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)

PETITIONER'S COMBINED REPLY TO SUPPLEMENTAL BRIEFS OF RESPONDENT AND AMICUS CONSUMERS FOR AUTO RELIABILITY AND SAFETY

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

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INTRODUCTION

All parties agree that there should be a single, uniform, objective standard for substantive unconscionability. Where petitioner parts company with Sanchez and his amicus, Consumers for Auto Reliability and Safety (CARS), is that: (1) the standard needs to present a high hurdle to invalidating contract provisions; and (2) the standard needs to be truly objective. The shocks-the-conscience standard embodies these values, but those proffered by Sanchez and CARS do not.

ARGUMENT

I. All Parties Agree That A Single, Uniform, Objective Standard Is Needed And That Many Of The Formulations To Date Do Not Meet That Criteria.

The supplemental briefing reveals multiple points on which both parties agree: "uniformity in this area of the law" is important, and "subjective tests lead[] to inconsistent results." (Resp. Supp. Br. at p. 3; see also Pet. Supp. Br. at pp. 2-4.) The amici confirm this wisdom. (See Supplemental Brief of Amicus Curiae Association of Southern California Defense Counsel; Supplemental Brief of Amicus Curiae Pacific Legal Foundation; Supplemental Brief of Amicus Curiae Consumers for Auto Reliability and Safety; Supplemental Brief of Amicus Curiae Federated Mutual Insurance Company.)

There is further common ground between petitioner and Sanchez. Standards such as "overly harsh," "unreasonably favorable," "unduly oppressive," "unfairly one-sided" and the like escape neither supplemental

brief unscathed. (Pet. Supp. Br. at p. 26; Resp. Supp. Br. at p. 6.) Sanchez rightly acknowledges that these formulations leave too "much leeway in the test." (Resp. Supp. Br. at p. 6.) They are amorphous and, ultimately, subjective.

Where the parties disagree is that Sanchez attacks "shocks the conscience" as both a high hurdle and subjective and instead proposes his own wide-open, any-consumer-might-reject standard. As we explain, the shocks-the-conscience standard appropriately presents a high hurdle and, properly understood, is objective. The standard Sanchez proposes does the opposite. It calls on courts to rewrite contracts willy-nilly, to readjust for bargaining power, and to reject terms that any reasonable consumer might conceivably find to be unfair or unreasonable. And, it ultimately is a subjective test.

II. Any Standard Must Present A High Hurdle To Judicial Remaking Of Contracts.

Glaringly absent from Sanchez's and CARS's approaches is any recognition that a substantive unconscionability standard must impose some restraint on judicial remaking of contracts. Substantive unconscionability is decidedly *not* a device for the judiciary to pass on the fairness of all contracts or the fairness of all consumer or adhesion contracts. "The principle is one of the prevention of oppression and unfair surprise [citation] and *not* of disturbance of allocation of risks because of superior bargaining power." (Legis. Com. com., Civ. Code, § 1670.5, emphasis added.) "All of the[] formulations point to the central idea that

unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain'. . . ." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145.) "'[A] contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable.'" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117, quoting with approval, *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1536.)

Yet, Sanchez and CARS propose rules that would make the judiciary the arbiters of what is a good or bad bargain. That is not an appropriate judicial role. More important, that is decidedly *not* the role the Legislature has given to the courts.

III. The Shocks-The-Conscience Test Provides The Appropriate Standard.

A. "Shocks the Conscience" Is An Appropriate, Objective Standard.

Sanchez attacks the shocks-the-conscience test by asking whether "anything really 'shock[s] the conscience' anymore?" (Resp. Supp. Br. at p. 6.) But a high hurdle (as "shocks the conscience" appropriately is, because "shocks" affords that meaning) is not an impossible one. "Shocks the conscience" is in wide use by many states today, without any suggestion that it is an impossible standard. (See Pet. Supp. Br. at pp. 15-16 & fn. 3.) An illusory arbitration process where one party effectively selects the decisionmaker, for example, shocks the conscience. (*Graham v. Scissor-*

Tail, Inc. (1981) 28 Cal.3d 807, 820, citing *Jacklich v. Baer* (1943) 57 Cal.App.2d 684 [a "shocks the conscience" case].) More recently, appellate courts have struck down provisions that would shock the conscience. (E.g., *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138 [provision written in English that Spanish speaking employees, who were refused a Spanish version, had to sign as a condition of employment waived statutory rights and required employees to pay the employer's attorneys fees in any arbitration].) The standard is not toothless. Rather, it requires something outside the realm of what a reasonable person would agree to absent coercion.

Nor is "shocks the conscience" a subjective standard. Properly understood, the standard is objective: (1) the "conscience" at issue is not one judge or justice's individual conscience, but the collective conscience of reasonable people of common sense; and (2) a result "shocks the conscience" when it is outside the range of results that a reasonable person might view as available based on contemporary values. (See *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 214 ["inequality. . . must be so strong and manifest as to shock the conscience and confound the judgment of *any man of common sense*," emphasis added]; Pet. Supp. Br. at p. 17.) In other words, the standard is that a provision is substantively unconscionable if *no* reasonable person would have agreed to it without coercion.[1] The standard is neither overinclusive

[1] The "sliding scale" for procedural and substantive unconscionability that sometimes is referenced affects the degree of certainty required. If there is minimal procedural unconscionability (e.g., a provision that would have been easily noticed and understood had a party

(continued...)

nor underinclusive (Pet. Supp. Br. at p. 24), and it has long been applied in California and most other states without difficulty. (*Id.* at pp. 16-17.)

The shocks-the-conscience standard is not concerned with whether someone might think they could have gotten a better deal or negotiated better wording had there been extended negotiations on every contract term. It is concerned with whether the terms agreed to are outside the *range* of provisions to which reasonable people might agree. That is an objective standard.

B. Sanchez's "Best Illustration" Of Discontinuity In "Shocks The Conscience" Cases Is No Discontinuity At All.

According to Sanchez, the "best illustrat[ion]" of the supposedly loose nature of "shocks the conscience" and other currently-used terms is a comparison between two cases in which this Court has granted review, *Goodridge v. KDF Automotive Group, Inc.* (Ct. App. 2012) 147 Cal.Rptr.3d 16, review granted Dec. 19, 2012, S206153, and *Flores v. West Covina Auto Group* (Ct. App. 2013) 151 Cal.Rptr.3d 481, review granted Apr. 10, 2013, S208716. (See Resp. Supp. Br. at p. 5.) Both cases, of course, are not citeable as authority. But if they were, they stand for the *opposite* of what Sanchez claims.

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[1] (...continued)
read the contract), then a high degree of certainty that no reasonable person would have agreed to the challenged provision is required. If, on the other hand, there is substantial procedural unconscionability (e.g., a contract presented in English to a non-English speaker who is required to sign it to retain employment or to obtain a necessity of life or medical care), then a court would only need to be reasonably certain that no reasonable person would have agreed to the provision without coercion.

Sanchez claims that both *Goodridge* and *Flores* applied "substantially similar terms" for substantive unconscionability, including a shocks-the-conscience formulation, yet reached contradictory conclusions. (Resp. Supp. Br. at pp. 5-6.) He is wrong. *Goodridge* and *Flores* did not use the same tests. *Flores* concluded the arbitration terms were not substantively unconscionable while applying the "shocks the conscience" standard, a standard that it noted was a high hurdle involving more than "mere benefit to one side over the other." (151 Cal.Rptr.3d at p. 503.) *Goodridge*, on the other hand, held the same arbitration terms substantively unconscionable only after expressly disavowing the shocks-the-conscience formulation. *Goodridge* "ch[ose] *not* to apply the higher standard adopted by some courts that would require [a] provision to be so one-sided as to shock the conscience." (147 Cal.Rptr.3d at p. 29, fn.4, emphasis added, internal quotation marks omitted.) Thus, Sanchez's "best illustrat[ion]" of discontinuity in applying the shocks-the-conscience test is no discontinuity. (Resp. Supp. Br. at pp. 5-6.) Rather, it illustrates the difference between a high-hurdle, shocks-the-conscience standard and a lesser, judicial free-rein standard.

Indeed, we are aware of *no* case in which courts have said that different results can be forthcoming under a shocks-the-conscience standard.[2]

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[2] Sanchez contends the shock-the-conscience standard is "unattainable" and "leads to inconsistent results" because slavery was legal when our country started but is illegal today. (Resp. Supp. Br. at p. 7.) That misses the point. A provision must shock the collective conscience based on *contemporary* mores and values. Under contemporary mores and values, slavery would shock the conscience today without any inconsistent

(continued...)

IV. Sanchez's Proposed Any-Consumer-Might-Reject Test Is Neither Objective Nor Sufficiently Stringent.

Sanchez does not suggest that he could bear his burden of proof to show substantive unconscionability under a shocks-the-conscience standard or the other formulations that this Court has identified. Instead, he proposes a test that allows courts to refuse to enforce an arbitration provision if: (a) the particular consumer at issue did not reasonably expect it; or (b) *any* reasonable consumer might not have agreed to it. The standard is both subjective and invites wide-ranging judicial interference with contracts.[3]

A. Sanchez's *This* Party's Expectations Prong Is Subjective.

The first half of Sanchez's test asks whether "the terms in question [are] within the reasonable expectations of *the consumer*" at issue. (Resp. Supp. Br. at p. 3, emphasis added.) The test would require courts to consider the specific consumer before them and inquire into his or her own reasonable expectations. Although Sanchez claims his test is objective, his application of it confirms that it is subjective. He relies on his own, personal "reasonable expectations," describing what he personally had a "reason to suspect" was written on "the back of the contracts" and citing his personal "understand[ing of] the effect [of] the arbitration clause" in the

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[2] (...continued)
results.

[3] Sanchez presumes that the provision here is procedurally unconscionable. As petitioner has explained elsewhere, it is not. (Brief on the Merits at pp. 50-54; Reply Br. at pp. 29-32.) Not only was the provision in a highlighted black box, it was specifically referenced immediately above Sanchez's signature line.

agreement. (Resp. Supp. Br. at p. 10.) Focusing on a party's personal level of understanding, expectations, and state of mind is the hallmark of a *subjective* test. (See *Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal.4th 1113, 1120, 1128 ["purely subjective" inquiry "evaluates the state of mind of the" party and "focuses on the actual state of mind," not other factors such as reasonableness]; *Kleveland v. Siegel & Wollensky, LLP* (2013) 215 Cal.App.4th 534, 556 ["subjective standard" for determining merit of appeal "looks to the motives of the appealing party and his or her attorney" while "objective standard looks at the merits of the appeal from a reasonable person's perspective"]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1094, 1100 ["subjective standard . . . focuses on the (individual's) state of mind"].)

Focusing on a consumer's "reasonable expectations" also distorts the contracting process, elevating consumer expectations over commercially reasonable and necessary interests of vendors. As one commentator has recently explained:

> Courts should . . . avoid the "reasonable expectations" of consumers when assessing substantive unconscionability. . . . [A]ttention to reasonable expectations can result in the over-policing of commercially reasonable form terms. A provision outside of the reasonable expectations of a consumer may impose only slightly on consumer interests while serving an important commercial purpose. Although such a term may "surprise" consumers unfamiliar with

> industry practices, absent an unjustified burden on consumer interests, the term can hardly be considered sufficiently "oppressive" to justify relief. Therefore, such a provision included in a consumer form contract should not be subject to invalidation on the basis of substantive unconscionability.

(Lonegrass, *Finding Room for Fairness in Formalism: The Sliding Scale Approach to Substantive Unconscionability* (2012) 44 Loy. U. Chi. L.J. 1, 62, footnote omitted.)[4]

The arbitration clause at issue here serves an important commercial purpose, recognizing that "individuals and dealers gain much by speedy and efficient arbitration but no one is comfortable using that process" in every context. (Pet. Supp. Br. at pp. 28-29.) Holding the clause substantively unconscionable based on mere subjective surprise, or Sanchez's personal belief that he made what he now considers a bad bargain, sends the law in precisely the wrong direction, and violates the fundamental premise that unconscionability "requires a substantial degree of unfairness beyond 'a simple old-fashioned bad bargain.'" (*Sonic-Calabasas A, Inc. v. Moreno*, *supra*, 57 Cal.4th at p. 1160.) Sanchez's standard does not even require a bad bargain; it only requires second-thoughts or remorse as to the bargain, in fact, made.

---

[4] Empirical research of consumer behavior has called into question whether "consumers[']. . . expectations about the standardized terms of . . . contracts" are measurable. (See Lonegrass, 44 Loy. U. Chi. L.J. at pp. 43-44; Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine* (1998) 5 Conn. Ins. L.J. 295, 304-307.) Because there is no barometer for measuring "reasonable expectations," the test provides no firm guidance, and encourages lower courts to form "an I-know-it-when-I-see-it conclusion based on unarticulated or unexamined reasons." (Pet. Supp. Br. at p. 2.)

B. Sanchez's Any-Consumer-Might-Reject Test Would Fundamentally Distort Unconscionability By Imposing Judicial Rebalancing Of All Consumer Transactions.

The second half of Sanchez's test is even more radical. Under Sanchez's proposal, a term is enforceable and not substantively unconscionable only where "a reasonable consumer" with the opportunity to reject the terms "would" affirmatively accept it. (Resp. Supp. Br. at p. 3.) If *any* reasonable consumer *might not* accept the term, the term would be deemed unconscionable. The clear difference between what Sanchez proposes and petitioner's shock-the-conscience test is this: Under Sanchez's test, if *any* reasonable consumer might not have agreed to the provision it is substantively unconscionable; under petitioner's shock-the-conscience test, a provision is substantively unconscionable only if *no* reasonable consumer would have agreed to it.

The test Sanchez proposes is ultimately subjective because it asks the court to put itself in the consumer's shoes. If the court would not have agreed to the provision, then by definition *a* reasonable person might not have done so. Under Sanchez's approach, only provisions that are one-sided *in favor of a consumer* may be sustained.

Adopting Sanchez's approach to unconscionability would be a dramatic departure from longstanding statutory and judicial approaches to unconscionability. As *Sonic-Calabasas* recognizes, the unconscionability doctrine stops far short of reordering parties' transactions merely because one reasonable consumer, somewhere, might consider the terms unacceptable to him or her. (See 57 Cal.4th at p. 1160 [a mere "old-

fashioned bad bargain" is not subject to unconscionability doctrine, internal quotation marks omitted].) Courts do not use unconscionability to assume "the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable." (*Deleon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800, 814, internal quotation marks omitted; *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1323 [same]; *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391 [same].) A court may not "disturb[] . . . allocation of risks" in a contract merely because one party has "superior bargaining power." (Legis. Com. com., Civ. Code, § 1670.5.) Yet, Sanchez would impose a consumer's-interest-trumps-all standard.

In brief, unconscionability has never been, and should never be, a doctrine that saves parties from a bargain that some reasonable people might accept and other reasonable people might reject. It is not a way for parties, even consumers, to renegotiate after the fact for a better deal. Yet that is what Sanchez proposes. Under Sanchez's approach, only deals *most favorable* to consumers may be deemed not unconscionable. That is a far cry from "not . . . disturb[ing] . . . allocation of risks because of superior bargaining power" (*ibid.*) or "provid[ing] a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need . . . ." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal.4th at p. 117, quoting with approval, *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at p. 1536).

C. Sanchez's Arbitration-Only Approach Contradicts Controlling Federal Law.

Another problem with Sanchez's proposal is that he urges a "test for whether an *arbitration clause* in an adhesion contract is substantively unconscionable." (Resp. Supp. Br. at p. 3, emphasis added.) Federal law prohibits an arbitration-only approach to state-law unconscionability doctrine. Although the Federal Arbitration Act "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as . . . unconscionability," arbitration agreements cannot be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 1746].) States cannot "place arbitration clauses on an unequal 'footing,'" in relation to other contractual terms. (*Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 281.)

The tone and tenor of Sanchez's Supplemental Brief reflect a special distrust for arbitration provisions and a misplaced suspicion that they operate to create unfair processes. Sanchez *presumes* that consumers are, and should be, suspicious and unwilling to agree to any arbitration protocol. But that distrust of arbitration is "far out of step with [the Supreme Court's] strong endorsement of the federal statutes favoring this method of resolving disputes." (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30.) It is also out of step with the reality that arbitration often *benefits* consumers, affording a quick and economical remedy. That *this* consumer and his lawyer in retrospect dislike arbitration (because they seek to

transform a simple dispute into a complex one), or that some consumer somewhere might have had doubts about arbitration, cannot suffice under controlling federal law. Federal law bars a special, arbitration-only or arbitration-distrustful test.

V. Amicus CARS Misreads *Williams* And Proposes A Test That Both Parties Disfavor.

In their supplemental amicus brief, CARS proposes using selected "unreasonably one-sided" and "unreasonably favorable" language from *Williams v. Walker-Thomas Furniture Company* (D.C. Cir. 1965) 350 F.2d 445, 449-450; it claims those approaches are distinct from a "shocks the conscience" approach. (CARS Amicus Br. at pp. 1, 4.) But as both interested parties in this case have explained, in unison, terms like "unreasonably" or "unfairly," when used without any reference or comparison point, are vague and only bring "politics . . . into play." (Resp. Supp. Br. at p. 6; see also Pet. Supp. Br. at p. 26.)

And, as explained in petitioner's supplemental brief, *Williams* actually did not depart from traditional standards of unconscionability. (Pet. Supp. Br. at pp. 18-19.) Although *Williams* used "unreasonably one-sided" and "unreasonably favorable" as short-hand phrases, the court also emphasized that in determining such reasonableness and fairness "when no meaningful choice was exercised upon entering the contract," the appropriate test is "whether the terms are so extreme as to appear unconscionable *according to the mores and business practices of the time and place.*" (350 F.2d at p. 450, emphasis added, fn. omitted.) In the

accompanying footnote, *Williams* says that "[t]he traditional test . . . is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other.'" (*Id.* at p. 450, fn. 12; see *Hume v. United States* (1889) 132 U.S. 406, 411, citing *Earl of Chesterfield v. Janssen*, 2 Ves.Sen. 125, 155, 28 Eng.Rep. 82, 100 (Ch. 1750) [same].) Tethering the standard to contemporary mores and business practices and to what "no man" would accept is closely akin to a "shocks the conscience" standard. *Williams*, thus, supports the shocks-the-conscience test, not some open-ended judicial guessing as to what is "unreasonably" one-sided or favorable.

Unlike Sanchez, CARS does at least suggest that substantive unconscionability should present a hurdle beyond a bad bargain or a term that the consumer, in retrospect, now seeks to disavow. But even then, the CARS standard is completely amorphous. CARS never suggests how high that hurdle should be. It just says that there should be some hurdle, without identifying where the line should be drawn. Ultimately, CARS proposed "unreasonably one-sided"/"unreasonably unfair" standard is a recipe for divergent results resting on subjective judicial reactions. It should not be adopted.

CONCLUSION

On this much, the parties agree: California needs a uniform, objective standard for substantive unconscionability, and dangling adjectives like "unduly," "unreasonably," "unfavorably," and "unfairly" miss the mark.

But the standard also needs to present a significant hurdle against courts simply remaking contracts after the fact just because they believe the contract is not as favorable to some party or some consumer as it might be.

The appropriate single, uniform, objective standard should be "shocks the conscience" – that is, an outcome that *no* reasonable person would have agreed to absent coercion. The standard proffered by Sanchez – what *any* reasonable consumer might have found disadvantageous or what *this* particular consumer now claims after the fact he would have rejected – does not meet the mark.

This Court should confirm that "shocks the conscience" is the standard for substantive unconscionability.

Dated: March 18, 2014 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c), I certify that this **PETITIONER'S COMBINED REPLY TO SUPPLEMENTAL BRIEFS OF RESPONDENT AND AMICUS CONSUMERS FOR AUTO RELIABILITY AND SAFETY** contains **3,540** words, not including the tables of contents and authorities, the caption page, graphics, this Certification page and appendices.

Dated: March 18, 2014

Robert A. Olson

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 March 19, 2014, I served the foregoing document described as: **PETITIONER'S COMBINED REPLY TO SUPPLEMENTAL BRIEFS OF RESPONDENT AND AMICUS CONSUMERS FOR AUTO RELIABILITY AND SAFETY** on the parties in this action by serving:

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Executed on March 19, 2014, 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;
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