2d Civil No. B228027

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GIL SANCHEZ, Individually and
as Personal Representative, etc.

Plaintiff and Respondent,

vs.

VALENCIA HOLDING COMPANY, LLC
dba MERCEDES-BENZ OF VALENCIA,

Defendant and Appellant.

Appeal from Los Angeles Superior Court,
Case No. BC433634
Honorable Rex Heeseman

APPELLANT'S PETITION FOR REHEARING
(Service on Attorney General and District Attorney required by Business & Professions Code § 17209 and California Rules of Court, rule 8.29)

THARPE & HOWELL
Christopher S. Maile (Bar No. 117998)
Soojin Kang (Bar No. 219738)
15250 Ventura Boulevard, 9th Floor
Sherman Oaks, California 91403-3221
Telephone: (818) 205-9955
Facsimile: (818) 205-9944
Email: cmaile@tharpe-howell.com
Email: skang@tharpe-howell.com

GREINES, MARTIN, STEIN & RICHLAND LLP

Robert A. Olson (Bar No. 109374)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
Email: rolson@gmsr.com

Attorneys for Appellant
VALENCIA HOLDING COMPANY, LLC
dba Mercedes-Benz of Valencia

2d Civil No. B228027

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GIL SANCHEZ, Individually and
as Personal Representative, etc.

Plaintiff and Respondent,

vs.

VALENCIA HOLDING COMPANY, LLC
dba MERCEDES-BENZ OF VALENCIA,

Defendant and Appellant.

Appeal from Los Angeles Superior Court,
Case No. BC433634
Honorable Rex Heeseman

APPELLANT'S PETITION FOR REHEARING
(Service on Attorney General and District Attorney required by Business & Professions Code § 17209 and California Rules of Court, rule 8.29)

THARPE & HOWELL
Christopher S. Maile (Bar No. 117998)
Soojin Kang (Bar No. 219738)
15250 Ventura Boulevard, 9th Floor
Sherman Oaks, California 91403-3221
Telephone: (818) 205-9955
Facsimile: (818) 205-9944
Email: cmaile@tharpe-howell.com
Email: skang@tharpe-howell.com

GREINES, MARTIN, STEIN & RICHLAND LLP

Robert A. Olson (Bar No. 109374)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
Email: rolson@gmsr.com

Attorneys for Appellant
VALENCIA HOLDING COMPANY, LLC
dba Mercedes-Benz of Valencia

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

INTRODUCTION

The Opinion decides this appeal based on unconscionability by omitting or misstating material facts and misconstruing crucial law. It also decides two issues – unconscionability and severability – not addressed by the trial court, although committed in the first instance to the trial court's determination. Rehearing should be granted.

ARGUMENT

I. The Opinion's Procedural Unconscionability Determination Omits Or Misstates Critical Facts.

A. The Opinion Omits That On The Form's *Front,* Just Above His Signature, Plaintiff Acknowledged In Prominent Type That The Agreement Had An Arbitration Provision On The Back And That He Had Read That Provision.

The Opinion concludes that plaintiff was surprised by the arbitration provision. (Opn. 14.) It reaches this conclusion, in part, because the arbitration provision was on the agreement's back. But the Opinion fails to mention a critical fact – that on the agreement's *front.* in capitalized letters, *immediately above the plaintiff's signature*, the plaintiff specifically averred that he had read the arbitration clause on the back:

> "YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE

FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT"

(AA 276.)

Nowhere does the Opinion mention this signposting. Yet it directly refutes the Opinion's assertion that the arbitration provision was hidden on the agreement's back. Likewise, this highlighted language distinguishes this case from *Smith v. Americredit Financial Services, Inc.* (S.D.Cal.2009) 2009 U.S. Dist. Lexis 115767, 2009 WL 4895280 appeal pending No. 09-57016 (9th Cir.), relied on by the Opinion at 14. Nothing in *Smith* suggests that the contract there had a similar *front-page, signature-preceding* specific reference to the arbitration provision.

B. The Opinion Misstates That The Agreement Is Three Pages, Back And Front, Rather Than A Single Long-Page Document.

The Opinion, at p. 8, states that the Sale Contract is three pages, front and back. That is incorrect. Rather, although reproduced in the record on multiple pages (AA 274-279), it is clear that the Sale Contract is a

single page, front and back. As reproduced, much of the language overlaps. (See, e.g., AA 278-279 [repeating 1/2 or more of the page, from "Seller's Right to Cancel" box, para. b. through 1/3 or more of the "Arbitration Clause"]; *id.* 277-228 [repeating an inch and a half or so of text].) When the overlaps are eliminated the form is a single page, 26 inches long (it is 21½ inches in the record, but only because it was reduced), with provisions front and back.

There is a reason the agreement is a single page. Before Attorney General Opinion 08-804, the California Automobile Sales Finance Act appeared to require a single-page document. (92 Ops.Cal.Att.Gen. 97 (2009).) Much of the document is statutorily required disclosures. Those disclosures alone, taking into account required type sizes, require 24 inches of text on both sides. (*Id.* at pp. 2-3.)

C. The Opinion Obfuscates The Arbitration Provision's Prominence.

The Opinion suggests that the arbitration provision was not prominent, referring to it as the last provision appearing at the bottom of the back of the "last" page. In fact, it is not the last provision *and* the Opinion omits that it appears in a 4½ inch by 8 inch box making it stand out significantly from surrounding text.

* * *

The Opinion should fairly describe the Sales Contract – a 26 inch, single page document, specifically referencing the arbitration provision *on*

the front in all caps immediately preceding the plaintiff's signature, an arbitration provision which is prominently set out in a 4½ inch by 8 inch box on the back.

Rehearing should be granted and the Opinion should be modified to include the omitted *front-side* contract arbitration reference and, taking that into account, to find no surprise and, therefore, no procedural unconscionability.

II. The Opinion's Substantive Unconscionability Determination Misstates The Law.

A. The Opinion Misconstrues The Meaning Of Public Resources Code Section 42885, An Unbriefed Issue; That Section Affords A Per Document, Not Per Tire, Penalty For Which There Is *No* Private Right Of Action.

The Opinion offhandedly states that "[a] violation of the 'new tire' statute alone ([Public Resources Code] § 42885) could result in civil penalties up to $125,000 if the car dealer knowingly misstated that all the tires, including the spare, were new." (Opn. 18.) The Opinion, thus, in passing purports to determine the meaning of a statute which has not even been briefed and for which there may be substantial consequences not only in this case but in numerous other cases.

On its face, there is substantial reason to believe that section 42885 does not mean what the Opinion says. First, that section says that a knowing misrepresentation "in a document used to comply with this

section" may result in a civil penalty. (Pub. Resources Code, § 42885, subd. (e).) It is, thus, if anything, a *per document*, not a per tire, civil penalty (i.e., a maximum of $25,000, not $125,000, in this case).

Second, there is no indication that there is even a private-party right of action to collect such a civil penalty. (See *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597 [requiring unmistakable or obvious private right to sue under statute or clear legislative intent; no private right of action under statute ostensibly regulating employer-mandated tip pooling]; *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 [no private right of action to enforce Ins. Code, § 790.03, regulating insurance company claims practices]; *Vuki v. Superior Court* (2010) 189 Cal.App.4th 791 [statutes governing home foreclosures not subject to private right of action]; cf. Lab. Code, § 2699 [Private Attorney General Act specifically empowers "aggrieved employees" to seek civil penalties payable under the Labor Code].)

To the contrary, "[n]ot only is there no express unmistakable private right to sue (citation), there is a virtually unmistakable intent *not* to allow a private right to sue." (*Vuki*, *supra*, 189 Cal.App.4th at p. 799, original emphasis.) Every indication is that private parties have *no* right to seek civil penalties under section 42885. Administration of that section (and the whole of its chapter) is given to the California Integrated Waste Management Board. (Pub. Resources Code, § 42880.) And, under the California Code of Regulations "[p]rocessing *and collection of civil penalties* shall be made by the CIWMB [California Integrated Waste

Management Board] as provided in Public Resources Code section 42855." (14 Cal. Code Regs. § 18499.7, emphasis added.) Indeed, only misrepresentations in documents "used to comply with" section 42885, that is reporting and transmitting to the State tire-fee collections, are subject to the civil penalty. In sum, the right to obtain civil penalties inheres in the Board, *not* private litigants.

Rehearing should be granted. Any reference to Public Resources Code section 42885 should be deleted as should any hypothesis that plaintiff might have a claim exceeding $100,000 arising out of his purchase of a $50,000 car.

B. The Opinion Seriously Misreads *ATT Mobility v. Concepcion* As Limited To Class Action Waiver Provisions; Rather *Concepcion* Precludes California Courts From Using "Unconscionability" To Invalidate Parties' Facially Neutral Arbitration Process Choices.

AT&T Mobility LLC v. Concepcion (2011) 563 U.S. ___ [131 S.Ct. 1740], undoubtedly was a game changer as to plaintiff's claim that the arbitration provision was unenforceable as excluding class action arbitration. Accordingly, the Opinion sidesteps the sole ground upon which the trial court ruled – excluding class action relief from arbitration.

The Opinion, however, asserts, at pp. 11-12, that *Concepcion* is limited to class action waivers (and undefined "judicially imposed procedure[s] that conflict[] with the arbitration provision and the purposes

of the Federal Arbitration Act") and does not affect unconscionability analysis generally. In effect, the Opinion holds that *Concepcion* only applies to *affirmative* judicial requirements, *not* to the judicial negation of a particularly tailored arbitration structure to which the parties agreed. That is wrong.

Concepcion holds that courts cannot use substantive unconscionability to judicially negate the "parties discretion in designing arbitration processes . . . to allow for efficient, streamlined procedures *tailored to the type of dispute.*" (131 S.Ct. at p. 1749, emphasis added.) *Concepcion* holds that California courts cannot use unconscionability as an excuse to avoid arbitration provisions just because courts, after the fact, do not like the process agreed upon by the parties. (See 131 S.Ct. at p. 1747 citing Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act* (2006) 3 Hastings Bus. L. J. 39; 131 S.Ct. at p. 1753, 1754-1755 [Thomas, J. concurring; defenses limited to fraud or duress].)

Concepcion restrains the use of the unconscionability doctrine generally. (131 S.Ct. at p. 1747; see *Sonic-Calabasas A, Inc. v. Moreno* (2011) ___ U.S. ___, 2011 WL 2148616 vacating *Sonic–Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 [granting certiorari, vacating and remanding to California Supreme for further consideration in light of *Concepcion* in case not involving any class action waiver issue].) "[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.' [Citation.]" (131 S.Ct. at p. 1747.) *Concepcion* provides examples of arbitration-process "unconscionability" evaluations (ranging from discovery to evidentiary requirements) that the Federal Arbitration Act precludes. (*Ibid.*) But *Concepcion* is clear that the list is nonexclusive. It more generally holds that courts cannot, under the guise of unconscionably, judge the supposed fairness of the *process* that the parties have agreed to. Doing so usurps the parties' discretion to structure arbitration in the way *they*, not a court, deem most beneficially tailored to resolving the particular universe of potential disputes.

In particular, *Concepcion* is clear that the parties "may agree to limit the issues subject to arbitration" and may limit the risks associated with outlier results or "high stakes" arbitral determinations. (131 S.Ct. at p. 1748.) Thus, *Concepcion* decrees that parties are free to limit the scope of arbitration (or in this case, single-stage arbitration) to avoid issues less suitable for arbitration; they may account for the fact that "[a]rbitration is poorly suited to the higher stakes . . . litigation." (131 S.Ct. at p. 1752.)

Yet, that is exactly why the Opinion here finds fault with the arbitration provision: that it takes some of the risk out of arbitration – for both parties – by providing an appeal mechanism (but still arbitration – just more intensive arbitration) for outlier results, those resulting in a $0 award, a greater than $100,000 award, or injunctive relief and that it excludes self-

help remedies.[1] Parties should be free under *Concepcion* to structure arbitration provisions to limit the risks that inhere in arbitral results in higher stakes disputes by providing for greater levels of arbitral scrutiny (e.g., an appeal to a three-arbitrator panel) for results which fall outside the normal expected arbitration mid-range.

Parties are free to so structure their arbitration provisions even if doing so might disadvantage certain litigants or types of claims. (131 S.Ct. at p. 1753 ["The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. (Citation.) But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"].)

Arguably, the Federal Arbitration Act's purposes are not furthered where the arbitration process is so fundamentally unfair to one side or so not rationally connected to the type of disputes involved that the only reasonable conclusion has to be that no rational person could have freely consented to them. But that certainly is not the case here. The procedures here undoubtedly are facially neutral and *are* related to the nature of the likely claims. Most claims arising out of the sale of automobiles can be expected to fall within the broad $0 to $100,000 range for which one-shot arbitration is provided. The process for more intensive arbitration review (through the arbitration appeal) potentially benefits both sides and applies

---

[1] It is hard to see how it could ever be unconscionable to exclude self-help remedies. Such remedies, by definition, do not flow from third-party determinations, whether judicial or arbitral.

only to what would be expected to be atypical results.[2] In the circumstances here, *Concepcion* does not allow the California courts to pass on the "fairness" or "harshness" of the process chosen to limit arbitral risk or issues.

Rehearing should be granted. The Opinion should be modified to accord the *Concepcion*-required deference to the parties' decisions regarding how to structure the arbitration process thereby eliminating any substantive unconscionability finding.

III. The Opinion's Unconscionability Determination Is Premature.

A. Before Determining Unconscionability, The Trial Court Should Be Afforded The Opportunity, In The First Instance, To Resolve Factual Disputes And Make Credibility Determinations.

Although unconscionability is ultimately a legal issue, it is a legal issue based upon *facts as found by the trial court*. "[N]umerous factual issues may bear on" the unconscionability question. (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89.) Accordingly, the trial court's predicate "resolution of conflicts in the evidence, or on the factual

---

[2] In the normal, bilateral consumer-dealer dispute the typical results are going to be damages somewhere between $0 and $100,000 or rescission and restitution (again valued in that range). The most likely of the "appealable" results will be a $0 award, where the right to an arbitral appeal likely favors the consumer.

inferences which may be drawn therefrom," are reviewed "in the light most favorable to the court's determination" and "for substantial evidence." (*Ibid.*) The trial court has never been afforded the opportunity to make any factual determinations on the unconscionability issue for this court to review.

The Opinion attempts to evade this problem by asserting that the evidence is undisputed. (Opn. 10.) But plaintiff's evidence here *is* disputed. Contrary to his declaration, in signing the contract plaintiff averred that he had read the contract and specifically that he had read the arbitration provision on the back. (AA276.) Given the conflict, on remand, the "better course" will be for the trial court to hear live testimony. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414.) To the extent that the evidentiary record is missing, e.g., as to the costs borne, that cannot be a basis for invalidating the arbitration provision. (*Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 90-91.)

Rehearing should be granted and the Opinion should be modified to simply remand the unconscionability issue to the trial court to decide in the first instance.

B. Severabilty Is Committed, In The First Instance, To The Trial Court's Discretion.

Whether to sever an invalid contract provision is committed in the first instance to the trial court's discretion. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 121–122.)

Rehearing should be granted and the Opinion should be modified to remand to the trial court to allow it to exercise its discretion as regards severability.

CONCLUSION

Rehearing should be granted.

The Opinion should be modified consistent with *Concepcion* to eliminate any finding of substantive unconscionability.

Alternatively, the Opinion should be modified to remand to the trial court for its determination of factual unconscionability predicates and its exercise of discretion as to severability.

In any event, the omission of the *front* page, all caps reference to arbitration and the other misdescriptions of the agreement should be corrected and the suggestion that Public Resources Code section 42885

might provide a private right of action to collect a per tire $25,000 civil penalty should be removed.

Dated: November 8, 2011 Respectfully submitted,

THARPE & HOWELL, LLP
Christopher S. Maile
Soojin Kang

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson

By: 

Robert A. Olson
Attorneys for Defendant and Appellant
Valencia Holding Company, LLC dba
Mercedes-Benz of Valencia

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **APPELLANT'S PETITION FOR REHEARING** contains **2,591** words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated: November 8, 2011

Robert A. Olson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On November 8, 2011, I served the foregoing document described as: **APPELLANT'S PETITION FOR REHEARING** 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 Los Angeles, 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 November 8, 2011, at Los Angeles, California.

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

Anita F. Cole

Anita F. Cole

SANCHEZ
v.
VALENCIA HOLDING COMPANY, LLC
[California Court of Appeal Case No. B228027;
Los Angeles Superior Court Case No. BC433634]

Hallen David Rosner
Rosner & Mansfield, LLP
10085 Carroll Canyon Road, Suite 100
San Diego, California 92131
[Attorneys for plaintiff and respondent Gil Sanchez]

Steve Borislav Mikhov
Romano Stancroff & Mikhov PC
640 S San Vicente Boulevasrd, Suite 350
Los Angeles, California 90048
[Attorneys for plaintiff and respondent Gil Sanchez]

Christopher Patrick Barry
Rosner Barry & Babbitt, LLP
10085 Carroll Canyon Road, Suite 100
San Diego, California 92131
[Attorneys for plaintiff and respondent Gil Sanchez]

Jon David Universal
Universal Shannon & Wheeler LLP
2240 Douglas Boulevard, Suite 290
Roseville, California 95661
[Attorneys for defendant and appellant Mercedes-Benz USA, LLC]

Deputy Attorney General
State of California, Department of Justice
300 S. Spring Street, 5th Floor
Los Angeles, California 90013
[Served per Business & Professions Code § 17209 and California Rules of Court, rule 8.29]

Office of the District Attorney
Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012-3266
[Served per Business & Professions Code § 17209 and California Rules of Court, rule 8.29]

Clerk to the
Hon. Rex Heeseman
Los Angeles County Superior Court
111 North Hill Street, Dept. 19
Los Angeles, California 90012
[LASC Case No. BC433634]

Clerk
California Supreme Court
350 McAllister Street
San Francisco, California 94102\
[Four (4) Copies]