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Chief Justice Ronald M. George
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ***Juarez v. Arcadia Financial, Ltd.*, No. S155139, D048640**
Request For Depublication

Dear Chief Justice George and Associate Justices:

Pursuant to California Rules of Court, rule 8.1125(a), the American Financial Services Association ("AFSA") respectfully requests that the Court depublish the Court of Appeal opinion in *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889.

The opinion's principal holding misconstrues the Rees-Levering Act, particularly Civil Code section 2983.2(a)(2). The opinion reads into the statute a disclosure standard that it admits cannot be found in the statute's words.

If left published, the decision will generate a tidal wave of class action litigation that will engulf virtually all California auto finance companies, potentially subjecting them to millions of dollars of liability, interest and attorney fees for past transactions based on a new judge-crafted standard no one could reasonably have predicted. The first cases in that wave have already been filed; many more will follow unless the Court depublishes the *Juarez* opinion.

The opinion's harmful consequences are not limited to past transactions. It sets an un-attainable standard for future transactions, as well, thus threatening auto finance companies with large future losses in repeated rounds of expensive class litigation or through waiving car buyers' deficiencies to avoid that litigation.

Defaulting car buyers, and their attorneys, may reap a short-term gain from the *Juarez* opinion's misconstruction of the Rees-Levering Act. But most car buyers will suffer in the long run. As losses mount, less credit will be extended to California car buyers and at higher prices, just as increasing losses in the subprime mortgage market have driven lenders from that field.

The *Juarez* opinion's secondary holding misconstrues the Unfair Competition Law (Bus. & Prof. Code, §17200 et seq.; "UCL"). If left published, the opinion will occasion, at a minimum, efforts to take intrusive discovery into the defendant's profits and finances in every UCL action. At worst, it will lead to greatly increased liability in that important class of litigation, contrary to the spirit, if not holding of this Court's decisions in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 and *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254.

I. Interest Of Party Seeking Depublication

AFSA is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. Organized in 1916, AFSA now represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States.

AFSA members range from independently owned consumer finance offices to the nation's largest financial services, retail and automobile finance companies as well as national and state banks that operate multi-state consumer credit programs.

AFSA's mission is "to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with a quality and cost effective service, (2) promoting a financial system that enhances competitiveness, and (3) supporting the responsible delivery and use of credit-related products."

To promote its members' interests and pursue its above-stated mission, the AFSA has appeared as an *amicus curiae* in many cases and brought others, such as *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239. AFSA seeks depublication because the *Juarez* opinion will negatively affect many of AFSA's members as well as the consumers they serve, if the opinion remains published precedent.

II. Reasons For Depublication

A. The *Juarez* Opinion Misconstrues The Rees-Levering Act

To preserve its right to obtain a deficiency judgment, the holder of a conditional car sale contract must send the car buyer and other obligors an NOI within 60 days after repossessing a car. (Civ. Code, §2983.2(a).) Among other required disclosures, the NOI must notify the car buyer of his or her conditional right to reinstate the contract within 15 days and state "all conditions precedent thereto." (Civ. Code, §2983.2(a)(2).)

As the Court of Appeal conceded, the just-quoted phrase "does not, in itself, provide insight as to precisely what information" the NOI must provide regarding the conditions precedent. (*Juarez*, 152 Cal.App.4th at p. 903, slip opn., p. 15.) "[T]he phrase 'all the conditions precedent' reveals nothing about the level of specificity the Legislature intended that NOI's provide in describing those conditions." (*Id.*, 152 Cal.App.4th at pp. 903-904, slip opn., p. 17.) Therefore, the *Juarez* opinion finds the phrase "all conditions precedent" to be ambiguous.

Abjuring other aids to statutory interpretation and basing its decision solely on the Rees-Levering Act's general consumer-protection purpose, the *Juarez* opinion holds that, by the words "all conditions precedent," "the Legislature [must have] intended that the NOI provide a level of specificity ... sufficient to inform the consumer—without need for further inquiry—as to exactly what the buyer must do to cure the default." (*Id.*, 152 Cal.App.4th at p. 904, slip opn., p. 18.)

Under the Court of Appeal's construction, the statute requires that the NOI state, among other things: (a) "any amounts the consumer must pay to the creditor and/or to third parties," (b) the amount of and date on which any additional payments such as monthly installments, late fees or other fees might come due after the NOI is sent, and (c) the names and addresses of those to whom each payment must be made. (*Id.*, 152 Cal.App.4th at pp. 904-905, 912, slip opn., pp. 18, 30.)

Moreover, according to the *Juarez* opinion, the phrase "all conditions precedent" imposes a duty of inquiry on a creditor, requiring it to discover information it does not otherwise possess: "The creditor must provide the consumer with *all* of the relevant information it possesses ***and/or information it has the ability to discern***, concerning precisely what the buyer must do to reinstate his or her contract. (*Id.*, 152 Cal.App.4th at p. 909, slip opn., p. 25; bold italics added.)

On its face, this exegesis is unconvincing. It reads into the statute far more than any three English words, and particularly the statute's three words "all conditions precedent," could possibly encompass. The *Juarez* opinion reaches this erroneous conclusion, in large part, because it applies the rules of statutory construction in the wrong order, jumping first to statutory purpose before considering internal aids to interpretation. In doing so, the Court of Appeal erred.

"As [many] courts have noted, the key to statutory interpretation is applying the rules of statutory construction in their proper sequence." (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.) First, "a court should examine the actual language of the statute" which alone "has successfully braved the legislative gauntlet." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th

1233, 1238.) Second, if the statute's words remain ambiguous, "courts must take the second step and refer to the legislative history." (*Id.*, at p. 1239.)

Last and least, the court may "apply reason, practicality, [statutory purpose,] and common sense to the language at hand." (*Ibid.*) But this last step "should only be taken when the first two steps have failed to reveal clear meaning." (*Ibid.*) These external aids to construction are considered least and last because they are inherently less accurate guides to legislative intent. Reason, practicality, purpose and common sense are not voted on by legislators or signed by the Governor.

Also, legislation rarely pursues a single purpose to its ultimate conclusion. Instead, statutes are most frequently framed as compromises between competing interests. (See *American Financial Services Assn. v. City of Oakland, supra,* 34 Cal.4th at p. 1257-1258.) The 1976 bill that added paragraph (a)(2) to section 2983.2 resulted from just such a compromise between opposing interests. (See Assem. Finance, Ins. & Commerce Com., analysis of SB 1894 (1975-76 Reg. Sess.), p. 6.)[1] For this reason, "[i]dentification of the laudable purpose of a statute alone is insufficient to construe the language of the statute." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 176 n. 9.) "Without due attention to the statutory terms, the statute becomes an open charter, a hunting license to be used where any prosecutor, plaintiff and judge sees an evil encompassed by the statutes' purpose." (*Ibid.*, quoting *Delta v. Humane Soc. of U.S., Inc.* (9th Cir. 1995) 50 F.3d 710, 713.)

As in other statutes, the words the Legislature enacted in section 2983.2 "define and cabin its laudable purposes." (*Ibid.*) The statutory language shows that when the Legislature intended the NOI to contain a detailed disclosure, it said so clearly. For example, paragraph 2983.2(a)(1) requires the NOI to set forth the buyer's right to redeem and to provide "an itemization of the contract balance and of any delinquency, collection or repossession costs and fees and sets forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice."

Paragraph 2983.2(a)(1)'s detailed description of exactly what must be disclosed with respect to redemption contrasts markedly with paragraph 2983.2(a)(2)'s general command to state "all conditions precedent." Had the Legislature intended to require a similarly detailed disclosure regarding preconditions to reinstatement, it would have said so, just as it did in paragraph 2983.2(a)(1).

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[1] The author's Fact Sheet on SB 1894 (Nejedly) also states: "SB 1984 represents the results of extensive negotiations primarily between Legal Services representatives and the California Bankers Association, but with some input by the New and Used Car Dealers Association."

The disparity in statutory language between the adjacent paragraphs 2983.2(a)(1) and (a)(2) cannot be ignored, as the Court of Appeal did, simply because in some cases reinstatement may be preconditioned on performance of acts other than the payment of money. (See *Juarez*, 152 Cal.App.4th at pp. 909-910, slip opn., pp. 26-27.) The Legislature was perfectly capable of drafting precise statutory language to accommodate that circumstance, too, if it had intended the kind of detailed disclosure that the *Juarez* opinion reads into the statute. Indeed, the *Juarez* opinion's own words, paraphrased and quoted above (p. [3]) could easily have been turned into statutory language. That the Legislature avoided such language and chose, instead, the simple, general three-word phrase "all conditions precedent" is compelling evidence—taken from the words of the statute itself—that it did not intend to require such detailed disclosure.

Nor is it difficult to discern why the Legislature reached that decision. Contrary to the *Juarez* opinion's reasoning, the Legislature did not pursue consumer protection to its bitter end in enacting and amending the Rees-Levering Act. Like all other statutes, it is a compromise. For example, the Act allows creditors to collect deficiencies from car buyers, but requires the creditor to send an NOI first. (Civ. Code, §2983.2; compare Civ. Code, §1812.5 (no deficiency allowed on credit sale of other goods).) It limits the buyer's right to rescind for violations of the Act. (Civ. Code, §2983.1.) It imposes liability on assignees for a dealer's wrongs, but only up to the amount owed at the time of assignment. (Civ. Code, §2983.5(a).) In these and many of its other provisions, the Act evinces the Legislature's care not to impose impractical burdens or insuperable risks on creditors and assignees so as not to drive them from the important auto finance sector of California's economy. As explained below (pp. [7-8]), the *Juarez* opinion's misconstruction of section 2983.2(a)(2) imposes just such an impractical burden.

In short, the *Juarez* opinion's principal holding misinterprets the Rees-Levering Act. The opinion should be depublished before it leads other courts astray in interpreting section 2983.2, the Rees-Levering Act in general, and other statutes according to their purpose rather than their words.

B. *Juarez* Will Impose Severe Losses On Innocent Creditors

If left as precedent, the *Juarez* opinion will engulf the entire auto finance industry in a wave of class action litigation that will cost creditors many millions of dollars, all for not including in their past NOIs detailed disclosures that no one but the Court of Appeal ever thought required by section 2983.2.

As already stated, a creditor may not obtain a deficiency judgment if its NOI does not strictly conform to section 2983.2's requirements. (*Bank of America v. Lallana* (1998) 19 Cal.4th 203, 210.) As Juarez' cross-complaint illustrates, car buyers can sue creditors for defective

NOIs, seeking refunds of collected deficiencies and expungement of uncollected deficiencies under the UCL. Such suits are typically brought on behalf of all car buyers to whom an allegedly deficient NOI was sent within the four years preceding suit. (Bus & Prof. Code, §17208.) Deficiencies are often several thousand dollars per car buyer; consequently, these suits normally put many millions of dollars of deficiencies at risk.

Over the past decade, many AFSA members have been sued for mistakenly missing required disclosures in their NOIs. They have paid many millions of dollars to resolve that litigation and have revised their NOIs to conform to what was thought to be section 2983.2's requirements.

Juarez introduces entirely new requirements not evident in the statute's words. If *Juarez* remains published precedent, it will spawn a new wave of NOI litigation that will overtake the entire auto finance industry. Indeed, that wave has already hit shore, the first suits having already been filed. (*See e.g.*, *Ford Motor Credit Co v. Diaz*, San Mateo County Sup.Ct., No. CLJ 463874 [putative class action cross-complaint].)

Virtually every auto finance company is likely to face a *Juarez*-engendered suit in the near future. No one contemplated that section 2983.2(a)(2) required such detail in the NOI. Indeed, plaintiffs' lawyers—including Juarez' attorneys—have settled prior NOI class actions, approving revised NOI forms that do not even approach the level of disclosure that *Juarez* for the first time requires.

Nearly every auto finance company will be subjected to class litigation over its past NOIs and collection of deficiencies based on *Juarez'* new requirements. Innocent creditors will be held liable to refund many millions of dollars of collected deficiencies and expunge even more millions of uncollected deficiencies in addition to liability for prejudgment interest and more millions in attorney fees.

Nor is the litigation mill likely to end there. Emboldened by *Juarez'* reasoning, plaintiffs will likely attack creditors' NOIs repeatedly claiming, on each new revision, that the form still fails *Juarez'* new, high standard of providing "specificity ... sufficient to inform the consumer—without need for further inquiry—as to exactly what the buyer must do." (*Juarez*, 152 Cal. App.4th at p. 904, slip opn., p. 18.)

Auto finance companies will suffer first from the wave of litigation that *Juarez* will spawn. However, the harm is likely to spread much farther, as the current credit crisis illustrates. As losses mount, credit will become more difficult to obtain and will cost more, particularly for consumers who can least afford cars without credit and/or pose the greatest credit risk. Constrained credit will dampen car sales, just as lessened availability of mortgage loans has caused home sales and values to plummet in recent months. If creditors must forego

collecting deficiencies because compliance with *Juarez'* new standard proves impracticable, creditors' increased losses on the small percentage of consumers who default will be factored into, and increase the price of, credit to all car buyers.

Juarez should be depublished to avoid these deleterious consequences which far outweigh the marginal gains that a few defaulting car buyers may realize from the decision's newly imposed and entirely unanticipated disclosure requirements.

C. *Juarez'* New Disclosure Standard Is Impractical

Large, unanticipated losses due to retrospective application of *Juarez'* new disclosure requirements are bad enough. But the decision's harm does not stop there because it will be difficult, if not impossible, for a creditor to meet *Juarez'* new high standard of disclosure prospectively as well.

The *Juarez* opinion is premised on the notion that, at the outset, the creditor has all the requisite information regarding reinstatement in its possession—or readily available to it—so it is a relatively easy matter for the creditor to set it all forth in the NOI. (*Juarez*, 152 Cal. App.4th at pp. 905, 908-909, 910-911, slip opn., p. 19, 24-25, 27-28.) But that assumption is incorrect. Additional amounts may become due depending on circumstances that are beyond the creditor's control and beyond its knowledge or ability to predict at the time it sends the NOI.

For example, late payment fees become due only if the car buyer fails to pay the next monthly payment within 10 days of its due date. (Civ. Code, §2982(k).) A returned check charge may become due if and when the car buyer's check is returned unpaid. (Civ. Code, §2982(p).) Additional collection charges in amounts that cannot be predicted in advance may also become due as a result of returned checks. (*Ibid.*) Additional storage charges or repossession charges may accrue, depending on other unpredictable events.

The *Juarez* opinion tries to circumvent these obvious difficulties by suggesting that the NOI can simply state , "[t]he reinstatement amount increases by the amount of the missed payment on its due date, by the amount of the late payment fee ten days later, and by an additional $15 on another date if the buyer's check is returned unpaid." (*Juarez*, 152 Cal. App.4th at p. 911, slip opn., p. 29.)

Arguably, though, such a disclosure would not meet *Juarez'* own new requirement that the NOI disclose preconditions to reinstatement with "specificity ... sufficient to inform the consumer—without need for further inquiry—as to exactly what the buyer must do." (*Id.*, 152 Cal. App.4th at p. 904, slip opn., p. 18.) In most instances, the car buyer will be unable

to ascertain—without further inquiry—whether the creditor received payment more than 10 days late or whether a check was returned unpaid.

These facts cannot be stated accurately in advance in the NOI. They can be ascertained in hindsight and can be disclosed to the car buyer when he or she phones the creditor to learn the exact amount needed to reinstate the contract.[2] Undoubtedly for that reason, the Legislature chose not to impose the impracticably burdensome disclosure standards that the *Juarez* opinion conjured, but only a more general statement of "all conditions precedent" to reinstatement, leaving it to the mutual self-interest of creditor and car buyer to work out the needed details at the time the car buyer seeks to reinstate. (See *id.*, 152 Cal.App.4th at pp. 907 n. 9, 911 n. 11, slip opn., pp. 23 n. 9, 28 n. 11.)

Juarez' new disclosure standard imposes impracticable burdens on creditors, as the opinion's self-contradictory statements illustrate. The opinion should be depublished before it wreaks further havoc and spawns unending litigation in the auto finance industry.

D. *Juarez* Will Also Subject All UCL Defendants To Inappropriate, Expensive And Intrusive Discovery

Juarez' secondary holding is just as wrong and deleterious as its new NOI disclosure standard. For the first time in any published opinion, the Court of Appeal has suggested that in a UCL action, the plaintiffs may "have an ownership interest in any profits [the defendant] may have gained through interest or earnings on the plaintiffs' money that [the defendant] wrongfully held." (*Juarez,* 152 Cal.App.4th at p. 915, slip opn., p. 35.) Also for the first time, *Juarez* holds that plaintiffs in a UCL action may obtain discovery regarding any profits the defendant earned on money acquired from plaintiffs or class members as well as the defendant's "return on equity." (*Id.*, 152 Cal.App.4th at pp. 912, 917, slip opn., pp. 31, 39.)

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[2] Apparently, the Court of Appeal was heavily influenced by Juarez' complaints that Arcadia did not respond promptly or correctly to his oral requests for information regarding the amount needed to reinstate his contract. (*Juarez*, 152 Cal.App.4th at pp. 905-906, slip opn., pp. 19-21.) This is an apt illustration of hard cases making bad law. An entire industry should not be saddled with onerous new, judicially created burdens to remedy a single instance of a creditor's alleged failure to give a car buyer required information. There was no showing in Juarez that such problems were widespread, let alone that the Legislature found them to be so. Quite to the contrary, the Legislature said that the right to reinstatement it codified in 1976 "corresponds to common industry practice. The seller would normally prefer having a valid contract to repossessing and reselling his security." (Assem. Finance, Ins. & Commerce Com., analysis of SB 1894 (1975-76 Reg. Sess.), p. 6; see also *Juarez*, 152 Cal.App.4th at p. 907 n. 9, slip opn., p. 23 n. 9.) In the 30 years since that Legislative statement, *Juarez* is the first case or other authority to report that a creditor had failed to give an inquiring car buyer the information needed to reinstate his or her contract. There is no need to adopt a new and burdensome disclosure regime to handle the one odd case every quarter century.

As the Legislature has recognized in the punitive damage context, discovery of a defendant's finances is particularly burdensome and intrusive. (See Civ. Code, §3295(a), (c).) Introduction of evidence on that subject is especially likely to distract the trier of fact from the real issues in the case, putting more defendants at risk of adverse judgments based on wealth or profitability rather than wrongdoing. (See Civ. Code, §3295(d).)

By opening every UCL defendant's finances to the plaintiff's probing discovery, *Juarez* will usher in a whole new, and particularly burdensome, era of UCL litigation. California has been down this path once before in the punitive damages arena. "It soon became obvious, ... that such discovery [of the defendant's financial condition] had enhanced rather than removed the 'game element' by creating a situation in which a plaintiff, merely by alleging a claim for punitive damages, could pressure a defendant into settlement because of a desire to protect his financial privacy." (*Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 90.)

The Legislature fixed that abuse by enacting Civil Code section 3295, implementing new safeguards "designed to protect the defendant from a ... situation in which the plaintiff puts forth an easily alleged cause of action for punitive damages, thus requiring a defendant to expend the time and money 'necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damage which may never be awarded.' " (*Id.*, at p. 91; *Richards v. Superior Court* (1978) 86 Cal.App.3d 265, 271; italics deleted.)

The *Juarez* opinion now opens all UCL litigation to this same abuse. It is just as easy to allege a UCL claim as to allege a punitive damage claim. Discovery of a defendant's financial condition in a UCL case will consume just as much time and money as similar discovery in a punitive damage case. That discovery will be just a prying and equally invasive of the defendant's financial privacy. As it was used in the punitive damage arena to "pressure a defendant into settlement," so similar discovery of a defendant's finances may impel unwarranted settlements of UCL suits. And, just as in the punitive damage context, discovery of a defendant's financial condition in a UCL suit is "unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damage which may never be awarded."

The three interrogatories asked in *Juarez* are the leading edge of much more extensive, expensive, and intrusive discovery likely to follow once *Juarez* swings open the door on discovery of a defendant's finances in every UCL action. Juarez asked for Arcadia to state its "return on equity." Juarez will likely contend that he need not accept Arcadia's answer as the truth. Once the subject matter is opened to discovery, Juarez may have a field day asking interrogatories, requiring production of financial documents and deposing witnesses to discover backup for each subsidiary item of revenue and expense that Arcadia did or could have taken into account in computing its "return on equity." Nor will the next plaintiff be

constrained to ask only about "return on equity." Every other facet of a defendant's finances can be probed with equal justification to arrive at some assumed rate of earnings on commingled funds that include some money plaintiffs claim was wrongfully acquired by a UCL violation.

Furthermore, contrary to the *Juarez* opinion's supposition, a plaintiff has no "ownership interest" in the profits the defendant has earned with plaintiff's money, even if defendant wrongfully acquired the sum. The normal measure of restitution is return of the money wrongfully received together with interest, just as that is the measure of damage for breach of an obligation to pay money. (Rest. Restitution, §§150, 156; Civ. Code, §3302; see also *Pollak v. Staunton* (1930) 210 Cal. 656, 665.) Recovery of a defendant's profits is allowed as a measure of restitution only when the defendant has wrongfully acquired the plaintiff's land or chattels and used them to the defendant's profit. (Rest. Restitution, §157.)

Absent an "ownership interest" in the defendant's profits, plaintiffs cannot recover them as restitution under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at pp. 1148-1150; *Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1266.) Accordingly, expensive, prying discovery on that subject should be disallowed in UCL cases.

There is no need to repeat, in the UCL realm, the abuses that led to the adoption of Civil Code section 3295. This Court can and should put a stop to those abuses before they start by depublishing the *Juarez* opinion.

III. Conclusion

For the reasons stated above, AFSA respectfully requests that the Court depublish the Court of Appeal opinion in *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889.

Sincerely,

William L. Stern

cc: All parties; Court of Appeal

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. secs. 1013(a), 2015.5)

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

REQUEST FOR DEPUBLICATION

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 , in accordance with Morrison & Foerster's ordinary business practices:

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

Executed at San Francisco, California, this 27th day of August, 2007.

Janie L. Fogel
(typed)

(signature)