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No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Angelica Ramirez,

Plaintiff and Respondent,

v.

Charter Communications, Inc.,

Defendant and Petitioner.

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

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

PETITION FOR REVIEW

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Pursuant to California Rules of Court, Rule 8.500, Defendant and Petitioner Charter Communications, Inc. ("Charter") respectfully petitions for review of the published decision of the Court of Appeal, Second Appellate District, Division Four, filed February 18, 2022 ("Opinion"). The Opinion affirmed the trial court's order denying Charter's motion to compel arbitration of Plaintiff Angelica Ramirez's employment claims against Charter. In doing so, the Court below explicitly contradicted *Patterson v. Superior Court*, 70 Cal. App. 5th 473 (2021) ("*Patterson*"), a recent, prior case from Division Seven which enforced Charter's employment arbitration agreement. A copy of the Opinion is attached as Exhibit A to this Petition.

I. ISSUES PRESENTED

1. Whether the Court of Appeal erred in finding the provision in Charter's arbitration agreement allowing for recovery of interim attorneys' fees after a successful motion to compel arbitration so substantively unconscionable as to render the arbitration agreement unenforceable where the Court of Appeal in *Patterson* reached the opposite conclusion and found the provision lawful and enforceable.

2. Whether the Court of Appeal erred in refusing to enforce and refusing to sever the allegedly unconscionable provisions of Charter's arbitration agreement where numerous other courts have enforced the same agreement.

3. Whether the Court of Appeal's decision that

Charter's arbitration agreement is not enforceable is preempted as in conflict the Federal Arbitration Act as interpreted by this Court.

II. WHY REVIEW SHOULD BE GRANTED

The Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law. Cal Rules of Court, Rule 8.500(b).

Here, the Court of Appeal below explicitly contradicted a prior decision of a different Division of the same court in *Patterson*, which was issued just four months before. The Court's reasoning in the Opinion also contradicts the trial court below, the decision from the same Division in *Bravo v. Charter Communs.*, No. B303179, 2021 Cal. App. Unpub. LEXIS 1872 (Mar. 23, 2021) ("*Bravo*"), and numerous other California trial court and federal district court decisions which enforced Charter's arbitration agreement. Consequently, there is now a split in appellate authority regarding whether Charter's arbitration agreement, and any other employment arbitration agreements with similar provisions, are enforceable.

Specifically, Charter's arbitration agreement includes a provision at Section K which allows for interim recovery of attorneys' fees if a party successfully compels arbitration of claims improperly initiated in state court. In *Patterson*, the Court of Appeal analyzed Section K and held that the provision

was enforceable under certain circumstances and did not render Charter's agreement unenforceable. Yet the Opinion below explicitly rejected the *Patterson* rationale and held that Section K is one of four provisions which render the agreement irreparably unconscionable.

The Opinion's analysis of Section K and three other provisions of Charter's arbitration agreement contradicts the reasoning of numerous other courts that have analyzed and enforced the same arbitration agreement. For example, the trial court below issued a tentative ruling in Charter's favor, and then reversed its decision based on supposed substantive unconscionability on *different* grounds. On the other hand, the decision in *Bravo* held that the agreement is valid and compelled arbitration. The majority of California trial court and federal district courts which have reviewed Charter's Agreement have also enforced it.

In the rare cases where trial courts found some provision of the Charter Agreement substantively unconscionable, those courts properly severed such provisions in order to render the Agreement enforceable. *See, e.g.*, *Albarro Ibarra v. Charter*, Los Angeles Superior Court case number 21STCV36249; *Angela Sestrick v. Charter*, Los Angeles Superior Court case number 21STCV33717. Severance of the unconscionable provisions is required by California law. *See, e.g.*, *Serpa v. Cal. Sur. Investigations, Inc.*, 215 Cal. App. 4th 695 (2013) ("*Serpa*"), *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016) ("*Baltazar*"),

and *Iskanian (Arshavir) v. CLS Transp. of L.A. LLC*, 147 Cal. Rptr. 3d 324 (2012) ("*Iskanian*"). As these authoritative decisions recognize, the Federal Arbitration Act ("FAA") requires California courts to give deference to the parties' private arbitration agreements and to interpret or sever provisions of those agreements as necessary in order to render them enforceable. The Opinion contravenes the FAA and this Court's precedent by starkly refusing to sever the allegedly unconscionable provisions.

The impact of the decision below will be to perpetuate confusion among employers, employees, attorneys, trial courts, and appellate courts.[1] Accordingly, Charter respectfully requests the Supreme Court to grant this Petition in order to create uniform authority regarding the enforceability of Charter's Agreement and other similar employment arbitration agreements under the FAA.

III. FACTUAL AND PROCEDURAL BACKGROUND

Charter provides telecommunications services to customers throughout the United States. Charter also purchases and sells goods, materials, supplies, services, and equipment in multiple states. As such, during all relevant times, Charter was engaged and involved in interstate commerce within the meaning of the FAA. Ramirez worked for Charter from July 17, 2019 through

[1] Charter alone employs over 93,000 employees nationwide, most of whom are bound by Charter's Arbitration Agreement.

May 14, 2020.

A. The Arbitration Agreement

Plaintiff Angelica Ramirez agreed to arbitrate all claims against Charter on two occasions. First, when Ramirez applied to work for Charter on June 28, 2019, and second when Ramirez commenced employment with Charter on July 17, 2019. In order to submit her application for employment and then later to complete the onboarding process, Ramirez was required to agree to participate in Charter's Solution Channel Program, which requires binding arbitration of employment-related disputes pursuant to the terms of Charter's Mutual Arbitration Agreement ("Arbitration Agreement").

Charter's Arbitration Agreement cautioned applicants, prospective employees, and employees in bold and capitalized text to "**PLEASE READ THE FOLLOWING MUTUAL ARBITRATION AGREEMENT ('AGREEMENT') CAREFULLY**" and informed them that: "**IF YOU ACCEPT THE TERMS OF THE AGREEMENT … YOU ARE AGREEING TO SUBMIT ANY COVERED EMPLOYMENT-RELATED DISPUTE BETWEEN YOU AND [CHARTER] TO BINDING ARBITRATION. YOU ARE ALSO AGREEING TO WAIVE ANY RIGHT TO LITIGATE THE DISPUTE IN COURT AND/OR HAVE THE DISPUTE DECIDED BY A JURY**." The Arbitration Agreement further specified that it was a mutual agreement, and that Charter must also submit any claims it had against the employee to binding arbitration. The

Solution Channel Guidelines explained the benefits of arbitration and described the arbitration process in detail, including that all parties waived the right to have covered claims "heard by a court, judge, or jury."

B. The Complaint and Motion to Compel Arbitration

On July 9, 2020, notwithstanding her agreement to arbitrate, Ramirez filed this civil action, alleging the following employment-related causes of action against Charter: (1) disability discrimination; (2) interference with taking pregnancy leave; (3) retaliation; (4) harassment; (5) failure to prevent retaliation and harassment; (6) failure to accommodate; (7) failure to engage in the interactive process; and (8) and wrongful termination. It is undisputed that all of Ramirez's claims fall within the scope of her Arbitration Agreement.

On October 20, 2020, Charter filed a Motion to Compel Arbitration and to Dismiss or Stay the Action in response to Ramirez's Complaint. Charter also filed a Request for Judicial Notice in Support of the Motion. The trial court took notice of twelve United States District Court and California state court decisions where the courts compelled arbitration based on the same Arbitration Agreement that was at issue in the appeal and is the subject of this Petition.

Ramirez opposed Charter's Motion to Compel Arbitration on November 2, 2020. Charter filed a Reply in Support of the Motion to Compel Arbitration on November 5, 2020.

On November 16, 2020, the trial court held a hearing on Charter's Motion to Compel Arbitration. Prior to the hearing, the trial court issued a tentative ruling granting Charter's motion. In its tentative ruling granting Charter's Motion to Compel Arbitration, the trial court correctly found that Ramirez consented to the Arbitration Agreement both when she applied for employment with Charter and when she completed Charter's onboarding process after accepting the job offer. The trial court further found that while the statute of limitations provision and the provision providing remedies to the prevailing party could be interpreted as potentially unconscionable in certain circumstances, those circumstances were not present in this case and that those provisions could be severed.

At the hearing on the Motion, for the first time, Ramirez contended that the interim attorneys' fee provision in section K of the Arbitration Agreement was also unconscionable. Section K of the Arbitration Agreement provides for attorneys' fees to be awarded to a prevailing party on a motion to compel arbitration. The trial court incorrectly held this provision unconscionable, refused to sever it, and on that basis refused to enforce the Arbitration Agreement. On November 25, 2020, the trial court issued its final ruling, denying the motion on the ground that the Agreement was unconscionable.

C. The Court of Appeal Decision

Charter timely appealed the denial of the Motion by filing a Notice of Appeal on December 7, 2020. On February 18, 2022, the Court of Appeal affirmed. Exh. A. This Petition for Review follows.

D. The *Patterson* Decision and Other Cases Enforcing the Arbitration Agreement

The Opinion directly contradicts and openly criticizes a recent prior decision by Division Seven of the same Court, in *Patterson v. Superior Court*, 70 Cal. App. 5th 473 (2021), which was issued on October 18, 2021. In *Patterson*, the Court of Appeal affirmed the enforceability of the interim attorneys' fee provision in Section K of Charter's Arbitration Agreement.

In *Patterson*, the trial court granted Charter's motion to compel arbitration of Michael Patterson's employment claims against Charter and rejected Patterson's arguments that Charter's Arbitration Agreement is unconscionable. *Patterson* at 479. Patterson sought a writ of mandate of the grant of Charter's motion, which was summarily denied. *Id.* Charter then moved the trial court for an award of attorneys' fees under Section K of the Arbitration Agreement, which the trial court granted. Patterson sought a writ of mandate of the fee award, arguing that Section K of the Agreement was unconscionable. The Court of Appeal granted the petition to decide whether Section K of Arbitration Agreement is enforceable. The Court found that

Section K was ***not substantively unconscionable***:

> Charter argues the fee provision in its arbitration agreement is analogous to the separate fee provision at issue in *Acosta*, *supra*, 150 Cal.App.4th 1124—that is, it is specifically directed to fees incurred to compel arbitration—and **should be enforced on the same basis. We agree.** … Patterson's claims are based on Charter's alleged violations of FEHA. The only contract dispute was the enforceability of the arbitration agreement. **Charter was the prevailing party in the superior court and is entitled to its fees under the fee provision in that contract to the extent not otherwise prohibited or limited by FEHA**.

Patterson, at 486 (emphasis added). While Patterson (a former Charter employee) urged this Court to "hold the fee-shifting provision in the Charter arbitration agreement is unenforceable and direct the superior court to enter a new order denying Charter's motion for attorney fees[,]" the Court of Appeal held:

> [G]iven the **strong public policy favoring arbitration** (see, e.g., *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 (*Concepcion*); *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125) and the **requirement we interpret the provisions in a contract in a manner that render them legal** rather than void when possible (see Civ. Code, §§ 1643 [if possible without violating the parties' unambiguous intent, a contract is interpreted so as to make it 'lawful, operative, definite, reasonable, and capable of being carried into effect'], 3541 ['[a]n interpretation which gives effect is preferred to one which makes void']), **we construe the prevailing party fee provision in the arbitration agreement to impliedly incorporate the FEHA asymmetric rule for awarding attorney fees and costs**. (Cf. *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682; *Roman v. Superior Court* (2009)

172 Cal.App.4th 1462, 1473).

Patterson, at 489-490 (emphasis added).

Patterson is one of many California and federal court rulings enforcing Charter's Arbitration Agreement. *See, e.g.*, *Bravo*. The Opinion below conflicts with these rulings and creates a conflict of law that this Court should resolve.

IV. LEGAL DISCUSSION

The Court below invalidated Charter's arbitration agreement on the premise that the agreement includes four provisions which are substantively unconscionable, and thus render the entire agreement unenforceable. One of these purportedly unconscionable provisions is the provision which allows for recovery of interim attorneys' fees on a successful motion to compel arbitration, which the *Patterson* court recently enforced. Although the *Patterson* court found that the provision could be read to contravene the fee shifting provisions of the Fair Employment and Housing Act ("FEHA"), the Court still followed the requirements of the FAA and precedent in *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000) ("*Armendariz*") by finding the provision enforceable under circumstances that would not conflict with FEHA. Here, by contrast, the Court of Appeal contravened the FAA and this Court's decisions in *Baltazar* and *Iskanian* by refusing to sever any allegedly unconscionable provisions in the Arbitration Agreement in order to render it enforceable.

A. There is a Direct Conflict Between the Decision Below and the *Patterson* Decision on Whether Section K of Charter's Arbitration Agreement Is Enforceable.

As discussed above, the *Patterson* court held that Section K of Charter's Arbitration Agreement was enforceable, under the principles established by the FAA and *Armendariz*, which require courts to give effect to arbitration agreements between parties. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (noting the "liberal federal policy favoring arbitration"); *Armendariz*, 24 Cal. 4th at 97 ("California law, like federal law, favors enforcement of valid arbitration agreements."). The *Patterson* court relied primarily on Civil Code §§ 1643 3541, *Armendariz*, *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal.4th 665, 682 (2010) ("*Pearson*"), and *Roman v. Superior Court* 172 Cal.App.4th 1462, 1473 (2009) ("*Roman*") in its holding that although Section K had the potential to conflict with the attorneys' fee award provisions in the FEHA, the provision and thus the Agreement were still enforceable where the plaintiff's opposition to the motion to compel arbitration was frivolous or groundless. *Patterson* at 490.

The Opinion below explicitly rejected the reasoning of the *Patterson* decision and created conflicting authority:

> In affirming, we also disagree with [*Patterson*], which considered the enforceability of a provision in the same arbitration agreement at issue here that awards attorney fees to the prevailing party on a motion to compel arbitration. After concluding that the provision

> was not enforceable as written, the court in *Patterson* incorporated an implied term bringing the provision into accord with the asymmetrical attorney fee standard of FEHA under section 12965, subdivision (c)(6) (a prevailing defendant is entitled to attorney fees only if the employee's action was frivolous, unreasonable, or groundless). With that implied term, the court in *Patterson* found the provision enforceable. As we explain in detail below, we disagree with *Patterson*'s analysis and find the provision unconscionable.

Exh. A at 369. The Opinion below details the reasons it disagrees with the *Patterson* ruling, including *Patterson*'s reliance on this Court's ruling in *Armendariz* to support its enforcement of the Agreement. The Opinion below concludes the attorneys' fee provision is not sufficiently ambiguous to allow the Court to step in to enforce it. *See* Exh. A at 379.

The Court's logic below is faulty. The Court relies in part on *Serpa v. Cal. Sur. Investigations, Inc.*, 215 Cal. App. 4th 695 (2013) to hold that because the attorneys' fee provision in Charter's Agreement is straightforward, it cannot be saved or severed. *See* Exh. A at 379. Yet in *Serpa* the Court enforced an employment arbitration agreement that included an unenforceable fee provision and simply severed the offensive provision. After finding the attorneys' fee provision unenforceable, the *Serpa* court held that the "offending provision, which is plainly collateral to the main purpose of the contract, is properly severed and the remainder of the contract enforced." *Id.* at 710 (citing *Roman v. Superior Court*, 172 Cal. App. 4th 1462 (2009) ("*Roman*")).

The Court below then attempted to distinguish the particular facts of the rulings relied upon by the *Patterson* Court, *Pearson* and *Roman*. The Court below concluded that the courts' efforts to save the arbitration agreements in those cases were distinguishable because they were required to interpret ambiguous provisions or provisions which were "treated as ambiguous under the circumstances." Exh. A (*Ramirez* at 380). The Court's finding of ambiguity in the provisions at issue in these other cases was arbitrary. Both *Pearson* and *Roman* clearly stand for the principle applied in the *Patterson* case, that allegedly unconscionable fee provisions in arbitration agreements are collateral to the main purpose of those agreements and should be severed.

In *Roman*, the Court of Appeal relied on *Armendariz* and severed an unconscionable fee shifting provision, noting: "the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement." *Roman*, at 1477. "We have little difficulty concluding the interests of justice would be furthered by severance of the cost provision, which, if unconscionable … is plainly 'collateral to the main purpose of the contract.'" *Roman*, at 1478 (citing *Armendariz* at 124).

In *Pearson*, this Court cited *Roman* to re-emphasize "the general principle that we interpret a contractual provision in a manner that renders it enforceable rather than void." *Pearson* at 682. The Court proceeded to interpret a provision in the arbitration agreement at issue regarding administrative

remedies to comply with existing law. *Ibid.*

Again, the Court's efforts to distinguish *Pearson* and *Roman*, both of which enforced the arbitration agreements at issue, illustrate that the Court below improperly ignored the weight of Supreme Court and Appellate Court precedent that requires enforcement of employment arbitration agreements, even where there is doubt as to the enforceability of certain provisions.

Finally, the Court below attempted to undermine the *Patterson* court's reliance on *Armendariz*, by arguing that the provisions in the arbitration agreement regarding costs were different than Section K at issue here: "In *Armendariz*, the agreement had no provision governing costs, and the court was not called upon to interpret one. Thus, the Supreme Court did not make the arbitration agreement enforceable by grafting an implied cost-sharing term onto an express provision governing costs." Exh. A (*Ramirez* at 382).

But the Court below in its analysis of *Armendariz* entirely missed the point made in *Patterson*: *Armendariz* stands for the principle that courts must interpret arbitration agreements so as to render them enforceable. *Patterson*, at 490. It does not matter if the exact attorneys' fee issue in *Armendariz* was distinct from the fee provision in Charter's Arbitration Agreement. Rather, as *Patterson* correctly concluded, *Armendariz* requires the Courts of Appeal in these cases to give credence to the parties' contract to arbitrate all claims between them, even if that process requires

the Court to interpret the interim attorneys' fee provision in Section K not to conflict with FEHA.

> That is precisely the course followed by the Supreme Court in *Armendariz*, which, after concluding it violated FEHA to require an employee to pay the costs associated with arbitration of a FEHA claim, held, "[A] mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration." [citing *Armendariz* at 113]. As a result, the court continued, "[t]he absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement." (Ibid.).

Patterson at 490.

Thus, in concluding that Section K is irreparably unconscionable, the Court below went to great pains to distinguish two California Supreme Court cases (*Armendariz* and *Pearson*), and two Court of Appeal cases (*Roman* and *Patterson*), all of which require enforcement of arbitration agreements through use of interpretation or severance. At the same time, the Court improperly relied on *Serpa*, which actually supports severance of any allegedly unconscionable provision. The Court below cited no cases in its analysis of Section K which support the erroneous conclusion that the *Patterson* decision is wrong.

B. The Decision Below Also Conflicts with the Trial Court, the *Bravo* Decision, and Numerous Other Federal and Trial Court Rulings.

The Opinion below also found that three other provisions of

Charter's Agreement are substantively unconscionable: (1) restrictions on the statutes of limitations; (2) lack of mutuality of claims subject to arbitration; and (3) limitations on the number of depositions. If these provisions are unconscionable, they are all easily severable, as required by the precedents discussed above in *Armendariz*, *Pearson*, *Roman*, and *Serpa*. But also, many other courts have held that Charter's Arbitration Agreement is enforceable, including the *Bravo* Court, which is the *same court in Division Five* that issued the Opinion below. The conflicts between the Opinion below and those of numerous other courts confirm that the ruling is erroneous.

First, as discussed in the Opinion, the trial court below came to a different conclusion about which aspects of Charter's Arbitration Agreement are unenforceable. The trial court held that the Arbitration Agreement was substantively unconscionable based on the interim fee award in Section K (discussed in *Patterson*), the broader attorneys' fee provision regarding the entire arbitration, and a provision regarding the statute of limitations for FEHA claims. *See* Opinion at 371. The Court below disagreed with the trial court and held that the general attorneys' fee provision regarding the entire arbitration (as opposed to the interim fee award in Section K) is *not* unconscionable. Instead, the Court found unconscionability in two provisions that were not deemed unconscionable by the trial court: (1) a provision regarding the types of claims subject to arbitration, and (2) a provision that limits the number of depositions in arbitration to four per side.

Under a year before the Opinion below was issued, in March 2021 in the *Bravo* case, the same Court (with two of the same Justices), reversed a trial court's denial of Charter's motion to compel arbitration, and held that the Arbitration Agreement was enforceable. The Court in *Bravo* held that the seven plaintiffs in that case had affirmatively assented to arbitration and that there was sufficient consideration for the agreement because the Arbitration Agreement is mutual. *See Bravo*, No. B303179, 2021 Cal. App. Unpub. LEXIS 1872, at *20 (Mar. 23, 2021). Although the *Bravo* decision did not specifically address the issue of substantive unconscionability at issue here, the difference in outcomes from the same court is concerning. There is a lack of clarity with regard to the viability of Charter's Arbitration Agreement where the same court has both enforced and invalidated the same Arbitration Agreement in two decisions issued in the same year.

In addition, no fewer than eleven California trial court decisions and sixteen federal district court decisions have enforced Charter's Arbitration Agreement in the last four years. Twelve of these decisions were included in Charter's request for judicial notice, which was accepted and reviewed by the trial court below.

The disparity in decisions on a single Arbitration Agreement has created uncertainty for Charter, and many other parties seeking to resolve employment conflicts based on similar types of employment arbitration agreements. The Opinion's

divergence from the weight of authority upholding Charter's Arbitration Agreement demonstrates that the ruling below was in error.

C. The Court's Analysis of Substantive Unconscionability Is Legally Flawed.

Even without reference to the other cases which contradict the Opinion below, the record in this case shows that the Court's finding of irreparable substantive unconscionability and refusal to enforce Charter Arbitration Agreement violates legal precedent.

1. The Court of Appeal's Refusal to Enforce the Arbitration Agreement Conflicts with and Is Preempted by the Federal Arbitration Act.

Notably, the Opinion below does not mention the FAA nor acknowledge that Charter's Arbitration Agreement is governed by the FAA. The *Patterson* decision, by contrast, acknowledges the FAA, and relies upon the U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) ("*Concepcion*") in its decision to interpret Charter's Arbitration Agreement in a way that renders the Agreement enforceable. *See Patterson* at 490 (noting "the strong public policy favoring arbitration" as stated in *Concepcion*).

In *Concepcion*, the U.S. Supreme Court examined the language of the FAA and emphasized the importance of state

court deference to the FAA's protection of arbitration agreements. "The overarching purpose of the FAA, evident in the text [the statute], is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion* at 344. In interpreting arbitration agreements that arise under the FAA, courts cannot impose unconscionability rules that interfere with arbitral efficiency. *Ibid.*

Since *Concepcion* was issued, this Court has acknowledged that decision's preeminence in requiring enforcement of employment arbitration agreements. *See Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 366 (2014) (explaining that under *Concepcion*, the FAA preempts the California rule invalidating class action waiver in arbitration agreements); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1139 (2013) (acknowledging that under *Concepcion*, the FAA preempts the California rule invalidating waivers of Berman hearings in employment arbitration agreements).

The FAA "is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *DIRECTV, Inc. v. Imburgi*a, __ U.S. __ 136 S. Ct. 463, 468 (2015).

The Opinion below contravenes the FAA by imposing unconscionability rules on Charter's Agreement that prevent arbitration of claims that the parties have agreed to submit to arbitration. The lower Court's insistence that Charter's

Arbitration Agreement is irreparably unconscionable contravenes the FAA, *Concepcion*, and the interpretations of the FAA by this Court.

2. The Court of Appeal's Refusal to Enforce the Arbitration Agreement Conflicts with the California Civil Code.

Similarly, the Opinion below fails to give credence to the California Civil Code, which requires severance of any allegedly unconscionable provisions of the contract between Charter and Ramirez. There is no issue in this case as to whether Ramirez and Charter entered into a contract to arbitrate all of Ramirez's employment claims against Charter. The only basis for invalidating Charter's Arbitration Agreement is the purported four substantively unconscionable provisions. The Court below could have and should have severed those four provisions, or else interpreted the provisions in a way that renders them enforceable (as the *Patterson* court did with Section K).

As the *Patterson* court acknowledged, the California Civil Code requires the same result as the FAA and *Concepcion*. *See* Civ. Code, § 1643 (if possible without violating the parties' unambiguous intent, a contract is interpreted so as to make it "lawful, operative, definite, reasonable, and capable of being carried into effect"); § 3541 ("[a]n interpretation which gives effect is preferred to one which makes void"). Based on these statutes, the *Patterson* court construed the prevailing party fee provision in Charter's Arbitration Agreement to impliedly

incorporate the FEHA asymmetric rule for awarding attorney fees and costs, and thus to be enforceable. *See Patterson* at 490. The Court below should have applied the Civil Code to interpret the other three allegedly unconscionable provisions in a way so as to render them enforceable.

3. The Court's Refusal to Sever Any Unconscionable Provisions in the Arbitration Agreement Conflicts with This Court's Precedent.

Alternatively, the Court below could have relied upon this Court's precedent to sever any allegedly substantively unconscionable provisions in the Arbitration Agreement. The Opinion below stands in stark contrast with the weight of authority from this Court, including *Pearson*, *Sonic Calabasas*, *Baltazar*, and *Iskanian* – all of which enforced arbitration agreements that included potentially unenforceable provisions.

In order to invalidate an arbitration agreement on the grounds of substantive unconscionability, the agreement must be severely unfair and one-sided. "A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to 'shock the conscience." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012) (internal quotations omitted).

In *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016), this Court applied the "shock the conscience" standard to hold that

unless an arbitration agreement is extremely unfair, courts must enforce employment arbitration agreements. *Id.* at 1243-45.

> Commerce depends on the enforceability, in most instances, of a duly executed written contract. A party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain. Not all one-sided contract provisions are unconscionable; hence the various intensifiers in our formulations: 'overly harsh,' 'unduly oppressive,' 'unreasonably favorable.' (See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, *supra*, 55 Cal.4th at p. 246 … .) … [¶] … **The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement**.

Id. at 1245 (emphasis added).

In *Baltazar*, this Court addressed three substantively unconscionable provisions, which were similar to the types of supposedly non-mutual provisions at issue here. In *Baltazar*, the arbitration agreement provided for provisional relief that was more likely to favor the employer, only specifically listed claims brought by employees as subject to arbitration, and explicitly protected the employer's confidential information. The decision held that the apparent unfairness of these terms was largely a result of skewed contract interpretation, and that in reality, the agreement was fair. *See Baltazar* at 1246-1250. The primary principle established in *Baltazar* is that courts must interpret arbitration agreements so as to promote enforceability, unless there is extreme unfairness.

In *Iskanian*, this Court addressed the viability of an

employment arbitration agreement which included a class action waiver and a representative action waiver that covered claims under the Private Attorneys General Act. *See Iskanian*, 59 Cal. 4th 348 (2014). Although this Court held that the class action waiver was enforceable in light of the U.S. Supreme Court's decision in *Concepcion*, the representative action waiver was held to be invalid. Yet this Court *still enforced the remainder of the arbitration agreement*. *See Iskanian* at 391-92.

This Court has established that unconscionable or unenforceable provisions in otherwise valid employment arbitration agreements should be either interpreted to be enforceable or should be severed. The *Patterson* court properly applied these cases to enforce Charter's Arbitration Agreement.

Taken together, this Court's rulings in *Armendariz*, *Pearson*, *Baltazar*, *Sonic Calabasas*, and *Iskanian* illustrate that this Court requires interpretations of arbitration agreements that render them enforceable, while ensuring a fair outcome in arbitration for all parties. The Opinion below failed to follow this directive.

4. The Court's Conclusion That It Is Impossible to Sever the Allegedly Unconscionable Provisions Conflicts With Numerous Other State and Federal Decisions.

The Opinion below concluded that because there were four substantively unconscionable provisions in the Arbitration

Agreement, it was "reasonable" for the trial court to refuse to sever the unconscionable provisions and even suggested that severance would not be "possible." *See* Exh. A (*Ramirez* at fn. 11). Many other courts have come to the opposite conclusion. Under California and federal precedent, numerous courts analyzing similar provisions in employment arbitration agreements have severed otherwise enforceable arbitration agreements, especially where the unconscionable provisions are collateral to the main purpose of the agreement, as they are here.

Pursuant to Cal. Civ. Code § 1670.5(a), a court has discretion to "enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Thus, as the Supreme Court observed in *Armendariz*, while a trial court has considerable discretion with respect to severability, the statute contemplates that refusal to enforce an agreement altogether should be limited to situations where the agreement is "'permeated'" by unconscionability. *See Farrar v. Direct Commerce, Inc.*, 9 Cal. App. 5th 1257, 1274 (2017) (citing *Armendariz* at 122). "If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." *Id.*

Each of the provisions the Court below found to be unconscionable are collateral to the main purpose of the Arbitration Agreement. In fact, courts have routinely found

similar terms to be collateral to the main purpose of the agreement. For example, numerous courts have found that provisions that exclude claims that are more likely to be brought by an employer from arbitration "can be extirpated without affecting the remainder of the [agreement] and [are] collateral to the main purpose of the contract, which is to require arbitration of disputes." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261 (9th Cir. 2017) (internal quotation marks and citation omitted); *Cummings-Reed v. United Health Grp.*, No. 2:15-CV-02359-JAM-AC, 2016 WL 1734873, at *6 (E.D. Cal. May 2, 2016) ("The injunctive relief provision in the arbitration policy . . . is not the main purpose of the policy, and the Court will therefore sever the following sentence without invalidating the rest of the policy."). Courts have also found fee and cost provisions to be "collateral to the main purpose of the contract." *Roman* at 1478; *see also Serpa* at 710 (finding fee provision to be "plainly collateral to the main purpose of the contract" and determining that the provision should be "properly severed" with the "remainder of the contract enforced"); *Smith v. Vmware, Inc.*, No. 15-CV-03750-TEH, 2016 WL 54120, at *6 (N.D. Cal. Jan. 5, 2016) (severing cost-splitting and attorney's fees provisions from the Agreement because they "are easily severable . . . as they do not permeate the Agreement"). Courts have similarly recognized that discovery limitations and provisions that shorten the statute of limitations on a claim can be severed without affecting the central purpose of the arbitration agreement. *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 985 (2010) ("Even if we assume the discovery provision

to be unconscionable, which we do not, the trial court abused its discretion by refusing to sever it."); *Sonico v. Charter Commc'ns, LLC*, No. 19-CV-01842-BAS-LL, 2021 WL 268637, at *13 (S.D. Cal. Jan. 27, 2021) ("severing the jury trial waiver from the contract under California Civil Code § 1670.5(a) is appropriate" because (1) "the central purpose of the JAMS Agreement is to mandate arbitration of employment-related claims, which is indisputably lawful. The objective of the jury trial waiver is clearly collateral to this central purpose because the waiver intends to require bench trials for any disputes that cannot be subject to the agreement's mandate;" and (2) "the jury trial waiver is a single sentence that does not rely on or create any conditions for other provisions in the JAMS Agreement; it can therefore be easily stricken without requiring 'reform[ing] the contract by augmenting it or otherwise rewriting the parties' agreement.'" (citation omitted)); *Butterfield v. Fedex Office*, No. SACV1800033AGKESX, 2018 WL 5919208, at *3 (C.D. Cal. July 16, 2018) ("Still, even if the jury trial waiver is unlawful, the Court concludes its wrongfulness doesn't 'permeate' the rest of the agreement such that compelling arbitration would be inappropriate."); *Jones v. Deja Vu, Inc.*, 419 F. Supp. 2d 1146, 1150 (N.D. Cal. 2005) ("I find that the unconscionable provisions shortening the statute of limitations . . . are collateral to the main purpose of the parties' contracts and do not so pervade the entirety of the contracts as to render the contracts unenforceable.").

Severance in this case is especially appropriate because the

Arbitration Agreement specifically provides for severability. Section Q of the Arbitration Agreement states:

> [I]f any portion or provision of this Agreement (including, without implication of limitation, any portion or provision of any section of this Agreement) is determined to be illegal, invalid, or unenforceable by any court of competent jurisdiction and cannot be modified to be legal, valid, or enforceable, the remainder of this Agreement shall not be affected by such determination and shall be valid and enforceable to the fullest extent permitted by law, and said illegal, invalid, or unenforceable portion or provision shall be deemed not to be a part of this Agreement.

(Arbitration Agreement at ¶ Q). Accordingly, the Court below erred and contradicted the tide of California and federal cases interpreting California law by refusing to sever the supposedly unconscionable provisions.

5. The Court Improperly Refused to Consider the AAA Rules in Order to Save the Agreement.

The Court of Appeal's refusal to sever unconscionable provisions in Charter's Arbitration Agreement and to follow the *Patterson* court's lead in enforcing the interim attorneys' fee provision, improperly violates the premise in *Concepcion* and the Court's precedent in *Armendariz*, which require California courts to give effect to the parties' agreements to arbitrate.

The Court below took great pains to make it seem difficult to sever or correct any perceived errors in Charter's Arbitration Agreement. For example, the Court included a

footnote asserting that it would not be "possible" to sever the unconscionable discovery limitation in the Agreement because "the arbitration agreement does not provide the arbitrator discretion, apart from the power conferred by the agreement, to order additional discovery." Exh. A (*Ramirez* at 387, fn. 11). In making this point, the Court willfully ignored the fact that the AAA rules for employment arbitration provide for all discovery necessary to allow for a full and fair resolution of plaintiff's claims. The AAA rules, which are part of the appellate record, because they were attached to Charter's motion to compel arbitration, specifically state that they shall apply, whether or not explicitly incorporated by reference into an arbitration agreement and supersede any contrary provisions in the arbitration agreement.

> **The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association** (hereinafter "AAA") or under its Employment Arbitration Rules and Mediation Procedures or for arbitration by the AAA of an employment dispute without specifying particular rules*. **If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules**.

AAA Rule 1 (emphasis added). In *Armendariz* and *Baltazar*, this Court held that the arbitration rules are presumed to be incorporated by reference in the arbitration agreement, and that those rules can save an agreement which is otherwise lacking in explicit protections for employees.

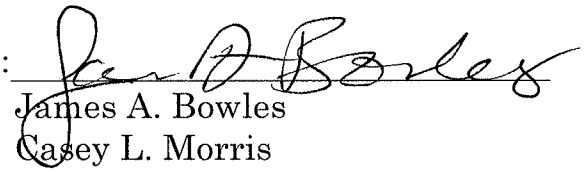
Under the FAA and this Court's precedent, the Court below had an obligation to interpret Charter's Arbitration Agreement so as to render it enforceable. Its stark refusal to do so, in direct conflict with *Patterson* and other decisions of numerous courts, requires this Court's intervention.

V. CONCLUSION

For all the foregoing reasons, Charter respectfully requests that this Court grant review and set the case for plenary briefing and argument.

Dated: March 28, 2022

HILL, FARRER & BURRILL LLP

By: 

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), the undersigned hereby certifies that this Petition for Review contains 6453 words, excluding the tables and this certificate according to the word count generated by the computer program used to produce this document.

Dated: March 28, 2022

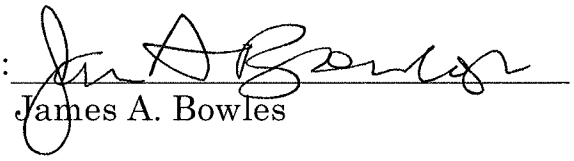
By: 
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EXHIBIT A

Ramirez v. Charter Communications, Inc.

Court of Appeal of California, Second Appellate District, Division Four

February 18, 2022, Opinion Filed

B309408

Reporter

75 Cal. App. 5th 365 *; 2022 Cal. App. LEXIS 135 **; 2022 WL 498706

ANGELICA RAMIREZ, Plaintiff and Respondent, v. CHARTER COMMUNICATIONS, INC., Defendant and Appellant.

Prior History: [**1] APPEAL from a judgment of the Los Angeles County Superior Court, No. 20STCV25987, David J. Cowan, Judge.

Disposition: Affirmed.

Counsel: Hill, Farrer & Burrill, James A. Bowles and Casey L. Morris for Defendant and Appellant. [*369]

Panitz Law Group and Eric A. Panitz for Plaintiff and Respondent.

Judges: Opinion by Willhite, J., with Manella, P. J., and Collins, J., concurring.

Opinion by: Willhite, J.

Opinion

WILLHITE, J.—Plaintiff Angelica Ramirez and defendant Charter Communications, Inc. (Charter), are parties to an arbitration agreement. After Charter terminated Ramirez's employment, Ramirez filed suit alleging claims under the California Fair Employment and Housing Act (Gov. Code, § 12940 et seq.; FEHA)[1] against Charter, and Charter filed a motion to compel arbitration. Finding the arbitration agreement unconscionable, the trial court denied Charter's motion, and Charter appealed. On appeal, Charter contends the trial court erred in concluding the arbitration agreement is unconscionable and in refusing to sever any provisions the court considered unconscionable.

We affirm the trial court's order denying the motion to compel arbitration (though we disagree with certain particulars of the trial court's reasoning). In affirming, we also disagree with *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473 [285 Cal. Rptr. 3d 420] (*Patterson*), which considered the enforceability of a provision in the [**2] same arbitration agreement at issue here that awards attorney fees to the prevailing party on a motion to compel arbitration. After concluding that the provision was not enforceable as written, the court in *Patterson* incorporated an implied term bringing the provision into accord with the asymmetrical attorney fee standard of FEHA under section 12965, subdivision (c)(6) (a prevailing defendant is entitled to attorney fees only if the employee's action was frivolous, unreasonable, or groundless).[2] With that implied term, the court in *Patterson* found the provision enforceable. As we

[1] All undesignated section references are to the Government Code.

[2] Effective January 1, 2022, the Legislature renumbered former subdivision (b) of Government Code section 12965 as current subdivision (c)(6). (Stats. 2021, ch. 278, § 7.) The language of this subdivision was left unaltered.

explain in detail below, we disagree with *Patterson*'s analysis and find the provision unconscionable.

FACTUAL AND PROCEDURAL BACKGROUND

In 2017, Charter created a program for resolving and ultimately arbitrating employment-related disputes, called "Solution Channel." All individuals applying for a position with Charter were required to agree to participate in Solution Channel as well as agree to Charter's mutual arbitration agreement (arbitration agreement). Individuals who applied and received an offer from Charter were then required to complete a web-based onboarding process as a condition of employment. Prospective employees were prompted to review [*370] and accept [**3] various policies and agreements, including the arbitration agreement and the Solution Channel program guidelines (guidelines).

After agreeing to submit all employment-related disputes with Charter to arbitration, Ramirez was hired as an employee in July 2019. In May 2020, Charter terminated Ramirez. In July 2020, Ramirez filed suit, alleging multiple causes of action under FEHA and wrongful discharge in violation of public policy.

Charter filed a motion to compel arbitration and sought attorney fees in connection with its motion pursuant to the arbitration agreement. In opposition, Ramirez argued that the arbitration agreement was procedurally unconscionable because it was a contract of adhesion. She argued the agreement was substantively unconscionable for several reasons, including that it shortened the statute of limitations, broadened the employer's ability to recover attorney fees against an employee, unduly limited discovery, and favored the employer in defining the scope of the claims covered. She also argued that because unconscionability permeated the agreement, severance was not permissible. Lastly, Ramirez contended Charter was not entitled to attorney fees and in any event, [**4] the request for fees was itself substantially unconscionable. Charter responded that the arbitration agreement's terms were not unconscionable and, even if specific terms were unconscionable, the trial court should sever them and enforce the parties' agreement to arbitrate.

Prior to the hearing on the motion, the court issued a tentative ruling granting Charter's motion to compel. The tentative ruling found that there was minimal procedural unconscionability from the adhesive nature of the contract, and two points of substantive unconscionability—the restriction on timing for arbitration of FEHA claims and the remedy provision for prevailing party fees—were severable. The tentative ruling denied Charter's request for attorney fees in connection with the motion to compel pursuant to the arbitration agreement.

At the November 16, 2020 hearing, counsel for Ramirez noted that in the tentative ruling the court "found minimal procedural unconscionability because there was a forced arbitration agreement as a condition of employment." But there were in fact three, not two, points of substantive unconscionability that were part of the tentative ruling: the restriction on timing for arbitration of FEHA [**5] claims, the remedy provision for prevailing party fees, and the attorney fee provision regarding a party bringing a successful motion to compel. Counsel further argued the arbitration agreement lacked mutuality and that the 90 days to complete discovery was also substantively unconscionable. Counsel emphasized that unconscionability must be analyzed at the time the parties entered into the agreement, instead of at the time of [*371] Ramirez's lawsuit. In response, counsel for Charter argued the agreement was not substantively unconscionable. However, severance would be appropriate as the disputed terms do not specifically affect Ramirez. The court took the matter under

submission.

On November 25, 2020, the court issued a final written ruling denying Charter's motion to compel. The court noted that it was undisputed the arbitration agreement was an adhesion contract as a mandatory condition of employment. However, adhesion alone establishes only a minimum degree of procedural unconscionability. But the court further found the agreement was substantively unconscionable because it shortened the statute of limitations for FEHA claims, failed to restrict attorney fee recovery to only frivolous [**6] or bad faith FEHA claims (contrary to FEHA), and impermissibly provided for an interim fee award for a party successfully compelling arbitration. The court did not find the limited discovery or the exclusion of certain claims under the agreement substantially unconscionable. The court concluded the arbitration agreement is "permeated with unconscionability" and therefore, severance was improper.

Charter filed a timely notice of appeal.

DISCUSSION

Charter contends the trial court erred in denying its motion to compel because the arbitration agreement is neither procedurally nor substantively unconscionable. And even if it were, the trial court should have severed the substantively unconscionable provisions, upheld the agreement, and ordered the parties to arbitration. Ramirez responds that the arbitration agreement is procedurally and substantively unconscionable and the trial court's decision to find the entire agreement unconscionable, rather than severing the unconscionable provisions, should not be disturbed on appeal.

(1) We conclude the arbitration agreement was a contract of adhesion, which establishes a minimal degree of procedural unconscionability. We further conclude the agreement [**7] contained a high degree of substantive unconscionability based on the restriction of the statute of limitations for FEHA claims, the provision granting an award of attorney fees for a prevailing party in compelling arbitration, the lack of mutuality, and the limitation on discovery. Therefore, we hold the arbitration agreement is permeated by unconscionability and cannot be enforced.

A. *Standard of Review and Applicable Law*

(2) An order denying a motion to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) "Standards of review of orders on a motion to [*372] compel arbitration are not uniform. [Citation.] Generally, if the trial court's order rests on a factual determination, the appellate court adopts a substantial evidence standard. If the court's decision rests solely on an interpretation of law, then we employ the de novo standard of review. [Citation.]" (*Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 468 [275 Cal. Rptr. 3d 741].)

(3) A written agreement to submit a controversy to arbitration is valid and enforceable, absent a reason under state law, such as unconscionability, that would render any contract revocable. (Code Civ. Proc., § 1281; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 [99 Cal. Rptr. 2d 745, 6 P.3d 669] (*Armendariz*); *Sandoval-Ryan v. Oleander Holdings LLC* (2020) 58 Cal.App.5th 217, 222 [272 Cal. Rptr. 3d 314].) "The party seeking to compel arbitration bears the burden of proving the existence of an arbitration agreement, while the party opposing the petition bears [**8] the burden of establishing a defense to the agreement's enforcement. [Citation.]" (*Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 890 [221 Cal. Rptr. 3d 225]; see Civ. Code, § 1670.5, subd. (a) ["If the court as a matter of law finds the contract or any

clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract"].

(4) The doctrine of unconscionability has both a procedural and a substantive element. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243–1244 [200 Cal. Rptr. 3d 7, 367 P.3d 6] (*Baltazar*).) "'[T]he former focus[es] on "'oppression'" or "'surprise'" due to unequal bargaining power, the latter on "'overly harsh'" or "'one-sided'" results.' [Citation.]" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 [130 Cal. Rptr. 2d 892, 63 P.3d 979].) But the two elements need not exist to the same degree. The more one is present, the less the other is required. (*Armendariz, supra*, 24 Cal.4th at p. 114 [unconscionability is measured on a sliding scale in which greater procedural unconscionability requires less substantive unconscionability, and vice versa].)

If a court finds a clause within a contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or instead sever the unconscionable clause and enforce the remainder of the contract. (Civ. Code, § 1670.5, subd. (a); *Armendariz, supra*, 24 Cal.4th at p. 122; *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 905 [267 Cal. Rptr. 3d 927] (*Davis*).) "We review a trial court's order declining to sever the unconscionable provisions from an arbitration agreement for abuse of discretion." (*Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 453 [260 Cal. Rptr. 3d 35], citing *Armendariz, supra*, 24 Cal.4th at p. 124.)

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B. *Procedural [**9] Unconscionability*

(5) "A procedural unconscionability analysis 'begins with an inquiry into whether the contract is one of adhesion.' [Citation.] An adhesive contract is standardized … and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.' [Citations.] Arbitration contracts imposed as a condition of employment are typically adhesive … ." (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 [251 Cal. Rptr. 3d 714, 447 P.3d 680].) Here, it is undisputed that the arbitration agreement is an adhesion contract because it was a mandatory condition of employment.

"[T]he adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 915 [190 Cal. Rptr. 3d 812, 353 P.3d 741]; see *Alvarez v. Altamed Health Services Corp.* (2021) 60 Cal.App.5th 572, 591 [274 Cal. Rptr. 3d 802] [adhesion "alone is a fairly low level of procedural unconscionability"].) "However, the fact that the arbitration agreement is an adhesion contract does not render it automatically unenforceable as unconscionable. Courts have consistently held that the requirement to enter into an arbitration agreement is not a bar to its enforcement. [Citations.]" (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179 [185 Cal. Rptr. 3d 151].) Rather, it is "'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.' [Citation.]" (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819 [171 Cal. Rptr. 604, 623 P.2d 165].) When, as here, the degree of procedural unconscionability is low, the agreement must be enforced [**10] unless the degree of substantive unconscionability is high. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704 [155 Cal. Rptr. 3d 506]; accord, *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 981–982 [104 Cal. Rptr. 3d 341].)

C. *Substantive Unconscionability*

Charter contends the trial court erroneously found the arbitration agreement substantively unconscionable based on the restriction on the statute of limitations for

FEHA claims, the provision granting the prevailing party in the arbitration any remedy (including attorney fees) available under applicable law, and a separate provision granting attorney fees in connection with a successful motion to compel arbitration. We conclude the trial court's analysis was correct as to the restriction on the statute of limitations and the attorney fee provision on a motion to compel arbitration. We conclude the trial court was incorrect as to the remedy provision for a prevailing party in the arbitration, the limitations on discovery, and the mutuality of the agreement.

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1. *Restriction on Statute of Limitations*

(6) "While parties to an arbitration agreement may agree to shorten the applicable limitations period for bringing an action, a shortened limitations period must be reasonable. [Citation.] '"A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate [**11] and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained."' [Citation.]" (*Baxter v. Genworth North America Corp.* (2017) 16 Cal.App.5th 713, 731 [224 Cal. Rptr. 3d 556] (*Baxter*).)

At the time the arbitration agreement was executed, a FEHA administrative claim had to be filed with the Department of Fair Employment and Housing (DFEH) within one year of the employer's discriminatory act. (*Baxter, supra*, 16 Cal.App.5th at p. 730; see also Civ. Code, § 1670.5, subd. (a); *O'Hare v. Municipal Resources Consultants* (2003) 107 Cal.App.4th 267, 281 [132 Cal. Rptr. 2d 116] ["a judicial determination of unconscionability focuses on whether the contract or any of its provisions were 'unconscionable at the time it was made'"].)[3] Further, under the law as it existed at the time of execution of the agreement (as now), DFEH had up to one year from the filing of the administrative claim to complete its investigation and issue a "right-to-sue" letter (§ 12965, subd. (c)(1)(A)), and a lawsuit alleging FEHA claims had to be filed within one year of the issuance of the "right-to-sue" letter. (§§ 12960, subd. (f)(1)(B), 12965, subd. (c)(1)(C).) Thus, factoring in the time limit for an employee to file a claim with DFEH and for DFEH to investigate and respond to the claim, the outside limit to file a FEHA lawsuit under the law as it existed when the arbitration agreement was executed could have been as long as three years. [**12]

Section E of the arbitration agreement provides, in pertinent part: "The aggrieved party must give written notice of the claim, in the manner required by this Agreement, within the time limit established by the applicable statute of limitations for each legal claim being asserted. To be timely, any claim that must be filed with an administrative agency or body as a precondition or prerequisite to filing the claim in court, must be filed with Solution Channel within the time period by which the charge, complaint or other similar document would have had to be filed with the agency or other administrative body."[4]

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[3] Effective January 1, 2020, the Legislature "enlarge[d] the time for filing a [FEHA] claim [from one] to three years from the date of the challenged conduct." (*Brome v. California Highway Patrol* (2020) 44 Cal.App.5th 786, 793, fn. 2 [258 Cal. Rptr. 3d 83]; see § 12960, subd. (e)(5).)

[4] Charter conveniently omits in its briefing and at oral argument the fact that the guidelines provided an identical timetable for filing a claim with Solution Channel as Section E of the arbitration agreement. The guidelines stated the statute of limitations was "[t]he period of time during which the law allows an individual or entity to pursue a particular type of claim. … Also, to be timely, any claim that must be filed with an administrative agency or body as a precondition or prerequisite to filing the claim in court, must be filed with Solution Channel within the time period by which the charge,

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Under this provision of the arbitration agreement, the period within which an employee must make a FEHA claim is one year, the applicable statutory period under FEHA for filing an administrative claim with DFEH. (See *Baxter, supra*, 16 Cal.App.5th at p. 730.) But as we have noted, FEHA grants DFEH up to one year to investigate and issue a "right-to-sue" letter (§ 12965, subd. (c)(1)(A)), and grants the employee one year after the "right-to-sue" letter to file an action in court (§§ 12960, subd. (f)(1)(B), 12965, subd. (c)(1)(C)).

The practical effect of the arbitration agreement is therefore twofold: it cuts the period that would otherwise apply to file a FEHA action in court by as much as [**13] two years, and (given that DFEH has up to one year to investigate and issue a "right-to-sue" letter), it makes it possible that the employee will be compelled to arbitrate before DFEH has completed its investigation and issued a "right-to-sue" letter. Therefore, we agree with the trial court that reducing the period within which a FEHA claim may be brought from three years to one is substantively unconscionable, as it substantially conflicts with the statutorily sanctioned period for vindicating statutory rights under FEHA. (See *Ellis v. U.S. Security Associates* (2014) 224 Cal.App.4th 1213, 1223 [169 Cal. Rptr. 3d 752] [employment discrimination claims are already subject to shortened statutes of limitation]; *Baxter, supra*, 16 Cal.App.5th at pp. 730–732 [finding substantively unconscionable a shortened limitation period of one year for FEHA claims when, under then-current law, the outside limit to file a lawsuit under FEHA was as long as three years].)[5]

Charter notes that Ramirez sought an immediate "right-to-sue" from the DFEH and filed suit within one year of its accrual. Therefore, Charter contends that Ramirez was not forced to forfeit her right to a DFEH investigation because of the arbitration agreement. How Ramirez chose to enforce her claims does not affect the [**14] unconscionability analysis, which generally looks to an agreement "at the time it was made." (Civ. Code, [*376] § 1670.5, subd. (a).) Furthermore, "protections under FEHA are for the benefit of the entire public, not just [a particular employee]. Thus, a mandatory arbitration provision required as part of an employment relationship cannot waive the statutory rights. [Citation.]" (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1249 [123 Cal. Rptr. 3d 1]; see also *Armendariz, supra*, 24 Cal.4th at p. 101 ["it is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA"].)

2. *Remedy Provision for a Prevailing Party*

A prevailing defendant in a FEHA case may recover attorney fees and costs only if the plaintiff's action was "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." (§ 12965, subd. (c)(6); see *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985 [104 Cal. Rptr. 3d 710, 224 P.3d 41].) The Solution Channel program guidelines provide: "At the discretion of the arbitrator,

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complaint or similar document would have had to be filed with the agency or other administrative body."

[5] Charter relies on a federal district court case, *Greer v. Sterling Jewelers, Inc.* (E.D.Cal., July 10, 2018 No. 1:18-cv-480-LJO-SKO) 2018 WL 3388086, to support its contention that similar provisions have been upheld by courts. We conclude the relevant provision in *Greer* is factually distinguishable. The provision in *Greer* stated, "'[u]nless prohibited by law, a demand [for arbitration] must be made … no later than one (1) year after the alleged unlawful conduct occurred.'" (*Id.* at p. *5.) Unlike the case at bar, the clause within the agreement that prevents shortening a statute of limitations where "'prohibited by law'" saved the agreement from being rendered unconscionable. (*Ibid.*) There is no similar savings clause in the arbitration agreement here.

the prevailing party may recover any remedy that the party would have been allowed to recover had the dispute been brought in court."[6]

Charter contends the trial court misinterpreted this provision as allowing a prevailing defendant to recover attorney fees if a plaintiff's FEHA claims fail but were not frivolous. We agree that [**15] the trial court misinterpreted the provision.

The provision at issue entitles a prevailing party to a remedy, such as attorney fees, only if the party would be entitled to that remedy if the dispute had been litigated in court. In court, a prevailing defendant in a FEHA case is entitled to an award of attorney fees only if the plaintiff's action was frivolous, unreasonable, or groundless. (§ 12965, subd. (c)(6).) Thus, in a FEHA case the arbitration agreement's remedy provision entitles Charter to attorney fees only in compliance with, not in violation of, FEHA: if the plaintiff's action was frivolous, unreasonable, or groundless. Therefore, we conclude the remedy provision in the arbitration agreement is not substantively unconscionable.[7]

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3. *Interim Award of Attorney Fees Under Paragraph K*

Paragraph K of the arbitration agreement provides in relevant part: "The parties agree and acknowledge … that the failure or refusal of either party to submit to arbitration as required by this Agreement will constitute a material breach of this Agreement. If any judicial action or proceeding is commenced in order to compel arbitration, and if arbitration is in fact compelled or the party resisting arbitration submits [**16] to arbitration following the commencement of the action or proceeding, the party that resisted arbitration will be required to pay the other party all costs, fees and expenses that they incur in compelling arbitration, including, without limitation, reasonable attorneys' fees."

Charter contends that the trial court erred in concluding that paragraph K, which awards attorney fees to the prevailing party on a motion to compel arbitration, is substantively unconscionable. We disagree, and in the process also disagree with *Patterson, supra*, 70 Cal.App.5th 473, which (after concluding that the paragraph K as written is not enforceable) made it enforceable by implying a term that incorporates the FEHA asymmetrical rule of attorney fees (i.e., a prevailing defendant in a FEHA action can recover attorney fees only if the action was frivolous, unreasonable, or groundless), thereby bringing paragraph K into compliance with FEHA.

In *Patterson, supra*, 70 Cal.App.5th 473, our colleagues in Division Seven considered paragraph K in a procedural posture different than the present case. That

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[6] The arbitration agreement and the Solution Channel program guidelines also provide that Charter will pay administrative expenses and the arbitrator's fees, but all other costs, fees and expenses, "including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses." Although not raised by the parties and therefore not a basis for a finding of substantive unconscionability, we observe this provision requiring each party to bear its own attorney fees deprives an employee of his or her statutory right to recover attorney fees if the employee prevails on a FEHA claim. (See *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 251 [199 Cal. Rptr. 3d 332].)

[7] In finding the attorney fee provision in the arbitration agreement substantively unconscionable, the trial court relied on *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387 [116 Cal. Rptr. 3d 804], disapproved on another ground in *Baltazar, supra*, 62 Cal.4th 1237. But the attorney fee provision invalidated in *Trivedi* involved a mandatory award of attorney fees to the prevailing party, in violation of the FEHA standard. (*Trivedi*, at pp. 394–395.) It is thus distinguishable.

is, the court in *Patterson* did not consider (as do we) the question of unconscionability in connection with a motion to compel arbitration. Rather, the court considered the enforceability of [**17] paragraph K in a mandate proceeding after the trial court had granted Charter's motion to compel arbitration of an employee's FEHA action and awarded Charter its attorney fees under paragraph K for the successful motion. (*Patterson*, at pp. 478–480.)

On the employee's petition for a writ of mandate to vacate the attorney fees award, our colleagues in *Patterson* reasoned that Charter was entitled to its attorney fees under paragraph K "to the extent not otherwise prohibited or limited by FEHA." (*Patterson, supra*, 70 Cal.App.5th at p. 486.) They also concluded that an employee may not be required to waive the asymmetric FEHA attorney fee standard. (*Patterson*, at p. 488.) That standard, as [*378] previously noted, allows a prevailing defendant to recover attorney fees only if the plaintiff's action was frivolous, unreasonable, or groundless. (§ 12965, subd. (c)(6).)

Consistent with this analysis, the court in *Patterson* concluded that the attorney fee clause as written violated the employee's rights under FEHA: "Permitting Charter to recover its attorney fees for a successful motion to compel arbitration in a pending FEHA lawsuit without a showing the plaintiff's insistence on a judicial forum to determine his or her claims was objectively groundless … denies the plaintiff the rights guaranteed by section 12965[(c)(6)] with a corresponding [**18] chill on access to the courts for any employee or former employee who has an arguably meritorious argument that the Charter arbitration agreement is unenforceable. Even with a strong claim of unconscionability, an employee might not pursue it and risk a substantial award of attorney fees before arbitration begins." (*Patterson, supra*, 70 Cal.App.5th at p. 489.)

Nonetheless, the court rejected the employee's request to hold the clause unenforceable. Invoking "the strong public policy favoring arbitration" and the requirement that provisions in a contract be construed (where reasonable) in a manner that render them legal rather than void, the court "construe[d] the prevailing party fee provision in the arbitration agreement to impliedly incorporate the FEHA asymmetric rule for awarding attorney fees and costs." (*Patterson*, 70 Cal.App.5th at p. 490.) Thus, the court vacated the attorney fee award and remanded the case to the trial court to hold a hearing to determine whether, under the FEHA standard, the employee's opposition to the motion to compel arbitration was frivolous, unreasonable, or groundless.

We agree with *Patterson* that paragraph K as written is unenforceable as being in violation of FEHA. We respectfully disagree, however, with our colleagues' analysis incorporating [**19] the FEHA attorney fee rule, thereby making the provision enforceable.

We begin with the relevant language of the clause. A party's "failure or refusal … to submit to arbitration as required by this Agreement" is a "material breach." Further, "[i]f a[] judicial … proceeding is commenced in order to compel arbitration" (such as an employer's motion to compel arbitration) "and if arbitration is in fact compelled" (i.e., the motion is granted), "the party that resisted arbitration" (i.e., the employee who opposed the motion to compel arbitration) "will be required to pay" (i.e., without qualification) "the other party" (i.e., the employer) "all costs, fees and expenses that they incur in compelling arbitration, including, without limitation, reasonable attorneys' fees." We find this language unambiguous. There is no room to vary the terms by interpretation.

[*379]

(7) Whereas ambiguous terms in an arbitration

agreement should be construed, where reasonable, in favor of legality, "[i]f contractual language is clear and explicit, it governs. [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal. Rptr. 2d 538, 833 P.2d 545]; see Civ. Code, § 1643 ["A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into [**20] effect, *if it can be done without violating the intention of the parties*" (italics added)]; cf. *Serpa v. California Surety Investigations, Inc., supra*, 215 Cal.App.4th at p. 709 [holding an attorney fee provision in an arbitration agreement was not ambiguous as it "expressly requires each party to bear his, her or its own attorney fees"].) Thus, we disagree with *Patterson* that standard rules of contract interpretation support its analysis.

Further, the policy favoring arbitration does not permit the court to add an interpretive gloss to unambiguous provisions. *Patterson* cited two decision as supporting its authority to modify paragraph K by incorporating the FEHA attorney fee standard. In each, *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682 [108 Cal. Rptr. 3d 171, 229 P.3d 83] (*Pearson*), and *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1473 [92 Cal. Rptr. 3d 153] (*Roman*), the appellate court interpreted *ambiguous language* in the arbitration agreement and invoked the policy favoring arbitration as a reason to construe the language in a manner that rendered it legal.

In *Pearson*, the language at issue declared the intention of the parties to the employment arbitration agreement "'to avoid the inconvenience, cost, and risk that accompany formal *administrative* or judicial proceedings.'" The employee argued that the language declaring an intent "'to avoid'" the listed negative characteristics of "'formal administrative … proceedings'" precluded the employee from [**21] seeking administrative remedies for violations of FEHA. (*Pearson*, 48 Cal.4th at p. 680.)

Our Supreme Court concluded that the provision was merely a statement of purpose and did not actually preclude the plaintiff from pursuing any administrative remedy; and even if the agreement were understood to preclude "'formal administrative … proceedings,'" it would not be unlawful in all possible applications. (*Pearson, supra*, 48 Cal.4th at p. 682.)

The court then reasoned: "When an arbitration provision is *ambiguous*, we will interpret that provision, if reasonable, in a manner that renders it lawful, both because of our public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution, and because of the general principle that we interpret a contractual provision in a manner that renders it enforceable rather than void. [Citations.]" (*Pearson, supra*, 48 Cal.4th at p. 682, italics added.) The court then interpreted the language in question "as [*380] stating an intention to lawfully preclude or restrict the parties to the arbitration agreement from submitting their claims for adjudication to an administrative entity such as the Labor Commissioner, at least to the extent set forth by the United States Supreme Court in [*Preston v. Ferrer* (2008) 552 U.S. 346, 360 [169 L. Ed. 2d 917, 128 S. Ct. 978]]. We therefore conclude that the inclusion of [**22] a provision limiting resort to an administrative forum does not render the arbitration agreement unconscionable or unenforceable." (*Ibid.*)

Similarly, *Roman* involved language in an arbitration agreement that was treated as ambiguous under the circumstances. In *Roman*, the employee signed a mandatory predispute agreement containing an arbitration clause that provided: "'*I agree*, in the event I am hired by the company, that all disputes and claims that might arise out of my employment with the company will be submitted to binding arbitration.'"

(*Roman, supra*, 172 Cal.App.4th at p. 1466, italics added.) Although the rest of the agreement was bilateral, the employee argued that the "'I agree'" language manifested only a unilateral obligation to arbitrate. (*Ibid.*) Assuming the language of the arbitration provision was ambiguous, the appellate court noted the public policy favoring arbitration and the requirement that the court interpret ambiguous provisions in a manner that renders them legal rather than void. (*Id.* at p. 1473.) Under these rules, the court held that the "mere inclusion of the words 'I agree' by one party in an otherwise mutual arbitration provision [does not] destroy[] the bilateral nature of the agreement." (*Ibid.*)

On examination, we do [**23] not agree that these cases support our *Patterson* colleagues' interpretation of paragraph K. These decisions apply standard rules of contract interpretation to ambiguous terms. As we have observed, the language at issue in paragraph K is not ambiguous; it leaves no reasonable basis for an interpretation in variance with the plain meaning.

Our colleagues in *Patterson* also found that incorporating the FEHA asymmetrical rule of attorney fees into paragraph K by implication was "precisely the course followed by the Supreme Court in" *Armendariz, supra*, 24 Cal.4th at page 113, where the Supreme Court incorporated into the arbitration agreement a term imposing on the employer the sole duty to pay arbitration costs in employer-compelled arbitration. (*Patterson*, 70 Cal.App.5th at p. 490.) We respectfully disagree that *Armendariz* supports the analysis in *Patterson*.

In *Armendariz*, the arbitration agreement compelled the employee to arbitrate employment claims and stated that the employee "'agree[d] to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at [*381] section 1280 et seq.'" (*Armendariz, supra*, 24 Cal.4th at p. 92.)[8] The agreement did not have a specific provision defining who would pay the costs of the arbitration. Thus, it was governed by the default cost-sharing scheme of [**24] Code of Civil Procedure section 1284.2, which provides: "*Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree*, each party to the arbitration shall pay his pro rata share of the expenses and fees" of the arbitration. (Italics added.)[9]

(8) The court in *Armendariz* agreed with the employees that applying this default provision would impose "substantial forum fees … contrary to public policy, and is therefore grounds for invalidating or revoking an arbitration agreement and denying a petition to compel arbitration under Code of Civil Procedure sections 1281 and 1281.2." (*Armendariz, supra*, 24 Cal.4th at p. 110.)

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[8] The clause stated in relevant part: "'I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at section 1280 et seq. or any successor or replacement statutes.'" (*Armendariz*, 24 Cal.4th at p. 92.)

[9] Civil Code section 1284.2 provides in full: "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit."

With these concerns in mind, the court promulgated the rule that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Id.* at pp. 110–111, italics omitted.)

The court later analyzed whether the rule requiring the employer to pay the costs of arbitration was inconsistent with the default cost-sharing scheme of Code of Civil Procedure section 1284.2 (i.e., unless the arbitration agreement provides otherwise, each party pays a pro rata share). The court found no inconsistency: the [**25] agreement to submit a FEHA claim to arbitration "is implicitly an agreement to abide by the substantive remedial provisions of the [FEHA] statute," which (the court found) forbids sharing of costs. (*Armendariz, supra*, 24 Cal.4th at p. 112.) Further, the court found "little reason to believe that the Legislature that passed Code of Civil Procedure section 1284.2 contemplated a situation in which the intended beneficiary of such an antidiscrimination statute would be compelled to pay large arbitration costs as a condition of pursuing a discrimination claim. Thus, we construe the [*382] FEHA as implicitly prohibiting such costs, a prohibition which the default provisions of section 1284.2 do not displace." (*Id.* at pp. 112–113.)

The court then concluded: "We therefore hold that a mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration. Accordingly, we interpret the arbitration agreement in the present case as providing, consistent with the above, that the employer must bear the arbitration forum costs. The absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement." [**26] (*Armendariz, supra*, 24 Cal.4th at p. 113.)

From our discussion of *Armendariz*, we conclude that it does not support the reasoning in *Patterson*. In *Armendariz*, the agreement had no provision governing costs, and the court was not called upon to interpret one. Thus, the Supreme Court did not make the arbitration agreement enforceable by grafting an implied cost-sharing term onto an express provision governing costs. Rather, as a matter of public policy and statutory interpretation, the court imposed an implied provision (the employer must bear the costs of employer-compelled arbitration) in place of the default cost provision of Code of Civil Procedure 1284.2 (arbitration costs must be shared pro rata by the parties), which would have applied because the agreement *did not have* an express cost provision. The import of the court's holding was, therefore, that "[*t*]*he absence of specific provisions on arbitration costs* would … not be grounds for denying the enforcement of an arbitration agreement." (*Armendariz, supra*, 24 Cal.4th at p. 113, italics added.)

In short, we disagree that *Armendariz* supports the holding in *Patterson* that paragraph K, which is (as *Patterson* acknowledges) unenforceable as written, can be saved by impliedly incorporating the FEHA asymmetrical attorney fee standard into its unambiguous language. We therefore conclude, as did [**27] the trial court, that paragraph K is unconscionable.

4. *Other Terms of the Arbitration Agreement*

a. *Mutuality*

(9) Ramirez contends the trial court erred in rejecting her argument that the arbitration agreement lacked mutuality by excluding claims likely to be brought by an employer. "An agreement may be unfairly one-sided if it

compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party. [Citations.]" (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 724 [13 Cal. Rptr. 3d 88] (*Fitz*).)
[*383]

The arbitration agreement specifically covers claims "related to pre-employment, employment, employment termination or post-employment-related claims, whether the claims are dominated as tort, contract, common law, or statutory claims," including without limitation claims for: collection of overpaid wages and commissions; damage to or loss of Charter property; recovery of unauthorized charges on company credit card; whistleblowers; unlawful termination; unlawful failure to hire or failure to promote; violations of wage and hour laws; unlawful discrimination or harassment; unlawful retaliation; violations under the federal Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.), Americans with Disabilities [**28] Act of 1990 (42 U.S.C. § 12101 et seq.), Sarbanes-Oxley Act of 2002 (Pub.L. No. 107-204 (July 30, 2002) 116 Stat. 745), and Occupational Safety and Health Administration. The arbitration agreement also covers "all disputes, claims, and controversies set forth … above, whether made against Charter, or any of its subsidiaries, parent, or affiliated entities, or its individual officers, directors, shareholders, agents, managers, or employees (in an official or personal capacity, if such claim against the employee arises from or in any way relates to … pre-employment or employment relationship with Charter)."

On the other hand, the arbitration agreement specifically excludes "claims for injunctive or other equitable relief related to unfair competition and the taking, use or unauthorized disclosure of trade secrets or confidential information." The agreement further excludes claims: arising under separate or severance agreements or noncompete agreements; for theft or embezzlement or any other criminal conduct; and over the validity of any party's intellectual property rights.

We agree with Ramirez and conclude that the arbitration agreement is unfairly one sided because it compels arbitration of the claims more likely to be brought by an employee, the weaker party, but exempts [**29] from arbitration the types of claims that are more likely to be brought by an employer, the stronger party.

The decision in *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167 [116 Cal. Rptr. 2d 671] (*Mercuro*) is instructive. In *Mercuro*, the Court of Appeal held the arbitration agreement covered "some employment-related claims including employment discrimination but excluded others such as … equitable relief for unfair competition, unauthorized disclosure of trade secrets or violation of intellectual property rights" to be unfairly one sided in favor of the employer. (*Id.* at p. 172.) The court noted that an employee terminated for stealing trade secrets would have to arbitrate his or her wrongful termination claim, but the employer could avoid arbitration by simply requesting injunctive or declaratory relief. (*Id.* at p. 176.) The court concluded that the agreement compelled "arbitration of the claims employees [*384] are most likely to bring" but exempted "from arbitration the claims [the employer] is most likely to bring against its employees." (*Ibid.*) As such, it was unconscionably one sided.

Charter points out that the agreement here excludes certain claims significant to employees such as claims for workers' compensation, unemployment benefits, and severance/noncompete agreements. "These exceptions [**30] do not turn what is essentially a unilateral arbitration agreement into a bilateral one. Workers' compensation and unemployment benefits are governed by their own adjudicatory systems; neither is a proper subject matter for arbitration." (*Mercuro, supra*,

96 Cal.App.4th at p. 176.) And claims arising out of a severance or noncompete agreement are most likely to be brought by the employer, not the employee. (See *Fitz, supra*, 118 Cal.App.4th at p. 725 ["it is far more often the case that employers, not employees, will file [actions over noncompete agreements]."]

In support of the trial court's finding, Charter further contends none of the excluded claims are at issue in Ramirez's case. However, the unconscionability analysis evaluates whether the agreement is bilateral "at the time it was made" rather than as applied to a specific plaintiff. (Civ. Code, § 1670.5, subd. (a); see generally *Fitz, supra*, 118 Cal.App.4th 702.)

b. *Discovery Limitation*

The arbitration agreement states that the arbitration will be conducted "pursuant to the Solution Channel Program Guidelines." The guidelines in turn provide that "[t]he parties will have 90 days to exchange information and take depositions." Each party will be permitted to take up to four depositions, 20 total interrogatories (including subparts), and 15 total requests for documents [**31] to the other party. In addition, "[a]ny disagreements regarding the exchange of information or depositions will be resolved by the arbitrator to allow a full and equal opportunity to all parties to present evidence that the arbitrator deems material and relevant to the resolution of the dispute."

Ramirez contends that the trial court erred in finding that the limitations on discovery were not substantively unconscionable. We agree.

(10) "Adequate discovery is indispensable for the vindication of statutory claims. [Citation.]" (*Fitz, supra*, 118 Cal.App.4th at p. 715.) But adequate discovery does not mean unfettered discovery. (*Ibid.*) The parties may agree to something less than the full panoply of discovery available in California's discovery statutes. (*Armendariz, supra*, 24 Cal.4th at pp. 105–106.) Nonetheless, "arbitration agreements must 'ensure minimum standards of fairness' so employees can vindicate their public rights. [Citation.]" (*Fitz, supra*, at [*385] p. 716.) Generally, unconscionability is determined "at the time [the agreement] was made" (Civ. Code, § 1670.5, subd. (a)), yet courts have consistently assessed unconscionability for limitations on discovery as applied to a particular plaintiff (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 404–405 [168 Cal. Rptr. 3d 473] (*Sanchez*)).

"In striking the appropriate balance between the desired simplicity of limited discovery and an employee's statutory rights, [**32] courts assess the amount of default discovery permitted under the arbitration agreement, the standard for obtaining additional discovery, and whether the plaintiffs have demonstrated that the discovery limitations will prevent them from adequately arbitrating their statutory claims. [Citation.]" (*Davis, supra*, 53 Cal.App.5th at pp. 910–911.)

Ramirez argues that the limitation of discovery in and of itself denies her a reasonable opportunity to prove her statutory claims. However, as observed by the trial court, "[l]imited discovery rights are the hallmark of arbitration" (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 689 [99 Cal. Rptr. 2d 809]) and there must be some showing of inadequacy under the circumstances of the case (*Sanchez, supra*, 224 Cal.App.4th at p. 405).

Although limitations on discovery are generally permitted, we conclude that Ramirez met her burden in the trial court of showing inadequacy in the discovery limitations of Charter's agreement. In the trial court, Ramirez estimated (with no dispute from Charter) that she would need to take at least seven depositions: her former supervisor, the Human Resources (HR) person,

the four people hired by her former supervisor during her pregnancy leave, and the person(s) most knowledgeable at Charter regarding its HR and pregnancy leave policies and procedures. Therefore, Ramirez demonstrated [**33] (with no rebuttal from Charter) that the guidelines' limitation on depositions (four) is inadequate to permit Ramirez fair pursuit of her claims (which requires at least seven depositions). (*Davis, supra*, 53 Cal.App.5th at pp. 913–914.)

Charter contends that the guidelines' provision allowing the arbitrator to resolve "[a]ny disagreements regarding the exchange of information or depositions," is tantamount to providing the arbitrator authority to order additional depositions.[10] But resolving "disagreements" between the parties [*386] "regarding … depositions" cannot reasonably be construed to include the authority to increase the number of depositions permitted by the guidelines. Rather, it reasonably appears to refer only to the "disagreements" between the parties regarding the four depositions permitted by the guidelines, things like the identity of persons sought to be deposed, objections made during depositions, and the dates, location, and duration of depositions.

It is true that Ramirez does not explain with any particularity why the limitations on written discovery (20 total interrogatories, including subparts, and 15 total requests for documents) are inadequate. Nor does she demonstrate any need for a longer period of discovery [**34] than the 90-day limit in the guidelines. However, we conclude the limitation on depositions is sufficient to show substantive unconscionability. Under the deposition limit, Ramirez would be deprived of the opportunity to prepare her case because of her inability to depose three of the minimum seven necessary witnesses. That, we conclude, would not provide her a fair opportunity to present her case.

D. *Severance*

Charter contends severance is appropriate, and the court abused its discretion by failing to sever the unconscionable provisions. We affirm the denial of severance.

(11) "An unconscionable contractual term may be severed and the resulting agreement enforced, unless the agreement is permeated by an unlawful purpose, or severance would require a court to augment the agreement with additional terms. [Citation.]" (*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 223 [207 Cal. Rptr. 3d 473].) Severance may be properly denied when the agreement contains more than one unconscionable provision, and "'there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.' [Citation.]" (*Baxter, supra*, 16 Cal.App.5th at p. 738.)

Here, we conclude that the limitations period for bringing a FEHA claim under the agreement, the provision granting an award of [**35] attorney fees for a

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[10] In the trial court, Charter did not contend that this provision permitted the arbitrator to grant additional discovery. Rather, Charter contended, and the trial court found, that the arbitration agreement incorporated the American Arbitration Association (AAA) rules, which granted discretionary authority to the arbitrator to order additional discovery. (*Roman, supra*, 172 Cal.App.4th at p. 1475 [under AAA rules, the arbitrator has authority to order "'such discovery, by way of deposition, interrogatory, document production, or otherwise'"].) Charter does not resurrect this argument on appeal. In any event, we agree with Ramirez that the arbitration agreement and the guidelines fail to incorporate the AAA rules. The only reference to the AAA rules in either document is in relation to the selection of an arbitrator, and Charter's obligation to pay the AAA administrative fees. In fact, the arbitration agreement clearly stated the applicable rules in paragraph I: "Arbitration hearings will be conducted pursuant to the Solution Channel Program Guidelines."

prevailing party in moving to compel arbitration (par. K), the lack of mutuality, and the limitation on discovery (specifically, depositions) are [*387] substantively unconscionable. In so concluding, we have disagreed with the trial court's findings that the arbitration agreement did not lack mutuality and the limitation on discovery was reasonable. We also set aside the trial court's conclusion that the remedy provision in the arbitration agreement (as applied to prevailing party attorney fees) is substantively unconscionable.

Although we find that the trial court erred on these two points, we do not find the errors prejudicial with respect to whether the unconscionable provisions should be severed. Given the multiple defects we have found that work to Ramirez's distinct disadvantage, it is not reasonably probable that the trial court would have reached a different decision regarding severability had the errors not been committed. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) And given that we have found the agreement permeated by significant unconscionable terms, a denial of severance is entirely reasonable.[11]

DISPOSITION

The trial court's order denying Charter's motion to compel arbitration is affirmed. [**36] Ramirez is entitled to her costs on appeal.

Manella, P. J., and Collins, J., concurred.

[11] We note in particular that it does not appear that severing the unconscionable limitation on depositions is possible. The arbitration agreement does not provide the arbitrator discretion, apart from the power conferred by the agreement, to order additional discovery. Thus, it is not at all clear on what authority the arbitrator could order *any* depositions.

PROOF OF SERVICE

I, Josefina Perez, declare:

I am a resident of the state of California and over the age of eighteen years, and not a party to the within action; my business address is Hill, Farrer & Burrill LLP, One California Plaza, 37th Floor, Los Angeles, California 90071-3147. On March 28, 2022, I served the within documents:

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

Executed on March 28, 2022, at Los Angeles, California.

/s/ Josefina Perez
Josefina Perez

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Number: **TEMP-B7WDHBLB**
Lower Court Case Number:

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Bowles, James A. (89383)
Last Name, First Name (PNum)

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