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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

CHERYL OLDHAM,
Plaintiff and Respondent,

vs.

LARRY FLYNT et al.,
Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
JUDITH C. CHIRLIN, JUDGE • BC353508

APPELLANTS' OPENING BRIEF

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* * *

REMINDER: INCLUDE FILE-STAMPED COPY OF CERTIFICATE OF INTERESTED ENTITIES OR PERSONS HERE
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutions

Court Rules

Miscellaneous

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INTRODUCTION

This is an appeal by L.F.P., Inc. (LFP), LFP Video, Inc., Flynt Management Group LLC, Larry Flynt, and Lyn Heller (collectively, the Flynt Defendants) from an order denying their motion to compel arbitration based upon LFP's written employment arbitration agreement with plaintiff Cheryl Oldham. Among other terms, the arbitration agreement includes provisions providing for: (1) enhanced judicial review of any resulting arbitration award; and (2) a right to one

deposition per side, with additional discovery permitted at the arbitrator's discretion. The trial court denied the motion to compel arbitration based on its determination that these two provisions in the agreement are unenforceable and rendered the entire agreement void.

The trial court was wrong as a matter of law. Its ruling is inconsistent with the Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), which identified five requirements for the enforcement of a pre-dispute employment arbitration agreement where the employee seeks to vindicate statutory rights under the Fair Employment and Housing Act (FEHA), as Oldham does here. As we demonstrate, the LFP agreement complies with the *Armendariz* requirements.

First, the trial court is wrong about the enhanced judicial review provision. That provision is enforceable under California arbitration law and, if not, then that law is preempted by federal law. *Armendariz* requires an arbitrator's written findings in FEHA cases to include "the essential findings and conclusions on which the award is based"and contemplates this will facilitate heightened judicial review of the arbitration award. (*Armendariz*, *supra*, 24 Cal.4th at p. 107.) LFP's agreement complied with *Armendariz* by requiring the arbitrator's written award to include the essential findings and conclusions, and providing for judicial review of the award for legal and factual errors. Thus, the judicial review provision is enforceable.

To the extent the trial court is correct that California arbitration law (and not generally applicable principles of contract law) precludes enforcement of the agreement's judicial review provision, the law would be preempted by the Federal Arbitration Act (FAA).

Second, *Armendariz* requires an employment arbitration agreement to provide employees adequate and sufficient discovery necessary for the vindication of FEHA claims, which *Armendariz* contemplated can be something less than the scope of discovery permitted by the California Arbitration Act (CAA). Here, by contrast, the arbitration agreement permits by right each party to take one deposition (one more than permitted by the CAA) and additional discovery of any type, including depositions, permitted at the discretion of the arbitrator. Accordingly, the discovery provision here comports with California law and is enforceable.

As a result, this court should reverse with directions to the trial court to grant the motion compelling arbitration. At a minimum, the trial court should be directed to enforce the arbitration agreement by severing the two offending provisions, as requested by the Flynt Defendants. It was an abuse of discretion not to do so.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Oldham agreed to arbitrate any employment-related disputes she had with LFP.

Oldham began working at LFP as an executive assistant in January 1999 and, at that time, acknowledged receiving the then governing version of LFP's employee handbook from 1993. (2 CT 335, 378, 379, 384.[1/]) LFP updated its employee handbook in August 1999, which, by its terms, replaced all prior versions of the employee handbook. (1 CT 93; 2 CT 388.) The updated handbook was forwarded to all LFP employees in October 1999. (2 CT 379, 386.)

The 1999 handbook contained a broad mandatory arbitration provision applicable to all employment-related disputes, including claims of "racial, sexual or other discrimination or harassment." (1 CT 119.) Oldham executed an acknowledgment of receipt for the 1999 handbook on January 7, 2000. (1 CT 88; 2 CT 388.) Specifically, Oldham acknowledged that she read the 1999 handbook and understood and agreed to the terms of the policies, procedures, and conditions of employment contained therein. (2 CT 388.) With respect to arbitration, she further expressly acknowledged that "the agreement

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1/ "CT" refers to the Clerk's Transcript filed in response to the December 26, 2006 notice of appeal. The December 26, 2006, appeal was later consolidated with the February 27, 2007 notice of appeal. "2/27/07 CT" refers to the Clerk's Transcript filed in response to the February 27, 2007 notice of appeal.

to arbitrate may not be waived without a written document signed by either the Chairman of the Board or President of LFP, on the one hand, and by me, on the other hand." (*Ibid*.)

B. The arbitration agreement between Oldham and LFP included provisions for discovery and judicial review.

The arbitration agreement delineated the applicable scope of discovery for the arbitration proceedings as follows: "Each party shall be entitled to take one deposition, and to take any other discovery as is permitted by the Arbitrator. In determining the extent of discovery, the Arbitrator shall exercise discretion, but shall consider the expense of the desired discovery and the importance of the discovery to a just adjudication." (1 CT 119.)

The agreement required the arbitrator to "render a decision which conforms to the facts, supported by competent evidence." (1 CT 119.) In addition, the agreement provided: "Any party may apply to a court of competent jurisdiction for entry of judgment on the arbitration award. The court shall review the arbitration award, including the ruling and findings of fact, and shall determine whether they are supported by competent evidence and by a proper application of law to the facts. If the court finds that the award is properly supported by the facts and law, then it shall enter judgment on the award; if the court finds that the award is not supported by the facts or the law, then the court may enter a different judgment (if such is

compelled by uncontradicted evidence) or may direct the parties to return to arbitration for further proceedings consistent with the order of the court." (*Ibid.*)

C. Notwithstanding the arbitration agreement, Oldham sued the Flynt Defendants in superior court.

Oldham filed this action against the Flynt Defendants alleging sex and age harassment, discrimination, and retaliation in violation of FEHA. (1 CT 6-19.)

After the complaint was filed, the Flynt Defendants notified Oldham that they would be moving to compel arbitration, unless she stipulated to having her claims resolved in arbitration, as required by her employment agreement. (1 CT 86, 123.) The Flynt Defendants agreed to pay all the forum fees and expenses associated with the arbitration. (1 CT 123.)

D. The Flynt Defendants moved to compel arbitration.

The Flynt Defendants moved to compel arbitration pursuant to the mandatory arbitration provision contained in LFP's employee handbook. (1 CT 75-83, 88, 90-119.)

Oldham opposed the motion on numerous grounds, including that the judicial review and discovery provisions were unenforceable and not severable. (1 CT 126-144.) In support of her motion, Oldham

attached 29 exhibits and three declarations. (1 CT 145-209; 2 CT 210-355.) Only ten exhibits and one supporting declaration related to Oldham's action (1 CT 145-177, 187-189, 206-209; 2 CT 330-331, 335-348); the remaining two-thirds of the exhibits and supporting declarations pertained to other arbitration proceedings against LFP and Flynt involving other plaintiffs. (1 CT 179-186, 191-204; 2 CT 211-328, 332-334, 349-354; compare 2 CT 335-337 with 2 CT 332-334, 354-355.) The Flynt Defendants objected to the irrelevant declarations, and attached exhibits. (2 CT 369-376.)

E. The trial court denied the motion to compel arbitration. This appeal followed.

The trial court denied the Flynt Defendants' motion to compel on the sole basis that the enhanced judicial review provision and the discovery provision were unenforceable and non-severable. (1 RT 7; 2 CT 402, 403-404; 2/27/07 CT 12-13.) The trial court did not rule on the Flynt Defendants' objections to Oldham's irrelevant evidence. (2 CT 402-404.)

The Flynt Defendants appealed from the November 1, 2006 minute order denying their motion to compel and separately appealed from the January 19, 2007 written order denying the motion to compel. (2 CT 409-410; 2/27/07 CT 12-13.) On May 2, 2007, this court granted the Flynt Defendants' motion to consolidate the two appeals.

STATEMENT OF APPEALABILITY

The Flynt Defendants' appeal is from an order denying their motion to compel arbitration. (See Code Civ. Proc., § 1294, subd. (a).)

LEGAL DISCUSSION

I.

THE TRIAL COURT ERRONEOUSLY DENIED THE FLYNT DEFENDANTS' MOTION TO COMPEL ARBITRATION.

A. Enforcement of arbitration agreements is favored under the law.

California has a strong public policy favoring arbitration as a speedy and relatively inexpensive means of dispute resolution. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*); *Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401, 407 (*Jones*).) Accordingly, any "doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration." (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323; *Moncharsh*, at p. 9 [courts will "'indulge every intendment to give effect to such proceedings'"].)

When a party petitions to compel arbitration, a court must order arbitration if it determines that an agreement to arbitrate the

controversy exists, except in very limited circumstances. (Code Civ. Proc., § 1281.2.) Indeed, "under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (*Armendariz*, *supra*, 24 Cal.4th at p. 98; Code Civ. Proc., § 1281.)

Where, as here, the validity of an arbitration agreement does not depend on the evaluation of extrinsic evidence, this court engages in de novo review of the trial court's order denying the motion to compel. (See *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527; *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708 (*Fittante*).)

The California Supreme Court has identified five requirements for the enforcement of a pre-dispute arbitration agreement arising out of an employment relationship where the employee seeks to vindicate statutory rights under the FEHA, as is the case here: (1) it must provide for a written decision including the arbitrator's essential findings and conclusions to allow for judicial review; (2) it must provide for adequate discovery; (3) it may not limit remedies that would otherwise be available in court; (4) it must provide for a neutral arbitrator; and (5) it must not require the employee to pay unreasonable costs and fees. (*Armendariz*, *supra*, 24 Cal.4th at pp. 102, 103 & fn. 8.) In addition, as with all other arbitration agreements, to be unenforceable, an employment arbitration agreement must be both procedurally and substantively unconscionable. (*Id.* at p. 114.)

Here, the trial court refused to enforce the parties' arbitration agreement because it found the judicial review and discovery provisions invalid. (1 RT 7; 2 CT 402, 403-404; 2/27/07 CT 12-13.) As we demonstrate below, the trial court erred because the agreement meets all of the *Armendariz* requirements for enforceability.

B. The parties' agreement for enhanced judicial review is enforceable.

1. *Armendariz* requires some form of enhanced judicial review for FEHA claims.

The Supreme Court has held that some level of additional judicial scrutiny is required for arbitration proceedings involving FEHA cases: "[J]udicial review may be appropriate when 'granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights.'" (*Armendariz*, *supra*, 24 Cal.4th at p. 106.) While acknowledging that the lack of judicial review of arbitration awards might "'make[ ] the vindication of FEHA rights in arbitration illusory,'" the Court declined to articulate the precise standard of judicial review "'sufficient to ensure that arbitrators comply with the requirements of'" FEHA because it was not faced with a petition to confirm an arbitration award. (*Ibid.*)

The Supreme Court ensured that such heightened review would be possible by requiring that an arbitrator must "issue a written

arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based," even though "such written findings and conclusions are not required under the CAA" (Code Civ. Proc., § 1283.4) in other cases. (*Armendariz*, *supra*, 24 Cal.4th at p. 107; see also *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1080-1081 (*Little*) [extending *Armendariz* requirements to wrongful termination in violation of public policy claims]; Knight et al., Cal. Practice Guide: Alternative Dispute Resolution, Contractual Arbitration (The Rutter Group 2006) ¶ 5:456.3 ["A reasoned award is required in an arbitration adjudicating a [FEHA] [citation] discrimination claim and *some enhanced judicial review* of such an award may be required"]; cf. *Baldwin Co. v. Rainey Construction Co.* (1991) 229 Cal.App.3d 1053, 1058, fn. 3 [in a non-FEHA case, "there is no rule [in the CAA] that an arbitrator must find facts and give reasons for the award"].) Generally, an arbitrator's decision can be clearly erroneous, cause substantial injustice and still not warrant judicial intervention (*Moncharsh*, *supra*, 3 Cal.4th at pp. 1, 27) —making written findings and conclusions unnecessary. Thus, the written findings and conclusions requirement for FEHA claims contemplates actual review of the arbitrator's findings. Otherwise, the requirement would be meaningless.

The LFP agreement complies with *Armendariz*'s directive to ensure serious review of FEHA arbitration awards by requiring the arbitrator to issue a written opinion justifying the award, including "written findings of fact," the evidentiary basis of each factual finding, and an explanation of "how the findings of facts justify [the

arbitrator's] ruling." (1 CT 119.) The LFP agreement also explicitly provides for enhanced judicial review of the arbitrator's award. (*Ibid*.) This review is precisely the type of additional judicial review contemplated by *Armendariz* as necessary to protect an employee from an arbitrator's arbitrary, capricious, and clearly erroneous decision-making, making the vindication of FEHA rights possible. Accordingly, the trial court's finding that the provision for enhanced judicial review is unenforceable ignores the rationale for *Armendariz*'s written findings and conclusions requirement—to ensure that arbitration awards adjudicating FEHA claims are given greater judicial scrutiny than arbitration awards in other contexts in order to protect employees' statutory rights.

2. Special rules for FEHA claims aside, the trial court's reliance on *Crowell v. Downey Community Hospital* is misplaced.

Instead of relying upon the directive *Armendariz* provided for FEHA cases to ensure additional review of an arbitration award, the trial court relied upon *Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal.App.4th 730 (*Crowell*), a non-FEHA case involving an arbitration agreement between a professional medical corporation and a hospital, to support its determination that the enhanced judicial review provision was unenforceable. (2/27/07 CT 7; see also 1 RT 7.) *Crowell* held that the parties could not contract for expanded judicial

review of the arbitrator's award because the grounds of review specified in the CAA, sections 1286.2 and 1286.6 of the Code of Civil Procedure, are the exclusive grounds for reviewing an arbitration award.[2/] (*Crowell,* at p. 739.) Even if *Crowell* were correct for non-FEHA cases, it would not control a FEHA case governed by *Armendariz*. However, as we now explain, *Crowell* is wrong for all cases.

The dissent in *Crowell* correctly explained that the majority opinion is inconsistent with Supreme Court authority. (*Crowell*, *supra*, 95 Cal.App.4th at pp. 743-745, (dis. opn. of Nott, J.).) While, in *Moncharsh*, the Supreme Court held that "an arbitrator's decision is not *generally* reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice," there, the parties' agreement specified that the arbitrator's decision would be both binding and final. (*Moncharsh*, *supra*, 3 Cal.4th at pp. 6, 9, emphasis added.) Thus, the arbitrator's decision in *Moncharsh* was "final and conclusive *because the parties have agreed that it be so*." (*Id.* at p. 10.) So, by refusing to allow judicial review, even of a clearly erroneous decision, the Court was "simply assur[ing] that the parties receive[d] the benefit of their bargain." (*Ibid.*)

2/ The issue of whether parties, in general, can contract for expanded judicial review is presently before the California Supreme Court in *Cable Connection, Inc. v. DIRECTV, Inc.* (2006) 143 Cal.App.4th 207, review granted Dec. 20, 2006, S147767, and in the United States Supreme Court under the FAA in *Hall Street Associates, L.L.C. v. Mattell, Inc.* (9th Cir. Aug. 1, 2006, Nos. 05-35721, 05-35906) 2006 WL 2193411 (nonpub. opn.), cert. granted May 29, 2007, No. 06-989.

Indeed, the Court explicitly contemplated contractual agreements for higher levels of judicial review: "'*[I]n the absence of some limiting clause in the arbitration agreement*, the merits of the award, either on questions of fact or law, may not be reviewed except as provided in the statute." (*Moncharsh*, *supra*, 3 Cal.4th at p. 25, emphasis added; see also *Wagner Const. Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 29 ["[t]he parties may avoid this risk [of arbitrator error], if they wish, by specifically agreeing that the arbitrators must act in conformity with rules of law"]; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 57 [115 S.Ct. 1212, 131 L.Ed.2d 76] (*Mastrobuono*) ["'Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit'"].) Moreover, many federal courts[3/], sister state courts[4/],

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3/ See *Puerto Rico Telephone v. U.S. Phone Mfg.* (1st Cir. 2005) 427 F.3d 21, 31; *Roadway Package System, Inc. v. Kayser* (3d Cir. 2001) 257 F.3d 287, 288; *Syncor Intern. Corp. v. McLeland* (4th Cir. Aug. 11, 1997, No. 96-2261) 1997 WL 452245 (per curiam, unpublished); and *Gateway Technologies v. MCI Telecommunications* (5th Cir. 1995) 64 F.3d 993, 997 & fn. 3. But see, e.g., *Kyocera Corp. v. Prudential-Bache* (9th Cir. 2003) 341 F.3d 987, 1000 (en banc) (*Kyocera*).

4/ See *Weinstock v. Weinstock* (N.J.Super.Ct. App.Div. 2005) 377 N.J. Super. 182, 189 [871 A.2d 776, 780]; *Northern Indiana Commuter Transp. Dist. v. Chicago Southshore and South Bend R.R.* (Ind.App. 2001) 744 N.E.2d 490, 494-495; *Maluszewski v. Allstate Ins. Co.* (1994) 34 Conn.App. 27, 32 [640 A.2d 129, 132]; *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.* (Tex.App. 2003) 105 S.W.3d 244, 251; and *Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GmbH* (R.I. 2001) 765 A.2d 1226, 1233.

and commentators[5/] agree that parties should have the freedom to contract for enhanced judicial review.

Since parties should be permitted to contract for judicial review beyond the limited statutory bases set forth in the CAA, the enhanced judicial review provision in the LFP arbitration agreement is enforceable.

3. To the extent California arbitration law precludes enforcement of the LFP agreement's enhanced judicial review provision, it is preempted by the Federal Arbitration Act.

The FAA *preempts* state laws that target arbitration agreements for invalidity for reasons unique to arbitration: "Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 682, 687 [116 S.Ct. 1652, 134 L.Ed.2d 902]; see also U.S. Const., art. VI, cl. 2; *Mastrobuono*, *supra*, 514 U.S. at pp. 53-54.) Rather, the FAA "preclude[s] [s]tates from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *(Doctor's Associates,* at p. 687; see

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5/ See, e.g., Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act* in Arbitration Law in America: A Critical Assessment (Brunet et al. edits, 2006) p. 107; and Moses, *Expanded Judicial Review of Arbitral Awards* (2004) 52 U. Kan. L.Rev. 129, 437.

also *Volt Info. Sciences v. Bd. of Trustees* (1989) 489 U.S. 468, 478 [109 S.Ct. 1248, 103 L.Ed.2d 488] [federal law preempts state law that is inconsistent with or "undermine[s] the goals and policies of the FAA"]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-11 [104 S.Ct. 852, 79 L.Ed.2d 1] [Congress intended the FAA to apply in state courts and preempt state anti-arbitration laws to the contrary]; *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 281 [115 S.Ct. 834, 130 L.Ed.2d 753] [a federal common law of arbitrability preempts state law disfavoring arbitration].)

"[I]n assessing the rights of litigants to enforce an arbitration agreement," a court is not free to "construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." (*Perry v. Thomas* (1987) 482 U.S. 483, 492, fn. 9 [107 S.Ct. 2520, 96 L.Ed.2d 426].) The court below refused to allow the parties the benefit of their contractual language, finding the extra judicial review provision unenforceable based on *Crowell*'s holding that Code of Civil Procedure sections 1286.2 and 1286.6 (the CAA) preclude private parties from contracting for expanded judicial review of arbitral decisions.

State law in California generally protects contracting parties by ensuring that they receive the benefit of their bargain. (See, e.g., *AIU Ins. v. Superior Court* (1990) 51 Cal. 3d 807, 821-822; Civ. Code, § 1636; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Thus, the interpretation of sections 1286.2 and 1286.6 in *Crowell* which does not give effect to the parties' agreement is preempted by federal law

because it applies a rule of law specific only to arbitration contracts that is contrary to the more general rules applicable to all other contracts. (Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act* in Arbitration Law in America: A Critical Assessment, *supra*, p. 107 [enhanced judicial review provisions "should be enforced to advance the principle that arbitration agreements should be enforced 'save upon such grounds as exist at law or in equity for the revocation of any contract'"]; Moses, *Expanded Judicial Review of Arbitral Awards*, *supra*, 52 U. Kan. L.Rev. at p. 437 ["if a court denies expanded judicial review in order to preserve the independence of the arbitral process, the parties' agreement will not be enforced according to its terms"]; see also *id*. at p. 443 [courts that do not permit enhanced judicial review ignore "the critical issue of treating the parties' agreement like any other contract"].) Therefore, the FAA preempts any application of California arbitration law which precludes enforcement of the expanded judicial review provision in LFP's agreement.

C. The LFP agreement provides for ample discovery, as required by *Armendariz*.

The Supreme Court in *Armendariz* explained that some discovery is necessary for the vindication of FEHA claims. (*Armendariz*, *supra*, 24 Cal.4th at p. 104.) Employees are at least entitled to "discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the

arbitrator(s) and subject to limited judicial review pursuant to Code of Civil Procedure section 1286.2 ." (*Id.* at p. 106.)

"Adequate discovery is not synonymous with unfettered discovery." (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 118 (*Martinez*); *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 184 (*Mercuro*).) The employee's entitlement to discovery must be balanced with the nature of the arbitration process, in which a limitation on discovery is an important component "absent more specific statutory or contractual provisions." (*Armendariz*, *supra*, 24 Cal.4th at p. 106, fn. 11; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 689 ["Limited discovery rights are the hallmark of arbitration"].) Indeed, as the Supreme Court recognized, adequate discovery can be "something *less than* the full panopoly of discovery provided in [the CAA]." (*Armendariz*, at p. 105.)

The LFP agreement provides for more generous deposition discovery than permitted under the CAA. The CAA does not permit *any* depositions without the arbitrator's prior consent. (Code Civ. Proc., § 1283.05, subd. (e).) By contrast, the LFP agreement guarantees each side one deposition and then additional depositions as permitted by the arbitrator. (1 CT 119.)

The LFP agreement also gives the arbitrator the discretion to grant an unlimited number of additional discovery requests of any type: "In determining the extent of discovery, the Arbitrator shall exercise discretion, but shall consider the expense of the desired discovery and the importance of the discovery to a just adjudication."

(1 CT 119.) These considerations are exactly the factors endorsed by *Armendariz*. (*Armendariz*, *supra*, 24 Cal.4th at p. 106, fn. 11 ["[t]he arbitrator and reviewing court *must* balance th[e] desirable simplicity [of arbitration] with the requirements of the FEHA in determining the appropriate discovery, absent more specific statutory or contractual provisions" (emphasis added)]; see also *Mercuro*, *supra*, 96 Cal.App.4th at p. 184 ["Ultimately it is up to the arbitrator and the reviewing court to balance the need for simplicity in arbitration with the discovery needs of the parties"].) In prior cases, provisions restricting the arbitrator's discretion to allow additional discovery (unlike the provision here) have been held enforceable. (See *Mercuro*, at pp. 182-183 [arbitrator could grant discovery requests "'only upon a showing of good cause,'" "'with a presumption against increasing the aggregate limit on requests'"]; *Martinez*, *supra*, 118 Cal.App.4th at p. 118 [additional discovery requested allowed upon showing of "'substantial need'"].)

The LFP agreement provides the balanced approach to discovery in FEHA arbitrations contemplated by *Armendariz*. It guarantees deposition discovery beyond that which is permitted under the CAA, yet places a reasonable limit (one deposition by right) in light of the nature of arbitration, and further provides arbitrators the same broad discretion to grant additional discovery requests as would be allowed if the arbitration agreement incorporated the CAA. Accordingly, the trial court erred as a matter of law in finding the discovery provision invalid.

D. The remaining *Armendariz* requirements are met by the LFP agreement.

The trial court did not address any of the remaining *Armendariz* factors in its order. As we now show, the LFP agreement meets those other requirements as well.

1. Oldham is entitled to the same relief in arbitration as is otherwise available in court.

Consistent with *Armendariz*, the LFP agreement contains no limit on the remedies available to Oldham through arbitration. (*Armendariz*, *supra*, 24 Cal.4th at pp. 103-104; see 1 CT 119.)

2. The LFP agreement does not require Oldham to pay any arbitration costs or fees.

An employment arbitration agreement cannot require an employee to pay for expenses beyond those she would have paid to file the action in court. (*Armendariz*, *supra*, 24 Cal.4th at pp. 110-111.) Consistent with this requirement, the LFP agreement does not require Oldham to bear any arbitration costs. (1 CT 119.) Rather, it is silent as to the allocation of arbitration costs and fees, meaning that LFP impliedly agrees to pay all costs. (See *Armendariz*, at p. 113; *Little*, *supra*, 29 Cal.4th at p. 1084; *Fittante*, *supra*, 105 Cal.App.4th at p. 719.) The

Flynt Defendants made this implied obligation explicit by agreeing to pay the costs of arbitration after Oldham filed this action. (1 CT 123.)

3. The LFP agreement ensures a neutral arbitrator will preside over the arbitration proceedings.

The LFP agreement provides for a neutral arbitrator. (1 CT 119.)

4. All disputes between Oldham and LFP are subject to arbitration, rendering the agreement substantively conscionable.

An arbitration agreement must contain a "'modicum of bilaterality'" to be substantively conscionable. (*Armendariz*, *supra*, 24 Cal.4th at pp. 118, 119.) If both the employer and employee are required to arbitrate all disputes arising out of the employment relationship, the arbitration agreement satisfies this bilaterality requirement. (*Jones*, *supra*, 130 Cal.App.4th at pp. 415-416; *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 100; *Armendariz*, at p. 120.) The LFP agreement satisfies this requirement because it applies to any "dispute between LFP (or any of its officers, directors or employees) and any employee of LFP, which is in any way related to the employment of the employee . . . ."[6/] (1 CT 119; see also *Jones*, at

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6/ As we have demonstrated, the LFP agreement is overwhelmingly (continued...)

p. 416 ["The provision binds both parties. Nothing in it gives one party greater rights or protections than those provided to the other"]; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213 [arbitration enforceable as substantively conscionable where "clause applies equally to employer and employee"].)

II.

EVEN IF PORTIONS OF THE ARBITRATION AGREEMENT ARE INVALID, REVERSAL IS STILL REQUIRED TO SEVER THE UNENFORCEABLE PROVISIONS AND COMPEL ARBITRATION.

A. Courts should attempt to sever unenforceable provisions in order to preserve the contracted for arbitration agreement.

A "heightened-scrutiny" abuse of discretion standard governs the trial court's determination whether to sever unconscionable provisions from an arbitration agreement or refuse its enforcement.

6/ (...continued)
substantively conscionable and meets all the *Armendariz* requirements. (*Ante*, pp. 8-21.) Thus, even if it were adhesive (it is not), the agreement is enforceable. (See *Armendariz*, *supra*, 24 Cal.4th at p. 114 [both procedural and substantive unconscionability must be present for an agreement to be unenforceable]; *Jones*, *supra*, 130 Cal.App.4th at pp. 415-416 [contract of adhesion enforceable because the "arbitration clause satisfies the requirement of mutuality"].)

(*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1411; *Armendariz*, *supra*, 24 Cal.4th at pp. 122, 124.) "[R]efusing to enforce the entire agreement is an option 'only when an agreement is "permeated" by unconscionability.'" (*Harper*, at p. 1411, quoting Legis. Com. com., 9 West's Ann. Civ. Code (1985 ed.) foll. § 1670.5, p. 494; Civ. Code, § 1670.5, subd. (a); see also *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 910 [severing provision requiring out of state arbitration because "[i]t is not necessary to throw the baby out with the bath water"].) Otherwise, where the agreement is not permeated by unconscionability, the court "may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results." (Legis. Com. com., 9 West's Ann. Civ. Code, *supra*, foll. § 1670.5, p. 494.)

The "overarching inquiry" in the severance determination is whether "'"the interests of justice . . . would be furthered"' by severance." (*Armendariz*, *supra*, 24 Cal.4th at p. 124.) Courts should sever invalid terms as a matter of public policy rather than void an entire contract in order to: (1) "prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement"; and (2) "conserve a contractual relationship if to do so would not be condoning an illegal scheme." (*Id*. at pp. 123-124.) Thus, "[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such

severance and restriction are appropriate." (*Id*. at p. 124.) Put another way, "[i]f the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." (*Ibid*.)

In *Armendariz*, "permeation [was] indicated by the fact that there [was] no single provision a court [could] strike or restrict in order to remove the unconscionable taint from the agreement." (*Armendariz*, *supra*, 24 Cal.4th at pp. 124-125.) That was particularly so because the agreement lacked mutuality by requiring "the arbitration of employee—but not employer—claims arising out of a wrongful termination." (*Id.* at p. 120.) The only cure for the contract's lack of mutuality would have been for the court to, "in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms"—a resolution not authorized by statute, or the court's inherent authority. (*Id.* at pp. 124-125.)

As we explain in the following two sections, the LFP agreement does not suffer any lack of mutuality, and both the enhanced judicial review provision and discovery provision can be severed without any reformation of the contract.

B. The judicial review provision, if invalid, should be severed, as it is collateral to the arbitration proceeding and severance would not require any contract reformation.

Numerous courts have severed clauses allowing for extra review of an arbitration award, whether by other arbitrators or through the court system. (See, e.g., *Beynon v. Garden Grove Medical Group* (1980) 100 Cal.App.3d 698 [finding unenforceable and severing a provision in the arbitration agreement allowing only the drafting party the option of rejecting the arbitrator's decision and choosing to have the dispute resubmitted in its entirety to a second panel of arbitrators]; *Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1076-1077 [finding unenforceable and severing a trial de novo clause in an arbitration agreement between a doctor and a patient providing that either party could disregard any arbitral award exceeding $25,000 because, in effect, the clause operated to "tilt the playing field in favor of the doctor"]; *Armendariz*, *supra*, 24 Cal.4 at p. 127 [endorsing the severance findings in *Beynon* and *Saika*]; *Fittante*, *supra*, 105 Cal.App.4th at pp. 725-727 [severing a provision allowing appeal of awards exceeding $50,000 to a second arbitrator].)

Most notably, in *Little*, the California Supreme Court found a provision allowing for arbitration awards exceeding $50,000 to be reviewed on appeal by a second arbitrator substantively unconscionable because it benefitted only the employer, who was the party most likely to face such a significant adverse judgment. (*Little*,

supra, 29 Cal.4th at pp. 1071, 1073.) The Court enforced the arbitration agreement, severing the single unconscionable provision because "no contract reformation [was] required—the offending provision [could] be severed and the rest of the arbitration agreement left intact." (*Id.* at p. 1075.)

Kyocera, *supra*, 341 F.3d 987, 1001, although a non-FEHA case, is directly on point with respect to the severance question. The Ninth Circuit, applying California law, severed a judicial review provision nearly identical to that contained in the LFP agreement, which permitted the district court to vacate the arbitrator's award if either the factual findings were not based on substantial evidence or the conclusions of law were erroneous. (*Id.* at pp. 990-991.) The court found that the "expanded scope-of-review terms should be severed from the remainder of the arbitration clause," because, like *Little*, no contract reformation was necessary to leave the rest of the agreement intact. (*Id.* at p. 1001.) Rather, the Ninth Circuit explained that "the flaw manifest in the terms of appellate review [did] not permeate any other portion of the arbitration clause, and the review provisions [were] not interdependent with any other." (*Id.* at pp. 1001-1002.) *Kyocera* reasoned that "if internal arbitral review was not sufficiently cental to the purpose of an arbitration process to defeat severability [in *Little*], then surely the external scope of *judicial* review is not sufficiently central to the arbitration clause to defeat severability." (*Id.* at p. 1002; see also *Oakland-Alameda County Coliseum Authority v. CC Partners* (2002) 101 Cal.App.4th 635, 647 [in a non-FEHA case, severing an

enhanced judicial review provision similar to the one in the LFP agreement].)

Accordingly, if this court finds that the judicial review provision is unenforceable, the court should order the provision to be severed and enforce the parties' agreement to arbitrate their dispute.

C. The discovery provision, if invalid, should be severed because severance does not require any contract reformation and the provision does not taint the entire agreement with illegality.

Excising the discovery provision from the LFP agreement would not require the court to reformat the agreement. (See *Little*, *supra*, 29 Cal.4th at p. 1075.) Rather, severing the discovery provision merely would render the agreement silent as to discovery. In such a situation, "the employer, by agreeing to arbitrate the FEHA claim, has already impliedly consented to such discovery." (*Armendariz*, *supra*, 24 Cal.4th at p. 106; *ibid*. ["when parties agree to arbitrate statutory claims, they also *implicitly agree*, absent express language to the contrary, to such procedures as are necessary to vindicate that claim" (emphasis added)].)

The implicit agreement allows "discovery sufficient to adequately arbitrate [the employee's] statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s)." (*Armendariz*, *supra*, 24 Cal.4th at p. 106.) Thus, Oldham

would have sufficient discovery if the court severed the existing discovery provision. Therefore, the discovery provision does not taint the contract with illegality or require any reformation of the contract. Accordingly, the trial court abused its discretion by not severing the discovery provision and enforcing the remainder of the agreement after finding that the discovery provision was unenforceable.

CONCLUSION

For all of the foregoing reasons, this court should reverse the order denying the Flynt Defendants' motion to compel arbitration and direct the trial court to enter a new order granting the motion.

Dated: July 27, 2007

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CERTIFICATE OF WORD COUNT
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