No. S199119

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

VALENCIA HOLDING COMPANY, LLC'S CONSOLIDATED ANSWER TO AMICI BRIEFS

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

CALLAHAN THOMPSON SHERMAN & CAUDILL LLP
Robert W. Thompson (Bar No. 106411)
Charles S. Russell (Bar No. 233912)
2601 Main Street, Suite 800
Irvine, California 92614
Telephone: (949) 261-2872
Facsimile: (949) 261-6060
Email: rthompson@ctsclaw.com
Email: crussell@ctsclaw.com

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson (Bar No. 109374)
Edward L. Xanders (Bar No. 145779)
Meehan R. Rasch (Bar No. 261578)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
Email: rolson@gmsr.com
Email: exanders@gmsr.com
Email: mrasch@gmsr.com

Attorneys for Appellant
VALENCIA HOLDING COMPANY, LLC
d.b.a. Mercedes-Benz of Valencia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

TABLE OF AUTHORITIES
(Continued)

INTRODUCTION

The overwhelming view of the various amici support petitioner Valencia Holding's position.[1] Only three amicus briefs support respondent and plaintiff Sanchez.[2]

Unlike Sanchez's Answer Brief, those minority three briefs at least try to come to terms with the impact of *AT&T Mobility v. Concepcion* (2011) 563 U.S. ____ [131 S.Ct. 1740] (*Concepcion*). They each attempt to formulate some general rule from *Concepcion*. But their formulations are incomplete and insufficient. Ultimately, they present nothing but parades of horribles unconnected to the facts in this case and which can be fairly accounted for under Valencia Holding's reading of the limits *Concepcion* imposes.

Interestingly, the three amici criticize petitioner for finding the essence of *Concepcion*'s rule from the language and holding of that opinion itself, rather than from secondary sources. Yet, their own theories as to

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[1] The nine supportive amicus briefs often focus on particular arguments. For example, the brief of the American Financial Services Assn., California Financial Services Assn. and the California Bankers Assn. focuses on the reasonableness of preserving self-help remedies; the brief of the California New Car Dealers Assn. emphasizes the reasonableness of three-arbitrator re-arbitration for outlier cases; the brief of Toyota Motor Credit Corp. and General Motors Financial Co. focuses on how California's historical strict scrutiny of arbitration clauses runs afoul of the Federal Arbitration Act (FAA) and *AT&T Mobility v. Concepcion* (2011) 563 U.S. ____ [131 S.Ct. 1740]; and the brief of the Assn. of Southern California Defense Counsel focuses on the need for an objective and predictable unconscionability standard.

[2] They are the briefs filed by Consumer Attorneys of California (Consumer Attorneys), by Consumers for Auto Reliability and Safety (CARS), and by Arthur Lovett.

Concepcion's meaning appear to be made up out of whole cloth—conflicting with *Concepcion*, FAA preemption and this Court's prior holdings in the process:

- Lovett claims that *Concepcion* only bars interference with undefined "fundamental" arbitration attributes and permits invalidating arbitration provisions based on nothing more than perceived tactical advantage to one side. But this Court has rejected mere one-sideness as the proper test for unconscionability. Any contrary special rule for arbitration provisions would be an FAA pre-empted, anti-arbitration standard.

- The Consumer Attorneys claim that *Concepcion* only prohibits interference with arbitral efficiency (and then only interference through four specific mechanisms). But *Concepcion* itself states that honoring the parties' chosen process is equally important and must prevail even if the chosen process might conflict with judicial views of efficiency.

- CARS complains mainly that arbitration cannot fairly determine consumer claims and should be subject to special clause-by-clause unfairness scrutiny. But *Concepcion* clearly applies to consumer arbitrations (it was one) and bars any special anti-arbitration, strict-scrutiny standard.

In addition, none of the three amici addresses the reasonableness of the terms in *this* arbitration provision.[3] If, as petitioner Valencia Holding

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[3] By comparison, the amicus brief of the Nissan Motor Acceptance Corporation explains the reasonable balance struck by the arbitration provision here; the brief of the American Financial Services Assn., the California Financial Services Association and the California Bankers Assn.

(continued...)

has demonstrated, the arbitration provision here withstands scrutiny under a California unconscionability analysis that does not discriminate against arbitration (OB at 28-54; Reply Br. at 14-32),[4] then the three amici's briefs are irrelevant. If, on the other hand, the limits of California's unconscionability doctrine need to be measured against the constraints *Concepcion* imposes, then the three amici's briefs are not helpful.

In either event, the Court of Appeal's judgment should be reversed with directions that the arbitration provision here is to be honored and arbitration compelled.

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[3] (...continued)
explains the reasonableness of preserving self-help remedies; and the brief of the California New Car Dealers Assn. explains the reasonableness of three-arbitrator re-arbitration for outlier cases.

[4] We refer to the various briefs as follows: Petitioner's Opening Brief on the Merits: OB; Petitioner's Reply Brief on the Merits: Reply Br.; Amicus Curiae Brief of Arthur Lovett: Lovett AC; Amicus Curiae Brief of Consumer Attorneys of California: Consumer Attorneys AC; Amicus Curiae Brief of Consumers for Auto Reliability and Safety: CARS AC.

ARGUMENT

I. Numerous Post-*Concepcion* Decisions Recognize That *Concepcion* Has Imposed Substantial Constraints On Applying Unconscionability Analysis To Arbitration Provisions.

All three of plaintiff's supporting amici assert that *Concepcion* has left business as usual for California courts to use unconscionability to defeat arbitration provisions and that there is no authority otherwise. That is just wrong.

- *Sonic-Calabasas A, Inc. v. Moreno* (2011) ___ U.S. ___, 132 S.Ct. 496, vacated this Court's decision in *Sonic–Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, a case in which there is no issue as to class action waiver, and remanded *for reconsideration in light of Concepcion*. None of the three amici even acknowledges the *Sonic-Calabasas* remand.
- *Given v. V, M & T Bank Corp. (In re Checking Account Overdraft Litig.)* (11th Cir. 2012) 674 F.3d 1252, 1257, remanded for the district court "to reconsider its unconscionability determination in light of *Concepcion*." The unconscionability determination remanded was based on considerations *other than* arbitral class-action waiver. The Eleventh Circuit Court of Appeals thereafter affirmed an unconscionability finding. (*Barras v. Branch Banking & Trust Co. (In re Checking Account Overdraft Litig. MDL No. 2036)* (11th Cir. 2012) 685 F.3d 1269.) But it did so only after discussing

the constraints that *Concepcion* places on the unconscionability doctrine and after specifically distinguishing South Carolina law from how California courts have historically applied the unconscionability doctrine as an obstacle to enforcement of arbitration provisions. (*Id.* at pp. 1277-1279.)

- *Mance v. Mercedes-Benz USA* (N.D.Cal., Sep. 28, 2012, No. CV 11-03717 LB) 2012 WL 4497369, enforced an auto sales arbitration provision comparable to the one at issue here, noting that *Concepcion* does not eliminate unconscionability challenges to enforcement but necessarily informs and limits such a basis to challenge arbitration.
- *Morse v. Servicemaster Global Holdings Inc.* (N.D.Cal., Oct. 4, 2012, No. C 10-00628 SI) 2012 WL 4755035, upheld an arbitration provision in outside sales professionals' employment agreements from an unconscionability challenge based on lack of mutuality. It did so, in part, based on *Concepcion*'s directive that federal law requires review of "arbitration agreement[s] in light of the 'liberal federal policy favoring arbitration.'" (*Id.* at pp. *3; see also *Kairy v. Supershuttle Intern., Inc.* (N.D.Cal., Sept. 20, 2012, No. C 08-02993 JSW) 2012 WL 4343220 [enforcing employment arbitration provision post-*Concepcion* despite unconscionability challenge to cost-splitting and statutory remedies limitation].)
- *Beard v. Santander Consumer USA, Inc.* (E.D.Cal., Apr. 13, 2012, No. 1:11-cv-11-1815 LJO-BAM) 2012 WL 1292576, enforced an

arbitration provision in an auto sales contract against an unconscionability challenge to the preservation of self-help remedies comparable to the challenge made by Sanchez here. In doing so, it recognized that *Concepcion* restrains some of the broader readings of this Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*). (*Beard v. Santander Consumer USA, Inc.*, *supra*, at pp. *27–28, 2012 WL 1292576 at p. *9 ["The general *Armendariz* rule has been criticized following the Supreme Court's ruling in *Concepcion*"]; see also *Ruhe v. Masimo Corp.* (C.D.Cal., Sept. 16, 2011, No SACV 11-00734-CJC (JCGx)) 2011 WL 4442790, *2 [broad interpretation of *Armendariz* would violate *Concepcion*].)

- *James v. Conceptus, Inc.* (S.D.Tex., 2012) 851 F.Supp.2d 1020, 1032-1036, held that *Concepcion* limits this Court's decision in *Armendariz, supra*, 24 Cal.4th 83. It applied California unconscionability doctrine "post-*Concepcion*" to find enforceable a forum-selection clause in an arbitration provision, rejecting more restrictive pre-*Concepcion* case law.
- *Fensterstock v. Education Finance Partners* (S.D.N.Y., Aug. 30, 2012, No. 08 Civ. 3622 (TPG)) 2012 WL 3930647, on remand from the United States Supreme Court, held that after *Concepcion* a class action waiver provision and the choice (as here) between NAF (which no longer conducts consumer arbitrations) and AAA as arbitration neutrals could not be deemed unconscionable.

- *Grabowski v. Robinson* (S.D.Cal. 2011) 817 F.Supp.2d 1159, 1171, fn. 1, held that *Armendariz* and other "pre-*Concepcion* cases applying California unconscionability law must be read in light of *Concepcion.*"

The amici cite a number of cases (typically either federal district court cases or the occasional California Court of Appeal decision that will be governed by the decision here) in which courts have used the unconscionability doctrine, post-*Concepcion*, to defeat arbitration provisions. But the point is that there is no clear direction amongst the lower courts. (See *Antonelli v. Finish Line, Inc.* (N.D. Cal., June 27, 2012, No. 5:11-cv-03847 EJD) 2012 WL 2499930 [noting disparity in views amongst federal district courts and staying action pending Ninth Circuit review of order declining to enforce arbitration provision].)[5]

In any event, Valencia Holding has never argued that *Concepcion eliminated* unconscionability as a ground not to enforce an arbitration provision. Its only argument has been that *Concepcion* constrains and limits the unconscionability doctrine. The free-wheeling pre-*Concepcion* use of unconscionability to defeat arbitration provisions is no longer valid. No longer may courts substitute judicial after-the-fact notions of fairness for the parties' pre-dispute agreement to arbitration provisions tailored to

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[5] In this regard, citation by both sides to recent federal district court cases is not particularly helpful. Many of those decisions remain subject to appellate proceedings. (E.g., *Trompeter v. Ally Financial, Inc.*, 9th Cir. No. 12-16471.)

the particular transactional context and within the ballpark of what reasonable parties might have agreed.

II. The "Fundamental Attribute" Test Proffered By Lovett Both Begs The Question And Disregards *Concepcion*'s Central Tenet—Protecting The Discretion To Design A Unique Or Tailored Process.

Amicus curiae Lovett argues that judicial antipathy to "one-sided" arbitration agreements that pre-dates *Concepcion* should remain in place after *Concepcion*. (Lovett AC at 8-9.) He recognizes, as he must, that *Concepcion* must have had *some* impact and that *Concepcion* did change the law. (See Lovett AC at 9-10 ["the *Concepcion* plaintiff's argument would have carried the day under the law of FAA preemption that existed prior to April of 2011" (the date *Concepcion* was issued)].)

He argues that *Concepcion* created a "new strand of FAA preemption," which he characterizes as whether the asserted unconscionability is a "fundamental attribute[ ] of arbitration." (Lovett AC at 10-11.) In his view, the Supreme Court in *Concepcion* was not concerned about the *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), rule banning class-action arbitral waiver because it interfered with party choice, but rather because it somehow interfered with a "fundamental attribute" of arbitration—bilateralism. From that, he argues that "one-sidedness" is not a fundamental attribute of arbitration.

Lovett's "fundamental arbitration attribute" formulation begs the question. It substitutes a judicial inquiry into what is a fundamental arbitration attribute for the previous imposition of judicial fairness notions under the unconscionability cloak.

But *Concepcion*'s whole point is that what is fundamental to arbitration is that the *parties* get to design an appropriate process and procedure without being second-guessed by courts. The *parties* have "discretion in designing arbitration *processes* . . . to allow for efficient, streamlined procedures *tailored to the type of dispute*." (131 S.Ct. at p. 1749, emphasis added.) And, "*parties* 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 pp. 1748-1749, emphasis added, citations omitted.) Likewise, *parties* may limit or constrain the risks of "higher stakes" disputes. (*Id.* at pp. 1748, 1752.)

Tailoring processes, limiting issues to be arbitrated, adopting specific rules, limiting risks associated with high stakes outcomes are, according to *Concepcion*, *all* "fundamental attributes of arbitration." (*Id.* at p. 1748-1749, 1752.) Certainly they are as fundamental as bilateralism. Nothing says that there can never be multilateral or even class action arbitrations, if that's what the parties have agreed to. If *Concepcion* stands for anything, it is that parties, not courts, get to decide what appropriate arbitral procedures are for the specific transaction. Lovett contends that States (either judicially through the unconscionability doctrine or, by logical extension, statutorily) should be free to "strik[e] down selectively one-sided arbitration clauses."

(Lovett AC at 12.) But it is in the eye of the beholder whether a provision is "selectively one-sided" or instead represents an "efficient, streamlined procedure[] tailored to the type of dispute."

Nor can Lovett's "selectively one-sided" standard be the test. Under Lovett's standard, even *Concepcion*'s *result* would have been different. Barring class action arbitration can be "selectively one-sided," favoring defendants more than plaintiffs. (See *Concepcion*, *supra*, 131 S.Ct. at p. 1747 [noting *Discover Bank* argues that class action waivers are one-sided against consumers].) But that did not suffice to allow California unconscionability principles to bar enforcing the arbitration provision.

Indeed, *this Court* has repeatedly recognized that mere procedural "one-sideness" is *not* a legitimate basis to disregard an arbitration provision. It recently held in the arbitration provision context that "[a] contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."'" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*); see *id.* at pp. 247-249 [enforcing one-sided arbitration provision that only applied to construction disputes, i.e., disputes that would be brought (other than a comparative fault defense) only by one party and only against the other].) It previously noted in the arbitration-provision context that a party with superior bargaining power is entitled to obtain "'a "margin of safety"'" through "'a type of extra protection for which it has a legitimate commercial need without being unconscionable.'" (*Armendariz*, *supra*,, 24

Cal.4th at p. 117, quoting with approval, *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1536.) It has likewise recognized that parties may "designat[e] as arbitrator a person or entity who, by reason of relationship to a party or some similar factor, can be expected to adopt something other than a 'neutral' stance in determining disputes." (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 824 (*Graham*).) Thus, this Court has consistently rejected a mere "selectively one-sided" standard.

Like plaintiff Sanchez, none of the three amici supporting him comes to terms with the fact that *Armendariz* and *Graham rejected* requiring an enforceable arbitral process to be perfectly "fair" or evenly balanced. (See OB at 17 citing *Graham*, *supra*, 28 Cal.3d at pp. 823-825; OB at 31-32 citing *Armendariz*, *supra*, 24 Cal.4th at pp. 114, 116-118.)

Further, Lovett's proffered clause-by-clause judicial review of the arbitral process "one-sidedness" is an arbitration-specific inquiry, and hence, preempted. Being "selectively one-sided" does not suffice as a ground to refuse to enforce other contract clauses, e.g., a security interest, payment terms, special fees, time to perform. (E.g., *DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800 [wireless phone employee commission charge-back based on mid-term phone plan cancellations not unconscionable regardless whether unreasonable]; *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796 [$20 refueling fee in addition to fee for fuel used and not replaced not unconscionable even if one-sided].)

In short, the line between what is or is not an enforceable arbitration provision is not "one-sideness," it is whether the process is an illusory one. (OB at 16-17.)

Lovett relies on *Samaniego v. Empire Today* (2012) 205 Cal.App.4th 1138, 1147 (as does CARS). (Lovett AC at 13; CARS AC at 4, 10, 16.) But *Samaniego* is a far cry from this case. It is entirely consistent with Valencia Holding's view on the constraints *Concepcion* places on unconscionability and what remains vital in that doctrine. In *Samaniego*, the plaintiffs spoke Spanish and did not read English. Nonetheless, they were given a contract in English. Their request for a copy in Spanish was rebuffed. They were told that they had to sign. The contract limited the plaintiffs' substantive rights by shortening the statute of limitations to less than what the Labor Code mandated and imposed on the plaintiffs a requirement that they bear *both sides*' legal fees and costs (a provision the defendant admitted was statutorily barred and illegal). In addition, it exempted from arbitration the employer's use of *judicial* process by way of declaratory and preliminary injunctive relief.

Samaniego, in short, represents the sort of arrangement to which, even on balance, no reasonable person would agree absent coercion and which is in substantial part illusory. It does not stand for the proposition that *Concepcion* allows courts to deem the parties' agreed-upon arbitration process unenforceably unconscionable if, from any perspective, it might be viewed as advantaging one side.

The fundamental question is not judicially perceived one-sidedness but to what extent *Concepcion* allows courts to impose *their* notions of fairness and appropriate trade-offs for those to which the parties' have contractually agreed. On that point, *Concepcion* is clear: Parties can tailor the process, they can select issues to be subject to arbitration, they can decide what rules will govern the process. A State, in contrast, cannot require a particular arbitration process. It cannot, for example, dictate that losing consumers in arbitration always be allowed an appeal or re-arbitration, even if *the parties* could so agree.

Coming full circle, Lovett suggests that *Concepcion* left intact pre-*Concepcion* unconscionability decisions that essentially viewed all consumer arbitration provisions to be unconscionable unless proven to be neutral or favorable to the consumer in all conceivable circumstances. (Lovett AC at 10, 12.) That, in effect, is the standard to which Lovett seeks to return. But that clearly is not an available option.

Concepcion rejects a business-as-usual approach to California's use of unconscionability to refuse to enforce arbitration provisions. (See *Concepcion*, 131 S.Ct. at p. 1747, citing Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act* (2006) 3 Hastings Bus. L.J. 39, 54, 66 ("Broome") [arguing that California courts have violated the FAA by historically applying heightened unconscionability review to processes selected in arbitration provisions, including a mutuality requirement not applied in the non-arbitration context] and Randall,

Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability (2004) 52 Buffalo L.Rev. 185, 186-187 [same].) It rejects California's use of unconscionability as a special impediment to enforcing arbitration.[6] *Concepcion* makes clear that the arbitration witch-hunt that the Court of Appeal engaged in here—theorizing circumstances under which, even if remote, the arbitral process might disadvantage a consumer—violates the FAA.

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[6] We reviewed published and unpublished cases over the last 10 years searching for "unconscionable" or "unconscionability" and "arbitrate" or "arbitration" limited to a consumer or employment context ("consumer," "employee," "employment," "employer," "auto," "automobile," "vehicle," "gym," "health," "retail sales," "retail installment," "loan agreement," or "mortgage"). In 127 out of 262 cases (48%), California appellate courts found arbitration provisions to be unconscionable and wholly unenforceable. An additional 32 out of 262 such cases (12%) found an arbitration provision to be partially unconscionable with the unconscionable portion severable. The results are even more lopsided for published appellate decisions, the only ones that control lower courts. In published cases, an arbitration provision was thrown out in its entirety as unconscionable in 47 out of 83 cases (56%). Portions were found unconscionable and severed in another 10 cases (13%). An arbitration provision withstood an unconscionability challenge unscathed in only 26 cases (31%).

This is consistent with the data in Broome, *supra*, 3 Hastings Bus. L.J. at p. 48 cited in *Concepcion*, 131 S.Ct. at p. 1747, that 53 of 114 (46% of) California appellate decisions found arbitration provisions unconscionable and wholly unenforceable and an additional 13 (11%) found portions unconscionable but severable. By contrast, 41 of 46 (89% of) appellate decisions studied involving *non*-arbitration issues found contract provisions to be conscionable and enforceable. (*Ibid.*; see also Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements* (2011) 62 Hastings L.J. 1065, 1082-1084 [confirming and updating Broome's empirical findings after reviewing a sample of 120 cases from the First, Second, and Fourth Districts of the California Courts of Appeal between 2005 and 2008; "exclud[ing] cases from the Third, Fifth, and Sixth Districts, because each district reported fewer than ten cases in which unconscionability determined the outcome"].)

The bottom line: *Concepcion*'s language and holding do not support Lovett's hypothesized "fundamental attribute" test or his view of "one-sidedness" as fatal. The "fundamental attribute" of arbitration is the parties' discretion to design a process tailored to the business transaction at issue, which includes lessening the risks posed by outlier results.

III. The "Arbitration Efficiency" And Four-Limitations Test Proffered By The Consumer Attorneys Is Insupportable.

The Consumer Attorneys take a slightly different tack. They argue that *Concepcion* only bars findings of unconscionability that would interfere with arbitral efficiency. (Consumer Attorneys AC at 10.) In their view, *Concepcion*'s only concern was that requiring class action arbitrations would make the arbitral process less efficient and more expensive. (*Id.* at 10-11.)

At the same time, the Consumer Attorneys inconsistently argue that arbitral efficiency cannot be the only goal and that courts should be free to strike down "unfair" arbitral provisions. (*Id.* at 11, 15-16.) Even so, the Consumer Attorneys agree that the reasonable expectations of the parties is that the arbitral process need only yield "'rough justice.'" (*Id.* at 13.)

The Consumer Attorneys conclude that *Concepcion* only bars States from imposing four specific efficiency-killing requirements: (1) class action arbitration, (2) judicially-monitored discovery, (3) adherence to the Federal Rules of Evidence, and (4) resolution of arbitral disputes by a jury. (*Id.* at 14-15.)

There are multiple problems with the Consumer Attorneys' analysis:

1. *Concepcion* is *not* premised on protecting some judicial concept of arbitral efficiency. Rather, its premise is that the parties get to design an arbitral process that they judge best tailored to the particular type of transaction and likely disputes.

Concepcion's theme is that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" (131 S.Ct. at p. 1748, citations omitted.) That is the opening, topic sentence of *Concepcion*'s dispositive section III.B. At the same time, *Concepcion rejects* the Consumer Attorneys's view that the FAA favors efficiency over party-structured arbitral process: "'We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the [FAA's] drafters.'" (*Id.* at p. 1749, quoting *Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158.)

States and state courts do not get to superimpose *their* views of a fair (or efficient) process on those of the parties. The issue is honoring the choices (efficient or not) made in the arbitral agreement, not courts' view on what is or isn't more efficient. Put another way, *Concepcion*'s emphasis on honoring arbitration processes as designed aligns with the "shocks the conscience" standard this Court recently reiterated as the governing norm for finding unconscionability. (*Pinnacle*, *supra*, 55 Cal.4th at p. 248.)

2. In cherry-picking a handful of *Concepcion*'s examples of how States and courts might improperly interfere with the design of the arbitral process, the Consumer Attorneys' ignore broad swaths of what *Concepcion* said that the parties *can* do without State or judicial interference. As even the Consumer Attorneys concede, *Concepcion* held that the FAA protects the ability to design an arbitral process that avoids disputes (e.g., class action claims) that "'greatly increase[ ] risks to defendants' who are unlikely to 'bet the company with no effective means of review'"; otherwise "a [bet-the-company] requirement which makes arbitration unattractive to defendants will tend to undermine the 'national policy favoring arbitration' embodied in the FAA." (Consumer Attorneys AC at 11, citations omitted.)

The Consumer Attorneys say that "[t]his reasoning is clear enough insofar as it applies to the *Discover Bank* [class-action waiver] rule, but not very useful in determining how far *Concepcion* goes *beyond* that rule." (*Ibid.*, original emphasis.) Really? To the contrary, *Concepcion*'s reasoning is very useful in deducing a broader point: The FAA protects arbitral processes designed to alleviate the risk of unreviewable "bet-the-company" outlier results because otherwise parties won't risk arbitration, even for more run-of-the-mill claims. (See OB at 15.) That's especially true where, as here, *both* sides are entitled to further review of outlier results. (See *id.* at 25-26, 43; Reply Br. at 21-22.)

Concepcion did not reject the *Discover Bank* rule merely because it was inefficient. It rejected that rule because it interfered with a choice that reduced the risk of unreviewable "bet-the-company" results in an informal

arbitration forum—a choice necessary to at least one side's decision to engage in arbitration. What *Concepcion* holds is that States and courts can't interfere with the parties' choice to tailor the arbitration process to the particular contracting context or to the risks posed by outlier results.

3. The Consumer Attorneys criticize Valencia Holding for formulating the test as "reasonably tailored," when *Concepcion* only says "tailored." (Consumer Attorneys AC at 13-14.) But it is hard to see how the adjective changes the picture. "Tailored," unmodified, does not alter the analysis. The arbitration process agreed upon here is undoubtedly tailored to the context and typical disputes involved in the purchase of an automobile. $0 and over-$100,000 awards as well as injunctive relief are unusual, outlier results in an automobile purchase dispute context for which it is reasonable to have an additional level of arbitral review.

The provision is further tailored to automobile purchases with certain provisions that favor *the consumer*, such as the seller paying the first $2,500 of the consumer's arbitration expenses and the consumer getting to choose any arbitration service subject only to the dealer's consent (which the implied covenant of good faith and fair dealing precludes a dealer from unreasonably withholding). (See Reply Br. at 29.) Indeed, the *Consumer Attorneys* cite the rules of the American Arbitration Association (AAA), one of the identified arbitrator choices available to the consumer here, as *guaranteeing* fundamental fairness. (See Consumer Attorneys AC at 6 & fn. 1.)

4. The Consumer Attorneys' only-four-limitations theory does not match up with *Concepcion*'s language and direction. Yes, *Concepcion* gave discovery and evidentiary-rule requirements as examples of barred State-imposed arbitral requirements. But it made clear those examples were not all-inclusive: "[T]he judicial hostility towards arbitration that prompted the FAA had manifested itself in '*a great variety*' of 'devices and formulas' declaring arbitration against public policy." (131 S.Ct. at p. 1747, emphasis added, citation omitted.) Under *Concepcion*, the FAA preempts the entire "great variety" of anti-arbitration devices and formulas, not just four specific ones.

Concepcion nowhere limits the foreclosed means of State-imposed intervention in the private arbitral agreement process. States can't impose specific evidentiary requirements—whether the Federal Rules of Evidence, the California Evidence Code, or otherwise. Nor can States require specific processes—whether discovery, jury determination or otherwise. States and courts cannot prescribe a one-size-fits-all arbitration process by simply avoiding what the Consumer Attorneys identify as the four fatal sins. *Concepcion* held *broadly* that parties have "discretion in designing arbitration processes," that they may "tailor" those processes to the type of dispute that might be anticipated, that they "may agree to limit the issues subject to arbitration," and that they may agree "to arbitrate according to specific rules," as well as acting to limit the risks involved with "higher stakes" disputes. (131 S.Ct. at pp. 1748-1749, 1752.) The Consumer

Attorneys' just-four-limitations interpretation ignores *Concepcion*'s broad direction.

5. There's another problem with the Consumer Attorneys' view that *Concepcion* holds that unconscionability should remain in States' arsenals unaltered and unconstrained as a means of shaping allowable arbitral processes. If their view were correct, then why was the result in *Concepcion* to overrule *Discover Bank*? It wasn't because *Discover Bank* created an arbitration-only rule. It didn't. Was it *solely* because class action arbitration is less efficient? No: *Concepcion* equally rested on concerns about judicially dictated arbitral processes *and* letting parties limit the risk of unreviewable outsized results. (131 S.Ct. at pp. 1751-1752.)

* * *

So, given the flaws in the Consumer Attorneys' approach, what role does an unconscionability limitation play after *Concepcion*? As explained in the Opening and Reply Brief, what States can do—what they are limited to doing—is patrol the outer limits of what reasonable parties might agree to absent coercion. (OB at 13-27; Reply at 11-14.) Consistent with *Concepcion,* unconscionability can operate to bar enforcement of a provision that "shocks the conscience" either because (1) the parties could not rationally believe it to be tailored to the nature of the parties' relationship or anticipated disputes, or (2) it is so illusory (i.e., *inevitably* producing a result for one-side) that no reasonable person could have agreed to it without coercion. (*Ibid.*)

IV. Contrary To The CARS Amicus Brief, Nothing In *Concepcion* Suggests That Arbitration Cannot Fairly Adjudicate Consumer Complaints Or Justifies An Anti-Arbitration Premise.

At heart, CARS argument is that consumer claims cannot be fairly determined in arbitration and, therefore, arbitration must be presumptively unconscionable. But there is no logical or empirical reason to believe that consumer claims cannot be fairly (and more speedily and efficiently) resolved in arbitration. More to the point, Congress made the policy decision, in enacting the FAA, that all disputes *can and should* be resolved in arbitration when that is the contractually chosen process. Indeed, *Concepcion* is a consumer arbitration case.

To reach its anti-arbitration presumption, CARS starts from the premise that *Concepcion* and the FAA did not do away with unconscionability as a basis to attack an arbitration provision. (CARS AC at 4-6.) Valencia Holding agrees and has never argued otherwise. (See OB at 14-15.)

But from that premise, CARS makes the giant and unjustifiable leap that *Concepcion* left in place California's pre-existing antipathy to enforcing arbitration provisions. (CARS AC at 8 ["*Concepcion* also left intact California's test for unconscionability as it applies to review of the arbitral process"], 9 [*Concepcion* "did not fundamentally transform the unconscionability inquiry"].) And, CARS asserts that *Concepcion* left in place that antipathy's mechanism—clause-by-clause dissection of

agreed-upon arbitration processes to ferret out any perceived *potential* lack of completely balanced mutual benefits. (CARS AC at 9-12 [*Concepcion* did not purport to change California's unconscionability standard, and that standard specifically permits the kind of clause-by-clause review performed by the Court of Appeal in this case].)

CARS readily admits that the Court of Appeal engaged in an anti-arbitration clause-by-clause strict scrutiny analysis. But it misstates California law in arguing that such a clause-by-clause dissection is proper without regard to the arbitration process as a whole, the overall modicum of bilaterality and, most importantly, the reasonable justification for the agreed-upon process. (See OB at 31-39, Reply Br. at 15-19.) In effect, CARS agrees with Lovett's unsupportable "one-sidedness" approach. As discussed above, however, this Court has rejected mere one-sidedness as the test. CARS' clause-by-clause approach would be an FAA-barred arbitration-specific rule that is *not* the way unconscionability operates in other contract realms.

Nor can CARS' position be reconciled with *Concepcion*'s holding. If CARS were correct, the result in *Concepcion* would have been different. A class action waiver provision could never survive a clause-by-clause "one-sideness" analysis because it only benefits defendants and only disadvantages plaintiffs. But *Concepcion disapproved* this Court's *Discover Bank* rule, a rule premised on unconscionability. So, it is clear that *Concepcion* constrains the use of California's unconscionability doctrine to refuse to enforce arbitration provisions. The question, thus, isn't

whether California's free wheeling use of unconscionability to strike down arbitration was left intact—it undoubtedly was not. (See Lovett AC at 9-10 [arguing that *Concepcion* changed existing standards].) The question is, to what limited extent does the unconscionability doctrine continue to operate?

After stating that *Concepcion* did not change the clause-by-clause approach to unconscionability that the Court of Appeal applied here, CARS then backtracks, proffering a new limitation: It asserts—with no supporting analysis—that "*Concepcion* prohibits courts from applying the unconscionability doctrine to an arbitration agreement only when doing so would fundamentally transform arbitration's fundamental nature." (CARS AC at 12.) But CARS identifies no source or basis for this formulation, let alone explains what it means.

Instead, CARS criticizes Valencia Holding for relying on *Hume v. United States* (1889) 132 U.S. 406 [10 S.Ct. 134, 33 L.Ed. 393], as setting the standard for allowable unconscionability regulation under the FAA. (CARS AC at 9.) But Valencia Holding did not pull *Hume* out of thin air. It is the test for unconscionability that Justice Thomas cites in his concurring opinion in *Concepcion* and presumably the test the majority had in mind. (131 S.Ct. at p. 1755, fn. *, conc. opn. of Thomas, J.; see *Brewer v. Missouri Title Loans* (Mo. 2012) 364 S.W.3d 486, 488-492, 495-496 [*Concepcion*'s majority and Justice Thomas's concurring opinion must be read together; applying *Hume* standard post-*Concepcion* as consistent with *Concepcion* and finding that no reasonable person would have agreed to particular arbitration provision]; cf. *Cal. Grocers Assn. v. Bank of*

America (1994) 22 Cal.App.4th 205, 214 [relying on *Hume* in adopting a "shocks the conscience" test].)[7] Thus, *Concepcion* limits the unconscionability doctrine's role to guarding the outer boundaries of party consent—applying only where the arbitration provision "shocks the conscience" because it creates a process so illusory or untethered to the nature of the relationship that, *objectively*, it can be said that *no* reasonable person would have consented absent coercion.

CARS argues that the standard should be a broader unjust or unreasonable-to-enforce standard referenced in dicta in *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.* (1985) 473 U.S. 614, 632 [105 S.Ct. 3346, 87 L.Ed.2d 444], a case regarding forum-selection clauses. But if the Supreme Court agreed with that view, *Concepcion* undoubtedly would have cited to that portion of *Mitsubishi*, which it didn't. And, *Concepcion* would have *upheld* the *Discover Bank* rule instead of invalidating it because *Discover Bank* rested on such an unjust or unreasonable-to-enforce rationale. (Cf. *Cal. Grocers Assn. v. Bank of America*, *supra*, 22 Cal.App.4th at pp. 214-215 [rejecting "unreasonableness" test for unconscionability as too amorphous in favor of "shocks the conscience" test].)

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[7] *Cal. Grocers* and its "shocks the conscience" test were relied on in *Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal.App.4th at p. 1532, which, in turn, was cited by *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213, for that same principle. *Pinnacle*, *supra*, 55 Cal.4th at p. 246, then cites *24 Hour Fitness, Inc.* for that test. *Hume* is the source for *Pinnacle*'s "shock the conscience" test.

The bottom line is that the FAA makes arbitration enforceable—in consumer contracts and otherwise—absent a "shocks the conscience" unconscionability finding.

V. The Present Arbitration Provision Survives Even Under The Amici's Proposed Tests.

Ultimately the three amici's proposed tests are irrelevant to this case because they do not establish that the arbitration provision at issue here is substantively unconscionable. Each of the proffered tests comes down to ensuring a relatively efficient and basically fair arbitration process. This provision meets that goal. Whether framed in terms of "fundamental attributes," efficiency, or "rough justice," *this* arbitration process cannot be deemed substantively unconscionable.

Why? Because the agreed-upon process is fair, balanced, and provides more than a modicum of bilaterality, it is specifically tailored to the transactions at issue, and it is amply justified by the realities of the parties' relationship.

- There is no question of a fair arbiter. The arbitration will be held by, *at the consumer's choice*, the AAA (which the Consumer Attorneys proffer as an example of a fair neutral, Consumer Attorneys AC at 6 & fn. 1; see *Fensterstock v. Education Finance Partners*, *supra*, 2012 WL 3930647 at p. *7 ["(t)he AAA is a highly reputable organization"]) or any other neutral, subject only to the dealer's consent, that cannot be unreasonably withheld. (See OB 29.)

- The vast majority of expected disputes (monetary claims between $0 and $100,000) are subject to binding, final, one-arbitrator determination.
- The safety-valve rearbitration clause for outlier results (1) *still* results in a binding arbitration award and (2) is available to adverse results affecting *both* sides, $0 awards, over-$100,000 awards, and injunctive relief (e.g., requiring return of the vehicle). (See OB at 24, 44-46; Reply Br. at 21-22.)
- The dealer is to advance the consumer's first $2,500 in arbitration fees. (Reply Br., App. "Arbitration Clause.") Although an arbitrator can ultimately award costs to a specific side, that is no different than what happens in court and is standard in arbitration. (Reply Br. at 25-26; *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 Cal.App.4th 503.)
- The only excepted claims—small claims, self-help remedies—are ones that would not be undertaken in regular court proceedings anyways.

Thus, at the end of the day, the three amici's attempts to fashion a different construction of *Concepcion* than Valencia Holding's view is much ado about nothing. This arbitration provision passes muster under any standard that recognizes the ability of parties to design an arbitral process fairly addressing mutual needs and concerns, with benefits for *both* sides.

VI. The Parades Of Horribles Offered By The Three Amici Have Nothing To Do With The Facts In This Case.

Tellingly, none of the three amici discusses the clauses in *this* arbitration provision or the ultimate basic fairness of the agreed-upon process. Instead, they rely on parades of horribles as to possible arbitration clauses that are *not* in this provision. The amici's examples fall into a couple of categories, none of which suggests any problem with Valencia Holding's reading of *Concepcion* and none of which has *anything* to do with the particular arbitration clauses at issue here:

Biased decisionmaker. The Consumer Attorneys and CARS decry what might happen if there is an arbitration where the arbitrator is biased in favor of one side, is barred from disclosing conflicts, is required to decide the dispute in one side's favor or refuses to hear one side's evidence. (E.g., Consumer Attorneys AC at 11-12; CARS AC at 14-15.) The simple answer is that those schemes would all fail under Valencia Holding's reading of *Concepcion*. The process would be illusory, such that no reasonable person would agree to without coercion. (See *Graham*, *supra*, 28 Cal.3d at pp. 823-825; OB at 16-17.) Any such circumstance would also be a basis for vacating any arbitration award. (Code Civ. Proc., § 1286.6; see also *SWAB Financial v. E*Trade Securities* (2007) 150 Cal.App.4th 1181, 1187 [California grounds for vacating award apply even if arbitration governed by FAA].)

There is no hint of a biased arbitrator here. The arbitration will be conducted by either the AAA or an arbitration agency *selected by Sanchez*.

(See Reply Br., App. "Arbitration Clause"; *Fensterstock v. Education Finance Partners*, *supra*, 2012 WL 3930647 at p. *7 [clause designating AAA as arbitrator not unconscionable as "(t)he AAA is a highly reputable organization"]; see Consumer Attorneys AC at 6 & fn. 1 [AAA protects fair process].)

Barriers to participation. CARS hypothesizes that an arbitration provision might pose undue barriers to a consumer's participation in an arbitration, either in terms of location or fees. (CARS AC at 15-16.) But there is no such issue in *this* case. Here, any arbitration is to take place either in the federal district where the consumer resides or where the contract was executed—hardly an abusive location. (See Reply Br., App. "Arbitration Clause.") A refusal by an arbitrator to allow a party to appear remotely (e.g., by video-conference) might be grounds to vacate an award. (See Code Civ. Proc., § 1286.2 [refusal to hear evidence or to postpone hearing or any other substantially prejudicial hearing conduct is grounds to vacate arbitration award].) And, unlike the examples postulated in CARS' amicus brief, the dealer must advance the first $2,500 of the consumer's arbitration costs, typically more than enough to cover a consumer's share of *all* costs. (Reply Br. at 26 fn. 10; "Arbitration Clause.") This advancement of fees is *more favorable* to the consumer than California's statutory standard by which each party bears its own share of fees. (See Code Civ. Proc., § 1284.2 [parties to share arbitral fees equally].)

Nor do the amici address the controlling United States Supreme Court precedent that requires a particularized showing of economic

hardship and rejects speculative hypotheses about an undue economic burden as a basis to defeat an arbitration provision. (*Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 91 [121 S.Ct. 513].)[8] There is no such showing here. Nor is such a showing plausible as the buyer here purchased a $50,000 luxury automobile and most arbitral organizations have fee protections for consumers. (See Reply Br. at 26, fn. 10.) Plus, any expense calculations would need to account for court filing fees and the *savings* produced by the much more streamlined and economical arbitration process.

Valencia Holding's unconscionability standard more than adequately addresses any barriers to participation. If, unlike here, the arbitration provision imposes insurmountable cost, location or other barriers to a consumer's participation in arbitration, the process is illusory such that no reasonable person would have agreed to it absent coercion. There are no such insurmountable barriers here.

CARS suggests that there are special concerns as to servicemembers. (CARS AC at 20-21.) But there is no indication that the plaintiff here falls into that category. In any event, servicemembers, appropriately, have special protections under the Servicemembers Civil Relief Act (SCRA) (50 U.S.C. Appen. §§ 501-596). They also have access through the military to legal assistance on consumer matters. (See generally *Special Legal Issues,*

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[8] In California, unconscionability is a facial attack on a contract provision. (See Code Civ. Proc., § 1670.5 [unconscionability is to be determined "at the time (contract) was made"].) An as-applied challenge to the fairness of an arbitration provision is a matter for a post-arbitration motion to vacate. (See Code of Civ. Proc., § 1286.2.)

The Armed Forces Legal Assistance Program, MilitaryOneSource.com, http://www.militaryonesource.mil/MOS/f?p=MOS:HOME:0::: [last visited Nov. 8, 2012] ["Your legal assistance attorney can also help if you believe you have been a victim of a scam, or otherwise have a dispute over a consumer issue or service"].)

If anything, arbitration is a plus for servicemembers because it provides an inexpensive *and speedy* dispute resolution system. The problem that plagues servicemembers is that they move (through reassignment or deployment) often and are rarely in one place for the years that litigation can take. If anything, the speed and informality of arbitration benefits—rather than disadvantages—servicemembers.

Hidden provisions. The Consumer Attorneys posit concern about an arbitration provision in 8-point type buried in a 30-page employment contract. (Consumer Attorneys AC at 12-13.) Again, that's not this case. Here, the provision takes up a quarter of the back page of a double-sided single page contract and appears in a black box with a bold and all capitals heading. Importantly, there is a direct reference to the arbitration provision on the front of the form, immediately above where the buyer signed, in all capitals specifically representing that the buyer has read the arbitration provision. (See *Mance v. Mercedes-Benz USA*, *supra*, 2012 WL 4497369 at p. *7 [buyer's "argument that he was surprised by the arbitration agreement is not persuasive. The arbitration provision is found on the back of the contract and is highlighted by bold, capitalized text that alerts the reader . . . . [I]t is conspicuously labeled on the back side of a single,

double-sided piece of paper and there is fair warning next to the signature block" on the front].) There has been *no* contrary fact finding in this case.

But even in the Consumer Attorneys' hypothetical, the alleged procedural unconscionability would not suffice alone to make the provision unenforceable in California. (*Armendariz, supra*, 24 Cal.4th at p. 114 [unconscionability requires both substantive and procedural elements].) Any contrary rule for arbitration provisions would violate the FAA, which bars courts from applying special standards making it harder to enforce arbitration provisions than other contract provisions. (E.g., *Pinnacle, supra*, 55 Cal.4th at 245-246 citing *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687-688, 116 S.Ct. 1652, 134 L.Ed.2d 902.) In the Consumer Attorneys' hypothetical, there would still have to be some substantive unfairness, not just the fact that the arbitration provision was hidden.

Elimination of substantive rights. Lovett notes that some post-*Concepcion* cases have struck down arbitration provisions that strip parties of substantive rights and remedies. (Lovett AC at 14-15.) But the arbitration provision here *nowhere* limits either party's rights or remedies. To the contrary, it directs the arbitrator to "apply governing substantive law" and for each party to be "responsible for its own attorney, expert and other fees, *unless awarded by the arbitrator under applicable law*." (Reply Br., App. "Arbitration Clause," emphasis added.) Under *this* arbitration provision, the full panoply of rights and remedies, including attorneys' fees

or protection from them, are available to all parties in arbitration to the same extent that they would be in litigation.

The arbitration provision here, thus, preserves all the parties' substantive rights. A question *might* arise in some *other* cases as to whether a reasonable person would have agreed to give up statutorily afforded remedies in agreeing to arbitrate. But that issue is not in this case.

Inability to have claims resolved. CARS suggests that public policy supports allowing consumers to obtain redress for unlawful or inappropriate business conduct, if established. (CARS AC at 19-21.) We agree. But that is just what arbitration allows.

Nothing says that appropriate redress cannot be obtained through an arbitral forum. It can. Cheaply and efficiently. There is *no* evidence, or even argument, that plaintiff Sanchez cannot obtain full substantive redress in arbitration *if* he proves his case before the arbitrator. Arbitration affords him that opportunity. If he does not prove his case to the satisfaction of the arbitrator, he will not recover. But that will not be because of the structure of the arbitration process. It will be because he lacks a case on the merits.

CONCLUSION

The three amici briefs supporting plaintiff are beside the point. They address what ultimately is a nonissue in this case. The arbitration provision here is within the realm of reasonable choices that parties might make, does not "shock the conscience," and thereby passes muster under California's traditional unconscionability test. That's true if, as the law mandates, the

unconscionability doctrine is fairly applied to arbitration provisions with the same party-choice deference afforded to other contract provisions.

But if this Court desires to plumb the limits of State-imposed unconscionability requirements on arbitration provisions, the three amici briefs are unhelpful. To their credit, they at least attempt to come to terms with the United States Supreme Court's controlling *Concepcion* decision. But ultimately their overly cramped readings of *Concepcion* are insupportable.

For all of the above reasons, and those set forth in the Opening Brief on the Merits, the Reply Brief, and the nine amicus briefs supporting Valencia Holding's position, the judgment of the Court of Appeal should be reversed and the matter remanded with directions to compel arbitration.

Dated: November 9, 2012 Respectfully submitted,

CALLAHAN THOMPSON SHERMAN & CAUDILL LLP
Robert W. Thompson
Charles Russell

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Edward L. Xanders
Meehan R. Rasch

By:
Robert A. Olson

Attorneys for Defendant and Appellant
Valencia Holding Company, LLC d.b.a.
Mercedes-Benz of Valencia

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c), I certify that this **VALENCIA HOLDING COMPANY, LLC''S CONSOLIDATED ANSWER TO AMICI BRIEFS** contains **7,731** words, not including the tables of contents and authorities, the caption page, graphics, this Certification page and appendices.

Dated: November 9, 2012

Robert A. Olson