S204032

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN, an individual,

Plaintiff and Appellant,

vs.

CLS TRANSPORTATION OF LOS ANGELES,

Defendant and Respondent

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT • DIVISION TWO • CASE NO. B235158
AFFIRMING A JUDGMENT OF THE SUPERIOR COURT OF
LOS ANGELES COUNTY • CASE NO. BC356521
THE HONORABLE ROBERT HESS, JUDGE

BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF AND APPELLANT AS AMICUS CURIAE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following application and brief are made by the Consumer Attorneys of California ("CAOC").

CAOC is a non-profit organization of attorneys and is not a party to this action. Pursuant to California Rule of Court 8.208, CAOC hereby states that no entity or person has an ownership interest of 10% or more in CAOC and CAOC knows of no person or entity that has a financial or other interest in the outcome of the proceeding under Rule 8.208.

Dated: May 10, 2013

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 *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949 (review granted by *Iskanian v. CLS Transp. of Los Angeles LLC* (Cal. 2012) 147 Cal.Rptr.3d 324) (hereafter, "*Iskanian*") under California Rules of Court, rule 8.520(f) in support of Plaintiff and Petitioner Arshavir Iskanian, 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.) ("UCL"). In recent years, CAOC has participated as amicus curiae in many cases, including: *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Kwikset v. Superior*

Court (2011) 51 Cal.4th 310; *In re Tobacco II Cases* (2009) 46 Cal.4th 298; *Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376; and *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185. CAOC has 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 employees are provided access to justice. In part, this means working to ensure that long-standing state contract defenses such as fraud, duress and unconscionability are correctly interpreted and applied in a consistent manner. It also means working to ensure that vindication of workers' and consumers' unwaivable statutory rights are preserved in a manner consistent with both the Supreme Court's precedents and also with this State's strong public policy that such cases be determined on their merits. 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, counsel for a party, or other 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 9th day of May, 2013.

Application for Leave to File Amicus Brief

Respectfully submitted,

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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 advocates for the rights of California workers and consumers.

The underlying matter in this case concerns alleged California Labor Code violations and Private Attorney General Act ("PAGA") claims brought by Plaintiff/Petitioner, Arshavir Iskanian, on behalf of himself and the putative Class (collectively, "Plaintiffs") against Defendant/Respondent CLS Transportation ("Defendant'). As a requirement of employment, Petitioner was required to sign a "Proprietary Information and Arbitration Policy/Agreement" (arbitration agreement) providing that "any and all claims" arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator. *Iskanian*, 206 Cal.App.4th at 949.

The U.S. Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1745 ("*Concepcion*") has led to a flood of decisions and interpretations, spurring considerable controversy concerning the validity of arbitration provisions in consumer and employment contracts. However, *Concepcion*'s holding is not as far reaching as some may argue. Significantly, *Concepcion* does not abrogate generally applicable defenses to contract formation and does not deprive Plaintiff the opportunity to vindicate his

statutory rights under California law.

Here, Plaintiff seeks redress for his claims and the claims of all others similarly situated through class arbitration. However, the arbitration agreement contains a class arbitration waiver. This led the Plaintiff to rely, in part, on *Gentry v. Superior Court* (2007) 42 Cal.4th 443 ("*Gentry*") and Defendant argues that *Gentry* was impliedly overruled by *Concepcion*. However, as addressed below, *Concepcion* turns on different facts, different legal doctrines and different legal issues than were presented in *Gentry*.

Concepcion held that the Federal Arbitration Act ("FAA") preempted California's *Discover Bank* rule which held that class arbitration waivers in certain consumer contracts are unconscionable. *Concepcion, supra*, 131 S.Ct. at 1753. However, *Concepcion*'s holding should not be read to overrule *Gentry*. This is because *Concepcion* expressly limited its holding to the *Discover Bank* rule. *Concepcion, supra*, 131 S.Ct. at 1746. The *Discover Bank* rule was a narrow sub-rule within the much broader doctrine of unconscionability. *Infra*, at pp. 5-10. Thus, *Concepcion* cannot be read to address anything other than the *Discover Bank* rule. Further, to do so would be to read *Concepcion* to categorically prohibit state application of generally applicable defenses to contract formation, including unconscionability, to all contracts that contain an arbitration clause. This interpretation contradicts *Concepcion*'s own language and

the FAA's Savings clause. Thus, *Concepcion* cannot be read to preclude all state contract defenses merely because an agreement contains an arbitration clause.

Further, Justice Thomas's concurring opinion reveals that the limited unconscionability addressed in *Concepcion* is not the same broader concept of unconscionability that was addressed in *Gentry*. *Concepcion*, *supra*, 131 S.Ct. at 1753-56. In *Concepcion* the application of unconscionability was grounded in public policy. *Id.* at 1754. *Concepcion* addressed the short-cut through procedural and substantive unconscionability in all consumer contracts that was created by the *Discover Bank* rule. *Id.* at 1750. On the other hand, this Court in *Gentry* analyzed whether there was procedural unconscionability present in the arbitration agreement and remanded the case to the lower court to assess whether substantive unconscionability exists. *Gentry*, *supra*, 42 Cal.4th at 470. Thus, in contrast, *Gentry* addressed the procedural requirements of unconscionability whereas *Concepcion* was confined to only procedural unconscionability and the short-cut to substantive unconscionability that the *Discover Bank* rule allowed.

In addition, the legal issues addressed in both cases are distinct. In *Gentry*, this Court addressed two separate challenges brought on two distinctly different grounds. First, *Gentry*'s allegation of unconscionability was levied at the entire agreement as a whole. *Gentry*, *supra*, 42 Cal.4th at 467. Second, *Gentry* challenged the class arbitration waiver clause because it prohibited

vindication of his unwaivable statutory rights that were granted to him under the Labor Code. *Gentry*, *supra*, 42 Cal.4th at 455. *Concepcion*, however, only considered procedural unconscionability and *Discover Bank*'s short-cut through substantive unconscionability as applied to a class arbitration waiver clause. In contrast, this Court in *Gentry* looked at the entire arbitration agreement, including its formation. Further, *Concepcion* had no occasion to consider the doctrine of vindication of statutory rights, unlike *Gentry*, where this Court also considered whether or not class arbitration would be a minimum requirement of arbitration in some employment cases when unwaivable statutory rights are at issue. Thus, the cases are vastly distinct on numerous critical legal issues.

For the reasons set forth and discussed below, CAOC respectfully requests that this Court reverse the Court of Appeals' decision affirming the trial court's order to compel arbitration.

LEGAL DISCUSSION

I. CALIFORNIA'S WELL-DEVELOPED UNCONSCIONABILITY DOCTRINE UPON WHICH *GENTRY* IS BASED IS MUCH BROADER THAN THE NARROW UNCONSCIONABILITY STANDARDS DISCUSSED IN *CONCEPCION* AND THUS, THE DETERMINATION BY THAT SINGLE CASE CANNOT APPLY TO THE NUMEROUS OTHER FACTUAL SCENARIOS WHERE UNCONSCIONABILITY CAN PROPERLY BE FOUND.

A. The Unconscionability Addressed in *Discover Bank* and *Concepcion* Was Different Than The Unconscionability Addressed in *Gentry*.

In *Gentry*, an employee filed a putative class action against his employer, alleging a violation of California's overtime compensation statutes (§§ 510, 1194). *Gentry, supra*, 42 Cal.4th at 451. The employer moved to compel arbitration pursuant to its arbitration agreement which also contained a class action waiver. *Gentry, supra*, 42 Cal.4th at 452. The trial court found the class action waiver was valid and ordered the plaintiff to arbitrate his claims on an individual basis. *Gentry, supra*, 42 Cal.4th at 452. The Court of Appeal denied the plaintiff's petition for a writ of mandate, finding that the class action waiver was enforceable. *Gentry, supra*, 42 Cal.4th at 452. Gentry attacked the arbitration agreement on two fronts. First, Gentry challenged the *entire arbitration agreement as a whole* based on the generally applicable contract defense of unconscionability. *Gentry, supra*, 42 Cal.4th at 467 ("Gentry does challenge provisions of the arbitration agreement other than the class arbitration

waiver, however, and argues that the entire arbitration agreement is unconscionable and unenforceable.") Second, Gentry's other challenge was only to a portion of the arbitration agreement, namely the class arbitration waiver because it was a de facto waiver of his unwaivable statutory rights. *Gentry*, *supra*, 42 Cal.4th at 457. This Court granted review to clarify its holding in *Discover Bank*. *Id.*

B. *Gentry* Considered the Procedural Unconscionability of the Entire Arbitration Agreement and *Concepcion* Addressed a Categorical Ban of Only a Provision in an Arbitration Agreement.

In *Gentry*, the plaintiff's challenge to the entire arbitration agreement was that his failure to opt out of the arbitration agreement in his employment contract was not a valid assent to arbitrate. *Gentry*, *supra*, 42 Cal.4th at 467. Gentry signed a form that claimed that he understood that he had thirty (30) calendar days to opt out of the arbitration agreement. *Gentry*, *supra*, 42 Cal.4th at 468. This Court found that Gentry's signature reasonably led the defendant to believe that Gentry's failure to opt out was acceptance to arbitration. *Gentry*, *supra*, 42 Cal.4th at 468. However, this Court went on to find that there was indeed procedural unconscionability because "there are several indications that Gentry's failure to opt out of the arbitration agreement did not represent an authentic informed choice." *Gentry*, *supra*, 42 Cal.4th at 470. The arbitration materials given to *Gentry* failed to adequately disclose the significant disadvantages the

arbitration agreement contained when compared to litigation and that it was not clear that someone in Gentry's position would have felt free to opt out. *Gentry, supra*, 42 Cal.4th at 470-72. With these specific facts in mind, this Court found the arbitration agreement as a whole to be "not entirely free from procedural unconscionability." *Gentry, supra*, 42 Cal.4th at 472. Thus, the case was remanded to the Court of Appeal to determine whether the entire agreement, as a whole, was substantively unconscionable. *Id.* at 473-73.

The foregoing demonstrates that this Court in *Gentry* considered the much broader generally applicable contract defense of unconscionability. "As we have further explained: 'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.'" *Gentry, supra*, 42 Cal.4th at 469 quoting *Armendariz v. Foundation Health Psychcare Services, Inc.*, (2000) 24 Cal.4th 83, 114 ("*Armendariz*"). *Gentry*'s decision revolved around whether or not procedural unconscionability existed without any determination as to whether substantive unconscionability existed. On the other hand, the *Discover Bank* rule created a categorical ban against all class arbitration waivers in consumer contracts by creating a shortcut through procedural and substantive unconscionability.

Discover Bank's shortcut to unconscionability allowed courts to find class

arbitration waivers substantively unconscionable even, as was alleged the case in *Concepcion*, the individual arbitration terms were pro-consumer. *Infra*, at pp. 9-11. However, this Court in *Gentry* never reached the factual question of substantive unconscionability because that issue was remanded to the state court to resolve that issue. Thus, *Concepcion* can not be read to impliedly overrule *Gentry* because neither decisions fully addressed the broader, two-part test for unconscionability.

Further, *Gentry* concerned a challenge to an entire agreement to arbitrate, where in *Concepcion*, the U.S. Supreme Court only addressed a class arbitration waiver clause. *Supra*, at pp.6-7; *Concepcion, supra*, 131 S.Ct. at 1751. The basis and analysis for the two cases should not be considered analogous because under *Gentry* there were additional reasons beyond just the class arbitration waiver. "As noted, Gentry argues that several provisions of the arbitration agreement other than the class arbitration waiver are substantively unconscionable. . . ." *Gentry, supra*, 42 Cal.4th at 472. Thus, *Concepcion*'s holding is too narrowly constrained to the question of class arbitration waivers to be applicable to *Gentry*'s much broader unconscionability analysis.

C. *Concepcion* Is Limited to The Facts in That One Case.

In *Concepcion*, the U.S. Supreme Court examined California's unconscionability doctrine as applied to class action waivers in certain consumer

contracts. *Concepcion, supra*, 131 S.Ct. at 1747 ("But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as. . .unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.") *Discover Bank* held that class action waivers in certain kinds of consumer contracts are generally unconscionable. *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 163 ("*Discover Bank*") abrogated by *AT&T Mobility LLC v. Concepcion* (U.S. 2011) 131 S.Ct. 1740.

Concepcion's allegation against AT&T concerned improper charges for sales tax on the retail value of cellular phones provided for free under the terms of their service contract. *Id.* at 1744. The plaintiffs' suit was consolidated with a class action that alleged, in part, that AT&T's charge for sales tax on phones advertised as free was false advertising and fraud. *Id.* AT&T moved to compel individual arbitration under its contract with the plaintiffs and the district court found that the arbitration provision was unconscionable under the *Discover Bank* rule. *Id.*

The majority opinion asked "whether § 2 [of the ACT] preempts California's [*Discover Bank*] rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." *Id.* at 1746. *Discover Bank* held that a class action waiver in a consumer contract of adhesion is unconscionable when consumer claims against the defendant are predictably small and the plaintiff

alleges a scheme to cheat consumers. *Id.* Missing from the *Discover Bank* rule was any finding that individual arbitration was worse for the aggrieved consumers than class arbitration would be. *Id.* at 1750, 1753. The *Discover Bank* rule also failed to require a finding that the arbitration agreement in question had individual terms that were onerous or unfair. *Id.* Thus, the *Discover Bank* rule's effect invalidated class arbitration waivers in most consumer contracts without considering the longstanding two-part test for unconscionability set forth in this Court's decisions in *Armendariz, supra*, 24 Cal.4th at 114, and *Gentry, supra*, 42 Cal.4th at 469; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 ("Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. (Citation.) Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. (Citation.") (citations ommitted)

Removing the need to demonstrate actual unconscionability permitted *Discover Bank*'s holding to require class arbitration even if the parties had already agreed to not use class arbitration. *Id.* at 1750. This is why *Concepcion* held that class arbitration was "manufactured by *Discover Bank*, rather than

consensual. . .." *Id.* Thus, Justice Scalia, writing for the majority, reasoned that mandating class arbitration under the foregoing circumstances frustrated the FAA's goals for fast, informal dispute resolution and greatly impaired defendants who did not consent to class arbitration. *Id.* at 1751–52. Justice Scalia also found that such a rule could harm consumers because even individual arbitration agreements with pro-consumer terms would be found unconscionable under *Discover Bank*. *Id.* at 1753. Thus, *Concepcion* held that the act preempted California's *Discover Bank* rule "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . .." *Id.* (citations omitted).

D. Finding That the *Discover Bank* Rule Is Preempted by the FAA Does Not Mean That All State Law Unconscionability Defenses Are Also Preempted.

Although *Concepcion*'s majority decision stated that the FAA preempted the *Discover Bank* rule, the FAA does not preempt generally applicable state law unconscionability defenses across the board.

The Federal Arbitration Act ("FAA") provides that a "written provision in any. . .contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract." 9 U.S.C. § 2 (2006). Thus, while the FAA's

language validates arbitration agreements, the statute's language also allows state law that is generally applicable to all contracts to invalidate arbitration agreements. "'[G]enerally applicable contract defenses, such as. . .unconscionability, may be applied to invalidate arbitration agreements without contravening' the FAA." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 quoting *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687; accord, *Armendariz, supra*, 24 Cal.4th at 114; accord *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389; *see, e.g., Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505 ("[w]e apply general California contract law to determine whether the parties formed a valid agreement to arbitrate," (*quoting Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88–89; *see also First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944.)

As expressly narrowed, the sole issue in *Concepcion* was: "... whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." *Concepcion, supra*, 131 S.Ct. at 1746. Thus, the issue in *Concepcion* was not whether the FAA preempts all state law unconscionability defenses but rather, whether a mere finding of procedural unconscionability through an adhesion contract and a presumption against arbitration clauses in consumer contracts, as expressed by the *Discover Bank* rule,

was preempted by the FAA.

In practice the *Discover Bank* rule created a targeted obstruction to arbitration by making "the enforceability of certain arbitration agreements on the availability of class wide arbitration procedures". *Concepcion*, *supra*, 131 S.Ct. at 1744. However, *Concepcion* did not find that all state law contract defenses require class wide arbitration to the detriment of all parties nor would that likely be the case. Instead, the *Discover Bank* rule was a smaller sub-rule addressing a specific factual scenario within the much broader doctrine of unconscionability. Further, unconscionability is merely one generally applicable contract defense amongst numerous legal and equitable grounds expressly protected by the FAA. 9 U.S.C. § 2 (2006). To read *Concepcion* to overrule all other cases applying general contract defenses, including the much broader two-part test for unconscionability, is to contradict not only the FAA's language but also the express language of *Concepcion* finding that "California's *Discover Bank* rule is preempted by the act." *Id.* at 1753. Finally, if *Concepcion* had intended to find that the FAA preempted all state law unconscionability defenses then its detailed discussion finding the arbitration terms at issue in *Concepcion* to not lead to an unconscionable result would have been unnecessary. *Id.* at 1753. Thus, *Concepcion* merely stands for the proposition that a case-by-case approach gives the proper analytical structure to assess state law contract defenses under the

savings clause of the act. *See e.g.*, *Compton v. Superior Court* (Mar. 19, 2013) 2013 WL 1120619, *10 (observing *Concepcion* does not abrogate the *Armendariz* One–Sidedness rule).

E. Justice Thomas's Concurring Opinion Supports Reading *Concepcion* Narrowly Because *Discover Bank* Concerned Only a Single Specie of Unconscionability.

Although five Justices signed the majority opinion (*Concepcion*, *supra*, 131 S.Ct. at 1743), Justice Thomas's concurring opinion casts doubt that the majority of the Court agreed with the majority opinion's logic. Justice Thomas expressly provided a different interpretation of the FAA. *Id.* at 1753-56. He agreed that the FAA preempts state law contract defenses premised on public policy uniquely regarding arbitration. *Id.* at 1754. He also agreed that state law contract defenses including "fraud, duress, and unconscionability 'may be applied to invalidate arbitration agreements without contravening § 2.'" *Id.* at 1755, n. 1 (quoting *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687). However, Justice Thomas "reluctantly" signed the majority opinion despite his alternate interpretation of the FAA because "the Court's test will often lead to the same outcome as my textual interpretation." *Id.* at 1754.

Justice Thomas's textual interpretation was based on § 2's use of the word "revocation." *Id.* at 1754 (quoting 9 U.S.C. § 2). His concurring opinion observed that the words "invalidation," and "nonenforcement" were blatantly

absent from § 2. *Id.* at 1754. Justice Thomas asserts the savings clause excludes all contract defenses and selects "some subset of those defenses." *Id.* According to Justice Thomas, only contract formation defenses are saved by § 2 and not nonenforcement defenses like contravening public policy. *Id.* at 1755. Therefore, the reason the FAA preempts the *Discover Bank* rule is because it is based in public policy concerns rather than contract formation defenses. *Id.* at 1756.

Justice Thomas's concurring opinion reveals the much broader reach of the entire doctrine of unconscionability. The *Discover Bank* rule provided an example of a public policy basis to find an arbitration agreements unconscionable. However, in California, there can be unconscionability found at the formation stage. For instance, in *Olvera v. El Pollo Loco, Inc.* (2009) 173 Cal.App.4th 447, the court found an arbitration provision (that also contained a class arbitration waiver) unconscionable because the arbitration provision was not translated into Spanish, was in small type and appeared at the end of the materials. *Olvera*, at 450, 457. *Olvera* is an example of the classic procedural unconscionability doctrine of "unfair surprise result[ing] from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice." *Olvera v. El Pollo Loco, Inc.* (2009) 173 Cal.App.4th 447, 455 (citing *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473,

486, also citing Spanogle, *Analyzing Unconscionability Problems* (1969) 117 U. Pa. L.Rev. 931, 943).

F. California's Unconscionability Doctrine Has Numerous Variables Giving Rise To Near Infinite Variations of *Unconscionability* That Were Neither Discussed Nor Mentioned in *Concepcion*

California structured its unconscionability doctrine to allow for a very fact-specific analysis and near infinite variations of unconscionability. First, "the doctrine has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Gentry*, *supra*, 42 Cal.4th at 468-69 (citations and quotation marks omitted). This rule expresses two general grounds giving rise to procedural unconscionability. "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.... Surprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party in a superior bargaining position." *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1469. Thus, procedural unconscionability has two distinct and separate grounds. *Gentry* observed this point:

> . . .there are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties. . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum.

> Ordinary contracts of adhesion. . .contain a degree of procedural unconscionability even without any notable surprises, and bear within them the clear danger of oppression and overreaching.

Gentry, supra, 42 Cal.4th at 469. In *Gentry* the court focused on procedural unconscionability and found it present because "Gentry's failure to opt out of the arbitration agreement did not represent an authentic informed choice." *Gentry, supra*, 42 Cal.4th at 479. Gentry's choice was uninformed because he was not told about the specific legal disadvantages the arbitration agreement contained. *Supra*, at pp.6-7. *Gentry's* kind of procedural unconscionability is more like the "surprise" kind of procedural unconscionability before the court in *Olvera*. In contrast, *Discover Bank* and *Concepcion* dealt with contracts of adhesion where no element of unfair surprise was alleged. *Concepcion, supra*, 131 S.Ct. at 1750. The basis of the procedural unconscionability in *Concepcion* was oppression due to lack of bargaining power. *See Vasquez v. Greene Motors, Inc.* (2013) 214 Cal.App.4th 1172, 1183 ("The classic example of oppression is the use of a contract of adhesion—a contract presented without the option of negotiation, on a take-it-or-leave-it basis."). On this procedural prong of California's doctrine of unconscionability, the basis of procedural unconscionability in *Concepcion* is different than *Gentry*.

Additionally "procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a

contract or clause under the doctrine of unconscionability." *Gentry*, *supra*, 42 Cal.4th at 469 (citation and quotation marks omitted.) "But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." *Armendariz*, *supra*, 24 Cal.4th at 114 (citations and quotation marks omitted). "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Gentry*, *supra*, 42 Cal.4th at 469 citing *Armendariz*, *supra*, 24 Cal.4th at 114. "Substantive unconscionability addresses the fairness of the term in dispute. It traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159 (citation and quotation marks omitted).

Allowing variations in the degree of procedural and substantive unconscionability permits courts to find unconscionability in agreements by drawing on a fluid spectrum that can embrace a multitude of factual scenarios. The presence of an extreme degree of procedural unconscionability may allow for a lesser amount of substantive unconscionability and vice versa. These numerous

legal variables allow a near infinite number of factual scenarios that can give rise to a determination of unconscionability. Additionally, the grounds for substantive unconscionability can either be that the contract is one-sided or overly harsh. Thus, the overruling of a single case's determination of unconscionability should not be forced upon the rest of the courts facing an array of scenarios giving rise to unconscionability.

Discover Bank founded its substantive unconscionability analysis of the class arbitration waiver on one-sidedness because the waiver exempted defendants "from responsibility for [its] own fraud, or willful injury to the person or property of another." *Discover Bank, supra*, 36 Cal. 4th at 163 *abrogated by Concepcion, supra*, 131 S.Ct. 1740 quoting Civ. Code, § 1668; *Concepcion* at 1747. In *Gentry* the court never reached the question of substantive unconscionability. It is unclear to what degree the arbitration agreement in *Gentry* was substantively unconscionable. It is also unknown as to whether the arbitration agreement in *Gentry* was one-sided or overly harsh. As stated above, *Discover Bank* found the exculpatory effect of a class arbitration waiver to be the basis for substantive unconscionability. Forcing *Concepcion* onto *Gentry* assumes that the plaintiff in *Gentry* complained about the one-sidedness of his arbitration as in *Discover Bank.* To do so would be wrong, not only because *Gentry* made no determination about substantive unconscionability, but also

because *Gentry* concerned a challenge to the entire arbitration agreement. *Supra*, at pp. 6-8. Thus, there may be numerous provisions beyond a class arbitration provision in an agreement that a court may properly find one-sided or overly harsh.

According to Justice Thomas, the FAA's savings clause reveals the vast difference in generally applicable contract defenses, including the differing species of unconscionability. According to Justice Thomas, *Discover Bank* concerned unconscionability based on public policy concerns and not the viability of procedural unconscionability as a defense to contract formation. Therefore, to force *Concepcion*'s holding to apply to the wide and varied species of unconscionability would cast too wide of a net and improvidently invalidate long-standing state law defenses to contract formation.

Numerous courts have observed that *Concepcion* narrowly addressed only the factual scenario that gave rise to the decision in *Discover Bank*. *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 507 citing *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498 ("[a]lthough we agree. . .that *Concepcion* implicitly disapproved the reasoning of the *Gentry* court, the United States Supreme Court did not directly address the precise issue presented in *Gentry*."); (*see e.g.*, *Brewer v. Missouri Title Loans* (Mo. 2012) 364 S.W.3d 486, 491, "[b]ased on our reading of *Concepcion*, we reject the conclusion that

the [FAA] requires state courts to replace the essentially categorical *Discover Bank* rule requiring class arbitration with another categorical rule requiring individual arbitration in every case . . . ."). Thus, *Concepcion* should be read narrowly and not interpreted to invalidate all state law contract defenses merely because the contract at issue contains an alleged agreement to arbitrate.

II. UNLIKE *DISCOVER BANK*, *GENTRY* ALSO CONSIDERED VINDICATION OF UNWAIVABLE STATUTORY RIGHTS.

A. *Discover Bank* and Subsequently *Concepcion* Deliberately Lacked the Kind of Legal and Factual Issues Present in *Gentry*

Gentry concerned not only a challenge to the entire arbitration agreement as a whole as unconscionable (*supra*, at pp. 6-8), but also brought another challenge on a separate basis against a single provision in the arbitration agreement. In particular, Gentry challenged the class arbitration waiver, not as unconscionable, but rather, as being a de facto waiver of unwaivable statutory rights. *See Gentry, supra*, 42 Cal.4th at 455. *Concepcion* did not discuss much less address that issue.

Concepcion's analysis was based upon the assumption that defendant's arbitration agreement would not prevent the plaintiffs from vindicating their statutory rights. The question presented in *Concepcion* was whether the FAA preempted state law that invalidated a class action ban where classwide treatment is "*not* necessary to ensure that the parties to the arbitration agreement are able

to vindicate their claims." Pet. for Writ of Cert., *AT&T Mobility, LLC v. Concepcion* (Jan. 25, 2010) No. 09-893, 2010 WL 304265 at *1 (emphasis added). An issue presented in *Gentry* and this case, is in contrast to the issue faced in *Concepcion*. The issue in *Gentry* and here is whether class action treatment *is* necessary to ensure parties to the arbitration agreement will be able to vindicate their unwaivable statutory rights. Thus, *Concepcion* does not overrule *Gentry* on this ground.

In distinguishing the issues present in *Gentry* from the issues in *Discover Bank* this Court expressly observed that "[it] had no occasion in *Discover Bank* to consider whether a class action or class arbitration waiver would undermine the plaintiff's statutory rights." *Gentry, supra*, 42 Cal.4th at 455. *Gentry* concluded that the right to overtime compensation was an *unwaivable* statutory right. *Gentry, supra*, 42 Cal.4th at 456 ("In short, the statutory right to receive overtime pay embodied in section 1194 is unwaivable."). *Discover Bank*'s analysis of class arbitration waivers turned on the doctrine of unconscionability but in contrast, *Gentry*'s focus regarding class arbitration waivers turned on unwaivable statutory rights. *Gentry, supra*, 42 Cal.4th at 456. "While *Discover Bank* is a case about unconscionability, the rule set forth in *Gentry* is concerned with the effect of a class action waiver on unwaivable rights regardless of unconscionability." *Arguelles–Romero v. Superior Court* (2010) 184

Cal.App.4th 825, 836. This is a crucial distinction between *Discover Bank* and *Gentry*.

Unlike *Concepcion*, this Court in *Gentry* also addressed the framework of unwaivable vindication of statutory rights. *Gentry*, *supra*, 42 Cal.4th at 456. This Court in *Gentry* based its discussion on prior case law setting out the minimal requirements of arbitrating unwaivable statutory rights that *Armendariz, supra*, 24 Cal.4th 83 recognized. *Gentry*, *supra*, 42 Cal.4th at 456. *Armendariz* held that when an employee is bound by a predispute arbitration agreement to adjudicate unwaivable statutory employment rights the arbitration will be subject to certain minimal requirements. *Gentry*, *supra*, 42 Cal.4th at 456. *Gentry* then listed *Armendariz's* minimal requirements:

> (1) the arbitration agreement may not limit the damages normally available under the statute (*Armendariz, supra,* 24 Cal.4th at p. 103[, 99 Cal.Rptr.2d 745, 6 P.3d 669]); (2) there must be discovery 'sufficient to adequately arbitrate their statutory claim' (*id.* at p. 106 [, 99 Cal.Rptr.2d 745, 6 P.3d 669]); (3) there must be a written arbitration decision and judicial review ' "sufficient to ensure the arbitrators comply with the requirements of the statute" ' (*ibid.*); and (4) the employer must 'pay all types of costs that are unique to arbitration' (*id.* at p. 113[,99 Cal.Rptr.2d 745, 6 P.3d 669])."

Gentry, *supra*, 42 Cal.4th at 456-57 quoting *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076 ("*Little*").) Unlike the factors in *Discover Bank* and *Concepcion*, the *Gentry* and *Armendariz* requirements are not tethered to an

unconscionability analysis.

Gentry recognized that "a party compelled to arbitrate such rights does not waive them, but merely submits to their resolution in an arbitral, rather than a judicial, forum, arbitration cannot be misused to accomplish a de facto waiver of these rights." *Gentry*, *supra*, 42 Cal.4th at 457 quoting *Little, supra,* 29 Cal.4th at 1079 (internal quotation marks removed). "[T]he above requirements [are] necessary to enable an employee to vindicate ... unwaivable rights in an arbitration forum." *Gentry*, *supra*, 42 Cal.4th at 457 quoting *Little*, *supra*, 29 Cal.4th at 1077. In evaluating a class arbitration waiver *Gentry* invoked the requirements related to the vindication of unwaivable statutory rights (see *e.g.*, *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489), unlike *Concepcion* which addressed only unconscionability. *Supra*, at pp. 8-11. Thus, the *Gentry/Armendariz* factors stand in marked contrast to the limited reach of *Concepcion*. *Gentry*'s factors explicitly address the inherent dangers in vindicating labor rights. For instance, *Gentry* acknowledged the chilling presence of "retaliation" in employment litigation. *Gentry*, *supra*, 42 Cal.4th at 459. Also, *Gentry*'s factors were directed at random and fragmentary enforcement of California's labor laws. *Gentry*, *supra*, 42 Cal.4th at 462. *Concepcion*'s analysis lacks these factors because *Concepcion* only faced consumer contracts. Finally, *Discover Bank* did not consider statutory rights

because the *Discover Bank* plaintiff strategically did not pursue and statutory rights:

> We noted that the plaintiff in *Discover Bank* did "not plead a CLRA cause of action and so does not invoke its antiwaiver provision; nor does he seek recovery under any other California statute as to which a class action remedy is essential" (*id.*, at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100, fn. omitted) apparently because the plaintiff sought to pursue a national class action suit and had made a strategic decision not to rely on a California statute. (*Discover Bank, supra,* 36 Cal.4th at p. 160, fn. 2, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) Accordingly, we had no occasion in *Discover Bank* to consider whether a class action or class arbitration waiver would undermine the plaintiff's statutory rights.

Gentry, *supra*, 42 Cal.4th at 455. Thus, *Discover Bank* and subsequently *Concepcion* deliberately lacked the kind of legal and factual issues present in *Gentry*. For these reasons, despite *Concepcion*'s holding, *Gentry* remains binding and good law.

As stated above, the statutory labor rights addressed in *Gentry* are unwaivable. *Gentry* was concerned with determining when a class arbitration waiver might become a de facto waiver of unwaivable statutory rights. The *Gentry* court declared:

> We have not yet considered whether a class arbitration waiver would lead to a de facto waiver of statutory rights, or whether the ability to maintain a class action or arbitration is necessary to enable an

> employee to vindicate . . . *unwaivable rights* in an arbitration forum.' . . . We conclude that under some circumstances such a provision would lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws.

Gentry, supra, 42 Cal.4th at 457 (italics added). In contrast, *Discover Bank* and *Concepcion* did not face the question of unwaivable statutory rights in an employment contract. *Supra*, at pp. 20-24. Instead, *Concepcion* only addressed policy that was codified in a statute that did not expressly confer an unwaivable right, but merely stated what contracting parties may not do. *Concepcion*, at 1746 citing *Discover Bank* at 162 quoting Civ. Code, § 1668. As discussed above, *Concepcion* concerned *Discover Bank's* judicially created or "manufactured" consent to class arbitration when none existed in the first place. *Supra*, at pp. 10-11. However, if statutory rights are unwaivable, then issues related to consent are entirely distinct because a party would not be able to consent to waive unwaivable rights (at least not in a manner similar to *Concepcion*). Further, an improperly obtained consent to waive unwaivable rights presents a valid defense to contract formation which Justice Thomas's textual interpretation of the FAA's savings clause would permit. *Supra*, at pp. 13-15. The factual issues, legal issues and legal doctrines presented in *Concepcion* and *Gentry* are separate and distinct and thus, *Concepcion* cannot be read to impliedly overrule *Gentry*.

B. *Gentry*'s Decision Regarding Class Arbitration Waivers Was a Continuation of a Line of Cases Discussing the Minimal Requirements of Arbitration Agreements in the Context of Statutory Rights.

Although the FAA evidences a policy that favors arbitration, the U.S. Supreme Court has also recognized that arbitration agreements must allow plaintiffs to vindicate statutory rights. *See, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 637 (*"Mitsubishi"*). "If an arbitration agreement works as a prospective waiver of a party's right to pursue statutory remedies. . .it will be condemn[ed] . . . as against public policy." *Id.* at 637, fn. 19. *Armendariz*'s analysis relies on this vindication doctrine as laid out by their decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614. *Armendariz, supra*, 24 Cal.4th at 98. The roots of *Gentry* are embedded in *Armendariz. Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 839 ("The seeds for the rule of *Gentry* were planted not in *Discover Bank,* but in *Armendariz.* . . .") (citation omitted). On this issue, *Gentry*'s reliance on *Armendariz* makes its decision regarding class arbitration waivers a progeny of *Mitsubishi* and those related federal cases concerned with the interplay between statutory rights and arbitration. Thus, to reach the question of whether *Concepcion* overruled *Gentry*, this Court would have to first find that *Concepcion* overruled *Mitsubishi,* something the high court simply has not done.

In *Mitsubishi*, the U.S. Supreme Court eased concerns regarding

arbitration agreements that covered statutory claims: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi, supra*, 473 U.S. at 628. "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. However, if provisions of an arbitration clause would effectively operate "as a prospective waiver of a party's right to pursue statutory remedies... we would have little hesitation in condemning the agreement as against public policy." *Id.* The Court stressed these principles in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26, 28, an employment discrimination case under the Age Discrimination in Employment Act, 29 U.S.C.A. § 621, et seq.

In *Green Tree Fin. Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, the Court advanced the vindication of statutory rights doctrine by stating, "that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. Thus, courts have acknowledged that class action waivers can prevent the vindication of statutory rights where substantial litigation costs outweigh an individual claim's value. *See, e.g., Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, 29, 53-55, 58-61; *In re Am. Express Merchs. Litig.*, (2d Cir. 2012) 667

F.3d 204, cert. granted, Nov. 9, 2012, 133 S. Ct. 594; *Sutherland v. Ernst & Young*, LLP (S.D.N.Y. 2011) 768 F. Supp. 2d 547, recons. denied. (S.D.N.Y. 2012) 847 F. Supp. 2d 528. Courts have widely cited Judge Posner's observation discussing class certification concerns: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.* (7th Cir. 2004) 376 F.3d 656, 661 (emphasis added). Therefore, the Court of Appeal erred in overlooking the U.S. Supreme Court's line of cases protecting the vindication of statutory rights in arbitration.

Numerous courts have observed that *Gentry* is a statutory rights vindication analysis. *Compton v. Superior Court* (2013) 214 Cal.App.4th 873 fn. 3 (acknowledging that *Gentry* established a four-factor test that employees had to meet in order to show that a class proceeding was necessary to secure the nonwaivable statutory rights of potential class members.); *Franco v. Arakelian Enterprises, Inc.* (2012) 211 Cal.App.4th 314, *as modified (Dec. 4, 2012), review granted and opinion superseded sub nom. Franco v. Arakelian Enterprises* (Cal. 2013) 152 Cal.Rptr.3d 422 (observing that *Gentry*'s rule flows from statutory rights); *see also, e.g., Walnut Producers of Cal. v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 651 ("Our Supreme Court has established that a class action waiver in an employment arbitration agreement is unenforceable if it

prevents a person from vindicating unwaivable statutory rights.") (citing *Gentry*, *supra*, 42 Cal.4th at 450; *Armendariz*, *supra*, 24 Cal.4th at 100–113); *Olvera v. El Pollo Loco, Inc.* (2009) 173 Cal.App.4th 447, 454, fn.4.

Months after the Supreme Court decided *Concepcion*, in another labor related claim the California Court of Appeal, Second District, Division 5 observed that "*Gentry* remains the binding law of this state which we must follow." *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 505 (citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454).

Gentry's ruling regarding class arbitration waivers focused on vindicating unwaivable statutory rights tethered to doctrines that *Concepcion* did not consider. Thus, *Gentry* is still valid law.

III. CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: May 10, 2013

Respectfully submitted,

By: _____

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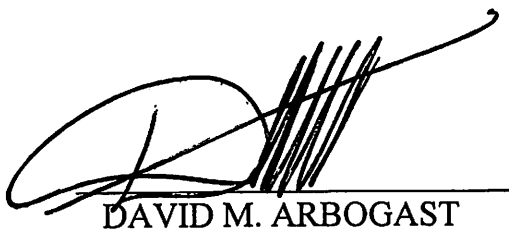
CERTIFICATE OF COMPLIANCE

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 6,954 words as counted by the Corel WordPerfect X5 program used to generate this petition.

Dated: May 10, 2013



DAVID M. ARBOGAST

DECLARATION OF SERVICE BY MAIL

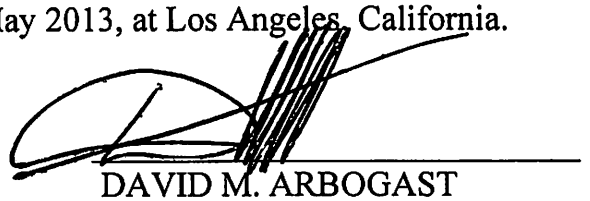
I, the undersigned, declare:

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 May 10, 2013, declarant caused to be served the **BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFFS AND PETITIONER 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 10th day of May 2013, at Los Angeles, California.



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