Case No. S199119

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GIL SANCHEZ,
Plaintiff and Respondent,
vs.
VALENCIA HOLDING COMPANY, LLC
Defendant, Appellant, and Petitioner.

ANSWER BRIEF ON THE MERITS

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

Los Angeles Superior Court Case No. BC433634
Honorable Rex Heeseman

ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner (Bar No. 109740)
Christopher P. Barry (Bar No. 179308)
Angela J. Smith (Bar No. 216876)
10085 Carroll Canyon Road, Ste.100
San Diego, California 92131
(858) 348-1005

Attorneys for Plaintiff and Respondent
Gil Sanchez

Case No. S199119

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GIL SANCHEZ,
Plaintiff and Respondent,
vs.
VALENCIA HOLDING COMPANY, LLC
Defendant, Appellant, and Petitioner.

ANSWER BRIEF ON THE MERITS

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

Los Angeles Superior Court Case No. BC433634
Honorable Rex Heeseman

ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner (Bar No. 109740)
Christopher P. Barry (Bar No. 179308)
Angela J. Smith (Bar No. 216876)
10085 Carroll Canyon Road, Ste.100
San Diego, California 92131
(858) 348-1005

Attorneys for Plaintiff and Respondent
Gil Sanchez

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S199119 - SANCHEZ v. VALENCIA HOLDING COMPANY

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
GILBERTO ANTONIO SANCHEZ PLAINTIFF	[X]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

Submitted by: Hallen David Rosner

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES **PAGE**

TABLE OF AUTHORITIES

CALIFORNIA CASES **PAGE**

TABLE OF AUTHORITIES

CALIFORNIA CASES **PAGE**

TABLE OF AUTHORITIES

CALIFORNIA CASES **PAGE**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

STATUTES

Civil Code

Code of Civil Procedure

FEDERAL STATUTES

I. Introduction

Are arbitration clauses above the law? Are there no limits on what procedures a business can include in a consumer contract of adhesion? Are businesses free to put their foot on the scales of justice in the guise of creating an alternative dispute resolution procedure? This case involves a one-sided, unfair arbitration clause found on the back of contracts to purchase vehicles in California that Appellant, the car dealership Mercedes Benz of Valencia,[1] never discussed with or disclosed to Respondent Gil Sanchez. Appellant asks this Court to give businesses free rein to force the customers who purchase their products to sacrifice all the protections the law affords by putting the otherwise clearly illegal sacrifice inside the allegedly sacrosanct walls of an "arbitration" clause.

Contrary to Appellant's wishes, the Federal Arbitration Act ("FAA") does not give businesses the freedom to trample consumer rights by drafting arbitration clauses that would be unenforceable were they contractual provisions for any other purpose. General contract defenses to overbearing arbitration clauses still exist, as recognized by the United States Supreme Court in *AT&T Mobility v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740. If an equitable doctrine or legal standard exists to revoke

[1] Apparently to generate sympathy, Appellant refers to itself as a "family owned" dealership. (*See* Appellant's Opening Brief, at 3.) There is no evidence in the record Valencia Holding Company, LLC, the owner of this Mercedes dealership, is a family-owned business.

any contract, then that same doctrine or standard must be applied to a contract to arbitrate disputes. That is what both the trial court and the Court of Appeal did here, and their rulings are consistent with the Supreme Court's ruling in *Concepcion* and every 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 in *Concepcion* 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 targeting arbitration clauses. As such, according to the Supreme Court, the *Discover Bank* rule ***did*** derive its meaning from the fact an agreement to arbitrate was at issue. Furthermore, the *Concepcion* Court found the *Discover Bank* rule fundamentally altered the agreement of the parties by requiring them to agree to class arbitration. (*Id.*, at 1748.)

Here, the trial court avoided this issue by following the Supreme Court's prior instructions, repeated in *Concepcion*, that arbitration is a matter of contract, and that courts should enforce the terms of the contract before them. Appellant's contract includes a "poison pill" provision, setting out specific criteria that the parties agreed, when satisfied, would void the agreement to arbitrate. The trial court found the conditions required to trigger the "poison pill" were present, and therefore enforced the terms of the contract and honored the parties' agreement not to arbitrate disputes. The Court of Appeal in *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601, *review denied* Dec. 7, 2010, reviewed this same contract and reached the same conclusion. The FAA mandates enforcing arbitration clause *according to their terms*. (*Concepcion,* 131 S.Ct. at 1745.) That is exactly what the trial court and the *Fisher* Court did. This has long been the law, and it remains good law post-*Concepcion.*

This is not the only problem with Appellant's attempt to force Mr. Sanchez to arbitrate his claims in this dispute. The Court of Appeal found the arbitration clause suffered from an even more fundamental problem – it is unconscionable under California law. The vehicle sale contract at issue here is a contract of adhesion. The arbitration clause was not fairly disclosed to Mr. Sanchez, and it sets out a dispute resolution process that so unfairly favors Appellant the Court of Appeal found *enforcing* the clause would undermine the purpose of the FAA. (*See*

Sanchez v. Valencia Holding Co., LLC (2011) 135 Cal.Rptr.3d 19, 30-31.)[2] Under decades of established state law on the general contract defense of unconscionability, where a clause is both procedurally and substantively unconscionable, it is not a valid contract. The Court of Appeal applied this settled law and, like any other clause permeated with unconscionability, it refused to enforce the improperly formed contractual arbitration clause.

Appellant asks this Court to depart from this well-established law and make new law. To find for Appellant, this Court will have to throw out the Supreme Court's mandate to enforce arbitration clauses as written, using ordinary contract law. It will also have to ignore the Supreme Court's specific affirmation of the continuing validity of California's unconscionability defense. Then, this Court will have to create new laws that: (i) businesses can use otherwise illegal contract clauses as long as they make the illegal clause a condition to arbitration, (ii) businesses can use the FAA to force consumers into arbitration even where the contract prohibits arbitration, and (iii) making arbitration clauses exempt from general contract defenses, including unconscionability. Unless the Court makes all three of those proposed rules into law, there is no basis to reverse the trial court and the Court of Appeal's decisions enabling Mr. Sanchez to litigate this dispute.

---

[2] Citations are made to the published opinion for ease of reference to what occurred in the Court of Appeal, in this case not as a binding authority.

There is no reason to so radically change California law to strictly enforce Appellant's poorly written and highly biased arbitration clause. Although they used different routes to reach the same practical result, the lower courts in this case got it right – the selective, permissive, arbitration clause in Mr. Sanchez's contract should not be enforced. Mr. Sanchez requests this Court maintain California law and its protections against illegal contracts and unconscionable contract provisions, and affirm the lower courts' rulings.

II. Response To Appellant's Statement Of The Case

Appellant's Statement of the Case is generally accurate, but is incomplete in the following material ways:

A. The Arbitration Clause On The Back Of The Contract

1. The Arbitration Clause Did Not Have To Be On The Back

Appellant falsely claims "statutory mandates" forced it to hide the arbitration clause on the back of the form. (Appellant's Opening Brief ("AOB"), at 52.) Civil Code Section 2982 specifically notes disclosures not listed in it (which includes arbitration clauses) "may appear in the contract in any location or sequence and may be combined or interspersed with other provisions of the contract." Thus, the arbitration clause could be anywhere in the document, or in an entirely separate document, and it could have required a signature or initial to acknowledge it. (*See also Crippen v.*

Central Valley RV Outlet, Inc. (2004) 124 Cal.App.4th 1159 (enforcing arbitration agreement that was separate from vehicle purchase contract).) It was Appellant's choice to hide it on the back in small font without any signed acknowledgement by Mr. Sanchez.

2. The Arbitration Clause Is "Selective" And "Optional"; It Is Not Mandatory For All Disputes

Most arbitration clauses are mandatory, and require all disputes to be resolved by binding arbitration. The clause at issue in this case is different – there is nothing that prevents the parties from choosing litigation as a means of resolving their dispute. The first sentence in the clause states "either you or we ***may*** choose to have any dispute between us decided by arbitration and not in court or by jury trial." (Appellant's Appendix ("AA"), Vol. I, Tab 8, at 00279 (showing bottom of back side of contract) (emphasis added).) Later, the clause states "neither you nor we waive the right to arbitrate by using self-help remedies ***or filing suit***." (*Id.* (emphasis added).) Thus, the clause clearly contemplates disputes between the parties can be resolved in litigation. It also clearly excludes from arbitration car dealers' and lenders' favorite and most-sought after remedy – the "self-help remedy" of repossession. Had Mr. Sanchez missed a payment, Appellant could take his vehicle without initiating arbitration. No reciprocal right exists for Mr. Sanchez.

Essentially, the "arbitration clause" in this contract operates more as a lawsuit veto clause. One party can sue the other, and then either party can choose arbitration instead. But neither party is required to select arbitration, and disputes can be litigated.

Because the arbitration clause is elective, not mandatory, Mr. Sanchez acted within his contractual rights by filing a class action lawsuit against Appellant.

3. The Class Action Waiver Only Applies To Arbitration, Not Litigation

- The arbitration clause includes the following provisions regarding class disputes: ***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.

- 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***.

(AA, Vol. I, Tab 8, at 00279 (emphasis added).)

Thus, had Mr. Sanchez elected to arbitrate the dispute, he could not have asserted class claims. All of the restrictions against class actions are specifically tied to class arbitration. The parties clearly are stating there will not be class arbitration. But there is no restriction anywhere in the contract or the arbitration clause prohibiting a party from asserting class claims in litigation. Mr. Sanchez elected to litigate his dispute, and elected

to assert class claims. Both choices by Mr. Sanchez were permissible under the terms of his contract.

4. The Anti-Arbitration Clause

The "arbitration clause" in Appellant's form contract includes a "poison pill" that nullifies the entire arbitration clause if certain conditions are present:

> 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.

(AA, Vol. I, Tab 8, at 00279 (emphasis and capitalization added).)

This is the last sentence of the arbitration clause. It is not mentioned in Appellant's Opening Brief. As arbitration is a matter of contract, and parties are free to limit what disputes they will arbitrate, this sentence cannot be ignored in analyzing where and how this case should be resolved.

B. The Trial Court's Ruling

Appellant attempts to blame the trial court's denial of the motion to compel arbitration on "the class-action waiver provision." (AOB, at 9.) In reality, the trial court denied Appellant's motion because, as just noted above, the arbitration clause has a "poison pill" whose conditions were met, and therefore Appellant's contract (not state laws or rules) rendered the arbitration clause unenforceable. The trial court read the terms of the arbitration clause, applied the plain meaning of the words, and concluded,

like the *Fisher* court did, that the "poison pill" in the arbitration clause was triggered, and therefore the terms of the contract itself made the entire arbitration clause "unenforceable."

C. The Court Of Appeal's Opinion

Appellant attempts to dismiss the Court of Appeal's second opinion, which included additional analysis, as "not material" to the issues before this Court. (AOB, at 12, fn. 7.) Yet, of significance to this appeal, from the first opinion to the second opinion, the Court of Appeal added three lengthy paragraphs of analysis why the United States Supreme Court's opinion in *Concepcion* did not prevent the Court from reaching the conclusion it did. (*Sanchez,* 135 Cal.Rptr.3d at 29-30.) Because Appellant argues *Concepcion* fundamentally altered the law, Justice Mallano's explanation why Appellant is wrong is quite material.

III. Argument

A. The Federal Arbitration Act, As Interpreted In *Concepcion*, DOES NOT Preempt The State Law General Contract Defense Of Unconscionability.

1. Unconscionability Is A General Contract Defense Within The Scope Of 9 U.S.C. § 2

Section 2 of the FAA states a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist ***at law or in equity*** for the revocation of any contract." (9 U.S.C. § 2 (emphasis added).) In *Concepcion*, the Supreme Court held "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,* 131 S.Ct. at 1746 (citations omitted).) Thus, the Supreme Court itself recognized unconscionability remains a generally applicable contract defense that can be used to invalidate arbitration agreements.

Since the Supreme Court's opinion in *Concepcion*, California Courts of Appeal, like the appellate court in this case, have continued to determine whether arbitration clauses should be invalidated by the unconscionability defense. (*See, e.g., Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138, 1150, *rev. den'd* (July 11, 2012) ("arbitration agreements remain subject, post-*Concepcion*, to the unconscionability analysis employed by the trial court in this case"); *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1158, n.4 ("General state law doctrine pertaining to unconscionability is preserved unless it involves a defense that applies 'only to arbitration or that derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue.'"); *Ajamian v. CantorCO2e, L.P.* (2012)

203 Cal.App.4th 771, 804 n. 18 (*Concepcion* does not prevent unconscionability analysis).)[3]

The Supreme Court, besides recognizing unconscionability is a general contract defense, specifically acknowledged California's test for unconscionability set forth by this Court and took no issue with it:

> Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." Cal. Civ.Code Ann. § 1670.5(a) (West 1985). A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing

---

[3] Multiple Federal Courts have reached the same conclusion. (*See, e.g., Kilgore v. Key Bank National Assn.* (9th Cir. 2012) 673 F.3d 947, ("*Concepcion* did not overthrow the common law contract defense of unconscionability whenever an arbitration clause is involved."); *Lau v. Mercedes-Benz USA, LLC* (N.D. Cal. 2012) 2012 WL 370557, *7 ("California's unconscionability defense, codified in California Civil Code Section 1670.5, does not create a per se rule invalidating arbitration clauses, but instead looks more generally to the facts and circumstances of each case to determine whether a contract is unconscionable."); *Trompeter v. Ally Financial, Inc.* (N.D. Cal. 2012) 2012 WL 1980894, *8 ("*Concepcion* does not preclude this Court's finding that the arbitration agreement in the present case is unconscionable because the finding does not undermine the fundamental attributes of arbitration as an alternative form of dispute resolution that is neutral, speedy, economical and informal. The Court's review of the arbitration agreement applies the generally applicable contract principle of unconscionability and, thus, does not offend the FAA's policy objective favoring arbitration."); *see also Trompeter*, 2012 WL 1980894, at*3 ("Under California law applicable to all contracts generally, the adhesive nature of a contract is a consideration in determining whether the agreement is unconscionable, and such an agreement will not be enforced if it defies 'the reasonable expectations of the weaker or 'adhering' party' or is 'unduly oppressive.' [citation] While the [U.S.] Supreme Court has overturned California law requiring the availability of class-wide relief in arbitration agreements, the Court has indicated that state law bearing on contracts of adhesion remains good law").)

> on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz v. Foundation Health Pyschcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000); *accord, Discover Bank*, 36 Cal.4th, at 159–161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108.

(*Concepcion,* 131 S.Ct. at 1746.)

Concepcion did not throw out the general contract defense of unconscionability. Rather, the specific rule in *Discover Bank* is preempted by the FAA. The *Discover Bank* rule was a special sub-rule of unconscionability applicable to class action waivers. (*Concepcion*, 131 S.Ct. at 1746.) The Supreme Court's problem with the *Discover Bank* rule was that by eliminating the class action waiver from an arbitration clause, the rule turned arbitration clauses with class action waivers into arbitration clauses that permitted class arbitrations. (*Id.*, at 1750 ("Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.*").)[4] The problem was not the underlying general contract defense of unconscionability. Moreover, the Supreme Court ***did not*** hold the arbitration clause at issue in *Concepcion* was enforceable. Nor did the Supreme Court hold that class

[4] The Supreme Court did not address how the *Discover Bank* rule could "require" class arbitration absent explicit agreement by the parties consenting to class arbitration, which the Supreme Court previously held was a necessary pre-requisite to compelling class arbitration. (*See Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. __, 130 S.Ct. 1758, 1763.)

action waivers withstand all general contract defenses. Instead, the Supreme Court remanded the case for further proceedings consistent with its opinion the *Discover Bank* rule could not be used to invalidate the arbitration clause as unconscionable. (*Id.*, at 1753.)

The contract defense at issue here – unconscionability – applies equally to all contracts. (*See Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820 ("a principle of equity **applicable to all contracts generally** is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'") (emphasis added); *Lona v. Citibank* (2011) 202 Cal.App.4th 89, 107-112 (applying unconscionability to pricing terms of a mortgage contract); *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035-37 (settlement agreement); *Chang Bee Yang v. Sun Trust Mortg., Inc.* (E.D.Cal. 2011) 2011 WL 6749076, *9 (loan agreement); *Pinel v. Aurora Loan Services, LLC* (N.D.Cal. 2011) 814 F.Supp.2d 930 (mortgage workout agreements); *Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796 (forfeiture provision in employment contract); *Smith v. Ford Motor Co.* (9th Cir. 2011) 2011 WL 6322200 (automobile warranty); *Marchante v. Sony Corp. of America, Inc.* (S.D.Cal. 2011) 801 F.Supp.2d 1013 (television warranty).) Because the defense of unconscionability does not single out arbitration clauses, it is not pre-empted by the FAA and remains

a valid defense to a contractual arbitration agreement. (*See Concepcion*, 131 S.Ct. at 1746.)

2. As A General Contract Defense, Unconscionability Is Not Preempted

Appellant mis-reads, and therefore overextends, the Supreme Court's analysis in *Concepcion*. Appellant reads *Concepcion* to create carte blanche in the language of arbitration clauses: "*Concepcion*, thus, is clear that, absent exceptional circumstances, states – either judicially or legislatively – may not, under the guise of unconscionability, judge the supposed fairness of the parties' agreed arbitration process." (AOB, at 15.)

Despite the Supreme Court's recitation of California's test for unconscionability without modification, Appellant argues there is nonetheless a brand new test for this defense: unconscionability is now "limited" only to arbitration clauses that "bear[] no rational relationship to the anticipated disputes such that no reasonable person would have agreed to it absent coercion." (*Id.*, at 16.) It is not clear where Appellant gets this new test. Nowhere in its opinion did the Supreme Court say it was changing California's test for unconscionability. Rather, the Supreme Court was concerned with a specific rule which operated to interfere with the purpose of the FAA. California's unconscionability test in general, however, does not interfere with the purpose of the FAA, and does not mandate any specific rules or procedures. Instead, California's

unconscionability defense examines how a contract was made (the procedural element, which focuses on bargaining power) and the terms of the contract (the substantive element, which focuses on the one-sidedness of the terms). When contracts are both procedurally and substantively unconscionable, courts are authorized to refuse to enforce the contract, or to limit the application of unconscionable clauses to avoid an unconscionable result. (Civil Code Section 1670.5.)

3. Under The *Graham* Standard, This Arbitration Clause Would Not Be Enforced

Appellant states "*Concepcion* has undoubtedly changed the playing field (or, in California, returned it to the *Graham* standard) regarding unconscionability attacks." (AOB, at 18.) In *Graham*, this Court held there were two ways to defeat an arbitration clause:

> Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. The second a principle of equity applicable to all contracts generally is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."

(*Graham,* 28 Cal.3d at 820 (internal citations omitted).)

Here, the record was clear the arbitration clause "did not fall within the reasonable expectations of the weaker or 'adhering' party."

Mr. Sanchez had no reason to suspect that by purchasing a vehicle he was agreeing to give Appellant the right to veto his choice of filing a lawsuit or seeking relief for similarly-situated consumers. (*See* AA, Vol. II, Tab 11, at 00357-359 (Sanchez Declaration).) If this is "where *Concepcion* takes California," then the trial court and Court of Appeal's conclusions in this case are easily affirmed because Mr. Sanchez did not reasonably expect the arbitration clause.

B. Parties Can Decide What Disputes Will Be Arbitrated And What Disputes Will Be Litigated, And The Parties Expressly Contracted This Class Action Dispute Would Be Litigated.

In arguing *Concepcion* limits the scope of the unconscionability general contract defense, Appellant cites *Concepcion* for the proposition "the FAA . . . requires enforcement of the arbitration agreement ***according to its terms***." (AOB, at 13 (citing *Concepcion*, 131 S.Ct. at 1749, 1753) (emphasis added).) This is exactly what the trial court did – it enforced the terms of the arbitration clause and applied the clause's own "poison pill" to invalidate the clause. Appellant ignores that ***its own contractual language***, rather than a State of California law or judicial rule, said "this arbitration clause shall be unenforceable" in this case.

"The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Concepcion*, 131

S.Ct. at 1748.) "[P]arties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes." (*Id.*, at 1748-49 (citations omitted).) "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." (*Id.*, at 1752-1753 (citation omitted).) Parties are free to agree to arbitrate class claims, apply particular rules, or include particular procedures in their arbitration agreements. (*Id.*; *see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 479.)

With *Concepcion*, businesses are using the Supreme Court's decision to create a conundrum. If parties are free to agree to any procedure, what if the procedure violates state law? For example, if the arbitration agreement prohibits the consumer from getting married during the arbitration, it would be an invalid restriction on marriage in violation of Civil Code Section 1669. What if the arbitration clause requires a consumer to serve as the business's slave for a period of time in order to initiate a claim? If Appellant is correct that *Concepcion* eliminates an evaluation of the process agreed to by the parties, then no law is safe as any conduct could be written into the clause as part of the "arbitral procedure." Such a broad reading also contradicts the Supreme Court's repeated holdings that "A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner

different from that in which it otherwise construes nonarbitration agreements under state law." (*Perry v. Thomas* (1987) 482 U.S. 483, 492 n. 9; *see also Concepcion*, 131 S.Ct. at 1745 ("courts must place arbitration agreements on an equal footing with other contracts") (citation omitted).)

The answer must be found in Section 2 of the FAA, so that the parties have complete freedom to contract – as long as they do so subject to any ground that exists at law or equity to revoke any contract. Any legal contract is then permissible. But a term which is invalid in any other contract remains invalid in an arbitration clause. In other words, the parties' freedom to contract for arbitration is only as broad as their general freedom to contract, not broader.

Here, Appellant put a "poison pill" in its arbitration clause in order to avoid class arbitration. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." (*Volt*, 489 U.S. at 478 (citations omitted); *see also First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943 ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration.").)

Mr. Sanchez alleges class action claims under California's CLRA in this case. (*See* AA, Vol. I, Tab 2, at 00076-78, 00081-82, 00086-87.) The CLRA provides an express statutory right to bring class action claims for violations of the CLRA. (Civil Code Section 1781.) The CLRA also prohibits contractual waivers of any rights under it, including the right to bring a class action. (Civil Code Section 1751.) In *Fisher*, the form contract and claims were nearly identical to the ones at issue here. Like this case, the plaintiff in *Fisher* had filed a class action lawsuit against a car dealership including class claims under the CLRA seeking to put a stop to the dealership's deceptive business practices. (*Fisher*, 187 Cal.App.4th at 606.) The court found the class action waiver unenforceable because parties cannot contract away unwaivable statutory rights. (*Id.*, at 615-17.)

Illegal contract terms in violation of California law are void and invalid in **all** contracts. (*See* Civil Code § 1668; *Gombiner v. Swartz* (2008) 167 Cal.App.4th 1365, 1372 (illegal contract terms are void); *Neubauer v. Goldfarb* (2003) 108 Cal.App.4th 47, 56-57 (same).) Thus, if the parties to a contract try to waive the right to bring a CLRA class action, like any other illegal contract term in violation of California law, the attempted waiver is invalid. (*See Fisher*, 187 Cal.App.4th 601 (finding class action waiver was illegal and unenforceable in case with CLRA class claim); *Doe 1 v. AOL LLC* (9th Cir. 2009) 552 F.3d 1077, 1084 (voiding forum selection clause because it operated as waiver of consumer's right to

a class action under the CLRA); *Sawyer v. Bill Me Later, Inc.* (C.D.Cal. 2010) 2010 WL 5289537, *6 (finding forum selection clause unenforceable where enforcement would result in an illegal waiver under the CLRA).)

Looking at the arbitration clause here, it plainly refers to class action lawsuits – "in a case which class allegations have been made." That is the situation here. (*See, e.g.*, AA, Vol. I, Tab 2, at 00058-59, 00063-70, and 00076-78.) Because the condition precedent was present, the trial court then looked at the potential triggering event: "If a waiver of class action rights is deemed or found to be unenforceable ***for any reason*** . . . ." Notably, there is no limitation on the basis for finding the class action waiver unenforceable. The contract could have included a limitation – but it doesn't. It says "any reason." The use of the term "for any reason" is deliberately broad and must be construed as such. (*City of Carlsbad v. Ins. Co. of State of Penn.* (2009) 180 Cal.App.4th 176, 181 ("From the earliest days of statehood we have interpreted 'any' to be broad, general and all embracing.").)

Appellant knew how to put a more specific limitation in its arbitration clause. For example, the clause states "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." (AA, Vol. I, Tab 8 at 00279.) For example, in *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, the United States Supreme Court addressed when federal

law excludes a claim from binding arbitration. For example, although Appellant, a car dealer, seeks to force its customer Mr. Sanchez into arbitration, based on an arbitration clause he didn't see and they didn't discuss, Appellant itself, as a car dealer, cannot be forced by manufacturers to arbitrate franchise disputes absent written consent after the dispute arises. (*Id.*, at 672 (citing 15 U.S.C. § 1226(a)(2).) No such similar law protects consumers from car dealers.

Appellant's "poison pill", however, uses the much broader modifier "any reason" for determining when the class action waiver is unenforceable, and Mr. Sanchez was not limited to the protections of specific federal laws prohibiting arbitration of specific claims. The term "any reason" is broad enough to include state laws applicable to class action waivers, as well as the general state and federal contract defense that private parties cannot waive unwaivable statutory rights. (*Carlsbad*, 180 Cal.App.4th at 181.)

"Under the plain meaning rule, courts give the words of the contract or statute their usual and ordinary meaning. 'We interpret the words in their ordinary sense, according to the plain meaning a layperson would attach to them.'" (*Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 162 (citations omitted).) The plain meaning of "any reason," when contrasted with the more specific limitation regarding federal prohibition of the

arbitration of certain claims, is that California law can provide "a reason" the class action waiver is unenforceable.

The parties did not have to include a "poison pill" in the arbitration clause. But they did. And now Appellant is seeking to avoid a reasonable interpretation of the plain language in its own clause. While Courts do not enforce laws or rules which are inconsistent with the FAA, they are required to enforce contractual terms, even if those terms are inconsistent with the FAA. (*Concepcion*, 131 S.Ct. at 1753 (parties could require use of Federal Rules of Evidence in arbitration even though that is not arbitration as contemplated by the FAA); *Volt*, 489 U.S. at 472 (parties can agree to apply state procedural rules not required by the FAA).) The trial court relied on *Fisher,* which engaged in this same analysis and concluded *the arbitration agreement*, not state law or rules, prevented the arbitration of the claims.

The *Fisher* case is directly on point. Relying on well-established case law prohibiting the waiver of statutory rights in private contracts, including this Court's opinion in *Little v. Auto Stiegler* (2003) 29 Cal.4th 1064, the *Fisher* Court found the Legislature had prohibited any waiver of a consumer's right to bring a class action under the CLRA, regardless of where the waiver appears in the contract.[5] Hiding the waiver inside the

[5] Appellant falsely claims, without citation, *Fisher* relied on *Discover Bank.* (*See* AOB, at 9 and 59.) *Fisher* discussed *Discover Bank* to provide a

arbitration clause did not give it a special exemption from the Legislature's reasons or reach. (*See Fisher*, 187 Cal.App.4th at 619; *accord Perry*, 482 U.S. at 492 fn. 9 (arbitration clauses must be treated the same as other contracts).) As the *Fisher* court explained,

> It was DCH who chose to put the classwide arbitration and class action lawsuit waiver in the arbitration agreement and then included the "poison pill" provision that invalidated the remainder of the arbitration agreement if the classwide arbitration waiver was unenforceable. We cannot sever the offending class action waiver, as we are bound by the language of the contract.

(187 Cal.App.4th at 619.)

Appellant asked the trial court, asked the Court of Appeal, and now asks this Court to enforce the arbitration clause it included on the back of Mr. Sanchez's contract, all the while conveniently ignoring the plain language of the clause which actually prohibited arbitration of this dispute. *Concepcion* mandates courts read the contract and enforce the actual terms of the agreement. Here, that means this "arbitration clause shall be unenforceable." This Court, like the trial court, can engage in this process and enforce the "poison pill," without ever needing to determine whether the arbitration clause is unconscionable. Once the illegal waiver was voided, the contract itself prohibited arbitration. (*See Fisher*, 187

---

history of cases discussing FAA pre-emption – and to note the CLRA anti-waiver issue did not arise in *Discover Bank* and, therefore, was not discussed in *Discover Bank*. (187 Cal.App.4th at 614-15.)

Cal.App.4th at 619.) A court is bound to honor that choice. (*See ibid.*) The same is true here. Thus, the Court cannot compel arbitration of this dispute, because the parties did not agree to arbitrate this dispute.

1. The FAA Allows Parties To Agree To Eliminate FAA Pre-Emption

Arbitration agreements are just contracts. Courts are required to enforce arbitration clauses as written, applying ordinary contract rules. The purpose of the FAA "is to ensure the enforcement of arbitration agreements ***according to their terms*** . . . ." (*Concepcion*, 131 S.Ct. at 1748 (emphasis added).) Indeed, the FAA places such importance on the parties' freedom of contract the Supreme Court has held it allows the parties to eliminate FAA pre-emption from their contract by stating they want state law to apply. (*Volt*, 489 U.S. at 472.) That is what the RISC here does, stating California law applies to it. (AA, Vol. I, Tab 8, at 00277 (Section 6 of the RISC entitled "Applicable Law").)[6] Because the parties specifically chose to have California law apply, the FAA ***cannot*** pre-empt the application of

---

[6] Section 6 of the contract sets out the law governing the ***entire agreement***. The arbitration clause also states "[a]ny arbitration . . . shall be governed by the FAA." This means the ***arbitration proceeding*** shall be governed by the FAA's procedures, rather than the California Arbitration Act's procedures. This Court has limited this very wording to the arbitration proceeding only and held it is not to be interpreted broadly to affect other issues. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12.)

California law to this contract and the "poison pill." (*Volt*, 489 U.S. at 472.) This is especially true where the parties then agreed if the class action waiver is found unenforceable for "any" reason – which includes application of the California law governing the contract – there will be no arbitration. The parties chose to have this law apply, which overrides any otherwise applicable FAA pre-emption. (*See ibid.*)

2. The FAA Does Not Make Illegal Contract Terms Enforceable

Moreover, even if the contract hadn't already said California law applies, the FAA would not pre-empt the neutral state law at issue here. The FAA does not contain an express pre-emption provision. (*Volt*, 489 U.S. at 477.) Instead, it impliedly pre-empts "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 1746.) All other general contractual defenses still apply. (*Doctor's Associates v. Casarotto* (1996) 517 U.S. 681, 687; 9 U.S.C. § 2.) The FAA only makes contractual terms to arbitrate equal to other contractual terms; it does not give them a special status or exemption from otherwise applicable contract rules. (*Prima Paint v. Flood & Conklin Mfg.* (1967) 388 U.S. 395, 404 fn. 12 ("the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, ***but not more so***") (emphasis added); *accord Volt*, 489 U.S. at 478.)

The defense at issue here that triggered the "poison pill" – voiding contract terms in violation of statutory law – applies equally to all contracts. It does not single out arbitration clauses. Indeed, here, it is being applied to the same type of class action waiver term which courts have found in violation of the CLRA – and therefore invalid – in cases not involving arbitration. (*See, e.g., Doe 1*, 552 F.3d at 1084; *Sawyer*, 2010 WL 5289537, at *6.) If the waiver was illegal in those non-arbitration contracts, the Supreme Court and the FAA require the same conclusion here.

Moreover, the CLRA never mentions arbitration, let alone singles it out for unfavorable treatment. The only reason arbitration is an issue is because Appellant chose to condition the enforceability of the arbitration clause on the validity of the waiver of Mr. Sanchez's rights under the CLRA. Inserting a waiver of statutory rights into an arbitration clause does not somehow exempt the waiver from the law applicable to all other contracts though. Thus, not surprisingly, the Courts of Appeal have held illegal waivers of statutory rights remain illegal, even when in arbitration clauses. (*Brown v. Ralphs Grocery* (2011) 197 Cal.App.4th 489, 500, 502–503, *cert. denied* 132 S.Ct. 1910 (*Concepcion* "does not provide that a public right ... can be waived if such a waiver is contrary to state law"); *Hoover v. Am. Income Life Ins.* (2012) 206 Cal.App.4th 1193, 142 Cal.Rptr.3d 312, 316 fn. 2.)

Indeed, as discussed above, the contract itself recognizes the class action waiver will be unenforceable in some cases and, therefore, provides for situations like this one. It clearly states there will be no arbitration in cases (like this one) where the right to a class action is not waivable under ordinary contract law. The clause prohibits class arbitration, *not class litigation!* Enforcing the express contractual terms here means voiding the arbitration clause. (*Fisher*, 187 Cal.App.4th at 619.)

C. Appellant's Arbitration Clause Is Unconscionable As A Matter Of Law.

The Court of Appeal in this case described the "general principles of unconscionability." (*Sanchez,* 135 Cal.Rptr.3d at 28.) The Court of Appeal cited *Concepcion* for the standard that "the doctrine of unconscionability remains a basis for invalidating arbitration provisions . . . ." (*Id.*, at 29.) 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.*) 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); *see also Iskanian v. CLS Transp. Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 961 n.4 (noting Court of Appeal in this case "held that an arbitration

provision was unconscionable for reasons that would apply to any contract in general.").)

The explanation and analysis provided by the Court of Appeal is consistent with the Supreme Court's opinion in *Concepcion*. It treats the arbitration clause on the back of Mr. Sanchez's contract the same as 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 this arbitration clause such that it is placed on "equal footing" with other contracts.

A blog by defense attorneys criticizing the Court of Appeal's analysis in this case does not change 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 appellate panels in recent cases addressing other, non-arbitration contractual clauses for unconscionability. (*DeLeon v. Verizon Wireless, LLC* (Jul. 10, 2012) __

Cal.App.4th __, 2012 WL 2765812 (applying *Armendariz* test to terms of employment agreement); *Lona*, 202 Cal.App.4th at 107-112 (pricing terms of a mortgage); *Lanigan*, 199 Cal.App.4th at 1035-37 (settlement agreement).)

The Court of Appeal's opinion does not result in arbitration inconsistent with the terms of the arbitration clause or the purposes of the FAA. Rather, the opinion results in no arbitration 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*, 202 Cal.App.4th at 111.) The Court of Appeal in this case, the *DeLeon* court, and the *Lona* court all applied the same unconscionability test, and none of them ignored *Concepcion*. Unconscionability remains a general contract defense which is being applied in a consistent manner by the Courts of Appeal in California. Consistent with the application of the defense of unconscionability by the Courts of Appeal in arbitration and non-arbitration clauses, the clause at issue here is unconscionable and unenforceable. And that should be the end of the story.

Contrary to Appellant's claim, this case does not "directly conflict" with the opinion in *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 (which was cited by the Court of Appeal in this case – *see* 135 Cal.Rptr.3d at 39). 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-Romero* 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 arbitration, is not in conflict with the Court of Appeal's decision in this case. This Court of Appeal did not conclude this clause was unconscionable because only one side could initiate arbitration. Rather, this decision was based, in part, because the clause excludes the dealer's primary claims from the arbitration process while forcing the consumer to arbitrate their claims. (*Sanchez*, 135 Cal.Rptr.3d at 38-40.) 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 Court of Appeal here raised in *Arguelles-Romero* for consideration.

This particular contractual clause is indeed unconscionable under the general contract defense of unconscionability set out in Civil Code Section 1670.5:

> California law on unconscionability is well established. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Phrased another way, unconscionability has both a "procedural" and a "substantive" element. The procedural element requires oppression or surprise. Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. The substantive element concerns whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner. Under this approach, both the procedural and substantive elements must be met before a contract or term will be deemed unconscionable. Both, however, need not be present to the same degree. A sliding scale is applied so that the 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.

(*Samaniego,* 205 Cal.App.4th at 1144-1145 (internal punctuation and citations omitted).)

Here, the arbitration provision is procedurally unconscionable because it is adhesive and satisfies the elements of oppression and surprise. It is substantively unconscionable because it contains terms that are objectively unreasonable and unexpected. When a drafting party abuses the power which comes with form contracts of adhesion, like here, the law does

not bind the unsuspecting party to the onerous terms. (*See Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1248-49.) Because the arbitration clause contains multiple invalid terms, it is permeated by unconscionability and severance of the offending language is not appropriate. Rather, as the Northern District of California recently found when examining the same arbitration clause in the same form contract, the entire clause is unenforceable. (*See Trompeter*, 2012 WL 1980894, *7.)

This argument was presented to the trial court. (*See* AA, Vol. II, Tab 12, at 00373-377.) The trial court found the contract itself prohibited arbitration of this dispute even if the clause were enforceable, so it declined to address the issue of unconscionability. (*See* AA, Vol. II, Tab 24, at 00527-530.) The Court of Appeal was free to affirm the trial court's ruling on any ground. (*See RealPro, Inc. v. Smith Residual Co.* (2012) 203 Cal.App.4th 1215, 1219 ("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).) Further, because the evidence in the record is undisputed, the only issue was the application of the legal doctrine of unconscionability to the undisputed facts, which was a legal issue the Court of Appeal could decide on appeal. (*See Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1511-12.)

D. The Contractual Clause In This Case Is Procedurally Unconscionable

"Procedural unconscionability pertains to the making of the agreement; it focuses on the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice." (*See Ajamian,* 203 Cal.App.4th at 795; *see also Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 980 (oppression is when "contracting party has no meaningful choice but to accept contract terms" and unfair surprise is when there are "circumstances indicating that party's consent was not an informed choice.").) There are at least five factors (including the two relied on by the Court of Appeal) weighing strongly in favor of a finding of procedural unconscionability here.

1. The Sale Contract Is A Contract Of Adhesion

First, procedural unconscionability exists when the stronger party drafts the contract and presents it to the weaker party on a "take it or leave it basis." (*Ajamian,* 203 Cal.App.4th at 794-795 (citation omitted).) Here, the Sale Contract is a form contract of adhesion, which was presented to Mr. Sanchez on a "take it or leave it basis." (AA, Vol. II, Tab 11, at 00357-358.) It is undisputed Mr. Sanchez was never informed the contract contained an arbitration clause, much less offered an opportunity to negotiate the arbitration terms. (*See id.*) These undisputed facts weigh in favor of finding procedural unconscionability. (*See Armendariz v.*

Foundation Health Pyschcare Servs., Inc. (2000) 24 Cal.4th 83, 113; *Little*, 29 Cal.4th at 1071; *Ajamian*, 203 Cal.App.4th at 796; *Wherry,* 192 Cal.App.4th at 1246; *Lona*, 202 Cal.App.4th at 108; *Trivedi v. Curexo Tech.* (2010) 189 Cal.App.4th 387, 393; *see also Bridge Fund Capital v. Fastbucks Franchise* (9th Cir. 2010) 622 F.3d 996, 1004 ("California law treats contracts of adhesion, or at least terms over which a party of lesser bargaining power had no opportunity to negotiate, as procedurally unconscionable to at least some degree.").)

2. When He Signed The Sale Contract, Mr. Sanchez Did Not Know It Contained An Arbitration Clause, Showing "Actual Surprise"

Second, the undisputed evidence shows Mr. Sanchez was not aware of the existence of the term in question – the arbitration provision – when he signed the Sale Contract. (*See* AA, Vol. II, Tab 11, at 00357-358.) Actual surprise regarding the existence of the term is further evidence of procedural unconscionability, even where a party had the opportunity to read the document before signing. (*See Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1291; *see also Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519, 1535 ("[a]s has been observed, even 'experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms.'").)

Appellant's brief selectively highlights the fact the Contract contained a few words buried in the 2,000 words on the front of the document – in fairly fine print – claiming Mr. Sanchez had read all the fine print. (*See, e.g.*, AOB, at 6-7.) But if Mr. Sanchez didn't read the pre-printed contract terms, he didn't read that pre-printed sentence either, which was in smaller print than the terms around it and squished into a small block paragraph on the side. The inquiry in an unconscionability analysis is ***not*** whether the drafting party was smart enough to include terms about having read the fine print in the contract when everyone knows buyers almost never read the fine print. (*See A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 490 ("In fact, one suspects that the length, complexity and obtuseness of most form contracts may be due at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing."); *Chavarria v. Ralphs Grocer Company* (C.D.Cal. 2011) 812 F.Supp.2d 1079, 1085 (finding procedural unconscionability even though contract contained a term claiming "the Applicant acknowledges that she has 'read, understood, and agree[d]' that the Arbitration Policy is incorporated into the Application" because the Applicant had not actually read the contract); *Higgins v. Superior Court* (2010) 140 Cal.App.4th 1238, 1253 (clause stating party read the entire agreement is "relevant to our inquiry, [but] does not defeat the otherwise strong showing of procedural unconscionability"); *Trompeter,* 2012 WL

1980894, *4 (finding nearly identical arbitration clause procedurally unconscionable despite presence of acknowledgement and consumer's failure to present evidence of surprise).) Rather, the inquiry is whether there was actual notice and assent to the terms (and if not, if the terms are fair and reasonably expected – and bind the buyer anyway, or unexpected and only binding when there is actual knowing assent). (*See Bruni*, 160 Cal.App.4th at 1290-91; *see also Wherry*, 192 Cal.App.4th at 1247 ("That plaintiffs initialed every page and signed the document does not vitiate plaintiffs' lack of time to review the agreement or have a lawyer look at it.").)

Appellant tries to avoid this factor by citing to a different rule about how 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. (*See* AOB, at 50-53.) But this rule only comes into play ***after*** nothing indicates the contract is unconscionable. (*Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1318.) If unconscionability is at issue, however, fairness must be established before the unwitting signer will be bound by the unknown terms. This makes sense. Under Appellant's proposed version of the rules, no written clause could ever be unconscionable because a buyer could never be surprised by a written clause. This is not the law though. As set out throughout this brief, courts routinely find unfair and oppressive written clauses unconscionable.

Moreover, it is well-established the rule cited by Appellant binding contract signers to unknown contract terms does ***not*** apply to adhesion contracts – which this contract is. (*See id.*, at 1318; *Ramirez v. Sup. Ct.* (1980) 103 Cal.App.3d 746, 754; *see also Arguelles-Romero*, 184 Cal.App.4th at 843 (this form contract is contract of adhesion); *Smith v. AmeriCredit Financial Services, Inc.* (S.D. Cal. 2012) 2012 WL 834784, at *3 (same); *Trompeter*, 2012 WL 1980894, at *3 (same).) Indeed, in the case of adhesion contracts, failure to read the contract helps establish actual surprise. (*Bruni*, 160 Cal.App.4th at 1291; *Chavarria*, 812 F.Supp.2d at 1085.)

The only testimony on this issue established Mr. Sanchez did not read this adhesion contract and was unaware of the existence of the arbitration clause. (*See* AA, Vol. II, Tab 11, at 00357-358.) Thus, Mr. Sanchez experienced "actual surprise." This weighs in favor of a finding of procedural unconscionability. (*See A&M Produce*, 135 Cal.App.3d at 490; *Bruni*, 160 Cal.App.4th at 1290-91; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88.)

3. The Arbitration Clause Was Hidden In The Form Contract And Not Pointed Out To Mr. Sanchez

Third, Mr. Sanchez was not aware of the existence of the arbitration clause because it is hidden. The contract consists of two long pages of densely-set provisions printed in very fine font. The contract's provisions

are not easy to follow, due both to the density of the text and the "organization" of the terms. The word "arbitration" is only used in the over 2,000+ words on the front of the contract, is difficult to read, in small type, and is surrounded by similarly small, dense text. There is no requirement for the buyer to initial this warning, unlike other warnings and notices on the contract. All the places for signatures and initials are on the front page, while the arbitration clause is hidden on the back of the contract. (*See* AA, Vol. I, Tab 8, at 00274-279 (full copy of RISC).)

Such placement of a term in a dense, prolix form is procedurally unconscionable. (*See A&M Produce*, 135 Cal.App.3d at 490 (finding procedural unconscionability where the provision appeared "in the middle of the back page of a long preprinted form contract which was only casually shown to [the buyer]"); *Samaniego*, 205 Cal.App.4th at 1146 (placing term in a dense, prolix form is procedurally unconscionable); *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 484 (same); *Lhotka v. Geographic Expeditions* (2010) 181 Cal.App.4th 816, 821 (same); *Walnut Producers of Calif. v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 646 (same).) Indeed, other courts to examine the same or similar clause in the same form vehicle sale contract consistently find this placement of this arbitration clause in this contract is procedurally unconscionable. (*See Arguelles-Romero*, 184 Cal.App.4th at 845; *Smith*, 2012 WL834784, at *3; *Trompeter,* 2012 WL 1980894, at *3-4; *Lau,* 2012 WL 370557, at *8-*9,

see also Gutierrez, 114 Cal.App.4th at 87-88 (similar placement in vehicle lease).)

Nor does Appellant do anything to counteract the hidden nature of the clause. In addition to his own testimony, Mr. Sanchez submitted deposition testimony from Appellant affirming 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. (*See* AA, Vol. II, Tab 13 at 00388-389, and 00391 (Deposition of Appellant's Person Most Qualified, at 14:7-14; 14:24-15:5; 15:25-16:4; and 17:17-23).) Appellant could not identify a single instance where a finance manager had actually explained the clause to a customer, perhaps because it also testified that it does ***not*** train its employees to explain the clause. (*See id.*, at 00403-405 and 00407-408 (Dep. at 32:16-33:6; 34:2-8; and 36:21-37:1).) Indeed, it would be hard for Appellant to train its employees to explain the operation of a clause even it does not understand. Appellant itself 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. (*See id.*, at 00396-398, 00401-402 (Dep. at 22:16-23:19; 27:7-13; 27:19-25; 30:10-13; and 31:7-14).)

4. Mr. Sanchez Was Not Given An Opportunity To See The Pre-Printed Form Contract Terms Until After The Deal Negotiations Were Completed

Fourth, Mr. Sanchez was not given an opportunity to negotiate any of the pre-printed terms in the contract, including the arbitration clause. Instead, all of the negotiating for the terms of the sale were completed and the Contract was already filled-in before he was ever presented with the Contract (and its hidden arbitration clause), which he was instructed to just sign in various places (on the side *without* the arbitration clause). (*See* AA, Vol. II, Tab 11, at 00357.) Not having access to the proposed arbitration term during the negotiation process constitutes oppression sufficient for procedural unconscionability. (*See Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 175; *Suh*, 181 Cal.App.4th at 1516; *see also Olvera v. El Pollo Loco* (2009) 173 Cal.App.4th 447, 455 ("Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice").)

5. The Proposed Arbitral Rules Were Not Attached To The Sale Contract

Fifth, it is undisputed Mr. Sanchez was never given copies of the proposed arbitral rules at the time he signed the contract (a key term he was supposedly agreeing to). (*See* AA, Vol. II, Tab 11, at 00358.) This was because Appellant didn't have them. Appellant itself testified it did not have resources, like the arbitral rules, available if a customer did actually

read the clause and request information about the operation of the clause. (*See* AA, Vol. II, Tab 13, at 00399-400 (PMQ Dep. at 28:19-29:4.).) While the contract acknowledges some procedural rights may be lost if a dispute is arbitrated, the buyer cannot determine at the time of signing what rights he or she will lose, and therefore cannot make an informed choice whether to agree to the proposed arbitration clause. Courts repeatedly note this is "significant," and the failure to attach the proposed rules is enough ***on its own*** to warrant a "strong" finding of procedural unconscionability. (*See Samaniego*, 205 Cal.App.4th at 1146; *Ajamian,* 203 Cal.App.4th at 797 (even if clause provides a choice of arbitrators, procedurally unconscionable not to provide rules at time contract entered into); *Zullo,* 197 Cal.App.4th at 485-86; *Trivedi*, 189 Cal.App.4th at 393; *Suh*, 181 Cal.App.4th at 1516; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721.) Because the proposed rules were not attached, it was not possible for Mr. Sanchez to know exactly what rules he was supposedly agreeing to, which in the case of AAA rules, is "no trifling matter." (*See Trivedi*, 189 Cal.App.4th at 393, fn. 4.)

Moreover, providing Mr. Sanchez with the proposed arbitration rules would have drawn attention to the fact the Contract contained an arbitration clause. But if Appellant drew Mr. Sanchez's attention to the clause, it would have risked Mr. Sanchez declining to sign the Contract because he

did not want to give up his right to sue. The only way to make the sale and still include an unfair term is to keep the term under the radar. Thus, while there may be several reasons why Appellant chose not to provide the proposed rules, it all adds up to an unfair situation where a buyer is duped into signing the Contract without information about the rules and terms to which he is supposedly agreeing. This is procedurally unconscionable.

For the reasons set out above, the presence of all of these factors weighs heavily in favor of a finding of procedural unconscionability. Thus, if there is even a modicum of substantive unconscionability here, the provision is unenforceable. (*Armendariz*, 24 Cal.4th at 114.)

E. The Clause Is Substantively Unconscionable

There is indeed a modicum of substantive unconscionability here – and then some (beyond that found by the Court of Appeal). Evaluating substantive unconscionability means considering "whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner." (*Lanigan*, 199 Cal.App.4th at 1036 (internal punctuation omitted).) "Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (*Little*, 29 Cal.4th at 1071; *see Ajamian*, 203 Cal.App.4th at 797 ("Substantive unconscionability arises when a contract imposes unduly harsh, oppressive, or one-sided

terms.").)[7] Contrary to Appellant's argument, "[i]n assessing unconscionability, we focus on the practical effect of a provision, not a facial interpretation." (*Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1079-80; *accord Zullo*, 197 Cal.App.4th at 486.)

In light of the strong showing of procedural unconscionability, if this clause is substantive unconscionable in even one way, that is enough to find the entire clause unconscionable. The very existence of a clause supposedly agreeing to arbitrate disputes was unexpected for Mr. Sanchez. (*See* AA, Vol. II, Tab 11, at 00357-58.) Also, this clause allocates risks and

---

[7] Appellant argues the standard for substantive unconscionability is whether the clause "shocks the conscience." (AOB, at 34.) Notably, this Court has addressed unconscionability multiple times and, from all the cases Respondent was able to locate, has never adopted the "shock the conscience" standard. Rather, as noted in *Little*, there are many ways to show an agreement is one-sided. The "shock the conscience" test is one way appellate courts have listed as a ***possible*** way to show substantive unconscionability. (*See Wherry*, 192 Cal.App.4th at 1248 ("Substantive unconscionability addresses the fairness of the term in dispute. It 'traditionally involves contract terms that are so one-sided as to 'shock the conscience,' ***or*** that impose harsh or oppressive terms.") (emphasis added).) While there are many ways to approach the issue depending on the case and circumstances, at its heart, the concern is still one of equity and fairness. (*See Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249, 1257 ("A claim that a contract is unenforceable on the ground of unconscionability is an equitable matter").) When a drafting party abuses the power which comes with form contracts of adhesion, the law does not bind the unsuspecting party to the onerous terms. (*See Wherry*, 192 Cal.App.4th at 1248-49.)

includes terms which are unexpected and unreasonable, both facially and when the practical effect is examined. These multiple unexpected, unfair, and unbalanced terms in the arbitration provision make it substantively unconscionable for each of eight reasons (rather than just the four relied on by the Court of Appeal).

1. The Threshold For Requesting A New Arbitration Favors Appellant

First, under the arbitration clause in this contract, a party who loses the arbitration may request a new arbitration, with three arbitrators instead of one, if the award exceeds $100,000.[9] (*See* AA, Vol. I, Tab 8, at 00279.) This provision benefits the party with greater bargaining power, here, the car dealer who selected the form contract. The buyer will rarely benefit from the clause because the buyer, not the dealer, is more likely to recover an award of that size; it is the dealer who would seek a new arbitration. The threshold exists to relieve the dealer – who also happens to be the party who imposed the contract of adhesion – of what it deems excessive

[9] Appellant refers to such claims as "outliers," without any admissible evidence in the record to support this label. Appellant tries to sneak in evidence which is NOT in the record. (*See, e.g.*, AOB, at 24 n. 11 and 25 n. 12.) Appellant did not request judicial notice of this new evidence and it should not be considered anyway. (*See People v. Eubanks* (2011) 53 Cal.4th 110, 130 fn. 9 (rejecting request to judicially notice data not considered by the trial court); *Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194 Cal.App.4th 623, 627 (refusing to take judicial notice of website because it was evidence not presented to the trial court.)

liability. This is one-sided, unexpected, and unreasonable. Thus, the clause is unconscionable. (*See Little*, 29 Cal.4th at 1073; *Saika*, 49 Cal.App.4th at 1076-77; *see also Trompeter*, 2012 WL 1980894, at *5-6 (finding same term in same clause substantively unconscionable); *Smith,* 2012 WL834784, at * 3 (same).)

2. The Terms For Requesting A New Arbitration For Injunctive Relief Claims Favor Appellant

Second, the clause permits a new arbitration if the award includes any injunctive relief – but not if there is no award of injunctive relief. (*See* AA, Vol. I, Tab 8, at 00279.) The amount of the monetary award is irrelevant, thereby creating a perverse incentive for consumers not to seek injunctions to stop deceptive practices because then any award, regardless of amount, can be subjected to a second round. This type of provision unduly burdens the buyer, who would be the party primarily seeking and obtaining an injunction. (*See People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 20 (injunctions are a primary tool for enforcing consumer rights).) Injunctions also require at least a prima facie showing of the likelihood of success on the merits, which is an indicator there is a practice requiring judicial intervention. (*See Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 433.) Under this provision, if a preliminary injunction is issued to stop a harmful practice, Appellant gave itself an immediate right to a new arbitration. Arbitration is supposed to streamline

procedures and make the process efficient. But if an injunction is issued against Appellant, then delay, complexity, and higher costs take precedence, and the buyer is subjected to another round of arbitration – by three arbitrators this time – denying the buyer of the benefits of arbitration. This one-sidedness is unconscionable. (*See Trompeter*, 2012 WL 1980894, at *6 (finding same term in same clause substantively unconscionable); *see also Smith,* 2012 WL834784, at * 4 (same).)

3. The Cost Provision For Paying For A New Arbitration Favors Appellant

Third, the clause requires the party requesting a new arbitration to pay, in advance, "the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs." (AA, Vol. I, Tab 8, at 00279.) This provision allows a dealership with deep pockets to request a new arbitration while discouraging or possibly preventing a more cash-strapped consumer from doing so. 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*, 114 Cal.App.4th at 82-83, 89-90.) Similarly, the California Arbitration Act makes it illegal to shift arbitral expenses to a consumer. (*See* Code of Civil Procedure Section 1284.3(a).) If fees are charged up front, reapportionment at the conclusion of the arbitration is inadequate. (*Gutierrez*, 114 Cal.App.4th at 90.) "[That] possibility ...

provides little comfort to consumers ... who cannot afford to initiate the [appeal] process in the first place." (*Ibid.*) The costs of a three-arbitrator arbitration add up quickly. 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 exists to discourage buyers from seeking a new arbitration and is, therefore, unreasonable and substantively unconscionable. (*See id.*, at 91-92; *see also Trompeter*, 2012 WL 1980894, at *6-7 (finding same term in same clause substantively unconscionable); *Smith,* 2012 WL834784, at * 4 (same).)

Appellant claims the clause is tailored for specific disputes, and such specification is permissible. (*See, e.g.*, AOB, at 23-24.) Appellant then asks the Court to overlook the fact the clause ***is*** tailored to include Mr. Sanchez's specific disputes with his purchase – and exempts from arbitration any disputes Appellant was likely to bring. Yet where the clause clearly it is not tailored to the specific disputes is the cost provisions. Appellant argues the average car sale price is $29,000. If that's true, it will never be financially practical for a buyer to risk spending the money on an initial arbitration at $400-600/hour for the arbitrator (plus attorney costs), get $0 from the first arbitration (the situation where a buyer can pay for a re-trial), and then invoke a 3-arbitrator re-trial at $1200-$1800/hour – especially when any given arbitration will likely take at least 4 to 8 hours, if

not more. (*See* AA, Vol. II, Tab 13, at 00380-381.) This cost provision is completely out of sync with the situation to which it is supposedly "tailored," not one a customer would reasonably expect, and not one that is fair. It is only tailored to allow the more financially-capable dealership to invoke the re-trial provision when the situation suits it.

4. The Clause Only Provides For Arbitration Of The Claims Most Likely To Be Brought By Mr. Sanchez – Not The Ones Likely To Be Brought By Appellant

Fourth, while the clause initially purports to apply to "any dispute," it goes on to carve out exceptions for the claims the seller is likely to bring, such as repossession and small court claims. (*See* AA, Vol. I, Tab 8, at 00279.) Buyers do not repossess vehicles. Only sellers and holders repossess vehicles. The only other claim a seller is likely to bring against a buyer is for unpaid vehicle payments, which will usually be a smalls claim court matter. If the unpaid payments exceed that threshold, a seller would generally repossess the car. Thus, the two most common claims made by the seller conveniently happen to be exempted from arbitration in the clause in the seller's contract, and the consumer can't exercise the veto power and force those disputes to arbitration. In contrast, the claims the pre-printed form does make subject to potential arbitration are the ones only a consumer is likely to bring, like regular actions for consumer law violations or fraud.

Courts must look to the practical effect of an arbitration clause when evaluating substantive unconscionability. (*See Zullo*, 197 Cal.App.4th at 486; *Saika*, 49 Cal.App.4th at 1079-80.) Here, the practical effect of the clause is only the consumer's claims are subject to arbitration. (*See Trompeter*, 2012 WL 1980894, at *5 (finding same clause substantively unconscionable because clause exempts dealer's claims from arbitration but gives the dealer the option of forcing the consumer's claims to arbitration); *Smith,* 2012 WL834784, at * 4 (same).) Like in *Zullo*, this effect is further evidenced by the fact the clause talks about the consumer picking the arbitration organization – because the consumer will always be the one forced to arbitration. (*See* AA, Vol. I, Tab 8, at 00279 ("You may choose one of the following arbitration organizations...."); *Zullo*, 197 Cal.App.4th at 486.) In essence, Appellant uses a clause where its claims will almost never be subject to arbitration, yet it can realistically compel all Mr. Sanchez's claims to arbitration whenever it wants to. Where a clause provides for the arbitration of claims most likely to be brought by the weaker party, but exempts the claims most likely to be filed by the stronger party, the clause is unconscionable. (*See Samaniego*, 205 Cal.App.4th at 1147-1148; *Trivedi*, 189 Cal.App.4th at 397; *Fitz*, 118 Cal.App.4th at 724-25.) If the arbitration system established by the seller is indeed fair, then the seller should be willing to submit its claims to arbitration rather than exempting its claims from arbitration. (*See Armendariz*, 24 Cal.4th at 117-

18.) This one-sided term is substantively unconscionable. (*See Samaniego*, 205 Cal.App.4th at 1147-1148; *Zullo*, 197 Cal.App.4th at 486; *Trivedi*, 189 Cal.App.4th at 397; *Fitz*, 118 Cal.App.4th at 724-25.)

5. The Cost Provision For Paying For The Initial Arbitration Favors Appellant

Fifth, like the re-trial cost issues discussed above, the regular cost provisions are unconscionable for the same reasons. The clause makes Mr. Sanchez front all costs above $2,500 (and he may even have to reimburse that $2,500). (*See* AA, Vol. I, Tab 8, at 00279.) However, not much of an arbitration can be had for only $2,500, and the consumer will have to pay out of pocket for any amount above that. This benefits the more financially-capable dealership and can chill buyers from seeking to enforce their legal rights. Moreover, the clause makes it possible the consumer can be held responsible for all of the costs of arbitration at the end of the day. This is illegal. (*See* C.C.P. Section 1284.3(a).) Thus, even the regular cost provision is substantively unconscionable.

6. The Clause Makes Only The Weaker Party – Mr. Sanchez – Give Up Statutory Rights

Sixth, unless the class action waiver term is found invalid "for any reason," the Contract forces Mr. Sanchez to give up his unwaivable statutory rights under the CLRA (to bring a class action). (*See* AA, Vol. I, Tab 8, at 00279.) Requiring the weaker party to give up statutory rights

and protections – either directly or by operation of a contractual term – is a factor weighing in favor of substantively unconscionability. (*See Armendariz,* 24 Cal.4th at 101; *Samaniego*, 205 Cal.App.4th at 1147-1148; *Ajamian*, 203 Cal.App.4th at 798-99; *Trivedi*, 189 Cal.App.4th at 395; *Wherry*, 192 Cal.App.4th at 1249.)

7. The Clause Makes Mr. Sanchez Give Up A Key Right, But Doesn't Make Appellant Give Up Any Equivalent Right

Seventh, not only does the Contract strip Mr. Sanchez of his right to sue or to even be a class member in a different lawsuit if his dispute goes to arbitration, but it does not make Appellant give up any equivalent right. (*See* AA, Vol. I, Tab 8, at 00279 ("If a dispute is arbitrated, ***you*** will give up ***your*** rights to participate as a class representative or class member of any class claim ***you*** may have against us ... ***You*** expressly waive any right ***you*** may have to arbitrate a class action.") (emphasis added).) There is not an equivalent exchange of some other right. There is no *quid pro quo*. Where one side loses something and the other side loses nothing, or one side gains something and the other side gains nothing, that is the very definition of a one-sided term that is unexpected and unfairly allocates risk. Here, Appellant gained something and Mr. Sanchez lost something, making it an extremely one-sided term.

In fact, Appellant not only doesn't lose anything equivalent – it gains something: illegal protection from class action lawsuits. And the term just so happens to be one-sided in favor of the drafting party, and to the detriment of the weaker, adhering party. The benefit to the seller also happens to be illegal under Civil Code § 1667. This drastic one-sidedness is classic substantive unconscionability. (*See Ajamian*, 203 Cal.App.4th at 798-99; *Stirlen*, 51 Cal.App.4th at 1529-30 and 1542.)

If there were any doubt about the intended operation of this one-sided waiver term, Appellant itself put those doubts to rest in the trial court. Appellant only seeks to enforce the "Arbitration Clause" when there is a potential class action filed. At its deposition, Appellant could not identify a single instance where it requested arbitration of an individual dispute. (*See* AA, Vol. II, Tab 13 at 00406, 00409-410 (PMQ Dep. at 35:5-11; 39:15-40:2).) This lawsuit – which is the only class action Appellant could recall being filed against it – is the first lawsuit where Appellant sought to enforce the "Arbitration Clause" and the class action waiver provision in it. (*See id.*, at 00409 (PMQ Dep. at 39:11-14).) Thus, while the clause is entitled "Arbitration Clause," this title is false. The clause does not operate to promote alternative dispute resolution. Rather, it only operates when it is needed as a "Class Action Waiver Clause."

8. The Clause Gives A Misleadingly False "Choice" In Arbitrators

Eighth, Mr. Sanchez purchased his car in August 2008. The form the seller had him sign purports to offer a "choice" of arbitrators, either the NAF, AAA, or any other arbitrator the seller approves. (*See* AA, Vol. I, Tab 8, at 00279.) But the NAF stopped arbitrating consumer matters a year later, in July 2009 after being investigated for being unfair and biased against consumers. (*See Carideo v. Dell, Inc.* (W.D.Wash. 2009) 2009 WL 3485933, *3.) Without NAF as an option, the clause gives Appellant the power to veto any choice Mr. Sanchez makes other than AAA, thus making the choice illusory. If Mr. Sanchez tried to select another arbitrator, as a practical matter, Appellant can veto all such choices, stonewalling a dispute by rejecting every arbitral choice. This is permissible under the clause. This is also one-sided, unfair, unexpected, and, thus, substantively unconscionable.

The existence of even one of these factors, when combined with the strong showing of procedural unconscionability here, is sufficient to find this clause unenforceable.

F. The Court Of Appeal Properly Determined Appellant's Arbitration Clause Was Unconscionable And Not Severable.

As noted by the Court of Appeal, the issues of unconscionability and severability are "typically" resolved by the trial court. (*Sanchez,*

135 Cal.Rptr.3d at 41.) Appellant ignores the word "typically" and incorrectly concludes this is an ironclad rule. Rather, the correct conclusion is issues of unconscionability and 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.

Appellant complains the Court of Appeal "concluded on its own that it was 'undisputed' (based on plaintiff's own say so) that the plaintiff did not read the contract and did not know about the arbitration provision." (AOB, at 56.) Apparently Appellant forgets Mr. Sanchez introduced deposition evidence at the trial court from Appellant's person most qualified establishing the dealership personnel were clueless about the arbitration clause, its meaning, and how it worked. (*See* AA, Vol. II, Tab 13, at 00396-398, 00401-402 (Dep. at 22:16-23:19; 27:7-13; 27:19-25; 30:10-13; and 31:7-14).) Appellant also ignores it did ***not*** introduce any testimony to dispute Mr. Sanchez's description of what happened. The only alleged "conflict" in the evidence Appellant can identify is the pre-printed terms in the contract – terms drafted before any of the events ever occurred – claim Mr. Sanchez read the entire contract, which is inconsistent with the only testimony about what actually happened. As noted above, the clause in the contract stating Mr. Sanchez read it is not sufficient to defeat the

otherwise strong showing of procedural unconscionability in this case. When the evidence is undisputed, as it was here, it is proper for the Court of Appeal to review the contract de novo to determine unconscionability. (*Suh,* 181 Cal.App.4th at 1511-1512 (citations omitted).)

Likewise, it is not possible to cure the problems with Appellant's arbitration clause by severance, making only one outcome possible under the law: a finding the clause is not enforceable. (*Armendariz,* 24 Cal.4th at 126; *Trompeter*, 2012 WL 1980894, at *7 (evaluating same clause and concluding "because two of the unconscionable provisions in the arbitration agreement relate directly to circumstances in which the right of appeal attaches following an arbitration award, they are not collateral to the agreement and extirpating them by means of severance would amount to a reformation of the agreement").) Courts are not allowed to reform agreements, thus, the only option is to void the entire clause. (*See Armendariz,* 24 Cal.4th at 125.) 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. (*Sanchez,* 135 Cal.Rptr.3d at 41 (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 not involving arbitration clauses. (*See, e.g., First American Title Ins. Co. v.*

Superior Court (2007) 146 Cal.App.4th 1564, 1576 (deciding without remanding that potential for abuse of class action procedure outweighed right of plaintiff to take pre-certification discovery to find replacement class representative); *Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 390 (ordering reformation of contract rather than remanding to trial court to do because "reformation is the only reasonable disposition").)

Civil Code Section 1670.5 provides that if a contract or a provision in a contract is unconscionable, "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." In *Armendariz*, this Court held that "if the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." (24 Cal.4th at 124.) Because there were multiple unlawful provisions in that clause, and "there is no single provision a court can strike or in order to remove the unconscionable taint from the agreement," (*id.*, at 124-125), it was proper to strike the entire clause. Courts are not permitted to reform contracts through augmentation to make them legal. (*Id.*, at 125 (citations omitted).)

Appellant relies on *Brown v. Ralphs Grocery Store Co.* to claim the Court of Appeal exceeded its authority. In *Brown*, unlike here, the

arbitration clause had 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 severing 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,* 181 Cal.App.4th at 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 rotten pieces here, 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. (Civil Code Section 3632.)

G. Whether *Concepcion* Preempts *Broughton* And *Cruz* Is Irrelevant.

Appellant contends *Concepcion* preempts this Court's holdings in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303. In those cases, this Court held claims for injunctive relief under the CLRA (*Broughton*) and UCL (*Cruz*) could not be arbitrated. Mr. Sanchez does not dispute that because those decisions barred arbitration of particular types of claims, they may now be pre-empted in federal court by *Concepcion*. But whether those decisions are preempted is irrelevant to the Court of Appeal's conclusion the arbitration clause in Appellant's contract is substantively unconscionable. The Court of Appeal noted that Appellant "does not address how the injunction exception, if still valid, would affect the unconscionability of the arbitration provision." (*Sanchez*, 135 Cal.Rptr.3d at 36 fn. 5.)

As discussed above, one of the reasons the Court of Appeal concluded Appellant's arbitration clause is unconscionable is because it permitted a new arbitration if the arbitrator awarded injunctive relief (regardless of the monetary award), but did not permit a new arbitration if a request for injunctive relief was denied. The plain language of the arbitration clause made injunctive relief available which, under *Volt* and other United States Supreme Court decisions, was a valid and enforceable

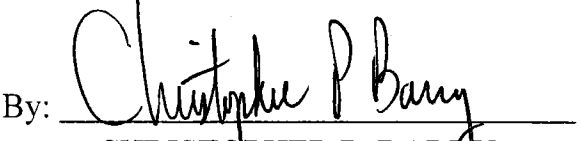
agreement about what disputes would be arbitrated and remedies were available. Because the right to review the awarding of injunctive relief was one-sided, and that one-side would favor Appellant, the Court of Appeal found the clause substantively unconscionable. (135 Cal.Rptr.3d at 40.) That determination has nothing to do with whether the rules in *Broughton* and *Cruz* prohibiting private arbitration of public injunction claims survive *Concepcion*.

IV. Conclusion

Arbitration clauses are like any other contract, subject to the same general contract defenses. The trial court and the Court of Appeal both treated Appellant's arbitration clause like any other contract, and both found it was unenforceable. This Court should not re-write California law to change that result.

DATED: July 18, 2012

Respectfully submitted,
ROSNER, BARRY & BABBITT, LLP

By: 

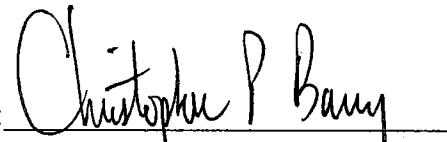
CHRISTOPHER P. BARRY
HALLEN D. ROSNER
ANGELA J. SMITH
Attorneys for Plaintiff and
Respondent GIL SANCHEZ

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, the foregoing **ANSWER BRIEF ON THE MERITS** is produced using 13-point Times New Roman type and contains 13,994 words, including footnotes, and excluding the cover page, Certificate of Interested Parties, signature block, and this Certificate, which is less than the 14,000 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: July 18, 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.
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 **July 19, 2012**, I served the foregoing document(s) described as:

ANSWER BRIEF ON THE MERITS

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 **July 19, 2012,** at San Diego, California.

Amie Olesko

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

Robert W. Thompson, Esq.
Charles S. Russell, Esq.
Callahan, Thompson, Sherman & Caudill, LLP
2601 Main Street, Suite 800
Irvine, CA 92614
Tel: 949-261-2872
Fax: 949-261-6060

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
Tel: 310-859-7811
Fax: 310-276-5261

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
Tel: 916-780-4050
Fax: 916-780-9070

Attorneys for Mercedes Benz USA, LLC

Steve Mikhov, Esq.
Romano Stancroff & Mikhov
640 S. San Vicente, Suite 350
Los Angeles, CA 90048
Tel: 323-936-2274
Fax: 323-939-7973

Attorneys for Plaintiff Gil Sanchez

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

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

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

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

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

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

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

(4 copies)