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S273802

SUPREME COURT OF THE STATE OF CALIFORNIA

ANGELICA RAMIREZ,
Plaintiff and Respondent

v.

CHARTER COMMUNICATIONS, INC.,
Defendant and Appellant

Court of Appeal of the State of California, Second Appellate District, Division Four, Case No. B309408

Superior Court of the State of California
for the County of Los Angeles
Hon. David J. Cowan, Dept. 20
Case No. 20STCV25987

ANSWER TO PETITION FOR REVIEW

Eric A. Panitz (SBN 243877)
PANITZ LAW GROUP APC
18000 Studebaker Road, Suite 700
Cerritos, CA 90703
(562) 924-7800 Phone
(562) 924-7801 Fax
eric@panitzlaw.com

Attorneys for Plaintiff and Respondent

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I. Introduction

Petitioner Charter Communications, Inc. ("Charter") seeks review of the Court of Appeal's decision in this case based on three points:

(1) The Court of Appeal's finding that the provision in Charter's arbitration agreement allowing for recovery of interim attorneys' fees after a successful motion to compel arbitration is unconscionable and could not be re-written to render it enforceable.

(2) The refusal to sever the multiple unconscionable provisions of the agreement to allow enforcement.

(3) Whether the decision violates the Federal Arbitration Act ("FAA").[1]

As set forth below, review is not appropriate here because the Court of Appeal's reasoning and holding is consistent with established law and does not create any meaningful conflicts with the decisions of other appellate courts.

Accordingly, review is not "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, Rule 8.500(b).)

II. Allowing Recovery of Attorney's Fees for Enforcement of Arbitration Clause is Substantively Unconscionable

A. The Agreement Has Multiple Unconscionable Provisions

In its published opinion in this case, the Court of Appeal affirmed the trial court's decision to deny Charter's motion to compel arbitration. *Ramirez v. Charter Commc'ns, Inc.* (2022) 75 Cal. App. 5th 365 ("*Ramirez*"). While the Petition focuses only on

[1] 9 U.S.C § 1, *et seq.*

one aspect of the Court of Appeal's analysis of the arbitration clause at issue – interim attorney fees for enforcement of arbitration – the Court of Appeal's decision is not dependent on that issue alone.

The Court of Appeal found that the arbitration agreement at issue had *multiple* provisions that rendered it substantively, as well as procedurally, unconscionable and therefore unenforceable:

1. By requiring that arbitration be initiated within the statutory time for filing an administrative charge with the DFEH, it had the "practical effect" of "cut[ting] the period to file a FEHA[2] action by as much as two years" and could require the employee to arbitrate even before the DFEH has finished its investigation. (*Id.* at 375.)
2. The agreement requires an award of interim attorney fees for enforcement of the arbitration clause to the employer. (*Id.* at 377-82.)
3. The agreement "is unfairly one sided because it compels arbitration of the claims more likely to be brought by an employee, the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by an employer, the stronger party." For example, it excludes claims regarding trade secrets, confidentiality agreements, non-compete agreements, theft or embezzlement, and intellectual property, all of which are claims almost exclusively brought by employers. (*Id.* at 382-83.)

[2] Gov. Code § 12940, et seq.

4. It limits discovery in a manner that would not allow the employee a fair opportunity to present her case. (*Id.* at 384-86.)

In spite of the fact that the Court of Appeal found that the agreement was substantively unconscionable on these four separate bases, Charter's Petition only challenges the decision as to a single item, the interim attorney fees provision. Thus, even if, *arguendo*, Charter were correct about this provision, the ultimate result would not change because there are three other provisions that also render the agreement substantively unconscionable.

Thus, regardless of the resolution of Charter's proposed Issue I, the results in this case would remain unchanged. Accordingly, there is no basis for Supreme Court review in this case.

B. *Patterson* Did Not Address Issue of Unconscionability of the Agreement as a Whole

1. Enforceability of Agreement Was Not at Issue in *Patterson*

Moreover, *Patterson v. Sup. Ct.* (2021), 70 Cal.App.5th 473 ("Patterson"), is not in conflict with the Court of Appeal's decision in this case on the larger question of unconscionability because (a) it did not address the overall enforceability of the agreement and (b) it held that the interim fee provision was unenforceable as written. *Patterson* was the result of a writ petition seeking reversal of an award of attorney's fees under the same arbitration agreement at issue here. The trial court had previously rejected the employee's unconscionability challenge to the agreement as a whole and the Court of Appeal had summarily denied the writ as

to that issue. (*Id.* at 478-79.) Thus, the issue of the agreement's enforceability as a whole was not the subject of the court's decision in *Patterson*; nor was severance of unconscionable provisions. Since "it is axiomatic that cases are not authority for propositions not considered," there can be no conflict between *Ramirez* and *Patterson* on matters not at issue in *Patterson.* (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1160.)

The only issue in *Patterson* was the enforceability of the interim attorney's fee provision.

2. *Patterson* and *Ramirez* Agree That Interim Attorney's Fee Clause is Unenforceable as Written

After the motion to compel arbitration in *Patterson* was granted, Charter had filed a separate motion to recover attorney's fees on the motion to compel arbitration. It was after the trial court granted that motion that the Court of Appeal took up the issue on a writ. (*Id.* at 479-80.) In cases brought under FEHA, a prevailing defendant may only recover attorney fees and costs if the plaintiff's case was frivolous; by contrast, a prevailing plaintiff is presumptively entitled to recover fees. (*Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, 115.)

The primary questions addressed in *Patterson* were: (1) whether the interim fee clause violated FEHA's "asymmetric" rules regarding attorney's fees; and (2) if so, can it be saved by interpolating a requirement that the employer only recover fees if the employee's position was frivolous. *Patterson* also discussed the enforceability of the provision under Civ. Code section 1717.

Charter itself argued in that case that FEHA's asymmetric attorney's fee rules were *not* applicable to fees on enforcement of arbitration and sought to enforce the provision as written. Clearly, Charter believed the contract (which it itself wrote) to unambiguously support its claim for fees in that case without regard to whether the plaintiff's position had been frivolous.

Patterson concluded that, although interim fees could be authorized by contract, FEHA's asymmetric rule regarding attorney's fees and costs *also* applies to interim fees on a motion to compel arbitration. Accordingly, attorney's fees could only be awarded to an employer based on a finding that the employee's opposition to arbitration was frivolous. (*Id.* at 431.) Thus, the interim attorney's fee clause was *unenforceable as written*.

3. *Ramirez* Correctly Determined That Interim Attorney's Fee Clause Was Mandatory and Unambiguous

To that extent, there is no conflict between *Patterson* and *Ramirez*: both agree that this clause of the Charter arbitration agreement is unenforceable as written. The only point in contention is whether the court should "construe the prevailing party fee provision in the arbitration agreement to impliedly incorporate the FEHA asymmetric rule for awarding attorney fees and costs." (*Patterson* at 490.)

In *Ramirez,* the court concluded that it could not do so because the provision clearly and unambiguously states:

> If any judicial action or proceeding is commenced in order to compel arbitration, and if arbitration is in fact compelled or the party resisting arbitration submits to arbitration following the commencement of the action or proceeding, the party that resisted

> arbitration will be required to pay to the other party all costs, fees and expenses that they incur in compelling arbitration, including, without limitation, reasonable attorneys' fees. (1AA 132.)

The contractual language is clear and mandatory: the party unsuccessfully "resisting arbitration… *will* be required" pay the compelling party's attorneys' fees. (Emphasis added.) There is no indication that the court has any discretion in determining whether either party acted reasonably or was taking a frivolous position.

Ramirez noted that, although courts are generally directed to interpret contracts so as to render them "lawful, operative, definite, reasonable, and capable of being carried into effect," that *only* applies if it can be done "without violating the intention of the parties" as reflected in the explicit meaning of the text. (*Ramirez* at 379; Civ. Code § 1643.) *Ramirez* concluded that interpolating the FEHA asymmetric attorney's fee rule into the agreement would violate the clear mandate of the contract's language and was therefore not an option.

In this, *Ramirez* is in agreement with *Serpa v. California Surety Investigations, Inc.* (2013), 215 Cal.App.4th 695. In *Serpa*, the agreement unambiguously stated that each party would bear its own attorney's fees. The court refused to read FEHA's statutory attorney fee recovery rules into the agreement because it was unambiguous and not susceptible to reinterpretation; that clause was therefore unenforceable. (*Id.* at 709-710.)

Serpa also noted that a different result would be required if the agreement was "silent on the question of attorney fees" or

generally allowed recovery fees "in accordance with applicable law." In either of those circumstances, FEHA's attorney's fee rules could *not* be read into the agreement. (*Id.*) This was consistent with prior caselaw holding that agreements should be interpreted in a manner allowing enforcement whenever they are silent or ambiguous on an issue. (*See, e.g., Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682 [ambiguity regarding administrative charges]; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1473 [ambiguity regarding bilateral obligations]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113 [imposing arbitration costs on employer where agreement was silent.])

Patterson failed to recognize the fundamental distinction between imposing an interpretation where an agreement is silent or ambiguous, and re-writing a clear and unambiguous provision of the agreement to mean something it patently does not say. Petitioners similarly ignore this crucial distinction in arguing that the court should have reinterpreted the provision to incorporate FEHA rules on attorney's fees and costs.

Thus, the *Ramirez* court correctly found that the provision at issue was not ambiguous or subject to reinterpretation and was therefore correct in refusing to read the FEHA requirements into the agreement.

C. *Ramirez* is not Inconsistent with *Bravo*

In addition, there is no inconsistency between *Ramirez* and *Bravo v. Charter Communs.*, No. B303179, 2021 Cal. App. Unpub. LEXIS 1872 (Mar. 23, 2021) ("*Bravo*"), an unpublished case. First, even assuming, *arguendo,* that there is a conflict

between *Ramirez* and *Bravo*, that would not create any legal issue to be resolved by the Supreme Court or pose any difficulty to the trial courts in this state. As an unpublished case, *Bravo* cannot be cited or relied upon by the trial courts in this state. (Cal. Rules of Court, Rule 8.1115.) Trial courts are bound to the follow *Ramirez*, which is a published case. (*Auto Equity Sales, Inc. v. Sup. Ct.* (1962) 57 Cal.2d 450, 455 [decisions of any division of the District Courts of Appeal binding on all superior courts, unless there is a split of authority.]) Thus, any potential conflict between the cases poses no issue of statewide uniformity of law.

In any case, there is no conflict between *Bravo* and *Ramirez* because they were dealing with different issues. In *Bravo,* the employees did not oppose the motion to compel arbitration on grounds of unconscionability. Instead, they argued that the agreements failed because the requirements for electronic transactions were not followed and there was no evidence of actual notice to the employees of the terms of the agreement. (*Bravo* at *6.) The trial court rejected these arguments and instead denied the motion on other grounds: that there was "an absence of acceptance and consideration." (*Id.* at *7-8.) The Court of Appeal rejected all of these arguments – both those of the employees and those of the trial court – and reversed the order denying the motion to compel arbitration.

The only mention of unconscionability in *Bravo* is a footnote stating: "The trial court also found, for purposes of the Employers' motion, the arbitration agreements were not

unconscionable, as the parties did not appear to dispute the matter." (*Id.* at*7, fn.2.)

Thus, although *Bravo* involved the same arbitration agreement, there is no conflict between *Ramirez* and *Bravo* because the Court of Appeal was presented different issues by the respective trial court rulings and the parties' arguments. *Bravo* did not discuss any of the issues involved in *Ramirez* and did not address unconscionability other than to state that unconscionability was *not an issue* because it was not disputed by the parties. Accordingly, there is no conflict between *Bravo* and *Ramirez* and no possible issue of statewide uniformity in the application of the law on this issue.

D. Trial Court Cases Do Not Do Not Support Grant of Review

Charter also argues that Supreme Court review is necessary because a number of trial courts have enforced the agreement in the past. This, however, is irrelevant to the issue of statewide uniformity of law because trial courts are bound to follow the published rulings of the Courts of Appeal and are therefore now bound to follow *Ramirez.* Further, "a written trial court ruling has no precedential value," and therefore cannot create a conflict of authority. (*Santa Ana Hospital Medical Center v. Belshé* (1997) 56 Cal.App.4th 819, 831.)

Moreover, even if some federal district court opinions conflict with *Ramirez* that too does not raise any serious risk to statewide uniformity of law. District courts are also generally required to follow *Ramirez* in the future as the last word of a California appellate court on these issues of California law. (*See*, *Poublon v. C.H. Robinson Co.* (9th Cir. 2017) 846 F.3d 1251, 1266

[“A state appellate court's announcement of a rule of law is … is not to be disregarded by a federal court unless it is convinced … that the highest court of the state would decide otherwise.”])

Finally, the mere fact that Charter employs a large number of employees in this state, and that it has been successful in enforcing its arbitration agreement in certain trial courts in the past, does not raise an “important issue of law” requiring the intervention of this court.

Based on the foregoing, there is no need for this Court to order review over proposed Issue I, as there are no conflicts of authority regarding “important issues of law,” and there is no risk to the uniformity of decision in the courts.

III. Court of Appeal Correctly Found No Abuse of Discretion in Trial Court’s Refusal to Sever

The Court of Appeal in this case declined to order severance of the unconscionable provisions based on the longstanding rule that “[s]everance may be properly denied when the agreement contains more than one unconscionable provision, and there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.” (*Ramirez* at 386-87, internal quotes omitted; *Baxter v. Genworth North America Corp.* (2017) 16 Cal.App.5th 713, 737-38; *see, e.g., Magno v. Coll. Network, Inc.* (2016) 1 Cal.App.5th 277, 292 [“An agreement to arbitrate is considered ‘permeated’ by unconscionability where it contains more than one unconscionable provision”]; *Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 223; *Ali v. Daylight Transp., LLC* (2020) 59

Cal.App.5th 462, 482; *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 918.)

Here, the Court of Appeal found the agreement to be unconscionable for four separate reasons, as described above, and therefore refused to order a severance of the unconscionable provisions. This is consistent with *Armendariz* in which this Court held that "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (*Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83, 124.)

Moreover, a trial court's order denying severance of an unconscionable arbitration agreement is reviewed for abuse of discretion. (*See, Armendariz, supra,* 24 Cal.4th at 121–125; *Davis v. Kozak, supra*, 53 Cal.App.5th at 917; *Ali v. Daylight Transp., LLC*, *supra*, 59 Cal.App.5th at 481; *Magno v. Coll. Network, Inc.*, *supra,* 1 Cal.App.5th at 292.) Both the trial court and the Court of Appeal here were following well established precedent in exercising discretion to deny severance once they found multiple unconscionable terms. Charter fails to address this issue in terms of the proper standard of review and therefore fails to demonstrate any abuse of discretion. Thus, the decision to deny severance provides no basis for review in this case.

Charter also faults the Court of Appeal for failing to apply the AAA rules in order to save the arbitration agreement. The Agreement, however, never states that the AAA rules should be incorporated or that the arbitration will be conducted in

accordance with AAA rules. The rules are only invoked with regard to the appointment of the arbitrator. Under the AAA rule quoted in the Petition, AAA rules are only incorporated if the agreement fails to specify other "particular rules." (Petition at p.34.) The agreement, however, states that the proceedings will be "conducted pursuant to the Solution Channel Program Guidelines," not the AAA rules. (1AA 131.). Thus, since Charter chose to specify rules other than the AAA rules, the court could not impose them on the parties.

Finally, none of the California cases cited by Charter, including *Pearson, Baltazar, Sonic Calabasas*, and *Iskanian*, modify or reject the rule above that a court has *discretion* to deny severance when multiple unconscionable provisions exist. Others cited by Charter involved "**only one** substantively unconscionable provision." (*Farrar v. Direct Commerce, Inc*. (2017), 9 Cal.App.5th 1257, 1274 [emphasis added; one unconscionable provision re: exclusion of confidentiality]; *see, e.g., Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975 [one unconscionable provision re: discovery]; *Serpa v. California Surety Investigations, Inc.*, *supra,* 215 Cal.App.4th 695 [one unconscionable provision re: attorney's fees]; *Roman v. Superior Court* (Flo-Kem, Inc.) (2009) 172 Cal.App.4th 1462 [one unconscionable provision re: costs.])

Accordingly, there are no grounds for ordering review based on the decision to deny severance.

IV. Court of Appeal's Ruling is Not Preempted by the FAA

Ramirez refused to enforce the Charter arbitration agreement based on state law contract rules of unconscionability. Charter argues that the decision to deny enforcement, rather

than sever its numerous unconscionable provisions, violates the FAA as interpreted by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011) (*"Concepcion"*). Not so.

This Court has made it clear that "unconscionability remains a valid defense to a petition to compel arbitration." (*Sonic-Calabasas A, Inc. v. Moreno*, *supra*, 57 Cal.4th 1109, 1142 (*Sonic II*)). This Court in *Sonic II*, discussed numerous examples of unconscionable arbitration agreements, to which the court had correctly denied enforcement, including agreements allowing recovery of attorney's fees by employers. (*Id.* at 1145, *citing Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 799–800.) The Court concluded that:

> As the FAA contemplates in its savings clause (9 U.S.C. § 2), courts may examine the terms of adhesive arbitration agreements to determine whether they are unreasonably one-sided. What courts may not do, in applying the unconscionability doctrine, is to mandate procedural rules that are inconsistent with fundamental attributes of arbitration, even if such rules are "desirable for unrelated reasons." (*Id.* at 1146.)

This Court's reasoning in *Sonic II,* that unconscionability rules are consistent with the FAA, is consistent with the findings of other courts as well. (*Schnuerle v. Insight Commc'ns, Co*. (Ky. 2012) 376 S.W.3d 561 [FAA does not preempt holding that confidentiality provision of arbitration agreement is unconscionable]; *Barras v. Branch Banking & Trust Co.* (11th Cir. 2012) 685 F.3d 1269, 1279 ["South Carolina's

unconscionability doctrine is not preempted by the FAA in its application to arbitration agreements."])

Ramirez does not impose or mandate any procedural rules that undermine the general enforceability of arbitration agreements or the fundamental attributes of arbitration. Instead, it simply engages in the proper judicial role evaluating arbitration agreements under generally applicable contract rules of unconscionability, i.e., "determining whether they are unreasonably one-sided."

Under the established precedent of this Court and of the United States Supreme Court, such decision making is perfectly valid and in consonance with the FAA.

V. Conclusion

Based on the foregoing, Petitioner Charter fails to demonstrate that review is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, Rule 8.500(b).) The petition should therefore be denied.

DATED: April 14, 2022

PANITZ LAW GROUP APC

Eric A. Panitz
Attorneys for Plaintiff/Respondent

CERTIFICATE OF WORD COUNT

The text of Respondent's Answer to Petition for Review consists of 3,346 words as counted by the Microsoft Word 2016 word-processing program used to generate this brief.

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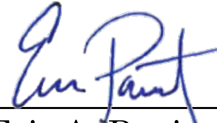

Eric A. Panitz
Attorneys for Plaintiff/Respondent

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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HILL, FARRER & BURRILL LLP
James A. Bowles S.B. No. 089383
jbowles@hillfarrer.com
Casey L. Morris S.B. No. 238455
cmorris@hillfarrer.com
300 S. Grand Avenue, 37th Floor Los Angeles, California 90071-3147

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Los Angeles County Superior Court
111 N. Hill St.
Los Angeles, CA 90012

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/s/ *Eric A. Panitz*
Eric A. Panitz

Supreme Court of California
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S273802**
Lower Court Case Number: **B309408**

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James Bowles Hill, Farrer & Burrill Llp 89383	jbowles@hillfarrer.com	e-Serve	4/14/2022 4:19:21 PM

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