as follows: (1) $25 if the original Amount Financed does not exceed $1,000, (2) $50 if the original Amount Financed is more than $1,000 but not more than $2,000, or (3) $75 if the original Amount Financed is more than $2,000.

2. **YOUR OTHER PROMISES TO US**
   a. **If the vehicle is damaged, destroyed, or missing.** You agree to pay us all you owe under this contract even if the vehicle is damaged, destroyed, or missing.

   GAP LIABILITY NOTICE
   In the event of theft or damage to your vehicle that results in a total loss, there may be a gap between the amount you owe under this contract and the proceeds of your insurance settlement and deductible. THIS CONTRACT PROVIDES THAT YOU ARE LIABLE FOR THIS GAP AMOUNT. An optional gap contract (debt cancellation contract or coverage) at the rate allowed may be offered for an additional charge.

   b. **Using the vehicle.** You agree not to remove the vehicle from the U.S. or Canada, or to sell, rent, lease, or transfer any interest in the vehicle or this contract without our written permission. You agree not to expose the vehicle to misuse, seizure, confiscation, or involuntary transfer. If we pay any repair bills, storage bills, taxes, fines, or charges on the vehicle, you agree to repay this amount when we ask for it.
   c. **Security interest.** You give us a security interest in:
      - The vehicle and all parts or goods installed on it;
      - All money or goods received (proceeds) for the vehicle;
      - All insurance, maintenance, service, or other contracts we finance for you; and
      - All proceeds from insurance, maintenance, service, or other contracts we finance for you. This includes any refunds of premiums or charges from the contracts.

      This secures payment of all you owe on this contract. It also secures your other agreements in this contract as the law allows. You will make sure the title shows our security interest (lien) in the vehicle.
   d. **Insurance you must have on the vehicle.** You agree to have physical damage insurance covering loss of or damage to the vehicle for the term of this contract. The insurance must cover our interest in the vehicle. If you do not have this insurance, we may, if we choose, buy physical damage insurance. If we decide to buy physical damage insurance, we may either buy insurance that covers your interest and our interest in the vehicle, or buy insurance that covers only our interest. If we buy either type of insurance, we will tell you which type and the charge you must pay. The charge will be the premium for the insurance and a finance charge equal to the Annual Percentage Rate shown on the front of this contract or, at our option, the highest rate the law permits. If the vehicle is lost or damaged, you agree that we may use any insurance settlement to reduce what you owe or repair the vehicle.
   e. **What happens to returned insurance, maintenance, service, or other contract charges.** If we get a refund of insurance, maintenance, service, or other contract charges, you agree that we may subtract the refund from what you owe.

3. **IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES**
   a. **You may owe late charges.** You will pay a late charge on each late payment as shown on the front. Acceptance of a late payment or late charge does not excuse your late payment or mean that you may keep making late payments. If you pay late, we may also take the steps described below.
   c. **We will sell the vehicle if you do not get it back.** If you do not redeem, we will sell the vehicle. We will send you a written notice of sale before selling the vehicle.
      We will apply the money from the sale, less allowed expenses, to the amount you owe. Allowed expenses are expenses we pay as a direct result of taking the vehicle, holding it, preparing it for sale, and selling it. Attorney fees and court costs the law permits are also allowed expenses. If any money is left (surplus), we will pay it to you unless the law requires us to pay it to someone else. If money from the sale is not enough to pay the amount you owe, you must pay the rest to us. If you do not pay this amount when we ask, we may charge you interest at the Annual Percentage Rate shown on the face of the contract, not to exceed the highest rate permitted by law, until you pay.
   g. **What we may do about optional insurance, maintenance, service, or other contracts.** This contract may contain charges for optional insurance, maintenance, service, or other contracts. If we demand that you pay all you owe at once or we repossess the vehicle, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe or repair the vehicle. If the vehicle is a total loss because it is confiscated, damaged, or stolen, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe.

4. **WARRANTIES SELLER DISCLAIMS.**
   If you do not get a written warranty, and the Seller does not enter into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.
   This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide. If the Seller has sold you a certified used vehicle, the warranty of merchantability is not disclaimed.

5. **Used Car Buyers Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.**
   Spanish Translation: Guía para compradores de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta.

6. **Applicable Law.**
   Federal law and California law apply to this contract. If any part of this contract is not valid, all other parts stay valid. We may delay or refrain from enforcing any of our rights under this contract without losing them. For example, we may extend the time for making some payments without extending the time for making others.

7. **Warranties of Buyer.** You promise you have given true and correct information in your application for credit, and you have no knowledge that will make that information untrue in the future. We have relied on the truth and accuracy of that information in entering into this contract. Upon request, you will provide us with documents and other information necessary to verify any item contained in your credit application.

You waive the provisions of Calif. Vehicle Code Section 18620.21 and authorize the California Department of Motor Vehicles to furnish your residence address to us.

CREDIT DISABILITY INSURANCE NOTICE
CLAIM PROCEDURE

If you become disabled, you must tell us right away. You are advised to send this information to the same address to which you are normally required to send your payments, unless a different address or telephone number is given to you in writing by us at the location where we would like to be notified. We will tell you where to get claim forms. You must send in the completed form to the insurance company as soon as possible and tell us as soon as you do.

If your disability insurance covers all of your missed payment(s), WE CANNOT TRY TO COLLECT WHAT YOU OWE OR FORECLOSE UPON OR REPOSSESS ANY COLLATERAL UNTIL THREE CALENDAR MONTHS AFTER your first missed payment is due or until the insurance company pays or rejects your claim, whichever comes first. We can, however, try to collect, foreclose or repossess if you have any money due and owing us or are otherwise in default when your disability claim is made or if a senior mortgage or lien holder is foreclosing.

If the insurance company pays the claim within the three calendar months, we must accept the money as though you paid on time. If the insurance company rejects the claim within the three calendar months or accepts the claim within the three calendar months on a partial disability and pays less than for a total disability, you will have 35 days from the date that the rejection or the acceptance of the partial

b. **You may have to pay all you owe at once.** If you break your promises (default), we may demand that you pay all you owe on this contract at once, subject to any right the law gives you to reinstate this contract.
Default means:
- You do not pay any payment on time;
- You give false, incomplete, or misleading information on a credit application;
- You start a proceeding in bankruptcy or one is started against you or your property;
- The vehicle is lost, damaged or destroyed; or
- You break any agreements in this contract.

The amount you will owe will be the unpaid part of the Amount Financed plus the earned and unpaid part of the Finance Charge, any late charges, and any amounts due because you defaulted.

c. **You may have to pay collection costs.** You will pay our reasonable costs to collect what you owe, including attorney fees, court costs, collection agency fees, and fees paid for other reasonable collection efforts. You agree to pay a charge not to exceed $15 if any check you give to us is dishonored.

d. **We may take the vehicle from you.** If you default, we may take (repossess) the vehicle from you if we do so peacefully and the law allows it. If your vehicle has an electronic tracking device, you agree that we may use the device to find the vehicle. If we take the vehicle, any accessories, equipment, and replacement parts will stay with the vehicle. If any personal items are in the vehicle, we may store them for you at your expense. If you do not ask for these items back, we may dispose of them as the law allows.

e. **How you can get the vehicle back if we take it.** If we repossess the vehicle, you may pay to get it back (redeem). You may redeem the vehicle by paying all you owe, or you may have the right to reinstate this contract and redeem the vehicle by paying past due payments and any late charges, providing proof of insurance, and/or taking other action to cure the default. We will provide you all notices required by law to tell you when and how much to pay and/or what action you must take to redeem the vehicle.

between the past due payments and what the insurance company pays for the partial disability, plus late charges. You can contact us and we will tell you how much you owe. After that time, we can take action to collect or foreclose or repossess any collateral you may have given. If the insurance company accepts your claim but requires that you send in additional forms to remain eligible for continued payments, you should send in these completed additional forms no later than required. If you do not send in these forms on time, the insurance company may stop paying, and we will then be able to take action to collect or foreclose or repossess any collateral you may have given.

Seller's Right to Cancel

a. Seller agrees to deliver the vehicle to you on the date this contract is signed by Seller and you. You understand that it may take a few days for Seller to verify your credit and assign the contract. You agree that if Seller is unable to assign the contract to any one of the financial institutions with whom Seller regularly does business under an assignment acceptable to Seller, Seller may cancel the contract.

b. Seller shall give you written notice (or in any other manner to which actual notice is given to you) within 10 days of the date this contract is signed if Seller elects to cancel. Upon receipt of such notice, you must immediately return the vehicle to Seller in the same condition as when sold, reasonable wear and tear excepted. Seller must give back to you all consideration received by Seller, including any trade-in vehicle.

c. If you do not immediately return the vehicle, you shall be liable for all expenses incurred by Seller in taking the vehicle from you, including reasonable attorney's fees.

d. While the vehicle is in your possession, all terms of the contract, including those relating to use of the vehicle and insurance for the vehicle, shall be in full force and you shall assume all risk of loss or damage to the vehicle. You must pay all reasonable costs for repair of any damage to the vehicle until the vehicle is returned to Seller.

ARBITRATION CLAUSE
PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com); the American Arbitration Association, 335 Madison Ave., Floor 10, New York, N.Y. 10017-4605 (www.adr.org); or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor (Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will advance your filing, administrative, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under the Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The preceding NOTICE applies only if the "personal, family or household" box in the "Primary Use for Which Purchased" section of this contract is checked. In all other cases, Buyer will not assert against any subsequent holder or assignee of this contract any claims or defenses the Buyer (debtor) may have against the Seller, or against the manufacturer of the vehicle or equipment obtained under this contract.

Seller assigns its interest in the contract to _____ (Assignee's address)

under the terms of Seller's agreement(s) with Assignee.

☐ Assigned with recourse ☐ Assigned without recourse ☐ Assigned with limited recourse

Seller _____ By _____ Title _____

Form No. 553-CA-ARB 5/08

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 3, 2012, I served the foregoing document described as: **PETITION FOR REVIEW** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on January 3, 2012, at Los Angeles, California.

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

Anita F. Cole

Anita F. Cole

SANCHEZ
v.
VALENCIA HOLDING COMPANY, LLC
[California Court of Appeal Case No. B228027;
Los Angeles Superior Court Case No. BC433634]

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Clerk to the
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Los Angeles County Superior Court
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Los Angeles, California 90012
[LASC Case No. BC433634]

Clerk
California Court of Appeal
Second District, Division One
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[Court of Appeal Case No. B228027]