COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION __

CONSTANCE RAMOS,
Petitioner/Plaintiff

v.

THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO,
Respondent

WINSTON & STRAWN, LLP
Real Parties in Interest/Defendants

San Francisco Superior Court Case No.: CGC-17-561025
Hon. John Stewart, Judge

PETITION FOR WRIT OF MANDATE, OR OTHER APPROPRIATE RELIEF

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CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that the following persons or entities have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in California Rules of Court, Rule 8.208:

None other than Petitioner.

Dated: January 19, 2018

DUCKWORTH PETERS LEBOWITZ OLIVER LLP

By: /s/ Noah D. Lebowitz
Noah D. Lebowitz
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INTRODUCTION

This case presents an issue of first impression for California appellate courts: When should a nominal "partner" in a business be considered to be an "employee" protected by California's workplace protections against sex discrimination, retaliation, and sex-based differential pay practices? The Supreme Court of the United States addressed this question in the context of federal law in *Clackamas v. Gastroenterology Assocs., P.C.* (2003) 538 U.S. 440, but no published California case applying state law has done so.

In this case, the Respondent trial court held that Petitioner Constance Ramos and Real Party in Interest Winston & Strawn LLP were in a "partnership relationship" "for the purpose of this motion [to compel arbitration]." This holding was error. Respondent court failed to properly consider the facts of Petitioner's employment establishing that she was truly an employee, and not an owner or employer, or someone empowered to take part in any significant decision-making pertaining to the business. Respondent court compounded that error by then ordering Petitioner to submit her claims of violations of California labor laws to the commercial arbitration provisions set forth in the Partnership Agreement of Winston & Strawn, LLP ("Partnership Agreement").

Irreparable harm will result if these errors are allowed to stand in that they will deprive Petitioner of this state's workplace protections against sex discrimination, retaliation, wrongful termination in violation of public policy, and sex-based differential pay practices.

First, as explained below, the scope of the Arbitration Clause is expressly limited to matters concerning the terms of the Partnership Agreement and the partnership. (Ex. 6, pp. 180-81.) [1] Petitioner's pleaded claims are not for breach of contract, nor for failure of anyone in the partnership to perform an express contractual obligation or duty to Petitioner under the Partnership Agreement. (*See generally* Ex. 4, pp. 68-86.).

Second, the express terms of Winston's commercial arbitration clause preclude the panel of arbitrators from reaching the merits of the discrimination, retaliation, wrongful termination, and fair pay claims brought by Petitioner. The Arbitration Clause specifically prohibits the panel of arbitrators from "substitut[ing] its judgment for, or otherwise overrid[ing] the determination made [by the decision-makers in this case] with respect to any determination made or action committed by such parties. . . ." (Ex. 6, p.124.) But, of course, Petitioner's claims require the arbitrators to do exactly that. It is Petitioner's burden to prove that the

[1] All citations to the record correspond to the Appendix of Writ of Mandate or Other Appropriate Relief filed concurrently herewith.

decision-makers were motivated, in substantial part, by unlawful bias – that they considered Petitioner's sex or Petitioner's objections to discriminatory conduct as a substantial factor in reaching the decisions to, *inter alia*, twice dock her pay, deny her work, remove her from her primary case, deny her earned bonuses, and repeatedly demand that she withdraw from the firm. (*See e.g., Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 230) The express prohibition that the arbitrators may not "substitute its judgment for, or otherwise override the determination made [by the decision-makers in this case] with respect to any determination made or action committed by such parties. . . ." hamstrings the panels' ability to consider all of the facts and the totality of the circumstances which demonstrate illegal bias against Petitioner in her workplace. The Respondent court's refusal to acknowledge this plain reading of the Arbitration Clause was in error, and will result in irreparable harm to Petitioner if not immediately corrected.

Third, the Respondent court's order to enforce use of the AAA commercial rules – which are recognized by the AAA itself as inadequate for handling employment disputes – will not afford Petitioner adequate protections against discovery abuses, nor provide adequate deposition and written discovery tools for obtaining all relevant information and evidence demonstrating illegal bias and its consequential harm. (Ex. 9, pp. 268-69.) Moreover, the requirement that the arbitration panel must comprise only partners from US-based law firms of 500+ attorneys creates a "fox

guarding the henhouse" scenario that can only bias the arbitration process against Petitioner from the outset. The creation of an uphill battle right out of the gate is inherently unfair and harmful to Petitioner's ability to prove her claims.

Petitioner was offered and accepted employment with Winston in late 2013 as an Income Partner, as opposed to a Capital Partner. (Ex. 8, p. 225.) She did not, nor was she required to or provided with the opportunity to, have a capital account with the firm. (*Id*. at p. 226.) Her first day of work at Winston was May 1, 2014. (*Id*.) The Partnership Agreement was presented to Petitioner only after she had already accepted employment and began working. (*Id*.)

According to the Partnership Agreement, Winston had 228 Capital Partners and 156 Income Partners listed at the time the agreement was presented to Petitioner. (Ex. 6, pp. 183-86.) Petitioner's employment with the firm was at-will, as she could be expelled from the partnership "for any reason upon vote by secret ballot of two-thirds of the Capital Partners." (*Id*. at p. 175 [§ 9.05] [emphasis added].)

The Partnership Agreement sets forth the means and methods of operation of the partnership as a whole. The partnership is run by the Executive Committee. (*Id.* at pp.165-72.)

> Except as expressly provided herein with respect to actions requiring an approving vote of the Capital Partners, Income Partners or Partners, the complete and sole management of the

> Partnership is hereby vested in the Executive Committee. (*Id*. at 166 [§ 7.01(a)].)

Only Capital Partners may be members of the Executive Committee. (*Id*. at p. 167 [§ 7.03(a)].) Eligibility to serve on the Executive Committee is determined by the Nominating Committee. (*Id*. at pp. 167-68 [§ 7.03(c)].) Only Capital Partners may serve on the Nominating Committee. (*Id*.) The Nominating Committee submits a slate of candidates which is then put to a vote of the Capital Partners. (*Id*. at pp. 168, 169-70 [§§ 7.03(d), 7.05-7.06].) The Managing Partner of the firm must be selected by the Executive Committee from among its members. (*Id*. at p. 167 [§ 7.02(b)].) The Managing Partner then serves as the Chairperson of the Executive Committee and the CEO of the firm. (*Id*. [§ 7.02(b)(i)].) The Executive Committee, which is composed entirely of Capital Partners whose membership is elected exclusively by Capital Partners, is empowered by the Partnership Agreement to perform all the material management functions of the firm. (*See generally*, *id*. at p. 170-72 [§ 7.07].) For determination of all other "Major Decisions" of any significance, only Capital Partners are eligible to vote. (*Id*. at pp. 172-73 [§ 8.01].) For example, only Capital Partners can vote to modify or amend the Partnership Agreement. (*Id.*) Income Partners have no say in such matters, and yet are considered to be bound by such modifications or amendments. (*Id*.)

When Petitioner came to work at Winston she had a well-established career as an intellectual property attorney. She expected to be treated as her own person, assessed on her own performance, offered equal support, and compensated based on her own achievements. Instead, Winston treated her as the appendage to a senior male Capital Partner, with her career trajectory tied to his personal career choices. In Winston's eyes, when that senior male Capital Partner departed the firm, Petitioner was expected to follow suit and willingly give up her employment. When she declined, opting to forge her own career, Winston (among other things) twice docked her salary (amounting to a 56% reduction in pay), forced her to withdraw from representing a client she had brought into the firm, prevented her from participating in significant aspects of business development, prevented her from working on cases, assigned credit for her work to other partners, and refused to take any steps to remedy this differential treatment and the increasingly toxic work environment to which she was subjected, despite her repeated objections to it and her allegations of gender discrimination.

Because Winston had created an objectively intolerable workplace and had rejected each of Petitioner's attempts to remedy the situation, Petitioner had no choice but to resign and file the civil suit in this case in order to vindicate her rights.

Winston responded to the Complaint by filing a Motion to Compel Arbitration and Dismiss, or Alternatively, Stay in the court below and have

the case moved to a confidential setting of binding arbitration under rules that inure to its benefit by asking the trial court to enforce the terms of its Arbitration Clause (Ex. 6, pp. 180-81) contained in the Partnership Agreement.

However, Winston's Arbitration Clause is inapplicable to this dispute because it (1) is a commercial arbitration clause inapplicable to employment disputes like this case and (2) is intended to be implemented solely for disputes arising from the provisions of Winston's Partnership Agreement.

In reaching the opposite conclusion, the Respondent court erred in multiple material ways. First, Respondent court misapplied the standard for determining employee status. The court ignored the only admissible evidence before it which described Petitioner's complete absence of control of the operation of the firm even though control of the business is the test set forth in *Clackamas, supra* for determining employee status. The court compounded its error by mistakenly interpreting the scope of the Arbitration Clause as covering state statutory and tort claims, despite the fact that the Arbitration Clause specifically prohibits the arbitrators from reaching the types of claims raised by Petitioner. Finally, the court engaged in an improper exercise of its discretion by rewriting terms of a contract rather than hold the Arbitration Clause unenforceable as a whole under

accepted contract law. (Civ. Code § 1670.5; *Armendariz v. Foundation Health Psychare Svcs., Inc.* (2000) 24 Cal.4th 83, 124, n.13.)

As a result of these errors, Petitioner has been deprived of a venue to have her claims fairly adjudicated.

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF

Authenticity of Exhibits

1. All exhibits accompanying this petition in the Appendix are true copies of documents on file with Respondent court, except Exhibit 2, which is a true and correct copy of the original reporter's transcript of the hearing on November 30, 2017. The exhibits in the Appendix are incorporated herein by reference as though fully set forth in the Petition. The exhibits are paginated consecutively from page 1 through page 362, and the page references in this Petition are to that consecutive pagination in the Appendix to the Petition for Writ of Mandate or Other Appropriate Relief.

Beneficial Interest of Petitioner; Capacities of Respondent and Real Party in Interest

2. Petitioner Constance Ramos is a plaintiff in an action presently stayed pending arbitration in Respondent Superior Court for the County of San Francisco, Case No. CGC-17-561025. Defendant Winston & Strawn LLP is named herein as the Real Party in Interest.

Chronology of Pertinent Events

3. On August 30, 2017, Petitioner filed a lawsuit in the San Francisco Superior Court against Winston. Petitioner held the title of "Income Partner" at Winston, working as an attorney in the firm's

Intellectual Property practice group. The lawsuit sets forth six causes of action as follows: (1) Sex Discrimination (Gov. Code § 12900 *et seq.*), (2) Retaliation (Gov. Code § 12900 *et seq.*), (3) Failure to Prevent Discrimination and Retaliation (Gov. Code § 12900 *et seq.*), (4) Violation of Fair Pay Act (Labor Code § 1197.5), (5) Retaliation (Labor Code § 1197.5), and (6) Wrongful Termination in Violation of Public Policy. (Ex. 5, pp. 70-88.)

4. On October 2, 2017, Winston filed a Motion to Compel Arbitration and Dismiss, or in the Alternative, Stay Proceedings. (Exs. 3-6 pp. 45-200.) The hearing was set for November 16 at 9:30 before Hon. Harold Kahn in Department 302 of the Superior Court for the County of San Francisco.

5. Winston's motion argued that the court should compel the entire case to arbitration based on the Arbitration Clause found in Section 13.11 of the Partnership Agreement.

6. Winston argued that the commercial arbitration provisions of the Arbitration Clause were enforceable against Petitioner because she was a partner in the business (law firm) and not an employee. According to Winston, because Petitioner was not an employee, California's minimum procedural and substantive protections for employment arbitrations as set forth in *Armendariz, supra*, do not apply and the commercial arbitration clause is enforceable against her. Alternatively, Winston argued that

offending provisions of the Arbitration Clause could be severed so as to render its terms compliant with California law.

7. On November 2, Petitioner filed her opposition to the motion to compel arbitration. (Exs. 7-9, pp. 203-347.) Petitioner argued she was an employee of the business (law firm) because she did not have any right or ability to assert any sort of control over the operation of the firm. Because she was an employee, the Arbitration Clause could only be enforced if its terms complied with California's minimum public policy protections and was not unconscionable.

8. In analyzing the terms of the Arbitration Clause, Petitioner noted that by its very terms, the clause applied only to disputes arising under the terms of the Partnership Agreement. Because Petitioner's claims arose from violations of California law, and not contract, her claims were beyond the scope of the clause.

9. Even if Petitioner's claims fell within the scope of the Arbitration Clause, it still could not be enforced because it failed to comply with California public policy and was unconscionable. (*See Armendariz, supra,* 24 Cal.4th at 99-116.)

10. On November 8, Winston filed its Reply. (Exs. 10-11, pp. 346-360.) The Reply reiterated Winston's arguments made in its original motion and further emphasized its request to sever any terms the court found offended California law.

11. On November 15, Judge Kahn recused himself from the case and assigned the motion to Hon. John Stewart, to be heard at 2:00 p.m. on November 30, 2017 in Department 302.

12. On November 29, Judge Stewart published his tentative ruling to grant the motion. Petitioner contested the tentative ruling per the Local Rules of the San Francisco Superior Court.

13. On November 30, 2017, the parties appeared for oral argument. (Ex. 2, pp. 010-043.)

14. At the close of oral argument, the Court adopted its tentative ruling in full, without modification. (Ex. 1, pp. 007-008.) That ruling reads in its entirety:

> DEFENDANT WINSTON & STRAWN, LLP'S MOTION TO COMPEL ARBITRATION is GRANTED. It is undisputed that the parties agreed to the arbitration agreement. All of the claims alleged by plaintiff Ramos fall within the broad scope of the arbitration clause. For the purpose of this motion, the Court finds that Winston & Straun, LLP and Ms Ramos had a partnership relationship. However the Court finds that the provisions related to venue and cost sharing are unconscionable and will be severed from the arbitration agreement. Accordingly, the Court orders that the arbitration shall be held in San Francisco, California, that plaintiff Ramos need only pay those costs that she would have to pay if her claims were litigated in court, and the arbitrator shall have the authority to award attorney fees if plaintiff is the prevailing party and attorney fees are available under her claims.

Timeliness of Petition

15. Notice of Entry of Order of Respondent court's final order on the motion to compel arbitration was entered on December 1, 2017.

16. Petitioner filed this Petition on January 19, 2018.

Basis for Relief

17. The initial issue raised in this Petition is one that has not been addressed by any published appellate decision in California state courts: When should a "partner" be considered to be an "employee" for purposes of the protections of the California Government Code's protections against discrimination based on sex, retaliation, the California Labor Code's fair pay provisions, and California's law against wrongful termination in violation of public policy. As described below, Petitioner did not have sufficient control over the operation of the business of the law firm to be considered an employer. Rather, she was an employee for purposes of the protections granted by California's Government Code and Labor Code, and the law against wrongful termination. As such, the provisions of Winston's Arbitration Clause must meet the standards set forth in *Armendariz*. Because the commercial arbitration terms of the Arbitration Clause do not meet that standard – and cannot be saved through severance – its terms should not be enforced against Petitioner. Additionally, the terms of the Arbitration Clause do not apply to the claims stated by Petitioner because the scope and authority of the arbitrators are both limited to the express provisions of the Partnership Agreement, and the arbitrators are prohibited from evaluating the motivations of the decision-makers – a task required of

the trier of fact to rule on Petitioner's claims which are all based upon acts of discrimination and retaliation in violation of California law.

Absence of Other Remedies

18. Respondent court's December 1, 2017 Order is not immediately appealable. (*Abrahamson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648; *Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1088-89; *see* Ex. 12.) A petition for writ of mandate or prohibition is the only way to obtain appellate review prior to entry of final judgment. (*See, e.g., Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160 ["California courts have held that writ review of orders compelling arbitration is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive."]; *Cook v. Superior Court of Los Angeles County* (1966) 240 Cal.App.2d 880, 884 ["mandamus will lie to correct a nonappealable order compelling arbitration and staying proceedings."].)

19. A delay of review of this issue until final judgment would be an inadequate remedy. The Order of the Respondent court will deprive Petitioner of any opportunity to have her claims heard. The claims Petitioner raised in her Complaint require she be considered an "employee" as a threshold to coverage. Because the Respondent court ruled Petitioner is not an employee, she is not entitled to the protections of these laws.

Moreover, the terms of the Arbitration Clause expressly forbid the arbitrator panel from ruling on the substance of Petitioner's claims. As explained more fully in the memorandum below, these rulings are clearly erroneous as a matter of law and substantially prejudice Petitioner.

20. The issues presented by this writ are of widespread interest. The question of employee status in the modern partnership setting – and in law firms in particular – is of increasing public concern as issues related to gender discrimination and fair pay are more closely examined in these settings. (*See* Ex. 10, pp. 334-45.) As there is presently no guidance from California courts on the proper analysis of the appropriate legal standard, this case presents this Court with the opportunity to provide such guidance for trial courts as these cases sort their way through the system.[2]

PRAYER

1. Issue a Peremptory Writ of Mandate and/or Prohibition or such other extraordinary relief as is warranted in the first instance, directing Respondent Court to set aside and vacate its Order of December 1, 2017 granting Real Party in Interest's motion to compel arbitration; or

[2] *See e.g. Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1328 [petitioners' claims warrant extraordinary relief because "the issues presented are of great public interest and must be resolved promptly."]; *Silva v. Superior Court* (1993) 14 Cal.App.4th 562, 574 [reaching a similar conclusion].

2. Issue an Alternative Writ directing Respondent court to set aside and vacate its Order of December 1, 2017 granting Real Party's motion to compel arbitration, or to show cause why it should not be so directed, and, upon return of the alternative writ, issue a Peremptory Writ of Mandate and/or Prohibition or such other extraordinary relief as is warranted, directing Respondent Court to set aside and vacate its Order of December 1, 2017 granting Real Party's motion to compel arbitration, and enter a new and different order denying the motion, and set a date by which Real Party must respond to the complaint;

3. Award Petitioner her costs pursuant to rule 8.490(m) of the California Rules of Court; and

4. Grant such other further relief as may be just and proper.

Dated: January 19, 2018

By: /s/ Noah D. Lebowitz
Noah D. Lebowitz
Attorneys for Petitioner/Plaintiff
Constance Ramos

VERIFICATION

I, Noah D. Lebowitz, declare as follows:

I am the attorney for Petitioner herein. I have read the foregoing Petition for Writ of Mandate, or Other Appropriate Relief and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioner, verify this Petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on January 19, 2018 at San Francisco, California.

/s/ Noah D. Lebowitz
Noah D. Lebowitz

MEMORANDUM

I. RESPONDENT TRIAL COURT ERRED WHEN RULING THAT PETITIONER AND WINSTON WERE IN A "PARTNERSHIP" RELATIONSHIP

Titles in the workplace are not dispositive. "Today there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." (*Clackamas*, *supra*, 538 U.S. at 446 [citation omitted].) Just as in other areas of employment law, a person's title in the workplace does not control the legal determination of whether that person is protected by the California Government Code and Labor Code. For instance, calling someone an "independent contractor" does not make it so. Rather, the courts will evaluate the realities of the job being performed and workplace relationship before endorsing the label. (*See generally, S.G. Borello & Sons, Inc. v. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341.) Similarly, holding the title of "manager" does not prevent that person from being entitled to overtime or meal and rest breaks. (*See generally, Murphy v. Kenneth Cole Production, Inc.* (2007) 40 Cal.4th 1094.) In that same vein, holding the title of "partner" in a law firm does not a fortiori preclude such a person from the benefit of the protections of California's employment laws. In this case, the facts show that title of "Income Partner" at Winston does not carry with it the status of actual "owner" or "employer." Instead, an Income Partner like Petitioner is more properly

characterized as an employee entitled to California's workplace protections against sex discrimination, retaliation, wrongful termination in violation of public policy and sex-based pay inequity.

In *Clackamas, supra*, the Court faced the question of whether particular "shareholders and directors of a professional corporation should be counted as 'employees'" for purposes of the employment provisions of the Americans with Disabilities Act. (538 U.S. at 442.) Though the Court was specifically analyzing the question in the context of a "professional corporation"—a corporate structure adopted by many law firms in lieu of limited liability partnerships—it relied on authority generally applicable to all business forms, including partnerships. In particular, the Court relied on, and adopted, the EEOC's guidance on the issue of analyzing employee status for purpose of applicability of the various employment discrimination statutes within its jurisdiction. (*Id*. at 448-50.)

The Supreme Court was "persuaded by the EEOC's focus on the common-law touchstone of control" and adopted the agency's six-factor test to assist in making that determination. (*Id*. 449 [citation omitted].) Those six factors are as follows:

> [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> [2] Whether and, if so, to what extent the organization supervises the individual's work;

> [3] Whether the individual reports to someone higher in the organization;
>
> [4] Whether and, if so, to what extent the individual is able to influence the organization;
>
> [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
>
> [6] Whether the individual shares in the profits, losses, and liabilities of the organization. (*Id*. at 449-50 [quoting EEOC Compliance Manual § 605:0009.].)

Winston – in the form of the Capital Partners – have the absolute power to hire or fire Income Partners like Petitioner without cause. (Ex. 6, pp. 172 [§8.01(b)], 175 [§ 9.05].) Petitioner was supervised by and reported to the Managing Partner of the San Francisco office, Joan Fife. (Ex. 8, p. 227.) At various times in her employment, she reported to other Capital Partners. For instance, during the pendency of the case to which Petitioner devoted almost all of her time for the first 1.5 years of her employment with Winston, Petitioner was required to submit all pleadings, etc. to Capital Partner Sunny Cherian for review and approval before filing them. (*Id*.)

Petitioner had no ability to influence the organization. (*Id*. at 226 [only vote was regarding elevation of Senior Associates to Income Partner.].) All meaningful decisions regarding Winston's operations are undertaken by the Executive Committee and the Managing Partner. (Ex. 6, pp. 172-73.) All material decisions regarding the firm's management and operations are delegated almost exclusively to the Capital Partners. (*Id*. at

pp. 170-72 [§ 7.07].) Income Partners have no say in modifying or amending the terms of the Partnership Agreement, yet are presumed to be bound by its modified or amended terms. (*Id.* at p. 172 [§ 8.01(a)(v)].) Even when Income Partners like Petitioner are permitted to vote, that vote is diluted as compared to the Capital Partners. (*Id*. p. 173 [§ 8.01(d)].)

Petitioner's compensation was decided by the Compensation Committee, which is a committee established by the Executive Committee. (Ex. 8, p. 226-27.) Only Capital Partners may vote for or occupy positions on the Executive Committee. (Ex. 6, pp. 167-69 [§§ 7.03, 7.05-7.06].)

For purposes of evaluating performance for compensation consideration, Income Partners were grouped with Senior Associates and Of Counsel, who are recognized employees of the firm, separated from Capital Partners, who are all equity owners of the firm. (Ex. 8, pp. 226-27, 230-31.

The Partnership Agreement provided to Petitioner for the first time only after she joined Winston does not list her as a partner of the firm — Income or otherwise. (Ex. 6, pp. 185-86.) Her title of "Income Partner" was not imposed upon her by any term of the Partnership Agreement; rather, it was offered to her as a nominal title in her offer letter of employment five months before she became employed with the firm on May 1, 2014. (Ex. 8, pp. 225-26.)

Finally, Petitioner did not share in the profits of the firm. (*Id*. at p. 226.) Her compensation was a fixed salary, regardless of firm revenues or profits, and she never received a single "bonus" for the three years she was at the firm. (*Id.* at pp. 226-27.) In her final months of employment, Petitioner was told that her performance achievements were being offset by an allocation of the costs of operating the San Francisco office. Prior to this statement, (a) Petitioner had never been told that she was responsible for the operating costs of the office; (b) had never seen any documents describing Income Partners as having such obligation; and (c) understood from policy documents that Income Partner compensation was determined by three – and only three – specific factors, none of which accounted for office operating costs. (*Id*. at pp. 227-28.)

As the *Clackamas* Court emphasized, the core issue here is the question of control. (538 U.S. at 448-49.) The undisputable record shows that Petitioner had no control over the operation or management of the firm. In its motion below, Winston failed to engage in any sort of meaningful analysis of this question. In its moving papers, Winston did not even cite, no less address, the *Clackamas* case. Rather, Winston cited easily distinguishable out-of-date cases to the Respondent trial court, below. (*See* Ex. 3, pp. 59-60 [citing *Burke v. Friedman* (7th Cir. 1977) 556 F.2d 867 and *Wheeler v. Hurdman* (10th Cir. 1987) 825 F.2d 257]; Ex. 10, pp. 350 [citing *Fountain v. Metcalf, Zima & Co.* (11th Cir. 1991) 925 F.2d 1398].)

In turn, Respondent court erred by failing to consider the facts of this case and the law of *Clackamas*.

To begin, *Burke v. Friedman* – a 1977 Seventh Circuit case – considered whether a member of a four-person partnership could be considered an employee for purposes of Title VII coverage. (556 F.2d 867, 868.) Without engaging in any analysis, that court concluded "we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business." (*Id*. at 869.) Obviously, the four-person partnership in *Burke* provides no meaningful comparison to the many hundreds of members of the Winston partnership, and the court's broad-based conclusion fails to account for the multi-factor test subsequently endorsed by the Supreme Court in *Clackamas*. It is also worth noting that *Burke* was limited to its facts by a later case in the same circuit. (*See EEOC v. Sidley Austin, Brown & Wood, LLP* (7th Cir. 2002) 315 F.3d 696, 706-07 [acknowledging the limited value of *Burke*.].)

Wheeler v. Hurdman – an outdated case from 1987 -- similarly provides Winston no meaningful support. In *Wheeler*, the Tenth Circuit criticized the EEOC's attempt to argue for a multi-factor analysis to look behind the title of "partner." Of course, fifteen years later, the U.S. Supreme Court expressly relied on – and adopted – those same arguments made by the EEOC. (*Compare Wheeler v. Hurdman* (10th Cir. 1987) 825 F.2d 257, 265-66 *with Clackamas, supra*, 538 U.S. at 449-450.) Indeed, the

Clackamas Court specifically adopted the EEOC's emphasis on "the common-law element of control" – a position rejected by the Tenth Circuit in *Wheeler*. (*Compare Clackamas*, *supra*, 538 U.S. at 448 *with Wheeler, supra,* 825 F.2d at 269-75 [discussing the so-called "domination principle."].)

Finally, *Fountain* actually provides significant support for Petitioner's position. Even in the pre-*Clackamas* timeframe of the case, the Eleventh Circuit acknowledged that "the evidentiary value of a label is extremely limited, the economic reality of the role played being a more probative indication." (*Fountain, supra,* 925 F.2d at 1401.) In *Fountain*, unlike here, the plaintiff was one of four partners. (*Id.* at 1398.) He owned 31% of the firm's shares, had the ability to vote those shares, shared in the firm's profits, losses and expenses, and was compensated based on his share of the firm's profits. (*Id.*) Here, Petitioner owned 0% of the firm's shares, had very limited and diluted voting rights, did not share in the firm's profits, and was compensated based on a set annual salary. It is quite obvious – and lies in stark contrast to Petitioner's situation – that the facts of *Fountain* were thoroughly considered by the court (unlike here), and were found to show that plaintiff exercised sufficient control over the firm to be considered an employer. The guiding principles of *Fountain* underscore the Respondent court's errors here.

Considering the current state of the law in combination with the record before the Respondent court, Petitioner should have been considered an "employee" for purposes of the protections provided by the FEHA and Labor Code. As a result, Winston's Arbitration Clause can only be enforced if it meets the minimum public policy standards and contract enforcement requirements described by the California Supreme Court in *Armendariz*, *supra*.

II. RESPONDENT TRIAL COURT ERRED IN HOLDING THAT THE SCOPE OF WINSTON'S ARBITRATION CLAUSE ENCOMPASSES THE CLAIMS MADE BY PETITIONER IN THIS CASE

By its own terms, Winston's Arbitration Clause is limited in its applicability to disputes arising from and concerning the Partnership Agreement or terms of the partnership contract. The Complaint in this case raises no such claims. (*See generally* Ex. 5, pp. 67-88.) The Arbitration Clause begins by describing its intended scope as covering "[a]ny dispute or controversy of a Partner or Partners arising under or related to this Agreement or the Partnership. . ." (Ex. 6, p. 180 [§ 13.11].) A fair reading of this language, on its face, is that the arbitration procedure is intended to be used for disputes over the adherence to or application of the terms of the Partnership Agreement.

That reading is supported when combined with the other express terms of the Arbitration Clause. In particular, the clause expressly limits the scope of authority of the panel of arbitrators to claims or disputes about the Partnership Agreement.

> The panel of arbitrators *shall have no authority* to . . . substitute its judgment for, or otherwise override the determinations of, the Partnership, or the Executive Committee or officers authorized to act in its behalf, with respect to any determination made or action committed to by such parties, unless such action or determination violates a provision of this Agreement. (*Id*. at p. 181 [emphasis added].)

The excerpted language expressly provides that the arbitrators' authority is limited strictly to determining if the conduct of the partnership (or its agents) "violates a provision of this Agreement." In other words, whether or not the actions complained of amount to a breach of the specific terms of the Partnership Agreement.

In this case, Petitioner brings claims for violations of California's Labor Code (fair pay) and Government Code (sex discrimination and retaliation) and sounding in tort (wrongful termination). These claims specifically allege that, among others, Tom Fitzgerald – a Capital Partner, member of the Executive Committee, and designated Managing Partner of the firm – and the Compensation Committee – a committee authorized to act on behalf of the Executive Committee – engaged in conduct that amounted to violations of these statutory provisions and California law. (*See e.g.*, Ex. 6, pp. 75-80.) For instance, the Complaint alleges that

Fitzgerald and the Compensation Committee's determination to reduce Petitioner's pay in both 2016 and 2017 – amounting to a 56% overall reduction – and denying her a bonus for those same years violated the California Labor Code and Government Code. (*Id*. at 78, 80.) In order to find in Petitioner's favor, the trier of fact will be required to examine the mental state of the decision-makers and determine whether those decisions were substantially motivated by an unlawful factor (*e.g.*, sex or protected activity). (*See e.g.*, California Civil Jury Instruction 2500, element (4).). In other words, the trier of fact will be required to "substitute its judgment for or override the determinations of . . . the Executive Committee or officers authorized to act in its behalf. . ." Under the limitation language in the Arbitration Clause, the arbitrators "shall have no authority" to rule on these claims. Query how it can be argued that an arbitration clause is broad enough to cover such disputes, but then prohibits the arbitrators from ruling on those claims? It cannot.

The Respondent court's reading of this language was error. (Ex. 2, pp. 34-38.) At oral argument on the motion below, Respondent court opined that the Partnership Agreement *implied* that claims for statutory violations were within the scope of the Arbitration Clause. (*Id.*) In so doing, the Respondent court improperly re-wrote the terms of the Partnership Agreement. (*See* Code of Civ. Proc. § 1858 ["In construction of a[n] . . . instrument, the office of the Judge is simply to ascertain and

declare what is in term or in substance contained therein, not to insert what has been omitted. . . ."].) By engaging in that reading, the Respondent court improperly read terms into the contract. In particular, the final clause of the relevant language qualifies the limitation on the arbitrators' authority as follows: "unless such action or determination violates a provision *of this Agreement*." (Ex. 6, p. 181 [emphasis added].)[3] That qualification could have read "unless such action or determination violates a provision *of the law*" but it does not. By choosing the former wording over the latter, the drafters of the Partnership Agreement chose to limit the application of the Arbitration Clause to issues related to the agreement, itself, to the exclusion of violations of the law. Claims for violation of the law are not covered by this language and may proceed to court.

Because the specific limiting terms of the Arbitration Clause show that it was not intended to cover statutory and common law claims against the firm, it does not apply to this case and it was error for Respondent court to hold otherwise.

[3] "Code of Civil Procedure section 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful. Nor do courts have any such power under their inherent limited authority to reform contracts." (*Armendariz, supra*, 24 Cal.4th at 125 [citations omitted].)

III. RESPONDENT COURT ERRED IN HOLDING THAT THE ARBITRATION CLAUSE WAS ENFORCEABLE, EVEN AS SEVERED

But even assuming, *arguendo*, the Arbitration Clause applies to this dispute, the motion should have been denied because the clause fails to meet even the most basic of protections required by California law.

Nothing about Winston's Arbitration Clause complies with California law. It generally incorporates a non-compliant set of rules: the Commercial Arbitration Rules of the American Arbitration Association. It then proceeds to override those rules in a number of areas which extend Winston's failures to comply with California law. (Ex. 6, pp. 180-81 ["the terms of this Section 13.11 shall prevail over any inconsistent provisions of the Commercial Arbitration Rules of the [AAA]."].)

A. Winston's Arbitration Clause Does Not Meet The Minimum Standards Required by California Law

Winston's Arbitration Clause is unenforceable because it fails to comply with California public policy. A truly voluntary and mutual arbitration agreement simply shifts the forum for claims from the courtroom to the arbitration room. The arbitrating parties must each have the same rights and remedies as if they were litigating the claims in court. (*Armendariz, supra,* 24 Cal.4th. at 99-100.) As the California Supreme Court explained,

> [P]arties agreeing to arbitrate statutory claims must be deemed to consent to abide by the substantive and remedial provisions of the statute. [Citation.] Otherwise, a party would not be able to fully vindicate [his or her] statutory cause of action in the arbitral forum. (*Id*. at 101 [citations and internal quotations omitted].)

For instance, where a statutory claim would entitle a prevailing plaintiff to attorneys' fees and costs if the claim were brought in court, that same entitlement must be incorporated into the arbitral arena. (*Id*.)

To assist courts in evaluating the enforceability of arbitration agreements, *Armendariz* adopted the five-factor test articulated in *Cole v. Burns Intern. Security Svcs.* (D.C. Cir. 1997) 105 F.3d 1465, 1482. Under that test, an arbitration agreement is lawful only if it:

> "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." (*Armendariz*, 24 Cal.4th at 102 [quoting *Cole, supra,* 105 F.3d at 1482].)

If the agreement fails to contain assurances of all five factors, it violates public policy and is unenforceable.

Winston's Arbitration Clause has two categories of provisions. First, the clause incorporates generally the AAA Commercial Rules. Then, the clause sets out its own custom provisions for various aspects of the proceeding. Wherever the two sets of provisions either conflict or the AAA Commercial Rules are silent, the Arbitration Clause's custom provisions

govern. As demonstrated below, Winston's Arbitration Clause complies with not one of the minimum standards adopted in *Armendariz*.

As the name indicates, the AAA Commercial Rules are designed to be used in commercial disputes, as opposed to consumer or employment disputes. As for the latter, AAA has acknowledged that its Commercial Rules are inadequate to address employment disputes and therefore designed an entirely different set of rules for those matters. Those rules, known as the Employment Arbitration Rules and Mediation Procedures, were developed to ensure compliance with "the state of existing law." (Ex. 9, pp. 235, 303.) Those rules are AAA's effort to comply with the *Armendariz* minimum standards. Were the commercial rules compliant with *Armendariz*, there would be no need for this separate set of rules.

1. Winston's Arbitration Clause Does Not Provide for Neutral Arbitrators

Winston's Arbitration Clause sets forth a specific procedure for arbitrator selection. (Ex. 6, p. 181.) Included in that language are provisions unfairly limiting the field of potential arbitrators. In describing the eligibility characteristics, the contract states, "each of whom shall be a partner in a law firm headquartered in the United States and having not less than 500 attorneys." (*Id*.) The listed characteristics are precisely the demographic characteristics of the individuals accused of wrongdoing in

this case. In so limiting the pool of potential arbitrators, Winston has assured itself that only permissible arbitrators share characteristics that are aligned with their own and has assured itself of presenting its case to arbitrators who are cut from the same cloth as they are. In essence, it is the fox guarding the henhouse.[4] Furthermore, this eligibility requirement also has the effect of having a disparate impact on women arbitrators. Traditionally, large law firm partnerships have been overly representative of male attorneys. A recent study re-confirmed that data. (Ex. 9, pp. 235, 334-45 ["McKinsey Study"].) As the McKinsey Study reveals, in 2017 men outnumber women in non-equity partner roles 63% to 37% and equity partner roles 81% to 19%. (*Id*. at p. 336.) Thus, Winston has unjustifiably narrowed the field of arbitrators.

2. Winston's Arbitration Clause Does Not Permit Any Discovery

Nowhere in the Arbitration Clause is discovery permitted. There is no language in any of the documents that provides for the "more than

[4] This provision also lends weight to the consideration of intent and scope of the Arbitration Clause. The only way in which this limitation on the pool of arbitrators is justifiable is if the drafters understood that this clause was to cover only disputes related to the terms of the Partnership Agreement. Having the pool of arbitrators limited to those who have worked in similar environments under similar agreements ensures that any potential arbitrator has familiarity with partnership agreements and how they operate in a large firm environment.

minimal discovery" required by *Armendariz*. This case involves multi-layered legal claims and underlying facts that will require the full panoply of discovery devices available in court. Petitioner's claims cover actions that took place over a three-year span of time involved multiple material witnesses who will need to be deposed and will require the discovery of significant amounts of documents, including emails, financial records, time records, and case files.

Petitioner's Complaint describes a multi-year series of events that demonstrate bias and differential treatment while at Winston. (Ex. 5, pp. 71-81.) The complicated nature of the facts and circumstances showing multiple violations of California law and public policy cannot be fully discovered in the arbitration proceeding contemplated by the Arbitration Clause because that clause offers no discovery procedures equivalent to those guaranteed for consumers and employees. As one example, Petitioner's Fourth Cause of action for Violation of the Fair Pay Act (Labor Code § 1197.5), Petitioner alleges that the firm, through its Compensation Committee and others, unjustifiably reduced her compensation. In order to prove her claim, Petitioner will require access to all information considered by the Compensation Committee in reaching its determination. That will require deposing multiple people and having access to communications amongst the committee members as well as documents reviewed by the committee in its assessment of how well Petitioner performed in light of the

evaluation criteria published by the committee. Petitioner will also require access to information – documents, data, and depositions – related to similarly situated (*i.e.*, comparator) male employees in order to show the required element that she was paid a wage "less than rates paid to employees of the opposite sex for substantially similar work." (*Id.* at § 1197.5(a).)

On top of the discovery required to prove Petitioner's Fourth Cause of Action, Petitioner's claims for sex discrimination, retaliation, and wrongful termination in violation of public policy will similarly require the depositions of multiple material witnesses who took part in communications with Fitzgerald and others at crucial points in time. (*See e.g.*, Ex. 6, pp. 75-81 [describing interactions with Joan Fife, members of the Compensation Committee, Laura Petroff, Kathi Vidal.].)

Winston has unfettered access to almost all relevant witnesses – *e.g.*, firm Managing Partner Tom Fitzgerald, members of the Compensation Committee and Executive Committee, and other partners who are material witnesses to events and decisions relevant to this case as well as the comparator witnesses. Winston also has unfettered access to almost all relevant documents – *e.g.*, emails, case files, and financial records. Without discovery, Petitioner has access to almost none of the described witnesses or documents. (*Martinez v. Master Prot. Corp.* (2004) 118 Cal.App.4th 107, 118 [acknowledging structural disadvantage between employee and

employer in regard to access to information in employment discrimination case.].) Access to sufficient discovery is crucial in employment cases such as this one. (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 717 [acknowledging that the complexity of employment disputes requires expansive discovery even in arbitration.].) The Arbitration Clause's lack of guaranteed discovery tips the scale in Winston's favor to such a degree so as to all but foreclose Petitioner's ability to prove her case, thus causing irreparable harm.

3. Winston's Arbitration Clause Does Not Require A Written Award

As stated in *Armendariz*, "an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based." (24 Cal.4th at 107.) The Arbitration Clause is silent on the form of award. The AAA Commercial Rules provide that the award must merely be "written." (Ex. 9, pp. 225, 276.) Those rules do not require the arbitrators to describe their "essential findings and conclusions" or any of their reasoning at all. In other words, writing the word "denied" would be sufficient to comply with the AAA Commercial Rules. Such a writing would not comply with the *Armendariz* standard.

4. Winston's Arbitration Clause Limits Relief

Winston's Arbitration Clause specifically denies Petitioner any relief whatsoever on the claims brought in her Complaint. As explained in detail above (§ II), the Arbitration Clause specifically prohibits the panel of arbitrators from considering the claims brought by Petitioner in this case. Again, Petitioner brings this case for violation of various California statutes and in tort. Those claims require the finder of fact to evaluate the determinations and decisions made by members of the firm's Executive and its agents, including the Compensation Committee. As explained above, the Arbitration Clause, by its own terms, blocks the arbitrators from engaging in that evaluation. Accordingly, it is impossible for Petitioner to obtain relief for her claims under the express terms of the Arbitration Clause.

5. Winston's Arbitration Clause Imposes Massive Fees & Costs on Petitioner

The Arbitration Clause requires that any fees charged by AAA or the arbitrators be split equally by the parties. Given the amount in dispute in this case, the AAA Commercial Rules fees would require Petitioner to pay in excess of $7,000 for the venue fee, alone. (Ex. 9, pp. 235, 243-48.) Then, she would be required to pay for half of the fees charged by each of the three arbitrators. In the end, the Arbitration Clause would require

Petitioner to incur fees and costs surely in excess of $100,000, not including her own attorneys' fees and costs of litigation.

Because Winston's Arbitration Clause does not comply with California's minimum standards, it is unenforceable and the Respondent court erred in granting Winston's motion.

B. Winston's Arbitration Clause is Unconscionable

As a separate and additional ground, the Arbitration Clause is unenforceable because it is unconscionable. (Civil Code § 1670.5.) Courts will not compel arbitration where an arbitration agreement contains unconscionable terms. (*Armendariz*, 24 Cal.4th at 113-27.) Unconscionability has two components, procedural and substantive, both of which must be present to render a contract unenforceable. (*Id*. at 114 [citing *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1533].) "But they need not be present in the same degree." (*Id*.) Instead, California courts use a "sliding scale" approach. (*Id*.) "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Id*.)

As a matter of California law, unconscionability is determined as of the time the agreement is entered into. A judicial determination of unconscionability focuses on whether the contract or any of its provisions

were "unconscionable at the time it was made." (Civil Code § 1670.5(a); *see also O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 281-82 ["The critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties."] [internal quotations omitted]; *see also Fitz, supra,* 118 Cal.App.4th at 715; *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487.)

1. Winston's Arbitration Clause Is Procedurally Unconscionable

In *Armendariz*, the California Supreme Court found the arbitration agreement procedurally unconscionable because it was a contract of adhesion. (24 Cal.4th at 114-16.) "'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract, or reject it.'" (*Id*. at 113 [quoting *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694].) That Court found procedural unconscionability because the contract was made a condition of employment and there was no opportunity to negotiate over its terms. (*Id*.) The *Armendariz* Court further recognized the effect of the economic realities that lead to the unequal bargaining power of the relationship between employers and newly hired (or prospective) employees even where the new employee is a sophisticated executive or

highly compensated. (*Id*. at 115; *see also Stirlen, supra*, 51 Cal.App.4th at 1533-34 [finding that even a high-level, sophisticated executive's arbitration agreement was procedurally unconscionable because he was given no opportunity to negotiate.].)

In this case, the Partnership Agreement which contains the Arbitration Clause at issue was presented to Petitioner in a take-it-or-leave-it fashion after she had already accepted employment and begun work at Winston. (Ex. 8, p. 226.) Though Petitioner is a skilled attorney, she has no training or experience in employment law, including the issues surrounding arbitration clauses. (*Id*.) It is folly to think that a single Income Partner like Petitioner has any power or ability to negotiate the terms of an existing partnership agreement that has been adopted and ratified by more than 200 Capital Partners. (*See* Ex. 6, p. 184.) Moreover, the express terms of the Partnership Agreement require a two-thirds vote of the Capital Partners to modify the terms of the agreement in any way. (Ex. 6, p. 172 [§8.01(a)(v)].] Income Partners who, by its terms, may not vote to amend or modify the Partnership Agreement, are nonetheless bound by any such amendments. Such feature defines the notion of "contract of adhesion."

Based on the above, the Arbitration Clause is procedurally unconscionable.

2. Winston's Arbitration Clause Is Substantively Unconscionable

a. The Venue Provision is Substantively Unconscionable

The Arbitration Clause requires that all arbitrations brought by attorneys based in the United States be venued in Chicago, Illinois. Winston's largest office and headquarters is located in Chicago. Petitioner lives in Albany, California, was based in Winston's San Francisco office and worked in Winston's San Francisco and Menlo Park offices. (Ex. 8, p. 226.) Requiring Petitioner to travel to Chicago to litigate her case would require her to incur substantial cost and hardship while simultaneously serving as a convenience to Winston. In such circumstances, venue clauses are substantively unconscionable. (*See e.g., Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 908-09 [holding that burdensome venue provisions in arbitration agreement are substantively unconscionable.].)

b. The Arbitrator Selection Provision is Substantively Unconscionable

As described above, (§ III.A.1) the arbitrator selection provision artificially limits the field of potential arbitrators in a way that inures to Winston's benefit.

c. The Cost Allocation is Substantively Unconscionable

As more fully described above (§ III.A.5), the Arbitration Clause imposes a massive cost on Petitioner – likely in excess of $100,000 – for the privilege of having her claims heard.

d. The Lack of Fee Shifting is Substantively Unconscionable

The Arbitration Clause provides that "[e]ach party shall bear its own legal fees." There is no exception to this provision. In other words, the Arbitration Clause does not permit the shifting of fees, even if the underlying statutory claim(s) allow for prevailing plaintiff attorneys fees, as is the case in this matter. (*See* Ex. 6, p. 088.)

e. The Confidentiality Provision is Substantively Unconscionable

In the present context, confidentiality provisions are substantively unconscionable. The Arbitration Clause requires Petitioner to maintain "strict confidence" of "all aspects of the arbitration." (Ex. 6, p. 181.) This provision operates as a gag order on Petitioner and prevents her from gathering evidence and presenting her case. As at least one court has recognized, because they operate to "prevent an employee from contacting other employees to assist in litigating (or arbitrating) an employee's case . . . would handicap if not stifle an employee's ability to investigate and engage in discovery," confidentiality provisions place the employer in a

"far superior legal posture. . . ." (*Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1078-79.)

f. The Limitation on Arbitrator Authority is Substantively Unconscionable

As noted more fully above (§ II) the Arbitration Clause prohibits the arbitrators from ruling in Petitioner's favor in this case.

3. Counsel's Post-Dispute, Post-Employment, Conditional, Unilateral Offer to Modify the Partnership Agreement Does Not Save the Failings of the Arbitration Clause

Acknowledging that Winston's Arbitration Clause fails each of the tests for enforceability under California law, counsel for Winston extended a conditional, unilateral offer to modify the Partnership Agreement well after Petitioner's employment ended and after the dispute had arisen. Indeed, it was several weeks after the Complaint was filed in this case that counsel for Winston transmitted the letter attached as Exhibit 5, pp. 90-140. In that letter, counsel articulated the offer as follows:

> Additionally, although Winston & Strawn disputes that Ms. Ramos was an employee – and therefore entitled to any particular arbitration conditions or provisions – the firm is willing to pay for the arbitrator fees for an arbitration to address her disputes (subject to any future recovery of such fees based on applicable law). *If* we can reach agreement on *other terms*, Winston & Strawn is also willing *to consider* going forward with an arbitration in California, and *to consider* using JAMS as an arbitration provider under the JAMS employment rules. (Ex. 5, p. 90 [emphasis added].)

This offer does not save the defects in the Arbitration Clause for a multitude of reasons.[5]

To begin, if it is anything, this offer is a unilateral offer to modify the Partnership Agreement. A modification to a written contract must be agreed upon by both of the parties. (Civil Code § 1698.) Here, Petitioner never agreed to any modification, therefore, it is at best an offer without an acceptance. (*See Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 181 [finding counsel's post-dispute letter offering to modify the arbitration clause an invalid offer to modify.].) Furthermore, her employment with Winston terminated several months before the offer was made.

Moreover, this offer to modify does not save any defects in the Arbitration Clause because it is both conditional and illusory. The offer to pay for the arbitrator fees is specifically conditioned upon Winston's assertion of potential future right to recover such fees. There is no device under law which permits Winston to recover the forum costs – including arbitrator fees. Thus, the firm is attempting to create a right to recover funds it normally would not have the ability to seek. Additionally, the offer is illusory and fails to save the Arbitration Clause because it simply pledges

[5] "Moreover, whether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy." (*Armendariz, supra,* 24 Cal.4th at 125.)

"to consider" changing the venue to California and "to consider" using JAMS employment rules (which comply with the minimum standards of *Armendariz*). And, the parties only get to this point if some undefined set of "other terms" are agreed upon. These are not promises. Were Petitioner to take Winston up on this offer, the firm would be bound merely to talk about the described items and nothing further. (*See Stirlen*, *supra*, 51 Cal.App.4th at 1536 [rejecting the employer's post-dispute letter offer to modify the arbitration clause, holding "No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it."].)

Also, Winston has provided no evidence that this offer to modify was authorized by a two-thirds vote of the Capital Partners, as required by the Partnership Agreement. (*See* Ex. 6, p. 170 [§ 8.01(a)(v)].) As the Second District Court of Appeal held, a letter from counsel does not override the provisions of the underlying contract in regard to modification to its terms. (*Mercuro*, *supra*, 96 Cal.App.4th at 181.) Finally, *Armendariz* similarly addressed this scenario, holding "[w]hether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy." (24 Cal.4th at 125.)

Based on the above, Winston's assertions that it "has already agreed to revise certain provisions of the Partnership Agreement to ensure there is no doubt that it complies with *Armendariz*" is plainly misleading. (Ex. 4, pp. 59.) Finally, Winston repudiated the Arbitration Clause by declining to engage in mediation which the Arbitration Clause requires as a condition precedent to arbitration. (Ex. 9, pp. 233-34, 237.)

4. Respondent Court's Attempt to Save the Arbitration Clause by Severing (Some) Unlawful Provisions was Improper

In its Order compelling Petitioner to arbitration, Respondent court severed three unconscionable provisions (venue, cost sharing, and attorneys' fees) of the Arbitration Clause. (Ex. 1, p. 7.) This ruling was improper and is reversible error.

To begin, the severance left intact several obviously unconscionable provisions related to scope of the arbitrators' authority, availability of remedies, discovery, and requirement for a reasoned award. Thus, the clause still fails to comply with California public policy as set forth in *Armendariz*. (*See, supra,* § III.A.) Moreover, severance was improper because the Arbitration Clause was permeated with such unlawful terms. As the California Supreme Court noted when refusing to rewrite an arbitration clause through severance:

> First, the arbitration agreement contains more than one unlawful provision; it has both an unlawful damages provision

> and an unconscionably unilateral arbitration clause. Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. (*Armendariz*, *supra*, 24 Cal.4th at 124.)

Once all the truly unlawful provisions are severed, there is nothing left of the contract.

As important is the *Armendariz* Court's admonition against permitting employers to continue to foist plainly unlawful arbitration contracts on employees. The landmark *Armendariz* decision was handed down in 2000. Employers operating in California have had many years to reform their arbitration clauses to bring them into compliance. The Partnership Agreement was first adopted in 2006, and amended in 2012. (Ex. 6, p. 149.) Winston's Arbitration Clause was unlawful at its initial adoption (six years after *Armendariz* was handed down) and remained so even after the Partnership Agreement went through revision six years later. At no point did Winston reform the terms of the Arbitration Clause to conform to California law. Allowing this clause to be enforced in this case will only serve to reinforce the message to companies operating in this state that the only consequence to not affirmatively reforming their forced arbitration agreements is that some terms will be severed. As the California Supreme Court noted, this mild consequence cannot stand in the face of California public policy:

> An employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter. In that sense, the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme, and severance would be disfavored unless it were for some other reason in the interests of justice. (*Armendariz, supra*, 24 Cal.4th at 124, fn. 13.)

IV. CONCLUSION

Put plainly, the Respondent court got it wrong. In determining that Petitioner and Winston were "in a partnership relationship," the Respondent court disregarded the facts in the record and misapplied the standard set forth in *Clackamas*. In upholding and enforcing Winston's Arbitration Clause, the Respondent Court misread the terms of the clause and engaged in improper severance of some of the unlawful terms while allowing plainly unlawful terms and conditions to stand. Most of all, the Respondent court left Petitioner with no remedy for her claims as the Arbitration Clause prohibits the arbitrators from reaching the merits of Petitioner's claims.

For all these reasons, immediate action by this Court is required as irreparable harm will result if this ruling is permitted to stand. Petitioner respectfully requests that this Court grant relief as described in the Prayer for Relief above.

Dated: January 19, 2018

DUCKWORTH PETERS LEBOWITZ OLIVIER LLP

By: /s/ Noah D. Lebowitz,
Noah D. Lebowitz
Attorneys for Petitioner Constance Ramos

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.204(c), Petitioner certifies that the text of this brief consists of 10,249 words as counted by the Word 2016 word processing program used to generate this brief.