SUPREME COURT COPY

Rosner, Barry & Babbitt, LLP's

AUTO FRAUD™ LEGAL CENTER

NO CHEATING

Because nobody should be cheated. ™

10085 Carroll Canyon Road, Suite 100, San Diego, CA 92131, Tel (858) 348-1005, (800) 466-5366, FAX (858) 348-1150

SUPREME COURT
FILED

MAR 19 2014

Frank A. McGuire Clerk

Deputy

March 18, 2014

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Sanchez v. Valencia Holding Co., LLC
Case No. S199119

Response to Appellants' Supplemental Brief and Amicus Supplemental Briefs

Dear Honorable Justices:

In response to Appellants' Supplemental Brief, and the various Amicus Supplemental Briefs, Respondent Gil Sanchez submits the following letter brief:

I. Introduction

In Respondent's Supplemental Brief, Respondent argued Corporate America wants to know how many rights they can deprive their customers of. Respondent's Supplemental Brief suggested a substantive unconscionability test using a "shocks the conscience" formulation was a license for Corporate America to take away all rights from consumers in adhesion contracts. Respondent argued the sky was falling on consumers, one contractual clause at a time.

The Supplemental Briefs submitted by Appellants, the Association of Southern California Defense Council ("SCDC"), the Pacific Law Foundation ("PLF"), and Federated Insurance demonstrate Respondent was neither hysterical nor mistaken. The "shocks the conscience" standard these groups advocate eliminates the unconscionability defense. All agree that a "shock the conscience" standard is as extreme as possibly can be created. This is not an arbitration issue;

this is an issue of basic contract law. We live in a society where form adhesion contracts govern our everyday lives. The supplemental briefs espouse a country for the corporation, by the corporation, and run by the corporation.

II. Since Consciences Can't Be Shocked, "Shocks the Conscience" Is a Meaningless Standard

What does it mean to "shock the conscience"? Justice Scalia, in evaluating the "shocks the conscience" test used in substantive due process analysis, referred to the test as the *ne plus ultra,* the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity . . . ." (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 861.) For arbitration clauses, however, there will be no subjectivity because there is no way to "shock the conscience."

Appellants invite this Court to travel back in time to 1750 and adopt the unconscionability standard used in England in *Earl of Chesterfield v. Jansson* (Ch. 1750): "Such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Appellants urge this Court to adopt a stricter less consumer friendly approach than 1750 England. Even when reasonable people would find a clause "repugnant," the clause should still be upheld unless "all or nearly all" people would agree. Appellants simply seek a license to include whatever they want into all forms of adhesion contracts.

The PLF asks this Court to create a "certainty" standard and their proposal to use a "shock the conscience" standard as they define it, would do just that. Such a standard would make it "certain" that virtually no consumer contract, no matter how procedurally unconscionable, would ever be invalidated or held substantially unconscionable. PLF proposes only contracts that "no man in his senses and not

under delusion would make." Only certain clauses that are "monstrous and extravagant" would not be enforced.

SCDC appears to argue that clauses that would be unconscionable in any other contractual setting should be upheld if an arbitration clause is at issue. The proposals set forth are a dream list for Corporate America. SCDC proposes that all burdens be placed on the consumer, with a "strong presumption" against the consumer which must be rebutted by clear and convincing evidence so as to prove the clause "is so one sided as to shock the conscience." (Proposal 2, at page 3. Further, consumers need never be shown or ever be aware of the arbitration clause, or even sign the clause. The clause should be allowed to obligate the consumer to pay one-half of the arbitration costs, and the adhesive nature of the clause should not be considered. (Proposals 3, 4, 5 at pages 2-3.)

Finally, Federated argues for a "shocks the conscience" test rooted in morality and a sense of right and wrong. Despite providing the definition of unconscionable from the Oxford English Dictionary to include "not in accordance with what is right or reasonable," Federated argues a clause is only substantively unconscionable if it is so "grotesquely one sided that a judge looking at the agreement can only shake his or her head at the objective, morally offensive term or contract, and find it shocking or offensive to 'the sense of right and wrong as regards things for which one is responsible.'"

In this case, Mr. Sanchez was sold an accident-damaged, unsafe vehicle despite being promised the vehicle was "certified" and inspected. Does the fact a car dealership tried to cheat him "shock the conscience"? No, car dealers have been cheating people a long time. Does it "shock the conscience" that a car dealer would try and minimize its liability by stealing away Mr. Sanchez's right to a jury trial? Not really. But, would an "honest and fair" or "right or reasonable" business try to

limit its exposure and liability, by taking away the right to a jury or access to class action lawsuits? And would an "honest and fair" business try to take away those rights by putting them on the back of an adhesion contract that is not discussed with its customers? Of course not.

But car dealers are not known for being "honest and fair." (*See* Gallup Honesty and Ethics Poll, December 2013 (9% of Americans rated the honesty and ethics of car dealers as "very high" or "high").) In fact, car dealers successfully lobbied Congress to make pre-dispute arbitration clauses in motor vehicle franchise contracts unenforceable under the Federal Arbitration Act unless both parties consent after the dispute arises. (*See* Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002 (Pub.L. 107-273 (amendment to the Automobile Dealers' Day in Court Act in 2002).) How exactly is the "honest and fair" car dealer exempt from mandatory arbitration clauses for disputes with manufacturers, but able to force consumers to be bound by such clauses? When an industry held in such low regard does anything, even engaging in conduct it itself deems unfair as applied to it, how can it really be labeled to "shock the conscience"?

Here, if the Court adopts a "shocks the conscience" definition of substantive unconscionability in form adhesion contracts, Corporate America wins and it is open season on consumer rights. We will not have arbitration clauses such as found in the *Concepcion* case. Rather, dealers will start with the agreement on the back of Mr. Sanchez's contract and make it as one-sided and unfair as possible. Why not take away the rights provided by consumer protection statutes such as the Consumers Legal Remedies Act and the Automobile Sales Finance Act under the guise of creating an arbitration clause to resolve disputes? Why bother putting the arbitration clause on the back of the contract at all? As long as at least <u>one person</u> does not find such clauses repugnant – they will not be unconscionable. And since

one person didn't find the clauses repugnant – the business who included the clause – the "shocks the conscience" test could never be satisfied.

III. Conclusion

The relationship between consumers and businesses using form adhesion contracts is not the relationship most contract law grew up to govern. Form adhesion contracts are not agreements in the sense the parties agreed on the terms. If consumers want to purchase products, have health care, utilities, credit cards, etc., they must accept the dictated terms. In the context of an adhesion form contract, the "shocks the conscience" tests proposed in the supplemental briefing destroy consumer rights. It could not be clearer – Corporate America seeks a standard so impossible to establish that challenges on the ground of unconscionability will seldom, if ever, be brought. One can only imagine how far these new adhesion contracts will go. Respondent previously analogized this dispute to making sure David has a fighting chance against Goliath. Based on the supplemental briefs submitted, it appears Goliath not only wishes to prohibit slingshots, but to strap David to a table and crush his skull with a boulder.

If Goliath enters into a contract with Goliath (Apple and Microsoft), a different standard should apply, than the case of consumer adhesion contracts. All of the groups advocating "shocks the conscience" support elimination of even considering "procedural unconscionability."

Sincerely yours,

Hallen D. Rosner

cc: *See* Attached Proof of Service

PROOF OF SERVICE

Gil Sanchez v. Valencia Holding Company, LLC et al.
California Supreme Court Case No. S199119
Court of Appeal, State of California, Second Appellate District, Division One B228027
Los Angeles Superior Court Case No. BC433634

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 10085 Carroll Canyon Road, Suite 100, San Diego, California 92131.

On **March 18, 2014**, I served the foregoing document(s) described as:

LETTER BRIEF DATED MARCH 18, 2014

on the interested parties in this action by mail at San Diego, California addressed as follows:

[X] **BY U.S. MAIL:** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

(1) [] deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

(2) [X] placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid, at San Diego, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **March 18, 2014,** at San Diego, California.

Amie Ipatenco

Gil Sanchez v. Valencia Holding Company, LLC et al.
California Supreme Court Case No. S199119
Court of Appeal, State of California, Second Appellate District, Division One B228027
Los Angeles Superior Court Case No. BC433634

SERVICE LIST

Kellie Christianson, Esq.
Atkinson, Andelson, Loya, Ruud & Romo
20 Pacifica, Suite 400
Irvine, CA 92618

Attorneys for Valencia Holding Company LLC
dba Mercedes-Benz of Valencia

Robert A. Olson, Esq.
Edward L. Xanders, Esq.
Greines, Martin, Stein & Richland LLP
5900 Wilshire Blvd., 12th Floor
Los Angeles, CA 90036

Attorneys for Valencia Holding Company LLC
dba Mercedes-Benz of Valencia

Jon D. Universal, Esq.
Universal, Shannon & Wheeler
2240 Douglas Blvd., Suite 290
Roseville, CA 95661

Attorneys for Mercedes Benz USA, LLC

Steve Mikhov, Esq.
Romano Stancroff & Mikhov
640 S. San Vicente, Suite 350
Los Angeles, CA 90048

Attorneys for Plaintiff Gil Sanchez

Office of the District Attorney
for Los Angeles County
Appellate Division
320 W. Temple Street, Room 540
Los Angeles, CA 90012

Service Pursuant to
Business & Professions
Code § 17209

Gil Sanchez v. Valencia Holding Company, LLC et al.
California Supreme Court Case No. S199119
Court of Appeal, State of California, Second Appellate District, Division One B228027
Los Angeles Superior Court Case No. BC433634

SERVICE LIST

Deputy Attorney General
State of California, Department of Justice
300 S. Spring Street
Los Angeles, CA 90013-1230

Service Pursuant to
Business & Professions
Code § 17209

Hon. Rex Heeseman
Superior Court of California
County of Los Angeles
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Lisa Perrochet, Esq.
Felix Shafir, Esq.
John F. Querio, Esq.
Horovitz & Levy LLP
15760 Ventura Blvd., 18th Floor
Encino, CA 91436-3000

Attorneys for California New Car Dealers Association

J. Alan Warfield, Esq.
McKenna Long & Aldridge LLP
300 South Grand Avenue, 14th Floor
Los Angeles, CA 90071

Attorneys for Association of Southern California
Defense Counsel

Clerk
California Court of Appeal
Second District, Division One
300 South Spring Street
Los Angeles, CA 90013

(4 copies)

Richard J. Simmons, Esq.
Karin Dougan Vogel, Esq.
Matthew M. Sonne, Esq.
Sheppard Mullin Richter & Hampton
650 Town Center Drive, 4th Floor
Costa Mesa, CA 92626

Attorneys for Employers Group

Gil Sanchez v. Valencia Holding Company, LLC et al.
California Supreme Court Case No. S199119
Court of Appeal, State of California, Second Appellate District, Division One B228027
Los Angeles Superior Court Case No. BC433634

SERVICE LIST

Deborah J. La Fetra, Esq.
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Attorneys for Pacific Legal Foundation

Richard M. Segal, Esq.
Nathaniel R. Smith, Esq.
Pillsbury Winthrop Shaw Pittman
501 W. Broadway, Suite 1100
San Diego, CA 92101

Attorneys for Nissan Motor Acceptance Corporation

Henry D. Lederman, Esq.
Alexa L. Woerner, Esq.
Littler Mendelson
1255 Treat Blvd., Suite 600
Walnut Creek, CA 94597

Attorneys for Volt Management Corp. and
Volt Information Sciences, Inc.

Jan T. Chilton, Esq.
Donald J. Querio, Esq.
Severson & Werson
One Embarcadero Center, Suite 2600
San Francisco, CA 94111

Attorneys for American Financial Services Association,
California Bankers Association, and California Financial
Services Association

Anna S. McLean, Esq.
Sheppard Mullin Richter & Hampton
Four Embarcardero Center, 17th Floor
San Francisco, CA 94111

Attorneys for Toyota Motor Credit Corporation and
General Motors Financial Company, Inc.

Gil Sanchez v. Valencia Holding Company, LLC et al.
California Supreme Court Case No. S199119
Court of Appeal, State of California, Second Appellate District, Division One B228027
Los Angeles Superior Court Case No. BC433634

SERVICE LIST

Aimee Feinberg, Esq.
California Supreme Court Clinic
University of California, Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Attorneys for Consumers for Auto Reliability and Safety

Mark A. Chavez, Esq.
Nance F. Becker, Esq.
Chavez & Gertler
42 Miller Avenue
Mill Valley, CA 94941

Attorneys for Arthur Lovett

Donald M. Falk, Esq.
Mayer Brown
Two Palo Alto Square, Suite 300
Palo Alto, CA 94306

Attorneys for The Chamber of Commerce of the United States of America, The Association of Global Automakers, Inc., and The Alliance of Automobile Manufacturers

Brian J. Wong, Esq.
Mayer Brown
1999 K. Street NW
Washington, DC 20006

Attorneys for The Chamber of Commerce of the United States of America, The Association of Global Automakers, Inc., and The Alliance of Automobile Manufacturers

Erica C. Frank, Esq.
1215 K Street, Suite 1400
Sacramento, CA 95814

Attorneys for The California Chamber of Commerce

Gil Sanchez v. Valencia Holding Company, LLC et al.
California Supreme Court Case No. S199119
Court of Appeal, State of California, Second Appellate District, Division One B228027
Los Angeles Superior Court Case No. BC433634

SERVICE LIST

Fred J. Hiestand, Esq.
2001 P Street, Suite 110
Sacramento, CA 95811

Attorneys for The Civil Justice Association of California

Gretchen M. Nelson, Esq.
Jacob H. Mensch, Esq.
Kreindler & Kreindler
707 Wilshire Blvd., Suite 4100
Los Angeles, CA 90017

Attorneys for Consumer Attorneys of California