NO. 09-16703

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW C. KILGORE and WILLIAM BRUCE FULLER,

Plaintiffs-Appellees,

v.

KEYBANK, NATIONAL ASSOCIATION and
GREAT LAKES EDUCATION LOAN SERVICES, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District Of California
No. 3:08-CV-02958-TEH

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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CIRCUIT RULE 26.01 DISCLOSURE STATEMENT

The National Association of Consumer Advocates (NACA) does not have a parent company or issue stock, and no publically-held company owns 10% or more of its stock.

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DATED: March 29, 2012

/s/Arthur D. Levy
Arthur D. Levy

STATEMENT IN COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCECURE 29(c)(5)

I certify that Nancy Barron and I are the sole authors of this this brief, and that it was not written in whole or in part by any other person. No person contributed money that was intended to fund preparing or submitting this brief.

DATED: March 29, 2012 */s/Arthur D. Levy*
Arthur D. Levy

I. INTRODUCTION

The continued vitality of the *Broughton/Cruz* doctrine is an issue of exceptional importance warranting rehearing. Justice Mosk's 1999 opinion in *Broughton* affirmed the central role of private attorneys general in enforcing California's core consumer statutes. A lifelong defender of civil and consumer rights, Justice Mosk sounded a clarion call for defending public rights against arbitration clauses in mass consumer contracts. Arbitration undermines public rights by relegating the public interest to private arbitrators who not only lack public accountability, but also the judicial supervisory and enforcement powers a public injunction requires.

Without significant briefing on the effect of *Concepcion* on the *Broughton/Cruz* doctrine, the Panel decision in this case swept away this central feature of California consumer law enforcement. The critical blow the Panel opinion deals to California consumer law cannot be understated. Amici believe that, at a minimum, this Court should receive a full briefing from the parties, interested organizations on both sides of the issue, and public officials before deciding an issue so central to California consumer law.

II. IDENTITIES AND STATEMENTS OF INTEREST OF AMICI CURIAE.

The National Association of Consumer Advocates (NACA) is a nationwide, nonprofit corporation with over 1,000 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices and interests primarily involve the protection and representation of consumers. Its mission is to promote justice for consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its *Standards and Guidelines For Litigating and Settling Consumer Class Actions* may be found at 176 F.R.D. 375 (1998), and, as revised, at 255 F.R.D. 215 (2009). About 150 of NACA's members are California consumer attorneys or non-attorney advocates who regularly represent and advocate for consumers residing in California. Consistent with its goal of promoting justice for consumers, NACA has appeared as amicus curiae in a number of consumer arbitration cases, including *Broughton v. Cigna Healthplans of Cal.*, 988 Pac. 2d 67 (Cal. 1999), *Discover Bank v. Superior Court*, 113 Pac. 3d 1100 (Cal. 2005), *Boghos v. Certain Underwriters at Lloyds' of London*, 115 Pac. 3d 68 (Cal. 2005), and *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273 (Cal. App. 1998).

The National Consumer Law Center is a public interest, non-profit law office established in 1969 and incorporated in 1971, with its main office

in Boston and a separate office in Washington DC. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed, and elderly consumers. NCLC works to defend the rights of consumers, concentrating on advocating for fairness in financial services, wealth building and financial health, a stop to predatory lending and consumer fraud, a stop to student loan abuse, and protection of basic energy and utility services for low income families. NCLC devotes special attention to vulnerable populations including immigrants, elders, students, homeowners, former welfare recipients, victims of domestic violence, military personnel, and others, on issues from access to justice, auto fraud, bankruptcy, credit cards, debt collection abuse, predatory lending, mortgage and payday lending, refund anticipation loans, Social Security, and more.

III. ARGUMENT

Amici respectfully submit that the Panel made a material error of law in holding that the *Mitsubishi Motors* exception to arbitration clause enforcement does not apply to waivers of state statutory rights. The Panel also gave unduly short shrift to key differences between the class action ban at issue in *Concepcion* and the public injunction claims at issue in this case.

Without doubt, *Concepcion* is an important development in FAA jurisprudence, with significant implications for the enforcement of

arbitration agreements. Amici do not suggest otherwise. However, there are material differences between the *Broughton/Cruz* doctrine before this Court and the *Discover Bank* rule that require closer analysis.

Applying the same preemption analysis the Supreme Court did in *Concepcion*, requiring arbitration of public injunctions is *inconsistent* with private, bilateral arbitration procedure. In contrast with the *requirement* of class arbitration at issue in *Concepcion*, *permitting* public injunction litigation is not an obstacle to the arbitration process envisioned by the FAA. Amici respectfully submit that the *Concepcion* preemption analysis leads to a result different from the one the Panel reached.

A. The *Concepcion* Preemption Analysis Leads to a Different Result; the FAA Does Not Preempt the *Broughton/Cruz* Doctrine.

The Panel held that "the *Broughton/Cruz* rule does not survive *Concepcion* because the rule 'prohibits outright the arbitration of a particular type of claim' — claims for public injunctive relief." Panel Opinion at *6. In *Concepcion*, the Supreme Court recognized that the analysis is rarely so simple:

> But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.

AT&T Mobility, Inc. v. Concepcion, ___ U.S. ___, 131 S. Ct. 1740, 1747 (2011).

Justice Scalia recognized that this more complex inquiry was necessary to decide whether the Federal Arbitration Act (FAA) preempts California's *Discover Bank* rule against class arbitration waivers. As the Supreme Court interpreted it, *Discover Bank* "classif[ied] most collective arbitration waivers in consumer contracts as unconscionable." *Concepcion*, 131 S. Ct. at 1746. "Although this rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it ex post." *Id*. at 1750 (emphasis in original).

Thus, *Concepcion* struck down what the Court regarded as a bright line rule that "manufactured" class arbitration,[1] in conflict with the consumers' express contractual agreement not to engage in class arbitration. And yet Justice Scalia, unlike the Panel in this case, held that *Discover Bank*'s direct override of an express arbitration provision did not automatically or easily fall victim to FAA preemption. Instead, the Court's "more complex inquiry" was required.

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[1] *Concepcion*, 131 S. Ct. at 1751.

The *Broughton/Cruz* doctrine, like the *Discover Bank* rule, cannot be analyzed as a simple "outright" prohibition on or interference with arbitration. Instead, like the *Discover Bank* rule, *Broughton/Cruz* reflects a judicially crafted limitation on arbitration based on "doctrine[s] normally thought to be generally applicable." *Concepcion*, 131 S. Ct. at 1747. In cases where generally applicable state law is applied to strike down an arbitration provision, *Concepcion* requires that a court analyze whether the state rule "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. *Concepcion* performed this analysis and concluded that "because [the *Discover Bank* rule] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress …, [it] is preempted by the FAA." *Id*. at 1753.

The Panel did not perform the *Concepcion* preemption analysis; it did not ask or answer whether the *Broughton/Cruz* doctrine "stands as an obstacle to the accomplishment of the FAA's objectives." The *Concepcion* analysis reveals that, unlike the *Discover Bank* rule, the *Broughton/Cruz* doctrine does not interfere with the FAA's objectives, and in fact leads to a result different from the case of the class action ban.

In *Concepcion*, the Supreme Court found that *Discover Bank*'s class arbitration requirement in small stakes consumer cases obstructed the FAA's

purpose of fostering bilateral arbitration as a "streamlined proceeding" with "expeditious results." *Concepcion*, 131 S. Ct. at 1749.

First, the Court concluded that class arbitration conflicts with the congressional purpose of promoting bilateral arbitration because class arbitration interferes with the speed and informality of the bilateral arbitration process: "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id*. at 1751.

Second, class arbitration is procedurally complex, in conflict with the procedural informality of bilateral arbitration: "it [is] unlikely that in passing the FAA Congress meant to leave the disposition of [class action] procedural requirements to an arbitrator." *Id*. at 1751.

Third, "class arbitration greatly increases risks to defendants" over simple, bilateral arbitration. *Id*. at 1751. "Arbitration is poorly suited to the higher stakes of class litigation:"

> We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

Id. at 1752.

Broughton shares considerable common ground with *Concepcion* in recognizing the distinction between the private character of bilateral arbitration and the public character of public interest litigation.

Justice Mosk, like Justice Scalia, agreed that arbitration is essentially a private affair: "[T]he purpose of arbitration is to voluntarily resolve *private* disputes in an expeditious and efficient manner." *Broughton v. Cigna Healthplans of Cal.*, 988 Pac. 2d 67, 76 (Cal. 1999) (emphasis added); *Concepcion*, 131 S. Ct. at 1748 ("The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'").) Arbitration proceedings "take place in private." *Broughton*, 988 Pac. 2d at 78. Confidentiality is one of the hallmarks of arbitration. *Concepcion*, 131 S. Ct. at 1750; *see also Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 (9th Cir. 2007) .

By contrast, a public injunction proceeding is inherently public and often "a matter of considerable complexity." *Broughton*, 988 Pac. 2d at 77.

> The continuing jurisdiction of the superior court over public injunctions, and its ongoing capacity to reassess the balance between the public interest and private rights as changing circumstances dictate, are important to ensuring the efficacy of

> such injunctions. In some cases, the continuing supervision of an injunction is a matter of considerable complexity. Indeed, in such cases, judges may assume quasi-executive functions of public administration that expand far beyond the resolution of private disputes.

Id. (citations omitted).

A public injunction requires a high degree of accountability to the public: "There can be little doubt that publicly accountable judges, rather than arbitrators, are the most appropriate overseers of injunctive remedies explicitly designed for public protection." *Broughton*, 988 Pac. 2d at 78.

The three key factors discussed above, which *Concepcion* cited in holding that the *Discover Bank* rule interfered with the FAA's purpose of promoting arbitration as a comparatively speedy and simple alternative to litigation, lead to a different conclusion in this case. These factors demonstrate that litigation of public injunctions outside arbitration does not conflict with the congressional vision for private, bilateral arbitration. To the contrary, public injunction arbitration is *inconsistent* with the arbitration model *Concepcion* said Congress intended to promote in enacting the FAA.

First, fashioning a public injunction within an arbitration process, and supervising and enforcing it on an ongoing basis, does not comport with the

speed, informality, and confidentiality the Supreme Court said Congress envisioned for bilateral arbitration and intended to protect in the FAA. *Concepcion* reasoned that Congress did not intend to force complex and protracted litigation into the "streamlined" and "expeditious" bilateral arbitration framework. Therefore, permitting inherently public, comparatively complex, and usually protracted public injunction litigation under the *Broughton/Cruz* doctrine does not obstruct congressional purpose.

Second, as already observed, public injunctions are procedurally complex and require extended and ongoing supervision and enforcement. Just as "it [is] unlikely that in passing the FAA Congress meant to leave the disposition of [class action] procedural requirements to an arbitrator,"[2] so it is unlikely that Congress contemplated leaving public injunctions to private arbitrators.

Finally, public injunctions pose significant business risks to defendants by subjecting ongoing business practices to scrutiny and potential prohibition. As in the case of class arbitration, a business could find itself subject to an arbitral injunction without any effective means of review. Arbitration awards are subject to judicial confirmation, subject to only

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[2] *Concepcion*, 131 S. Ct. at 1751.

narrow rights of review. *Concepcion*, 131 S. Ct. at 1752. *Concepcion* recognized that Congress would not likely have subjected businesses to high stakes arbitration with no effective means of review. Thus, again, the *Broughton/Cruz* doctrine permitting litigation of public injunction claims is consistent with a congressional intent not to subject businesses to high stakes arbitration awards without a judicial remedy.

For these additional reasons, the *Concepcion* preemption analysis leads to a different outcome for the *Broughton/Cruz* doctrine than the Supreme Court reached applying the same analysis to the class action ban in *Concepcion*. This Court should grant rehearing on the effect of *Concepcion* on the *Broughton/Cruz* doctrine.

B. The Court Should Rehear FAA Preemption Because of the Importance of the *Broughton/Cruz* Doctrine to Consumer Protection Law Enforcement in California.

Rather than merely recognizing arbitration as an alternative forum for the vindication of public rights, the Panel's holding threatens to eliminate private enforcement of public injunctive relief in California. The (perhaps unintended) consequence of the Panel's decision would be that a company bent on predatory or deceptive practices need only insert an arbitration clause into the fine print on the back of a cigarette pack, a theater stub, a receipt, an online privacy notice, a cell phone contract, a car loan or other contract, in order to obliterate the right to public injunctive relief. For the reasons stated in the Petition for Rehearing and in this brief, amici believe that *Concepcion* did not go that far.

This concern should not be lightly tossed aside and warrants closer consideration by the Ninth Circuit. The right to go to court to enjoin deceptive and unfair practices perpetrated against the public protects important social and economic values. The injunctive remedy, like a federal cease and desist order, protects the public against predatory practices that harm society and the economy as a whole, not just individuals. *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244 (1972) (interplay between consumer protection and anti-competition in the marketplace).

Public protection through private consumer law enforcement in general, and public injunctive relief in particular, has a long and venerable history in California. Private enforcement "supplements the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts." *In re Tobacco II Cases*, 207 Pac. 3d 20, 30 (Cal. 2009) , citing *Kraus v. Trinity Management Services, Inc.*, 999 Pac. 2d 718, 725 (Cal. 2000) .

Shortly after the enactment of the Unfair Competition Law (the UCL)[3] in 1931, the California Supreme Court stated:

> When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one.... [A]n equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.

American Philatelic Soc. v. Claibourne, 46 Pac. 2d 135, 140 (Cal. 1935).

The UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new

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[3] Cal. Bus. & Prof. Code §§ 17200 *et seq*.

schemes which the fertility of man's invention would contrive.'" *Barquis v. Merchants Collection Assn.*, 496 Pac. 2d 817, 830 (Cal. 1972) , quoting *American Philatelic, supra*, 46 Pac. 2d at 140.

In *Barquis*, the California Supreme Court upheld an action for public injunctive relief under the UCL against a debt collection agency that systematically filed collection suits in counties where the debtors did not live. The court held that the UCL "explicitly extends to any 'unlawful, unfair or deceptive business practice'; the Legislature, in our view, intended by this sweeping language to permit tribunals to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *Id.*

The case law demonstrates the effectiveness of public injunctions in a wide array of deceptive practices. *Stop Youth Addiction v. Lucky Stores, Inc.*, 950 Pac. 2d 1086 (Cal. 1998) (sale of cigarettes to minors); *Cortez v. Purolator Air Filtration, Inc.*, 999 Pac. 2d 706 (Cal. 2000) (wage and hour/overtime); *Kasky v. Nike, Inc.*, 45 Pac. 3d 243 (Cal. 2002) (false advertising regarding inhuman factory conditions); *Committee on Children's Television v. General Foods Corp.*, 673 Pac. 2d 660 (Cal. 1983) (false advertising of children's breakfast cereal); *Fletcher v. Security Pacific National Bank*, 591 Pac. 2d 51 (Cal. 1979) (misrepresentation of finance charge); *Chern v. Bank of America*, 544 Pac. 2d 1310 (Cal. 1977)

(misrepresentation of interest rate calculation); *Barquis v. Merchants Collection Ass'n of Oakland, Inc.*, 496 Pac. 2d 817 (Cal. 1972) (filing debt collection cases in improper remote venues); *Schnall v. Hertz Corp.*, 93 Cal. Rptr. 2d 439 (Cal. App. 2000) (deceptive fuel charges in rental cars); *Brockey v. Moore*, 131 Cal. Rptr. 2d 746 (Cal. App. 2003) (false advertising as "legal services" without license to practice law); *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 72 Cal. Rptr. 3d 888 (Cal. App. 2008) (post-claims underwriting); *Colgan v. Leatherman Tool Group, Inc.*, 38 Cal. Rptr. 3d 36 (Cal. App. 2006) (false statement of origin "Made in U.S.A.")

The Panel decision appears to hold that a simple provision in a form consumer contract suffices to wipe this slate clean. California's legacy of private enforcement of its consumer protection laws, and the central importance of public injunctive relief, amply supports the need for fuller briefing and a rehearing on whether *Concepcion* not only overturned the *Discover Bank* rule, but also disarmed California consumers from obtaining injunctions to protect the general public.

Respectfully submitted,

ARTHUR D. LEVY

DATED: March 29, 2012

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CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 29-2

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 29-2 that the foregoing brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2), as it is proportionately spaced, has a typeface of 14 points, and according to the word count feature of Microsoft WORD contains 2,879 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: March 29, 2012

/s/Arthur D. Levy
Arthur D. Levy

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed via the Court's electronic filing system on March 29, 2012, which will serve electronic notice to all parties of record.

DATED: March 29, 2012 */s/Arthur D. Levy*
Arthur D. Levy

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