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)

REPLY 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

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)
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

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

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

Page

Other Authorities:

INTRODUCTION

The Answer Brief rails against arbitration in consumer contracts—even contracts to purchase luxury, $50,000+ automobiles. But that ship has sailed. Both preeminent federal law and this State's public policy favor enforcing arbitration, including in consumer contracts. They do so because arbitration is a rational party choice, providing a swifter, less expensive route to resolve disputes, with the side benefit of alleviating court dockets.

The Answer Brief's attack on enforcing arbitration in *this* case is premised on multiple misconceptions. It begins with a one-sided, inappropriate view of the factual record. But the trial court made *no* factual findings. Instead, it ruled as a matter of law based on a then-controlling decision, *Fisher v. DCH Temecula Imports* (2010) 187 Cal.App.4th 601 (*Fisher*), which *AT&T Mobility v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*Concepcion*) subsequently superseded. The trial court's decision cannot be upheld based on factual findings it never made.

The Answer Brief also launches into newly-minted, convoluted arguments asserting that this arbitration provision is merely optional and that the parties chose to allow any individual claim coupled with class action allegations to be litigated. These tortured readings both were never advanced in the trial court or Court of Appeal and are utterly specious, affording no basis for affirmance.

The Answer Brief also misconceives *Concepcion*'s limitations on States' use of unconscionability to invalidate arbitration agreements. It

pays lips service to *Concepcion*, but ignores the case's fundamental rationale: States, either legislatively or judicially, cannot second-guess (under unconscionability's guise or otherwise) the contracting parties' chosen arbitral process if it is reasonably tailored to the commercial context at issue. *Concepcion*'s noninterference-with-party-choice rationale is not limited to arbitral class action waivers, but applies generally.

Nor does the Answer Brief properly analyze unconscionability. Rather, it engages in the precise sort of myopic dissection of individual clauses that both *Concepcion* and traditional California analysis foreclose. The question is not whether a particular clause in an arbitration provision might conceivably favor one party more than another—California law requires only a "*modicum* of bilaterality" in the *overall* arbitration provision. The question, rather, is whether *as a whole* the arbitration provision falls within the broad ballpark of what reasonable people might agree upon given the particular commercial context. The provision here amply meets that test.

Arbitration should be compelled and the Court of Appeal's contrary decision should be reversed.

ARGUMENT

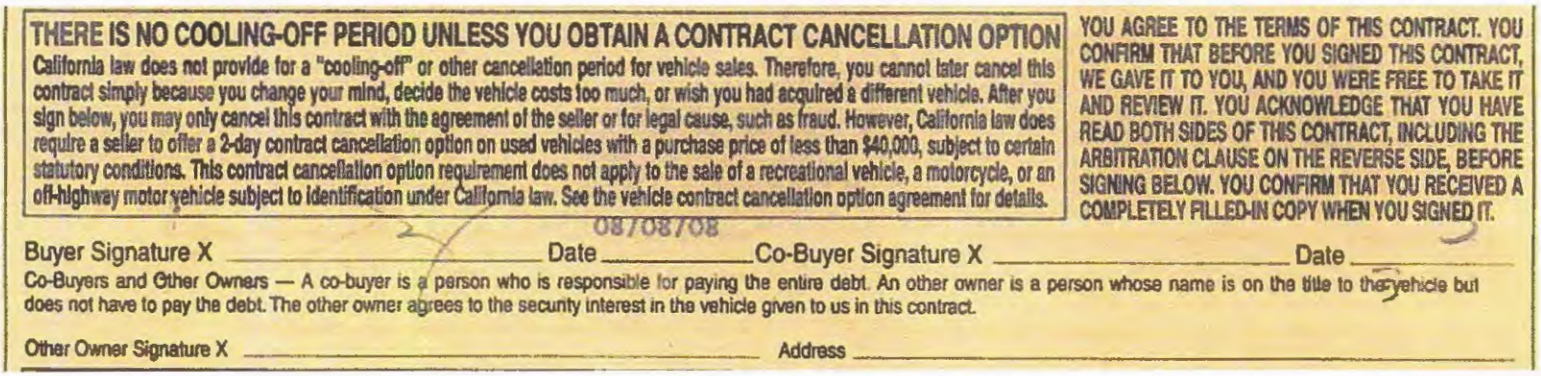
I. The Answer Brief Ignores Or Distorts Key Facts.

The Answer Brief presents a selective view of the factual record. But the trial court made *no* factual findings; it instead ruled as a matter of law based upon *Fisher*, *supra*, 187 Cal.App.4th 601. (2 Appellant's Appendix ["AA"] 529-530.) Here's what the record actually shows:

- Sanchez claims that he did not read the contract or know that there was an arbitration provision. (Answer Brief ["AB"] 1, 33-35, 37.) But, there has been *no* such factual finding—express or implied. The trial court never addressed unconscionability—the issue to which such a finding would be relevant—because it ruled on alternate legal grounds. Sanchez, nonetheless, asserts that the evidence about what he read or knew was undisputed. (AB 33-35, 37.) Wrong. In the agreement itself—in all caps just above where he signed—Sanchez represents that he read the contract, including the arbitration clause. At a minimum, there are two competing documents—the contract and Sanchez's declaration, both signed by Sanchez—asserting opposite facts. That's a conflict in the evidence, and one as to which the contractual representation may prevail. (See *Higgins v. Superior Court* (2010) 140 Cal.App.4th 1238, 1253 [contractual representation that party has read document is "relevant to (the) inquiry"]; *Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 660 [unsigned letter from lender as to loan terms and contrary declaration by borrower created conflict in evidence]; see *Casa Herrera, Inc. v. Beydoun*

(2004) 32 Cal.4th 336, 343 [parol evidence rule bars extrinsic evidence contradicting the terms of an integrated contract].)[1]

- Sanchez argues that the arbitration provision was on the form's back (prominently, in a black box, with a bold heading, taking up about one-quarter of the page). (AB 1, 6, 37-39.) That's a half-truth. He consistently omits that the arbitration provision was specifically referenced in all caps on the document's front, immediately above signature lines for the borrower (i.e., Sanchez) and co-borrower:[2]



THERE IS NO COOLING-OFF PERIOD UNLESS YOU OBTAIN A CONTRACT CANCELLATION OPTION

California law does not provide for a "cooling-off" or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud. However, California law does require a seller to offer a 2-day contract cancellation option on used vehicles with a purchase price of less than $40,000, subject to certain statutory conditions. This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle, or an off-highway motor vehicle subject to identification under California law. See the vehicle contract cancellation option agreement for details.

YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED 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.

08/08/08

Buyer Signature X _____ Date _____ Co-Buyer Signature X _____ Date _____

Co-Buyers and Other Owners — A co-buyer is a person who is responsible for paying the entire debt. An other owner is a person whose name is on the title to the vehicle but does not have to pay the debt. The other owner agrees to the security interest in the vehicle given to us in this contract.

Other Owner Signature X _____ Address _____

- Sanchez ignores that the overwhelming majority of arbitrations will be for claims between $0 and $100,000 and hence will result in awards for which there will be simple, binding, one-step arbitration. Rearbitrations will be the exception, not the rule, applying only in outlier circumstances.

---

[1] The cases that Sanchez cites (AB 35-36) on this point all involve instances where, unlike here, the trial court made a factual finding.

[2] This graphic is the exact size as in the original document, which was submitted to the Court of Appeal and attached to the petition for review. For the Court's convenience, we attach as Attachment A hereto a copy of the contract, reflecting correct type-size.

II. Sanchez Distorts The Arbitration Provision's Language With Belated, Unfounded Arguments.

In addition to a skewed view of the facts, Sanchez presents a skewed view of the arbitration provision itself. He advances new, tortured readings that the arbitration provision is merely optional and that the parties contracted not to arbitrate individual claims when coupled with class allegations. (See AB 6-8, 16-27.) Neither reading works.

A. Sanchez's New Arguments Should Be Ignored Because He Never Raised Them Below.

Sanchez's new arguments were not advanced in the trial court or Court of Appeal, and, accordingly, were not adopted by either. It is far too late for Sanchez to invent new theories. (Cal. Rules of Court, rule 8.500(c)(1) [this Court will not normally consider issues not raised in Court of Appeal]; *Cable Connection, Inc.v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12 [""The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant,'" citations omitted].)

B. Sanchez's New Interpretations Are Specious.

In any event, Sanchez's new readings are insupportable. As with any other contract provision, arbitration language must be read reasonably and

in context as a whole. (Civ. Code, §§ 1641 [as a whole], 1644 [words taken in ordinary sense]; see *American Internat. Underwriters Ins. Co. v. American Guarantee and Liability Ins. Co.* (2010) 181 Cal.App.4th 616, 629 [insurance policy language].) If language is unclear, a *pro*-arbitration interpretation prevails: "When an arbitration provision is ambiguous, we will interpret that provision, if reasonable, in a manner that renders it lawful, both because of our public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution, and because of the general principle that we interpret a contractual provision in a manner that renders it enforceable rather than void." (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682.)

1. Sanchez's invented "optional" versus "mandatory" dichotomy is wrong.

Sanchez contends that the arbitration provision makes arbitration "optional" (and that he therefore cannot be compelled to arbitrate) because it states that either party "may" request arbitration and that a party does not waive its right to arbitrate by "filing suit." (AB 6-7.) Nonsense.

The arbitration provision is only conditional in the sense that one party has to *request* arbitration. (See AA 279.) But, as the provision plainly states, once a request is made arbitration is mandatory: Any dispute "*shall*, at your *or* our election, be resolved by neutral, binding arbitration and not by a court action." (*Ibid.*, emphasis added.) "Or" means *either* party's election triggers *mandatory* ("shall") arbitration. (*Common Cause v.*

Board of Supervisors (1989) 49 Cal.3d 432, 443 ["'shall' is ordinarily construed as mandatory," citations omitted]; *In re Jesusa V.* (2004) 32 Cal.4th 588, 622 ["In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that'"].)

Sanchez equally errs in claiming the non-waiver language means arbitration is optional because it contemplates that some disputes might be resolved through litigation. (AB 6.) But that's always possible with any mandatory arbitration provision—if a party files suit and the other does not timely request arbitration, the arbitration right is waived. (E.g., *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1366; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558.) The non-waiver language merely reflects existing law. (See *Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1201 [filing suit alone does not waive arbitration].)

Sanchez's interpretation is also contextually nonsensical. If arbitration were optional, there would be no need for the various emphasized warnings, such as "Please Review—Important—Affects Your Legal Rights." They exist because the provision has real, *binding* effect—it is mandatory upon either party's election.

2. The arbitration provision applies to individual claims coupled with class action assertions.

Sanchez's next semantic ploy is to claim that the arbitration provision excludes arbitration (and allows litigation) if a buyer alleges a

class action claim. (AB 7-8, 16-27.) But that's not what the provision says. It says that a party can "have *any* dispute between us decided by arbitration" and that if a dispute is arbitrated the buyer "will give up" its right to participate in class claims. (AA 279, capitalization normalized, emphasis added.) The only reasonable reading is that Sanchez waives arbitrating class action allegations but still must arbitrate his individual claims. Sanchez proffers no other reasonable construction.

Instead, he makes a convoluted argument based on the arbitration provision's limited nonseverability clause, which directs that "*[i]f* 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 279, emphasis added.) Sanchez argues that this clause (which he labels a "poison pill") renders the entire arbitration provision unenforceable as to his individual claims upon the mere allegation of coupled class action claims even though *Concepcion* holds the class action waiver *enforceable*. (AB 8, 16.)

Sanchez's unreasonable, contra-arbitration reading fails. The class-action-waiver nonseverability provision makes clear that if given a *choice* between having to arbitrate class action claims and no arbitration at all, the parties choose no arbitration at all. But absent that choice, arbitration is the rule. After *Concepcion*, that choice is a non-issue: Under *Concepcion*, the class action waiver is enforceable, so the non-severability provision is inapplicable, its precondition unmet.

Sanchez tries to end-run this reality by arguing that even though the class action waiver is enforceable under *Concepcion*, the nonseverability provision still applies if the class action waiver might be unenforceable under *California* law, even if federal law invalidates such state law. (AB 20-23.)

But Sanchez's theory flounders out of the starting gate, because the arbitration provision here is governed by *federal* law, not California law: "Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration." (AA 279; see also *Caron v. Mercedes-Benz Financial Services USA, LLC* (2012) 208 Cal.App.4th 7, 24 (*Caron*) [rejecting *identical* argument: "[Plaintiff's] interpretation would allow state law to defeat the arbitration provision despite the provision's clear statement that the FAA governs"].)[3]

Sanchez tries to avoid this fatal flaw by focusing on the clause's reference to "deemed or found to be unenforceable ***for any reason,***" thereby suggesting "any reason" might include wholly preempted reasons or inapplicable law. (AB 20, emphasis added in Answer Brief). But under Sanchez's theory, if an arbitral class action waiver were unenforceable

---

[3] The contract contains a general choice-of-law provision that "Federal law *and* California law apply to this contract." (AA 277, ¶ 6, emphasis added.) But "the specific choice-of-law provision designating the FAA in the arbitration clause governs over the more general choice-of-law provision regarding the entire contract." (*Caron*, *supra*, 208 Cal.App.4th at p. 17, fn. 1.) Further, since the general provision states both federal and California law apply, "the Supremacy Clause mandates that federal law governs if there is a conflict between the two." (*Ibid.*)

under French or Mongolian law, the arbitration provision would self-destruct. That's a wholly unreasonable reading. Given the choice of law provision, California law is no more applicable to the arbitration provision than French or Mongolian law.

Finally, Sanchez argues that *Fisher*, *supra*, 187 Cal.App.4th 601, supports his reading. It doesn't. *Fisher* held—pre-*Concepcion*—a class action waiver unenforceable under California law, law that *Fisher* (erroneously) held unaffected by federal law. But *Fisher* does not survive *Concepcion*. (*Caron*, *supra*, 208 Cal.App.4th at p. 23 [under *Concepcion*, *Fisher* improperly "applied the CLRA's anti-waiver provision in a manner that discriminates against arbitration and therefore the FAA preempts it"].)

Fisher discussed the arbitrability of the plaintiff's individual claim only *after* determining that the class action waiver would be unenforceable under state *and* federal law—a premise that no longer applies post-*Concepcion*. *Fisher* never considered individual claim arbitrability under the *Concepcion* scenario of federal law upholding an arbitral class action waiver. (See *Caron*, *supra*, 208 Cal.App.4th at p. 22 ["*Fisher*'s preemption analysis did not address whether the CLRA's anti-waiver provision stood as an obstacle to the FAA's purposes and objectives"].) Cases do not stand for propositions not considered. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.)

III. Sanchez Ignores *Concepcion*'s Significant Limitations On Unconscionability Analysis; *Concepcion* Cannot Reasonably Be Read As Only Addressing Arbitral Class Action Waivers.

Sanchez gives short shrift to *Concepcion*, even though it is the elephant in the room. He emphasizes *Concepcion*'s statement that the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' . . . ." (AB 9-10, quoting *Concepcion, supra*, 131 S.Ct. at p. 1746.) But that's but one chapter of the story. *Concepcion* ultimately held that this Court's use of unconscionability in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, to refuse to enforce an arbitral class action waiver provision violated the FAA. (131 S.Ct. at pp. 1747-1748.) *Concepcion* thus *holds* that the FAA limits the use of unconscionability to refuse to enforce arbitration provisions.

Concepcion rejects the very arguments that Sanchez makes: (1) that refusing to enforce an arbitration clause is inevitably allowable if rooted in "California's unconscionability doctrine and California's policy against exculpation, [as those are] ground[s] that 'exist at law or in equity for the revocation of any contract' under FAA § 2"; and (2) that a rule interfering with arbitration rights would be acceptable if "applicable to all dispute-resolution contracts, [so long as] California prohibits [the same conduct in] litigation as well." (131 S.Ct. at p. 1746; see AB 12-14.) As the Supreme Court explained, "[a]lthough § 2's saving clause preserves

generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (131 S.Ct. at p. 1748.)

Certainly, *Concepcion* did *not* approve California courts' historical use of unconscionability to repudiate arbitration provisions. Quite the contrary. (See 131 S.Ct. at p. 1747, citing with approval 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 [arguing that California courts have historically violated the FAA by applying heightened unconscionability review to arbitration agreements, including a mutuality requirement not applied to non-arbitration agreements] and Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability* (2004) 52 Buffalo L.Rev. 185, 186–187.)

Nor can *Concepcion*'s holding be limited to arbitral class action waivers. Supreme Court cases must be read for their rationales, not just their precise facts and limited holdings. *Concepcion* announces generally applicable principles and its rationale, as other courts have recognized, is not just limited to arbitral class waivers. (Opening Brief ["OB"] 19-20.) Indeed, Sanchez does not dispute that *Concepcion* extends to bar this Court's *Broughton-Cruz* rule, thereby undermining the Court of Appeal's rationale. (AB 58; see OB 20-22.)

So, the question is not whether *Concepcion* gives courts carte blanche to apply unconscionability principles to defeat arbitration clauses, as the Answer Brief suggests (*Concepcion* clearly rejects that approach). Nor is it whether *Concepcion* holds that an arbitration provision can never be unconscionable (it does not so hold and petitioner has never so contended). Rather, the question is where to draw the line between those extremes. Although *Concepcion* is not definitive on that question, it provides landmarks from which a rule can be deduced:

- "The '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.)

- Parties have "discretion in designing arbitration *processes* . . . to allow for efficient, streamlined procedures *tailored to the type of dispute*." (*Id.* at p. 1749, emphasis added.)

- "[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 pp. 1748-1749, emphasis added.)

- Parties may limit or constrain the risks of "high stakes" disputes. (*Id.* at pp. 1748, 1752.)

The path collectively defined by these landmarks (ignored by Sanchez) is that the FAA limits judicial review and micro-management of the arbitral *process* chosen in the arbitration provision so long as there is a rational basis to the process. If the arbitral process *is* tailored to the particular business context, and if the supposed fault lies in reducing high

stakes or outlier outcomes, limiting issues to be arbitrated, or setting specific rules that differ from litigation, the FAA bars judicial second-guessing. In other words, the test for substantive unconscionability post-*Concepcion* must be whether the process bears no rational relationship to the anticipated disputes such that no reasonable person would have agreed to it. The test after *Concepcion* cannot be (if it ever was) whether arbitration affords one party greater leverage or tactical advantage than might exist in litigation. Sanchez complains that *Concepcion* does not say that in so many words. (AB 14.) Yet that is its ineluctable implication.

Concepcion's rationale rejects the business-as-usual approach that Sanchez advocates. Petitioner has proffered a defined, administrable test consistent with *Concepcion*'s rationale. Sanchez offers nothing.

IV. The Arbitration Provision Is Not Unconscionable Under Traditional California Unconscionability Analysis.

As noted, *Concepcion* substantially constrains any state's unconscionability standards. But even if it didn't, this arbitration provision would still pass muster under traditional California unconscionability principles, when properly applied.

A. Sanchez Misses The Point That The Arbitration Provision Must Be Reviewed As A Whole For A Lack Of Commercial Justification, Not Dissected To Find Any Possible, Isolated Disadvantage For A Buyer.

Sanchez argues that a court may declare an arbitration provision substantively unconscionable if it subjectively views the agreed-upon process as unfair based on isolated elements that may not always favor consumers. (AB 44-52.) But that is not the law. As the Opening Brief demonstrated:

- California law and public policy require an *objective* standard. (OB 29-30.)
- The objective standard requires not just a one-sided result but also *the absence of any business justification.* (OB 31-34.)
- Only a "modicum of bilaterality" *as a whole* is required, not that each clause benefit each party equally. (OB 35-38.)
- Federal law mandates applying the same standards to arbitration agreements as to other contracts, e.g., *not* applying a strict bilaterality test to each clause. (OB 39-42.)

Sanchez ignores each of these points. Nowhere does he attempt to address an objective standard or provide a definable standard for unconscionability; he relies instead on after-the-fact subjective judicial fairness/reasonableness reactions. Nowhere does he discuss the relevant business justification, e.g., for re-arbitration of outlier results. Nowhere

does he discuss the bilaterality afforded to buyers to re-arbitrate $0 or large adverse results.

Sanchez does quibble about the widely-accepted "shock the conscience" standard. He argues that it is only one possible test and that substantive unconscionability "'traditionally involves contract terms that are so one-sided as to "shock the conscience"' **or** that impose harsh or oppressive terms.'" (AB 43, fn. 7, bold added in Answer Brief.) But his suggestion that a contract term could not "shock the conscience" (i.e., fall outside the broad ballpark of potential reasonableness) yet still be unconscionably "harsh or oppressive," is the exact sort of amorphous, subjective standard that public policy prohibits. (See OB 29-30, discussing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182; *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1316.)

As this Court recently confirmed, "[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* (August 16, 2012, No. S186199) ___ Cal.4th ___ [2012 WL 3516134, *11] (*Pinnacle*).)[4] In other words, an arbitration

---

[4] *Pinnacle* defeats Sanchez's assertion that this Court "has never adopted the 'shock the conscience' standard." (AB 43, fn.7.) Even before *Pinnacle*, this Court followed that standard. (See, e.g., *Tarver v. State Bar of California* (1984) 37 Cal.3d 122, 134 [test for whether fee is unconscionable is whether it is so high "as to shock the conscience," internal quotation marks omitted]; *Bushman v. State Bar of California*

(continued...)

provision must be so harsh or one-sided "that it shocks the conscience." (*Id.* at *13.)[5] The test is not just one-sided, or even harsh, terms, but terms so far outside of the realm of potential acceptability as to "shock the conscience." In the words of the United States Supreme Court, unconscionability requires: "'a contract which no man in his senses, not under delusion, would make on the one hand, and which no fair and honest man would accept on the other." (*Hume v. United States* (1889) 132 U.S. 406, 406, quoted at OB pp. 16, 35.)

Sanchez argues that his and the Court of Appeal's analysis here is "the same analysis engaged in by other appellate panels in recent cases addressing other, non-arbitration contractual clauses for unconscionability." (AB 28.) But the three cases he cites merely parrot the general test outlined in *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*)—which the Opening Brief demonstrates supports petitioner's position. (See *Deleon v. Verizon Wireless, LLC, supra*, 207 Cal.App.4th at p. 814; *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 108-109; *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035-1037; OB at 42-44.)

---

[4] (...continued)
(1974) 11 Cal.3d 558, 563 [same].)

[5] *Pinnacle* follows the weight of Court of Appeal authority, i.e., the standard is whether challenged terms "create such 'overly harsh' or 'one-sided' results *as to* shock the conscience." (*Young Seok Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1515, italics added; accord *Deleon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800, 814; *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1340; *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1330; cases cited at OB 33-34.)

The three cited cases actually prove petitioner's point. *Deleon* and *Lanigan* found contract terms *not* unconscionable. *Deleon* both applied a "shock the conscience" test *and* refused "to impose a reasonableness standard, or to thrust this court into 'the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable.'" (207 Cal.App.4th at p. 814, internal quotation marks omitted.) *Lanigan* upheld a police officer's settlement agreement in which he gave up statutory protections in future disciplinary matters because, on the whole, there was a balance of benefit. (199 Cal.App.4th at p. 1036.) Both support petitioner's arguments. (OB 29-44.) The third case found a triable fact issue regarding a loan calling for monthly payments approximately four times the plaintiff's monthly income—something that would objectively shock the conscience. (*Lona*, *supra*, 202 Cal.App.4th at pp. 108-109.)

The problem is not the test, but how Sanchez applies it. He resorts to exactly what the law and public policy prohibit—an any-plausible-tactical-disadvantage standard: He dissects every possible way that isolated clauses, or even portions thereof, might possibly benefit sellers more than buyers in *some* instances. (AB 44-53.) He, as the Court of Appeal did, impermissibly transforms the "modicum of bilaterality" standard into a strict clause-by-clause bilaterality test, a test *not* applied to non-arbitration contracts. (See OB 39-42; McGuiness & Karr, *California's Unique Approach To Arbitration: Why This Road Less Traveled Will Make All The Difference On The Issue of Preemption Under The Federal Arbitration Act*

(2005) 2005 J. Disp. Resol. 61, 90 ["Whether or not these contractual (arbitration) terms are 'unfair' in some general sense, they are a far cry from the overtly oppressive contracts traditionally policed by courts under the doctrine of unconscionability—i.e., they do not 'shock the conscience.'"].)

Viewed under the correct—in the reasonable ballpark, as a whole—standard, the arbitration provision here is *not* substantively unconscionable, as shown in the opening brief and below.

B. Viewed As A Whole, The Arbitration Provision Falls Within The Ballpark Of Substantive Reasonableness.

Sanchez suggests that arbitration agreements are only enforceable if they exactly mirror litigation or provide a one-shot, single arbitration process for all possible disputes. That is decidedly *not* the law. Short of any such special categorical requirement (a categorical requirement that federal law would prohibit), the arbitration provision here falls well within the ballpark of what reasonable parties might agree upon. It therefore is enforceable.

1. The Answer Brief ignores the multiple benefits that arbitration provides to *both* parties.

The Answer Brief unrelentingly criticizes the arbitration provision. But it ignores that the provision benefits *both* buyers and sellers. For most disputes, the remedy is simple, speedy, and economical dispute resolution. There are no court filing and related fees. The seller advances the buyer's

first $2,500 in arbitration fees. There is no burdensome and expensive discovery. And, there is prompt resolution. Had Sanchez complied with petitioner's arbitration request, his dispute would have been resolved long ago. Sanchez ignores these substantial benefits that flow in most instances to buyers. But they are crucial to any proper unconscionability analysis. Without looking at the mutual benefits it is impossible to judge the provision as a whole.

2. In the overwhelming majority of cases, the arbitration provision affords one-shot, binding arbitration.

Strikingly, in most instances the arbitration provision here produces what Sanchez suggests is the ideal—binding, one-shot resolution. The arbitration provision here subjects *all* claims to arbitration excepting only self-help and small-claims-court remedies. Everything else *must* be arbitrated—the stronger party has no special opt-out power for its claims. (Cf. *Armendariz, supra*, 24 Cal.4th at p. 118.)

Sanchez doesn't claim otherwise. Instead, he contends that the clause permitting a new three-arbitrator re-*arbitration* for awards exceeding $100,000 or granting injunctive relief favors sellers because car sellers are more likely than buyers to suffer such awards. (AB 44-45.) But even assuming that were true (and nothing suggests it is, see section 3, below), Sanchez misses the point that such awards still remain *unlikely in general.* The re-arbitration provision covers *outlier* awards.

The overwhelming majority of car purchase cases will fall between the $0 and $100,000/injunctive relief thresholds. (See Attachment A, hereto [this contract for $53,500 car purchase].)[6] So, in most cases there will be binding, one-shot arbitration with no right to re-arbitration. Sanchez's citations to *Little v. Auto Stiegler* (2003) 29 Cal.4th 1064 and *Saika v. Gold* (1996) 49 Cal.App.4th 1074 are therefore misplaced. (See AB 45.) Neither decision, as the opening brief explained, prohibits outlier provisions. (See OB 45-46.)[7]

The re-arbitration provision is reasonably tailored to ensure arbitration of typical car purchase disputes; it protects *both* parties from outlier results. That's a reasonable business justification. (See *Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 713 [use of three arbitrators for damage claims exceeding $150,000 justifiable as protection against exaggerated claims], cited in OB repeatedly

---

[6] Sanchez chides petitioner for noting statistics about average vehicle sales prices without formally seeking judicial notice. (AB 44, fn. 9.) But the presumption is that arbitration agreements are enforceable. Sanchez, as the party claiming unconscionability, had the burden to present evidence that the process is not likely limited to outlier results. He didn't.

[7] Sanchez cites, as he does throughout his unconscionability argument, *Trompeter v. Ally Financial, Inc.* (N.D. Cal., June 1, 2012, No. C 12-00392CW) 2012 WL 1980894 and *Smith v. AmeriCredit Financial Services, Inc.* (S.D. Cal., Mar. 12, 2012, No. 09cv1076DMS) 2012 WL 834784. Those federal district court cases are merely *Sanchez*-clones and thus add nothing to the analysis. *Smith* expressly adopts the Court of Appeal's reasoning here; *Trompeter* disavows doing so because this Court's review grant rendered *Sanchez* non-citable, but its analysis wholly tracks *Sanchez*. (See *Smith*, 2012 WL 834784 at *5; *Trompeter*, 2012 WL 1980894 at *9.)

but not in AB; *Concepcion, supra*, 131 S.Ct. at pp. 1748, 1752 [arbitration not well suited to high-stakes disputes].)

3. The safeguards against outlier results are fair and benefit *all* sides.

In attacking the seldom-to-be-used re-arbitration clause, Sanchez also fails to discuss the entire clause. He claims the injunctive-relief or $100,000 thresholds necessarily favor the seller. But that is not so. Buyers can suffer awards enjoining them to return the vehicle or for more than $100,000 (e.g., if the vehicle was destroyed or attorney's fees and collection costs are owed per the sales contract's fee/cost provisions, see AA 277-278, ¶¶ 2.a., 3.c.). And, the clause *also* covers $0 awards, a trigger that more likely favors *buyers*. (See OB 24, 44.)

Viewed *as a whole*, the re-arbitration clause is bilateral, balanced and fair. In some instances, it may favor the seller. In others, it may favor the buyer.

4. The self-help and small-claims clauses are objectively reasonable.

Sanchez tries to manufacture one-sidedness by arguing that the parties' retention of self-help and small-claims-court remedies means that the arbitration provision "only provides for arbitration of the claims most likely to be brought by [plaintiff] - not the ones likely to be brought by appellant." (AB 48, capitalization normalized.) He asserts, ipse dixit, that

"the two most common claims made by the seller conveniently happen to be exempted from arbitration" because sellers can repossess autos and because claims for unpaid vehicle payments "will usually be a smalls [sic] claims court matter." (*Ibid.*) From this, Sanchez asserts that petitioner's claims "will almost never be subject to arbitration." (AB 49.) Baloney.

The argument is a smokescreen. To begin with, it is clear that parties can limit the disputes to be arbitrated. (*Concepcion*, 131 S.Ct. at p. 1749; *Pinnacle*, *supra*, 2012 WL 3516134 at *13 [nothing unconscionable in limiting arbitration to construction disputes between home purchaser and builder].) In any event, it is unsurprising that Sanchez fails to provide *any* evidentiary or case support for his sweeping assertions as to common seller claims. None exists. And, as the party asserting unconscionability, Sanchez must present evidence, not conjecture. (*Pinnacle*, *supra*, 2012 WL 3516134 at *12.) He has not, and cannot, meet that burden.

For starters, the arbitration clause does not *exempt* self-help remedies from arbitration. Self-help remedies never require a third-party decisionmaker—judge or arbitrator. They are just that—*self*-help.

Further, the suggestion that sellers use self-help repossession, coupled with small-claims-court claims, to address all their "likely" claims against buyers is utter nonsense:

- Self-help repossession is often unavailable. Sellers cannot indiscriminately enter private property to repossess cars—doing so subjects them to trespass and conversion tort claims. (See, e.g., *Henderson v.*

Security National Bank (1977) 72 Cal.App.3d 764, 770-771 [entry by force unlawful]; 1 The Law of Debtors and Creditors (June 2012) § 7.81 [detailing self-help repossession acts that give rise to an unlawful "breach of the peace"].) Buyers can avoid repossession simply by keeping cars in locked garages or at some unknown location. And, if the vehicle has been destroyed in an accident, sent abroad, or seized by the government for drug or immigration infractions, no vehicle is available to repossess.[8]

- The limited scope and jurisdiction of small claims court makes short work of Sanchez's bald assertion that it's a car seller's forum of choice. To begin with, a business entity's monetary demand cannot exceed $5,000. (Code Civ. Proc., § 116.220, subd. (a)(1).) The parties cannot use attorneys or agents. (*Id.*, §§ 116.530, 116.540.) And, a plaintiff cannot file more than two claims exceeding $2,500 within one calendar year. (*Id.*, § 116.231, subd. (a)).[9] Those limits make small claims court a non-viable option for most car sellers, particularly those selling luxury vehicles.

- Even if a seller is willing to forego using an attorney or agent and has less than two $2,500+ claims a year, its claim may well exceed the jurisdictional maximum. Sellers' claims include more than unpaid car payments. They have the right to recover attorney's fees and collection

---

[8] Nor is the self-help clause necessarily pro-seller. Buyers have self-help remedies too: They can stop paying their debt. There is no legitimate reason why sellers should have to delay repossession rights in order to utilize arbitration.

[9] Just three missed payments by Sanchez would exceed this threshold. (See AA 274.)

costs. (See AA 278, ¶ 3.c.) And, even where self-help repossession is utilized, a repossessed vehicle's value can fall well short of what the buyer owes. (See AA 277, ¶ 2.a., "Your Other Promises To Us," "Gap Liability Notice.") Where repossession is unavailable, small claims court is even less viable.

In truth, in disparaging the small-claims-court exception, Sanchez turns the nature of small claims court on its head. Small claims court is particularly advantageous *to buyers*, because they don't have to hire attorneys and they won't face sellers' attorneys. (OB 43-44.) The court's very purpose is to provide an inexpensive, expeditious, and informal alternative to litigating minor civil claims. (Civ. Code, § 116.120; *Linton v. Superior Court* (1997) 53 Cal.App.4th 1097, 1100.) It is hardly unconscionable for an arbitration agreement—which has the same basic purpose but encompassing larger claims—to preserve that alternative.

5. The cost provisions are fair; regardless, Sanchez cannot claim fee-based unconscionability because he presented no evidence that *he* could not pay arbitration costs.

- ***The initial arbitration***: The Court of Appeal found fault solely with potential re-arbitration costs. Nonetheless, Sanchez now claims the *initial* arbitration cost provision favors petitioner. (AB 50.) But a provision requiring the *seller* to advance the buyer's costs up to $2,500 is hardly pro-seller.

Sanchez asserts that he must front all costs above $2,500, and that "not much of an arbitration can be had for only $2,500." (AB 50.) Even ignoring his failure to present *evidence* supporting this assertion, the prospect of a party having to share arbitration costs cannot be conscience-shocking—indeed, in litigation each party pays substantial filing fees. Sanchez also ignores that the arbitration provision does not limit the seller to advancing $2,500 for the arbitration—it requires the seller to advance $2,500 of the *buyer's portion* of the costs.[10] Consequently, sellers typically must advance all or most costs. It's a pro-*buyer* provision.

- ***The re-arbitration costs.*** Sanchez similarly attacks the re-arbitration cost clause as "pro-appellant." (AB 46.) But a buyer will only initially bear re-arbitration costs if he or she loses the first round—a round where the seller advanced most, if not all, costs. There is nothing untoward about having the first-round loser advance second-round expenses. The opposite might be unreasonable. Undoubtedly, Sanchez would complain if the buyer, having won a first arbitration, had to equally advance fees for a

---

[10] In the typical arbitration, parties must deposit the arbitrator's compensation *equally*. Moreover, under the American Arbitration Association (AAA) rules, consumers are only responsible for $175 to $375 unless the consumer's claim is for more than $75,000 or for injunctive relief. (See, e.g., Consumer Related Dispute Supplementary Procedures found at www.adr.org/[Rules].) Even under the 4 to 8 hours at $400-$600 per hour estimate that Sanchez pulls out of thin air (AB 47), which translates to $800 to $2,400 *per side*; the seller would end up paying *all* initial arbitration costs. Further, most arbitration services, including the AAA, have their own fee-protections for indigent consumers. (See AAA Consumer Related Dispute Supplementary Procedures ¶ C-8.) And, the arbitration provision here allows the buyer to choose a cheaper arbitration service.

re-arbitration. Though a buyer might conclude that re-arbitration is not worth the cost given the stakes at issue, the same is equally true for a seller. The re-arbitration cost clause is hardly conscience-shocking.[11]

- ***Sanchez has never claimed, let alone proved, that he cannot comply with the cost provisions.*** The thrust of Sanchez's cost-argument is that the cost provisions will discourage or prevent a "cash-strapped consumer" from seeking a re-arbitration. (AB 46.) But as the Opening Brief pointed out and Sanchez ignores, he—the buyer of a $50,000 automobile—has never proven that *he* could not advance the fees. (OB 48-49.) And he had the burden of proof. (*Pinnacle*, *supra*, 2012 WL 3516134 at *12.) In *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, on which Sanchez extensively relies (AB 46-47), it was undisputed the plaintiffs could not pay (see 114 Cal.App.4th at pp. 90-91 & fn. 13). Not so here.

Tellingly, Sanchez does not even mention *Green Tree Financial Corp.-Alabama Randolph* (2000) 531 U.S. 79 [121 S.Ct. 513], even though the opening brief discussed it extensively (see OB 27, 49, 58). *Green-Tree* cannot be ignored: As the FAA expressly governs the arbitration provision, *Green-Tree* controls. (See *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1579 [noting that the *Green-Tree* rule applies to

---

[11] In labeling this provision pro-seller, Sanchez contradicts his own argument that the right to seek re-arbitration is pro-seller. If sellers are the ones likely to re-arbitrate, then the requirement that the party invoking that right must advance all costs favors *buyers*. Sanchez can't have it both ways.

agreements governed by the FAA]; see also *ibid.* [applying *Green Tree*-type rule even to agreement governed by California law].)

Green-Tree holds that allowing the speculative risk that someone won't be able to pay to invalidate arbitration "would undermine the 'liberal federal policy favoring arbitration agreements'" (*Green-Tree*, *supra*, 531 U.S. at p. 91); it therefore creates a *case-by-case* "prohibitively expensive" standard for determining whether an arbitration provision is enforceable against a particular party (see *Parada*, *supra*, 176 Cal.App.4th at pp. 1575-1589). Because Sanchez has never claimed, let alone proved, that *he* cannot cover arbitration costs, his cost argument fails under *Green-Tree*.

Morever, as Sanchez has never claimed that he lacks the necessary funds, he is effectively urging a categorical rule that arbitration agreements can never require the weaker party to pay arbitration costs or must specify a mechanism for dealing with impoverished consumers. *Concepcion* prohibits such categorical rules. (See, e.g., *James v. Conceptus, Inc.* (S.D. Tex., Mar. 12, 2012, Civ. A. No. H-11-1183) ___ F. Supp.2d ___ [2012 WL 845122, *10] ["To the extent *Armendariz* invalidates all cost-splitting provisions in arbitration agreements as a categorical rule, it likely is abrogated by *Concepcion*"].)

6. There is no "false choice" of arbitrators.

Sanchez also contends the arbitration agreement gave him a false choice of arbitrators because a year *after* he signed the contract the National Arbitration Forum (NAF) stopped arbitrating consumer matters. (AB 53.)

But unconscionability is determined at the time the contract was made. (OB 39.) So there was no false choice.

Regardless, even without the NAF, buyers may choose *any* comparable organization. Sanchez labels this choice "illusory" because sellers can veto a choice. (AB 53.) But, the implied covenant of good faith and fair dealing restricts sellers to withholding consent only for good reason: "'[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing.'" (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 923.)

C. There Was No Substantial Procedural Unfairness.

Sanchez's procedural unconscionability arguments are similarly overblown. "[P]rocedural unconscionability requires oppression or surprise." (*Pinnacle, supra*, 2012 WL 3516134 at *12.) Neither is present here.

1. Contracts of adhesion are not *per se* procedurally unconscionable.

Sanchez emphasizes that the arbitration agreement was a contract of adhesion. (AB 33.) But a contract's adhesive nature "heralds the beginning not the end, of [the] inquiry into its enforceability"; adhesion contracts are not *per se* procedurally unconscionable. (*Morris v. Redwood Empire Bancorp, supra*, 128 Cal.App.4th at p. 1319.) As *Concepcion* makes clear,

a contract's adhesive nature cannot weigh strongly in favor of procedural unconscionability: "[T]he times in which consumer contracts were anything other than adhesive are long past." (131 S.Ct. at p. 1750.)

Nor can the form nature of *this* contract weigh heavily against enforcement. It is undisputed that over 90% of the contract is statutorily dictated in both content and form. (OB 7.) The dealer cannot be faulted for insisting on a form that is needed to comply with statutory mandates. (See *Pinnacle, supra*, 2012 WL 3516134 at *12 [compliance with statutory mandate negates procedural unconscionability of adhesive provision].)

2. Absent factual findings not made and which cannot be inferred, there can be no assumption about what Sanchez, in fact, did read or understand.

Sanchez contends that he established "surprise" because "undisputed evidence" shows that he didn't read the contract and didn't know about or understand the arbitration provision when he signed it. (AB 34-35, 39.) That contention fails—factually and legally.

As discussed above (see § I), there has been no such factual finding and the contract itself affords ample evidence that Sanchez read it.

Legally, Sanchez cannot avoid the contract's terms merely by claiming he didn't read it. "An arbitration clause within a contract may be binding on a party even if the party never actually read the clause." (*Pinnacle, supra*, 2012 WL 3516134 at *4.) Sanchez knew he was signing a contract for an expensive purchase. He cannot urge "surprise" merely by

saying he never read the contract. (E.g., *Kilgore v. Keybank, Nat. Assn.* (9th Cir. 2012) 673 F.3d 947, 964 [holding plaintiffs' assertion that they were unaware of clause was irrelevant "given the clarity of the contract"].)

3. The arbitration provision was not "hidden."

Sanchez also claims "surprise" on the ground that the arbitration provision was purportedly "hidden" in "two long pages of densely-set provisions printed in very fine font." (AB 37.) That's hyperbole.

The arbitration clause wasn't hidden. It was clearly referenced on the form's front. (See p. 4, *ante*.) Any reasonable person handling the document would realize there are terms on the back. When the back is viewed, the arbitration provision stands out in its own large box, prominently labeled "**ARBITRATION CLAUSE**," "**PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS**." (AA 279.)

Although the contract contains numerous terms, most everything other than the arbitration provision is *statutorily required.* (OB 7.) This is not a case of a seller trying to bury key terms in surplusage.

Any procedural unconscionability was limited at best.

4. The failure to provide arbitral rules does not demonstrate procedural unconscionability.

Finally, Sanchez claims the arbitration provision is procedurally unconscionable because he "was never given copies of the proposed arbitral

rules at the time he signed the contract (a key term he was supposedly agreeing to)." (AB 40.)

But Sanchez was not agreeing to any specific arbitral rules when he signed the sales contract. The arbitration provision expressly gave the buyer the right to *choose* the NAF, the AAA "or any other organization that you may choose subject to our approval." (AA 279.) There was no way to provide all potential governing arbitral rules at the time of contracting—because the governing rules would be determined later when *the buyer* made his choice. If the buyer ultimately decided that he did not like NAF or AAA rules, he had the right to choose a forum with rules he preferred. There was no need to—or conceivable basis to—hand out arbitral rules at the time of contracting. The law does not require the impossible.

* * *

The arbitration provision here is not even close to unconscionable.

V. The Court Of Appeal Was In No Position To Determine Unconscionability Or Severance De Novo.

Not only is the arbitration provision not unconscionable, the Court of Appeal should never have reached the issue. At Sanchez's urging, the Court of Appeal decided unconscionability and severance in the first instance. Sanchez recognizes that these issues ordinarily are ones for the trial court's fact-finding and discretion, but he claims the trial court had *no* discretion here. (AB 53.) Not so.

"[W]hile unconscionability is ultimately a question of law, numerous factual inquiries bear upon that question. The business conditions under which the contract was formed directly affect the parties' relative bargaining power, reasonable expectations, and the commercial reasonableness of the risk allocation as provided in the written agreement." (*Walnut Producers of Cal. v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 644.) The trial court, not an appellate court, is supposed to take evidence on, and weigh, these considerations. As just one example, it would be the trial court's job to resolve the conflicting evidence regarding what Sanchez knew when he signed the agreement. (See pp. 3-4, *ante*.)

For these very reasons, *Caron, supra*, 208 Cal.App.4th 7, recently held that an appellate court could *not* make an arbitration-provision unconscionability determination in the first instance. (*Id.* at pp. 26-27.) As here, the trial court had denied arbitration on the basis of the now-discredited *Fisher, supra*, 187 Cal.App.4th 601, not reaching unconscionability. (*Caron, supra*, 208 Cal.App.4th at p. 12.) There, as here, the plaintiff "argue[d] [that the appellate court] should affirm the trial court's ruling because substantial evidence supports her contention that the arbitration provision is unconscionable." (*Id.* at p. 26.) The Court of Appeal disagreed:

> "But we cannot affirm the trial court's ruling on that ground because the court declined to decide whether any of the arbitration terms rendered it unconscionable. [¶] We . . . cannot decide [plaintiff's] unconscionability challenge in the

first instance because some of her arguments require factual findings that we cannot make." (*Id.* at pp. 26-27.)

The same is true as to severance. A trial court indisputably has *discretion* whether to sever unenforceable terms. And it must exercise that discretion in favor of severing, rather than invalidating a contract: "Significantly, the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement: Although 'the [severance statute] appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement[,] . . . it also appears to contemplate the latter course *only* when an agreement is 'permeated' by unconscionability.'" (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1477-1478, emphasis added, quoting *Armendariz, supra*, 24 Cal.4th at p. 122.) The express severance clause in the arbitration provision here reinforces that policy preference. (AA 279.) Thus, a trial court's discretion *not* to sever here is severely limited.

Sanchez seeks to usurp that discretion by claiming that severance would result in "a jumbled, meaningless arbitration clause." (AB 57.) Wrong. To the extent any of the subject clauses are actually unconscionable, the problem can be resolved entirely by striking the sentences, or portions of those sentences, that contain the problematic language. For example, the trial court could simply excise the re-arbitration provision if it found unconscionability in that process. Such blue-penciling

wouldn't be meaningless. It would produce an arbitration provision that encompasses all claims between the parties (except class action claims), without the allegedly problematic clauses.

To say that the entire entire provision *must* be invalidated reflects the sort of categorical bar against arbitration, under the guise of unconscionability, that *Concepcion* prohibits and the disdain for arbitration that federal law precludes. Severance can be precluded as a matter of law *only* where the problems cannot be fixed without *adding* to the agreement. (*Roman v. Superior Court*, *supra*, 172 Cal.App.4th at p. 1478.) That's not the situation here. In fact, the claimed issues are comparable to those in *Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th 1064, where this Court (post-*Armendariz* but pre-*Concepcion*) held that a one-sided arbitral appeal provision was both unenforceable *and* severable *as a matter of law*. Sanchez never explains why *Little* should not control here or why it would not entitle (or compel) a reasonable trial judge to decide to sever.

VI. Sanchez Has Waived Any Claim About The Continuing Vitality of *Fisher*; In Any Event, *Fisher* Does Not Survive *Concepcion*.

In his answer to the petition for review, Sanchez suggested that upon review being granted, this Court should address whether *Fisher*, *supra*, 187 Cal.App.4th 601, remains good law. But Sanchez has formulated no separately-headed or identified argument to that effect, nor has he formulated a precise issue for review in that regard. He therefore has

waived any such issue. (Cal. Rules of Court, rules 8.204(a)(1)(B), 8.504(b)(1); *Conservatorship of Estate of Hume* (2006) 139 Cal.App.4th 393, 395, fn. 2; *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51-52.)

Sanchez discusses *Fisher* but only in the context of his erroneous argument that the so-called "poison pill" provision terminates the entire arbitration provision even if *Concepcion* nullifies *Fisher*. (See pp. 8-10, *ante*.) In doing so, he asserts that *Fisher* did not rely on the now-disapproved *Discover Bank* rule. (AB 22-23, fn. 22.) But that's a far-fetched reading given *Fisher*'s extensive *Discover Bank* discussion. Regardless, if this Court chooses to delve into the issue, *Fisher*'s rationale is undeniably at odds with *Concepcion*. Here's *Fisher*'s reasoning:

> "'In California, private contracts that violate public policy are unenforceable.' [Citation.] This is a generally available contract defense. Further, under California law, the waiver of a class action right under the CLRA is not restricted to only arbitration agreements." (*Fisher, supra*, 187 Cal.App.4th at p. 617.)

Replace "the CLRA" with "*Discover Bank*" and one has the very argument that *Concepcion* rejected.

California cannot do by statute (the CLRA) what it cannot do by judicial decision (*Discover Bank*). *Fisher* founders on the same shoals as *Discover Bank*. Even the Court of Appeal here did not attempt to resurrect *Fisher*. As one appellate court recently confirmed: "*Fisher* applied the

CLRA's anti-waiver provision in a manner that discriminates against arbitration and therefore the FAA preempts it." (*Caron, supra*, 208 Cal.App.4th at p. 23; see also *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 960 ["the premise that (plaintiff) brought a class action to 'vindicate statutory rights' is irrelevant in the wake of *Concepcion*"].)

CONCLUSION

The Court of Appeal's judgment should be reversed and the matter remanded to the trial court with directions to compel arbitration. Alternatively, the trial court should be directed to consider unconscionability consistent with the limits imposed by *Concepcion* and, if necessary, severability.

Dated: August 28, 2012

Respectfully submitted,

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

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

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 **REPLY BRIEF ON THE MERITS** contains **8,393** words, not including the tables of contents and authorities, the caption page, graphics, this Certification page and appendices.

Dated: August 28, 2012

Robert A. Olson

ATTACHMENT A

[Cal. Rules of Court, rule 8.204(d)]

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On August 28, 2012, I served the foregoing document described as: **REPLY BRIEF ON THE MERITS** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on August 28, 2012, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

Anita F. Cole

SANCHEZ
v.
VALENCIA HOLDING COMPANY, LLC
[California Supreme Court Case No. S199119;
Court of Appeal Case No. B228027;
Los Angeles Superior Court Case No. BC433634]

Hallen David Rosner
Christopher Patrick Barry
Angela Jean Smith
Rosner & Mansfield, LLP
10085 Carroll Canyon Road, Suite 100
San Diego, California 92131
[Attorneys for plaintiff and respondent Gil Sanchez]

Steve Borislav Mikhov
Romano Stancroff & Mikhov PC
640 S San Vicente Boulevard, Suite 350
Los Angeles, California 90048
[Attorneys for plaintiff and respondent Gil Sanchez]

Jon David Universal
Universal Shannon & Wheeler LLP
2240 Douglas Boulevard, Suite 290
Roseville, California 95661
[Attorneys for defendant and appellant Mercedes-Benz USA, LLC]

Jan T. Chilton
Severson & Werson
One Embarcadero Center, 26th Floor
San Francisco, California 94111
[Attorneys for depublication requestor American Financial Services Association]

Lisa Perrochet
John F. Querio
Horvitz & Levy LLP
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
[Attorneys for Amicus Curiae California New Car Dealers Association]

J. Alan Warfield
McKenna Long & Aldridge, LLP
300 South Grand Avenue, 14th Floor
Los Angeles, California 90071
[Attorneys for Amicus Curiae Association of Southern California Defense Counsel]

Deputy Attorney General
State of California, Department of Justice
300 S. Spring Street, 5th Floor
Los Angeles, California 90013
[Served per Business & Professions Code § 17209 and California Rules of Court, rule 8.29]

Office of the District Attorney
Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012-3266
[Served per Business & Professions Code § 17209 and California Rules of Court, rule 8.29]

Clerk to the
Hon. Rex Heeseman
Los Angeles County Superior Court
111 North Hill Street, Dept. 19
Los Angeles, California 90012
[LASC Case No. BC433634]

Clerk
California Court of Appeal
Second District, Division One
300 South Spring Street
Los Angeles, California 90013
[Court of Appeal Case No. B228027]

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On August 29, 2012, I served the foregoing document described as: **REPLY BRIEF ON THE MERITS** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on August 29, 2012, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Anita F. Cole