Case No. **S199119**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GIL SANCHEZ,

Plaintiff and Respondent,

vs.

VALENCIA HOLDING COMPANY, LLC,

Defendant and Appellant.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE, NO. B228027.
LOS ANGELES SUPERIOR COURT, HON. REX HEESEMAN, BC433634.

AMICI CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND APPELLANT

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Prometheus Press * Sacramento, CA

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INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICI

The Civil Justice Association of California (CJAC) and the California Chamber of Commerce (Cal Chamber) ("amici curiae") welcome the opportunity to address the issue this case presents:[1]

> **Whether the Federal Arbitration Act, as limned by *AT&T Mobility, LLC v. Concepcion* (2011) 131 S. Ct. 1740, bars use of state unconscionability law to invalidate an arbitration agreement in a retail automobile sales contract because it (1) permits an internal arbitral appeal process to a three-person panel for extreme outlier results ($0, >$100,000, injunctive relief), (2) requires the losing party to advance costs for an internal arbitral appeal, and (3) excludes from arbitration self-help relief.**

The importance of this issue to the future viability of arbitration agreements cannot be gainsaid. "[I]n an era in which dissatisfaction with the expense and

[1] By separate application accompanying the lodging of this brief, CJAC and the Cal Chamber ask the Court to accept and file it.

inefficiency of formal litigation has stimulated the search for alternative methods of dispute resolution, arbitration enjoys increasing popularity as a substitute for trial." Comment, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions* (1987) 72 *IOWA L. REV.* 473. The advantages of private arbitration over court litigation, whether in the commercial, personal injury[2] or international context, are well known: it "speed[s] the resolution and lower[s] the expenses of disputes,. . . [provides] the ability to select factfinders with experience and competence in the particular . . . area or the legal issues . . ., reduc[es] . . . uncertainties and complexities that accompany . . . litigation, and . . . provi[des] . . . a more neutral, convenient and certain forum of dispute resolution." Craig M. Gertz, *The Selection Of Choice Of Law Provisions In International Commercial Arbitration: A Case For Contractual Depecage* (1991) 12 *J. INTL. L. BUS.* 163.

These precise benefits—fairness, efficiency, economy and certainty—are among the principal goals that animate our mutual efforts to educate the public about ways to improve our civil injury reparations system. Toward these ends we have regularly petitioned the government—i.e., the legislature, the judiciary and the people themselves—for redress in determining who gets paid, how much, and from whom, when injured by acts that allegedly occasion harm to others.

Amici view the arguments advanced by plaintiff and the order and opinion of the courts below as sanctioning a way "out of" or "end-run around" private, binding

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[2] This court observed long ago "the growing interest in and use of arbitration to cope with the increasing volume of medical malpractice claims, " and noted that "Code of Civil Procedure section 1295[, enacted in 1975,] . . . evidences legislative acknowledgment of arbitration as a means of resolving malpractice disputes." *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal. 3d 699, 708, fn. 9.

arbitration agreements (*i.e.*, abuse of the doctrine of contract unconscionability) that, if upheld, will effectively destroy them and condemn our courts to further congestion and the people of this state to the ills attendant thereto. We are not alone in our concern. "Courts applying California law are most likely discriminating against arbitration agreements in a manner that is preempted by the interpretation of the FAA advanced by the Supreme Court." Paul Thomas, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements* (2011) 62 *HASTINGS L.J.* 1065, 1084.

There is more than anecdotal evidence underlying our worries about the misuse of state unconsionability law to discriminate unfavorably against arbitration agreements in comparison to other contracts. A recent scholarly article, for instance, reports that a computerized database search found

> 114 cases in which the California Courts of Appeal examined an arbitration agreement for unconscionability, fifty-three of the agreements were held unconscionable and thus unenforceable; in thirteen, a provision of the agreement was found unconscionable and severed, and in forty-eight, the agreement was upheld by its terms. [Citation.] In comparison, in . . . forty-six cases before the same court[s] where a non-arbitration contract was alleged to be unconscionable, forty-one of the contracts were upheld and only five were held to be unenforceable due to unconscionability.[3]

This case presents a unique opportunity for the Court to end unfair judicial hostility to private, binding arbitration by clarifying the legal principles that determine

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[3] Thomas H. Riske, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts' Disdain for Arbitration Agreements*, 2008 *J. DISP. RESOL.* 591, 602, fn. 99.

the validity of an arbitration agreement when the preemptive sweep of the FAA intersects with California law on unconscionable contracts. That guidance is essential for courts and counsel to understand if binding and final arbitration agreements are "to be or not to be" a viable alternative to litigation in California.

SUMMARY OF ARGUMENT

The FAA preempts use of state law on unconscionable contracts to stand as an obstacle to the accomplishment and execution of private, binding arbitration agreements even if it may be desirable to do so for public policy reasons. This is the unmistakable holding of *AT&T Mobility, LLC v. Concepcion* (2011) 131 S. Ct. 1740. Merely requiring "procedures incompatible with arbitration" violates the FAA; and any procedure that interferes with a "streamlined" arbitration proceeding is prohibited.

The arbitration agreement at issue in this case, incorporated into a retail automobile sales contract widely used by car dealers, clearly comports with federal law; and, to the extent its provisions conflict with state law defining unconscionable contracts, state law must yield to the broad preemptive sweep of the FAA. However, the specific provisions of this arbitration agreement are neither procedurally nor substantively unconscionable. They meet the *Concepcion* standard for providing a "streamlined procedure tailored to the type of dispute." All the challenged arbitration provisions satisfy the "modicum of bilaterality" required by California law on unconscionable contracts. No remedies under the arbitration agreement are afforded to one party and denied the other.

Exclusion of self-help remedies and small claims court prosecutions from arbitration are justified under *Concepcion* for the same reason class action waivers in adhesion contracts are allowed to be excluded: to assure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Affording parties to the arbitration agreement an internal arbitral appeal for outlier awards and injunctive relief is a fair and balanced process under *Concepcion* and state law governing unconscionable contracts. The arbitration agreement is valid and enforceable.

ANALYSIS

I. THE FAA PREEMPTS CALIFORNIA LAW ON UNCONSCIONABLE CONTRACTS FROM BEING USED THE WAY IT WAS HERE TO INVALIDATE THE ARBITRATION AGREEMENT.

AT&T Mobility, LLC v. Concepcion (2011) 131 S. Ct. 1740 (*Concepcion*) is the most recent wrinkle on the scope and application of federal preemption under the Federal Arbitration Act (FAA, 9 U.S.C. § 1 *et. seq.*) and the essential starting point for understanding why the arbitration agreement at issue here is valid and enforceable.

Concepcion holds that the FAA preempts this Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. *Discover Bank* held that class arbitration waivers in arbitration agreements were unconscionable and therefore unenforceable because they effectively exempted the stronger party "from responsibility for its own fraud, or willful injury to the person or property of another." 131 S. Ct. at 1746. The plaintiffs in *Concepcion* argued, as does plaintiff herein, that the "savings clause" found at § 2 of

the FAA allowed for revocation of their arbitration agreements, especially since unconscionability is grounds for revocation, whether at law or in equity.

Concepcion did not dispute that the law, as held by *Discover Bank*, would invalidate the class action waiver as unconscionable based on the three-part test used in *Discover Bank*:

> (1) the waiver is found in a consumer contract of adhesion drafted by a party that has superior bargaining power; (2) disputes between the contracting parties predictably involve small amounts of damages; and (3) it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.[4]

However, *Concepcion* explains that the triggering conditions of the *Discover Bank* rule impose "no effective limit on its application" and thus "set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases, upon the mere *ex post* demand by any consumer." 131 S. Ct. at 1750. *Concepcion* concluded that such a "state-imposed policy preference 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.' " *Id.* at 1748. The inconsistency arises from use of state unconscionability law to "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . .," and is thus preempted by the FAA even if it may be "desirable for [other] reasons[.]" *Id.* at 1750, 1753.

While recognizing that its ruling could deprive many persons of the only practical means of recovering small amounts from large defendants, *Concepcion*

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[4] *Discover Bank*, *supra*, 36 Cal.4th at 162-163.

nonetheless concludes that even an adhesive contract providing for a waiver of class claims is enforceable. *Discover Bank* cannot stand because it effectively required a specific form of procedure (class arbitration) for a certain class of arbitration agreements (*i.e.*, those involving consumers) in violation of federal preemption.

A. Opinions Decided After *Concepcion* Confirm its Broad Preemptive Sweep over State Law Unconscionability Attacks on Arbitration Agreements.

Plaintiff's brief is replete with cited authorities to opinions that, contrary to *Concepcion*, hold state law on unconscionabiliy of contracts invalidates arbitration agreements. The problem is that most of these citations are to opinions that predate *Concepcion*. What is more instructive for the Court's guidance in this case are opinions decided after *Concepcion* that apply its holding and reasoning to arbitration agreements challenged on state law unconscionability grounds.

In *Marmet Health Care Center, Inc. v. Brown* (2012) 565 U.S. __, 132 S.Ct. 1201 (per curiam), for instance, the Court held that, under the FAA, an arbitration agreement between a nursing home and a patient's family member was enforceable in a suit against the nursing home for personal injury or wrongful death despite the state court's conclusion that arbitration of such claims was against that state's public policy. *Id.* at 1203–04. Because the public policy of West Virginia prohibited "outright the arbitration of a particular type of claim" – personal injury and wrongful death claims – that policy was "displaced by the FAA." *Id.* at 1203; quoting *Concepcion,* 131 S.Ct. at 1747.[5]

[5] See also *Sonic-Calabasas A, Inc. v. Moreno* (2011) 132 S.Ct. 496 and *CompuCredit Corp. v. Greenwood* (2012) 132 S. Ct. 665. In *Sonic*, the high court granted review, vacated this court's (continued...)

Kilgore v. KeyBank, N.A. (9th Cir. 2012) 673 F.3d 947[6] holds that the FAA preempts California's *Broughton-Cruz* rule[7] prohibiting arbitration of claims for public injunctive relief. *Kilgore* arose out of loans secured by two students of a helicopter vocational school. They sued to enjoin a lender from engaging in false and deceptive practices in violation of California's Unfair Competition Law (UCL). The notes they signed provided for binding arbitration and stated there shall be "no authority for any claims to be arbitrated on a class action basis." The students petitioned a district court to compel arbitration; and the court denied their motion on the ground that *Broughton-Cruz* prohibited arbitration of injunctive relief claims under the UCL.

The Ninth Circuit reversed and ordered the claims to arbitration. The court concluded that, under *Concepcion*, state laws "cannot require a procedure that is

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[5](...continued)
decision and remanded for reconsideration the question of whether state public policy *can* require state administrative adjudicatory procedures inconsistent with the FAA even if those procedures may be otherwise desirable under state public policy. *CompuCredit* recognizes and reaffirms the supremacy of the FAA and that Congress knows how to legislate with respect to arbitration when it wants to do so. The opinion cites the "liberal federal policy" favoring court enforcement of arbitration agreements, "even when the claims at issue are federal statutory claims," unless the FAA's mandate for enforcement "*has been overridden by a contrary congressional command.*" Emphasis added. Noting the "clarity" with which Congress has restricted the use of arbitration in some statutory contexts, *CompuCredit* holds that a legislative provision that merely references or contemplates judicial enforcement does not suffice to establish a "congressional command" to override the FAA.

[6] Although not binding, California appellate courts frequently find persuasive the Ninth Circuit's interpretation of the U. S. Supreme Court cases they are bound to follow. See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 ["although not binding, we give great weight to federal appellate court decisions"]; *Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1454 [following "the well-reasoned and on-point decisions of the Ninth Circuit"].

[7] *Broughton v. Cigna Health Plans of Cal.* (1999) 21 Cal.4th 1066; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303.

inconsistent with the FAA, even if it is desirable for unrelated reasons," and even though such a result may admittedly "reduce the effectiveness of state laws like the [California] Unfair Competition Law." 673 F.3d at 960.

Kilgore further acknowledged that state legislatures may well "find their purposes frustrated" by the Supreme Court's ruling, but it said that this "cannot justify departing from the preemption analysis as set forth . . . in *Concepcion*." *Id.* at 960-961. The appeals court, therefore, concluded that a claim to enjoin false advertising under the UCL was arbitrable, even though the plaintiffs were attempting to act as "private attorneys general" representing the public interest.

Coneff v. AT&T Corp. (9th Cir. 2012) 673 F.3d 1155 involves a challenge to a district court ruling holding a class action waiver in a consumer arbitration agreement to be substantively unconscionable under Washington law. The claimant argued that the district court's ruling was correct, relying on the Second Circuit's most recent decision in *In re American Express Merchants Litigation* (2d Cir. 2012) 667 F.3d. 204 (*AMEX*). The claimant also argued that *Concepcion* was distinguishable. But the Ninth Circuit disagreed, finding instead that it was bound by the "broadly written" ruling in *Concepcion*. The court distinguished *AMEX* in a footnote on the ground it involved "not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so." 673 F.3d at 1159. While acknowledging that concern is "a primary policy rationale for class actions," *Coneff* stated that according to *Concepcion*, "such unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Id.*

Coneff relied on *Concepcion's* acknowledgement that "individualized proceedings are an inherent and necessary element of arbitration." See also *Quilloin v. Tenet Healthsys* (3rd Cir. 2012) 673 F.3d 221, 233 (Pa. law prohibiting class action waivers "surely preempted by C*oncepcion*"). The Ninth Circuit agreed with the Eleventh Circuit's conclusion that evidence of small value claims going unprosecuted as a result of a class action waiver "goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*." *Coneff*, *supra*, 673 F.3d at 1160. Thus, it expressly rejected the notion that an implied exception must be read into the *Concepcion* rule to permit state laws to "invalidate class-action waivers when such waivers preclude the effective vindication of statutory rights." *Id.* at 1158.

Coneff is noteworthy because it makes clear that *Concepcion* not only overruled the *Discover Bank* rule, it also overruled decisions based on *Discover Bank*. This logically includes the decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, which invalidated arbitration agreements with class waivers when class actions were deemed necessary to vindicate unwaivable statutory rights. For claimed violations of statutory rights, "if [a court] concludes . . . that a class arbitration is likely to be a significantly more effective practical means of vindicating the [statutory] rights . . . than individual litigation or arbitration . . . it must invalidate the class arbitration waiver . . .." This court granted review in *Gentry* for the express purpose of "clarify[ing] its holding in *Discover Bank*," and then relied on the *Discover Bank* "rule" in formulating the test for determining whether a waiver of class claims in an employment arbitration agreement could be enforced. Since *Discover Bank* has been overridden and reversed *sub silentio* by *Concepcion*, decisions like *Gentry* that rely upon it are, *a fortiori*, of dubious authority.

These and other related authorities make clear that the reasons given by the appellate opinion and advanced by plaintiff for invalidating the arbitration agreement do not wash. To begin with, the arbitration agreement meets the *Concepcion* yardstick of providing a "streamlined procedure tailored to the type of dispute." *Concepcion*, *supra*, 131 S.Ct. at 1749. The specific type of dispute concerns issues arising over and out of a retail automobile sales contract. That the agreement is "tailored" to such disputes is evident on its face. It provides an internal arbitral appeal process for "outlier" awards from which either party would likely want an appeal: an award of nothing from which the buyer can and may well want to appeal, or an award in excess of $100,000 from which the seller can and may well want to appeal. This is consistent with *Concepcion's* observation that parties can recognize and adjust for the realization that binding arbitration without appeal may not be particularly well-suited for high [or low] stakes determinations." *Id.* at 1752. Similarly, an appeal from an order of injunction, which could be directed to the buyer with respect to returning the car or the seller with respect to halting a business practice, is afforded both parties.

Moreover, the agreement is consistent with *Concepcion's* recognition that certain types of claims can be excluded from arbitration. In *Concepcion*, class action claims were excluded; here, small claims court and self-help remedies (i.e., repossession) along with class actions are excluded. In addition, there is a "balancing" of cost allocation in the arbitration agreement: the seller advances the fees for the initial arbitration up to $2,500, and the party wishing to avail itself of the internal arbitral appeal advances the costs thereafter. Since most arbitration awards involving

individual claims are likely to fall within these two extremes, the outlier appeals process is even-handed as to buyers and sellers.

Finally, it simply will not suffice, as the appellate opinion failed to recognize when it stated that the "costs" of the arbitral appeal may be too high for a buyer to bear, to void the agreement. As *Green Tree Financial Corp.- Alabama v. Randolph* (200) 531 U.S. 79, 91 underscored, "The 'risk' that [the party] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." Should plaintiff show that he in fact cannot afford the fees for the arbitral appeal, arbitrators have broad remedial powers to fashion a fair remedy in accordance with what the circumstances warrant. "[A]rbitrators . . . enjoy the authority to fashion relief they consider just and fair . . . so long as the remedy may be rationally derived from the contract. . . .." *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 383.

B. The Specific Provisions of the Challenged Arbitration Agreement are not Unconscionable.

Applying the aforementioned authorities and other well-reasoned opinions to the provisions at issue in the arbitration agreement makes clear that if it is not protected from state law assault by the ambit of FAA preemption, neither is it unconscionable. Under California law, for a contract to be unconscionable it must be so *both* procedurally and substantively. *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 853 (finding unconscionable an arbitration agreement in a mortgage loan contract that excluded any lender remedy while requiring the borrower to arbitrate all of his or her claims). Although both procedural and substantive unconscionability must be present, they need not be present in the same degree;

instead, "[c]ourts apply a sliding scale: the more substantively oppressive the contractual term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Davis v. O'Melveny & Myers* (9th Cir.2007) 485 F.3d 1066, 1072; citation omitted.

Procedural unconscionability focuses on "oppression" or "surprise." "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Flores,* 93 Cal.App.4th at 853. Substantive unconscionability focuses on "the effects of the contractual terms and whether they are overly harsh or one-sided." *Id.* at 853. California courts have also found substantive unconscionability where an arbitration clause limits the types of remedies that would be available under the statute, thus violating the "principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees." *Armendariz v. Found. Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 103 (*Armendariz*).

The arbitration agreement in this case is neither procedurally nor substantively unconscionable.

1. *The Arbitration Agreement is not Procedurally Unconscionable.*

Plaintiff and the Court of Appeal assert the arbitration agreement is procedurally unconscionable because it is a contract of adhesion and plaintiff neither read nor understood when he signed the sales contract that he was consenting to

arbitrate disputes in accordance with the terms of the arbitration agreement contained therein. These two assertions arguably are intended to satisfy the "oppression" and "surprise" elements of procedural unconscionability. Neither suffices.

In the first place, it strains credulity that plaintiff was "surprised" he had signed an arbitration agreement because the salesman did not tell him that or direct his attention to the part of the contract where he agrees to arbitrate. Petitioner points out that "the arbitration provision was specifically referenced in all caps on the documents front, immediately above the signature lines for the borrower and co-borrower." Reply Brief on the Merits, p. 4. Moreover, the sales contract states in bold, capital letters immediately above the signature line that "You agree to the terms of this contract, we gave it to you, and you were free to take it and review it. You acknowledge that you have read both sides of this contract, including the arbitration clause on the reverse side, before signing below. You confirm that you received a completely filled-in copy when you signed it." Obviously, plaintiff got "buyer's remorse" after signing the agreement and seeks to evade his agreement to arbitrate by claiming ignorance of what his signature belies.

Generally, it is *not reasonable* to fail to read a contract; this is true even if the plaintiff relied, as he claims here, on the defendant's assertion that it was not necessary for him to read the contract. *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 423-424. Reasonable diligence requires a party to read a contract before signing it. *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1674. Only if there is a fiduciary relationship between the parties (or the signing party claims his signature was forged) – neither of which is the case here – may a court indulge the

plaintiff's claim that he is not bound by the contract bearing his signature. *Stafford v. Shultz* (1954) 42 Cal.2d 767, 777.

Next, plaintiff's argument that the sales contract containing the arbitration provision is "oppressive" because it is an adhesion contract is refuted by *Concepcion*. The contract at issue in *Concepcion* was, as this court expressly found in *Discover Bank*, one of *adhesion*; but that did not affect *Concepcion's* analysis and, indeed, the majority opinion appears to be little troubled by that fact. Accordingly, this court should discount the weight to be attributed to the adhesive nature of the arbitration agreement at issue here. The presence of adhesion alone will not make a clause unconscionable because if "these sorts of take-it-or-leave-it agreements between businesses and consumers . . . were all deemed to be unconscionable and unenforceable contracts of adhesion, . . . much of commerce would screech to a halt." *Cicle v. Chase Bank USA* (8th Cir. 2009) 583 F.3d 549, 555.

While adhesion can be a factor when arguing unconscionability, the mere lack of a meaningful choice and negotiation between the parties "does not even get close to the establishment of unconscionability . . . [because a] harsh result alone is an insufficient ground for a finding of unconscionability." 7 *CORBIN CONTRACTS* § 29.4 (2011). "To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.' Thus, a contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules – legislative or judicial – operate to render it otherwise."

Roman v. Superior Court (2009)172 Cal.App.4th 1462, 1470, n. 2; internal citations and footnotes omitted.

2. *The Arbitration Agreement is not Substantively Unconscionable.*

Provisions of the arbitration agreement are *bilateral* in the sense required by *Armendariz*, *supra*, 24 Cal.4th 83. Whether an arbitration agreement is sufficiently bilateral is determined by an examination of the actual effects of the challenged provisions. *Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796, 1803. Here there are no remedies expressly made available or prohibited to one party but not the other. They have the same remedies under the arbitration agreement.

The appellate opinion assumed that only a buyer would pursue injunctive relief, making the clause pertaining to a second tier arbitral appeal if injunctive relief is accorded either side appear insufficiently bilateral. But when dealers seek return of a car through restraining orders and writs of possession against buyers under state claim and delivery laws, the buyer may also invoke the injunctive appeal clause. See Code of Civ. Proc. §§ 511.010-516.050.

Further, in conferring arbitral appeal rights for buyers who obtain no monetary relief and dealers stuck with an award exceeding $100,000, the arbitration agreement comports with the spirit of *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*). There the court found unconscionable an arbitration clause in an employment contract that allowed an appeal of an award in excess of $50,000. That appeal procedure was of benefit only to the employer, however, who would have little or no occasion to seek significant damages against an employee. Car dealers, though, in

contrast to employers, are often owed significant amounts by buyers, and in drafting the arbitration agreement at issue here their counsel took note of *Little's* suggestion that its analysis would differ if an appeal were allowed (by the employee or buyer) should no damages be awarded them. 29 Cal.4th at 1073.

Nor is the exclusion from arbitration of self-help remedies and small claims court prosecutions in any way a violation of the "modicum of bilaterality" required of arbitration agreements by *Armendariz, supra*, 24 Cal.4th at 117. *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 expressly and correctly holds that excluding self-help remedies and small claims court actions from arbitration is "clearly bilateral, and not unconscionable." *Id.* at 845, fn. 21.

Finally, there is nothing substantively unconscionable or bilaterally lacking about the arbitration agreement's requirement that the losing party in the first tier arbitration advance the costs of the arbitral appeal. If it's facially unfair to any party it would be the seller, who already has to advance the costs (up to $2,500) for the initial arbitration should the buyer choose to prosecute a claim against the seller under the contract. Should the buyer decide to appeal, however, it is completely unclear, and purely a matter of speculation from the face of the arbitration agreement, that he could not afford to do so, thereby rendering the provision unconscionable. As amici pointed out previously, this "speculation" is an insufficient basis for voiding an arbitration agreement. *Green Tree Financial*, *supra*, 531 U.S. at 91 and discussion *ante* at p. 11-12. The appellate opinion's citation to *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77 as contrary authority is misplaced since there, as opposed to here, the plaintiff presented evidence that he could not pay the fees. *Id.* at 90-91, fn. 13. It is

simply wrong for a court, as a matter of law, to do what the appellate opinion herein did and conclude that a party cannot afford to bear the costs of an arbitral appeal absent any evidence.

CONCLUSION

"*Concepcion* was the culmination of a long struggle by . . . defendants to get the Court to review a lower court's unconscionability ruling that . . . discriminated against arbitration." David Horton, *Unconscionability Wars* (2012) 106 *NW. U. L. REV.* 387, 394. Likewise, this case is the "culmination of a long struggle" to get this court to clarify that state law on unconscionable contracts should not be interpreted to discriminate against arbitration.

For this reason and all the reasons aforementioned, the judgment of the Court of Appeal should be reversed.

Dated: October 1, 2012

Respectfully submitted,

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Date: October 1, 2012

Fred J. Hiestand

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I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2001 P Street, Suite 110, Sacramento, CA 95811.

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

Executed this 1st day of October 2012 at Sacramento, California.

David Cooper