S200128

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MELISSA WISDOM, ET AL.,

Plaintiffs and Respondents,

vs.

ACCENTCARE, INC., ET AL.,

Defendants and Appellants,

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT • CASE NO. C065744
AFFIRMING A JUDGMENT OF THE SUPERIOR COURT OF
SACRAMENTO COUNTY • CASE NO. 2009-00063028
THE HONORABLE STEVEN H. RODDA, JUDGE

BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS AMICUS CURIAE

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SERVICE ON THE CALIFORNIA ATTORNEY GENERAL AND THE SACRAMENTO COUNTY DISTRICT ATTORNEY PURSUANT TO BUSINESS & PROFESSIONS CODE § 17209 AND C.R.C. RULE 8.29

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: July 16, 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 APPELLANT

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 *Melissa Wisdom, et al. v. Accentcare, Inc., et al.*, (Jan. 3, 2012) No. C065744, 136 Cal.Rptr.3d 188 (hereafter, "*Wisdom*") under California Rules of Court, rule 8.520(f) in support of Plaintiffs and Respondents, Melissa Wisdom, Jessica Bondi, Norma Rodriguez, Vanessa Rodriguez, Katrina Rodriguez, and Batseba Escoto, 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 Unfair Competition Law (Cal. Bus. & Prof. Code, § 17200 et

seq.). 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 like *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.

CAOC has a substantive and abiding interest in ensuring that California consumers and workers are provided access to justice. In part, this means working to ensure that employment contracts are interpreted in a manner consistent both with the Supreme Court's precedents and also with the strong public policy against one-sided, adhesive, employment contracts. This Court has consistently affirmed these principles.

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.

Executed in Los Angeles, California, this 16th day of July, 2012.

Application for Leave to File Amicus Brief

Respectfully submitted,

By: ______________________

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

LEGAL DISCUSSION 2

I. COURTS MAY INVALIDATE AN ARBITRATION AGREEMENT THAT IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE 2

II. AN ARBITRATION AGREEMENT REQUIRING ONLY ONE PARTY TO SUBMIT ITS CLAIMS TO ARBITRATION IS SUBSTANTIVELY UNCONSCIONABLE 3

III. THE ARBITRATION AGREEMENT AT ISSUE IN THIS CASE REQUIRES ONLY THE EMPLOYEES TO SUBMIT THEIR CLAIMS TO BINDING ARBITRATION 5

IV. CALIFORNIA'S PRO-ARBITRATION POLICY MUST BE WEIGHED AGAINST THE RULE REQUIRING AMBIGUITIES BE HELD AGAINST THE DRAFTER OF ADHESIVE CONTRACTS 8

V. *WISDOM* AND *ROMAN* INVOLVE UNIQUELY DRAFTED ARBITRATION AGREEMENTS AND THIS COURT SHOULD DECIDE THIS ISSUE IN FAVOR OF PLAINTIFFS TO ENCOURAGE EMPLOYERS TO DRAFT CLEARLY BILATERAL ARBITRATION AGREEMENTS 10

CONCLUSION 12

CERTIFICATE OF WORD COUNT 13

TABLE OF AUTHORITIES

STATE CASES

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

Armendariz v. Foundation Health Psychcare Services, Inc.,
(2000) 24 Cal.4th 83 . . . . 1, 3, 4, 10, 11

Graham v. Scissor-Tail, Inc.,
(1981) 28 Cal.3d 807 9

Higgins v. Superior Court,
(2006) 140 Cal.App.4th 1238 4

Katz v. Haskell,
(1961) 196 Cal.App.2d 144 7

Kleveland v. Chicago Title Ins. Co.,
(2006) 141 Cal.App.4th 761 5

Little v. Auto Stiegler, Inc.,
(2003) 29 Cal.4th 1064 11

Mission Viejo Emergency Medical Associates v. Beta Healthcare Group,
(2011) 197 Cal.App.4th 1146 5

Neal v. State Farm Ins. Cos.,
(1961) 188 Cal.App.2d 690 9

Nyulassy v. Lockheed Martin Corp.,
(2004) 120 Cal.App.4th 1267 4

Parsons v. Bristol Development Co.,
(1965) 62 Cal.2d 861 8

Pearson Dental Supplies, Inc. v. Superior Court,
(2010) 48 Cal.4th 665 8

Roman v. Superior Court,
(2009) 172 Cal.App.4th 1462 10

Victoria v. Superior Court,
(1985) 40 Cal.3d 734 9

Wisdom v. AccentCare, Inc.,
(2012) 136 Cal.Rptr.3d 188 . . . . 5, 6, 7, 8, 10

Wolf v. Superior Court,
(2004) 114 Cal.App.4th 1343 8

Zullo v. Superior Court,
(2011) 197 Cal.App.4th 477 4

FEDERAL CASES

Coup v. Scottsdale Plaza Resort, LLC,
(D. Ariz. 2011) 823 F.Supp.2d 931 11

CALIFORNIA STATUTES

Civ. Code § 1636 5

Civ. Code § 1638 5

Civ. Code § 1643 7

Civ. Code § 1644 6

Civ. Code § 1670.5 3

Code Civ. Proc. § 1281 2

FEDERAL STATUTES

9 U.S.C. § 2. 2

INTRODUCTION

In this brief, amicus curiae Consumer Attorneys of California ("CAOC") addresses a controversial matter from its unique perspective as a leading legal organization that specializes in advocating for the rights of California employees and consumers.

The issue this Court has accepted for review is whether an arbitration clause in an employment application that provides "I agree to submit to binding arbitration all disputes and claims arising out of the submission of this application" is unenforceable as substantively unconscionable for lack of mutuality. Plaintiffs-Respondents Norma and Katrina Rodriguez, Batseba Escoto, and Jessica Bondi ("Plaintiffs") signed an arbitration agreement when they applied for employment with AccentCare ("Defendant"). The Third District Court of Appeal found that the arbitration agreement was unenforceable because it was both procedurally and substantively unconscionable.

This Court has consistently found that an arbitration agreement that requires only one party to arbitrate its claims is substantively unconscionable. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) The clear and explicit language of the arbitration agreement at issue here shows that only the applicants agreed to arbitrate their disputes; the

employer did not agree to be mutually bound. This lack of mutuality is unambiguous and makes the agreement substantively unconscionable. Although California is in favor of arbitration as a matter of public policy, courts still apply general principles of contract interpretation to arbitration agreements. Since ambiguities in contract language are held against the drafter, especially in adhesive contracts, any ambiguity should be held against Defendant AccentCare. This ruling will encourage employers to draft clear and unambiguous bilateral arbitration agreements and thus avoid future litigation.

For the reasons set forth and discussed below, CAOC respectfully requests that this Court uphold the Court of Appeal's decision and find the arbitration agreement substantively unconscionable.

LEGAL DISCUSSION

I. COURTS MAY INVALIDATE AN ARBITRATION AGREEMENT THAT IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE.

An arbitration agreement is a contract, enforceable on its terms under both federal and California law. (9 U.S.C. § 2; Code Civ. Proc., § 1281.) However, an arbitration agreement, like any contract, is unenforceable if grounds exist at law or in equity for revocation of the agreement.

(*Armendariz*, *supra*, 24 Cal.4th at p. 98 .) Under California Civil Code section 1670.5, a court may refuse to enforce any contract that was unconscionable when it was made. Thus, unconscionability is a valid reason for a court to refuse to enforce an arbitration agreement. (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

To void a contract for unconscionability, a court must find both procedural and substantive unconscionability. (*Id.*) The procedural unconscionability analysis focuses on oppression or surprise due to unequal bargaining power. (*Id.*, citations omitted.) Substantive unconscionability occurs when the contract leads to overly harsh or one-sided results. (*Id.*, citations omitted.) Although both procedural and substantive unconscionability must be present to invalidate a contract, they need not be present in equal measure. (*Id.*) Rather, they exist on a sliding scale: the more procedurally unconscionable a contract is, the less substantive unconscionability must be present to invalidate the contract, and vice versa. (*Id.*)

II. AN ARBITRATION AGREEMENT REQUIRING ONLY ONE PARTY TO SUBMIT ITS CLAIMS TO ARBITRATION IS SUBSTANTIVELY UNCONSCIONABLE.

Substantive unconscionability looks to the contract terms rather than the process. Terms that produce overly harsh or one-sided results are

substantively unconscionable. (*Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 484.) "A contractual term is substantively suspect if, viewed at the time the contract was formed, it allocates the risks between parties in an unreasonable or unexpected manner." (*Id.*, citing *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487.)

This Court held in *Armendariz* that "it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" (*Armendariz*, *supra*, 24 Cal.4th at p. 117.) Since then, courts have consistently held that an arbitration agreement that requires only one party to bring its claims in the arbitration forum is substantively unconscionable for this lack of mutuality. (See *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267 (refusing to enforce an employment agreement requiring plaintiff only to arbitrate claims); see also *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238 (finding substantive unconscionability in a contract that required only the plaintiffs to submit their claims to arbitration).)

III. THE ARBITRATION AGREEMENT AT ISSUE IN THIS CASE REQUIRES ONLY THE EMPLOYEES TO SUBMIT THEIR CLAIMS TO BINDING ARBITRATION.

Courts use general principles of California contract law to review arbitration agreements. (*Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 764; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1153.) Under California Civil Code, "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) Additionally, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) Thus, the clear and explicit language of the arbitration agreement, which evidences the parties' intentions, controls its interpretation.

The agreement was part of a document with a heading that stated, "Acknowledge Your Understanding of the following Statements and Agreements by Placing Your Initials by Each Paragraph, then Sign and Date Below." (*Wisdom v. AccentCare, Inc.* (2012) 136 Cal.Rptr.3d 188, 191 (*Wisdom*).) The agreement was phrased as follows:

> I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application. I further agree, in the event that I am hired by *AccentCare*, that all disputes

> that cannot be resolved by informal internal resolution which might arise out of my employment with *AccentCare*, whether during or after that employment, will be submitted to binding arbitration. I agree that such arbitration shall be conducted under the rules then in effect of the American Arbitration Association.

(*Id.* at p. 192.)

The plain language of this agreement demonstrates that only the applicants signing the Acknowledgment (the employees) agreed to submit their claims to arbitration. "The words of a contract are to be understood in their ordinary and popular sense. . ." (Civ. Code, § 1644.) "I" can only refer to the individuals who signed the agreements as part of their applications for employment. It does not refer to the employer, as AccentCare is mentioned by name. Within this paragraph of the Acknowledgment, only the "I" "agree[s]" to submit claims to binding arbitration. AccentCare did not agree to submit its claims to arbitration, or give up its right to a jury trial. As the Court of Appeal found below, "There is no language in the agreement binding AccentCare to arbitrate its claims against its employees." (*Wisdom*, *supra*, 136 Cal.Rptr.3d at p. 197.)

The clear and explicit language whereby only the applicant agrees to submit claims to arbitration is not undermined, as defendant claims, by the "all disputes" language. Someone drafting an arbitration agreement with the intent

of binding only the applicant, and not the employer, would use broad language to assure that any claim brought by the applicant would be subject to arbitration. Thus, it is logical to phrase the agreement so that the applicant agrees to submit "all disputes" to binding arbitration. In retrospect, the agreement would have been clearer had the drafter written "all my disputes." However, failure to add this clarifying pronoun does not change the fact that only the applicant is agreeing to be bound by the arbitration agreement.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, *if it can be done without violating the intention of the parties*." (Civ. Code, § 1643, emphasis added.) Here, interpreting the language of the agreement as a bilateral promise to arbitrate would remove the substantive unconscionability. However, such an interpretation directly contradicts the clear and explicit language. "The purpose of construction is to explain and not add or subtract terms. [Citations.]" (*Katz v. Haskell* (1961) 196 Cal.App.2d 144, 158.) To construe this agreement as bilateral would require this Court to add terms binding AccentCare to arbitrate. If that was the intent of AccentCare when it drafted the agreement, it could have added those terms, as it apparently did when contracting with Plaintiff Bondi. (*Wisdom*, *supra*, 136 Cal.Rptr.3d at p. 192.) The intention of AccentCare, as memorialized in the

pre-employment arbitration agreements, was to bind only the employee-applicants to arbitrate their claims, not the claims of AccentCare against the employees.

IV. CALIFORNIA'S PRO-ARBITRATION POLICY MUST BE WEIGHED AGAINST THE RULE REQUIRING AMBIGUITIES BE HELD AGAINST THE DRAFTER OF ADHESIVE CONTRACTS.

Despite the clear language binding only Plaintiffs to arbitrate, Defendant AccentCare claims that the arbitration agreement is ambiguous and that the ambiguity should be resolved in its favor. Although the Court of Appeal found that the arbitration agreement was not ambiguous (*Wisdom*, *supra*, 136 Cal.Rptr.3d at p. 197), the lower "court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal." (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351; see also *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

Defendant has pointed to this Court's decision in *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665 as indicative of how an ambiguous arbitration agreement should be construed. "When an arbitration provision is ambiguous, we will interpret that provision, if reasonable, in a manner that renders it lawful, both because of our public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution, and because of the general principle that we interpret a contractual provision

in a manner that renders it enforceable rather than void." (*Id.* at p. 682.)

California has long held a strong preference for arbitration. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 738 (*Victoria*).) However, a public policy favoring arbitration is not the only consideration. As this Court stated in *Victoria*, "It is a well-settled rule of law that ambiguities in a written contract are to be construed against the party who drafted it." (*Id.* at p. 745.) This is especially true in an adhesive arbitration clause, where ambiguities will be subject to stricter construction against the party with the stronger bargaining power. (*Id.* at p. 742 citing *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819, fn. 16, 17 (*Scissor-Tail*).)

An adhesive contract "signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694 (*Neal*). "The rule requiring the resolution of ambiguities against the drafting party applies with peculiar force in the case of a contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language." (*Scissor-Tail*, *supra*, 28 Cal.3d at p. 819, fn. 16 citing *Neal*, *supra*, 188 Cal.App.2d at 695.)

As the Court of Appeal noted, the agreement at issue here was a contract of adhesion. (*Wisdom*, *supra*, 136 Cal.Rptr.3d at p. 194.) It was a form contract given to applicants applying for a job. (*Id.*) Just as "few employees are in a position to refuse a job because of an arbitration requirement" (*Armendariz*, *supra*, 24 Cal.4th at p. 115), few applicants are in a position to refuse the opportunity to apply for a job because of an arbitration agreement. The Plaintiffs had no opportunity to negotiate for bilateral arbitration. As such, the the heightened standard of holding ambiguities against the drafter should apply in this case, should the Court determine the contract language is ambiguous.

V. *WISDOM* AND *ROMAN* INVOLVE UNIQUELY DRAFTED ARBITRATION AGREEMENTS AND THIS COURT SHOULD DECIDE THIS ISSUE IN FAVOR OF PLAINTIFFS TO ENCOURAGE EMPLOYERS TO DRAFT CLEARLY BILATERAL ARBITRATION AGREEMENTS.

The *Wisdom* decision is at odds with Second District Court of Appeal's decision in *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462. The Court of Appeal, faced with nearly identical arbitration agreement language, held that the agreement was not substantively unconscionable. (*Id.* at p. 1473.) In doing so, the *Roman* court reviewed several cases with similar language. (*Id.*) But all of those cases involved arbitration agreements with more language that explained the intent of the parties. *Roman* pointed to no agreements with

identical language and did not explain how the "I agree" language bound the defendant to arbitrate.

Looking at case law in other jurisdictions for instances where other courts analyzed arbitration agreements like the one at issue here and in *Roman*, most cases involved mutual language, like the agreement in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1070, where "both I and the Company give up our rights to trial by jury." Unilateral agreements generally use explicit language by which the employer reserves the right to bring certain claims in court, as in *Armendariz, supra*. Other cases look for mutuality in determining whether there was adequate consideration for an agreement to arbitrate. (See *Coup v. Scottsdale Plaza Resort, LLC* (D. Arizona 2011) 823 F.Supp.2d 931.) *Wisdom* and *Roman* address the rare instance where the only language that indicates the parties' intent is "I agree to arbitrate all disputes."

As the Court of Appeal pointed out, "defendants knew how to draft a bilateral agreement." (*Wisdom, supra*, 136 Cal.Rptr.3d at p. 196.) AccentCare's arbitration agreement with Plaintiff Bondi explicitly includes language that binds AccentCare to arbitrate its disputes with employees. This Court should encourage employers to draft this type of explicitly bilateral agreement, rather than the voidable unilateral agreement AccentCare presented to job applicants.

CONCLUSION

For the foregoing reasons, CAOC respectfully requests that this Court uphold the Court of Appeal's finding that AccentCare's arbitration agreement was substantively unconscionable for lack of mutuality.

Dated: July 16, 2012

Respectfully submitted,

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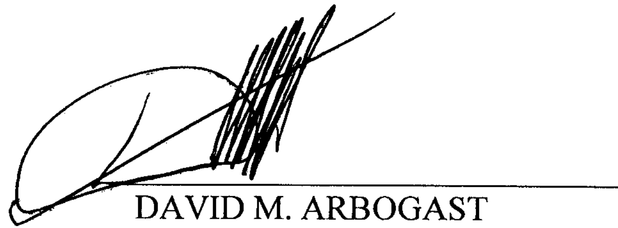
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned counsel certifies that the text of this petition uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this petition consists of 3,854 words as counted by the Corel WordPerfect X5 program used to generate this petition.

Dated: July 16, 2012



DAVID M. ARBOGAST

DECLARATION OF SERVICE BY MAIL

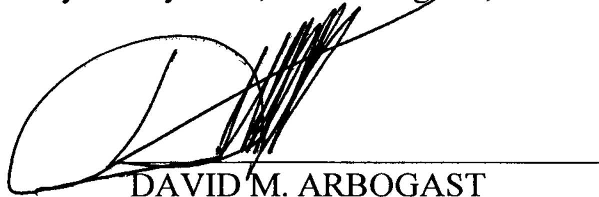
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 11400 W. Olympic Boulevard, Second Floor, Los Angeles, California 90064.

2. That on July 16, 2012, declarant served the **BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF RESPONDENTS AS AMICUS CURIAE** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of July 2012, at Los Angeles, California.



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