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March 21, 2012

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Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister St.
San Francisco, CA 94102-4797

Re: ***Buzenes v. Nuvell Financial Services, LLC*, No. S200376**
Amicus 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, *amici curiae* American Financial Services Association, the California Financial Services Association, and the California Bankers Association urge the Court to grant review in this case.

Nuvell Financial Services raises two issues, each worthy of review:

(i) Whether the Court should resolve a split of authority between this decision and *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, *rev. pending*, No. S199119), on the one hand, and *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, on the other hand, which interpret the exact same arbitration provision differently; and

(ii) Whether the Court of Appeal opinion misinterprets *AT&TMobility LLC v. Concepcion* (2011) 563 U.S. __, 131 S.Ct. 1740 (*Concepcion*), thus presenting trial courts with a dilemma as to whether to follow a decision of the United States Supreme Court or that of a California appellate court.

Last year, approximately 1.3 million new car transactions were consummated in this state, most using the same arbitration clause at issue here. Millions more, involving used cars, motor homes, trailers, and off-road vehicles, also use this standard "Law Printing" purchase agreement and arbitration clause. Members of each *amici* association are assignees of tens or hundreds of thousands of retail installment contracts containing the very same arbitration clause at issue in this case.

The Court should grant review to resolve the split in authority with *Arguelles-Romero*, and to put California law in alignment with the United States Supreme Court's opinion in *Concepcion.*

INTEREST OF *AMICI*

Amicus American Financial Services Association ("AFSA") is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 90 years, AFSA has represented financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA is dedicated to protecting access to credit and consumer choice. It encourages ethical business practices and supports financial education for consumers of all ages. AFSA advocates before legislative, executive and judicial bodies on issues affecting its members' interests. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239.)

The California Financial Services Association ("CFSA") is a non-profit trade association representing major national and international corporations and independent lenders with operations in the State of California. CFSA members provide a broad range of financial services, including consumer and commercial loans, retail installment financing, automobile and mobile home financing, home purchase and home equity loans, credit cards, and lines of credit.

CFSA's mission is to foster ethical practices and high standards of conduct in the finance industry. CFSA strives to improve conditions within the industry and promote a greater knowledge and understanding of the economic and social aspects of consumer lending among all Californians. CFSA advocates in its members' interests before the California Legislature and regulatory bodies as well as the courts.

Founded in 1891, the California Bankers Association ("CBA") represents most of the FDIC-insured depository financial institutions doing business in California, including commercial banks, industrial loan companies and savings institutions. The CBA is one of the largest state trade associations in the country. The CBA advocates on behalf of its members before the state and federal legislatures, executive agencies, and in the courts..

AFSA, CFSA, and CBA have often appeared in this Court and others as parties or amici in cases affecting their members' interests. Each of these associations includes members who,

in the regular course of their business, finance large numbers of new and used automobiles sold to California consumers.

WHY REVIEW SHOULD BE GRANTED

A. This Court Should Grant Review to Resolve a Split of Authority.

The Court should grant review because the Court of Appeal opinion conflicts with another published California appellate decision, *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, which interprets the exact same contract language. The opinion in this case and in *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, 100-101 both hold that a reservation of self-help remedies in the standard Law Printing car purchase contract is non-mutual and substantively unconscionable, rendering the entire arbitration agreement unenforceable.

The Court of Appeal in *Arguelles-Romero,* 184 Cal.App.4th at p. 844 n. 21 begs to differ. There, the appellate court examined an arbitration agreement identical to Buzenes' and held that the agreement's exclusion of self-help remedies from arbitration did not render the agreement non-mutual or unenforceable. The court concluded that "the arbitration clause is clearly bilateral, and not unconscionable." (*Ibid.*)

The Court of Appeal opinion in this case squarely conflicts with *Arguelles-Romero*. Interpreting the exact same contractual language as in *Arguelles-Romero*, the Court of Appeal here concluded: "Under its terms, defendants retain their rights to pursue its self-help remedy of repossession. There is no basis for concluding a person in plaintiff's position would ever exercise self-help remedies (repossess her own car)—such an argument is unreasonable." (*Buzenes* slip opn., p. 12.)

True, no debtor would repossess her own car. But car buyers who have stopped making payments on their cars regularly claim *other* self-help remedies, including locking the car in a garage to avoid repossession, or "deduct[ing] all or any part of the damages resulting from any breach of the contract [by the defendant] from any part of the price still due and stopping payment until the damage has been recouped. (Cal. Com. Code § 2717.)

A creditor would no more "withhold-and-deduct" than a debtor would repossess her own vehicle. Whether or not justified, these self-help remedies "belong exclusively" to debtors, to borrow the Court of Appeal's phrase (*see Buzenes*, slip opn., p. 12), and debtors frequently resort to them without commencing arbitration. Clearly there is mutuality, as *Arguelles-Romero* recognizes.

That each party to the finance contract has *different* self-help remedies—in recognition of the parties' different circumstances—does not render either side's respective remedies non-mutual. In short, it is not Nuvell Financial's argument of bilaterality that is "unreasonable," rather, it is the Court of Appeal's resort to a nonsensical example that is so.

The following shows the Court of Appeal's faulty reasoning. Just as no debtor would pursue self-help repossession of her own car, neither would she run to court seeking a writ of possession. Yet, Nuvell Financial could. By the Court of Appeal's odd logic, Nuvell Financial's right to go to court and seek a writ of possession would be therefore non-mutual and, hence, unconscionable. That makes no sense. By statute, a party may seek provisional remedies *without* waiving its right to arbitrate. (Cal. Civ. Code § 1281.8(b).) In fact, the availability of provisional remedies advances public policy, for it prevents opposing parties from dissipating assets or other conduct that would render the arbitration a "hollow formality." (*See Davenport v. Blue Cross of Calif.* (1997) 52 Cal.App.4th 435, 451.) The same public policy—preventing the dissipation of assets pending arbitration—is served by allowing creditors a right of *self-help* repossession.

The split in authority between *Arguelles-Romero* and *Sanchez v. Valencia Holding Co.* predated the Court of Appeal opinion.[1] Indeed, it was the *Sanchez* panel that first strayed from the common-sense rule of *Arguelles-Romero*. Nevertheless, the opinion in this case reveals why review should be granted. Unless this Court accepts review and clarifies the law, the same confusion that marks the Court of Appeal opinion will be reenacted over and over again by every trial and appellate court that is asked to adjudicate the enforceability of an arbitration clause found in the exact same Law Printing form of purchase contract.

To resolve that split of authority, these *amici* respectfully ask the Court to grant review.

B. This Court Should Grant Review to Avoid Conflict With *Concepcion*.

This Court should grant review for a second reason: The Court of Appeal opinion misapplies the United States Supreme Court's decision in *Concepcion*, thus presenting trial courts with a further dilemma: Follow *Concepcion*, or follow the Second District?

In truth, there is no real option. Decisions of the United States Supreme Court "on questions of federal constitutional law are binding on all state courts under the supremacy clause of the United States Constitution." (*People v. Fletcher* (1996) 13 Cal.4th 451, 469, fn. 6.) *Concepcion* addressed whether the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.* ("FAA") preempts

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[1] All three decisions—*Buzenes*, *Sanchez*, and *Arguelles-Romero*—were decided by the Second District Court of Appeal, albeit different divisions.

state unconscionability law. It said yes. The Court of Appeal cannot say no, because *Concepcion* involved a question of "federal constitutional law," namely, the scope of the Supremacy Clause of the Constitution. (U.S. Const. art. VI.) That decision must be followed. Therein lies the problem.

The Court of Appeal missed badly. It held that *Concepcion* was no obstacle to its invalidation of the arbitration clause in this case due to the perceived lack of mutuality in the parties' self-help remedies:

> There is no merit to defendants' argument we should reverse the order under review because of the holding in *AT&T Mobility LLC*, *supra*, at p. __ [131 S.Ct. at p. 1753]. *AT&T Mobility LLC* abrogated this state's rule disapproving "most collective arbitration waivers in consumer contracts" established in our Supreme Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 163-168. (*AT&T Mobility LLC*, *supra*, at p. __ [131 S.Ct. at p. 1746].) *AT&T Mobility LLC* did not disapprove of any other portion of our Supreme Court's unconscionability jurisprudence in the arbitration context. A United States Supreme Court decision may not be cited for a proposition not considered therein. (*Cooper Industries, Inc. v. Aviall Services, Inc.* (2004) 543 U.S. 157, 170; *People v. McKinnon* (2011) 52 Cal.4th 610, 639.) We have not relied upon the rule disapproved of in *AT&T Mobility LLC* in deciding this case. (*Buzenes*, slip opn. at 11.)

The Court of Appeal's narrow reading of *Concepcion*'s scope, as reflected in this quote, is impossible to reconcile with the broad language of *Concepcion* itself. Under the FAA, courts are not allowed to invalidate arbitration agreements "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion*, 131 S.Ct. at p. 1746.) Thus, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Id.*, p. 1747.)

There is nothing ambiguous about the words "is displaced." As for what gets "displaced," *Concepcion* is clear: Any state law that "prohibits outright the arbitration of a particular type of claim." (*Id.*) Thus, *Concepcion* commands that California's rule of substantive unconscionability that demands mirror-image mutuality must yield.

California law is to the same effect. Code of Civil Procedure section 1281.2 requires courts to compel arbitration except when arbitration has been waived or when the agreement is

revocable on *generally* applicable grounds. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97-98; Code Civ. Proc., §§ 1281, 1281.2.) "In other words, under California law, as under federal law, an arbitration agreement may only be invalidated for the same reasons as other contracts." (*Armendariz*, 24 Cal.4th at p. 98.)

The Court of Appeal rested its decision on a state principle of unconscionability that does *not* apply to contracts generally, only to contacts of arbitration., As Petitioners point out, many other contracts reserve self-help remedies and sometimes grant those remedies to one side and not the other. Examples include deeds of trust (lender has a right of nonjudicial sale), leases (landlord has the right to draw upon security deposit to pay for repairs, cleaning, or unpaid rent), and letters of credit (giving the seller the right to make a claim against the issuing bank). (*See* Petition for Review, pp. 11-12 [listing examples of contracts that expressly grant one side a self-help remedy].) But no court has ever held that these other contracts could be revoked due to lack of mutuality. (*Ibid.*)

That matters. It means that the Court of Appeal created a specific, arbitration-hostile rule that strikes down a contract clause as unconscionable *only* in one instance—where the reservation of self-help remedies is coupled with an arbitration clause. Arbitration cannot be singled out.

The consequence of the Court of Appeal holding is to put every creditor with a defaulting debtor to an election: Arbitrate and forego self-help, or repossess the vehicle and forego arbitration. (*See* Pet. for Review, p. 3.) As just noted, lots of contracts contain self-help remedies, but no contract—except one calling for arbitration—demands surrender of *another* contractual right as the price of exercise. That violates the FAA and *Concepcion.*

A further reason to grant review is that the Court of Appeal decision marks a divergence from two recent decisions by the Ninth Circuit Court of Appeals regarding *Concepcion.* Thus, the ruling invites forum-shopping and the specter of making enforceability of the same Law Printing contract clause turn on the happenstance of forum.

Two weeks ago, the Ninth Circuit held that a state law rule that prohibited the arbitration of public injunctive relief claims[2] did not survive the United States Supreme Court's decision in *Concepcion* and was preempted by the FAA. (*Kilgore v. Keybank, N.A.* (9th Cir., March 7, 2012) ___ F.3d ___, 2012 WL 718344, *12 ("the very nature of federal preemption requires that state law bend to conflicting federal law—no matter the purpose of the state law.") Said the Ninth Circuit:

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[2] As set forth in *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 and *Cruz v. Pacificare Health Systems, Inc.* (2003) 30 Cal.4th 303.

> The FAA is "the supreme law of the land," U.S. Const. art. VI, and that law renders arbitration agreements enforceable so long as the savings clause is not implicated. The *Broughton–Cruz* rule "prohibits outright the arbitration of a particular type of claim"—claims for public injunctive relief. *Concepcion*, 131 S.Ct. at 1747. This prohibition can-not be described as a "ground[ ] as exist[s] at law or in equity for the revocation of any contract," 9 U.S.C. § 2, because it "appl[ies] only to arbitration [and] derive[s] its meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 131 S.Ct. at 1746. Although the *Broughton–Cruz* rule may be based upon the sound public policy judgment of the California legislature, we are not free to ignore *Concepcion's* holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a "particular type of claim." Therefore, we hold that "the analysis is simple: The conflicting [*Broughton–Cruz*] rule is displaced by the FAA." *Concepcion*, 131 S.Ct. at 1747. *Concepcion* allows for no other conclusion. (*Kilgore v. Keybank, N.A.*, *supra*, slip opn. at 13.)

A week later, the Ninth Circuit went further. In *Coneff v. AT&T Corp.* (9th Cir., March 16, 2012) ___ F.3d ___, 2012 WL 887598, it held—contrary to the Court of Appeal's decision below—that *Concepcion* did more than sweep aside only those state law bases for invalidating arbitration clauses that this Court identified in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. It reversed the district court's order refusing to compel arbitration, which had relied on Washington state law of *substantive* unconscionability. The Ninth Circuit found Washington unconscionability law "similarly reasoned" to California's (*Coneff*, *supra*, slip opn. at 3) and that *any* claim of substantive unconscionability was difficult to reconcile with *Concepcion.* (*Ibid.*, *4.) It remanded back to the district court to decide only whether plaintiffs' claim of *procedural* unconscionability might survive *Concepcion.* (*Ibid.*, *5.)

Debtors who sue creditors in class action cases on claims arising from the same Law Printing form contract often have a choice whether to sue in state or federal court. But after *Kilgore* and *Coneff*, it is highly likely that a claim of substantive unconscionability as was found sufficient to void the arbitration clause in this case[3] would not pass muster in federal court. Unless this Court grants review, this federal/state disparity could result in an unseemly game of forum-shopping in which the outcome of arbitrability turns on the happenstance of state

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[3] The Court of Appeal characterized the lack of mutuality in the case below as a problem of "substantive" and not "procedural" unconscionability. (*Buzenes*, *supra*, slip. opn. at 12.)

versus federal court. This would be particularly unfortunate where, as here, the issue ultimately turns on *federal* law—whether the FAA preempts state unconscionability law—on which the Ninth Circuit has expressed its disagreement with the Court of Appeal's narrow interpretation of *Concepcion.* Thus, this case presents an opportunity to restore a measure of comity.

C. In the Alternative, the Court Should Grant and Hold This Case Pending a Decision in *Sonic-Calabasas* and *Sanchez.*

Issues presented by this Petition are already pending in two other matters. So, in the alternative to granting review, these *amici* urge this Court to grant and hold this case pending a decision in those other matters.

First, the United States Supreme Court granted review and vacated this court's decision in *Sonic-Calabasas A, Inc. v. Moreno* (2011) U.S. [132 S.Ct. 496, 181 L.Ed.2d 343], and then remanded for reconsideration of *Concepcion.* However, that case does not involve a class action 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].) If this Court were to acknowledge in *Sonic-Calabasas* that *Concepcion's* reasoning as well as its precise holding are binding on California courts, that decision will require reconsideration of the reasoning and result in this case as well.

Second, if this Court were to grant review in *Sanchez, supra,* No. S199119, a grant and hold would assure that the same rule of law is applied in both of these cases. As noted, *Sanchez* involved the exact same arbitration agreement in the same standard form Law Printing car purchase contract. One of the reasons *Sanchez* found the agreement unconscionable was because of the supposed non-mutual reservation of self-help remedies. Thus, *Sanchez* presents the exact same reasoning on which the Court of Appeal relied in this case.

CONCLUSION

The Court should grant review and reverse the Court of Appeal's erroneous decision.

Respectfully yours,

William L. Stern

PROOF OF SERVICE

Supreme Court of California
Case No. S200376
(Court of Appeal, Second Dist., Div. Five, No. B221870;
Los Angeles County Sup. Ct. Case No.: BC 407366)

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City and County of San Francisco, California; my business address is Morrison & Foerster, 425 Market Street, San Francisco, CA, 94105-2482.

On the date set forth below, I served a copy of the attached **Amicus Letter in Support of Review** on all interested parties in this case by placing copies of the brief in envelopes addressed as follows:

Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012-3014
Attn: Hon. Carolyn B. Kuhl

Case No. BC 407366

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I caused the envelopes to be deposited in the mail at San Francisco, California, with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California in sealed envelopes 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. This declaration is executed in San Francisco, California, on March 21, 2012.

_____
Janie Fogel