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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARY NELSON, Plaintiff and Respondent, v. AMERICAN APPAREL, INC. et al., Defendants and Appellants.	B205937 (Los Angeles County Super. Ct. No.BC333028)

APPEAL from an order of the Superior Court of Los Angeles County, John P. Shook, Judge. Reversed.

Mitchell Silberberg & Knupp, Adam Levin, Lucia E. Coyoca; Joyce E. Crucillo, General Counsel; Lascher & Lascher and Wendy Lascher for Defendants and Appellants.

Keith A. Fink & Associates, Keith A. Fink, Sarah E. Hernandez; Gemmill Thornton & Baldridge and Carlos V. Yguico for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, American Apparel, Inc., Dov Charney, and Martin Bailey, appeal from an order denying their petition to compel arbitration under a settlement agreement. Defendants seek to arbitrate two issues. First, defendants seek to arbitrate the issue of whether plaintiff, Nancy Nelson, and her attorneys *breached* the settlement agreement by failing to appear in San Francisco at an "arbitration" with foreordained facts and a predetermined award which would be followed by the issuance of a misleading press release. Second, defendants seek to compel arbitration of whether plaintiff or her attorneys *breached* the confidentiality provisions of the settlement agreement. We conclude the language in the arbitration clauses in the settlement agreement required the petition to compel arbitration of these two disputes be granted. We emphasize defendants are not seeking to compel arbitration of the questionable "arbitration" with foreordained facts and a predetermined award which would be followed by the issuance of a misleading press release.

II. BACKGROUND

On May 4, 2005, plaintiff filed an action against defendants American Apparel, Inc., its chief executive officer, Mr. Charney, and a vice president, Mr. Bailey. Plaintiff alleged that during her employment as a sales manager for American Apparel, Inc., Mr. Charney subjected her to a hostile work environment based on her gender by regularly making unwelcome, inappropriate comments, and suggestive non-verbal gestures, and ultimately wrongfully terminating her employment. In her first amended complaint, filed on September 19, 2005, plaintiff asserted causes of action for violations of the Government, Labor, and Business and Professions Codes, wrongful termination in violation of public policy, and defamation.

The matter was set for trial on January 24, 2008. On January 23, 2008, however, the parties entered into the settlement agreement. In the settlement agreement,

defendants, without admitting liability, agreed to pay plaintiff $1.3 million. Also, plaintiff agreed to release all of her claims against defendants and to dismiss the present lawsuit.[1] Additionally, the parties agreed that an arbitrator selected by and paid for by defendants would enter a specified award (stated word for word) in defendant's favor based on a stipulated record. Paragraph 7 of the settlement agreement provided in part: "Confidential Arbitration [¶] The parties agree to conduct a confidential arbitration pursuant to the following terms and conditions: [¶] (a) **The Arbitrator shall be selected by American Apparel at its sole and unfettered discretion. The Arbitrator's fee will be paid by American Apparel.** [¶] (b) The issue presented to the Arbitrator will be, 'Did American Apparel or Dov Charney subject Mary Nelson to unlawful sexual harassment in violation of the California Fair Employment & Housing Act.' [¶] (c) **The Arbitrator will issue a decision based solely on the following stipulated record:** [¶] (i) The Supreme Court's decision in Lyle v. Warner Brothers Television Productions, including the concurring opinion by Justice Chin, 38 Cal.4th 264 (2006), is the governing law. [¶] (ii) Nelson complains that she was unlawfully harassed by American Apparel's marketing materials, as well as the use of sexual speech by employees of American Apparel. [¶] (iii) Dov Charney never sexualized, propositioned or made any sexual advances of any nature whatsoever towards Mary Nelson. [¶] (iv) The marketing materials, sexual speech and much of the conduct about

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[1] Defendants, without admitting liability, agreed to compensate plaintiff as follows: "In consideration of the covenants undertaken and releases given herein by Plaintiff, specifically including but not limited to, the Arbitrator's Award referenced in Paragraph 7 below, the Company shall provide Plaintiff with the following consideration in full and final settlement of any and all matters of any kind or nature which were alleged by, or could have been alleged by, Plaintiff against the Company and/or any of the Releasees identified in Paragraph 4 below: following receipt by the Company of the decision and order of the Arbitrator pursuant to Paragraph 7, below, and concurrent with the receipt by counsel for the Company of a fully executed Request for Dismissal with prejudice, as set forth in Paragraph 3, below (and in no event later than February 7, 2008), the Company will pay the total amount of One Million Three Hundred Thousand Dollars ($1,300,000.00), for alleged emotional distress damages . . . ."

which Nelson complains are protected under the First Amendment's guarantee of free speech. [¶] (v) The remainder of the speech and conduct about which Nelson complains was not directed at her or other women because of their gender. [¶] (d) **The Arbitrator's decision will state only the following**: [¶] 'Mary Nelson was not subjected to unlawful sexual harassment in violation of the California Fair Employment & Housing Act. Dov Charney never sexualized, propositioned or made any sexual advances of any nature whatsoever towards Mary Nelson. The marketing materials, sexual speech and much of the conduct about which Nelson complains are protected under the First Amendment's guarantee of free speech and cannot form the basis for any claim. The remainder of the speech and conduct about which Nelson complains was not directed at her or other women because of their gender and therefore was not actionable.'" (Boldface added.)

The settlement agreement contemplated that following defendants' receipt of the arbitrator's order, and concurrent with receipt from plaintiff of a fully executed request for dismissal with prejudice—no later than February 7, 2008—defendants would deliver the $1.3 million to plaintiff. Finally, the parties agreed American Apparel, Inc. would be allowed to issue a press release stating an arbitrator had ruled in defendants' favor. Paragraph 7(e) of the settlement agreement provided: "Following issuance of the Arbitrator's decision and order, American Apparel may issue the following press release: [¶] 'American Apparel and its CEO Dov Charney announced today that an Arbitrator has ruled in their favor in the highly-publicized action brought by former sales manager Mary Nelson. The Arbitrator ruled that the marketing materials, sexual speech and much of the conduct about which Nelson complained are protected under the First Amendment's guarantee of free speech and could not form the basis for any claim. The Arbitrator further ruled that Dov Charney never sexualized, propositioned or made any sexual advances of any nature whatsoever towards Mary Nelson, and the remainder of the speech and conduct about which Nelson complained was not directed at her or other women because of their gender, and therefore was not actionable. The decision puts an end to the sexual harassment claims against Charney and the Company. 'I am pleased

that we have been able to bring clarity to the role of the First Amendment in the American workplace,' Charney stated." As can be noted, the proposed press release is materially misleading—among other things, no real arbitration of a dispute occurred and plaintiff received $1.3 million in compensation. Plaintiff promised to keep the settlement agreement confidential and not to represent that the case had been settled. The settlement agreement states, "Plaintiff expressly agrees not to file any notice of settlement with the Court or otherwise make a public record of any settlement."

Paragraph 13 of the settlement agreement included an arbitration clause: "Any dispute or controversy arising under or in connection with this Agreement, shall be resolved exclusively by confidential final and binding arbitration in Los Angeles, California, in accordance with the rules of JAMS—Los Angeles, California, which are then in effect, except that the parties hereby agree that there shall be one arbitrators [*sic*] appointed, by the following process: . . . . In the event that any civil action, litigation, arbitration, or other proceeding is instituted to remedy, prevent, or obtain relief from a claimed breach of this Agreement, the prevailing party shall recover all attorneys' fees incurred by such party in each and every such civil action, litigation, arbitration, or other proceeding, including but not limited to any and all appeals or petitions therefrom, in addition to any award of damages and costs to such party." Paragraph 13 relates to arbitration of a dispute arising from an alleged breach of the settlement agreement. It is paragraph 13 that defendants seek to enforce in this appeal. (Defendants are not seeking to resume the proceedings which were designed to produce the award absolving them of any misconduct and the ensuing misleading press release.)

Paragraph 9(e) of the settlement agreement sets forth the procedure to be followed when there is a breach of the confidentiality provisions: "Any dispute or controversy arising under or in connection with this Confidentiality Provision shall be settled exclusively by confidential final and binding arbitration in Los Angeles, California, in accordance with the rules of the Judicial Arbitration and Mediation Service ('JAMS') – Los Angeles, California which are then in effect, except that the parties hereby agree that there shall be one arbitrator appointed by the following process: JAMS shall provide a

list of nine potential arbitrators, and each party shall strike four arbitrators, with Plaintiff providing her strikes first, and the Company striking four names thereafter. The remaining arbitrator shall serve as the arbitrator in this matter." Defendants were obligated to advance the required arbitration fees. Paragraph 9(e) also provided for an award of attorney fees and costs by the prevailing party incurred in the arbitration. The paragraph also provided for liquidated damages under specified circumstances. It is also this paragraph defendants seek to enforce. The settlement agreement was signed on January 23, 2008 by plaintiff, her counsel, Keith A. Fink, defendants, and their attorney, Adam Levin.

On January 24, 2008, attorneys for plaintiff and defendants met in chambers and announced there had been a settlement. Defense counsel, Mr. Levin, stated: "The parties have agree to submit this matter to final and binding arbitration. It is going to be expedited. Following the completion of the arbitration, the plaintiff will be filing a request for dismissal with prejudice prior to February the 7th of 2008." Plaintiff's counsel, Sarah Hernandez, added that the settlement was pursuant to a written agreement signed by all of the parties. The trial court set the matter for an order to show cause re dismissal at 8:30 a.m. on February 7, 2008. The settlement agreement was not filed in court on January 24, 2008.

On February 7, 2008, the hearing on the order to show cause re dismissal was held. Ms. Hernandez stated that defendants had until "today" to comply with "paragraph[s] 2 and 3" of the settlement agreement. If those paragraphs were not complied with, Ms. Hernandez stated that she intended file a motion to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6 The trial court expressly stated it had not read any settlement agreement because it was sealed. But the trial court indicated it would consider such a motion but stated its inclination was to set the case for trial as the litigation was over three years old.

Defense counsel, Lucia E. Coyoca, stated on February 1, 2008, the "arbitration" commenced before Retired Judge Daniel Weinstein but plaintiff's counsel refused to participate. Ms. Coyoca said: "We attempted to arrange for a submission of facts

pursuant to stipulation. [¶] Judge Weinstein indicated that he was under the circumstances unable to rule in the arbitration proceeding. Pursuant to the terms of the agreement, all disputes concerning this agreement are supposed to be resolved via confidential binding arbitration submitted to Judicial Arbitration Mediation Services . . . ." Ms. Coyoca stated it was her intention to move to compel arbitration. The trial court indicated it appeared the case had not in fact settled and that whatever settlement had occurred, matters remained unresolved. The trial court reiterated it had never seen the settlement agreement.

Ms. Hernandez explained in terms of the "arbitration" and the unpaid settlement: "It is one of those – it is a certain set of stipulated facts. There is no basis on which the arbitrator cannot make a decision. The decision has already been agreed to as to what is in the arbitration. [¶] . . . [¶] But I have no problem commencing trial immediately if we do not receive that payment or bring a motion under 664.6 to enforce part of the agreement." Ms. Hernandez stated she was available to start trial the next week. The case was set for trial on Wednesday, February 13, 2008.

On Monday February 11, 2008, defendants appeared ex parte seeking a stay of proceedings or, in the alternative, for an order compelling arbitration. The settlement agreement was attached to the proposed petition to compel arbitration as an exhibit. It was enclosed in a sealed envelope. Ms. Coyoca requested the settlement agreement be filed under seal. Ms. Hernandez, who had appeared at the February 7, 2008 order to show cause hearing, objected to a stay or any documents being filed under seal given the public nature of the judicial proceedings in this state. Further, Ms. Hernandez indicated plaintiff would be filing a motion to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6. Ms. Coyoca related in terms of the sealing issue: "We have not been reluctant to have the court review the agreement. What we have been reluctant to do is to have it available to the public, because one of the key terms of the agreement is confidentiality . . . ." After further discussion, the trial court read all of the documents including the sealed settlement agreement. The trial court stated it tentatively believed that defendants were "ready, willing, able and eager" to pay the $1.3 million

dollar settlement as soon as they secured the arbitration award. Ms. Hernandez described the arbitral process as a "fake arbitration" designed to produce a press release calculated to blunt negative media attention. The trial court stated it tentatively believed the "case should go to arbitration" but wanted the matter briefed. Ms. Coyoca argued that any papers filed by plaintiff that made specific reference to terms of the settlement should be filed under seal. On plaintiff's behalf, Ms. Hernandez argued the petition to compel arbitration should not be filed under seal. The trial court stated: "It is smart to keep this under seal until we get it worked out. We can always take it out of seal if we need to. I think that is prudent. I don't want to make any ruling that will blow this settlement apart." The trial court made no findings concerning sealing the papers as mandated by California Rules of Court, rule 2.550(d). (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217-1218; *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1279-1280.) The trial court set February 15, 2008 as the date for the hearing on defendants' petition to compel arbitration.

Defendants' petition to compel arbitration sought to arbitrate two issues pursuant to paragraph 13 of the settlement agreement. The first issue was an alleged breach by plaintiff of an obligation to participate in the abortive "arbitration" proceedings before Retired Judge Weinstein. The "arbitration" before Judge Weinstein with the foreordained facts and award and the misleading press release was conducted pursuant to paragraph 7 of the settlement agreement. Although defendants' petition referred to the proceedings before Judge Weinstein, they did not seek to compel anything in terms of that arbitration. Rather, plaintiff's alleged failure to appear along with her attorneys in the proceedings before Judge Weinstein was the basis of defendants' claim she had breached the settlement agreement. The second issue was the alleged "anticipatory repudiat[ion]"and actual violation of the confidentiality provisions of the settlement agreement. Paragraph 9(e) of the settlement agreement provided for arbitration of any dispute concerning a breach of the confidentiality provisions. And, as noted, paragraph 13 provided for arbitration of any dispute or controversy arising under the settlement agreement. Defendants asserted: "This Petition is made pursuant to the California Arbitration Act,

Cal. Civ. Proc. Code §§ 1280 et seq., and the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., on the grounds that Plaintiff signed a binding and enforceable agreement to arbitrate 'any disputes or controversies arising under or in connection with [the Arbitration] Agreement,' and Defendants contend that her refusal to participate in the arbitration and her breach of the confidentiality provisions of the Arbitration Agreement are required to be arbitrated under the terms of that arbitration agreement."

Attached to the moving papers were two declarations filed by Ms. Coyoca. Plaintiff objected to virtually all of Ms. Coyoca's declarations filed with defendants' petition to compel arbitration. The trial court sustained all of plaintiff's objections. No issue has been raise on appeal as to the correctness of the trial court's evidentiary rulings. Thus, the evidence posited by defendants that was the subject of sustained evidentiary objections is not before us. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1492; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015.)

Plaintiff relied on the declarations of Ms. Hernandez and Mr. Fink. Plaintiff's declarations expressly adverted to the settlement agreement which had been read by the trial court prior to issuing its order shortening time for hearing the petition to compel arbitration and was attached to one of Ms. Coyoca's declarations. Thus, the settlement agreement was read by the trial court without objection, relied upon by plaintiffs, and is thus before us. Mr. Fink's declaration stated: on January 22, 2008, defendants made a settlement offer; defendants requested that "the matter be submitted to an arbitration of pre-determined facts, law and evidence"; and pursuant to paragraph 7 of the settlement agreement, the arbitrator was to issue a "precise[] and predetermined" award. Mr. Fink continued: "Based on . . . Paragraph 7 of the Agreement it was my understanding and the parties['] intent that with respect to the sham arbitration, neither the arbitrator, nor Defendants required anything else of me, my firm or Ms. Nelson [¶] [] Sometime before Defendants personally submitted the matter to an arbitrator in San Francisco and for some unknown reason, Defendants requested that I join them in San Francisco for this arbitration. Since this was neither previously discussed nor agreed upon in the Agreement, I refused to do so as I personally did not want myself or my firm involved in

this sham arbitration." Ms. Hernandez's declaration stated: plaintiff was obligated by paragraph 3 of the settlement to deliver to defendants a fully executed dismissal request; on February 5, 2008, plaintiff served a fully executed dismissal request; pursuant to paragraph 2(a) of the settlement agreement, defendants were to pay plaintiff $1.3 million; and defendants have refused to tender payment to plaintiff in breach of the settlement agreement. Mr. Fink agreed with Ms. Hernandez's assessment that the fully executed dismissal had been transmitted but the $1.3 million payment had not been made by defendants.

On February 15, 2008, the hearing was held on defendants' petition to compel arbitration. Because the petition was heard on shortened notice, defendants filed no reply papers. At the outset, Mr. Levin, on behalf of defendants, requested that all proceeding be held in chambers. The trial court refused to hold the hearing in chambers. Mr. Levin emphasized that defendants merely wanted to compel arbitration pursuant to paragraph 13 of the settlement agreement. Mr. Levin reiterated that defendants asserted there were two alleged violations of the settlement agreement; the failure to appear in the "arbitration" with the foreordained facts and award and the misleading press release specified in paragraph 7 of the settlement agreement and the breach of the confidentiality clause. Mr. Levin acknowledged that paragraph 7 of the settlement agreement did not require Mr. Fink to appear in San Francisco. But Mr. Levin argued whether there had been a violation of an implied obligation to appear at the "arbitration" in San Francisco or the confidentiality agreement were matters for an arbitrator to decide; not a judge. Ms. Hernandez, on plaintiff's behalf, argued the trial court could invalidate paragraph 7 or order the arbitrator to proceed with the "arbitration" based on the foreordained facts and award, which was designed to lead to the issuance of the misleading press release. If paragraph 7 were invalidated because there was no "meeting of the minds," then the rest of the settlement agreement should be enforced. Ms. Hernandez conceded that the confidentiality agreement dispute could be arbitrated and defendants could proceed on that issue before the Judicial Arbitration and Mediation Service, the specified arbitration

provider. The trial court denied the petition to compel arbitration and defendants' motion to seal any of the declarations. The settlement agreement was returned to Mr. Levin.

Defendants filed a notice of appeal from the February 15, 2008 order denying their petition to compel arbitration. On February 21, 2008, defendants filed a supersedeas petition with us and sought to conditionally file certain documents including the settlement agreement under seal. On our own motion, we noted there was no compelling justification which would warrant filing any documents under seal. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 106-107; *Universal City Studios, Inc. v. Superior Court*, *supra*, 110 Cal.App.4th at pp. 1284-1285.) We denied the request to conditionally file any documents including the settlement agreement under seal. In response to our February 21, 2008 order, defendants immediately requested that, if we would not agree to file their papers under seal, they be filed in an unredacted form; i.e., not under seal. We granted defendants' alternative request to file all of the documents considered by the trial court including the settlement agreement in an unsealed format. Plaintiff never requested that we order the settlement agreement be filed in an unsealed format.

III. DISCUSSION

Apart from the issue of the abortive "arbitration" before Retired Judge Weinstein and the fact that virtually all of defendants' evidence was stricken, this is a routine arbitration dispute. Defendants seek to enforce the duty to arbitrate under paragraphs 9(e) and 13. Paragraph 9(e) of the settlement agreement requires: any dispute concerning the confidentiality clause be arbitrated before the Judicial Arbitration and Mediation Service; if defendants initiate the arbitration, they must advance any required arbitration fees; and the prevailing parties are to recover attorney fees and costs incurred in such an arbitration. Further, the parties have agreed to arbitrate generally in paragraph 13 "[a]ny dispute or controversy arising under or in connection with" the settlement agreement. These arbitration provisions are distinct from the matter before Retired Judge

Weinstein with the foreordained facts and award which it was anticipated would result in the issuance of the misleading press release. This deceptive procedure, which Retired Judge Weinstein refused to consummate, was conducted pursuant to paragraph 7 of the settlement agreement.

Given the language in paragraphs 9(e) and 13, the arbitration provisions in the settlement agreement, defendants' petition to compel arbitration concerning plaintiff's purported breach of her alleged obligation to appear before Judge Weinstein or the confidentiality agreement should have been granted. The obligation to arbitrate exists under both the United States and California Arbitration Acts. (9 U.S.C. § 2; Code Civ. Proc., § 1281.) There is a public policy in favor of arbitration under federal and state law. (*Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 96-97.) Any doubts as to whether an arbitration clause applies to a particular dispute should be resolved in favor of ordering the parties to arbitrate. (*Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189; *United Transportation Union, AFL/CIO v. Southern California Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808.)

There is no merit to plaintiff's contention that the arbitration clauses in paragraphs 9(e) and 13 are not subject to the limited preemptive effect of the United States Arbitration Act. (*Preston v. Ferrer* (2008) 552 U.S. __, __ [128 S.Ct. 978, 985-986.) Further, the issue of whether there was an alleged implied obligation that plaintiff and Mr. Fink appear in San Francisco in the purported arbitration before Retired Judge Weinstein is irrelevant in terms of the duty to arbitrate under paragraphs 9(e) and 13. The merits of defendants' claims in this regard are for an arbitrator to decide. (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 446-449; *Gueyffier v. Ann Summers, Ltd*. (2008) 43 Cal.4th 1179, 1186.) Moreover, the potential illegality of the "arbitration" clause in paragraph 7 with its goal of issuing a press release for the purpose of misleading journalists and the public is severable from the remainder of the settlement agreement. Paragraph 17 of the settlement agreement provides that paragraph 7 is severable from the remainder of the agreement. Further, under federal and state law, the

arbitration provisions in paragraphs 9(e) and 13 are severable from the remainder of the settlement agreement for purposes of determining arbitrability. (*Buckeye Check Cashing, Inc. v. Cardegna*, *supra*, 546 U.S. at pp. 445-446; see *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 416-419.)

Much of plaintiff's brief is dedicated to arguing the improper nature of the "arbitration" before Retired Judge Weinstein and that such can serve as a bar to an order compelling the parties to arbitrate under paragraphs 9(e) and 13. If this appeal involved a petition to compel the resumption of the "arbitration" before Retired Judge Weinstein or any other provision of paragraph 7, the issue would be different. Then there would be considerations of illegality, injustice, and fraud which would affect our powers as a court of equity to enforce the "arbitration" contemplated by paragraph 7. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 479 ["[a] proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract"]; *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664 [the court "may reject a stipulation that is contrary to public policy"].) But the petition to compel arbitration was expressly directed only at paragraphs 9(e) and 13 and Mr. Levin reiterated that point on behalf of defendants at the February 15, 2008 hearing. If defendants were seeking to enforce a duty to arbitrate under the paragraph 7 "arbitration" provision which was designed to lead to the issuance of a press release whose purpose was to mislead journalists and the public, then the result of this appeal would be materially different. Given our analysis, we need not discuss defendants' admissibility of evidence contentions.

IV. DISPOSITION

The order denying the petition to compel arbitration is reversed. Each side is to bear its own costs on appeal. Upon remittitur issuance, the previously entered stay of trial shall expire.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.