No. S199119

Supreme Court
OF THE
State Of California

GIL **SANCHEZ,**

Plaintiff and Respondent,

vs.

VALENCIA HOLDING COMPANY, LLC,

Defendant and Appellant.

Brief of Amici Curiae
AFSA, CFSA & CBA

From a Decision of the Court of Appeal (2nd Dist., Div. One; B228027)
Affirming an Order of the Los Angeles County Superior Court
Honorable Rex Heeseman, Judge

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TABLE OF CONTENTS

Page

I. INTEREST OF AMICI CURIAE 1

II. INTRODUCTION 2

III. PRESERVATION OF SELF-HELP REMEDIES IS NOT UNCONSCIONABLE 5

A. The Preservation Of Self-Help Remedies Is Not Substantively Unconscionable 6

1. To Be Substantively Unconscionable A Provision Must Shock The Judicial Conscience When Viewed In Context 6

2. Preservation Of Self-Help Remedies Seen In Context 8

3. Preservation of Self-Help Remedies Is Mutual Although It Need Not Be In Order To Avoid Being Unconscionable 11

(a) Self-Help Remedies Are Claimed By Consumers As Well As Financing Entities 12

(b) Preserving Self-Help Remedies In Arbitration Does Not Alter Existing Contract Rights 14

(c) Self-Help Remedies Are Not Equivalent To Injunctive Relief 15

B. The Arbitration Clause Is Not Procedurally Unconscionable 17

1. Adhesion Contract Begins But Does Not End Analysis 18

2. Sanchez Did Not Prove Oppression 19

3. Sanchez Did Not Prove Surprise 20

IV. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT 22

V. CONCLUSION 24

TABLE OF AUTHORITIES

Pages

Cases

A & M Produce Co. v. FMC Corp.,
(1982) 135 Cal.App.3d at p. 487.....5, 7

Ajamian v. CantorCO2e, LP
(2012) 203 Cal.App.4th 771 5

American Financial Services Assn. v. City of Oakland
(2005) 34 Cal.4th 1239 1

American Software, Inc. v. Ali
(1996) 46 Cal.App.4th 1386 7

Arguelles-Romero v. Superior Court
(2010) 184 Cal.App.4th 825 3

Armendariz v. Foundation Health Psychcare Services, Inc.
(2000) 24 Cal.4th 83 2-3,5-7

AT&T Mobility v. Concepcion
(2011) __ U.S. __ [131 S.Ct. 1740] ..... *passim*

California Grocers Assn. v. Bank of America,
(1994) 22 Cal.App.4th 205 .....7, 18

Caron v. Mercedes-Benz Financial Services USA, LLC
(2012) 208 Cal. App.4th 7 3

Carroll v. Interstate Brands Corp.
(2002) 99 Cal.App.4th 1168 3

Casey v. Proctor
(1963) 59 Cal.2d 97 19

Desert Outdoor Advertising v. Superior Court
(2011) 196 Cal.App.4th 866 19

Fisher v. DCH Temecula Imports, LLC
(2010) 187 Cal.App.4th 60 3

Flores v. Transamerica HomeFirst, Inc.
(2001) 93 Cal.App.4th 846 6

Goodridge v. KDF Automotive Group, Inc.
(2012) __ Cal.App.4th __, 2012 WL 3635279 3

TABLE OF AUTHORITIES

Pages

Cases

Graham v. Scissor-Tail, Inc.
(1981) 28 Cal.3d 807 ..... 5, 7-8

Jay Bharat Developers, Inc. v. Minidis
(2008) 167 Cal.App.4th 437 16

Kinney v. United Healthcare Services, Inc.
(1999) 70 Cal.App.4th 1322 7

Kunert v. Mission Financial Services Corp.
(2003) 110 Cal.App.4th 242 ..... 8-9, 18

Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP
(2011) 201 Cal.App.4th 368 3

Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.
(2001) 89 Cal.App.4th 1042 7

Morris v. Redwood Empire Bancorp.,
(2005) 128 Cal.App.4th 1305 ..... 6-7, 20

Norris v. San Mateo County Title Co.
(1951) 37 Cal.2d 269 3

Pantoja-Cahue v. Ford Motor Credit Co.
(2007) 375 Ill.App.3d 49, 872 N.E.2d 1039 14

Parada v. Superior Court
(2009) 176 Cal.App.4th 1554 ..... 17, 18, 0

Perdue v. Crocker National Bank
(1985) 38 Cal.3d 913 5

Perry v. Thomas
(1987) 482 U.S. 483 23

Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223 ..... *passim*

Preston v. Ferrer
(2008) 552 U.S. 346 22

Rosenthal v. Great Western Fin. Securities Corp.
(1996) 14 Cal.4th 394 20

TABLE OF AUTHORITIES

Pages

Cases

Sanchez v. Valencia Holdings Co., LLC
(2011) 135 Cal.Rptr.3d 19 ..... *passim*

Stirlen v. Supercuts, Inc.
(1997) 51 Cal.App.4th 1519 7

Szetela v. Discover Bank
(2002) 97 Cal.App.4th 1094 5

Toyo Tire Holdings of Americas, Inc. v. Continental Tire North America, Inc.
(9th Cir. 2010) 609 F.3d 975 16

24 Hour Fitness, Inc. v. Superior Court
(1998) 66 Cal.App.4th 1199 6

Volt Information Sciences, Inc. v. Board of Trustees
(1989) 489 U.S. 468.....22

Statutes

United States Code
Title 9, section 2.....22

California Uniform Commercial Code
Section 2502.....13
Section 2702.....13
Section 2703.....13
Section 2705.....13
Section 2706.....13
Section 2717.....13
Section 4403.....13
Section 9609.....13, 14

Civil Code
Section 1641.....7
Section 1670.5.....8
Section 1950.5.....13
Section 2981 .....3, 8
Section 2981.9.....9, 21
Section 2982.....9, 21
Section 2983.2.....24

TABLE OF AUTHORITIES

Pages

Statutes

Code of Civil Procedure
Section 116.231....10
Section 431.70....13
Section 512.070....17
Section 1281.8....16

Financial Code
Section 864....13

Other Authorities

Brandon et al., Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society (1984) 37 Vand. L. Rev. 845 11

Garner, ed., Black's Law Dict. (9th ed. 2009) 11

Gergen, A Theory of Self-Help Remedies in Contract (2009) 89 B.U. L. Rev. 1397 .... 11, 12

Lawrence's Anderson on the UCC (3d ed. 2011) Volume 11, section 9-609:12 14

McCullough, Letters of Credit Volume 1, sections 1.01, 4.05 3

Rubin, The Code, the Consumer, and the Institutional Structure of the Common Law (1997) 75 Wash. U. L.Q. 11.... 12

Ops. Atty. Gen. 08-804 (December 31, 2009), 2009 WL 5206063....9

I.

INTEREST OF AMICI CURIAE

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 leadership positions 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, 1245.)

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 such as 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 advo-

cates 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.

II.

INTRODUCTION

The Federal Arbitration Act ("FAA") affords "parties … discretion in designing arbitration processes … to allow for efficient, streamlined procedures tailored to the type of dispute." (*AT&T Mobility v. Concepcion* (2011) __ U.S. __, __ [131 S.Ct. 1740, 1749] ("*Concepcion*").) In tailoring arbitration to meet their needs, parties "may agree to limit the issues subject to arbitration." (*Id*., at p. 1748.)

"[A]rbitration clauses may be limited to a specific subject or subjects[; they] are not required to 'mandate the arbitration of all claims between [the parties] in order to avoid invalidation on grounds of unconscionability.' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 248 ("*Pinnacle Museum*"), quoting *Armendariz v.*

Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 120 ("*Armendariz*").)

The arbitration provision of the contract used in connection with Sanchez's auto purchase is just such a clause. The standard Law Printing form contract[1] was carefully designed to comply with the comprehensive state law governing such transactions, the Rees-Levering Motor Vehicle Sales and Finance Act (Civ. Code, §§ 2981 et seq.), while the contract's arbitration clause balanced the needs of the three parties to the sales finance transaction: the purchaser, the auto dealer and the financing entity.

Most importantly for these amici,[2] whose members finance many of this state's car sales, the arbitration clause preserves both the finance company's and the buyer's rights to exercise self-help remedies without waiving their right to arbitration.[3] The arbitration clause also preserves the car buyer's

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[1] Produced by The Reynolds and Reynolds Company of Dayton, Ohio, Law Printing forms document most California car sales. A spate of recent Court of Appeal decisions illustrates the ubiquity of these contract forms and the importance of this Court's resolution of the issues affecting enforceability of the forms' arbitration provision. (See *Goodridge v. KDF Automotive Group, Inc*. (2012) __ Cal.App.4th __, 2012 WL 3635279; *Caron v. Mercedes-Benz Financial Services USA, LLC* (2012) 208 Cal. App.4th 7; *Fisher v. DCH Temecula Imports, LLC* (2010) 187 Cal.App.4th 60; *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825.)

[2] Ordinarily, self-help remedies are invoked, if at all, only after the conditional sale contract has been assigned to a finance company, so this provision is of greatest concern to the finance company, not the dealer.

[3] The pertinent provision of the arbitration clause states: "You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit." (Reply Brief on Merits ("RBM"), Attachment A.)

right to go to small claims court, provides an expeditious alternative to litigation for larger disputes, and requires the dealer or financing entity advance the first $2,500 of the buyer's share of arbitration costs. The clause protects both buyer and dealer from unusually harsh awards by providing a three-arbitrator review for outlier results.

The Court of Appeal mistakenly analyzed whether the arbitration clause is unconscionable under California law by isolating these provisions— in particular the preservation of self-help remedies—rather than evaluating them in the context of the clause as a whole. According to Sanchez, this provision unfairly protects the financing entity's right to repossess a consumer's vehicle while giving the customer nothing in return.

The preservation of self-help remedies is not one-sided—it also protects the consumer's self-help remedies, of which the most frequently claimed are the suspension of monthly payments in the event of a dealer default and the denial of access to the vehicle by a finance company seeking repossession. Although mutuality is not a prerequisite to enforceability, the preservation of these extra-judicial remedies is bilateral and cannot by any stretch of the imagination "shock the conscience."

Self-help remedies are commonplace. Many types of contracts expressly grant self-help remedies to one contracting party only. Deeds of trust are an obvious example. In other instances, self-help remedies are implied or granted by statute. No judicial conscience has been shocked by these provisions when included in contracts without arbitration clauses. Adding an arbitration clause to a contract does not change the nature of a self-help provision or make self-help an anathema.

Moreover, the FAA would preempt any state-law rule that banned self-help remedies only in contracts with arbitration clauses. "[T]he FAA pre-

cludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses …." (*Pinnacle Museum*, 55 Cal.4th at p. 245.) Sanchez and the Court of Appeal would force parties to choose between self-help remedies and arbitration. Such a Hobson's choice is inconsistent with the FAA's mandate.

The Court should hold that the Law Printing form's arbitration provision is enforceable and, therefore, reverse the Court of Appeal's judgment.

III.

PRESERVATION OF SELF-HELP REMEDIES IS NOT UNCONSCIONABLE

"The party resisting arbitration bears the burden of proving unconscionability." (*Pinnacle Museum*, 55 Cal.4th at p. 247; *Ajamian v. CantorCO2e, LP* (2012) 203 Cal.App.4th 771, 795; *Szetela v. Discover Bank* (2002) 97 Cal. App.4th 1094, 1099.)

Under the widely used *A & M Produce* test,[4] to sustain its burden, the party resisting arbitration must show the arbitration agreement to be both substantively and procedurally unconscionable. (*Pinnacle Museum*, 55 Cal.4th at p. 247; *Armendariz*, 24 Cal.4th at p. 114 .)[5]

Substantive and procedural unconscionability need not be present in the same degree, however. Rather, "the more substantively oppressive the con-

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[4] *A & M Produce Co. v. FMC Corp*. (1982) 135 Cal.App.3d 473, 486.

[5] Following the Court's lead in *Pinnacle Museum*, amici analyze the arbitration clause in this case under the *A & M Produce* test rather than the alternative analysis of *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820 ("*Graham*"). "Both pathways should lead to the same result." (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925 n. 9.)

tract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Pinnacle Museum*, 55 Cal.4th at p. 247; see also *Armendariz*, 24 Cal.4th at p. 114.)

Sanchez cannot sustain his burden. In preserving self-help remedies, the Law Printing form's arbitration agreement does not "shock the judicial conscience" or even come close to doing so. Nor is the arbitration agreement procedurally unconscionable. It is neither oppressive nor surprising to the average car purchaser. It is well-suited to fair adjudication of the types of disputes likely to arise between car buyers and car dealers or between car buyers and auto finance companies. The Court of Appeal erred in finding this provision of the arbitration clause unconscionable.

A. The Preservation Of Self-Help Remedies Is Not Substantively Unconscionable

1. To Be Substantively Unconscionable A Provision Must Shock The Judicial Conscience When Viewed In Context

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. A contract term is not substantively unconscionable when it merely gives one side a greater benefit . . . ." (*Pinnacle Museum*, 55 Cal.4th at p. 246.) A provision is substantively unconscionable if it is "so one-sided as to 'shock the conscience.' " (*Ibid.*, quoting *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.)[6]

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[6] "The phrases 'harsh,' 'oppressive,' and 'shock the conscience' are not synonymous with 'unreasonable.' Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis." (*Morris v. Redwood Empire*

(Fn. cont'd)

"[U]nconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." (*Armendariz,* 24 Cal.4th at pp. 117-118, quoting *A & M Produce Co. v. FMC Corp., supra*, 135 Cal.App.3d at p. 487.) Thus, "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,* 24 Cal.4th at p. 117, quoting *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1536.) To shock the conscience, an arbitration clause must lack even a "modicum of bilaterality." (*Pinnacle Museum,* 55 Cal.4th at p. 256 (conc. opn. of Werdegar, J.); *Armendariz,* 24 Cal.4th at p. 117.)

The "shock the conscience" test may be applied to an individual contract term only after it is viewed in the context of the whole agreement. (See Civ. Code, § 1641 ("The whole of a contract is to be taken together ….").) Viewed alone, many contractual provisions might seem both non-mutual and extreme. Sanchez's unilateral promise to pay, for example, is not mutual and imposes a substantial financial obligation. But the buyer's non-mutual promise is given in exchange for the dealer's transferring title and arranging financing of a Mercedes-Benz car. Properly seen in that context, Sanchez's promise is quite reasonable.

Thus, as this Court held in *Graham* and reiterated in *Armendariz,* a contract "will be denied enforcement if, ***considered in its context***, it is unduly oppressive or 'unconscionable." (*Armendariz,* 24 Cal.4th at p. 113; *Graham,*

(Fn. cont'd)
Bancorp., supra, 128 Cal.App.4th at pp. 1322-1323; citations omitted; accord: *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1055; *Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1330; *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391; *California Grocers Assn. v. Bank of America, supra,* 22 Cal.App.4th at pp. 214-215.)

28 Cal.3d at p. 820; emphasis added.) Similarly, Civil Code section 1670.5(b) requires a court to give parties a "reasonable opportunity to present evidence as to [the contract's or a clause's] commercial setting, purpose, and effect to aid the court" in deciding whether it is unconscionable.

2. Preservation Of Self-Help Remedies Seen In Context

Most cars are purchased on credit. Most credit sales are tri-partite transactions. The buyer signs a conditional sale contract and takes delivery of the car. The dealer parts with the car and sells the contract to an auto financing entity, typically a finance company or a bank, in return for payment. As an assignee of the conditional sale contract, the financing entity acquires the right to collect the purchase price plus a time-price differential in monthly payments over the contract's term.

To document these sales, most California car dealers use Law Printing conditional sale contract forms. The Reynolds company offers dealers these contract forms in two versions, one with, the other without an arbitration agreement. (See Reynolds Document Solutions Product Catalog, F&I Management, p. 38.)[7] The Rees-Levering Act dictates most of the conditional car sale contract's contents and format.[8]

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[7] Publicly available at <http://www.reyrey.com/solutions/document_solutions/catalog/IDS_Catalog_F&I_Management_LR.pdf>.

[8] "The Rees–Levering Act … defines and governs conditional sale contracts. Its objective is to protect purchasers against excessive charges by requiring full disclosure of all items of cost. … The extensive formalities and requirements prescribed by the statute for conditional sale contracts are mandatory, and a contract that does not substantially conform to the requirements is unenforceable." (*Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242, 248 ("*Kunert*").)

The contract is lengthy—about 26 inches—because of the Rees-Levering Act's "single document" rule. (Civ. Code, § 2981.9.)[9] The front side of the contract is crammed with information that the Rees-Levering Act requires to be disclosed in particular locations and type sizes. (See Civ. Code, § 2982(a), (g), (h).) There, the dealer must disclose the terms over which buyer and dealer negotiate most frequently: the car, its price, any trade in, the finance charge, add-on products or services, and so on.

The reverse side of the contract states the standard terms that are seldom the subject of negotiation: the method of computing the finance charge; the buyer's other promises (such as to keep the car insured and to grant a security interest in the car), the contract holder's remedies on the buyer's default,[10] and the arbitration clause.

The Law Printing contract's arbitration clause was carefully drawn to balance the interests of car buyer, dealer, and finance company and to allow efficient adjudication of the varied types of disputes that may arise among those parties.

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[9] Under the Rees-Levering Act, "[a]ll terms must be set forth in a single document, … among other requirements." (*Kunert*, 110 Cal.App.4th at p. 248.) A recent Attorney General Opinion concludes that the single document rule is satisfied if the document consists of multiple pages that are attached to each other and integrated by means such as inclusive sequential page numbering (e.g., "1 of 4," "2 of 4," etc.). (Ops. Atty. Gen. 08-804 (Dec. 31, 2009), 2009 WL 5206063.) But few dealers or finance companies have been willing to risk Rees-Levering Act's severe sanction for violation of the single document rule to find out if the Attorney General is correct.

[10] In this section, the contract expressly grants the contract holder the right to repossess the car on the buyer's default. (See RBM, Attachment A ("If you default, we may take (repossess) the automobile from you if we do so peacefully and the law allows it.").)

A buyer's complaint often arises from perceived defects in the car or the dealer's servicing of it. The arbitration clause offers two efficient resolution mechanisms. For small disputes, the car buyer may resort to small claims court.[11] Larger disputes must, at either party's option, be arbitrated. Subject to the arbitrator's later award, the dealer or finance company must advance the first $2,500 in fees the car buyer would otherwise incur in the arbitration proceeding. The buyer has the right to seek a three-arbitrator review if the single arbitrator orders a turn-over of the vehicle, awards the buyer nothing, or enters an award against the buyer in excess of $100,000.

For the financing entity, the arbitration clause's preservation of self-help remedies is important. The company fully performs at the outset of the transaction by paying the dealer for the buyer's contract. The company must then await the buyer's full performance in monthly payments over the course of the ensuing 48-, 60- or even 72-month contract term. A buyer's decision to stop paying while retaining possession of the vehicle is by far the most common cause of disputes between a finance company and a buyer.

Because it normally assigns the buyer's contract to a finance com-pany shortly after execution, the dealer rarely has a claim against the buyer. For the dealer, the arbitration clause offers the advantage of a swift, comparatively inexpensive resolution of buyers' claims by arbitration while protecting the dealer against runaway awards: class action arbitration is not allowed, and the dealer may seek a three-arbitrator review if the single arbitrator awards an

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[11] Contrary to Sanchez's argument (Ans. Brief on Merits ("ABM"), 48), neither dealer nor finance company is likely to resort to small claims court because no person may file more than two small claims actions demanding more than $2,500 anywhere in the state in any calendar year. (Code Civ. Proc., § 116.231(a).)

injunction or more than $100,000 against it. For awards within the $0–$100,000 range, the single arbitrator ruling is final.

The arbitration clause in the Law Printing contract exhibits far more than the required "modicum of bilaterality." (*Pinnacle Museum*, 55 Cal.4th at p. 256.) Its terms are carefully crafted to meet the needs and protect the legitimate interests of the car buyer, the car dealer, and the auto finance company. In particular, the preservation of self-help remedies allows a car buyer and an auto finance company to employ self-help, the least expensive and most expeditious means of resolving their most common disputes.[12]

3. Preservation of Self-Help Remedies Is Mutual Although It Need Not Be In Order To Avoid Being Unconscionable

Self-help remedies are "actions a party may take to obtain redress for breach of contract [or other wrong] ***without going to court***."[13] Repossession, the example given in the Law Printing contract, is one self-help remedy.[14] But

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[12] The same is true of the three-arbitrator review provision that Sanchez and the Court of Appeal have also criticized. However, as that primarily protects car buyers and dealers from extreme arbitration awards, these amici leave it to others to discuss that issue. (See RBM, 20-22.)

[13] Gergen, A Theory of Self-Help Remedies in Contract (2009) 89 B.U. L. Rev. 1397 & n. 1 [emphasis added]; *see also* Brandon et al., Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society (1984) 37 Vand. L. Rev. 845, 850 (Self-help remedies are "legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a civil wrong."); Garner, ed., Black's Law Dict. (9th ed. 2009) ("extrajudicial remedy. A remedy not obtained from a court, such as repossession.—Also termed self-help remedy.").

[14] The pertinent portion of the arbitration clause states: "You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a

(Fn. cont'd)

other self-help remedies abound in other contracts, under statutes, including the Uniform Commercial Code, and at common law.[15] The preservation of these remedies in the event a party invokes the arbitration clause does not shock the conscience.

(a) Self-Help Remedies Are Claimed By Consumers As Well As Financing Entities

Contrary to the Court of Appeal's mistaken view,[16] purchasers and debtors—as well as retailers and creditors—invoke self-help remedies. "Perhaps the most important is [UCC] section 2-717, which authorizes the buyer to deduct from future payments any damages attributable to the seller's breach. This is a valuable self-help remedy for consumers …" (Rubin, *supra,* 75 Wash. U. L.Q. at p. 36.)[17]

Self-help "does not represent a final disposition of the dispute, since the other party can always appeal to the courts or, in this case, to the arbitrator; rather, its function is to shift the burden of initiating that appeal from one party to the other. Thus, self-help compels the other party—absent an ability to resort to countervailing self-help—to initiate a lawsuit if it wants redress."

(Fn. cont'd)
different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit." (RBM, Attachment A.)

[15] See Gergen, *supra,* 89 B.U. L. Rev. at pp. 1401-1448; Rubin, The Code, the Consumer, and the Institutional Structure of the Common Law (1997) 75 Wash. U. L.Q. 11, 36-40.

[16] 135 Cal.Rptr.3d at pp. 38-39.

[17] "Putting to the side repossession, the principal self-help remedy in contract is the power to withhold performance in response to breach. Often this power is exercised in tandem with the power to refuse non-conforming performance. In addition, a party may threaten to withhold performance in order to extract concessions." (Gergen, *supra,* 89 B.U. L. Rev. at p. 1398.)

(*Ibid*.) The arbitration clause's only effect on already extant self-help remedies is to give either party the option to change the forum for the other party's challenge from court to arbitration.

Though each party often retains self-help remedies, mutuality of self-help remedies is not required. Many contracts expressly grant only one party a self-help remedy. For example, most personal property-secured credit agreements grant the creditor the right to repossess the collateral upon default.[18] Deeds of trust uniformly grant the trustee a power of nonjudicial sale. Most leases provide for security deposits to which the landlord may resort, without judicial intervention, to pay for cleaning, repair, or unpaid rent. (See Civ. Code, § 1950.5.) Many other sorts of agreements call for security deposits,[19] regular or standby letters of credit,[20] special liens,[21] or other similar means allowing one party a self-help remedy if the other party defaults or breaches.[22]

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[18] Even without express agreement, a creditor may repossess personal property collateral after default. (Cal. U. Com. Code, § 9609(a)(1), (b)(2).) Other UCC provisions specifically authorizing self-help remedies include sections 2502(1), 2702, 2703(a)-(d), 2705(1), 2706, 2717, and 4403. Among the many other statutes recognizing or granting self-help remedies are Code of Civil Procedure section 431.70 and Financial Code section 864.

[19] See, e.g., *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 383-384.

[20] See 1 McCullough, Letters of Credit, §§ 1.01, 4.05.

[21] By contract, attorneys may acquire liens on their client's choses in action which they may enforce by notice to the defendant or by filing a notice of lien in a pending action. (See *Carroll v. Interstate Brands Corp*. (2002) 99 Cal. App.4th 1168, 1172, 1176.)

[22] Real estate purchase agreements, for example, typically call for a down payment by the buyer, which is held in escrow, and may be paid to the seller if the buyer defaults. (See *Norris v. San Mateo County Title Co.* (1951) 37 Cal.2d 269, 273.)

One-sided self-help remedies are frequently found in contracts under which one party fully performs at the outset in return for the other party's promise of a continuing series of payments or other performances. In those situations, one-sided self-help remedies offset an unequal risk of breach. But even if the contract expressly grants a self-help remedy to only one party, the other party may often employ self-help measures anyway.

Sanchez's purchase transaction illustrates both points. The Law Printing contract expressly grants a self-help remedy, repossession, to only one party: the dealer or its assignee. But Sanchez could use self-help to force the dealer or the finance company to initiate litigation or arbitration of any dispute. He could simply stop paying and lock the car in a garage when not using it, to prevent the finance company from repossessing it.[23] The arbitration agreement reserves the buyer's right to take whatever self-help steps the law allows, as well as the creditor's right to self-help repossession.

So, contrary to the Court of Appeal's assumption, the preservation of self-help remedies in the Law Printing contract's arbitration clause is not one-sided. It preserves those remedies for buyer, dealer, and finance company.

(b) Preserving Self-Help Remedies In Arbitration Does Not Alter Existing Contract Rights

The preservation of these remedies only reiterates expressly what would be true if the arbitration clause were silent on the subject. Choosing arbitration does not prevent parties from acting in their own self-interest by

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[23] Self-help repossession is permitted only if effected without a breach of the peace. (Cal. U. Com. Code, § 9609(b)(2).) It is a breach of the peace to break into a locked garage to repossess a car. (See *Pantoja-Cahue v. Ford Motor Credit Co.* (2007) 375 Ill.App.3d 49, 55-57, 872 N.E.2d 1039, 1044-1046; 11 Lawrence's Anderson on the UCC (3d ed. 2011) § 9-609:12 [Rev].)

means not requiring judicial intervention. And invoking those remedies does not waive a party's right to invoke arbitration when necessary to resolve any remaining dispute.

But even if the provision were as one-sided as the Court Appeal imagined, it would not be substantively unconscionable. As just noted, many agreements expressly grant self-help remedies, often only to one party. No court has ever held that any of these contracts unconscionable because it granted only one party a self-help remedy, while otherwise calling for judicial resolution of disputes.

That a contract calls for arbitral rather than judicial resolution of disputes cannot trigger less favorable treatment of one-sided self-help remedy provisions.[24] Self-help remedies which otherwise pass judicial muster cannot become unconscionable simply because the contract specifies an arbitral rather than a judicial forum for the final resolution of disputes.

A finance company is free to repossess cars under the Law Printing form contract which lacks an arbitration clause. Preservation of that same remedy in the parallel Law Printing form contract with an arbitration clause cannot shock the judicial conscience.

(c) Self-Help Remedies Are Not Equivalent To Injunctive Relief

The Court of Appeal also faulted the preservation of self-help remedies, asserting it protected "repossession—to which only the car dealer would

[24] As discussed below (see Section IV), the FAA would preclude such a result even if California law permitted it. "[T]he FAA precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses …." (*Pinnacle Museum,* 55 Cal.4th at p. 245.)

resort—from arbitration, while subjecting a request for injunctive relief—the buyer's comparable remedy [—] to arbitration … ." (135 Cal. Rptr.3d at p. 39.) This reasoning is flawed for two reasons.

First, it compares apples to oranges—a self-help remedy to injunctive relief which only a court (or arbitrator) may award. Repossession occurs without court or arbitrator intervention or approval. An injunction is a court's or arbitrator's order, not something a party can issue on its own. An arbitration agreement moves dispute resolution from court to arbitrator, including the function of issuing injunctions. But the arbitration agreement leaves unaffected self-help and other acts that parties may undertake on their own without a court's or an arbitrator's approval.

Second, a car buyer may, in fact, obtain injunctive relief from a court without waiving his or her right to arbitrate the dispute, if that relief is needed to preserve the status quo until the arbitrator may act.[25] So, even if it made sense to compare self-help with injunctive relief, the clause in question is mutual, permitting both of these remedies to be invoked outside (and without waiving) arbitration. This fact distinguishes *Flores v. Transamerica HomeFirst, Inc*. (2001) 93 Cal.App.4th 846, 854-855, which found an arbitration provision in a mortgage unconscionable because it not only excluded the lender's sole remedy—nonjudicial foreclosure—from arbitration but also forbade the arbitrator from awarding any injunction against foreclosure.

In reaching its conclusion about the preservation of self-help remedies, the Court of Appeal displayed a fundamental misunderstanding of the remedies available to, and often invoked by, car buyer and finance company. As

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[25] Code Civ. Proc., § 1281.8; *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 446-447, *Toyo Tire Holdings of Americas, Inc. v. Continental Tire North America, Inc*. (9th Cir. 2010) 609 F.3d 975, 980-982.

noted above, both of these parties may, and often do, resort to self-help—the buyer discontinuing monthly payments and keeping the vehicle under lock and key, and the finance company attempting repossession. Similarly, both sides frequently seek injunctive relief—the finance company as part of the claim and delivery process[26] and the buyer to block repossession or other collection efforts.

In short, the preservation of self-help remedies is not substantively unconscionable. Contracts granting self-help remedies, often to only one party, are common place. None has ever been held unconscionable for that reason. Here, the arbitration clause's preservation of self-help remedies merely restates expressly the rule that would apply in its absence.

B. The Arbitration Clause Is Not Procedurally Unconscionable

The procedural element of unconscionability "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (*Pinnacle Museum*, 55 Cal.4th at p. 246.) "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." (*Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1568 ("*Parada*"); citations omitted.)

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[26] The Court of Appeal opined that "it is the buyer, not the car dealer, who would be seeking a preliminary or permanent injunctive relief …" (135 Cal.Rptr.3d 19.) While dealers do not normally seek such a remedy, finance companies regularly do so in claim and delivery actions. (Code Civ. Proc., § 512.070 (" order directing the defendant to transfer possession of property to the plaintiff" enforceable through "contempt").)

1. Adhesion Contract Begins But Does Not End Analysis

Contrary to Sanchez's argument (ABM, 33), the fact that his conditional sale contract was adhesive " 'heralds the beginning, not the end, of our inquiry into its enforceability.' A procedural unconscionability analysis also includes consideration of the factors of surprise and oppression." (*Parada*, 176 Cal.App.4th at p. 1571 [citations omitted]; *California Grocers Assn. v. Bank of America, supra,* 22 Cal.App.4th at p. 214.)

To label a contract "adhesive" does not advance the unconscionability analysis, particularly when the contract must be standardized to conform to statutory requirements. (*Pinnacle Museum*, 55 Cal.4th at p. 248 ("Thus, while a condominium declaration may perhaps be viewed as adhesive, a developer's procedural compliance with the Davis-Sterling Act provides a sufficient basis for rejecting [a] claim of procedural unconscionability.").) Moreover, "the times in which consumer contracts were anything other than adhesive are long past." (*Concepcion,* 131 S.Ct.at p. 1750.)

Like the *Pinnacle Museum* CC&Rs, Sanchez's conditional sale contract was adhesive. It was a pre-printed form. Also like the *Pinnacle Museum* CC&Rs, Sanchez's contract, including its content, its font size and the terms' location in the contract, were mandated by the Legislature, in the Rees-Levering Act. (Civ. Code, §§ 2981 et seq.; *Kunert* 110 Cal.App.4th at p. 248.) Only the contract's key terms—the car and accessories sold, the trade-in, the sales price and finance charge—were negotiated. The standard terms, including the arbitration clause, were not. But such terms rarely are, even in contracts between sophisticated business entities.

The Court of Appeal's reference to the standard form contract as "a prolix printed form drafted by the party seeking to enforce the disputed terms" was a misplaced criticism of the Legislature's mandate. It failed to consider

how the Rees-Levering Act's many requirements constrain a drafter's ability to accord an arbitration clause the prominence which the Court of Appeal—but not the Legislature—thought appropriate. (See 135 Cal.Rptr.3d at p. 30.)

2. Sanchez Did Not Prove Oppression

The Court of Appeal also erred in holding that Sanchez had proven the arbitration clause was "oppressive" because the contract was presented on a take-it-or-leave-it basis, he was not given time to read it, and he was not told that there was an arbitration provision on the back of the contract form. (135 Cal.Rptr.3d at p. 30.)

More is needed to establish oppression. *Pinnacle Museum*, 55 Cal.4th at p. 236 ("An arbitration clause within a contract may be binding on a party even if the party never actually read the clause.")[27] Sanchez's arguments all miss the mark.

Sanchez's claim that he was not "given" time to read the contract is belied by his admission that he signed the same form contract for the second time a week after he first signed and received a copy of it. (Appellant's Appendix, 366.) A week was ample time to peruse the contract. Sanchez simply chose not to do so.

That the car salesman did not mention the contract's arbitration provision also fails to prove oppression. A salesman is not a car buyer's

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[27] "A cardinal rule of contract law is that a party's failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract's enforcement." (*Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal. App.4th 866, 872; citations omitted; see also *Casey v. Proctor* (1963) 59 Cal.2d 97, 104-105 ("[P]laintiff's failure to read the release, or, if he did read it, his failure to understand … it … was, as a matter of law, the neglect of a legal duty ….").)

fiduciary. Even a stockbroker, who *is* a fiduciary, is under no duty to orally warn his customer of an arbitration provision.[28]

Sanchez offered no evidence that he could not have bought a car he wanted, or one like it, from another dealer that used a contract form without an arbitration clause.[29] As already noted, Law Printing provides conditional car sale contracts without arbitration agreements. Some dealers use those forms.[30]

In short, Sanchez failed to meet his burden of showing oppression beyond the simple fact that his contract was one of adhesion.

3. Sanchez Did Not Prove Surprise

Surprise may be shown "where the allegedly unconscionable provision is hidden within a prolix printed form." (*Parada*, 176 Cal.App.4th at p. 1568.) As in *Pinnacle Museum*, the Law Printing contract's form is dictated by the Legislature in the Rees-Levering Act. Legislatively mandated prolixity cannot invalidate a contract. Instead, compliance with statutory requirements "pro-

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[28] "[W]e find no authority for the proposition the fiduciary obligations of a broker extend to orally alerting the customer to the existence of an arbitration clause or explaining its meaning and effect." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 425.)

[29] "Oppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives." (*Morris v. Redwood Empire Bancorp., supra,* 128 Cal.App.4th at p. 1320.)

[30] In holding for Sanchez on this issue, the Court of Appeal improperly switched the burden of proof, finding "no evidence Sanchez could have purchased a Mercedes-Benz from a dealer who did not mandate arbitration." (135 Cal.Rptr.3d at p. 31.)

Oddly, the Court of Appeal also cited the dealer's argument that "arbitration per se may be within the reasonable expectation of most consumers." (135 Cal.Rptr.3d at pp. 32-33.) This finding of a common expectation negates the element of surprise, but does not prove a lack of marketplace alternatives.

vides a sufficient basis for rejecting [a] claim of procedural unconscionability." (*Pinnacle Museum*, 55 Cal.4th at p. 248.)

A long list of disclosures must appear on the Law Printing contract's front side. (Civ. Code, § 2982.) The entire contract must be in a single document, which until after Sanchez's car purchase was taken to mean a single page. (Civ. Code, § 2981.9; see n. 9, above.) To fit all required terms on the front of the contract already requires a 26-inch-long form. Adding the arbitration clause to the front side would further lengthen the already unwieldy form.

In any case, the arbitration clause in the Law Printing contract was not hidden. It was emphasized and separated from the rest of the contract's text by a box. The rest of the text above the box was in two-column format, contrasting with the arbitration clause's single column format. In all-capital-letter and boldface type at the top of the box, the clause was clearly identified as an "ARBITRATION CLAUSE." (RBM, Attachement A.)

On its front side, the contract twice mentions the terms on its reverse side. The second time—right above the buyer's last signature—the contract states: "**YOU ACKNOWLEDGE YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE**." (RBM, Attachment A.)

If the buyer, nevertheless, does not bother to turn the contract over, he or she will not see the arbitration clause. But that is the result of the buyer's choice not to examine the document before signing it, not the fault of the draftsman. In this case, Sanchez was led to water—as it turns out, twice over the course of a week. It was his choice not to drink.

Thus, apart from its being an adhesion contract, there was nothing procedurally unconscionable about Sanchez's auto purchase agreement or its arbitration clause. The Court of Appeal erred, as a matter of law, in holding otherwise.

IV.

THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

Reflecting a " 'liberal federal policy favoring arbitration,' ... and the 'fundamental principle that arbitration is a matter of contract' " (*Concepcion,* 131 S.Ct. at pp. 1742, 1745), the FAA decrees that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[31] (9 U.S.C. § 2.) As self-help remedies are available under traditional contract law, the FAA precludes using the preservation of those remedies as a ground to deny the enforceability of an arbitration clause.

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced ***according to their terms***." (*Concepcion,* 131 S.Ct. at p. 1748, quoting *Volt Information Sciences, Inc. v. Board of Trustees* (1989) 489 U.S. 468, 478; emphasis added.) The FAA affords "parties … discretion in designing arbitration processes … to allow for efficient, streamlined procedures tailored to the type of dispute." (*Concepcion,* 131 S.Ct. at p. 1749.) Thus, "parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." (*Id.*, at pp. 1748-1749; citations omitted.)

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[31] The FAA " 'appli[es] in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.' " (*Preston v. Ferrer* (2008) 552 U.S. 346, 353.)

The FAA not only preempts any state law or doctrine that "prohibits outright the arbitration of a particular type of claim" but also precludes a state from employing "generally applicable contract defenses, such as fraud, duress, or unconscionability"[32] in a manner that disfavors arbitration. (*Id.*, at p. 1747.) "[A] court 'may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.' " (*Ibid.*, quoting *Perry v. Thomas* (1987) 482 U.S. 483, 493 n. 9.) "Although [FAA] § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Concepcion*, 131 S.Ct. at p. 1748.)

Contrary to the Court of Appeal's narrow view (135 Cal.Rptr.3d at p. 29), these principles sweep well beyond *Discover Bank's* condemnation of class action waivers in arbitration agreements, the particular context in which *Concepcion* applied them.

The Court of Appeal's reasoning was irreconcilable with these FAA principles. As just explained, the FAA commands state, as well as federal, courts to enforce arbitration clauses as written. Under the FAA, parties may limit the issues subject to arbitration and choose arbitration procedures tailored to the types of disputes likely to arise between them. Courts may not interfere

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[32] *Concepcion* may not completely "preclude application of the unconscionability doctrine" to determine an arbitration clause's enforceability, as the Court of Appeal observed. (135 Cal.Rptr.3d at p. 28.) But *Concepcion* does clearly prohibit courts from using unconscionability to strike down an arbitration agreement based on provisions that would pass muster in any other contract. (See *Pinnacle Museum,* 55 Cal.4th at p. 235.)

with those choices but must enforce the arbitration with the limitations and procedures it adopts.

Even were the arbitration clause's preservation of self-help remedies as one-sided as the Court of Appeal held it to be (see 135 Cal.Rptr.3d at p. 39), California law does not disallow one-sided self-help remedies in other contexts. The creditor-only right to non-judicially foreclose a deed of trust, for example, has been upheld in scores of California cases. Similarly, the Rees-Levering Act recognizes and regulates a creditor's self-help repossession remedy. (Civ. Code, § 2983.2.) No court has ever found these one-sided self-help remedies to be unconscionable or unenforceable in a contract lacking an arbitration clause. The FAA preempts any state law doctrine that would treat a contract with an arbitration clause differently.

To require parties to abandon self-help remedies in order to arbitrate rather than litigate a claim is to establish a special rule that "disfavors arbitration." (*Concepcion*, 131 S.Ct. at p. 1747.) Yet, that is precisely the dilemma the Court of Appeal decision created post-default for the finance companies as well as their customers. It is difficult to imagine a state-law provision that more dramatically stands as an "obstacle to the accomplishment of the FAA's objectives." (*Id*. at p. 1348.)

As they are incompatible with the FAA, the Court of Appeal's reasoning and decision must be reversed.

V.

CONCLUSION

For the reasons stated above, the Law Printing contract's arbitration clause is enforceable. Its preservation of self-help remedies is not unconscionable. The Court should therefore reverse the Court of Appeal's judgment and

remand with directions for that court to reverse and remand with directions to compel arbitration according to the terms of the parties' agreement.

DATED: September ___, 2012

SEVERSON & WERSON
A Professional Corporation

By: _____
Jan T. Chilton

Attorneys for Amici Curiae American Financial Services Association, California Bankers Association and California financial Services Association

CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.520(c)(1)]

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that the foregoing brief contains 6,986 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: September __, 2012.

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Jan T. Chilton

PROOF OF SERVICE

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 Severson & Werson, One Embarcadero Center, 26th Floor, San Francisco, CA 94111.

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