No. S123344
(Court of Appeal No. A102790)
(Alameda County Superior Court No. 2002056106)
(The Honorable Ronald M. Sabraw)

IN THE SUPREME COURT OF CALIFORNIA

GRAFTON PARTNERS L.P., a California limited partnership, ALLIED CAPITAL PARTNERS L.P., a California limited partnership, SIX SIGMA LLC, a California limited liability company, and its members, by RICHARD M. KIPPERMAN, Trustee in Bankruptcy; and TOM FRAME, BRUCE MILLER and RONALD G. VANDERBERGHE, for themselves and as representatives of class of investors,

Petitioners,

vs.

SUPERIOR COURT IN AND FOR THE COUNTY OF ALAMEDA,

Respondent.

PRICEWATERHOUSECOOPERS, a limited liability partnership,

Real Party in Interest.

BRIEF OF *AMICI CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA, TRIAL LAWYERS FOR PUBLIC JUSTICE, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PETITIONERS

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INTRODUCTION

Amici Consumer Attorneys of California ("CAOC"), Trial Lawyers for Public Justice ("TLPJ"), Association of Trial Lawyers of America ("ATLA"), and the National Association of Consumer Advocates ("NACA") file this Joint *Amici* Brief in support of petitioners to articulate and support the principle under California law that the right to a jury trial is fundamental and may not be waived through the insertion of pre-dispute jury trial waivers in contractual agreements.

Access to the justice system for consumers and employees has been severely and sharply curtailed by the growing number and range of corporations and other business entities that insert mandatory pre-dispute arbitration or jury trial waiver clauses in form contracts as a condition of doing business. In addition to preventing consumers and employees from having their claims resolved in court before a jury, it is increasingly prevalent for these clauses to preclude class action lawsuits. *Amici* have filed amicus curiae briefs in this Court and other courts addressing the importance of preserving the right to a jury trial for consumers, especially those with relatively small amounts in dispute, and to ensure that they can seek the full range of remedies that Congress and the California legislature have enacted for their benefit.

STATEMENT OF INTEREST

Consumer Attorneys of California ("CAOC") is a voluntary

membership organization of more than 3,000 consumer attorneys practicing throughout California. The organization was founded in 1962 and its members predominantly represent individuals subjected in a variety of ways to consumer fraud practices. CAOC has taken a leading role in advancing and protecting the rights of consumers and employees in both the courts and the Legislature.

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. TLPJ has been counsel in such cases as *Ting v. AT&T* (9th Cir.) 319 F.3d 1126, *cert. denied* (2003) 124 S.Ct. 53 and *Discover Bank v. Superior Court* (California Supreme Court Case No. S113725).

The Association of Trial Lawyers of America ("ATLA") is a voluntary national bar association with 50,000 member attorneys, including many who practice in California. ATLA members primarily represent plaintiffs in personal injury actions, employment discrimination suits, and consumer protection actions. ATLA's mission includes the preservation of the right to trial by jury in civil cases, guaranteed by the Seventh Amendment of the Constitution of the United States and by the constitutions of nearly every State, including California. ATLA's position is that this fundamental right may be surrendered only by a knowing and intelligent waiver and that courts ought to guard against its erosion by the

unfair use of pre-dispute jury waivers in contractual provisions.

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice involves 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 effort to curb unfair and abusive business practices.

From its inception, NACA has focused primarily on issues which concern abusive and fraudulent business practices, and has been concerned about the imposition by businesses of mandatory arbitration clauses on their customers, because of the expense, limitation on discovery and remedies such as injunctive relief, and inability to reverse decisions which are incorrectly decided and result in injustice. Consistent with its goal of promoting justice for consumers, NACA has appeared as *amicus curiae* in a number of cases challenging arbitration clauses, including *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, *Discover Bank v. Superior Court*, No. S113725 (Cal. Supreme Court) (awaiting oral argument), and *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.

As organizations representative of consumers throughout California and the entire United States, *amici* are vitally interested in the resolution of this issue and believe they can be of assistance in illuminating the legal and policy issues before the Court. Indeed, many members of *amici* represent private plaintiffs in litigation challenging mandatory pre-dispute arbitration clauses, and believe that authorities, arguments and policy considerations exist which have not yet been thoroughly addressed by the parties.

Specifically, *amici* will address California law with respect to the waiver of constitutional protection provisions. *Amici* will also address the discreet significance and importance of prohibiting pre-dispute jury waiver clauses in adhesionary consumer and employment agreements. The arguments of PricewaterhouseCoopers ("PwC") and many of the *amici* supporting it are virtually identical to those made in support of mandatory pre-dispute arbitration clauses – that they must be deemed enforceable because to rule otherwise would interrupt settled business practice and business certainty.[1] These arguments cannot stand in the face of the fundamental right – recognized by this Court and the California Legislature for over a hundred years – to a trail by jury.

ARGUMENT

I. THE HISTORY AND PLAIN LANGUAGE OF THE CALIFORNIA CONSTITUTION, INCLUDING THE EXPRESS ANTI-WAIVER CLAUSE, PRECLUDES PRE-DISPUTE WAIVERS OF THE RIGHT TO A JURY TRIAL

Nearly 150 years ago, this Court noted that the California Constitution, as originally adopted in 1849, established the right to a jury trial in unequivocal terms: "'[T]he right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the

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[1] Specifically, amici supporting PwC suggest waiving the right to a jury is required to provide a degree of certainty in the business community, rather than the "unpredictable liability" that accompanies jury trials. *See, e.g.,* Brief of Amicus Curiae Pacific Legal Foundation at pp. 11- 13; Brief of Amicus Curiae Employers' Group at pp. 4-5; Brief of Amicus Curiae California Chamber of Commerce and California Retailers Association at pp. 7-10; Brief of Amicus Curiae Chamber of Commerce of the United States of America at pp. 4-6. This cannot, however, be the test for waiver of such a fundamental right as the right to trial by jury, without which individuals may be deprived of meaningful access to our justice system.

parties in all civil cases in the manner to be prescribed by law.'" *Exline v. Smith* (1855) 5 Cal. 112, 112. Grafton Partners ("GP") and *amicus* The American Board of Trial Advocates have carefully reviewed the constitutional and statutory history of Code of Civil Procedure § 631, which these *amici* will not repeat here. These *amici* joined in those positions.

The right to a trial by jury is a fundamental constitutional right under the California law. Cal. Const., Art. I, § 16. Even if the rule in *Trizec Properties, Inc. v. Superior Court* (1991) 229 Cal.App.3d 1616 remains valid, "[i]n order to be enforceable, a contractual waiver of the right to a jury trial 'must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties.'" *Badie v. Bank of America, supra*, 67 Cal.App.4th at 804, *citing Trizec Properties* at 1619.[2] Even in the arbitration context, where there is a public policy favoring arbitration if a valid agreement is found to exist, "[i]n light of the importance of the jury trial and our system of jurisprudence, any waiver thereof should appear in clear and unmistakable form." *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1129. "Where it is doubtful whether a

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[2] Citing *Trizec Props., Inc. v. Superior Court*, 229 Cal.App.3d 1616 (1991), amici supporting PwC suggest that jury waivers have been condoned by courts and are a well-established and legally permissible procedure. *See* Brief of Amicus Curiae Pacific Legal Foundation at p. 17; Brief of Amicus Curiae Brief Employers' Group at pp. 4, 12; Brief of Amicus Curiae California Chamber of Commerce and California Retailers Association at pp. 13-15; Brief of Amicus Curiae California Bankers Association at p. 5; Brief of Amicus Curiae Commercial Finance Association at pp. 10-11; Brief of Amicus Curiae California Mortgage Bankers Association at p. 3. Aide from *Trizec*, however, these amici fail to offer support for this sweeping assertion.

party has waived his or her constitutionally-protected right to a jury trial, the question should be resolved in favor of preserving that right." *Badie v. Bank of America, supra*, 67 Cal.App.4th at 804, *citing Titan Group* at 1127-28, and *Byram v. Superior Court* (1997) 74 Cal.App.3d 648, 654.

The California constitutional provision is clear on its face, as is the anti-waiver provision found in Code of Civil Procedure § 631. The purpose of the anti-waiver provision is to safeguard from waiver the important protections of the right to jury trial.

Even were § 631 ambiguous and thus subject to interpretation by the Court, California law would dictate the application of the rule of construction contained in Civil Code § 3513. Section 3513 provides "anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." In both *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 and *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, this Court underscored the continuing vitality of § 3513 as well as the necessity of examining the purpose and language of any statutory right to be waived. *Armendariz, supra*, 24 Cal.4th at 100; *Bickel, supra*, 16 Cal.4th at 1051. To the extent that the anti-waiver provision could be considered ambiguous, Code of Civil Procedure § 3513 and this Court's reasoning in *Armendariz* and *Bickel* would preclude any pre-dispute waiver of the right to a trial by jury.

Furthermore, when a jury waiver is obtained by a business entity through means of an adhesion contract *prior* to a dispute ever arising, it compounds the problem of whether the waiver is "knowing, intelligent and voluntary."

In its decision below, the Court of Appeal held that *pre-litigation*

contractual waivers are not authorized under the California Constitution and cannot be enforced in this State. The Court noted that "[i]t is manifest that the timing of the waiver may be significant, given the importance of the right involved. Depending upon their level of sophistication, parties considering a jury waiver post-dispute may be far more aware of the consequences of such a decision and, therefore, exercise more care than when the initial contract was executed." *Grafton Partners LP v. Superior Court* (2004)115 Cal.App.4th 700, 710 (*review granted April 21, 2004*). This makes perfect sense. A waiver is "the intentional relinquishment of a known right *after full knowledge of the facts*." *DRG/Beverly Hills v. Chopstix Dim Sum Café* (1994) 30 Cal.App.4th 54, 59 (emphasis added); *see also Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983 (discussing the meaning of "waiver" in California case law). Until the controversy actually arises and is pending in court, a consumer cannot understand or often even begin to know the facts and consequences essential to making an intelligent and voluntary decision whether to waive or not to waive a jury trial. The consumer does not know what is at stake in the dispute, does not know the evidence, and does not know the identity of the judge who will decide the case if he does waive a jury trial. In short, the consumer is ignorant of a score of factors which might bear on whether it would be wise or foolish to give up his constitutional right to a jury trial in a particular case.

II. THE ESSENCE OF CONTRACTUAL CONSENT IS A KNOWING AND INTELLIGIBLE ASSENT TO AN AGREEMENT

In the arbitration context, corporate entities have long argued in vain that true consent is unnecessary to bind consumers and employees to

agreements containing mandatory pre-dispute arbitration clauses. Indeed, some have argued that no agreement whatsoever is required under a variety of situations. In *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 791, the bank argued that consent of the consumer was obtained simply by the failure of the consumer to act within a prescribed time period after a notice was mailed by the bank even where there was no record that the notice had been received, read, or understood. *Id.* at 791. Similarly in *Lopez v. Schwab* (2004) 118 Cal.App.4th 544, the defendant argued that the consumer was bound by an arbitration clause even where the defendant rejected the application containing it. *Id.* at 549-50. In each of these cases courts held that the policy favoring arbitration was insufficient to fill in any missing ingredient in the agreement process. As the court in *Badie* put it:

> Whether there is an agreement to submit disputes to arbitration or reference does not turn on the existence of a public policy favoring ADR [alternative dispute resolution]. ... That policy, whose existence we readily acknowledge, *does not even come into play* unless it is first determined that the Bank's customers agreed to use some form of ADR to resolve disputes regarding their deposit and credit card accounts, and that determination, in turn, requires analysis of the account agreements in light of ordinary state law principles that govern the formation and interpretation of contracts.

Id. (citations omitted); *see also Lopez, supra*, at 548, *quoting Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 638.[3]

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[3] The *Badie* case involved credit card account customers who challenged the validity of an alternative dispute resolution clause which Bank of America sought to add as a provision to existing account agreements. The only notice sent by the Bank to its customers was a "bill stuffer" insert with their monthly account statements. In *Badie*, there was a prior signed agreement in place between the Bank and the plaintiffs. The prior agreement in *Badie* specifically provided that the Bank may change any

The United States Supreme Court has held repeatedly that "the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute." *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943, *citing Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 57; *see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 475-476.

This holding was reaffirmed by the Supreme Court only last term in *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83, in which the Court stated "[t]his Court has determined that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.*, *citing Steelworkers v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 582, and *First Options of Chicago, Inc. v. Kaplan, supra,* 514 U.S. at 942-943. In *Howsam*, the Supreme Court reiterated the federal policy regarding arbitration agreements as follows: "The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability,*' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc., supra,* 537 U.S. at 83, *citing AT&T Technologies, Inc. v. Communications Workers* (1986) 475

"term, condition, service or feature" of a customer's credit account. Despite inclusion of the "change of terms" provision in the initial customer agreement, the Court found that by agreeing to that provision initially, the customers did not intend to give the Bank the power in the future to terminate its customers' existing right to have any dispute resolved in the civil jury system. *Id.* at 801. Based upon that finding, the Court held that the ADR clause was unenforceable. *Id.* at 804, 808. The *Badie* court reached its holding even though the customers had voluntarily entered into a prior agreement with the "change of terms" clause.

U.S. 643, 649 (emphasis added). This "gateway dispute" of whether or not the parties have a valid arbitration agreement at all is one to be decided by a court. *Id.* at 84; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 452.

Similarly, both the Federal Arbitration Act and the California Arbitration Act specifically require a written contractual agreement. The Federal Arbitration Act provides:

> A written provision ... in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ... shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added). The California Arbitration Act contains a similar provision, stating:

> A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, *save upon such grounds as exist for revocation of any contract* ... [o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy ... the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists.*

Code of Civil Procedure §1281 (emphases added). These state and federal arbitration statutes themselves make abundantly clear that arbitration is simply a matter of contract law, no more and no less. The purpose of the Federal Arbitration Act is merely to make privately-negotiated arbitration agreements "as enforceable as other contracts, but not more so." *Volt Info. Sciences v. Bd. of Trustees, supra,* 489 U.S. at 470, *quoting Prima Paint*

Corp. v. Flood & Conklin Mfg. Co. (1967) 388 U.S. 395, 404, n.12.

The threshold, therefore, is whether or not a written agreement to arbitrate exists. *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 126; *Badie v. Bank of America, supra*, 67 Cal.App.4th at 787. As stated in *Badie*, the first step in determining whether or not there is an enforceable arbitration agreement between two parties "involves applying ordinary state law principles that govern the formation and interpretation of contracts in order to ascertain whether the parties have agreed to some alternative form of dispute resolution. Under both federal and California state law, arbitration is a matter of contract between the parties." 67 Cal.App.4th 779, 787.

While both federal law and California law recognize a public policy which favors enforcement of voluntary agreements to arbitrate, there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. *Victoria v. Superior Court, supra,* 40 Cal.3d at 739; *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653; *Volt Info. Sciences v. Bd. of Trustees, supra,* 489 U.S. at 478; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 625-626; *AT&T Technologies, Inc. v. Communications Workers of America, supra*, 475 U.S. at 648. Thus, there is no substantive right to arbitration and no judicial preference for arbitration absent an agreement to arbitrate.

Thus, in the arbitration context, the basic elements of a contractual agreement must be satisfied. When considering a pre-dispute jury waiver – satisfaction of these elements, where there is not a federal statute that preempts contrary state law as in arbitration, stands as an even greater

imperative.

Whether or not there is a valid, enforceable contract is a question of state law. *Green Tree Financial Corp. v. Bazzle, supra,* 539 U.S. at 447, *Banner Entertainment, Inc. v. Superior Court (Alchemy Filmworks, Inc.)* (1998) 62 Cal.App.4th 348, 357 ("to determine whether there is an enforceable arbitration agreement, we apply state law principles related to the formation, revocation and enforcement of contracts."); *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1170 ("To evaluate the validity of an arbitration agreement, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" (citation omitted)); *cert. denied* (2004) 124 S.Ct. 1169, *Ting v. AT&T* (9th Cir.) 319 F.3d 1126, 1148, *cert. denied* (2003) 124 S.Ct. 53 (analyzing consumer long distance agreement under California law of contract formation and unconscionability).

A contract is defined as "an agreement to do or not to do a certain thing." Cal. Civ. Code § 1549. The essential elements of a contract are "(1) parties capable of contracting; (2) their consent; (3) a lawful object; and, (4) a sufficient cause or consideration." Cal. Civ. Code § 1550. In order for a contract to be binding on the parties, there must be both an offer and an acceptance. This basic rule of contract formation is no less true for agreements containing arbitration clauses. *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 126 (holding an arbitration agreement is to be rescinded on the same grounds as other contracts).

"California law is clear that there is no contract until there has been a meeting of the minds on *all* material points." *Banner Entertainment, supra,* 62 Cal.App.4th at 357-358 (italics in original); *Beard v. Goodrich* (2003)

110 Cal.App.4th 1031, 1039 (holding mutual consent is an essential element of any contract, and that mutual consent means the parties must assent to the same thing in the same sense). It is also the law in California that consent must be free, mutual, and communicated by each to the other. Cal. Civ. Code §1565. As set forth in the Civil Code, "[c]onsent is not mutual, unless the parties all agree upon the same thing in the same sense." Cal. Civ. Code §1580. The manifestation of mutual consent is accomplished through an offer communicated to the offeree and an acceptance communicated to the offeror. Rest. 2d Contracts §§ 22(1), 23, 24 (1981); *American Bldg. Maintenance Co. v. Indemnity Ins. Co.* (1932) 214 Cal. 608, 615; *Patterson v. Reid* (1933) 132 Cal.App. 454, 456; *Donovan v. RRL Corp.* (2002) 26 Cal.4th 261, 270-271. The offeree and offeror must assent to the same thing, or else there is no mutual consent and hence, no meeting of the minds. *Weddington Productions v. Flick* (1998) 60 Cal.App.4th 793, 811. As the court in *Weddington Productions* reiterated, "[t]he existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." *Id.*, *citing Meyer v. Benko* (1976) 55 Cal.App.3d 937, 943.

PwC's position in this case poses heightened issues of concern given the indisputable reality that few consumers can or do read the provisions of the adhesive contracts presented to them daily in the modern world of consumer transactions. The general rule is that, under most circumstances, a party is held to the provisions of a contract, regardless of whether those provisions were actually read prior to execution this rule applies in the consumer context as well as other contexts. *See, e.g., Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109; *Vernon v. Drexel*

Burnham & Co., Inc. (1975) 52 Cal.App.3d 706, 714. But that rule does not address the "minimum levels of integrity" in connection with standardized form contracts discussed in *Graham v. Scissor Tail, Inc.* (1981) 28 Cal.3d 807, 827.

In the context of consumer adhesion contracts, application of the general rule that a party has a so-called "duty to read" the provisions of a contract before signing, and hence is bound by all lawful provisions within it, raises significant public policy concerns. Large numbers of consumers are not fluent in English or are simply *unable* to read or understand the "fine print" contained in such contracts. *See, e.g.,* White and Mansfield, *Literacy And Contract*, 13 Stan. L. & Policy Rev. 233, 235-242 (2002) (noting recent research on literacy levels of American adults indicating that at least 51% of the American adult population could not be expected to understand and extract information of a modest degree of complexity, less complex than many modern consumer contract forms). As this article concludes

> The realities of today's marketplace, the [National Adult Literacy Survey], and readability research cry out for a new theory of consumer contract and statutory law that is based on reality. Consumer protection legislation should not be based on the false notion that documentary disclosures give consumers the ability to protect themselves when they enter into adhesion contracts. Consumer contract law should not be based on the false notion that by signing one of these form contracts, the consumer knows of, understands, and has assented to the terms of the writing. New approaches are needed to truly protect consumers and to give judges the ability to police consumer agreements using some means other than the doctrines of unconscionability, fraud, and public policy, and the technicalities of disclosure laws. By holding onto the freedom-of-contract doctrine as the main common law component, and using disclosure laws as the

> main statutory component of consumer law, the legal system is engaging in the fiction of a free and informed market, while turning a blind eye to the realities of the market place and to the fact that consumers cannot understand and do not actually assent to the terms of the consumer contracts they sign.

Id. at 266.

As the court in *Banner Entertainment* stated with regards to basic California contract law:

> Mutual intent is determinative of contract formation because there is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. (citation omitted.) "It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, *and when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an asset thereto*, in any other or different mode, will not be presumed." (citation omitted.) Thus, the failure to reach a meeting of the minds on all material points prevents the formation of a contract *even though the parties have . . . taken some action related to the contract.*

Id. at 358-359 (italics in original) (citation omitted). In finding that no such meeting of the minds occurred between Banner and Alchemy, the court relied upon evidence that the parties required a signature on the formal agreement before the contract would be legal and binding on the parties. *Id.* at 354. Where there was no formal signed writing, there was no contract, and thus, no agreement to arbitrate.

The examples in these cases and many others demonstrate that adhesion contracts foisted upon consumers and employees as a condition of obtaining goods, services, or a job are no different than the contractual elements that California law requires for an agreement to be deemed valid. Civil Code § 1550.

III. WHATEVER THE RIGHTS OF COMMERCIAL PARTIES ARE TO NEGOTIATE FREELY PROVISION IN A CONTRACT, PRE-DISPUTE WAIVERS IN ADHESION CONTRACTS ARE ILLUSORY AND UNCONSCIONABLE

In interpreting a contract to determine whether or not it is unconscionable, the court must follow California law. *Green Tree Financial Corp. v. Bazzle*, *supra*, 539 U.S. at 447; *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 99.

Under California law, the doctrine of unconscionability has two elements, procedural and substantive. *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1148-49 (applying California contract law). The procedural element focuses on "oppression" or "surprise." *Id.* "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Flores v. Transamerica Homefirst, Inc.* (2002) 93 Cal.App.4th 846, 853; *Ting v. AT&T* (N.D. Cal. 2002) 182 F.Supp.2d 902, 930. Substantive unconscionability relates to the "effects of the contractual terms and whether they are overly harsh or one-sided." *Flores, supra*, 93 Cal.App.4th at 853.

In deciding whether a contract is unconscionable, the courts look both at procedural unconscionability and substantive unconscionability. *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486. While the procedural element and the substantive element must be present before a court will hold that a contract is unenforceable, they need not be present to the same degree. *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 114. Instead, there is a "sliding scale relationship

between the two concepts: the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause," and vice versa. *Id.; Ting v. AT&T, supra,* 319 F.3d at 1148.

"Arbitration agreements are neither favored nor disfavored, but simply placed on an equal footing with other contracts." *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 127. Any public policy supporting arbitration agreements "is manifestly undermined by provisions in arbitration clauses [that] seek to make the arbitration process itself an offensive weapon in one party's arsenal." *Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1332 (*citing Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1081).

A. Pre-Dispute Jury Waiver Clauses In Contracts of Adhesion Violate the California Constitution and Are Procedurally Unconscionable.

"Procedural unconscionability" relates to the manner in which the contract was negotiated and the circumstances of the parties at the time of the negotiations. *Kinney v. United Healthcare Services, Inc., supra,* 70 Cal.App.4th at 352-353. The procedural unconscionability analysis begins, and may end, with the question of whether or not the contract is one of adhesion, i.e. "a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms." *Flores v. Transamerica Homefirst, Inc, supra,* 93 Cal.App.4th at 382. Under California law, if a contract is one of adhesion, it is procedurally unconscionable. *Armendariz, v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 113-118; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174 (same); *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100; *Stirlen v.*

Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1533-1534 (same); *Kinney v. United HealthCare Services, Inc., supra,* 70 Cal.App.4th at 1329 (same). As the Ninth Circuit confirmed in *Circuit City v. Adams* (9th Cir. 2001) 279 F.3d 889, 893, *cert. denied,* (2002) 122 S.Ct. 2329, a contract is procedurally unconscionable if it is "a contract of adhesion: a standard form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely."

B. Pre-Dispute Jury Waiver Clauses In Contracts of Adhesion Are One-Sided and Substantively Unconscionable.

Substantive unconscionability focuses on the specific terms of the agreement and whether they are overly harsh or one-sided. *Kinney v. United Healthcare Services, Inc., supra,* 70 Cal.App.4th 1322 at 353, *citing American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391 and *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at 1532. Substantively unconscionable terms may take various forms, including a lack of bilaterality, "wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration." *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071-1072, *citing Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 119.

The Court has held that an arbitration clause is substantively unconscionable unless there is a "'modicum of bilaterality' in the arbitration remedy." *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 117. "Although the parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, ... the

doctrine of unconsionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Id.* at 118.

In *Armendariz*, the arbitration clause at issue was limited in scope to employee claims regarding wrongful termination. Although the language of the clause did not expressly authorize the employer to pursue any claims in court against the employee, the court found that that was the clear implication of the language of the agreement. As stated by the *Armendariz* court, "[a]n arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences." *Id.* at 120.

Many other courts have also held that where there is a unilateral obligation to arbitrate, that fact by itself is "so one-sided as to be substantively unconscionable." *Kinney v. United HealthCare Services, Inc., supra,* 70 Cal.App.4th at 1332. In *Kinney*, the court was faced with an agreement that compelled the employee, but not the employer, to submit all his claims to arbitration. In concluding that the clause was substantively unconscionable, the court stated:

> The party who is required to submit his or her claims to arbitration foregoes the right, otherwise guaranteed by the federal and state Constitutions, to have those claims tried before a jury. (U.S. Const., Amend. VII; Cal. Const., art. I, §16.) Further, except in extraordinary circumstances, that party has no avenue of review for an adverse decision, even if that decision is based on an error of fact or law that appears on the face of the ruling and results in substantial injustice to that party. [citation.] By contrast, the party requiring the other to waive these rights retains all of the benefits and protections the right to a judicial forum provides. *Given the basic and*

> *substantial nature of the rights at issue, we find that the unilateral obligation to arbitrate is itself so one-sided as to be substantively unconscionable.*

Id. at 1332 (emphasis added).

The *Stirlen* court similarly held that the employment agreement at issue was one-sided and therefore substantively unconscionable because it required the employee to arbitrate all of his claims, but entitled the employer to bring certain of its claims to the courts. *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at 1536. In attempting to defend the validity of the arbitration clause, the employer argued that the agreement was in fact fair and reasonable because the types of claims excluded from arbitration (patent infringement, improper use of confidential information and competition) pose a potential immediate threat to its business operations and therefore it needed to reserve for itself the immediate access to the courts. *Id.* While agreeing that "a contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable[,] .... unless the 'business realities' that create the special need for such an advantage are explained in the contact itself, which is not the case here, it must be factually established." *Id.*

This Court in *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th 1064, also addressed the issue of asymmetrical arbitration agreements and found that although parties may justify such agreements, they can only do so where there is a legitimate commercial need. *Id.* at 1073, *citing Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 117. The arbitration clause in *Little* permitted either party to appeal an arbitration award of more than $50,000 to a second arbitrator. In finding that such a

clause inordinately benefits defendants, the *Little* court reasoned that the defendant would generally be the one to choose to appeal the decision. The court found no legitimate business justification for such a clause and concluded that is was unconscionable. *Little v. Auto Stiegler, Inc.*, *supra,* 29 Cal.4th at 1073-1074.[4]

Moreover, although the courts in *Armendariz, Kinney*, and *Stirlen* found other substantively unconscionable terms in the arbitration clauses at issue, these cases clearly hold that unilaterality is in and of itself enough to make a finding of substantive unconscionability.[5] The *Armendariz* court stated "we find that the unilateral obligation to arbitrate is itself so one-sided as to be substantively unconscionable . . . .We conclude that *Stirlen* and *Kinney* are correct in requiring this 'modicum of bilaterality' in an arbitration agreement." *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at 117.

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[4] The court in *Flores v. Transamerica Homefirst, Inc., supra,* 93 Cal.App.4th 846, similarly found the arbitration provision in the loan documents at issue did "not display a modicum of bilaterality" and was therefore substantively unconscionable. *Id.* at 854-855. The clause provided that the homeowner's only remedy was arbitration, while the lender could proceed by judicial or non-judicial foreclosure, by self-help remedies and by injunctive relief. Further, the loan documents allowed the lender to proceed with the foreclosure despite the pendency of the disputes brought to arbitration. *Id.* This lack of mutuality was the *only* basis upon which the court in *Flores* found the arbitration agreement substantively unconscionable. *Id.* at 855.

[5] The appellate court in *Badie v. Bank of America, supra,* 67 Cal.App.4th at 806-807, found that the language of the arbitration clause at issue, while it provided for mutuality by the literal terms of the agreement, because the Bank favored arbitration anyway, the customers exercise of the option to impose arbitration on the Bank "is not likely to be viewed by the Bank as an unwelcome turn of events." *Id.*

The analysis of substantive unconscionability in the context of arbitration clauses is equally applicable to pre-dispute jury waivers. While the parties to the current dispute are both sophisticated business entities, the ramifications of the issue before this Court extend to consumers and employees with little to no bargaining power who simply must sign on the dotted line to engage in a consumer transaction or begin employment. The lack of bilaterality which is certain to exist when consumers are faced with waiving their right to a jury trial renders such pre-dispute jury waivers unconscionable and thus unenforceable.

CONCLUSION

The right to a jury trial is a fundamental right that has been an integral part of our justice system for over a hundred years. Its waiver cannot occur freely. For the reasons stated above, amici urge this Court to affirm the decision of the Court of Appeal.

DATED: October 19, 2004

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE LENGTH OF BRIEF

I hereby certify that this brief contains 6,407 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 October 19, 2004, in San Francisco, California.

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CERTIFICATE OF SERVICE BY MAIL

I, Béla Nuss, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 475 Sansome Street, Suite 1750, San Francisco, California 94111.

I am readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for mailing with the ***United States Postal Service***, being that true and correct copies of the documents are deposited with the United States Postal Service, with postage thereon fully prepaid, for collection on the date stated below in the ordinary course of business.

On October 19, 2004, I served the within Brief of *Amici Curiae* Consumer Attorneys of California, Association of Trial Lawyers of America, and National Association of Consumer Advocates in Support of Petitioner on the interested parties in this action, by placing true and correct copies thereof in envelopes addressed to:

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