S273802

SUPREME COURT OF THE STATE OF CALIFORNIA

ANGELICA RAMIREZ,
Plaintiff and Respondent

v.

CHARTER COMMUNICATIONS, INC.,
Defendant and Appellant

On Gant of Petition for Review from
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

ANSWERING BRIEF ON THE MERITS

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I. INTRODUCTION

A. The lower courts properly refused to enforce Charter's arbitration agreement.

The trial court in this case correctly denied the Motion to Compel Arbitration brought by Petitioner/Defendant Charter Communications, Inc. ("Charter" or "Defendant") on grounds of unconscionability. The Court of Appeal properly affirmed the decision.

As shown below, the arbitration agreement and its attendant Guidelines, which were drafted by Charter and imposed on its employees, have been designed to create a tilted playing field in favor of Charter and to make it difficult for employees like Plaintiff/Respondent Ramirez ("Plaintiff") to vindicate statutory rights. Because the arbitration program created by Charter contains numerous unfair and unconscionable provisions, and the decision of the Court of Appeal was well founded in California law, the decision below should be affirmed.

B. Issues on review are to those limited set forth in the Petition.

The issues on review in this matter are defined in the Petition and review is limited to the issues properly raised and briefed therein. (Cal. Rules of Court, Rule 8.516.) In its Petition to this Court, Charter did not challenge the Court of Appeal's conclusions regarding the substantively unconscionable provisions other than the interim attorney's fee clause. (See, Petition at pps. 27-33.) Rather, the Petition merely sought to argue that these provisions should have been severed and the remainder of the agreement enforced. Furthermore, the Petition

did not challenge the Court of Appeal's conclusion regarding procedural unconscionability or the overall unconscionability analysis.

Now however, in its Brief on the Merits, Charter seeks to challenge the substantive conclusions of the Court of Appeal regarding these provisions of the agreement and its overall mode of analysis. (See, Opening Brief on the Merits ("OPM") at pps. 21-27, 33-43.) As these issues were not properly raised in the Petition, either in its statement of issues or in the argument of the Petition, they are not properly before this Court and should not considered.

II. STATEMENT OF THE CASE

A. Factual allegations.

The basic factual allegations in this matter are as follows (See, Complaint, 1AA 6-58):

Plaintiff worked for Charter as an Enterprise Account Manager, selling services to business clients. When Plaintiff's supervisor, Defendant Lanners learned of her pregnancy, he asked her about her "intentions career wise." Plaintiff made clear that she intended to return to work and that her family relied on both her and her husband's income. Lanners then attempted to discourage her from returning to work after her pregnancy. After that, Lanners made disparaging and discriminatory comments regarding her pregnancy and gender. On one occasion, he indicated that she would be able to land more clients because her pregnancy would engender sympathy. On another occasion, he went on a profanity laced rant about the ability of "girls" to "take

the heat." He stated that he needed to discuss the "team dynamic" because "I like to curse to get my 'fucking' point across with the men on the team, and you girls sometimes can't take the heat." Prior to her giving birth, Lanners implied that Plaintiff would not be able to meet her proposed sales quota due to her pregnancy.

In December 2019, Plaintiff gave birth to her son and began her pregnancy disability leave and subsequently took protected family bonding leave as well.

On May 5, 2020, Plaintiff confirmed her return date of May 14, 2020 with human resources. On May 11, 2020, Plaintiff phoned Lanners to let him know she planned on returning to work on May 14. Lanners was surprised to hear from her and told her that human resources would be "in touch." The next day, another company employee told Plaintiff that her job had been filled. On May 14, 2020 Charter terminated Plaintiff's employment on the alleged grounds that her position was "unavailable."

B. Plaintiff's Complaint.

Plaintiff filed this lawsuit on July 9, 2020, alleging violation of the pregnancy disability leave provisions of the Fair Employment and Housing Act, discrimination, failure to accommodate, harassment and related claims. Defendant answered on September 1, 2020.

C. Motion to compel arbitration and opposition.

On October 20, 2020, Charter filed its Motion to Compel Arbitration, which sought to enforce an arbitration agreement

allegedly entered into at both at the time of Plaintiff's application and during her "on-boarding" in June and July 2019. The motion was brought under the Federal Arbitration Act as well as California law.

Among other provisions, the alleged arbitration agreement included a clause allowing the recovery of attorney's fees for a party that successfully brings an action to compel arbitration, regardless of ultimate success in the underlying case. Charter also requested an award of $6,480 in attorney's fees under this clause.

Other pertinent provisions include the following:

- Arbitration to be conducted in accordance with Charter's "Solution Channel Program Guidelines;"
- Arbitrator selected from AAA panel in accordance with AAA procedures;
- "Charter will pay the AAA administrative fees and the arbitrator's fees and expenses. All other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses."
- Exclusion of various employee administrative claims, as well as, "Claims for injunctive or other equitable relief related to unfair competition and the taking, use or unauthorized disclosure of trade secrets or confidential information;" claims for alleged "theft" or "embezzlement," and claims over "intellectual property rights;"

- "The aggrieved party must give written notice of the claim, in the manner required by this Agreement, within the time limit established by the applicable statute of limitations for each legal claim being asserted. To be timely, any claim that must be filed with an administrative agency or body as a precondition or prerequisite to filing the claim in court, must be filed with Solution Channel within the time period by which the charge, complaint or other similar document would have had to be filed with the agency or other administrative body;"
- Limitations on discovery to 4 depositions; 20 interrogatories; and 15 requests for documents; and
- A requirement that all discovery be completed within 90 days.

(*See*, 1AA 111-127; 129-131.)

In support of the motion, Charter filed, inter alia, a declaration of counsel with exhibits, an affidavit of John Fries, vice president of human resources technology, and a request for judicial notice of a number of state and federal unpublished decisions enforcing its arbitration agreements. (1AA 59 - 2AA 311.)

Plaintiff opposed the motion on November 2, 2020. (2AA 312-412.) In opposition, Plaintiff challenged the existence of an agreement to arbitrate, challenged the deficient declaration filed in support of the motion, and argued that the alleged agreement was procedurally and substantively unconscionable. Plaintiff's

own declaration stated that she had never actually seen the alleged arbitration agreement and disputed whether she had actually consented to it.

Plaintiff also argued that the agreement was procedurally unconscionable because it was a contract of adhesion, presented on a take-it-or-leave-it basis, and made a condition of employment. In addition, the Opposition argued that the agreement was substantively unconscionable because it unduly limited discovery, favored the employer in defining the scope of claims covered, broadened the employer's ability recover attorney's fees against the plaintiff, and shortened the statute of limitations.

Charter filed its Reply on November 5, 2020, and also filed a supplemental declaration of John Fries, to which Plaintiff objected that same day. (2AA 413-442.)

D. The hearing and decision on the motion.

The trial court heard the motion on November 16, 2020; prior to the hearing, a tentative ruling was issued in favor of granting the motion, but denying the request for attorney's fees. In the tentative, the trial court agreed with Plaintiff that the agreement limited the statute of limitations, but found that it had no practical effect in this case and therefore could be severed, if necessary.

In addition, the court found that the provision allowing recovery of attorney's fees for enforcement of the arbitration agreement was unenforceable under *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012), 206 Cal.App.4th 515. The tentative

also agreed with Plaintiff that the agreement's provision regarding recovery of attorney's fees was improper because it did not explicitly limit Charter's ability to recover fees to frivolous claims. Nonetheless, the tentative ruling was to grant the motion with those provisions severed.

At the hearing, the court heard oral argument and took the matter under submission. The final ruling, issued on November 25, 2020, reversed the tentative and denied the motion. (2AA 460-477.) The trial court decided that the agreement was substantively unconscionable because it did not explicitly limit Defendant's potential recovery of attorney's fees to frivolous claims, it shortened the applicable statute of limitations and the inclusion of a one-sided attorney's fees clause for enforcement of the arbitration agreement was unconscionable.

The trial court also concluded that because the agreement contained multiple improper provisions, it was permeated with unconscionability. As such, the improper provisions could not be severed and the motion was denied.

E. Appeal.

Charter subsequently appealed the order denying its motion to compel arbitration. After full briefing and oral argument, the Court of Appeal issued its published decision affirming the trial court's ruling. (*Ramirez v. Charter Commc'ns, Inc.* (2022) 75 Cal. App. 5th 365 ("*Ramirez.*"))

Charter subsequently filed a Petition for Review in this Court, which was granted.

III. RAMIREZ DECISION IS CONSISTENT WITH ESTABLISHED PRECEDENT

Charter's Opening Brief on the Merits ("OBM") argues that the Court of Appeal's decision should be reversed because it failed to conduct the proper analysis of the issues of unconscionability and severability and the that it is inconsistent with the prevailing authority on these issues. As shown below, this argument should be rejected because the decision was well founded in California law.

A. The Court of Appeal applied appropriate standards of review.

De novo review generally applies to a "trial court's determination of the validity of the agreement to arbitrate." (*CPI Builders, Inc. v. Impco Technologies, Inc*. (2001) 94 Cal.App.4th 1167, 1172.) However, "[t]he ruling on severance is reviewed for abuse of discretion." (*Murphy v. Check'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144.)

The Court of Appeal noted these standards of review and applied them appropriately. (*Ramirez,* at 372, 386-87.)

B. The Court of Appeal conducted appropriate unconscionability analysis.

Contrary to the argument in the OBM, the Court of Appeal engaged in a standard unconscionability analysis based on established precedent.

A contract, including an agreement to arbitrate, is unenforceable if it is unconscionable. (*Baxter v. Genworth N. Am. Corp.* (2017) 16 Cal.App.5th 713, 721 ["… courts may invalidate an arbitration agreement if it contains provisions that are unconscionable or contrary to public policy."]) "A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party." (*OTO, L.L.C. v. Ken Kho* (2019) 8 Cal.5th 111, 125.) In order make such a finding, a court must find that a contract is both "procedurally" and "substantively" unconscionable. (*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 114 ("*Armendariz.*")) However, both aspects "need not be present in the same degree." Instead, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Id.*)

Procedural unconscionability focuses on "oppression or surprise due to unequal bargaining power," while substantive unconscionability turns "on overly harsh or one-sided results." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243 ("*Baltazar.*")) Substantive unconscionability is based on the "basic fairness of the arbitration agreement." (*Mercuro v. Sup. Ct.* (2002) 96 Cal.App.4th 167, 175 ("*Mercuro.*"))

Here, the Court of Appeal found that the agreement was subject to some procedural unconscionability due to the fact that

it was a contract of adhesion and a "mandatory condition of employment," although "the degree of procedural unconscionability" was relatively "low." (*Ramirez,* at 373; see, 1AA 88-90, 112, 117 [arbitration agreement is mandatory and a condition of employment.]) Charter concedes that this conclusion was correct. (OBM at 22.)

The Court of Appeal then turned to the substance of the agreement and found that the arbitration agreement at issue had multiple provisions that rendered it substantively 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[1] 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. It limits discovery in a manner that would not allow the employee a fair opportunity to present her case. (*Id.* at 384-86.)
4. 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

[1] Gov. Code, § 12940, et seq.

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.)

The Court of Appeal reversed the trial court on several points. The Court of Appeal rejected the trial court's conclusion that the agreement was unconscionable because it did not explicitly allow for recovery of attorney's fees for a prevailing Plaintiff under FEHA; the Court of Appeal held that these requirements could be read into the general clause governing available remedies. Conversely, the Court of Appeal also disagreed with the trial court's finding that the discovery provisions were reasonable and that the agreement's exclusions did not create a lack of mutuality. Nonetheless, the Court of Appeal fully affirmed the result: the agreement was found unconscionable and the refusal to sever offending portions was not an abuse of discretion. (*Id.* at 386-87.)

Charter faults the Court of Appeal for "fail[ing] to address the Agreement's compliance with the five *Armendariz* factors." (OBM at 23.) However, *Armendariz* never purported to set the exclusive means of determining unconscionability of arbitration agreements in the employment context. Rather, it identified five factors that constitute "*minimum requirements"* to allow the vindication of an employee's statutory rights. (*Armendariz,* 24 Cal. 4th at 90-91, 102-03.) The identification of these factors was never meant to preclude courts' ability to identify other

arbitration contract provisions as unconscionable. *Armendariz* represents a floor, not a ceiling, in setting the standards for arbitration agreements in the employment setting.

Further, as described below, the level of discovery allowed in the agreement was *not* sufficient to allow the vindication of Plaintiff's rights in this case and therefore did not comply with *Armendariz*.

C. The Court of Appeal correctly concluded that the agreement impermissibly shortened the statute of limitations.

Under FEHA, there are effectively two statutes of limitations, which combine to give the employee a minimum of four years to bring a claim in civil court. First the employee has three years (fomerly one year) to file an administrative complaint with the Department of Fair Employment and Housing (DFEH) and then another year after the issuance of a Right to Sue by the DFEH to file a civil claim. "Factoring in the time required for the DFEH to investigate and respond to the claim, as a practical matter the outside limit to sue under the FEHA may be as long as three years." (*Baxter,* 16 Cal.App.5th 713, 730 [referring to the deadlines then applicable.])

Charter's arbitration program, however, requires an employee to forego any right to a civil complaint and initiate a claim with its arbitration program. "Also, to be timely, any claim that must be filed with an administrative agency… as a precondition or prerequisite to filing the claim in court, *must be filed with Solution Channel within the time period by which the charge… would have had to be filed with the agency or other*

administrative body." (1AA 127, 131 [emphasis added.]) Filing a charge with the government agency does not obviate the requirement to file the arbitration claim within the same time period. (*Id.*)

Thus, while an employee normally has two limitations periods for bringing a claim under FEHA – the time for filing an administrative charge and then additional time after a right to sue is issued – employees under Charter's rules are only afforded the initial time to simultaneously file an administrative charge and an arbitration claim. In addition, the agreement explicitly bars employees from seeking any remedies via the administrative charge. (1AA 132 [¶L.]) In effect, Charter's rules significantly shorten the statute of limitation by incorporating the administrative filing deadline rather than the combined administrative and civil statute of limitations for filing FEHA claims in court, which is an additional one year *after* issuance of a right-to-sue letter.

These requirements almost identical with those of *Baxter*, in which the court found that by eliminating the statutorily allowed time for (1) the DFEH to conduct an investigation and issue a right to sue letter and (2) an additional one year to file a civil complaint in court, the agreement effectively reduced "the time to pursue a claim by as much as two-thirds," which "does not provide sufficient time to vindicate an employee's statutory rights under the FEHA." (*Baxter, supra,* at 732.)

The Court of Appeal here agreed and found that "reducing the period within which a FEHA claim may be brought from three years to one is substantively unconscionable, as it substantially conflicts with the statutorily sanctioned period for vindicating statutory rights under FEHA." (*Ramirez,* at 375.) Charter argues that the Court of Appeal misinterpreted this provision by ignoring the "context" of the "Guidelines" which supposedly allow for a broader interpretation of the time limits. (OPM at 37-38.) Not so.

The Court of Appeal specifically noted the existence of parallel definitions in the Guidelines and stated:

> [T]he guidelines provided *an identical timetable for filing a claim with Solution Channel as Section E of the arbitration agreement*. The guidelines stated the statute of limitations was "[t]he period of time during which the law allows an individual or entity to pursue a particular type of claim.... Also, to be timely, any claim that must be filed with an administrative agency or body as a precondition or prerequisite to filing the claim in court, *must be filed with Solution Channel within the time period by which the charge, complaint or similar document would have had to be filed with the agency or other administrative body*." (*Ramirez,* at 375 n.4 [emphasis added.])

Thus, contrary to Charter's argument, the Guidelines do not expand or conflict with the time limits set forth in section E of the Agreement – they are identical with it. For the same

reason, there is no "ambiguity" that would require the courts to interpret the agreement in manner that renders the provision enforceable.

Next, Charter argues that, even if it is true that the provision reduces the statute of limitations that is not sufficient render it unconscionable. This claim is also untenable. A limitation on the time to bring a claim in arbitration must be "reasonable." (*Ramirez,* at 374, *quoting, Baxter,* 16 Cal.App.5th 713, 731.) "A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained." (*Id.*)

In *Baxter,* the court held that "shortening the limitations period to pursue relief for FEHA statutory claims under Resolve to one year—the time required to file an administrative FEHA claim—is unreasonable." (*Baxter,* at 731.) The requirement that the employee initiate arbitration on or before the deadline for filing a charge with DFEH, in effect forces the employee to forego the agency's assistance. DFEH involvement can be very important in vindicating employee rights; the agency is charged with conducting an investigation, obtaining a "prompt, detailed response from the employer, giving the employee a free, quick look at the defenses the employer is likely to raise," and, in some cases, filing its own lawsuit. (*Id.* at 734.) Thus, "a provision that 'effectively eliminates any meaningful participation by the

DFEH' is unreasonable." (*Id.,* quoting, *Ellis v. U.S. Security Associates* (2014) 224 Cal.App.4th 1213, 1226 [six-month limitation unreasonable.]) As noted, the provision at issue here is nearly identical to that which *Baxter* found to be unreasonable.

In addition, it is irrelevant that Plaintiff in this case requested an immediate right to sue rather than DFEH investigation. (See, *Ramirez,* at 375-376.) A finding that a contract is unconscionable depends on its effect "at the time it was made." (Civ. Code, § 1670.5(a).) "It is blackletter law that whether a contract is fair or works unconscionable hardship is determined with reference to the time when the contract was made and cannot be resolved by hindsight by considering circumstances of which the contracting parties were unaware." (*Yeng Sue Chow v. Levi Strauss & Co.* (1975) 49 Cal.App.3d 315, 325.)

Thus, the issue of whether the agreement was unconscionable must be viewed from the perspective of when it was made. Here, the agreement imposed unfair and unconscionable time limits on Plaintiff at the time it was made. The fact that she was later able to obtain counsel and timely assert her rights *despite* those time limits does not change the fact that it was unconscionable at the time it was made. To now argue that the agreement was not unconscionable because Plaintiff happened to have been able to comply with its time limits is to engage in improper "hindsight," rather than viewing the agreement as it was at the time it was made.

This same argument has already been rejected by the court in *Wherry v. Award, Inc*. (2011), 192 Cal.App.4th 1242. In that case, the arbitration agreement required filing a claim in arbitration within 180 days of the issuance the right to sue by the DFEH, cutting short the one-year statute of limitations normally applicable. Defendants argued that this was irrelevant because the plaintiffs had actually complied with the time limit. The court found this to be "irrelevant." (*Id.* at 1249.) "[P]rotections under FEHA are for the benefit of the entire public, not just these plaintiffs. Thus, a mandatory arbitration provision required as part of an employment relationship cannot waive the statutory rights," even if these particular plaintiffs had managed to avoid such a pitfall as missing the shortened deadline.

Thus, the Court of Appeal's conclusion that the agreement's shortened time limitations are substantively unconscionable is well founded in precedent and the fact that Plaintiff actually managed to comply with the shortened deadline is irrelevant.

D. The Court of Appeal correctly concluded that the agreement's interim attorney fee provision is unconscionable.

1. The Court of Appeal correctly held that FEHA's asymmetric rule regarding attorney's fees must be applied to interim fees on a motion to compel arbitration.

Section K of the arbitration agreement 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 [¶K.])

By its terms, the clause allows recovery of attorney's fees for a party that successfully *enforces* arbitration, but denies fees to a party that successfully *resists* arbitration. It is almost invariably the employer that seeks to enforce arbitration when an employee files an action in court. Further, it is obviously Charter that is most likely to compel arbitration because it created the arbitration program and imposed it on all of its employees and job applicants. Thus, the fact that interim fees are awarded *only* for enforcement of arbitration clearly favors the employer, who in nearly every case is the party seeking to enforce arbitration. Thus, while neutral on its face, its effect strongly favors the employer.

Moreover, as the Court of Appeal here held, it violates FEHA's asymmetric rule for recovery of attorney's fees. Under FEHA, a prevailing plaintiff is virtually always entitled to recover attorney's fees while "a prevailing defendant… recover[s] attorney fees only if the plaintiff's action was frivolous, unreasonable, or groundless." (*Ramirez*, at 378; see, *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, 115; Gov. Code, § 12965(c)(6) ["a prevailing defendant shall not be awarded fees and costs unless the court finds the action was

frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so."]) Section K, by contrast, allows the defendant to recover fees on the motion to compel arbitration regardless of the merits of plaintiff's case or whether its position on arbitration was frivolous.

Court have already determined that "an arbitration clause in an employment agreement that authorized the recovery of attorney fees and costs by the prevailing party in the arbitration, rather than adopting FEHA's asymmetric standard, [is] substantively unconscionable." (*Patterson v. Sup. Ct.* (2021) 70 Cal.App.5th 473, 488 ("*Patterson"*), citing, *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, disapproved on others grounds, *Baltazar,* 62 Cal.4th 1237, 1246.) The *Patterson* court concluded, in consonance with *Ramirez,* that allowing Charter to recover attorney's fees on a motion to compel arbitration would violate the same rule and would also risk imposing a "chill on access to the courts for any employee or former employee who has an arguably meritorious argument that the Charter arbitration agreement is unenforceable. Even with a strong claim of unconscionability, an employee might not pursue it and risk a substantial award of attorney fees before arbitration begins." (*Patterson,* at 489.) Furthermore, *Patterson* noted that the motion to compel arbitration is "an integral part" of the FEHA litigation and must therefore be subject to the overall FEHA scheme regarding remedies, including attorney's fees. (*Id.*)

Ramirez agreed "with *Patterson* that paragraph K as written is unenforceable as being in violation of FEHA."

(*Ramirez,* at 378.) The only point on which they disagree is whether the clause is susceptible to an interpretation that renders it consistent with FEHA, as described below.

Although Charter briefly asserts that it believes the provision to be consistent with the requirements of FEHA, it makes no argument to actually support that contention. Instead, it argues that the Court of Appeal should have adopted the reasoning in *Patterson* and rewritten Section K of the agreement to conform with the requirements of FEHA. (OBM at 28-33.)

2. The Court of Appeal correctly held that the provision could not be reasonably be reinterpreted to incorporate asymmetric liability for attorney's fees.

Charter argues that, even if FEHA's asymmetric rule for recovery of attorney's fees must be applied to an interim fee provision, the Court of Appeal should have reinterpreted the contract to incorporate such a provision. In reality, however, this would entail rewriting Section K to include terms that are just not there and that contradict the plain and unambiguous language of the of the agreement.

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.

3. *Ramirez* is consistent with *Serpa.*

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 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. Sup. Ct.* (2010) 48 Cal.4th 665, 682 ("*Pearson*") [ambiguity regarding administrative charges]; *Roman v. Sup. Ct.* (2009) 172 Cal.App.4th 1462, 1473 ("*Roman*") [ambiguity regarding bilateral

obligations]; *Armendariz,* 24 Cal.4th 83, 113 [imposing arbitration costs on employer where agreement was silent.]) Charter's argument fails to recognize this fundamental distinction between imposing an interpretation where an agreement is silent or ambiguous, and rewriting a clear and unambiguous provision of the agreement to mean something it patently does not say.

Moreover, Charter's harping on the fact that *Serpa* severed the offending attorney's fee clause while enforcing the remainder of the agreement is also irrelevant to the issue at hand. The issue is whether a clear and unambiguous clause mandating recovery of fees for a prevailing employer can be reinterpreted to mean something it does not say: that prevailing employer may only recover fees if it is shown that the case was brought in bad faith or was frivolous.

4. *Ramirez* is consistent with *Pearson* and *Roman.*

Charter contends that in failing to interpolate FEHA's asymmetric fee rules into Section K of the agreement, *Ramirez* conflicts with this Court's rulings in *Pearson* and *Roman*. This is also not the case. Both of those cases involved ambiguities that could reasonably interpreted in a way that rendered the agreement valid.

In *Pearson*, the agreement merely had an introductory sentence indicating that the purpose of the agreement was to "to avoid the inconvenience, cost, and risk that accompany formal administrative or judicial proceedings." (*Pearson,* at 671.) The plaintiff argued that this language had the effect of improperly

limiting his ability to seek administrative remedies and was therefore void as against public policy. (*Id.,* at 680.) This Court noted that it was merely a statement of purpose and did "not in itself operate to preclude plaintiff from pursuing any administrative remedy." (*Id.*, at 681.) Moreover, even if it did limit administrative remedies to some degree, that would not be against public policy in all cases. While an arbitration agreement cannot restrict an employee's ability to file a complaint with the EEOC or the DFEH, an employee can agree to arbitrate claims that may otherwise be brought "to an administrative agency that acts as an adjudicator, rather than as a prosecutor, of employment claims, such as the Labor Commissioner in this state." (*Id.*) Thus, even if the sentence had more than "precatory" effect, it was susceptible to a reasonable interpretation that it was intended to refer only to the types of administrative claims that could be the subject of an arbitration agreement. The Court adopted this interpretation both because of the policy favoring arbitration agreements and the general rule of contract interpretation that a "contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.)

In *Roman*, the issue was whether the phraseology used by the arbitration agreement, including language like "I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application," meant that the

agreement bound only the plaintiff to arbitration and not the defendant. (*Roman,* at 1467-68.) The Court found that the agreement, read as a whole, covered "all disputes" between the parties and could therefore reasonably be understood as binding both parties. It was therefore bilateral. (*Id.*, at 1473.)

Unlike *Pearson* or *Roman,* this case involves a clear and mandatory provision directing the award of attorney's fees to a defendant who successfully compels arbitration. Nothing in the language or overall context of the agreement renders it ambiguous and there is no linguistic wiggle-room to interpolate FEHA's asymmetric rule for recovery of attorney's fees.

Notably, while Charter argues that *Ramirez* should have taken the approach of *Patterson* and interpolated FEHA's asymmetric rule regarding recovery of attorney's fees into Section K, it fails to identify any actual textual ambiguity or gaps that would allow such an interpretation. By contrast, this Court in *Pearson* specifically based its decision on the fact that clause at issue could be read (a) as a mere statement of general purpose and (b) as limited to referring to specific types of administrative actions. In *Roman,* as well, the Court looked to the agreement as a whole and found that there was no language that unambiguously rendered the agreement unilateral and that the reference to its coverage of "all disputes" could reasonably be interpreted as meaning the agreement was bilateral. With regard to the Charter agreement, however, neither Charter nor the Court of Appeal panel in *Patterson* ever identified any

particular ambiguity that would allow the "interpretation" they urge. (See, *Patterson* at 490.)

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.

5. Enforceability of the agreement was not at issue in *Patterson.*

Moreover, *Patterson* is not in conflict with *Ramirez* 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.) A summary denial is not generally a decision on the merits and has no res judicata effect where, as in *Patterson*, the issue could be raised again on appeal after judgment. (*Hoversten v. Sup. Ct.* (1999) 74 Cal.App.4th 636, 640, as modified (Sept. 20, 1999).)

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. As described, the cases are actually in agreement in concluding that the provision cannot be enforced as written. Furthermore, as set forth in detail above, *Patterson*'s conclusion that FEHA's asymmetric rule for recovery of attorney's was erroneous because the Agreement is clear and unambiguous on that issue.

E. The Court of Appeal correctly concluded that agreement's discovery provision was insufficient.

Charter also argues that the discovery provisions of the agreement are adequate and not unconscionable. *Ramirez* correctly determined that, at least as applied here, the agreement did not allow sufficient discovery for Plaintiff to investigate and vindicate her claims.

The arbitration agreement here that the arbitration will be conducted "pursuant to the Solution Channel Program Guidelines." (1AA 131.) The Guidelines allow each party "up to four (4) depositions… up to 20 total interrogatories (including subparts) and up to 15 total requests for documents to the other party, whether the interrogatories and requests for documents are sent at one time or in increments." (1AA 122.) Further, although the arbitrator is given the authority to resolve disputes over discovery, nothing in the applicable guidelines indicate that the arbitrator has the authority to expand the available discovery

beyond those limitations. (*Id.*) Finally, the rules require discovery to be completed within 90 days. (1AA 121.)

As Plaintiff explained in her opposition, given the facts of the case, she will need at least seven depositions just to establish the basic facts supporting her claims: her supervisor; the HR employee with whom she dealt; the four employees hired into her department during her leave; and a person most knowledgeable regarding Charter's policies. By contrast, employers typically only take one deposition – the plaintiff's. As such, the limit on the number of depositions affects the employee far more than the employer.

Charter faults Plaintiff for failing to present specific evidence supporting the claim that that at least seven depositions will be required. However, the necessity of these depositions is evident from the pleadings and allegations in the case. (See, 1AA 8-10.) Charter also faults *Ramirez* for evaluating the discovery procedures based on the specifics of this individual case rather than on what could reasonably be expected at the time of agreement. This criticism also fails. "Generally, unconscionability is determined 'at the time [the agreement] was made' (Civ. Code, § 1670.5), yet courts have consistently assessed unconscionability for limitations on discovery as applied to a particular plaintiff." (*Ramirez,* at 385, citing, *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 404–405.)

Moreover, the restriction of written discovery to 15 document requests and 20 interrogatories clearly imposes greater

burdens and difficulties on the employee plaintiff because all the relevant documentation is in possession of the employer. By contrast, the Code of Civil Procedure and the Federal Rules of Civil Procedure, for example, allow unlimited document requests. (See, Code Civ. Proc. § 2031.010; FRCP Rule 34.)

Finally, the requirement that all discovery be completed within 90-days creates a substantial burden to an employee's ability to vindicate her rights. As the trial court quoted in *Baxter* recognized, "[f]ew successful employment litigation attorneys will be in a position to suddenly put their practice on hold so as to accommodate this 'rocket docket' hearing procedure." (*Baxter*, 16 Cal.App.5th 713, 735.) When combined with the discovery restrictions above this extremely short timeline further enhances the unfairness of the discovery rules in the Solution Guidelines.

1. The agreement does not authorize the arbitrator to expand discovery.

Charter argues first that these limitations are merely the minimum discovery allowed and that the Guidelines permit the arbitrator to allow additional discovery when necessary. The language of the agreement, however, does not grant any such authority to the arbitrator. The actual language states:

> Any *disagreements regarding the exchange of information or depositions* will be resolved by the arbitrator to allow a full and equal opportunity to all parties to present evidence that the arbitrator deems material and relevant to the resolution of the dispute. (1AA 122 [emphasis added.])

This provision is merely a grant of authority to resolve discovery disputes. Nothing in the language implies any discretion to order *additional* discovery rather than simply resolving discovery disputes within the established limits. Where the agreement or Guidelines intend to grant the arbitrator discretion, they explicitly use such language. (See, e.g., 1AA 164 [discretion to bifurcate and manage order of proof.]) The fact that no such grant of discretion is mentioned with regard to expanding discovery demonstrates that it does not exist. Nor is this similar to the agreement in *Mercuro,* because that agreement *explicitly authorized* additional discovery on a showing of "good cause." (*Mercuro,* 96 Cal.App.4th 167, 182.) In fact, a review of the caselaw described in the next section below shows that such "safety-valve" clauses are extremely common. Had Charter intended to grant such authority to the arbitrator it could have easily done so and the fact that it did not do so demonstrates that it never intended to allow the arbitrator such authority.

Thus, there is no basis for the claim that the arbitrator has discretion under the Guidelines to order additional discovery or depositions.

2. Limitations on discovery are distinguishable from those approved in other cases.

Charter argues that these limitations are similar to those approved by the courts in other cases and merely reflect the limited discovery often used in arbitration. In fact, each of the cases is distinguishable in that they explicitly allow for more expansive discovery where necessary.

For example, while the agreement in *Dotson* allowed only one fact deposition in addition to experts, it also allowed unlimited document requests. (*Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 982.) More importantly, the agreement specifically authorized the arbitrator to allow additional depositions and discovery "upon a showing of need." (*Id.*) The agreement in *Sanchez* similarly allowed additional discovery on a showing of "substantial need," as did the agreements in *Mercuro* and *Torrecillas.* (*Sanchez v. Carmax Auto Superstores California, LLC*, *supra*, 224 Cal.App.4th 398, 404; *Mercuro*, 96 Cal.App.4th at 182; *Torrecillas v. Fitness Int'l, LLC* (2020) 52 Cal.App.5th 485, 497 ["The arbitrator may permit additional discovery at a party's request and after a showing of substantial need."]) As shown above, Charter's agreement makes no such provision for additional discovery where needed.

In addition, "*Sanchez* is inapposite because the agreement in that case required the disclosure of relevant documents with a continuing obligation to supplement." (*Leon v. Pinnacle Prop. Mgmt. Servs*. (2021) 72 Cal.App.5th 476, 494.) The agreement here has no such requirements to produce documents that have not been specifically requested and no duty to supplement.

Roman involved an agreement that incorporated the AAA rules on discovery which direct the arbitrator to allow all discovery necessary for "a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." (*Roman,* 172 Cal.App.4th 1462, 1475.) As described below, the AAA rules are not incorporated into this agreement and the

arbitrator does not have any discretion to alter the rules and limits on discovery.

Accordingly, *Ramirez's* conclusion that the agreement here, which pointedly does *not* make such a provision for additional discovery were needed, is unconscionable is well within the mainstream of authority on this issue.

3. The Court cannot infer adequate discovery where the agreement explicitly restricts discovery rights.

Next, Charter strangely argues that *Armendariz* stands for the proposition that a lack of adequate discovery should not generally be grounds to invalidate an arbitration agreement because provision of adequate discovery is implicitly incorporated into the arbitration agreement. What *Armendariz* actually says is: "The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights." (*Armendariz,* 24 Cal.4th 83, 104.) In the specific agreement at issue in *Armendariz,* it was held that the agreement had implicitly incorporated by reference the discovery rules of Code Civ. Proc. section 1283.05, which states that, after the appointment of the arbitrator, the parties have the "*right* to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures," of the Discovery Act, as if the case "were pending before a superior court of this state in a[n unlimited] civil action." (*Armendariz,* at 105 fn 10 [emphasis added.]) Thus, the Court found that that particular agreement could be read as including the right to the full scope of

discovery. The Court did *not* state that this would apply where, as here, the agreement is not ambiguous or silent on the issue.

4. The agreement does not incorporate AAA rules.

Charter also faults the Court of Appeal for failing to apply the AAA rules in order to save the arbitration agreement with respect to discovery and other issues. 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, AAA rules are only incorporated if the agreement provides for arbitration by the AAA "*without specifying particular rules*." (OBM at p.34.) The agreement, however, does specify "particular rules" other than those of the FAA. The agreement 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 and could not use the AAA rules to mitigate or override any defects in the agreement. (See, *Ramirez*, at 386 fn 10 ["The only reference to the AAA rules in either document is in relation to the selection of an arbitrator, and Charter's obligation to pay the AAA administrative fees. In fact, the arbitration agreement clearly stated the applicable rules in paragraph I: 'Arbitration hearings will be conducted pursuant to the Solution Channel Program

Guidelines.'"]) *Ramirez* also noted that, while Charter had argued in the trial court that the AAA rules expanded the arbitrator's power to order discovery, it had abandoned that argument on appeal. (*Id.*) Charter should not be allowed to "resurrect" that argument now before this court.

F. Exclusion of claims the employer is likely to raise grants the employer an unfair advantage.

Finally, the Court of Appeal found that the exclusion of certain claims from in which the employer is likely to be the plaintiff, while including all potential claims brought an employee rendered the agreement unduly one-sided. (*Ramirez*, at 382-84.) "An agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party." (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 724.) Courts recognize that "claims for injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information," are typically the types of claims more likely to be brought by an employer against and employee. (*Mercuro,* 96 Cal.App.4th 167, 176.) Further, "it is far more often the case that employers, not employees, will file" claims regarding non-compete agreements and intellectual property. (*Fitz, supra*, at 725.)

Section C of the arbitration agreement list a variety of claims excluded from arbitration. The only types of excluded claims typically made by employees are administrative claims

that are not arbitrable in any case, e.g., worker's compensation and unemployment claims. (1AA 130 [¶C.1-5.]) Worker's compensation exclusivity, for example, prevents bringing claims for workplace injuries in any context other than the worker's compensations system. (Labor Code, § 3602(a); *Amalgamated Transit Union v. Los Angeles County* (2003) 107 Cal.App.4th 673 [distinguishing claims for reinstatement from compensation for workplace injuries].) "Worker's compensation and unemployment benefits are governed by their own adjudicatory systems; neither is a proper subject matter for arbitration." (*Ramirez,* at 384, quoting, *Mercuro*, *supra*, 96 Cal.App.4th at 176.) Moreover, ERISA claims, which are also excluded, are covered by their own separate detailed plan documents and define their own claims and grievance procedures. Thus, the exclusion of employee-brought claims has little practical effect.

However, the agreement excludes most of the claims likely to brought by an employer in court against an employee: claims for injunctive relief or equitable remedies related to unfair competition, trade secrets, or confidential information; violation of severance and non-compete agreements; claims of theft, embezzlement or criminal conduct; and claims over validity of intellectual property rights. (*Id.,* [¶C.6,7,10,11.])

An employee is unlikely to initiate litigation against an employer for claims of unfair competition, breach of confidentiality, embezzlement or disputes over intellectual property rights. However, all those claims are commonly brought by employers, as recognized by the courts. Although Charter

argues that criminal issues are non-arbitrable, that is not true of civil claims arising from alleged criminal conduct. There is no bar to arbitrating civil claims of conversion, fraud or embezzlement. Nonetheless, the agreement grants Charter the right to pursue all such claims in the civil courts. In drafting this section, Charter is merely ensuring that it has the right to resort to the courts when it sees fit, while the employee is virtually always relegated to arbitration.

The remaining exclusions are also of little practical effect. They include claims that are non-arbitrable by statute, those barred by the statute of limitations, those already pending in court at the time of the agreement, and those involving separate employment or collective bargaining agreements.

The effect of these exclusions for the typical employee is that any claim that an employee is likely to assert, such as discrimination, harassment, retaliation, medical leave issues, or wage and hour claims, will be subject to arbitration. However, any claim that an employer is likely to assert against an employee, such as trade secret violations, confidentiality violations, or alleged theft or embezzlement, will not be subject to arbitration and Charter will be free file them in court.

Thus, the Court of Appeal correctly concluded that "the arbitration 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." (*Ramirez,* at 383.) Charter argues that

Ramirez erred in following *Fitz* and *Mercuro* rather than this Court's ruling in *Baltazar*. However, there is no conflict between *Baltazar* and *Mercuro* or *Fitz*.

The Court in *Baltazar* specifically cited *Mercuro* and *Fitz* did not indicate any disapproval of those cases and distinguished them from *Trivedi v. Curexo Technology Corp., supra,* 189 Cal.App.4th 387, of which it did disapprove. The plaintiff in *Baltazar* had argued that the exclusion of provision remedies and injunctions from arbitration rendered the agreement unfairly one-sided, since it is employers who typically seek such remedies. *Baltazar* rejected this argument due to the fact that the right to seek provisional remedies in court is protected by statute and the arbitration agreement therefore did nothing more than affirm "the parties' rights under [Code Civ. Proc.] section 1281.8." (*Baltazar,* at 1247.) It was on this point that the Court disapproved of *Trivedi*. At the same time, it noted that *Trivedi* was mistaken in relying on *Mercuro* and *Fitz* because the agreements in "those cases were substantively unconscionable because they 'compel[led] arbitration of the claims more likely to be brought by [the employee], the weaker party, but exempt[ed] from arbitration the types of claims that are more likely to be brought by [the employer], the stronger party.'" (*Baltazar*, at 1248 fn. 4 [quotes and brackets in original.])

Thus, this Court in *Baltazar* actually approved the essential holdings of *Fitz* and *Mercuro* that an agreement is unconscionable where it excludes claims an employer is likely to bring while including virtually all civil claims an employee is

likely to bring. *Baltazar* merely clarified that an exclusion of provision remedies on its own is not sufficient to render the agreement unconscionable.

The agreement here, though, does not only exclude provisional remedies from arbitration. It excludes all "[c]laims arising under separation or severance agreements or non-compete agreements," "[c]laims over the validity of any party's intellectual property rights" and all claims arising from alleged "theft or embezzlement," all of which are claims brought almost exclusively by employers. These claims are excluded *regardless of the remedies sought* and Charter would therefore have all the advantages of a civil lawsuit, including full discovery rights, a jury trial and right to appeal regarding such claims. By contrast, the employee is left with far more restricted rights to discovery, no jury, and no right to appeal on the claims he or she is most likely to bring.

Accordingly, *Ramirez*, should be affirmed on this point as well.

IV. CHARTER FAILS TO DEMONSTRATE THAT THE REFUSAL TO SEVER WAS AN ABUSE OF DISCRETION

A. Court of Appeal followed well-established precedent granting discretion to refuse severance where an agreement has multiple unfair provisions.

The Court of Appeal here 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,* 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, review denied, April 14, 2021; *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 918; *Leon v. Pinnacle Prop. Mgmt. Servs., supra,* 72 Cal.App.5th 476, 492.)

Here, the Court of Appeal found the agreement to be unconscionable for multiple reasons, as described above, and therefore refused to reverse the trial court's decision to deny 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*, 24 Cal.4th 83, 124.)

In fact, the provisions at issue are directly analogous to those at issue in *Davis v. Kozak, supra.* There, as in this case, the court identified "multiple defects that work to [the employer's] distinct advantage, namely, a restrictive arbitral discovery process that appears inadequate to protect vindication of [the employee's] statutory rights, plus an unjustified, non-mutual provision that exempts [the employer's] most likely claims

against employees from arbitration and allows it to pursue such claims in court with full discovery, trial, and appeal rights." (*Davis v. Kozak, supra,* 53 Cal. App. 5th at 917.) The trial court was therefore justified in "conclude[ing that] the agreement was permeated by unconscionability and should not be enforced." (*Id.*)

Moreover, a trial court's order denying severance of an unconscionable arbitration agreement is reviewed for abuse of discretion. (*See, Armendariz,* 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.

B. Charter cites no authority denying discretion to refuse severance where there is more than one unfair provision.

Finally, none of the cases cited by Charter, 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,* 172 Cal.App.4th 1462 [one unconscionable provision re: costs]; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165 [one unconscionable provision re: attorney's fees]; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77 [one provision re: costs of arbitration]; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1075 [severing "single provision that is unconscionable, the one-sided arbitration appeal."])

Charter's reliance on *Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, is also misplaced. In *Lange,* the trial court had mistakenly stated that it had no discretion to sever offending portions of the agreement when there were multiple unconscionable provisions. This was mistaken because there is no "*per se* rule" requiring non-severance in such cases. (*Id.* at 455.) However, the *Lange* court affirmed that a trial court's ruling on severance is reviewed for abuse of discretion and that a trial court could rely on the existence of "multiple unconscionable clauses… as evidence of '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.'" (*Id.* at. 454, quoting, *Armendariz,* at 124.) *Lange* concluded by affirming the trial court's decision to deny severance because it found that the agreement was permeated with unconscionability. (*Id.* at 455.) To the extent that *Lange* supports Charter's argument at all, it is inapposite because neither the trial court nor the Court of Appeal adopted a per se rule precluding

severance when more than unconscionable provision is identified. (See, *Ramirez,* at 386-87 ["severance *may* properly be denied…"])

C. Severing the discovery provision would require rewriting the agreement.

In addition, severance is not possible where "the court would have to 'reform the contract, not through severance or restriction, but by augmenting it with additional terms,' which would exceed its power to cure a contract's illegality." (*Ali v. Daylight Transp., LLC, supra,* 59 Cal.App.5th 462, 481, quoting, *Armendariz*, 24 Cal.4th at 124-25.) As described above, the agreement does not invoke or incorporate the AAA rules with regard to discovery or for any purpose other than the appointment of the arbitrator. It specifically states that discovery will be governed by the Guidelines. Thus, *Ramirez* correctly noted that if the discovery provisions were severed, "it is not at all clear on what authority the arbitrator could order *any* depositions." (*Ramirez,* at 387 fn 11 [emphasis in original.])

Based on the foregoing, the Court of Appeal's affirmance of the trial court's refusal to sever the unconscionable portions of the agreement was based on well-established law and should be affirmed by this Court.

V. CASES PRESENTED BY CHARTER IN ITS REQUEST FOR JUDICIAL NOTICE ARE OF LITTLE OR NO RELEVANCE

In addition, Charter's reference to the large number of unpublished trial court and out-of-state decisions enforcing the agreement is largely irrelevant. First, this Court is not bound by trial court decisions of any kind. Second, out-of-state decisions

applying non-California are largely irrelevant to the question of whether the Agreement is unconscionable under California law and precedent, which the Court of Appeal was required to follow here. In fact, federal district courts are generally required to defer to the Court of Appeal in matters of state law and absolutely required to follow the rulings of this Court on matters of state 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."])

California state superior court decisions are also irrelevant and should not be given any weight because "a written trial court ruling has no precedential value," and therefore cannot be cited, even for persuasive purposes. (*Santa Ana Hospital Medical Center v. Belshé* (1997) 56 Cal.App.4th 819, 831.)

Finally, the vast majority of the decisions presented in Charter's request for judicial notice do not address the issues of unconscionability and therefore shed no light on the issues at hand. Of those that do address the issue of unconscionability, many of the cases involve plaintiffs that were given the opportunity to "opt-out" of the agreement. (See, e.g., *Gonzales v. Charter Commc'ns, LLC* (C.D. Cal. 2020) 497 F. Supp. 3d 844; *Moorman v. Charter Commc'ns, LLC* (W.D. Wis. 2019) 2019 WL 1930116; *Castorena v. Charter Commc'ns, LLC* (C.D. Cal. 2018) 2018 WL 10806903; *Esquival v. Charter Commc'ns, LLC* (C.D. Cal. 2018) 2018 WL 10806904; *Krohn v. Spectrum Gulf Coast,*

LLC (N.D. Texas 2019) 2019 WL 4572833; *Prizler v. Charter Commc'ns, LLC* (S.D. Cal. 2019) 2019 WL 2269974.) Plaintiff in this case had no such opt-out ability. The arbitration agreement "was a mandatory condition of employment." (*Ramirez*, at 372; see, 1AA 88-90, Fries Decl., explaining that the consent was mandatory and a condition of employment; 1AA 112, 117.)

As such, the cases presented by Charter in its Request for Judicial Notice are of little or no relevance to the issues before the court here.

VI. APPLICATION OF ESTABLISHED PRECEDENT DOES NOT VIOLATE 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 III"*)). 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. (See, e.g., *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."

Moreover, the United States Supreme Court has recently clarified that there is no policy favoring arbitration per se under

the FAA. The FAA was intended to eliminate the bias against arbitration contracts and make them just "as enforceable as other contracts, **but not more so**." (*Morgan v. Sundance, Inc.* (2022) 142 S. Ct. 1708, 1713, quoting, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, n. 12 [emphasis added.]) "The federal policy is about treating arbitration contracts like all others, **not about fostering arbitration**." (*Id.* [emphasis added.]) Thus, just as courts may not adopt special arbitration-specific rules *disfavoring* arbitration, they also may not adopt "custom-made rules, to tilt the playing field in favor of… arbitration." (*Id*., at 1714.). What Charter is seeking here is to exempt its arbitration agreement from the normally applicable rules of unconscionability because it wishes the courts to grant greater deference to arbitration agreements than that granted to other contracts. This is the approach that the Supreme Court explicitly rejected in *Morgan v. Sundance* and this Court should not be persuaded to adopt it now.

Under the established precedent of this Court and of the United States Supreme Court, the unconscionability analysis applied in *Ramirez* is perfectly valid and in consonance with the FAA.

VII. CONCLUSION

Based on the foregoing, the decision of the Court of Appeal should be affirmed in full.

DATED: December 12, 2022 **PANITZ LAW GROUP APC**

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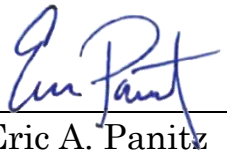
CERTIFICATE OF WORD COUNT

The text of Respondent's Answering Brief on the Merits consists of 10,712 words as counted by the Microsoft Word 2016 word-processing program used to generate this brief.

DATED: December 12, 2022 **PANITZ LAW GROUP APC**



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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 years and am employed in the county of Los Angeles, State of California. I am not a party to this action. My business address is 18000 Studebaker Road, Suite 700 Cerritos, CA 90703.

On the date below, I served the foregoing document(s) described as: **Answering Brief on the Merits** via electronic service pursuant to applicable Rules of Court and the Code of Civil Procedure (transmitted via the court's TrueFiling system to email address(es) on file) to the following:

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I declare under penalty of perjury pursuant the laws of the State of California that the foregoing is true and correct. Executed on December 12, 2022 in Cerritos, California.

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

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RAMIREZ v. CHARTER COMMUNICATIONS**
Case Number: **S273802**
Lower Court Case Number: **B309408**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **eric@panitzlaw.com**

3. I served by email a copy of the following document(s) indicated below:

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ANSWER TO PETITION FOR REVIEW (FEE PREVIOUSLY PAID)	22.12.12 Answering Brief on Merits

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/12/2022
Date

/s/Eric Panitz
Signature

Panitz, Eric (243877)
Last Name, First Name (PNum)

Panitz Law Group APC
Law Firm