

**IN THE
SUPREME COURT OF CALIFORNIA**

MARY NELSON,

Plaintiff and Respondent,

vs.

AMERICAN APPAREL, INC., DOV CHARNEY,
AND MARTIN BAILEY,

Defendants and Appellants.

AND RELATED ACTIONS

After a Decision By the Court of Appeal,
Second Appellate District, Division Five
Case No. B205937

PETITION FOR REVIEW

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ISSUE PRESENTED

1. The Supreme Court of California must settle an important question of law to determine whether the Federal Arbitration Act can be applied to an arbitration agreement within a settlement agreement that is to be governed only by California law to prevent the entire contract from being invalidated under California law.

WHY REVIEW SHOULD BE GRANTED

Due to the increase of Californians entering into contracts containing arbitration agreements to settle contractual disputes, this case presents a question of increasing importance to litigants throughout California - whether the Federal Arbitration Act can and should be used to interpret a settlement agreement containing arbitration provisions that was only to be governed by California law in order to prevent that very settlement agreement from being invalidated under California law.

While arbitration agreements have become more prevalent to reduce litigation costs, contracting parties need to clearly understand which jurisdiction's law applies to the contract. Parties who enter into life-changing settlement agreements must be certain of their rights and how their rights will be enforced under the contract.

In this instant case, the settlement agreement states that the agreement "shall be governed by and construed under and in accordance with the laws of the State of California." Therefore, the parties who entered into the contract understood and specifically agreed that the laws of the State of California would govern the settlement agreement.

However, the Court of Appeal in this case has confused the issue and overridden the parties' intentions to be governed solely by California law. This settlement agreement contained three separate arbitration provisions. One of those arbitration provisions, paragraph 7, was an illegal and fraudulent arbitration provision, which under California law should have

invalidated the entire contract, including the other two outstanding arbitration provisions, paragraphs 9(e) and 13.

Instead of routinely following the parties' choice-of-law provision and invalidating a settlement agreement rife with illegality, the Court of Appeal decided to apply both federal and state law in its interpretation of the settlement agreement. The Court of Appeal held that the Federal Arbitration Act applied to the settlement agreement, and thus preempted California law. Yet nowhere in the settlement agreement is the Federal Arbitration Act ever mentioned and nowhere in Appellants' Opening and Reply Briefs did Appellants assert how the settlement agreement entered into between the parties affected interstate commerce such that the Federal Arbitration Act should govern the contract.

The Court of Appeal for the Second Appellate District, Division Five decided that both federal law, the Federal Arbitration Act, and state law, the California Arbitration Act, should govern the arbitration agreements within the illegal settlement agreement. (Pursuant to *California Rules of Court* Rule 8.504(b)(4) the Court of Appeal Opinion is attached as Exhibit A.) The Court of Appeal made this decision despite the fact that Appellants made no showing that the settlement agreement entered into between the parties affected interstate commerce so that the Federal Arbitration Act would apply.

This Court must clarify this important question of law in regards to whether the Federal Arbitration Act can be used to interpret an agreement, containing arbitration provisions, notwithstanding an express choice-of-law provision stating that California law, not Federal law applies in order to

prevent a settlement agreement from being invalidated under California law. Otherwise, parties who enter into arbitration agreements in California that contain arbitration clauses will be uncertain as to which law applies.

BACKGROUND

On May 4, 2005, Plaintiff and Respondent Mary Nelson filed her Complaint against Defendants and Appellants American Apparel, Inc., Dov Charney, and Martin Bailey alleging that during her employment as a sales manager for American Apparel, Inc. Mr. Charney subjected Plaintiff to a hostile work environment based upon her gender and wrongfully terminated her employment. (Exhibit A p. 2) In her first amended complaint, filed on September 19, 2005, Plaintiff asserted causes of action for violations of California's Government, Labor, and Business and Professions Codes, wrongful termination in violation of public policy, and defamation. (Exhibit A p. 2) Plaintiff and Defendants litigated the case for the over two-and-a-half years. On January 24, 2008, the trial court vacated the parties' trial date based on the parties' representation that they would submit their dispute to binding arbitration, which would be completed on or by February 7, 2008. (Exhibit A p. 6)

This binding arbitration was to be based upon predetermined terms and conditions that the parties agreed upon, including the Arbitrator's issuance of a scripted decision without an actual determination of facts or of law as well as to be followed by a false press release from American Apparel, Inc. and Dov Charney declaring victory. (Exhibit A pp. 3-4) In exchange for accepting this fraudulent "arbitration" and allowing Defendants to deceive the public, Plaintiff was to receive \$1,300,000.00. (Exhibit A p. 3) As such, Defendants effectively paid Plaintiff

\$1,300,000.00 to keep silent about the sham arbitration and their premeditated scheme to defraud the public.

On February 11, 2008, Defendants filed a Petition to Compel Arbitration and Stay Proceedings based upon paragraphs 9(e) and 13 of the settlement agreement entered into between Plaintiff and Defendants on January 23, 2008. (Exhibit A pp. 7-8) Defendants claimed that Plaintiff had breached the settlement agreement by refusing to participate in the “arbitration” and by purportedly breaching the confidentiality provisions of paragraph 9(e). (Exhibit A p. 9). On February 15, 2008, the trial court denied the petition. (Exhibit A p. 10) Defendants filed their Notice of Appeal that same day. (Exhibit A p. 10)

The Court of Appeal, Second Appellate District, Division Five, reversed the trial court’s decision denying the Petition to Compel Arbitration on October 28, 2008. (Exhibit A) The Court of Appeal noted that the parties’ obligation to arbitrate existed under both the United States’s and California’s Arbitration Acts. (Exhibit A p. 12) Specifically, the Court of Appeal found that 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 was severable from the remainder of the settlement agreement. (Exhibit A p. 12) The Court of Appeal also noted that the arbitration provisions Defendants sought to be enforced, paragraphs 9(e) and 13, were severable under state and federal law from the remainder of the agreement for the purposes of determining arbitrability. (Exhibit A p. 12-13)

The Court of Appeal further held that there was no merit to Plaintiff’s contention that the arbitration clauses in paragraphs 9(e) and 13 were not subject to the limited preemptive effect of the Federal Arbitration

Act. (Exhibit A p. 12) Upon receipt of the Court of Appeal's judgment, Plaintiff did not file a petition for rehearing.

LEGAL DISCUSSION

I. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO A SETTLEMENT AGREEMENT WITH AN EXPRESS CALIFORNIA CHOICE-OF-LAW PROVISION.

A. Choice-of-Law

Contracting parties that enter into settlement agreements often choose to incorporate choice-of-law provisions within the agreement. These choice-of-law provisions provide the parties with equal notice as to what law will govern any disputes arising from the agreement. Both sides to the agreement must be fully aware of their rights under the contract in order to gain the benefits of the settlement agreement. When a contract contains arbitration agreements, both the California Arbitration Act and the Federal Arbitration Act acknowledge that the arbitration shall be governed by the terms the parties have agreed upon. In *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, the California Supreme Court acknowledged that the policy underlying the California Arbitration Act is to enforce arbitration agreements as written, stating:

Accordingly, policies favoring the efficiency of private arbitration as a means of dispute resolution must sometimes yield to its fundamentally contractual nature, and to the attendant requirement that arbitration shall proceed *as the parties themselves have agreed*. *Id.*, 21 Cal.4th at 831 (emphasis in original).

A similar policy underlies the Federal Arbitration Act. *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213 ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which the parties had entered, and that concern requires that we rigorously enforce

arbitration agreements, even if the result is ‘piecemeal’ litigation, at least absent a countervailing policy manifested in another federal statute.”)

Here, a private agreement, containing arbitration provisions, was entered into between Plaintiff and Defendants. This agreement was to be governed “by and construed under and in accordance with the laws of the State of California.” Parties are free to enter into an arbitration agreement specifying the controlling law. *Volt Information Services v. Stanford University* (1989) 489 U.S. 468, 479 (applied California law to arbitration agreement in interstate commerce because agreement provided that it would be governed by California law); *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1122 (applied Federal Arbitration Act to California arbitration agreement because arbitration clause stated that it was governed by FAA); *Duffens v. Valenti* (2008) 161 Cal.App.4th 434 (“When an arbitration provision contains California choice-of-law language, the parties’ intent is inferred that state law will apply for resolving motions to compel arbitration.”)

The parties in this instant case agreed to specifically be governed by the laws of the State of California. However, Defendants in their Petition to Compel Arbitration falsely argued that the Petition was made pursuant to both the California Arbitration Act as well as the Federal Arbitration Act. (Exhibit A pp. 8-9) The Court of Appeal agreed with Defendants when it applied both federal and state law in determining to reverse the trial court’s denial of Defendants’ Petition to Compel Arbitration. (Exhibit A pp. 12-13)

The Court of Appeals’ decision to apply both state and federal law to the agreement would be correct had the parties expressly agreed that both state and federal law should apply to the agreement. In *Cronus Investments*,

Inc. v. Concierge Services (2005) 35 Cal.4th 376, the California Supreme Court held that if the parties wish to ensure that their arbitration agreement is not rendered unenforceable due to the application of Code Civ. Proc. § 1281.2(c), they should expressly designate the Federal Arbitration Act as controlling law. The Court stated:

Our opinion does not preclude parties to an arbitration agreement to *expressly designate* that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law. (emphasis added.) *Cronus, supra*, 35 Cal.4th at 394.

Here, the parties **did not** expressly designate both federal law and state law in their choice-of-law provision. Instead, the parties agreed and designated that California law and California law only would control the agreement. Because the Court of Appeal held that both federal and state law applied, the Court of Appeal effectively negated the contractual intent of the parties.

B. The Commerce Clause Is Inapplicable to Settlement Agreements.

The Court of Appeal's application of the Federal Arbitration Act to the instant contract also was improper because the settlement agreement entered into between Plaintiff and Defendants did not involve interstate commerce. In other words, by applying the Federal Arbitration Act to the settlement agreement, the Court of Appeal effectively held that the Commerce Clause applies to California settlement agreements.

The reach of the Federal Arbitration Act was dramatically expanded by the U.S. Supreme Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265. In *Allied-Bruce*, the Court held that the Federal Arbitration Act governs only those contracts which are within the reach of the Commerce Clause of the United States Constitution, i.e., all

contracts which are within the power of Congress to regulate. *Id.*, 115 S.Ct. at 840, 843. However, in this instant case, this dramatic expansion of the Commerce Clause does not apply to a California settlement agreement entered into between private parties regarding California disputes.

The settlement agreement entered into between Plaintiff and Defendants also is not an economic activity, which in the aggregate, would be regulated by Congress under the Commerce Clause. Pursuant to *Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56, the Federal Arbitration Act is also triggered if the contract containing the arbitration agreement is part of an economic activity which, in the aggregate, is regulated by Congress under the Commerce Clause. In *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, the Court stated:

[T]he commerce clause power could be exercised to preempt contrary state law ‘in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice ... subject to federal control.’ [Citations.] ‘Only that general practice need bear on interstate commerce in a substantial way.’ *Shepard, supra*, 148 Cal.App.4th at 1098-1099 (quoting from *Alafabco, supra*, 539 U.S. at 56-57)

Here, the settlement agreement does not fall under “a general practice...subject to federal control.” The settlement agreement in this instant case was a settlement agreement involving a private dispute over alleged violations of California state law. As such, federal law does not control this settlement agreement.

The arbitration provisions in the instant settlement agreement did not mention that the Federal Arbitration Act would govern any arbitration arising from the settlement agreement. This was because interstate commerce was not involved in the settlement agreement. The settlement

agreement did not include any federal programs or policies that would cause the Commerce Clause to govern the settlement agreement.

Unlike here, in *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, the Court of Appeals held that notwithstanding the absence of an Federal Arbitration Act choice of law provision, the Federal Arbitration Act governed the *Hedges* arbitration agreement because it involved interstate commerce by way of its use of a nationally copyrighted form purchase agreement and because the purchase of the home entailed the use of HUD financing. *Hedges, supra*, 117 Cal.App.4th at 586-587.

Likewise, in *Shepard, supra*, a homebuyer and developer signed the same arbitration agreement construed in *Hedges*. *Shepard, supra*, 148 Cal.App.4th at 1095 (construing arbitration clause which stated: "YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY CALIFORNIA LAW"). Like the *Hedges* agreement, the *Shepard* agreement lacked a reference to the Federal Arbitration Act. The Court, nevertheless, held that the Federal Arbitration Act governed the arbitration agreement in the *Shepard* home purchase contract: "We conclude defendants met their burden of demonstrating that this transaction substantially affected interstate commerce, therefore the FAA preempts contrary state law in this case." *Shepard, supra*, 148 Cal.App.4th at 1101.

Here, Defendants failed to carry any burden in showing that the settlement agreement entered into between Plaintiffs and Defendants affects interstate commerce. The *Shepard* court specifically states that the Defendant bears the burden of showing how interstate commerce is affected in the transaction. *Shepard, supra*, 148 Cal.App.4th at 1101. The parties

involved in this agreement did not enter into a nationally copyrighted form purchase agreement or purchase a home with the use of HUD financing. Instead, the parties agreed to a settlement over a dispute stemming from conduct occurring in California that had been litigated for over two and a half years under California law.

This settlement agreement did not include the Federal Arbitration Act. Defendants have not made any showing that Federal Arbitration Act applied to the agreement because interstate commerce was affected. By allowing the Federal Arbitration Act to apply to the agreement, the Court of Appeal improperly asserted the preemptive powers of the Federal Arbitration Act over the State of California Law in order to validate the arbitration agreements that Defendants sought to compel.

C. California Law Invalidates Arbitration Clauses Contained Within Illegal Contracts.

In refusing to apply California law to interpret the settlement agreement entered into between the parties, the Court of Appeal exceeded its authority in upholding the arbitration agreements in paragraphs 9(e) and 13 were valid. The entire settlement agreement should have been invalidated due the illegality of paragraph 7 in the settlement agreement. Paragraph 7 of the agreement concerned, among other things, Defendants' issuance of a press release for the purpose of misleading journalists and the public, which the Court of Appeal noted triggered considerations of illegality, injustice and fraud. (Exhibit A pp. 12-13)

Instead of invalidating the entire agreement, as required under California law, the Court of Appeal severed paragraph 7 from the remainder of the settlement agreement. (Exhibit A p. 12) Yet severing an illegal section of a contract which permeates the entire contract with illegality is

not permitted under California law.

In *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, the California Supreme Court held that an arbitration agreement contained within an illegal contract is unenforceable. The Court held:

Section 1281 of the Code of Civil Procedure, providing for submission to arbitration of “any controversy ... which arises out of a contract,” does not contemplate that the parties may provide for the arbitration of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of the state. *Id.*, 33 Cal.2d at 610.

In *Loving & Evans*, the Court further held that a contractor could not enforce an arbitration agreement in his construction contract because the entire contract, including its arbitration agreement, was rendered unenforceable and illegal by the contractor’s lack of a valid license. *Id.* Subsequently, in *Hotels Nevada, LLC v. Bridge Banc, LLC* (2005) 130 Cal.App.4th 1431, *Loving & Evans* was followed by the Court of Appeal, which held that where an arbitration agreement is governed by state law as opposed to the FAA, the trial court, when presented with a petition to compel arbitration, may construe both the arbitration agreement and the contract containing the arbitration agreement as part of the arbitration petition if the respondent alleges that the arbitration agreement is unenforceable because it is part of a contract that is illegal under state law. *Id.*, 130 Cal.App.4th at 1439 (denied petition to compel arbitration because court determined that arbitration clause was part of an illegal, usurious loan agreement); *Duffens v. Valenti, supra*, 74 Cal.Rptr.3d at 328 (applying California law, denied enforcement of arbitration agreement in dating service contract which respondent alleged was illegal under statute regulating such contracts). Here, due to the illegality of paragraph 7, the

entire settlement agreement was illegal, and as such, the entire agreement should have been invalidated by the Court of Appeal.

The entire settlement agreement is also invalid because the settlement agreement is an agreement that compensates Plaintiff for false testimony. In *Davey v. Southern Pacific Co.* (1897) 116 Cal.325, the California Supreme Court stated:

No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. *Id.*, 116 Cal. at 329.

The settlement agreement was also subject to invalidation because it is an illegal contract to compensate Plaintiff for false testimony. The illegality of the subject agreement is illustrated in *Pelkey v. Hodge* (1931) 112 Cal.App. 424. In *Pelkey*, the plaintiffs were witnesses to the execution of a last will and testament. A dispute arose between the decedent's heirs concerning the authenticity of the will.

The plaintiffs (there were two of them) testified in the ensuing trial. Their participation in the trial proceedings lasted three weeks. While the jury deliberated, they demanded payment for their witness fees, which the defendant had failed to tender. The defendant persuaded the plaintiffs to waive their claim for witness fees in exchange for payment of \$10,000.00 apiece, provided the defendant prevailed in the lawsuit. The plaintiffs agreed.

The defendant prevailed in the will contest and recovered in excess of \$200,000.00. However, the defendant paid the witnesses only \$2,000.00

apiece. In the plaintiffs' subsequent action to recover the \$16,000.00 shortfall, the Court held that the witnesses' compensation agreement was unenforceable and void against public policy:

It is well settled that a contract to pay a witness for testifying where the payment is made contingent upon the success of the litigation is against public policy, since such a contract offers an inducement to perjury and tends to prevent the administration of justice. [Extensive citations omitted.] Appellants contend that the foregoing rule has no application to the contract here because the contract was entered into after their testimony had been given and the jury had retired and hence the evil against which the rule is invoked did not exist. The payment, however, was made contingent upon defendants winning their case and receiving the money from the estate and in the event of the granting of a motion for new trial or a reversal on appeal, appellants would be called upon to testify again in which event the temptation to perjury against which the rule is directed would exist. "Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not its actual injury to the public in a particular instance." (13 C. J., p. 425.) Measured by this standard, we must hold the contract set out in the complaints invalid. *Pelkey, supra*, 112 Cal.App. at 425-426.

The settlement agreement in this case is likewise against public policy. The agreement provides for the payment of \$1,300,000.00 to Plaintiff in return for her written assent (and silence) concerning stipulated facts, irrespective of Plaintiff's subjective beliefs concerning the truth or falsity of the stipulated facts.

The agreement is harmful to the public. Plaintiff's allegations have

been the subject of media scrutiny. Any press coverage reporting a false arbitral victory by Defendants based on the First Amendment would serve to discourage other potential American Apparel victims of sexual harassment from seeking redress. Further, prospective American Apparel employees, after hearing or reading the media's account regarding Plaintiff's allegations and lawsuit, are likely to place themselves in harm's way if they conclude that American Apparel is a working environment devoid of sexual harassment.

The settlement agreement is also an unconscionable agreement to arbitrate. In *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, the California Supreme Court issued its landmark decision concerning the invalidation of arbitration agreements on grounds of unconscionability. In *Graham*, the Court analyzed the enforceability of an arbitration agreement between a concert producer and performer. The agreement required all disputes between the parties to be arbitrated by the performer's labor union. The California Supreme Court preliminarily held that the agreement was within the producer's reasonable expectations because he had signed similar arbitration agreements with numerous other concert performers.

However, the Supreme Court concluded that the agreement was unenforceable because it was an unconscionable contract. The Court explained:

Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. (See, e.g., *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 271-272 [54 Cal.Rptr. 104, 419 P.2d 168]; *Steven v. Fidelity & Casualty Co.* (1962) 58 Cal.2d 862, 869-870 [27 Cal.Rptr. 172, 377 P.2d 284]; *Wheeler v. St. Joseph*

Hospital, supra, 63 Cal.App.3d 345, 357...The second-a principle of equity applicable to all contracts generally-is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or “unconscionable.” (*Jacklich v. Baer* (1943) 57 Cal.App.2d 684.) [Fn. omitted.] We proceed to examine whether the instant contract, and especially that provision thereof requiring the arbitration of disputes before the A.F. of M., should have been denied enforcement under either of these two principles.

* * *

We cannot conclude on the record before us that the contractual provision requiring arbitration of disputes before the A.F. of M. was in any way contrary to the reasonable expectations of plaintiff Graham. By his own declarations and testimony, he had been a party to literally thousands of A.F. of M. contracts containing a similar provision[.]

* * *

We are thus brought to the question whether the contract provision requiring the arbitration of disputes *before the A.F. of M.* - because it designates an arbitrator who, by reason of its status and identity, is presumptively biased in favor of one party - is for that reason [fn. omitted] to be deemed unconscionable and unenforceable.

* * *

As the United States Supreme Court has said in a related context, “Congress has put its blessing on private dispute settlement arrangements..., but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity.” (*Hines v. Anchor Motor Freight* (1976) 424 U.S. 554, 571 [47 L.Ed.2d 231, 245, 96 S.Ct. 1048].) By the same token it appears that the Legislature has determined that the parties shall have considerable leeway in structuring the dispute settlement arrangements by which they are bound; while recognizing that the leeway may permit the establishment of arrangements which vary to some extent from the dead-center of “neutrality,” we at the same time must insist - and most especially in circumstances smacking of adhesion - that certain “minimum levels of integrity” be achieved if the arrangement in question is to pass judicial muster.

It is for the courts of course to determine - largely on a case by case basis - what these “minimum levels of integrity” shall be. In doing so it must not be lost sight of that the “contractual

machinery” of the parties is intended by them to serve as a substitute for - although of course not a duplicate of - formal judicial proceedings. What is contemplated, then, is a *tribunal* - i.e., an entity or body which “hears and decides” disputes. (See Webster's New Internat. Dict. (2d ed. 1941) p. 2707.) As the *Cross & Brown* case indicates, an entity or body which by its nature is incapable of “deciding” on the basis of what it has “heard” - as, in that case, one of the principal parties to the contract - does not qualify. “Unless we close our eyes to realities,” the court there said, “the agreement here becomes, not a contract to arbitrate, but an engagement to capitulate.” (167 N.Y.S.2d at p. 576.) The same result would follow, the court there suggests, when one “so identified with the party as to be in fact, even though not in name, the party” is designated. (*Id.*) In such cases as this, the agreement to *arbitrate* is essentially illusory. Here, clearly, “minimum levels of integrity” are not achieved, and the “agreement to arbitrate” should be denied enforcement on grounds of unconscionability. *Graham, supra*, 28 Cal.3d at 820-825.

This settlement agreement is an agreement to capitulate. Defendants selected the “evidence” to be considered by Defendants’ hand-picked arbitrator. They limited the arbitrator’s authority by drafting his findings and award. They prohibited the arbitrator from considering any evidence outside Defendants’ “stipulated facts.” Through the settlement agreement, they told the arbitrator that he would be acting in excess of his authority if he issued any other award besides the award drafted by Defendants. The settlement agreement is without question a more oppressive agreement than the *Graham* agreement.

The agreement to arbitrate Plaintiff’s wrongful termination/sexual harassment claims is also unconscionable under *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83. This agreement requires only Appellant to arbitrate claims regarding her employment relationship. It does not require a neutral arbitrator. It has no provisions for discovery (since

all the evidence will be the stipulated facts drafted by Defendants). The foregoing features render this agreement unenforceable under *Armendariz, supra*.

Even though the Court of Appeal has stated that the illegal nature of paragraph 7 can be severed from the remainder of the agreement, paragraphs 9(e) and 13 are interconnected with paragraph 7, such that the entire agreement must be invalidated. Both paragraphs 9(e) and 13 relate to paragraph 7 in that the arbitration involved in paragraphs 9(e) and 13 is an arbitration directly related to a breach of the confidentiality of paragraph 7 and a dispute regarding the terms of paragraph 7. As such, due to the controlling nature of the illegal paragraph 7, paragraphs 9(e) and 13 are likewise permeated with illegality. Instead of negating the entire agreement, the Court of Appeal held that both paragraphs 9(e) and 13 themselves can be severed under federal and state law. Thus, the Court of Appeal has applied the Federal Arbitration Act, rather than state law, to validate paragraphs 9(e) and 13 and cause this agreement to be arbitrated, not invalidated.

CONCLUSION

The Court of Appeals' application of the Federal Arbitration Act to a settlement agreement that contained arbitration agreements and was specifically to be governed by the laws of the State of California is an important question of law that needs to be resolved. Litigants who enter into settlement agreements containing arbitration terms must clearly understand what type of law governs the agreement. By applying the Federal Arbitration Act, the Court of Appeal was able to sever the illegal paragraph 7 of the settlement agreement as well as the additional arbitration paragraphs from the agreement. Yet the Federal Arbitration Act cannot be incorporated into to this instant settlement agreement because the settlement agreement required

California law to govern the agreement and the agreement does not affect interstate commerce. Had the Court of Appeal applied state law rather than the Federal Arbitration Act, state law would have caused the entire settlement agreement to be invalidated due to its illegality. As such, in applying both federal and state law to a settlement agreement, the Court of Appeal has created confusion that must be clarified.

Respectfully submitted,

DATE: December 4, 2008

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CERTIFICATE OF WORD COUNT
(California Rules of Court Rule 8.504(d)(1))

The text of Plaintiff/Respondent's Petition for Review consists of 5,032 words as counted by the WordPerfect (ver. 12) word processing program used to generate this brief.

Respectfully submitted,

DATE: December 4, 2008

KEITH A. FINK & ASSOCIATES

By:



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Attorneys for Plaintiff
and Respondent
MARY NELSON

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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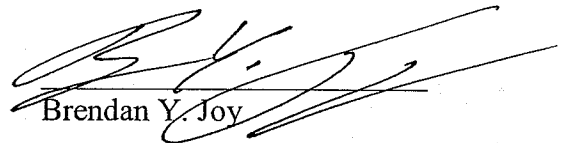
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Dated: December 5, 2008


Brendan Y. Joy

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EXHIBIT A

Filed 10/28/08 Nelson v. American Apparel CA2/5

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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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 & Baldrige 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

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 raised 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.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.