

January 25, 2012

VIA FEDEX

Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
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Re: *Sanchez v. Valencia Holding Company, LLC*
California Supreme Court Case No. S199119
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Under rule 8.500(g) of the California Rules of Court, amicus curiae the California New Car Dealers Association writes in support of Valencia Holding Company, LLC's petition for review, which challenges an opinion finding an arbitration clause used in a large majority of auto purchase agreements in this state to be unenforceable.

Valencia Holding raises several review-worthy issues, including how the Court of Appeal opinion misinterprets *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*) and conflicts with other California Court of Appeal decisions interpreting the same arbitration provision. We will focus on the practical problems created by the opinion for car dealers and buyers.

Since *Concepcion* was decided, state and federal courts have arrived at no consensus regarding the extent to which federal preemption limits the use of state-law unconscionability rules to invalidate arbitration provisions in consumer contracts. The resulting uncertainty as to the enforceability of millions of existing auto purchase contracts is intolerable, generating resource-sapping litigation that harms both car dealers and buyers throughout California.

The opinion in this case is an excellent vehicle for this court to resolve how lower courts should be implementing the *Concepcion* decision and for resolving the split in authority among the California courts concerning this particular arbitration clause. The straightforward fact pattern in this case, combined with the procedural posture in which the Court of Appeal analyzed several common features of arbitration agreements to find unconscionability as a matter of law, presents an ideal opportunity "to secure

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uniformity of decision” and “to settle an important question of law.” (Cal. Rules of Court, rule 8.500(b)(1).)

INTEREST OF AMICUS CURIAE

The California New Car Dealers Association (CNCDA) is a California non-profit mutual benefit corporation chartered to advance the interests of the new motor vehicle dealer industry in California. The CNCDA’s members are associated with new motor vehicle dealerships in California; of the more than 1,200 new vehicle dealers in California, more than 1,000 are members of the CNCDA. The CNCDA routinely advocates the interests of new car dealers in courts across the state by filing amicus curiae briefs in cases involving issues of vital concern. In fulfilling that role, the CNCDA has appeared multiple times before this court and the California Courts of Appeal.

The CNCDA’s new car dealer members negotiate retail installment sale contracts that include arbitration provisions allowing for a predictable and expeditious resolution of future disputes between the parties. The arbitration clause held to be unconscionable in this case is used by a large majority of the CNCDA’s members and governs several million purchase transactions. The Court of Appeal’s holding creates significant legal uncertainty regarding the continued use of this arbitration clause, affects the legality of millions of car purchase contracts in this state, and is accordingly of great interest and concern to the CNCDA’s members and the car-buying public.

WHY REVIEW SHOULD BE GRANTED

- I. **The arbitration clause at issue appears in a large majority of new and used car purchase contracts throughout California, and its validity is an issue of substantial importance that warrants this court’s review.**

Buying a car has become a fairly routine event for adults in California, and many car purchasers—especially purchasers of high-end luxury vehicles like Mr. Sanchez—have become quite sophisticated in these dealings. They generally have a fixed amount they choose to spend on their purchase, and they use internet resources to take full advantage of the fierce competition among car dealers to obtain a price that

leaves a very slim profit margin. Consumers also prefer an expedited, inexpensive resolution, in a less than formal setting, of disputes arising out of their purchases.

Dealers are predominantly family-owned businesses. (Cf. PFR 23-24 [over the past several years, average annual dealership profits nationwide have ranged between \$277,000 and \$642,000 and average dealership net worth between \$2.2 million and \$2.6 million].) California dealers, who are subject to a broad array of statutes and regulations dictating their conduct throughout the car sales process (see, e.g., 15 U.S.C.A. §§ 1601-1667f; Civil Code, §§ 2981-2984.6), have every interest in keeping that process running smoothly, without adding undue transaction costs to address disputes with consumers.

Because of the many intricate statutory and regulatory requirements governing auto contracts, car dealers must use standardized forms. California car dealers have used the Law Printing form containing the arbitration clause at issue in *Sanchez* for many years. Last year, approximately 1.3 million new car transactions were consummated in this state, most using the arbitration clause at issue here. Millions more, involving used cars, motor homes, trailers, and off-road vehicles, also use this standard purchase agreement and arbitration clause.

While disputes are not the norm, they do arise on occasion, and in the context of car sales, arbitration is a fair and efficient alternative to dispute resolution through the courts. The arbitration clause contained in the Law Printing auto purchase agreement was specially designed for auto purchase transactions and is well-suited to the type of disputes that arise in this area. The arbitration clause is carefully crafted to give both car buyers and dealers the benefits of arbitration for everyday disputes as well as protection against outlier results.

Most disputes regarding cars involve small-dollar litigation. Arbitration before the American Arbitration Association (AAA) offers informal resolution of such disputes, most of which are fact-intensive but too small to justify a full-blown trial under strict rules of evidence. Informality aids car buyers because it makes proceeding under these circumstances less of a challenge. Arbitration is also comparatively quick, which is especially important now that the state's budget crisis is lengthening delays in court.

Dealers and their customers can only benefit from the speedy resolution of their grievances afforded by this procedure.¹

Furthermore, most buyer-dealer disputes fall within the \$0 to \$100,000 range for which the arbitration clause allows no appeal. In those situations, the agreement provides a simple, straightforward, one-round arbitration that produces a final award and a quick resolution. For the outlier cases where the claimant receives \$0 or is awarded over \$100,000, the clause provides for a special three-arbitrator review, but still subject to the basic rules of the AAA. As will be explained in more detail in the next section, those outlier cases, although infrequent, carry the potential for a more severe economic impact for the dealer and the buyer, both of whom are guaranteed this appeal right.

The *Sanchez* opinion leaves car dealers and their customers in a state of confusion regarding whether this arbitration clause will be enforced. Before *Concepcion*, the Courts of Appeal were already split over whether this arbitration clause was unconscionable. (*Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 845 & fn. 21 (*Arguelles-Romero*) (finding no unconscionability); *Fisher v. DCH Temecula Imports* (2010) 187 Cal.App.4th 601, 617-620 (*Fisher*) (finding unconscionability because of the class action waiver). After *Concepcion* upheld this type of specially designed arbitration clauses for consumer contracts, *Sanchez* side-stepped *Concepcion*, ignored *Arguelles-Romero*, and found the same clause unconscionable.

The Court of Appeal's opinion in *Sanchez* and the varying outcomes and analyses in *Arguelles-Romero* and *Fisher*, leave the issue of enforceability of this arbitration provision in a state of suspense. This combination of opinions also ensures that any future effort to enforce the arbitration provision is likely to be litigated at least through the Court of Appeal level. Not only is this inefficient from the standpoint of judicial

¹ Doubtless for these reasons, both Congress and the state legislature have recognized that disputes with auto manufacturers—particularly warranty claims—are well-suited to arbitration. (See, e.g., 15 U.S.C.A. § 2310(a); Civ. Code, § 1793.22, subs. (c) & (d).) This is in addition to the general federal and state policies favoring arbitration. (See *CompuCredit Corp. v. Greenwood* (Jan. 10, 2012, No. 10-948) __ U.S. __ [2012 WL 43514, at p. *3]; *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 97-98.)

resources, it defeats the main reasons for establishing an arbitration procedure—expedited resolution and reduced expense—by ensuring that the arbitration provision itself will be the subject of exhaustive litigation.

Because of *Sanchez*, dealers are left with uncertainty as to whether they can invoke the arbitration clause in their contracts. Forgoing this specially crafted arbitration provision, however, will deprive both dealers and buyers of the benefits of the Law Printing arbitration provision, including the expeditious and relatively inexpensive resolution of garden variety customer disputes. Accordingly, this court should grant review to resolve the uncertainty regarding this arbitration clause that the Court of Appeal’s decision creates.

II. After *Sanchez*, California law is unclear concerning contracting parties’ ability to provide for an “appeal” to a three-judge arbitration panel in the event of certain arbitral outcomes.

The Court of Appeal concluded three aspects of the arbitration “appeal” provision were substantively unconscionable: (1) the clause allowing a complaining party to appeal to a three-arbitrator panel an award of \$0, while also allowing a responding party to seek such review of any award exceeding \$100,000 against it; (2) the clause permitting a party to appeal an award of injunctive relief against it; and (3) the provision that an appealing party must advance a filing fee and other arbitration costs, subject to final apportionment by the arbitrators. (Typed opn., 7, 18-27.)

Proceeding from the legally false premise that every provision in an arbitration agreement, viewed in isolation, must *equally* benefit or burden both sides of the transaction, the Court of Appeal assumed that the appeal provision in question would inure mostly to the benefit of the car dealer. Even if the Court of Appeal’s novel imposition of a provision-by-provision “bilaterality” test was appropriate, it would provide no basis for categorically invalidating the arbitration agreement in question.

(1) Appellate Rights for Awards of \$0 or Awards Exceeding \$100,000: The monetary award thresholds providing appellate rights under the arbitration agreement make sense for both parties. A buyer who asserts a claim and receives nothing can appeal. A buyer facing a claim by a dealer for nonpayment may face a judgment of more than \$100,000 (especially when attorney fee awards are considered), and may likewise appeal. Similarly, the dealer who receives nothing, or against whom an award

of over \$100,000 is returned, may appeal. With the *average* price of a new vehicle in California at \$30,792, the parties to the contract can rationally agree that a provision limiting appeals to awards of \$0 or awards greater than \$100,000 protects against outlier awards, while avoiding extra costs for mid-range awards. This benefits both the buyer and the dealer.

This bracketed threshold approach to providing appellate rights was spurred by this court's opinion in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*), where an employer's arbitration clause was found unconscionable in that it allowed an appeal in the event of an award exceeding \$50,000. This court found that, in the context of *that* case, the appeal procedure would benefit only the employer, which typically would have no occasion to seek significant monetary remedies against the employee. Car dealers, unlike employers, are sometimes owed significant amounts by car buyers, and they have relied on this court's suggestion in *Little* that the analysis would be different if an appeal were allowed (presumably, by the employee) in the event of a zero award. (*Id.* at p. 1073).

The appeal thresholds in the arbitration clause used in *Sanchez* and millions of other similar transactions were crafted to conform to the standard established in *Little*. The Court of Appeal's conclusion that this provision is, nonetheless, insufficiently bilateral conflicts with *Little* and jeopardizes parties' ability to structure their arbitration to achieve a balance of efficiency and fairness.

(2) Appellate Rights for Awards Involving Injunctive Relief: The Court of Appeal's discussion of the availability of appeal for awards including injunctive relief has generated further uncertainty. First, the Court of Appeal assumed that only a buyer would pursue injunctive relief, rendering this clause insufficiently bilateral. But when dealers seek return of a car through temporary restraining orders, preliminary injunctions, and writs of possession against buyers under state claim and delivery laws, the *buyer* may invoke the injunction appeal clause. (See Code Civ. Proc., §§ 511.010-516.050.)

Moreover, even if one were to assume that most injunctions target dealers, the clause should not be invalidated; it is consistent with the overall principle of fairness and efficiency dictating that extreme awards for or against *either side* are subject to review by a three-arbitrator panel, while more routine monetary remedies become final without further review. After *Sanchez*, is it unlawful to structure an arbitration clause so that the simplest cases can be resolved by a single arbitrator, while reserving

arbitral appeals for more complicated or higher-stakes cases? More generally, have car dealers and buyers lost the right to specify different levels of arbitration procedures for different types of disputes? These questions raised by the Court of Appeal's opinion impact car dealers and buyers throughout the state, and cry out for this court's attention.

(3) Advancing Filing Fee and Other Costs on Appeal: By holding that the provision requiring an appealing party to advance arbitral fees and costs is unconscionable absent a cost-waiver procedure for an indigent claimant, the *Sanchez* court has created *enormous* uncertainty regarding the level of specificity allowed and required in an arbitration agreement. (Typed opn., 24-27.)

In *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 90-92 [121 S.Ct. 513, 148 L.Ed.2d 373], the United States Supreme Court seemingly foreclosed such an analysis, holding that the party seeking to avoid arbitration bears the burden of showing that prohibitive arbitral expenses preclude resort to the arbitral forum, and that mere speculation as to inordinate expenses is insufficient to meet this burden. Nothing in *Sanchez* suggests that the claimant ever demonstrated the lack of a cost-waiver provision would preclude his resort to an arbitral appeal with respect to his purchase of a \$53,000 Mercedes. Nor does the court's analysis account for the recognized fact that costs of litigation, such as arbitration fees, are typically borne by plaintiffs' *counsel*, not by the plaintiffs themselves, under standard contingency fee agreements. (*Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 733.)

Moreover, no authority holds that all costs must be evenly shared or advanced. California's arbitration statute contemplates that the parties are free to provide otherwise, stating that *absent an agreement to the contrary*, each party pays a pro rata share of costs. (Code Civ. Proc., § 1284.2.) By disallowing such an agreement here, the Court of Appeal's approach conflicts both with California statutory law and with California cases acknowledging the flexibility that arbitrators have in shaping procedures to fill gaps in the arbitral rules. (See *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831 ["parties to a private arbitration need not, and sometimes may not, specify every detail, characteristic, and consequence of the proceeding they contemplate"]; *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1450-1456 [arbitrators have authority to interpret arbitral rules to fashion a fair procedure for the arbitration, even where rules may be silent or ambiguous].)

III. After *Sanchez*, California law is unclear concerning contracting parties' ability to preserve certain types of non-judicial remedies outside of arbitration.

Arbitration is a form of “alternative dispute resolution” that provides an alternative to *court* litigation. Several other remedies exist by statute and common law that do not require parties to resort to litigation—namely, self-help remedies. Such remedies include the centuries-old right of a secured party to repossess collateral upon default. (See Cal. U. Com. Code, § 9609.) Purchasers such as Mr. Sanchez have recently claimed they have the self-help remedy of withholding payment while refusing to surrender the vehicle. The arbitration agreement found unenforceable in *Sanchez* merely clarifies that any legitimate self-help remedies of both parties are unaffected by the arbitration clause. (Typed opn., 7.) At the same time, it is clear that any dispute over the exercise of self-help remedies—e.g., whether dealer repossession or a customer withholding of payment was wrongful—is subject to arbitration.

The Court of Appeal found the inclusion of this provision preserving self-help remedies substantively unconscionable, erroneously assuming that only dealers have extra-judicial remedies they might wish to pursue, and that dealers were thus unduly benefited by a one-sided arbitration carve-out. (Typed opn., 27-28.) As noted above, another Court of Appeal decision has come to the opposite conclusion, holding that the identical arbitration exclusion in a Law Printing auto purchase contract does not render it unconscionable. (*Arguelles-Romero, supra*, 184 Cal.App.4th at pp. 831, fn. 4, 845, fn. 21.) This conflict in the Court of Appeal decisions on such a fundamental aspect of auto finance by itself mandates review by this court. Especially in a time of economic stress for these businesses and their consumers, it is critical that they know whether this sensible division of remedies between the realms of self-help and arbitration is enforceable.²

² *Sanchez* assumes, incorrectly, that this provision immunizes self-help remedies from any arbitral scrutiny. Even if this were the case, it would not render the arbitration clause unconscionable. *Sanchez* ignores the well-established rule that parties are free to specify a subset of disputes that would fall within an arbitration agreement (typically, those that would otherwise drag the parties into court), while restricting or removing arbitrators' authority over other matters. (*Concepcion, supra*, 131 S.Ct. at pp. 1748-1749 [“parties may agree to *limit the issues subject to arbitration* (continued...)”])

IV. The Court of Appeal has left car buyers and dealers at sea regarding how to reconcile its holding with *Concepcion*.

The Court of Appeal stated that “*Concepcion* is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the [FAA].” (Typed opn., 13, emphasis added.) But by invalidating the parties’ arbitration clause for unconscionability, the Court of Appeal mandated “a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the [FAA].” (*Ibid.*) The Court of Appeal’s analysis of *Concepcion*’s scope is thus hard to reconcile with *Concepcion* itself.

To add to the uncertainty, several federal district courts have recognized *Concepcion*’s broad scope beyond merely class arbitration waivers, and these decisions are in significant tension with *Sanchez*. (See, e.g., cases cited at PFR 18-19.) Additionally, the United States Supreme Court has granted review, vacated this court’s decision, and remanded for reconsideration of *Concepcion* in *Sonic-Calabasas A, Inc. v. Moreno* (2011) __ U.S. __ [132 S.Ct. 496, 181 L.Ed.2d 343], which does not involve a class waiver. (See *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 668-669 [involving arbitration clause under which employee waives *Berman* hearing for unpaid wages].) This development shows the High Court’s determination that *Concepcion* is not limited to the class waiver context. In this environment, how are car dealers and buyers to proceed in structuring their transactions vis-à-vis arbitration, when there is no definitive answer to whether or how the FAA and *Concepcion* apply? This court should grant review to clear up the uncertainty in this area.

* * * *

(...continued)

[citation], to arbitrate according to specific rules [citation], and to limit *with whom* a party will arbitrate its disputes” (first emphasis added, second emphasis in original).)

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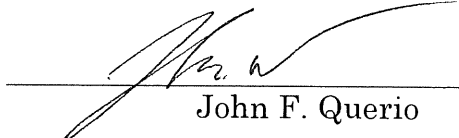
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For the foregoing reasons, the CNCDA respectfully requests that this court grant review to clarify the FAA's preemptive scope and the applicability of *Concepcion*, and to resolve the confusion the Court of Appeal created regarding whether the arbitration appeal provision and reservation of self-help remedies used in the large majority of car purchase transactions in this state comports with established unconscionability principles, as limited by the FAA.

Respectfully submitted,

HORVITZ & LEVY LLP
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By: _____


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Attorneys for Amicus Curiae
California New Car Dealers Association

cc: See attached Proof of Service

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

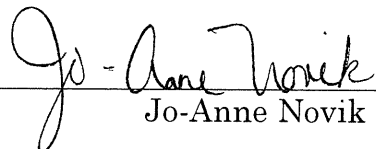
On January 25, 2012, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 25, 2012, at Encino, California.



Jo-Anne Novik

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SERVICE LIST
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