NOS. 14-17571, 15-15042

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDUARDO DE LA TORRE, *et al.*,
Plaintiffs/Appellants,

v.

CASHCALL, INC.,
Defendant/Appellee.

On Appeal from the
United States District Court for the Northern District of California
Case No. 3:08-cv-03174-MEJ, The Honorable Maria-Elena James

BRIEF OF AMICI CURIAE THE CENTER FOR RESPONSIBLE LENDING, THE PUBLIC GOOD LAW CENTER, AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Center for Responsible Lending and the National Association of Consumer Advocates are nonprofit, non-stock corporations. They have no parent corporations, and because they issue no stock, there are no publicly-held corporations that own 10% or more of their stock.

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INTEREST OF AMICI CURIAE[1]

Amicus curiae the Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive lending practices pertaining to home mortgages, payday loans and other consumer loans. Since its founding in 2002, CRL seeks to focus public and policymakers' attention on abusive practices in lending, including the charging of excessive interest and fees that strip significant wealth from consumers of modest means. CRL opened a California office in 2006, and since that time, has worked for responsible and fair lending practices in California, including as it relates to installment loans under the California Finance Lenders Law. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union) and a federally-chartered credit union (Self-Help Federal Credit Union) with a statewide network of branches in California that serve working families and underserved communities. Over 30 years, Self-Help has provided over $6 billion in financing to help nearly 90,000 low-wealth borrowers buy homes, start and build businesses, and strengthen community resources.

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the consent of all parties.

The Public Good Law Center is a public interest organization dedicated to fairness and justice in the courts and in the marketplace. Through cases of particular significance for the protection of consumers—especially low-income consumers—Public Good seeks to ensure that the aegis of the law remains available to everyone. Public Good has filed or participated in numerous matters before the Ninth Circuit, including cases involving fair debt collection practices, mortgage servicing, credit reporting abuses and other cases where, like this one, consumers' fundamental rights and financial well-being are at stake.

The National Association of Consumer Advocates ("NACA") is a nationwide non-profit corporation whose over 1,000 members are private, public sector, legal services and non-profit lawyers, law professors, and law students, whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers. Toward this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, the revised third edition of which is published at 299 F.R.D. 160 (2014).

NACA is dedicated to promoting justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in

part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States. For example, NACA has appeared as *amicus curiae* before this Court in support of consumer parties in *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052 (9th Cir. 2013) (*en banc*), and *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008), among other cases.

Amici are concerned that the District Court's decision in this case could undo longstanding law applying the doctrine of unconscionability to all contracts and could eviscerate the unconscionability doctrine as it applies to interest rates or pricing. The District Court's ruling, if left to stand, would allow lenders and other businesses to profit unfairly from California consumers, contrary to California law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Plaintiffs in this case are "individuals who, while residing in California, borrowed from $2,500 to $2,600 at an interest rate of 90% or higher from [Defendant] CashCall for personal family or household use at any time from June 30, 2004 through July 10, 2011." (E.R. 195.) CashCall made a total of 135,288 separate loans to these Plaintiffs at interest rates of 96% (99% annual percentage rate ("APR")) or 135% interest (138% APR) for 42-month and 35-month loan terms, respectively. If carried to full term, a consumer who borrowed at the interest rate of 135% ended up spending $11,000 to pay back a $2,600 loan—over four times the amount originally borrowed. Consumers who purchased at the rate of

96% did not fare much better—paying more than 3.5 times the amount originally borrowed.

Plaintiffs brought a class action asserting, as relevant here, that, given the loan size, costs and length, the CashCall loans were unconscionable under the circumstances and violated California's Unfair Competition Law, Business and Professions Code section 17200 et seq. ("UCL"), which prohibits any "unlawful, unfair or fraudulent business act or practice." As the state legislature has specified, "[a] loan found to be unconscionable pursuant to Section 1670.5 of the Civil Code shall be deemed to be in violation of this division and subject to the remedies specified in this division." Cal. Fin. Code § 22302(a) (incorporating Cal. Civ. Code § 1670.5). The District Court certified this class as the "Loan Unconscionability Class." (E.R. 195.)

After granting class certification, the District Court originally rejected CashCall's motion for summary judgment, recognizing that "[u]nder California law, a contract provision is unenforceable due to unconscionability only if it is both procedurally and substantively unconscionable." (E.R. 34 (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007).) The court found that numerous disputes of material fact precluded summary judgment. (*Id.*)

On CashCall's motion for reconsideration, the District Court reversed course. The court held that the Plaintiffs' unconscionability claim was "not viable

as a matter of law" because it "would impermissibly require the Court to regulate economic policy," and that because it "could not fashion a remedy without impermissibly intruding upon the legislature's province," Plaintiffs' claim was not viable. (E.R. at 5.) The Court also questioned whether unconscionability could properly be asserted as an affirmative claim, rather than as a defense, and appeared to distinguish the allowable remedy in an affirmative claim from one in a defensive claim.

Amici do not repeat the arguments made by Appellants, but instead submit this brief to add to those arguments. First, amici write to emphasize that, even aside from the incorporation of sections 22302 and 1670.5 into the Finance Lenders Law, UCL section 17200 directly prohibits unconscionable loan terms, including excessively high interest rates. The courts and the common law have long recognized that excessive interest rates and prices are unconscionable and therefore "unfair" and "unlawful."

Second, amici write to emphasize that the District Court erred when it concluded that it did not have the authority under the UCL to remedy any violation here. If it was proper to decide the issue of damages at all, the District Court improperly held that it could not provide a remedy without intruding upon the role of the legislature. In addition to other available theories for crafting a remedy discussed by Appellants, the District Court could have looked to existing statutory

guidance, including remedies set forth in the FLL for a violation of that statute, to craft an appropriate remedy without overstepping judicial bounds. By failing to recognize its broad authority, the District Court committed reversible error.

ARGUMENT

I. An Unconscionability Claim Based on Excessive Interest Rates Does Not Impermissibly Seek To Set Economic Policy.

The District Court wrongly held that it could not address Plaintiffs' unconscionability claim through the UCL because doing so would require the court impermissibly to set economic policy. As Appellants' brief demonstrates, addressing unconscionability through a UCL action does not invade the legislature's purview. To the contrary, the legislature directed that a loan found to be unconscionable would violate the FLL and therefore would be an "unlawful" business practice under the UCL. (Appls.' Opening Br. at 17-26.) In addition, the UCL not only prohibits unconscionable loans through its incorporation of sections 22302 and 1670.5, but also prohibits "unlawful" or "unfair" business practices, and therefore prohibits unconscionable loan terms, including interest rates that are excessively high under the circumstances.

As the California Court of Appeal reasoned in *California Grocers Ass'n v. Bank of America*, 22 Cal. App. 4th 205, 218 (1994), "the Legislature's broad grant of remedial power" under the UCL to "prohibit [] 'unfair' business practice[s], which 'may be enjoined in any court of competent jurisdiction,'" would in fact

"encompass" and provide an affirmative cause of action for unconscionability. California courts have long recognized that unfair prices and excessive interest rates can be unconscionable, and California courts and other states' courts have permitted affirmative causes of action for unconscionability to proceed in equity or under consumer protection laws.

A. Excessively High Prices and Interest Rates Can Be Unconscionable Under California Law.

California courts have long recognized that excessively high prices and interest rates can be unconscionable. Indeed, three decades ago, the California Supreme Court held that "it is clear that the price term, like any other term in a contract, may be unconscionable." *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 926 (1985) (holding that plaintiff's allegations that the bank's non-sufficient-funds charges were "oppressive, unreasonable, or unconscionable" stated a valid claim); *see also* 14 Cal. Jur. 3d Contracts § 12 (2015) ("Price like any other term in a contract may be unconscionable, … [and] will turn upon further allegations and proof setting forth the circumstances of the transaction…").

Other California courts have similarly recognized that the doctrine of unconscionability prohibits a wide range of abuses including "[u]nexpectedly harsh terms manifested in the form of price disparity." *Truta v. Avis Rent A Car Sys., Inc.*, 193 Cal. App. 3d 802, 819-21 (1987) (quoting 15 *Williston on Contracts* § 1763A, at 213-215 (3d ed. 1972)) (finding that plaintiff's allegation "that the

price for the [collision damage waiver] is 'far in excess of a price that would be determined in a competitive business environment'" stated a claim for substantive unconscionability), *overruled by statute on other grounds as stated in Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1155 n.5 (2000). *See also People v. James*, 122 Cal. App. 3d 25, 36 (1981) (affirming injunction against store owner for engaging in unfair business practices, including "charg[ing] unconscionable fees to retrieve [] vehicles from hoisting and impoundment"); *People v. Dollar Rent A Car Sys.*, 211 Cal. App. 3d 119, 130 (1989) (upholding judgment for plaintiff on unfair competition claim where company billed "inflated" prices such as $2,500 to repair car when actual cost was $1,304; $1,485 to repair car when actual cost was $500); *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 741 (1980) (reversing demurrer where plaintiffs alleged unfair business practices against a newspaper publishing company that charged some advertisers 30 percent more for advertisements than others).

Similarly, courts in other states have found contracts to be unconscionable wholly or largely based on price terms. *See, e.g., Quicken Loans Inc. v. Brown*, 737 S.E.2d 640 (W. Va. 2012) (holding that subprime mortgage loan was unconscionable given exorbitant fees and charges and finding that trial court had the authority to refuse to enforce the loan contract); *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971) (finding that selling "education materials" for more than two times

a reasonable price to poorly educated and disadvantaged consumers was unconscionable); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (1969) (finding sale of refrigerator for three times its ordinary price unreasonable), *cited in Carboni v. Arrospide*, 2 Cal. App. 4th 76, 82 (1991); *In re Wernly*, 91 B.R. 702 (Bankr. E.D. Pa. 1988) (finding that charges of $1,000 for cashing $11,000 in social security checks were unconscionable); *In re Jungkurth*, 74 B.R. 323, 335 (Bankr. E.D. Pa. 1987) (holding that 50% annual percentage rate on a loan to unsophisticated consumers was unconscionably high).

Courts have applied these authorities to interest rates, as well; after all, "the interest rate is the 'price' of the money lent." *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 82 (1991). In *Carboni*, the court of appeal applied *Perdue* and other California authorities to uphold the trial court's finding that an interest rate of 200% was unconscionable under the circumstances. *Id.* at 79, 84-85. Although the court noted that it may be "difficult to determine when that point [of unconscionability] is reached," this point did not deter the court from concluding that it could properly decide the issue. *Id.* at 82. Indeed, the court stated that it had "little trouble concluding that an interest rate of 200 percent on a secured $99,000 loan is substantively unconscionable," and also found the loan to be procedurally unconscionable. *Id.* at 83, 85-86. The court of appeal also upheld the trial court's decision to allow an interest rate of 24 percent, in place of the 200 percent rate

found to be unconscionable.[2] *See id.* at 80, 87. There was no indication that the court of appeal had any hesitation or concern that the trial court had overstepped its bounds. *See generally id.* Although the District Court seemed to distinguish *Carboni* on the ground that the unconscionability claim was a defense, rather than an affirmative claim, (E.R. at 4), it included no analysis and cited no other authority for the implication that setting an interest rate is permissible for the court in a defensive case, but not in an affirmative case.

Nor should the fact that this is a class case, unlike *Carboni*, make a difference. California courts have long held that class actions "serve an important function in our judicial system." *See, e.g.*, *Ramirez v. Balboa Thrift & Loan*, 215 Cal. App. 4th 765 (2013) (reversing the trial court's denial of class certification) (quoting *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 469 (1981)). Moreover, where a defendant's actions have harmed many, it is all the more important to provide a remedy. It would frustrate the public policy supporting class actions to hold that, where a remedy can be provided in an individual case, it cannot be provided in a class case.

[2] Although not addressed directly, the source of this interest rate appears to have been testimony about the prevailing rate in the credit market for similar loans. *See id.* at 84 and n. 9 (describing testimony that a third deed of trust would have carried an interest rate of 18 to 21 percent with a 10 percent broker's fee plus processing costs).

Other courts have agreed that, as with high prices, "[a] finding of unconscionability can result when interest rates are unreasonably high." *In re Price,* 313 B.R. 805, 811-12 & n.3 (Bankr. E.D. Ark. 2004) (applying California law and rejecting financial company's motion for summary judgment based on contract because, among other reasons, the contract with high interest rates was subject to the defense of unconscionability). *See also State ex. rel King v. B&B Inv. Grp.*, 329 P.3d 658, 670-71, 676 (N.M. 2014) (holding that $50 to $300 loans with interest rates at approximately 1,500% were substantively unconscionable, noting the 'gross disparity' between the value and the price" of the loan) (internal citations omitted); *Drogorub v. Payday Loan Store of WI, Inc.*, Case No. 2012-AP151, 345 Wis. 2d 847, at *6 (Wis. Ct. App. 2012) (affirming trial court's decision that several auto title loans bearing an annual interest rate of 294.35% were unconscionable).

B. Unconscionability Can Support an Affirmative Cause of Action Under the UCL.

Although it did not directly so hold, the District Court appeared to suggest that Plaintiffs could not bring an affirmative unconscionability claim. *See* Order at 3 (section 1670.5 "does not in itself create an affirmative cause of action[;] rather, it codifies the defense of unconscionability." (quoting *California Grocers Ass'n*, 22 Cal. App. 4th at 217)). The District Court also suggested, without analysis, that it lacked the ability to fashion a remedy for an affirmative claim. *See* Order at 4

(distinguishing *Carboni* as presenting "the classic situation in which a party asserted unconscionability as a defense to the enforcement of a contract and the court was therefore able to fashion a remedy avoiding the unconscionable provision"). The District Court is wrong on both counts.

The District Court relied primarily on *California Grocers*, 22 Cal. App. 4th at 217 for the suggestion that an affirmative cause of action for unconscionability is not available. (E.R. at 3-4.) The *California Grocers* court never so held, however. Instead, the court assumed that the UCL *does* encompass such a cause of action, as suggested by "the Legislature's broad grant of remedial power" through the UCL. 22 Cal. App. 4th at 218. Moreover, California courts have provided affirmative causes of action for unconscionably high prices on multiple occasions.

For example, in *Perdue*, the plaintiff filed a class action affirmatively challenging as unconscionable the validity of a six-dollar charge imposed by Crocker National Bank for processing checks drawn on accounts without sufficient funds. 38 Cal. 3d at 921. The California Supreme Court found that the plaintiff had stated a valid claim for affirmative relief, relying in part on § 1670.5, which "codified the established doctrine that a court can refuse to enforce an unconscionable provision in a contract." *Id.* at 925. The court then set forth several non-exclusive factors to consider in assessing whether a price is unconscionable. *Id.* at 926-28 (citations omitted).

Likewise, in *People v. James*, the Court of Appeal affirmed the grant of a preliminary injunction against a liquor store owner and a tow truck operator who allegedly cooperated in towing cars from the store's lot. 122 Cal. App. 3d at 35-36, 39. The injunction was based in part on UCL section 17200 for "unfair business practices," including the tow truck operator's "unconscionable fees to retrieve [customers'] vehicles from hoisting and impoundment." *Id.*

Thus, the California courts have long recognized that, although § 1670.5 itself is phrased in defensive terms, an unconscionable contract provision may form the basis of a claim that a defendant has committed an unfair business practice under § 17200.

Appellate courts in other states have also allowed affirmative causes of action for unconscionable prices or interest rates to proceed under common law, the UCC § 2-302, or through state unfair competition laws, and have held that the courts may provide remedies to the plaintiffs. A recent case directly on point is *State v. B & B Investment Group, Inc.*, 329 P.3d 658, 662 (N.M. 2014). There, the State brought an action against subprime lenders, alleging that high-cost installment loans of $50 to $300 with APRs ranging from 1,147.14 to 1,500 percent were unconscionable under common law and the Unfair Practices Act. *Id.* at 676. The New Mexico Supreme Court found that even though there was no statutory prohibition on interest rates, and the legislature had, in fact, removed the

usury interest rate cap in 1981, New Mexico courts remained empowered to police against unconscionable contracts. *Id.* at 671-72. The Court rejected the logical fallacy implicit in defendants' argument: that supposedly "by removing the interest rate cap, the Legislature was stating that there is *no* interest rate that would violate public policy." *Compare id.* at 672, *with* E.R. at 5-6 (holding that California legislature's lifting of cap prevented relief). This argument ran contrary to "New Mexico public policy as expressed in the UPA and other legislation." *B & B Inv. Grp.*, 329 P.3d at 672. The New Mexico Supreme Court then went one step further, and found that the trial court had abused its discretion when it failed to grant restitution to borrowers. *Id.* at 674-75. The court ruled that the stated (unconscionable) interest rate should be stricken from the contracts of all borrowers and then applied the statutory default interest rate of 15 percent simple interest to the contracts. *Id.* at 675-76.

In a Wisconsin case, *Drogorub v. Payday Loan Store of WI, Inc.*, Case No. 2012-AP151, 345 Wis. 2d 847 (Ct. App. Wis. 2012), the plaintiff alleged, and the trial court agreed, that auto title loans bearing an annual interest rate of 294.35 percent were unconscionable. On appeal, the defendant argued that Wisconsin law provided that consumer credit transactions were not subject to a maximum finance charge and that any charge or practice expressly permitted could not be unconscionable. *Id.* at *5. Rejecting that argument, the court noted, however, that

the law expressly provided that even where a practice is authorized, the totality of a creditor's conduct may show that such practice or charge is part of an unconscionable course of conduct." *Id.* (citing Wis. Stat. § 425.107(4)). The court of appeal affirmed the trial court's holding that the title loans were unconscionable.

The California precedent and cases from other state courts demonstrate that allowing an affirmative cause of action for unconscionability would not constitute impermissible economic policy-making by the court.

II. Providing A Remedy for Plaintiffs' Unconscionability Claim Would Not Require the Court to Set Economic Policy.

The District Court believed that it "could not fashion a restitution award without deciding the point at which CashCall's interest rates crossed the line into unconscionability," and that, therefore, "[e]ven if Plaintiffs were able to prove that the challenged loans were unconscionable, the Court could provide no remedy without impermissibly intruding upon the legislature's province." (E.R. at 5-6.) The Court erred in so finding.

Appellants raise three bases for their argument that the District Court committed reversible error regarding its ability to fashion a remedy. (*See* App. Opening Br. at 27.) Amici concur in these arguments and add that the District Court in the exercise of its broad remedial powers had numerous options for crafting a remedy here without intruding on the legislature's role.

The court's discussion of the limits of its authority to craft a remedy here was flawed. The UCL grants courts broad remedial powers to address unconscionability under the UCL. Therefore, the District Court got it backwards when it held that "[e]ven if Plaintiffs were able to prove that the challenged loans were unconscionable, the Court could provide no remedy." (E.R. at 5.) Under the UCL, when there is a right, there is a remedy: in this context, the "maxim as old as law that there can be no right without a remedy" means that "an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem." *James*, 122 Cal. App. 3d at 35 (affirming preliminary injunction based on UCL and other statutes). Therefore, if the Court determines on the merits that the plaintiffs have validly stated a *right* under the UCL against unfair and unlawful practices (by way of unconscionably high interest rates), the courts undoubtedly can fashion an appropriate remedy under the broad power afforded by the statute.[3]

[3] It is well recognized that courts sitting in equity have considerable flexibility in crafting appropriate injunctive and equitable relief. *See, e.g.*, *Missouri v. Jenkins*, 495 U.S. 33, 78 (1990) (recognizing that "equity has been characterized by a practical flexibility in shaping its remedies."); *Porter v. Warner Holding Co.*, 328 U.S. 395, 408 (1947) (noting "the creative resources of a court of equity" to fashion appropriate relief); *Bravo v. Buelow*, 168 Cal. App. 3d 208, 214 (1985) ("Equity is not bound by rigid precedent, but has the flexibility to adjust the remedy in order to do right and justice.").

The District Court was primarily concerned with overstepping judicial bounds and intruding upon the legislature's province in crafting a remedy. Although the legislature, through California Finance Code § 22302 directly granted to courts the authority to determine issues of unconscionability (and necessarily the ability to craft a remedy),[4] even absent § 22302, the Court could have assuaged its concerns about possibly exceeding its authority by looking to existing statutory authorities as guidance in providing a remedy. In this way, the Court would have exercised its broad remedial powers to "arrive at a just solution of the problem," *James*, 122 Cal. App. 3d at 35, while also respecting the legislature's determinations.

The California Finance Code, under which CashCall is licensed, provides for a remedy in the event that a licensee makes a loan that violates the California Finance Lenders Law. Section 22302 provides that "Section 1670.5 of the Civil Code [regarding unconscionable contract terms] applies to the provisions of a loan

[4] In *Shuts v. Covenant Holdco LLC*, the Court of Appeal noted that where the legislature has specifically provided for a question to be decided by the courts, it would frustrate the main purpose of [that law] to conclude that courts should abstain from adjudicating [such] claims." *Shuts v. Covenant Holdco LLC*, 208 Cal. App. 4th (2012) 609, 623-24, 145 Cal. Rptr. 3d 709, 720. Here, the legislature specifically granted courts the authority to determine whether contracts made under the Finance Lenders Law are unconscionable, and it would frustrate the main purpose of that provision, therefore, to allow a court to abstain from adjudicating unconscionability claims in deference to the legislature.

contract that is subject to [the FLL]," and that a loan found to be unconscionable is "deemed to be in violation of [the FLL] and subject to the remedies specified in [the FLL]." Cal. Fin. Code § 22302.

Section § 22750(b) in turn provides that "[i]f any provision of this division is willfully violated in the making or collection of a loan, …, *the contract of loan is void, and no person has any right to collect or receive any principal, charges, or recompense in connection with the transaction*." Cal. Fin. Code § 22750(b) (emphasis added). Alternatively, if a violation is found not to be by reason of a willful act, then "the licensee *shall forfeit all interest and charges on the loan and may collect or receive only the principal amount of the loan*." Cal. Fin. Code § 22752 (emphasis added).

We recognize that Plaintiffs did not bring their claims directly under the Financial Code, but rather the UCL. Nonetheless, the District Court certainly could have looked to the legislature's policymaking on these precise issues to determine what remedy, in equity, would be appropriate here. Doing so would have avoided any need to "second-guess" the legislature, as the Court would be following the legislature's lead. *Cf. Shuts v. Covenant Holdco LLC,* 208 Cal. App. 4th 609, 623-24 (distinguishing *California Grocers* and stating that, "a court should not abstain from deciding a case when the Legislature 'already has made

the relevant policy determinations....'").[5] The appropriateness of a remedy in these circumstances is independent of the identity, public or private, of the plaintiff.

Certainly, on summary judgment, it was improper for the Court to conclude that no remedy was possible, before considering the merits and without examining any evidence. Given the District Court's error, its Order should be reversed.

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[5] In the alternative, in the exercise of its broad equitable powers under Civil Code 1670.5 and UCL, the District Court – like the New Mexico Supreme Court in *B & B Investment Group* – could have struck the offending provision and substituted an interest rate drawn from other provisions of law. *See B & B Inv. Grp.*, 329 P.3d at 675-76 (striking offending interest rate as unconscionable and then substituting statutory default interest rate of 15 percent simple annual interest). *See also* Cal. Const. Art. 15, § 1 (providing a default usury interest rate of 7% and a maximum contractual usury rate of 10%); *Armstrong v. Picquelle*, 157 Cal. App. 3d 122, 129 (1984) (applying the constitutional provision, courts have held that "When a contract for payment of money is silent as to interest, the law awards interest at the 7 percent legal rate from maturity of the obligation ....") ; Civil Code 3289(b) ("If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.").

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the District Court granting summary judgment.

Dated: May 15, 2015

Respectfully submitted,

By: /s/ Caryn Becker

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The brief has been prepared in 14-point Times New Roman font, and the word count is 4,619.

/s/ Caryn Becker
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CERTIFICATE OF SERVICE

I certify that on May 15, 2015, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Vanessa Buffington

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