Supreme Court No. S199119

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GIL SANCHEZ,
Plaintiff and Respondent,

v.

VALENCIA HOLDING COMPANY, LLC,
Defendant and Appellant.

Review After a Decision By the Court of Appeal
Second District, Division One, Second Civil Number B228027
Los Angeles County Superior Court Number BC433634
Honorable Rex Heeseman, Judge

SUPPLEMENTAL *AMICUS CURIAE* BRIEF ON BEHALF OF *AMICUS CURIAE* ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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SUPPLEMENTAL AMICUS CURIAE BRIEF

I. ISSUE PRESENTED.

In formulating the standard for determining whether a contract or contract term is substantively unconscionable, this court has used a variety of terms, including "unreasonably favorable" to one party, "so one-sided as to shock the conscience," "unfairly one-sided," overly harsh," and "unduly oppressive." Should the court use only one of these formulations in describing the test for substantive unconscionability and, if so, which one? Are there any terms the court should *not* use? Is there a formulation not included among those above that the court should use? What differences, if any, exist among these formulations either facially or as applied?

II. ARGUMENT.

The Court should adopt a single, well-defined standard. Multiple formulations lead to uncertainty and prolonged litigation. In its amicus brief, *Amicus Curiae* advocated for a "no reasonable person would have agreed" test, because it is clear, intuitive, and furthers the strong public policy favoring enforcement of arbitration provisions.

In light of the Court's prior formulations of the standard, which are set forth above, *Amicus Curiae* recommends, as an alternative, that the standard be stated in the following terms: "so one-sided as to shock the

conscience." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (2012) 55 Cal.4th 223, 246.)

What is most important is that the Court adopt concrete rules to give meaning to the standard and provide clarity to lower courts, such as:

1. There is a strong presumption in favor of the enforcement of arbitration provisions consistent with the policies embodied in the Federal Arbitration Act (FAA) (9 U.S.C. § 2 et seq.) and the California Arbitration Act (CAA) (*Code of Civil Procedure* § 1281 et seq.). Under the FAA, state courts must "rigorously enforce" arbitration agreements (*Mitsubishi Motors v. Soler Chrysler–Plymouth* (1985) 473 U.S. 614, 626), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (*Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24–25.) Likewise, the CAA "'evidence[s] a strong public policy in favor of arbitration[ ], which policy has frequently been approved and enforced by the courts.'" (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706; see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97 ["California law, like federal law, favors enforcement of valid arbitration agreements"]; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1282 ["A strong public

policy favors the arbitration of disputes, and doubts should be resolved in favor of deferring to arbitration proceedings"].)

2. A party opposing enforcement of an arbitration provision on grounds of unconscionability has to rebut the strong presumption with clear and convincing evidence to support its position that it is so one-sided as to shock the conscience. (*Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1156, 1157-1158; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development, supra,* 55 Cal.4th at 246-247.)

3. Arbitration provisions are contractual provisions governed by general contract principles. (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 637.) For example, failure to read the arbitration provision is not a defense. (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109.) Nor is there any requirement that the arbitration provision be separately initialed or otherwise brought to the attention of the signing party. (See *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271 ["Whether or not an arbitration agreement is operative against a person who has not signed it involves a question of 'substantive arbitrability' which is to be determined by the court."]

4. A provision that requires the parties to pay their pro rata share of the costs of the arbitration is not unconscionable under *Code of Civil Procedure* § 1284.2. The Court should acknowledge the practical reality that arbitration expenses, like other litigation expenses, are not paid by plaintiffs but are advanced by their counsel as permitted by the *Rules of Professional Conduct* adopted by this Court. (*Rules Prof. Conduct*, rule 4-210(A)(3).) The repayment of these costs by the client is then properly contingent on the outcome of the case—i.e., reimbursed to the attorney only if and when a recovery by the plaintiff permits such reimbursement. (*Ibid.*; see *Kroff v. Larson* (1985) 167 Cal.App.3d 857, 861 ["the obligation to reimburse the attorney for costs advanced, matures, if at all, only upon the occurrence of the agreed contingency, i.e. recovery by the client"].) This financial arrangement is "commonplace." (*DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1285 (*DeBlase*).) Because of this "commonplace" practice, courts have routinely held that the payment of such litigation costs does not render an ADR provision unconscionable. (See *O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 260 [rejecting claim that having to pay for a judicial reference would make it "impossible or unreasonably difficult" for a party to proceed]; accord, *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 961-962, disapproved on another ground in *Tarrant Bell Property, LLC v. Superior*

Court (2011) 51 Cal.4th 538, 545, fn. 5 (*Tarrant Bell*); *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 733-734; *Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, 345-346, disapproved on another ground in *Tarrant Bell, supra*, 51 Cal.4th at p. 545, fn. 5.)

5. The fact that the arbitration provision may be included as part of a non-negotiable form contract does not render it unconscionable, nor does the fact that the parties have allegedly unequal bargaining power. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113; *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1248-1249.)

6. For an arbitration provision to "shock the conscience" it must call for an arbitration that is structurally or substantively unfair to one side, such as having physicians act as arbitrators for medical malpractice cases. Run of the mill arbitration provisions calling for arbitration before AAA, ADR, JAMS, under neutral rules are not unconscionable.

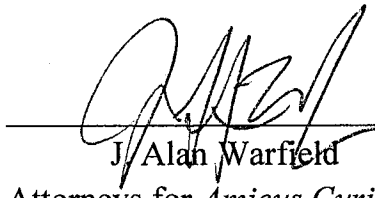
III. CONCLUSION.

The Association of Southern California Defense Counsel respectfully requests that this Court enunciate a definitive standard for determining whether contract provisions are substantively unconscionable,

which conveys that no reasonable person could have freely accepted the bargain reflected in the contract or challenged provision as a whole. Whether phrased as "no reasonable person would have agreed" or "so one-sided as to shock the conscience," it should be a single, clear, articulable standard so that parties and counsel have a consistent set of rules to work within.

Dated: March 6, 2014

MCKENNA LONG & ALDRIDGE LLP
J. Alan Warfield



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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1)

I, the undersigned J. Alan Warfield, declare that:

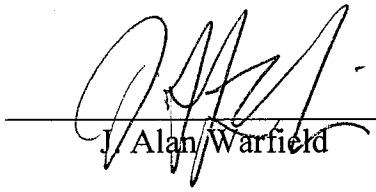
I am of counsel in the law firm of McKenna Long & Aldridge, which represents the Association of Southern California Defense Counsel in this case.

This Certificate of Compliance is submitted in accordance with Rule 8.204(c)(1) of the California *Rules of Court*.

This amicus brief was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 1075 words, including footnotes.

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

Executed on March 6, 2014, at Los Angeles, California.



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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **300 S. Grand Avenue, 14th Floor, Los Angeles, California 90071.**

On March 6, 2014, I served the ***SUPPLEMENTAL AMICUS CURIAE* BRIEF ON BEHALF OF *AMICUS CURIAE* ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

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The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

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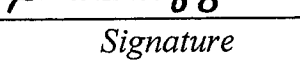

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