No. S117735
IN THE SUPREME COURT OF CALIFORNIA

ANTONE BOGHOS,

Plaintiff and Appellee,

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON (sued and served as "LLOYD'S OF LONDON"); INTERNATIONAL RISK MANAGEMENT GROUP; PETERSEN INTERNATIONAL UNDERWRITERS,

Defendants and Appellants.

AFTER APPEAL FROM THE COURT OF APPEAL, SIXTH DISTRICT, CASE NO. H024481

BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF APPELLEE

Deborah Zuckerman
AARP Foundation

Michael Schuster
AARP

601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Nancy Barron (SBN 99278)
Counsel of Record
Kemnitzer, Anderson, Barron & Ogilvie
445 Bush Street, 6th Floor
San Francisco, CA 94108
(415) 861-2265

Counsel for *Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATEMENT OF INTEREST

AARP is a non-partisan, non-profit AARP organization with more than 35 million members, approximately 3 million of whom live in California. As the largest membership organization dedicated to addressing the needs and interests of people aged 50 and older, AARP is greatly concerned about widespread fraudulent, deceptive, and unfair corporate practices because many of these practices have a disproportionate impact on older people. Accordingly, AARP supports laws and public policies designed to protect their rights and to preserve the means for them to seek redress when they are harmed in the marketplace. To help achieve this, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools. Specifically, AARP opposes pre-dispute, binding, mandatory arbitration, and believes that any alternative dispute resolution mechanism must provide adequate safeguards for participants with unequal bargaining power, including reasonable forum costs that are no greater than would be incurred in court.

Access to the justice system has been severely curtailed, however, by the growing number and range of corporations that impose binding arbitration as a condition of doing business. In addition to preventing consumers from having their claims resolved in court, either on an

individual or class-wide basis, many of these clauses impose extremely high, often unaffordable, costs on claimants. These clauses effectively shut the door to any forum in which claimants can obtain redress for their damages or change corporate practices for the benefit of all consumers. AARP attorneys represent clients challenging mandatory arbitration clauses, and AARP has filed *amicus curiae* briefs in the U.S. Supreme Court and in federal and state courts around the country, including this Court, addressing the importance of preserving court access for consumers and ensuring they can take advantage of the full range of protections Congress and state legislatures enacted for their benefit.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary practice and areas of specialty involve the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices. Consistent with its goal of promoting justice for consumers, NACA has appeared as *amicus curiae* in numerous federal and state courts. NACA is concerned that some arbitration providers have conceived and

implemented procedures that deprive consumers of meaningful opportunities to present their claims.

These concerns led AARP and NACA to file this brief respectfully urging the Court to prevent corporations like defendants from imposing arbitration as a means to exculpate themselves from liability, and to affirm the Court of Appeal's finding that the arbitration clause's requirement that plaintiff share the high costs of arbitration rendered it unconscionable and unenforceable.

ARGUMENT

I. THE IMPOSITION OF UNREASONABLE COSTS RENDERS AN ARBITRATION CLAUSE UNENFORCEABLE.

The U.S. Supreme Court has clearly stated that the arbitral forum must allow plaintiffs to effectively vindicate their statutory causes of action, and that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628, 637. *See also Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 28. It cannot be gainsaid that plaintiffs cannot vindicate their rights in any forum, including an arbitral forum, if they cannot get in the door, and the Supreme Court has recognized that high arbitration costs can preclude litigants from

effectively vindicating their statutory rights. *Green Tree Fin. Corp. v. Randolph* (2000) 531 U.S. 79, 90. While the Court found Randolph had not met her burden of showing the likelihood she would incur prohibitive arbitration costs, *id.* at 92, when claimants do introduce evidence of such costs numerous courts, like the Court of Appeal, have implemented these joint mandates by finding arbitration provisions unenforceable either because they are substantively unconscionable or because they prevent litigants from effectively vindicating their rights.[1] Thus, regardless of

---

[1] Other courts that have found plaintiffs failed to meet their evidentiary burden on costs nevertheless still uphold the principle that an adequate showing would render the clause unenforceable. *See, e.g.*, *Bradford v. Rockwell Semiconductor Sys., Inc.* (4th Cir. 2001) 238 F.3d 549, 556 (noting the crucial question is whether the arbitral forum in a particular case is an adequate, accessible substitute for litigation, to be determined from an inquiry into a claimant's expected or actual arbitration costs and his ability to pay them, "measured against a baseline of the claimant's expected costs for litigation and his ability to pay those costs."); *Boyd v. Town of Hayneville, Ala.* (M.D. Ala. 2001) 144 F. Supp. 2d 1272, 1280 ("arbitration related expenses are acceptable so long as they do not render the arbitral forum inaccessible to the statutory claimant."); *State ex*

whether the Court strikes down defendant's arbitration clause under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 110,[2] because plaintiff would incur expenses in arbitration that he

---

rel. Dunlap v. Berger (W. Va.) 567 S.E.2d 265, 282, *cert. denied sub nom. Friedman's Inc. v. State ex rel. Dunlap* (2002) 537 U.S. 1087 (plaintiffs' cost arguments were speculative but "provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect on a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.").

[2] This Court relied on the finding in *Cole v. Burns International Security Services* (D.C. Cir. 1997) 105 F.3d 1465, 1484, that requiring employees to pay arbitrators' fees when they would not have to pay for a judge's services in court would thwart their ability to vindicate their statutory rights. *See also Shankle v. B-G Maint. Mgmt., Inc.* (10th Cir. 1999) 163 F.3d 1230, 1235 ("'The Agreement thus placed Mr. Shankle between the proverbial rock and a hard place -- it prohibited use of the

would not have to pay to proceed in court, ample precedent exists to support the lower Court's finding that the costs render the clause unenforceable.

---

judicial forum, where a litigant is not required to pay for a judge's services and the prohibitive cost substantially limited use of the arbitral forum. [Citation] Essentially, B-G Maintenance required Mr. Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights.'"). *Armendariz*, 24 Cal. 4th at 109. This Court also recognized that "rights may be transgressed as much by the imposition of undue costs as by outright denial," and rejected the notion that the issue of excessive forum fees should be decided after the completion of arbitration, noting the mere possibility of cancelling costs at the end of the process was insufficient to remove the chill on the exercise of the right to vindicate statutory rights. *Id.* (citing *California Teachers Ass'n v. State* (1999) 20 Cal. 4th 327, 357-58). *See also Little v. Auto Stiegler, Inc.* 29 Cal. 4th 1064, *cert. denied*, (2003) 124 S. Ct. 83 (extending *Armendariz*'s minimal requirements for arbitration of statutory employment claims to employee claims based on public policy violations).

A. California Courts Refuse to Enforce Arbitration Clauses that Impose Unreasonable Costs on Claimants

In addition to the court below, several other California Courts of Appeal have struck down mandatory arbitration clauses based on costs. A recent decision involved the finding that a clause in a car lease was substantively unconscionable where it conditioned the process on the plaintiffs paying fees they could not afford.

> It is self-evident that such a provision is unduly harsh and one-sided, defeats the expectations of the nondrafting party, and shocks the conscience. . . . To state it simply: it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high. Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself.

Gutierrez v. Autowest, Inc. (2003) 114 Cal. App. 4th 77, 89-90 (modified Jan. 8, 2004) (citations and footnote omitted). Plaintiffs there presented substantial evidence they could not pay the arbitration administrative fees which, under the American Arbitration Association's (AAA) rules, were estimated at $8,000 based on the size of the claim. The Court of Appeal was not persuaded by defendant's claim that plaintiffs might be able to recover these costs at the end of the arbitration, finding "[t]his possibility,

however, provides little comfort to consumers like plaintiffs here, who cannot afford to initiate the arbitration process in the first place." *Id.* at 90. In addition to unconscionability, the court relied on *Armendariz* in holding plaintiffs could challenge the arbitration requirement on the ground it is a private agreement that contravened public rights. *Id.* at 94. Recognizing that a question remains as to whether *Armendariz* applies to consumer cases, the court adopted a case-by-case approach to determinations of whether arbitral costs are unreasonable and thus render clauses unenforceable. *Id.* at 97 & n.16.[3]

Another California appellate court issued a similar ruling in a case alleging state law claims for wrongful discharge and age discrimination. *O'Hare v. Mun. Res. Consultants* (2003) 107 Cal. App. 4th 267. The court found the costs provision was unconscionable as it was inconsistent with

---

[3] Moreover, when consumers seeks to vindicate unwaivable rights under a state consumer protection statute, the court implied in the arbitration clause an agreement that unaffordable fees will not be allocated to the consumer at the time of the award. "Implying this additional agreement ensures that consumers will not be deterred from pursuing their statutory claims by fear that the arbitrator will allocate unaffordable fees to them." *Id.* at 99.

Armendariz. The AAA's Rules for the Resolution of Employment Disputes required the parties to equally bear the costs of arbitration and the arbitrator's compensation unless they agreed or the arbitrator directed otherwise. The court rejected defendant's position that its preparedness to pay the costs made the question of cost allocation a "'non-issue,'" noting this "misses the mark." *Armendariz* found an employer's after-the-fact offer "to amend the arbitration provision to bring it into conformity with law to be wanting. . . . It therefore follows that MRC's willingness to bear all costs in the arbitration proceeding does not change the fact that the arbitration provision is substantively unconscionable." *Id*. at 280.

The Ninth Circuit affirmed a California federal district court's finding that an arbitration clause was unconscionable under *Armendariz*, where the National Arbitration Forum's (NAF) rules required that claimants pay up to a $125 filing fee and share equally in all costs after the employer paid the remainder of the filing fee and costs of the first hearing day. *Ferguson v. Countrywide Credit Indus., Inc.* (9th Cir. 2002) 298 F.3d 778. The court found these rules imposed multiple fees that would cost Ferguson thousands of dollars, and the possibility that an arbitrator would award fees and costs to a prevailing party did not ameliorate this problem. Not only was this authority discretionary, but "the significant up-front costs associated with bringing a claim in an arbitral forum may prevent

individuals with meritorious claims from even pursuing these claims in the first place." *Id.* at 785 n.8.

In a similar vein, a California federal district court found an arbitration clause substantively unconscionable for, among other reasons, "plac[ing] significant financial hurdles in the path of a potential litigant." *Ting v. AT&T* (N.D. Cal. 2002) 182 F. Supp. 2d 902, 939, *aff'd in part and rev'd in part*, (9th Cir.) 319 F.3d 1126, *cert. denied*, (2003) 124 S. Ct. 53. Plaintiffs introduced evidence, much of which the court noted was not available to class members when they received the Consumer Services Agreement containing the arbitration provision, from which it was "apparent that in a number of situations, large arbitration costs will preclude class members from effectively vindicating their legal rights." *Id.* at 934. Moreover, an arbitrator's ability to change the allocation of costs at the end of the arbitration "does little to mitigate the cost of 'buying into' arbitration,"*id.*, and while the AAA's policy allowed the occasional deferral of some of its administrative charges in cases of extreme hardship, such deferrals do not apply to the much higher arbitrator's fees.

The AAA's rules also formed the basis for another of the California federal district court's substantive unconscionability findings. Plaintiffs filed a nationwide class action challenging the practices of an on-line payment service. They claimed the cost of an individual arbitration was

likely to exceed $5,000 and submitted declarations that they could not afford such a proceeding. The court found that plaintiffs, whose individual claims were no more than $310, established that each of them likely would incur arbitration costs greater than the cost of bringing a collective action. "By allowing for prohibitive arbitration fees and precluding joinder of claims . . . PayPal appears to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices. Under these circumstances, the Court concludes that this aspect of the arbitration clause is so harsh as to be substantively unconscionable." *Comb v. PayPal, Inc.* (N.D. Cal 2002) 218 F. Supp. 2d 1165, 1176.

B. Federal and State Courts in Other Jurisdictions Also Reject Corporate Efforts to Impose High Arbitration Costs on Claimants

The Third Circuit has, on at least two occasions, found that high costs rendered arbitration clauses unconscionable. For example, the Court examined an arbitration clause in an employment contract which provided that each party had to pay its own costs and expenses, including attorneys' fees; while the employer would advance the arbitrator's fees and expenses, an employee who did not prevail in arbitration had to reimburse those costs. Plaintiffs, two former employees, expected their arbitration to last at least seven days and notified the company they could not afford arbitration. The Third Circuit found that several provisions of the arbitration clause,

including "under the circumstances of this case, the 'loser pays' provision for arbitrator's fees and expenses unreasonably favor [the employer] to the plaintiffs' detriment." *Alexander v. Anthony Int'l* (3d Cir. 2003) 341 F.3d 256, 263. The court concluded "[p]laintiffs thereby are effectively denied recompense for [the employer's] alleged misconduct, resulting in an unfair advantage for their former employer. . . . We therefore must find that the 'loser pays' provision is unconscionable as to these particular plaintiffs." *Id.* at 269-70.

That decision was consistent with the Third Circuit's ruling in *Spinetti v. Service Corp. International*, that a costs provision was unconscionable where the employee had to pay a $500 initial non-refundable filing fee, an additional filing fee of $2,750, a case-filing fee of $1,000, an additional charge of $150 for each day of the hearing, and half the arbitrator's compensation (estimated at $250 an hour with a $2,000 daily minimum). (3d Cir. 2003) 324 F.3d 212, 217. The trial court found Spinetti had shown the arbitration-related costs were prohibitive, and the Third Circuit clarified "what was implicit in the district court's order to compel arbitration, to-wit, the court intended that the employer pay all of the costs of arbitration and final responsibility for attorney's fees should be governed by the appropriate statute . . . ." *Id.*

An Illinois federal court has, on several occasions, refused to enforce

arbitration clauses due to high costs. One case involved claims that defendants had violated various federal and state credit repair statutes and plaintiffs claimed that proceeding under AAA's Commercial Dispute Resolution Procedures would cost them more than $4,000 each, exclusive of the costs of renting a room or traveling to Florida for the proceeding, or reimbursing the arbitrator for time spent on pre-hearing matters. Plaintiffs pointed out that "'common sense' suggests that such expenses would be prohibitive for consumers, like them, who sought credit repair services precisely because they were in debt." *Arnold v. Goldstar Fin. Systs., Inc.* (N.D. Ill., Aug. 22, 2002, No. 01 C 7694) 2002 U.S. Dist. LEXIS 15564, at *33. Even excluding fees that the parties might end up splitting, plaintiffs submitted sufficient evidence that arbitration would cost them each at least $2550, "seventeen times the cost of proceeding in district court," and defendants did not dispute the fact that people with debt problems are unable to afford such costs. *Id.* at *35-36.

The Illinois court had made similar findings in a case challenging a restaurant's promotional games. *Popovich v. McDonald's Corp.* (N.D. Ill. 2002) 189 F. Supp. 2d 772. The court held the arbitration clause unenforceable where plaintiff established his claim would be governed by the AAA's Commercial Rules, and submitted an unrebutted affidavit from an AAA-certified arbitrator that the "cost is likely to be as much as $48,000

and perhaps as high as $126,000. Popovich himself has averred, unsurprisingly, that costs in that range would be prohibitive, and McDonald's has not disputed that claim." *Id.* at 778.

An Illinois mortgage borrower also met her burden of proving that arbitration costs would effectively prevent her from vindicating her rights under the federal Truth in Lending Act. *Phillips v. Assocs. Home Equity Servs., Inc.* (N.D. Ill. 2001) 179 F. Supp. 2d 840, 846. Under the AAA's Commercial Rules, the borrower showed she would have to pay more than $4,000 just to file her claim and, while defendants agreed to advance this amount, the contract made this subject to later allocation by the arbitrator. The Rules also required that the parties share the arbitrator's fees, which ranged from $750 to $5,000 per day in the Chicago area, travel expenses, hearing room rental, and other costs. The court saw

> no reason to doubt Phillips' assertion regarding her financial viability, particularly in light of Phillips' inclusion in the 'subprime' market targeted by Associates Home Equity. Thus even if we disregard the filing fee, the cost of pursuing arbitration appears to be prohibitive for Phillips, and it is likely to be at least twelve times what it currently costs to file a case in federal court.

Id.

An Oregon federal court likewise found an arbitration clause was unconscionable where it required an employee to pay one-half the cost of

the arbitration proceeding and the court reporter and to pay her own costs for legal representation. *LeLouis v. W. Directory Co.* (D. Or. 2001) 230 F. Supp. 2d 1214. The exact costs could not be determined because it was unclear who would conduct the arbitration or what rules would govern, but the court found based on typical fees that plaintiff's share for a two-day arbitration might easily exceed $4,000 for a single arbitrator, and twice that amount for a three-arbitrator panel, plus witness fees and travel expenses. "By comparison, the filing fee in federal court is presently $150. The parties do not pay the judge's salary, or to rent the courtroom, or for the court reporter (unless they order a transcript)." *Id.* at 1223. Moreover

> the issue here is not just whether the costs in this particular case would deter this particular plaintiff from arbitrating her claims. . . . The better approach is that taken by the California Supreme Court in *Armendariz*, which 'places the cost of arbitration on the party that imposes it.'
>
> The higher cost of arbitration -- at least from the plaintiff's perspective -- also is significant because it is another example of how this arbitration agreement is slanted to favor Western Directory's interests at the employee's expense. It obligates LeLouis to pay thousands of dollars in costs for an arbitration that only Western Directory desires -- costs that LeLouis would not otherwise be obligated to pay -- and grants LeLouis nothing in return.

Id. at 1224 (citations omitted).[4]

Similarly, a Virginia federal court found the imposition of high arbitral costs prevented consumers from vindicating their statutory and common law rights in a suit arising from the sale of a manufactured home. *Camacho v. Holiday Homes, Inc.* (W.D. Va. 2001) 167 F. Supp. 2d 892. The arbitration clause did not indicate the costs or who had to pay them, stating only that the AAA Commercial Rules applied. The parties stipulated that a consumer initiating a claim the size involved here (between $75,000 and $150,000) has to pay a filing fee of $1,250 and a $750 case fee before an evidentiary hearing can be held. Once a consumer initiates a claim with AAA, the parties may not proceed until they pay the arbitrator's fees and expenses, and each party must pay half those costs. Arbitrators set their own fees, which typically range from $100 and $300 per hour, for a minimum one-day hearing, plus pre- and post-hearing preparation time.

---

[4] The court rejected defendant's offer to paying LeLouis' arbitration costs, finding fairness had to be determined at the time the contract was formed, and accepting defendant's proposal would give employers "no incentive to ensure that a coerced arbitration agreement is fair to both sides." *Id.* at 1225.

The defendant did not dispute plaintiff's estimate that the arbitrator's fees in this case would range between $1,200 and $8,000, and the court found plaintiff "adequately demonstrated that the arbitral forum provided for in the contract is financially inaccessible to her, and therefore fails to ensure that she can vindicate her statutory rights under the [Truth in Lending Act]." *Id*. at 896. The court noted that plaintiff might be able to recover the costs to initiate the arbitration if she prevailed, but found she did not have the money to pay those fees in the first place and that waiver of fees was very rare in practice. Moreover, the court recognized that even if those "fees were waived or deferred, Mrs. Camacho has demonstrated that the additional costs of the arbitration process itself amount to an insurmountable financial barrier to her. . . . Camacho's limited income affords no margin for expenses of the magnitude required to pay an arbitrator to consider her claim." *Id.* at 897.

Substantive unconscionability led a Tennessee federal court to refuse to order an employee's sexual harassment and constructive discharge claims into arbitration. The court noted that the arbitration clause was silent on the parties' responsibilities for fees and costs, but that AAA's Commercial Rules require the initiating party to pay a number of fees and costs. "Requiring a party to pay fees and costs, over and above what that

party would have to pay in a court, may deprive that party of the right to vindicate his or her rights." *Cooper v. MRM Investment Co.* (M.D. Tenn. 2002) 199 F. Supp. 2d 771, 781. The plaintiff's evidence convinced the court that she and others similarly situated could not pay the high costs; in fact, the arbitration costs might exceed her annual salary.[5]

An Indiana federal court reached a similar conclusion concerning the costs associated with arbitrating before an employer-provided forum. *Geiger v. Ryan's Family Steak Houses, Inc.* (S.D. Ind. 2001) 134 F. Supp. 2d 985. The rules required that claimants pay a $200 filing fee, which could be waived upon a showing of indigency and inability to pay. The parties had to pay the arbitrators' fees and the forum could require, at its discretion, that the parties prepay the estimated fees and expenses up to $2,000 per party, prior to commencement of the proceedings. While the

---

[5] The court refused to sever the cost provision, finding that "would create an incentive for employers to craft questionable arbitration agreements, require plaintiffs to jump through hoops in order to invalidate those agreements, and ultimately allow the defendants to jettison questionable provisions from the arbitration agreements. Allowing Defendants to do so at this point would be inequitable." *Id.* at 782.

parties typically shared fees and expenses equally, the losing party had to pay between half and the total amount of fees and expenses where the law required or the panel believed the party has abused the process. The court found it took "almost no imagination to see how this fee structure 'could potentially prevent an employee from prosecuting a federal statutory claim against an employer.' This alone permits us to conclude that the arbitration forum . . . is inadequate as an alternative to the federal courts." *Id.* at 997.

Federal and state courts in Washington have struck down arbitration clauses due to high costs. In *Luna v. Household Finance Corp.*, the court found an arbitration clause was unconscionable despite its inability to determine a precise arbitration cost for a particular plaintiff or hypothetical borrower. (W.D. Wash. 2002) 236 F. Supp. 2d 1166. The court did find that the evidence supported the conclusion that costs would be prohibitively expensive and "a borrower's cost for the arbitration likely would exceed the cost of a court proceeding by at least a factor of ten." *Id.* at 1182. The court contrasted arbitrations between commercial parties with those involving consumers and found "the consumer nature of the transactions at issue magnifies the impermissible effects of" the cost allocation and several other provisions (class action prohibition, confidentiality, use of court for ancillary or preliminary remedies). *Id.* at 1183.

In *Mendez v. Palm Harbor Homes, Inc.*, a Washington court created a new rule allowing an equitable and legal prohibitive cost defense to arbitration, and applied the rule to find an arbitration clause unenforceable. (Wash. Ct. App. 2002) 45 P.3d 594, 597. The clause in a mobile home sales contract required arbitration before a three-judge panel, and Mendez submitted an affidavit asserting the costs, including $2,000 to initiate the proceeding, would be prohibitive. The court found "the cost of arbitration is so high relative to his financial condition and the small size of his primary claim ($1,500) that forcing AAA arbitration with three arbitrators effectively precludes him from pursuing his claims against Palm Harbor. The circumstances here represent the antithesis of access to justice." *Id.* at 603. Moreover, the state "policy favoring arbitration is grounded on the proposition that arbitration allows litigants to avoid the formalities, expense, and delays inherent in the court system. This policy is defeated when an arbitration agreement triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims." *Id.* at 604 (citations omitted). The court rejected Palm Harbor's claim that Mendez should have provided more evidence, such as AAA invoices, finding it unreasonable to require him to incur the costs of arbitration to meet his burden of proof. *Id.* at 605. The court likewise rejected Palm

Harbor's argument that the possibility of cost shifting should defeat the prohibitive costs defense. "The argument ignores the primary public policy issue at stake, high arbitration costs precluding the consumer's access to a forum where he or she can vindicate his or her claim. . . . If the up front costs of arbitration have the practical effect of deterring a consumer's claim, the arbitration agreement should not be enforced." *Id.* at 607 (citations omitted).

New York courts have made similar decisions. A federal court found an arbitration clause was unenforceable where an employee had shown a likelihood she would incur significant arbitration costs that she would not incur in court. *Ball v. SFX Broadcasting, Inc.* (N.D.N.Y. 2001) 165 F. Supp. 2d 230. The clause required employees to bear their own arbitration expenses, and the court noted this was an issue central to determining the fairness of arbitration requirements. Where plaintiff showed she could not afford the fees imposed by the arbitration agreement and "the imposition of such costs upon an employee seeking to vindicate his or her statutory rights has no parallel in the litigation arena . . . it simply cannot be said that, under such circumstances, arbitration is 'a reasonable substitute for a judicial forum.'" *Id.* at 240 (quoting *Cole*, 105 F.3d at 1484).

A New York state court affirmed a trial court order granting a defendant's motion to compel arbitration, but modified the order due to excessive costs. Computer purchasers had filed a class action alleging deceptive sales practices and opposed Gateway's motion to compel arbitration, asserting the cost of proceeding before the International Chamber of Commerce (ICC) was prohibitive, especially in light of the size of the typical claim. The court noted that claims of less than $50,000 required advance fees of $4,000, more than the cost of most of defendant's products. That fee included a $2,000 registration fee which was non-refundable even if the plaintiff prevailed in arbitration. The court found the

> excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process. Barred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute.

Brower v. Gateway 2000, Inc. (N.Y. App. Div 1998) 676 N.Y.S.2d 569, 574.

Plaintiffs have obtained similar results in Pennsylvania. In *Giordano v. Pep Boys -- Manny, Moe & Jack, Inc.*, a federal court found that an arbitration clause was unenforceable where the AAA's Model

Employment Arbitration Procedures curtailed employees' access to the arbitral forum by providing that the initiating party has to pay an up-front filing fee and employees have to pay half the arbitration costs. (E.D. Pa., Mar. 29, 2001, Civ. A. No. 99-1281) 2001 U.S. Dist. LEXIS 5433, at *3. The employee asserted he would have to pay a $2,000 filing fee to proceed on his individual claim and that the daily arbitrator's charge, half of which he would have to pay, would range from $600 to $900. According to the court

> This is an easy case. Giordano was a fairly low-level employee of Pep Boys earning a relatively low wage of $400.00 per week at the time of his termination. He avers that he could not afford the filing fees and arbitrators' costs for which he would be responsible . . . . [T]he agreement . . . is quite explicit both as to the percentage of responsibility born [sic] by each party and as to the fact that the costs are to be paid up-front. . . . While [Giordano] has not established the arbitrator's likely charges with exacting precision, it is clear that an up-front responsibility for one half of daily fees anywhere near the range of $600 to $900, in conjunction with responsibility for the filing fee, would function as a barrier to plaintiff's pursuit of arbitration of his claims.

Id. at *22-24.

A Pennsylvania appellate court vacated an order dismissing a class action and ordering arbitration, and remanded for a hearing on

unconscionability, in a class action brought by home mortgage borrowers who raised federal and state statutory and common law claims. *Lytle v. Citifinancial Servs., Inc.* (Pa. Super Ct. 2002) 810 A.2d 643. The court noted that members of both houses of Congress had "recognized the relentless attempts by corporate entities to thwart, through the use of [arbitration] provisions, every state consumer statute enacted to balance the economic disparity of the parties and have introduced legislation . . . to confront the pinstriped exploiters." *Id.* at 660-61. The arbitration clause required the party seeking arbitration to pay $125 upon making the demand; the lender would pay all other costs for one day of arbitration; all costs of the proceeding beyond one day would be paid by the non-prevailing party; a party that appealed had to pay the costs of initiating the appeal, and the non-prevailing party had to pay all costs, fees, and expenses of the appeal and, if applicable, reimburse the prevailing party for the cost of filing the appeal. While the trial court relied solely on the loan documents to find the arbitration provisions were not unconscionable, the appellate court deemed it necessary for the lower court to hold a hearing to determine whether the clause was so one-sided as to be unconscionable. In addition to submitting evidence on the class action prohibition and the lender's ability to bring certain claims in court, plaintiffs had to be allowed

to present evidence to show that the costs associated with the arbitration of their individual claim would operate to prevent them from pursuing a remedy for the lender's alleged wrongs. If the lender established a compelling basis for its one-sided clause, then the borrowers had to be given the opportunity to present evidence about "the cost of arbitration as contrasted to court proceedings and the ability of consumers such as the Lytles to obtain relief in the absence of a class action from so predatory a consumer contract as the underlying agreement crafted by appellee." *Id.* at 668.

An Ohio appellate court recently had occasion to declare an arbitration clause in a car purchase contract unconscionable on several bases, including costs. In *Eagle v. Fred Martin Motor Co.* (Ct. App., Feb 24, 2004, Civ. A. No. 21522) 2004 Ohio App. LEXIS 765, the court noted the importance of safeguarding the state Consumer Sales Practices Act's remedial and deterrent functions in the context of arbitration, and that the preservation of these protections warrant trial and appellate courts giving increased scrutiny to arbitration clauses contained in consumer contracts, especially those involving necessities such as automobiles. *Id.* at *20, 36 (citing *Battle v. Bill Swad Chevrolet, Inc.* (Ohio Ct. App. 2000) 746 N.E.2d 1167). "When an arbitration clause vanquishes the remedial purpose of a

statute by imposing arbitration costs and preventing actions from being brought by consumers, the arbitration clause should be held unenforceable." *Id.* at *55 (citing *Randolph*, *Gilmer*, and *Ting*).

In examining the National Arbitration Forum's (NAF) Code of Procedures, the court noted that a party cannot file a claim in arbitration unless she pays the filing fees in a timely manner, and that these fees generally are not refundable. Ms. Eagle asserted damages of at least $75,000, making it a "large claim" under NAF's Code, and based on the fee schedule she conservatively estimated she would incur between $4,200 and $6,000 in fees for an in-person arbitration with a written opinion. The court noted that while the NAF Director had discretion to waive an indigent consumer's fees, that rule did not apply to "large claims." As a result of its case-by-case analysis, the court found the "arbitration costs and fees are prohibitive, unreasonable, and unfair as applied to Ms. Eagle. . . . [B]ased on these prohibitive costs alone, the arbitration clause in general is substantively unconscionable." *Id.* at *42. The court relied on the Sixth Circuit's ruling that "'[a] cost-splitting provision should be held unenforceable whenever it would have the "chilling effect" of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights.'" *Morrison v. Circuit City Stores, Inc.* (6th Cir. 2003) 317

F.3d 646, 661.[6] Here, "[i]nstead of seeking relief . . . the consumer is

---

[6] The *Morrison* court noted that "[u]nder *Gilmer*, the arbitral forum must provide litigants with an effective substitute for the judicial forum; if the fees and costs of the arbitral forum deter potential litigants, then that

forum clearly is not an effective, or even adequate, substitute for the judicial forum." 317 F.3d at 659. The Sixth Circuit rejected the "superficial
attractiveness" of judicial review of arbitration awards as a way to guarantee the forum's adequacy for protecting federal statutory rights. Besides the fact that such review is extremely limited, the "more telling problem with this 'arbitrate first and review the award of costs later' approach . . . is whether the risk of incurring the potential costs of arbitration is great enough to deter the plaintiff from bringing her statutory

caught between *scylla* and *charybdis*, potentially unable to obtain meaningful relief under the NAF terms and yet unable to proceed to the courts." *Eagle*, 2004 Ohio App. LEXIS 765, at *33.

CONCLUSION

As the preceding discussion demonstrates, courts routinely recognize that high costs can make arbitration inaccessible for consumers. While the courts apply different tests to reach that conclusion, they are unwilling to allow corporations with greater bargaining power to tilt the scales of justice so far in their own favor. The courts' reasoning applies to statutory as well as common law claims, and to the need to preserve access to justice for employees, consumers and other litigants. AARP and NACA respectfully urge the Court to affirm the Court of Appeal and not let defendants and others like them exculpate themselves from liability by closing the courtroom door and then erecting insurmountable barriers to accessing the arbitral forum as well.

---

claims. . . . Deterrence occurs early in the process. If we do not know who will prevail on the ultimate cost-splitting question until the end, we know who has lost from the beginning: those whom the cost-splitting provision deterred from initiating their claims at all." *Id.* at 662.

Respectfully submitted,

Dated: April 12, 2004

_____
Nancy Barron (SBN 99278)
Counsel of Record
Kemnitzer, Anderson, Barron & Ogilvie
445 Bush Street, 6th Floor
San Francisco, CA 94108
(415) 861-2265

Deborah Zuckerman
AARP Foundation

Michael Schuster
AARP

601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

Counsel for *Amici Curiae*

CERTIFICATION REGARDING LENGTH OF BRIEF

I hereby certify that this brief contains 6,209 words, including footnotes, as established by the word count of the computer program used for the preparation of the brief.

I declare and certify that the foregoing statement is true and correct and that this certification was executed on April 12, 2004, in Washington, D.C.

Deborah M. Zuckerman
Counsel for *Amici Curiae*

PROOF OF SERVICE

I, the undersigned, declare that I am employed by AARP Foundation, whose address is 601 E Street, N.W., Washington, D.C. 20049**;** I am not a party to the cause; I am over the age of eighteen years; and I am readily familiar with my employer's practice of collecting and processing correspondence for priority next-day delivery by Federal Express, and know that in the ordinary course of that practice the documents described below will be deposited with Federal Express on the same date they are placed in my employer's mail room fully prepaid for collection and delivery.

I further declare that on the date hereof I served a copy of an Application for Leave to File a Brief of AARP and the National Association of Consumer Advocates as *Amici Curiae* and Brief *Amici Curiae* of AARP and the National Association of Consumer Advocates in Support of Appellee on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and delivery by Federal Express at AARP, 601 E Street, N.W., Washington, D.C. 20049, in accordance with its ordinary business practices:

Michael J. Quirk
F. Paul Bland, Jr.
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, NW

Robert H. Bohn, Edq.
Bohn & Bohn, LLP
152 North Third Street, Suite 200
San Jose, CA 95112

Suite 800
Washington, D.C. 20036

Kate Gordon
Trial Lawyers for Public Justice
One Kaiser Plaza, Suite 275
Oakland, CA 94612

Dean Hansell
Sharon C. Corda, Esq.
LeBoeuf, Lamb, Greene & MacRae, LLP
725 South Figueroa Street, Suite 3100
Los Angeles, CA 90017-5404

Clerk of the Court
Court of Appeal
Sixth Appellate District
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

Appellate Division
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

I declare under penalty of perjury that the above is true and correct.

Executed at Washington, D.C., this 12th day of April, 2004.

_____
Stephanie Boyd