S199119

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GIL SANCHEZ, Plaintiff and Respondent, v. VALENCIA HOLDING COMPANY, LLC dba MERCEDES-BENZ OF VALENCIA, Defendants and Appellant,	B228027 (Los Angeles County Superior Court No. B433634)

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

ANSWER TO PETITION FOR REVIEW

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OF THE
STATE OF CALIFORNIA

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Supreme Court Case Number: S199119

Court of Appeal Case Number: B228027

Case Name: *Sanchez v. Valencia Holding Company*

Interested entities or parties are listed below:

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

DATED: January 24, 2012 ROSNER, BARRY & BABBITT, LLP

By: Christopher P Barry
CHRISTOPHER P. BARRY
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I. Introduction

Car dealers in California, for the most part, use the same form contract to sell vehicles to consumers. While consumers negotiate the price of the vehicle they purchase, their APR, their payments, and what after-market products they want to purchase, at the end of the process, the deal regarding those terms is memorialized on a pre-printed form provided by the car dealer. On the back of that form is an arbitration clause that is one-sided and unfair.

The real issue in this case is whether arbitration clauses have become a contractual free-for-all, or whether any limits remain on terms companies can force on consumers who purchase their products. Congress decided there were limits on arbitration clauses, namely the same limits that exist for every other contract. (*See* 9 U.S.C. § 2 (agreements to arbitrate are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").) This is not just a random exception to the policies underlying the FAA and arbitration – it is necessary to maintain the integrity of those policies and the public's confidence in the use of arbitration as an alternative dispute resolution process. (*See, e.g., Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1081 ("[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 an arbitration clause provide that when one side wins, the game doesn't count.").)

The United States Supreme Court , most recently in *AT&T Mobility v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740 ("*Concepcion*"), affirmed that unconscionability, which is a ground at law or equity for the revocation of any contract, remains a valid defense to the formation of an agreement to arbitrate. (*See Concepcion*, 131 S.Ct. at 1747-48; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687; *Allied-Bruce Terminex Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 281; *Rent-A-Center, West, Inc. v. Jackson* (2010) 130 S.Ct. 2772, 2776.) The Court of Appeal here, like other California appellate courts, engaged in an unconscionability analysis that neither favors, nor disfavors, arbitration clauses. And the Court of Appeal concluded the arbitration clause on the back of Mr. Sanchez's vehicle purchase contract was both procedurally and substantively unconscionable. The Court of Appeal then properly determined the unconscionability permeated the agreement, and that it would be an abuse of discretion for the trial court to determine otherwise. In such circumstances, this Court has held it is appropriate for a higher court to make such a determination as a matter of law. (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 122.) The Court of Appeal in this case merely applied that uncontested rule.

Contrary to what Petitioner's claim, there is no split of authority on any relevant issues set forth in Justice Mallano's published opinion. Just because car dealers used a poorly written and biased arbitration clause in a form contract does not mean this Court should disturb the Court of Appeal's opinion. If another Court of Appeal examines the same clause and reaches a different conclusion, then this Court may need to get involved. Until that time, however, the Court of Appeal's opinion should remain undisturbed. Accordingly, Mr. Sanchez respectfully requests this Court deny the petition to review.

II. Relevant Factual and Procedural Background

A. Mr. Sanchez's Purchase, The Arbitration Clause, and Mr. Sanchez's Lawsuit

On August 8, 2008, Mr. Sanchez went to Petitioner's dealership and looked at a certified, pre-owned 2006 Mercedes-Benz S500V (the "Vehicle"). Mr. Sanchez signed a Retail Installment Sale Contract that same day to purchase the Vehicle. (*Sanchez v. Valencia Holding Company, LLC* (2011) 201 Cal.App.4th 74, 2011 WL 5865694, at *1.) On or about August 12, 2008, Mr. Sanchez returned to the Dealership and met with the same Finance Manager he had dealt with on August 8 and provided another check to the Dealership for an additional $2,000. On August 15, 2008, he returned to the

Dealership again, met with the same Finance Manager again, and provided a third check, for a total of $15,000 down. He then signed a new purchase contract which stated he made a $15,000 down payment. (*Id.*, at *2.)

Mr. Sanchez was given the purchase contract forms on a take-it-or-leave-it basis. He was made to believe that he had no choice but to sign the pre-printed forms as presented. He was not given a genuine opportunity to read all of the densely packed words on the pre-printed portions of the forms, let alone an opportunity to negotiate any of these terms. (*Id.*, 2011 WL 5865694, at *5.) Mr. Sanchez did not know what arbitration meant, let alone the rules of the various arbitral bodies, and no one explained anything to him about the "arbitration clause" before he signed the forms. (*Id.*)

Petitioner produced Carlos Gerpe, its finance director, as the person most qualified to testify about Petitioner's practices, policies, and procedures regarding the arbitration clause at issue. Through Mr. Gerpe, Petitioner testified it does not turn over the sale contracts or do anything else to make sure the customer is aware of the arbitration clause on the back side of the sale contract. Petitioner does not have the arbitral rules available if a customer did actually read the clause and request information about the operation of the clause. Petitioner testified that it does not train its employees to explain the

clause, and could not identify a single instance where a finance manager had actually explained the clause to a customer.

Indeed, it would be hard for Petitioner to train its employees to explain the operation of a clause even it does not understand. Petitioner testified it is not familiar with the terms of the clause and did not understand how it was supposed to operate, including the highly relevant class action waiver and poison pill provisions. Nor did Petitioner know why the arbitration clause included a class action waiver.

Petitioner's representative testified a prior finance director had told him Petitioner used a contract with an arbitration clause because some lenders required it. This does not explain why the arbitration clause must also contain a class action waiver though. Further, despite claiming the lenders were the reason for having an arbitration clause, Petitioner was unable to identify even one lender that supposedly required an arbitration clause, and did not know if the lender that took assignment of Mr. Sanchez's contract required arbitration clauses. Petitioner also testified it stopped using sale contracts with arbitration clauses, without any objections from any lenders, less than three weeks after Mr. Sanchez's purchase in August 2008.

Moreover, Petitioner only seeks to enforce the clause when there is a potential class action filed. Petitioner could not identify a single instance

where it requested arbitration of an individual dispute. This lawsuit, which is the only class action Petitioner could recall being filed against it, conveniently happens to be the first lawsuit where Petitioner sought to enforce the arbitration clause that conveniently happens to contain a class action waiver provision in it.

B. The Trial Court Properly Denied the Motion to Compel Arbitration

On June 7, 2010, Petitioner filed its motion to compel arbitration. (*Sanchez*, 2011 WL 5865694, at *3.) Mr. Sanchez filed his opposition on August 6, 2010. Petitioner filed its reply brief on August 12, 2010. The trial court held oral argument on September 13, 2010.

On September 14, 2010, Judge Heeseman denied the motion to compel arbitration. (*Id.*, at *6.) Judge Heeseman relied on the holding in *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601, which held the general contract defense prohibiting parties from waiving unwaivable statutory rights applied as equally to arbitration clauses as to any other contract. (Petition for Review, Ex. B.) The Consumers Legal Remedies Act gives consumers an unwaivable right to file class actions against businesses that engage in unlawful and deceptive business practices. (Civil Code §§ 1751 and 1781.) Like other courts which have held contractual waivers of the right to

bring a class action under the CLRA are void when they appear outside arbitration clauses, (*see, e.g.*, *Doe 1 v. AOL LLC* (9th Cir. 2009) 552 F.3d 1077, 1084; *Sawyer v. Bill Me Later* (C.D.Cal. 2010) 2010 WL 5289537, *6), the *Fisher* court, and Judge Heeseman, held the class action waiver in this arbitration clause was similarly void. Because the arbitration clause at issue specifically stated the entire arbitration clause was unenforceable if the class action waiver was unenforceable for any reason, the *Fisher* court, and Judge Heeseman, enforced the terms of the arbitration clause and held the entire clause was unenforceable. (Petition for Review, Ex. B.)

C. The Court of Appeal Invites Additional Briefing

Petitioner filed its Opening Brief on February 17, 2011. Mr. Sanchez filed his Respondent's Brief on April 26, 2011. The next day, April 27, 2011, the United States Supreme Court issued its opinion in *Concepcion.* Petitioner requested, and received, an extension of time to file its Reply Brief so that it could address *Concepcion*. Petitioner's Reply Brief was ultimately filed on June 15, 2011.

On July 1, 2011, the Court of Appeal requested the parties submit letter briefs addressing whether *Concepcion* had any impact on the case. The parties filed their opening letter briefs on July 13, 2011, and their replies on July 26, 2011.

D. The Court of Appeal Issues a Published Opinion

Oral argument was held on September 21, 2011. A month later, on October 24, 2011, the Court of Appeal issued a published opinion affirming the trial court's order to deny the petition to compel arbitration. Rather than address the *Fisher* rationale, the Court of Appeal found the clause unconscionable and unenforceable.

E. The Court of Appeal Denies Petitioner's Petition for Rehearing and Grants Its Own Motion

On November 8, 2011, Petitioner filed a petition for rehearing, raising three issues with the published opinion. In response, the Court of Appeal requested the parties submit a duplicate copy of the sales contract in its original format (the original form document is approximately 26 inches long and is 2-sided, therefore, cannot be reproduced in exactly the same format in a typical 1-sided 8.5" x 11" court exhibit). The parties did so (*see* Petition for Review, Ex. C), and on November 18, 2011, the Court of Appeal denied the petition for rehearing. At the same time, the Court of Appeal granted its own motion for rehearing.

F. The Court of Appeal Issues a New, Revised Published Opinion

On November 23, 2011, the Court of Appeal issued the current published opinion which is the subject of this Petition. The new opinion clarified factual errors from the original opinion relating to the description of the sales contract, and included a more thorough legal analysis of the arbitration clause. With the clarified facts and more thorough analysis, the Court of Appeal reached the same conclusion – the arbitration clause is unconscionable and unenforceable under California law.

III. Why Review Should Be Denied

A. The United States Supreme Court Affirmed Unconscionability Is a Contract Defense to the Enforceability of an Arbitration Clause, and the Court of Appeal Engaged in the Proper Analysis

Are arbitration clauses above the law? That is where arbitration jurisprudence is headed, and it is a question Petitioner, the amici curiae, and businesses across the United States want courts to answer in the affirmative. Businesses want free reign to put whatever terms they want in arbitration clauses and the freedom to force their customers who purchase their products to sacrifice the protections the law affords.

The FAA, however, does not give businesses the freedom to trample consumer rights by drafting arbitration clauses that would not be enforceable were they contracts covering a subject other than arbitration. If an equitable doctrine or legal standard exists to revoke any contract, then that same doctrine or standard must be applied to a contract to arbitrate disputes. That is what the Court of Appeal did here, and its ruling is consistent with the United States Supreme Court's ruling in *Concepcion* and any other Supreme Court case.

In *Concepcion*, the Supreme Court addressed the question of "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." (*Concepcion*, 131 S.Ct. at 1744.) The Supreme Court reminded everyone that "courts must place arbitration agreements on ***an equal footing*** with other contracts . . . ." (*Id.*, at 1745 (citation omitted).) The *Discover Bank* rule at issue was a specific rule created by this Court addressing class action waiver clauses in arbitration agreements found in consumer contracts of adhesion and holding that such waivers are unconscionable if they operate to shield businesses from group liability. (*See id.* at 1746.) According to *Concepcion*, the *Discover Bank* rule did not put arbitration agreements on equal footing, it was a special rule just for arbitration clauses. As such, the *Discover Bank* rule

did derive its meaning from the fact an agreement to arbitrate was at issue. Furthermore, by striking the class action waiver in an arbitration clause, the *Discover Bank* rule fundamentally altered the agreement of the parties by requiring them to agree to class arbitration. (*Id.*, at 1748 ("Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").) In a great deal of dicta, the United States Supreme Court denounced class arbitration as a dispute resolution process generally. (*Id.*, at 1750-53.)

The Court of Appeal in this case described the "general principles of unconscionability." (*Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, 2011 WL 5865694, at *6-7.) The Court of Appeal cited *Concepcion* for the standard that "the doctrine of unconscionability remains a basis for invalidating arbitration provisions . . . ." (*Id.*, 2011 WL 5865694, at *8.) Next, the Court of Appeal concluded "*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." (*Id.*, 2011 WL 5865694, at *8.) Finally, the Court of Appeal reiterated that "the unconscionability principles on which we rely govern *all* contracts, are not unique to arbitration agreements, and do not disfavor arbitration." (*Ibid.*

(italics in original).)

The explanation and analysis provided by the Court of Appeal is not inconsistent with the U.S. Supreme Court's opinion in *Concepcion*. Rather, it treats the arbitration clause on the back of Petitioner's sale contracts the same way it would treat any other contractual clause to determine whether it was unconscionable. There are still limits to what can be put in a contract, and the Court of Appeal's decision merely places those same limits on arbitration clauses such that they are placed on "equal footing" with other contracts.

While defense attorneys may, not surprisingly, post diatribes on their blogs voicing their unhappiness with the Court of Appeal's analysis in this case, the truth of the matter is the Court of Appeal examined a poorly-written, one-sided arbitration clause, and found it was unconscionable under the general contract defense of unconscionability. It was a far cry from the consumer-friendly arbitration clause drafted by AT&T that was at issue in *Concepcion*. (*Concepcion*, 131 S.Ct. at 1744 ("the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer").) The unconscionability analysis engaged in by the Court of Appeal in this case was the same analysis engaged in by other Court of Appeal panels in recent cases addressing other, non-arbitration contractual

clauses for unconscionability. (*Lona v. Citibank, N.A.* (2011) __ Cal.App.4th__, 2011 WL 6391584, *10-13 (applying unconscionability test from *Armendariz* to the pricing terms of a mortgage); *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035-37 (applying unconscionability test from *Armendariz* to terms of a settlement agreement).)

The Court of Appeal's opinion does not result in an arbitration inconsistent with the terms of the arbitration clause or the purposes of the FAA. Rather, the Second District held a valid agreement to arbitrate was not reached here because the terms were too one-sided, just like the Sixth District held a valid loan agreement was not reached where the terms were too one-sided. (*See Lona*, 2011 WL 6391584, *14.) The Court of Appeal in this case, the Sixth District in *Lona*, and the Second District in *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035-37, all applied the same unconscionability test. The Court of Appeal in this case did not ignore *Concepcion* any more than the *Lona* court or the *Lanigan* court did. Unconscionability remains a general contract defense which is being applied in a consistent manner by the Court of Appeal in all cases in California. Contrary to Petitioner's claim, courts presented with this arbitration clause will not need to "stumble" through the analysis. There is sufficient, consistent law applying the unconscionability analysis to California contracts in a coherent

manner. Consistent with the application of the defense of unconscionability by the California Court of Appeal in both arbitration and non-arbitration clauses, the clause at issue here is unconscionable and unenforceable. And that should be the end of the story.

B. This Court's Decisions in *Broughton* and *Cruz* Regarding the Arbitrability of Claims for Injunctive Relief Are Not Determinative Issues in the Court of Appeal's Opinion

The Court of Appeal's citation to *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, is not for the holding that claims for injunctive relief under the CLRA are not subject to arbitration. Rather, Justice Mallano cited to *Broughton* for its analysis on why claims for injunctive relief are ill-suited for arbitration. The actual holding in *Sanchez*, however, was that the arbitration clause was unconscionable because the clause exempted self-help remedies from arbitration while subjecting claims for injunctive relief to arbitration. The point is that the clause was unjustifiably one-sided – why exclude the dealership/drafting party's primary remedy from arbitration while forcing an important consumer remedy to arbitration? Whether *Broughton* and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, are pre-empted by the FAA does not change whether Petitioner's arbitration clause "creates an unduly oppressive distinction in remedies." (*Sanchez*, 2011 WL 5865694,

at *18.)

This distinction is noted by the Court of Appeal. (*Id.*, 2011 WL 5865694, at 19, n. 6.) The question answered by the Court of Appeal here was not whether claims for injunctive relief under the CLRA and/or UCL can be subject to arbitration. The question answered was whether a car dealer can exempt its own claims from arbitration while forcing the consumer's claims to arbitration. The answer was an unequivocal "No." And that answer has nothing to do with whether the consumer's claims are for injunctive relief under the CLRA or the UCL.

The Court of Appeal's opinion is not a part of the "recipe for confusion and inconsistency" Petitioner claims exists. The Court of Appeal's decision does not "stand as an obstacle to the accomplishment of the FAA's objectives." (*See Concepcion*, 131 S.Ct. at 1753.) Rather, the Court of Appeal engaged in standard unconscionability analysis under California law and reached the proper conclusion it is unconscionable to impose these terms on a consumer.

This case is not the proper vessel for this Court to determine whether its decisions in *Broughton* and *Cruz* are pre-empted by the FAA. While all of the decisions involve the applicability of general contractual rules in the context of arbitration contracts, that is where the similarities end. *Broughton*

and *Cruz* are cases involving whether certain claims (for injunctive relief), as a general rule, can be arbitrated. This case involves whether a certain clause, which, among other problems, permits the drafting party to exclude its claims from arbitration while requiring the other party to arbitrate all of their claims, is enforceable. Accordingly, review of the rule applied by the Court of Appeal in this case will not impact the continuing validity of the rule in *Cruz* and *Broughton*, and vice-versa.

C. There Is No Dispute Between the Appellate Courts to Resolve – the Arbitration Clause On the Back of California Vehicle Contracts is Unconscionable

Petitioner, and the amici, are asking this Court to sponsor a "race to the bottom." Just how unfair can businesses make their arbitration clauses, and then have courts approve the process under the "liberal federal policy favoring arbitration"? (*Concepcion*, 131 S.Ct. at 1745 (citation omitted).) As noted above, *Concepcion* involved an arbitration clause that, while it included a class action waiver, provided numerous other protections to consumers. It did not, as Petitioner's clause does here, tip the scales in AT&T's favor to make arbitration a weapon rather than a fair alternative dispute resolution mechanism. Whereas AT&T agreed to pay all costs, permitted the consumer venue and procedure options, prevented AT&T from seeking its attorney's

fees, permitted the arbitrator to enter injunctions, and guaranteed the consumer $7,500 and double his or her attorney's fees if the consumer received an award greater than AT&T's final settlement offer *(see Concepcion*, 131 S.Ct. at 1744), Petitioner's clause provides none of those equities to consumers. Instead, costs and attorney's fees can be allocated by the arbitrator. If Petitioner thinks the award is too high, or does not like an injunction, then Petitioner can ask for a new arbitration. Moreover, under AT&T's contract with its customers, there was a pre-arbitration dispute resolution process designed to avoid arbitration. (*Ibid.*) Petitioner's arbitration clause lets it veto consumer lawsuits while excluding its own claims from arbitration.

The similarities between the arbitration clauses in *Concepcion* and this case pretty much end with the word "arbitration." That is why the clause was unconscionable in this case. And contrary to Petitioner's claim, this case does not "directly conflict" with the opinion in *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825. In *Arguelles-Romero*, the consumer sought "to establish substantive unconscionability under the spirit, if not the precise analysis, of *Discover Bank*." (*Id.*, at 844.) To that end, the Court of Appeal concluded "plaintiffs have not established the prerequisite to their theory of substantive unconscionability--that the claims are so small that a class action is the only viable means of enforcement." (*Id.*) In a footnote, the *Arguelles-*

Romero court then noted the plaintiffs made an argument in their **reply** brief the arbitration clause is not bilateral. (*Id.*, at 845, n. 21.) The sole argument made by the plaintiffs was that if they were sued for a post-repossession deficiency, they could not compel arbitration. (*Id.*) The *Arguelles-Romerro* court rejected that argument because the arbitration clause said either side could initiate an arbitration. (*Id.*)

The limited determination in *Arguelles-Romero,* that the arbitration clause permitted either side to initiate an arbitration, is not in conflict with the Court of Appeal's decision in this case. The Court of Appeal did not conclude this clause was unconscionable because only one side could initiate an arbitration. Rather, this decision was based, in part, on the one-sidedness of the claims which could be pursued in arbitration once initiated because the clause excludes the dealer's primary claims from the arbitration process while forcing the consumer to arbitrate their claims. (*Sanchez*, 2011 WL 5865694, at *18.) This issue was not presented to, nor decided by, the *Arguelles-Romero* court. Nor were any of the other three reasons relied upon by the *Sanchez* court even raised in *Arguelles-Romero* for consideration.

Finally, Petitioner's contention that courts will not enforce consumer arbitration clauses is grossly inaccurate. One need look no further than the case of *Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th

1159. In *Crippen*, the Court of Appeal held the consumer, who purchased a recreational vehicle from the defendant, failed to establish procedural unconscionability. Notably, "[t]he Arbitration Addendum was not set in small type or hidden in a prolix form. It was printed on a separate page, in ordinary type, with "Arbitration Addendum" at the top, and was signed separately by plaintiff." (*Id.*, at 1165.)

Crippen was published over three and a half years before Mr. Sanchez purchased his vehicle. Car dealers were on notice that if they wanted to enter into valid arbitration agreements with their buyers, they could use a separate form rather than hiding the clause on the back of the contract. Petitioner, and the "thousands of small and medium size California businesses" who sell cars in this State, chose not to follow the legally permissible and fair procedure identified in *Crippen*, but instead chose to hide the clause on the back of the form contract and roll the dice. The Court of Appeal has now told car dealers they made the wrong choice. There is no reason for this Court to disrupt that ruling and resolve purported conflicts that do not exist.

D. There Is No Dispute Between the Appellate Courts to Resolve – Unconscionability and Severability Can Be Determined by the Appellate Court

As noted by the Court of Appeal, the issues of unconscionability and

severability are "typically" resolved by the trial court. (*Sanchez*, 2011 WL 5865694, at *21.) Petitioner ignores the word "typically" and incorrectly concludes this is an ironclad rule. Rather, the correct conclusion is issues of severability are left for the trial court when there is room to apply discretion. In such situations, the case should be remanded so the trial court is given an opportunity to exercise its discretion.

When, however, there is only possible outcome as a matter of law, there is no discretion to apply. This is such a situation. It is not possible to cure the problems with Petitioner's arbitration clause by severance, making only one outcome possible under the law: a finding the clause is not enforceable. (*Sanchez*, 2011 WL 5865694, at *21 (citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 126).) When any other conclusion would be error, this Court has held (as cited by the Court of Appeal in its decision in this case), courts do not need to engage in the pointless exercise of remand, just to open up the possibility of an abuse of discretion. (*Id.*, (citing *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 122).) Rather, the Court of Appeal can apply the only outcome possible under the law. This approach has been utilized in other cases also not involving arbitration clauses. (*See, e.g., First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1576; *Jones v. First American Title Ins. Co.* (2003) 107

Cal.App.4th 381, 390.)

In *Brown v. Ralphs Grocery Store Co.* (2011) 197 Cal.App.4th 489, unlike here, there was only one substantively unconscionable term about one type of claim. (*See Brown*, 197 Cal.App.4th at 504 (finding waiver of PAGA claim in arbitration clause substantively unconscionable).) In *Brown*, it was possible the severance of that one provision would not alter the arbitration provision in such a way to benefit the party who had included the unconscionable provision. This was a matter of weighing the equities in the case and exercising discretion. (*See ibid.* ("We therefore remand the matter to the trial court to exercise its discretion...").) In this case, there are numerous substantively unconscionable terms, which is the commonly applied definition of having a clause "permeated" with unconscionability. (*See Armendariz*, 24 Cal.4th at 124-25; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826.) Where a clause is permeated with unconscionability, that is when it becomes impossible to just excise the single rotten piece. If the trial court tried to cut out all the pieces, the result would be a jumbled, meaningless arbitration clause. If the trial court didn't cut out all the pieces, it would be abusing its discretion. Either way, the clause is unenforceable. Thus, unlike the situation in *Brown* where there was still discretion to exercise, the trial court has no discretion left to exercise in this case. Remand would be

an idle act and the law does not require idle acts. (*See* Civil Code § 3632.)

IV. If This Court Grants Review, The Continued Viability of *Fisher v. DCH Temecula Imports, LLC* Should Be Addressed

Rules of Court Rule 8.504(c) permits a party filing an answer to identify additional issues for review by providing "a concise, non-argumentative statement of those issues, framing them in terms of the facts of the case but without unnecessary detail."

The trial court denied Petitioner's motion based on the holding in *Fisher v. DCH Temecula Imports, LLC* (2010) 187 Cal.App.4th 601. (Super. Ct. Order, at 3-4; *Sanchez*, 2011 WL 5865694, at *6.) The Court of Appeal, however, declined to address whether the class action waiver in the arbitration clause was unenforceable, as decided in *Fisher*. (*Id.*, at *6.) If this Court is inclined to review the appellate court's opinion, then the underlying basis of the trial court's order – the *Fisher* case – and whether the *Fisher* opinion is consistent with the United States Supreme Court's opinion in *Concepcion*, should also be addressed. A decision on this issue is potentially dispositive of the main issue on appeal: the enforceability of this particular arbitration clause.

Fisher does not require the arbitration of certain types of claims, or force parties to agree to class-wide arbitration. Rather, *Fisher* recognizes that California law requires class actions be available to consumers. It recognizes

the parties agreed in the arbitration clause to have a class action waiver, but acknowledged the waiver might not be enforceable in certain circumstances. And *Fisher* recognized that the contract provided a course of action if the class action waiver was unenforceable for any reason – the parties agreed they would not arbitrate class disputes, but instead would void the entire arbitration agreement. Thus, *Fisher* is consistent with the Supreme Court's mandate in *Concepcion* that parties can agree to limit what disputes they arbitrate, and to enforce the written agreement of the parties. (*See Concepcion*, 131 S.Ct. at 1745.)

V. Conclusion

Justice Mallano's well-reasoned analysis comports with the United States Supreme Court's position on analyzing the enforceability of arbitration clauses. There are no issues or disputes between the Courts of Appeal that require uniformity which can be solved by reviewing this case. Accordingly, Respondent Gil Sanchez respectfully requests this Court deny the Petition for Review and let him proceed with his lawsuit.

DATED: January 24, 2012

Respectfully submitted,
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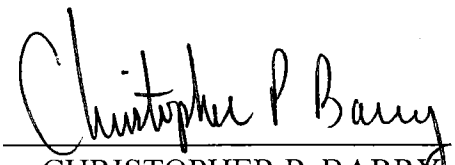
GIL SANCHEZ

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(c)(1) of the California Rules of Court, the foregoing **ANSWER TO PETITION FOR REVIEW** is produced using 13-point Times New Roman type and contains approximately 5,028 words, including footnotes, which is less than the 8,400 words permitted by rule. Counsel relies on the word count of the computer program used to prepare this Brief to calculate the number of words.

DATED: January 24, 2012

Respectfully submitted,
ROSNER, BARRY & BABBITT, LLP

By: 
CHRISTOPHER P. BARRY
Attorneys for Plaintiff and
Respondent GIL SANCHEZ

PROOF OF SERVICE

Gil Sanchez v. Valencia Holding Company, LLC et al.
Court of Appeal, State of California, Second Appellate District, Division One B228027

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 **January 24, 2012**, I served the foregoing document(s) described as:

ANSWER TO PETITION FOR REVIEW

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 **January 24, 2012,** at San Diego, California.

Amie Olesko

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