Case No. S199119

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GIL SANCHEZ,
Plaintiff and Respondent,

vs.

VALENCIA HOLDING COMPANY, LLC,
Defendant, Appellant, and Petitioner.

BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND RESPONDENT GIL SANCHEZ

California Court of Appeal, Second District, Division One
Case No. B228027

Los Angeles Superior Court Case No. BC433634
Honorable Rex Heeseman

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208, the following application and brief are made by the Consumer Attorneys of California ("CAOC"). CAOC is a non-profit organization and is not a party to this action.

The undersigned certifies that CAOC knows of no entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Dated: October 1, 2012

Respectfully submitted,

By: _____

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND RESPONDENT GIL SANCHEZ

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND ASSOCIATE JUSTICES:

The undersigned respectfully request permission to file a brief as amicus curiae in the matter of *Gil Sanchez v. Valencia Holding Company, LLC*, No. S199119, under California Rules of Court, rule 8.520(f) in support of Plaintiff and Respondent Gil Sanchez, on behalf of Consumer Attorneys of California ("CAOC").

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. This has often occurred through class and other representative actions under California's consumer protection laws. CAOC has taken a leading role in advancing and protecting the rights of consumers and workers by (among other activities) submitting amicus briefs in cases such as *Brinker*

Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, *In re Tobacco II Cases* (2009) 46 Cal.4th 298, *Kwikset v. Superior Court* (2011) 51 Cal.4th 310, *Prachasaisoradej v. Ralphs Grocery Co.* (2007) 42 Cal.4th 217, and *Elsner v. Uveges* (2004) 34 Cal.4th 915. CAOC also participated as an amicus in numerous cases pending at the intermediate appellate level.

In our proposed brief, we address the impact of *AT&T Mobility v. Concepcion* (2011) 563 U.S.__ [131 S.Ct. 1740] ("*Concepcion*") on the use of unconscionability as a defense to arbitration agreements. Our primary purpose is to urge the Court not to accede to the notion that unconscionability is fundamentally incompatible with the Federal Arbitration Act ("FAA") 9 U.S.C. § 1, *et seq.* *Concepcion*, and other recent cases, seem to view arbitration as an unequivocal good—as if more arbitration is always better, and every time a judge refuses to enforce an arbitration agreement, he or she impedes the progress of our "national policy favoring arbitration." (*Id.* at 1749, *quoting Buckeye Check Cashing v. Cardena* (2006) 546 U.S. 440, 443.) But the FAA actually reflects a more balanced view of arbitration. As we show below, the FAA's objective is not just to promote arbitration—it is to promote *consensual* and *fair* arbitration. And the unconscionability defense, sedulously applied to arbitration agreements, does not conflict with that objective—it *advances* that objective by insisting that arbitration is, in fact, consensual and fair.

For these reasons, it makes little sense to speak of unconscionability as if it were anti-arbitration. Unconscionability is pro-arbitration.

In response to California Rules of Court, rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. Except for the authors themselves, no party or counsel for a party, and no person made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows.

Dated: October 1, 2012

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I. Introduction

The "savings clause" of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* permits arbitration agreements to be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Long before its decision in *AT&T Mobility v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740] ("*Concepcion*"), the U.S. Supreme Court recognized that this clause preserves the defense of unconscionability, since unconscionability is indisputably a defense that applies generally to all contracts. (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687; *Perry v. Thomas* (1987) 482 U.S. 483, 492 n.9)

In *Concepcion*, however, the Court held that despite the FAA's savings clause, the unconscionability defense, as applied to arbitration agreements, is constrained by the species of preemption known as "obstacle preemption," which preempts state laws that stand as obstacles to the accomplishment of Congress' purposes and objectives. (131 S.Ct. at 1748; *Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376, 383 [describing the four types of federal preemption].) Applying this doctrine, the Court further held that the FAA preempts the rule of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 ("*Discover Bank*"), because the *Discover Bank* rule effectively "require[es] the availability of classwide arbitration," and

thus "interfere[es] with fundamental attributes of arbitration." (*Concepcion*, 131 S.Ct. at 1748.)

By applying obstacle preemption to unconscionability, *Concepcion* makes clear that courts can no longer rest their preemption analyses on the observation that unconscionability is a generally applicable contract defense within the meaning of the FAA's savings clause. (*See, e.g. Discover Bank*, 36 Cal.4th at 165.) Instead, the courts must ask whether applying the unconscionability defense in a given case would conflict with the FAA's objectives by interfering with "fundamental attributes" of arbitration. (*Concepcion*, 131 S.Ct at 1747, 1748.) Unfortunately, *Concepcion* offers little guidance as to how the existence of such a conflict should be determined. As a result, courts around the country have struggled to resolve a question now before this Court: apart from overruling *Discover Bank*, what effect, if any, does *Concepcion* have on the unconscionability defense?

In this brief, we argue that *Concepcion* has little effect on unconscionability outside the *Discover Bank* context. This is because as a general matter, unconscionability advances, rather than conflicts with, the FAA's objectives by reinforcing the FAA's commitment to arbitration as a consensual and fair alternative to litigation. Because of this, post-*Concepcion*, courts may continue to apply unconscionability to arbitration

agreements without fear of undermining the FAA—provided that, in so doing, they avoid imposing procedural requirements on arbitration that would significantly undermine its efficiency. Finally, in applying unconscionability to the arbitration agreement at issue, the Court of Appeals did not impose any such requirements on arbitration, and therefore the lower court was correct in concluding that its unconscionability analysis is not preempted by the FAA.

II. Arbitration Under the FAA Is Not Just Efficient; It is Also Consensual and Fair.

Much of *Concepcion's* discussion of the FAA's objectives is devoted to extolling the efficiency of arbitration. Arbitration is said to offer "efficient, streamlined procedures tailored to the type of dispute." (131 S.Ct. at 1749.) The "informality of arbitration proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." (*Id.*) A "prime objective" of arbitration agreements is to "achieve streamlined proceedings and expeditious results." (*Id.* at 1749, *citing Preston v. Ferrer* (2008) 552 U.S. 346, 357.)

All of this may be true, but this discussion of arbitration is incomplete, because in fact arbitration, as envisioned by the FAA, has two critical features that have nothing to do with its efficiency. The first is that arbitration is consensual. The U.S. Supreme Court's FAA precedents

"emphasiz[e] the consensual basis for arbitration." (*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758, 1776.) Under the FAA, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582.) Furthermore, "nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." (*E.E.O.C. v. Waffle House, Inc.* (2002) 534 U.S. 279, 289.) Thus, "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties," (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 57), but rather "requires courts to honor parties' expectations," (*Concepcion*, 131 S.Ct. at 1752). Simply put, "[a]rbitration under the [FAA] is a matter of consent, not coercion." (*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 479.)

Fairness is the second critical feature of arbitration that received little attention in *Concepcion*. Arbitration aims not just for speed, but for the "*fair and expeditious* resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 85 [emphasis added].) The job of an arbitrator is not just to resolve disputes as quickly and economically as

possible, but to "bring his informed judgment to bear in order to reach a fair solution of a problem." (*United Steelworkers of America v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, 597.)

Congressional concern for fairness in arbitration is particularly evident in the grounds for vacatur of arbitration awards contained in Section 10 of the FAA. Generally speaking, the grounds for vacatur "ferret out bias or procedural unfairness." (2 Domke on Com. Arb. (2012) § 39:2.)

For example, a concern for fairness inheres in Section 10(a)(2) of the FAA, which allows arbitration awards to be vacated "where there was evident partiality or corruption in the arbitrators." (9 U.S.C. § 10(a)(2).) This provision allows for vacatur not only where there is evidence of actual bias, but also where an arbitrator fails to "disclose to the parties any dealings that might create an *impression* of *possible* bias." (*Commonwealth Coatings Corp. v. Continental Cas. Co.* (1968) 393 U.S. 145, 149 [emphasis added].) The reason an arbitrator must disclose prior dealings with one of the parties is that nondisclosure would constitute a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party." (*Id.* at 148.)

Congress' concern for fairness is also reflected in Section 10(a)(3) of the FAA, which allows for vacatur "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause

shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." (9 U.S.C. § 10(a)(3).) This section has been construed essentially as a guarantee of procedural fairness. Thus, an award may be vacated where an arbitrator's misconduct "so affects the rights of a party that it may be said that he was deprived of a fair hearing." (*Grahams Service Inc. v. Teamsters Local 975* (8th Cir. 1982) 700 F.2d 420, 422; *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.* (3rd Cir. 1968) 397 F.2d 594, 599 [same]; *see also Robbins v. Day* (11th Cir. 1992) 954 F.2d 679, 685 [awards may be vacated under 9 U.S.C. § 10(a)(3) where "the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing."], *disapproved on other grounds, First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 948.) And although an arbitrator is generally permitted to set his own rules of procedure, in order to comply with Section 10(a)(3), he must "stay[] within the bounds of fundamental fairness." (*Keebler Co. v. Truck Drivers, Local 170* (1st Cir. 2001) 247 F.3d 8, 9; *National Post Office Mailhandlers v. United States Postal Service* (6th Cir. 1985) 751 F.2d 834, 841.)[1]

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[1] *See also* Commercial Arbitration Rules of the American Arbitration Association, Rule R-30 (an arbitrator has discretion with respect to arbitral procedures, "provided that the parties are treated with equality and that

Finally, outside the vacatur context, the U.S. Supreme Court has recognized in a number of cases that arbitration's ability to vindicate statutory and constitutional rights depends on the fairness of the proceedings. For instance, in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, the Court rejected the plaintiff's contention that his federal statutory claims for age discrimination were not arbitrable. The Court reasoned that in light of the ample discovery methods that would be available to him in arbitration, the plaintiff had not shown that arbitration would deprive him "a fair opportunity to present [his] claims." (*Id.* at 31.) And in a series of cases, the Court held that where an arbitral decision rendered pursuant to a collective-bargaining agreement is offered as evidence in a subsequent suit against an employer under (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, (2) the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, or (3) the Civil Rights Act of 1871, 42 U.S.C. § 1983, the weight given that evidence depends on, among other things, "the degree of procedural fairness in the arbitral forum." (*Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 60 n.21 [Title VII]; *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, 743 n.22 [FLSA]; *McDonald v. City of West Branch, Mich.* (1984) 466 U.S. 284, 292 n.13 [Section 1983].)

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each party has the right to be heard and is given a fair opportunity to present its case.")

In sum, the FAA's goal is not just to promote speedy dispute resolution at all costs. The FAA actually reflects a more balanced view of arbitration, one resembling the view contained in these remarks:

> Private arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration, however, may also become an instrument of injustice imposed on a "take it or leave it" basis. The courts must distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness.

(*Engalla v. Permanente Medical Group* (1997) 15 Cal.4th 951, 986 (Kennard, J.; concurring).)

III. The Unconscionability Defense Tends to Reinforce the FAA's Commitment to Arbitration as a Consensual and Fair Process.

Apparently, certain commentators believe that the rigorous application of unconscionability to arbitration agreements is fundamentally at odds with the FAA's goal of promoting arbitration. (Opening Brief, 22-23 and n.9 [citing defense lawyers' blog].) But once it is recognized that the FAA's goal is not just to promote arbitration, but to promote consensual and fair arbitration, it becomes clear that far from conflicting with the FAA, unconscionability advances the FAA's objectives.

Consent is the focus of the procedural element of unconscionability. This element looks for "oppression" and "surprise" in the contracting process. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114.) "Oppression" exists where "the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation." (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100.) "Surprise" exists where "terms of the bargain are hidden in a prolix printed form drafted by a party in a superior bargaining position." (*Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1165.) Both of these circumstances suggest that the weaker party did not truly consent to the terms of a contract—either because he or she was not aware of them (in the case of surprise), or because he or she had no ability to reject them (in the case of oppression). Thus, as applied to arbitration agreements, the procedural element of unconscionability ensures that arbitration is what the FAA intends it to be: "a matter of consent, not coercion." (*Volt*, *supra*, 489 U.S. at 479)

Meanwhile, the substantive element of unconscionability "addresses the fairness of the term in dispute." (*Szetela, supra,* 97 Cal.App.4th at 1100.) This element looks to the terms of the agreement, and asks whether those terms are "overly harsh" or "one-sided," (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487), or lack a "modicum of

bilaterality," (*Armendariz*, *supra*, 24 Cal.4th at 117). Applied to arbitration agreements, substantive unconscionability ensures that "private arbitration systems resolve disputes not only with speed and economy but also with fairness." (*Id.* at 115, *quoting Engalla*, *supra*, 15 Cal.4th at 986 (Kennard, J., concurring).) Put another way, substantive unconscionability ensures that arbitration provides a "fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." (*Howsam*, *supra*, 537 U.S. at 85.)

IV. A Conflict Between Unconscionability and the FAA Arises Only Where Unconscionability Imposes Procedural Requirements On Arbitration That Significantly Undermine its Efficiency.

We have seen that unconscionability and the FAA are generally aligned in their commitment to consent and fairness in arbitration. But *Concepcion* raises the spectre of at least *some* possibility of conflict between the two. In this section we show that the potential for conflict is limited to a narrow set of circumstances.

In the case of the *Discover Bank* rule, the U.S. Supreme Court held that a conflict arose for two basic reasons. First, the rule "requir[es] the availability of classwide arbitration," (130 S.Ct. at 1748), which according to the Court, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to

generate procedural morass than final judgment." (*Concepcion*, 131 S.Ct. at 1751.) In short, classwide arbitration is inconsistent with the FAA's objective of providing "efficient, streamlined procedures…reducing the cost and increasing the speed of dispute resolution." (*Id.* at 1749.)

Secondly, classwide arbitration, by aggregating claims, "greatly increases risks to defendants," who are unlikely to "bet the company with no effective means of review." (*Id.* at 1752.) And since defendants are generally the ones who draft consumer contracts—"the times when consumer contracts were anything other than adhesive are long past," 131 S.Ct. at 1750—a requirement which makes arbitration unattractive to defendants will tend to undermine the "national policy favoring arbitration" embodied in the FAA. (131 S.Ct. at 1749.)

This reasoning is clear enough insofar as it applies to the *Discover Bank* rule, but not very useful in determining how far *Concepcion* goes *beyond* that rule. Because the goals of promoting arbitration, and making arbitration efficient, have no obvious stopping points, and if taken too far, they collide directly with the FAA's commitments to consent and fairness.

For example, consider an arbitration agreement which *barred* the arbitrator from disclosing prior dealings with the parties. The agreement would advance the FAA's goal of efficiency, since the disclosure of prior dealings delays the proceedings during the period of such disclosure. And

the absence of disclosure would generally make arbitration more appealing to defendants, since at least in consumer and employment cases, the arbitrator's prior dealings, if any, are more likely to involve the corporate defendant than the individual plaintiff. But any award issued pursuant to this agreement would be vacated under 9 U.S.C. § 10(a)(2), because the arbitrator's failure to disclose would violate the "strict morality and fairness" that Congress expected. (*Commonwealth Coatings Corp., supra,* 393 U.S. at 149.)

Or consider an arbitration agreement that required the arbitrator to refuse any evidence and decide all cases in favor of the drafting party. This procedure would be "efficient," streamlined," and "informal." (*Concepcion*, 131 S.Ct. at 1749.) It would "reduc[e] the cost and increas[e] the speed of dispute resolution." (*Id.*) It would certainly eliminate any danger of "procedural morass." (*Id.* at 1751.) And it would make arbitration extremely popular with corporate defendants. But of course, any award issued pursuant to such a procedure would be vacated under 9 U.S.C. § 10(a)(3), because the plaintiff would have been denied a "fair hearing." (*See Grahams Service Inc. v. Teamsters Local 975* (8th Cir. 1982) 700 F.2d 420, 422 and cases cited in Part II, *supra*.)

Or consider an arbitration agreement written in 8-point type in the middle of an adhesive, 30-page employment contract. Enforcing the

agreement would, in a very limited sense, "promote arbitration." (*Concepcion*, 131 S.Ct. at 1749.) But enforcement would also mock the principle that arbitration is a matter of "consent, not coercion." (*Volt*, *supra*, 489 U.S. at 479.)

The point is a simple one, although one that would be hard to derive from *Concepcion* alone: the FAA's goals of making arbitration widespread and efficient are constrained by the FAA's fundamental commitment to ensuring that arbitration is consensual and fair. For this reason, the scope of *Concepcion* cannot be determined simply by observing that the Court believes arbitration should be widespread and efficient; rather, the real question is how far the Court intended to go in furtherance of those two goals. Petitioner Valencia Holdings ("Valencia") may be right that "rough justice" is all that disputants can expect from arbitration. (Opening Brief, p. 18.) But the question is, how rough?

Valencia's answer to this question appears to be derived entirely from a single sentence in *Concepcion*, where the Court stated that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." (131 S.Ct. at 1749.) Valencia adds the critical word "reasonably" to this stray remark, and claims to have identified *Concepcion's* holding: arbitration agreements are enforceable, notwithstanding unconscionability,

provided that the "arbitral process agreed upon by the parties" is "*reasonably* tailored to the type of dispute." (Opening Brief, p. 13 [emphasis added].)

The weakness of Valencia's analysis is illustrated by the fact that it is based on a single sentence in *Concepcion*—a sentence that even Valencia acknowledges needs major surgery in order to become a plausible candidate for *Concepcion's* holding. But even apart from this, Valencia's proposal raises more questions than it answers. For instance, what does it mean to talk about the "arbitral process agreed upon by the parties" in the case of a contract of adhesion? And what does "reasonably" mean? And from whose perspective are the courts to evaluate reasonableness? The drafting party? The consumer? Both?

We submit that the sounder basis for ascertaining the scope of *Concepcion*—indeed, the *only* basis—lies in a careful examination of the four examples contained in *Concepcion* of instances where the Court was actually willing to commit itself to the proposition that unconscionability conflicts with the FAA. The first example is, of course, the *Discover Bank* rule: an unconscionability-based rule "[r]equiring the availability of classwide arbitration." (130 S.Ct. at 1748.) But *Concepcion* contains three other examples that the Court clearly believed would entail a conflict: (1) a rule requiring that judicially-monitored discovery be available in

arbitration; (2) a rule requiring that arbitration be conducted in accordance with the Federal Rules of Evidence; and (3) a rule requiring that arbitral disputes be resolved by jury. (*Concepcion*, 131 S Ct. at 1747-48.)

These four examples share at least two common features. Firstly, these examples all concern procedures that directly impact the heart of the arbitral process; none of them involve extraneous matters, such as responsibility for the arbitrator's fees, or the forum selection, or the power of the arbitrator to award fees or costs. Secondly, the procedures are not the kind that would have only a trivial affect on the speediness of arbitration, such as the rule requiring the arbitrator to disclose prior dealings. Rather, each example involves a litigation-like procedure that would significantly diminish the efficiency of arbitration. Thus, at the very least, *Concepcion* stands for the proposition that unconscionability conflicts with the FAA when it imposes on arbitration procedures that significantly undermine its efficiency.

Concepcion cannot plausibly be read more narrowly than this, but neither should the opinion be read more broadly. Because an overbroad reading of *Concepcion* threatens the FAA's commitments to consent and fairness in arbitration by limiting the ability of unconscionability to prevent *non*consensual, *un*fair arbitrations. Put another way, an overbroad reading of *Concepcion* would "interfere[] with fundamental attributes of

arbitration," 130 S. Ct. at 1748, namely, the attributes of consent and fairness.

We conclude, then, that under *Concepcion*, courts may continue to apply the unconscionability defense to arbitration agreements without fear of undermining the FAA—indeed, they may do so with the firm conviction that unconscionability *advances* the objectives of the FAA. The only caveat to this rule is that courts may not use the defense to impose on arbitration procedures which would significantly undermine its efficiency, such as classwide arbitration, judicially-monitored discovery, the Federal Rules of Evidence, or arbitration-by-jury.

Finally, the Court of Appeals correctly discerned, and applied, the essence of *Concepcion's* holding: "*Concepcion* is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the Federal Arbitration Act." (*Sanchez v. Valencia Holding Co., LLC* (2011) 135 Cal.App.4th 74, 89.) Accordingly, the Court of Appeals was correct in concluding that its application of unconscionability to Valencia's arbitration agreement is not preempted by the FAA.

V. Conclusion

For the foregoing reasons, CAOC respectfully requests that the Court affirm the Court of Appeals' decision.

Dated: October 1, 2012

Respectfully submitted,

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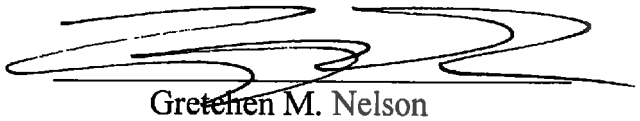
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned counsel certifies that the text of this brief uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this petition consists of 3520 words as counted by the Microsoft Word program used to generate this petition.

Dated: October 1, 2012



Gretchen M. Nelson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Kreindler & Kreindler LLP, 707 Wilshire Blvd., Suite 4100, Los Angeles, CA 90017.

2. On October 1, 2012, I served the forgoing document described as: APPLICATION AND BRIEF OF *AMICUS CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Mill Valley, California in the ordinary course of business. I am aware that on Motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on October 1, 2012, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct.

Patty Davis

Patty Davis

SANCHEZ
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