S207536

In the Supreme Court of the State of California

Avery Richey,

Plaintiff and Appellant,

v.

AutoNation, Inc., *et al.*

Defendants and Respondents.

Court of Appeal, Second Appellate District,
Division Seven, Case No. B234711
Los Angeles County Superior Court; Case No.BC408319
Honorable Malcolm H. Mackey

Opening Brief on the Merits

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Issues Presented

This case presents the following issues for review:

1. What is the proper standard of judicial review of an arbitration award involving an employee's "unwaivable rights" where the arbitrator decides the case by written decision following an evidentiary hearing on the merits of the plaintiff-employee's claim?

2. Does an employer violate CFRA by terminating an employee on approved medical leave where the employer has an honest belief that the employee is abusing the leave or violating company policy?

Statement of the Facts and Procedural History

A. Richey's employment at AutoNation, his termination, and the order compelling arbitration

Richey was an employee of an auto dealership, Power Toyota Cerritos. [3CT 538.] Between October 2007 and February 2008 while still working full time, Richey prepared to, and did, open a restaurant. [3CT 539.] Richey's production at the dealership suffered because he was "distracted" by the restaurant business and was a "bit off his game." [3CT 539.] In March 2008 he suffered a back injury at home, filed for medical leave under the Moore-Brown-Roberti Family Rights Act (Government Code §§ 12945.1, 12945.2) (CFRA), and was granted leave. [3CT 540.] The leave was extended more than once and was ultimately due to expire at the end of May 2008. [3CT 540.]

In April 2008, while Richey was still on medical leave from the dealership and receiving disability benefits, AutoNation learned that he nevertheless was working at his restaurant. [3CT 541.] AutoNation's[1] employee handbook limits work employees may do while on approved leave:

> Outside work while on FMLA[2] Leave is Prohibited. [¶] You are not allowed to accept employment with another company while you are on approved FMLA leave.

[3CT 552.] The arbitrator found that even though in his opinion the employee manual was "poorly written," "there was a general understanding in the workplace at Power—that outside employment was against company policy and others had been terminated for violating this rule." [3CT 553.]

Having learned that Richey was working at the restaurant, Richey's supervisor sent Richey a letter advising him of the company policy barring other employment, including self-employment, while on leave and invited Richey to call him if Richey had any questions. [3CT 541.] Richey ignored the letter. He did not communicate with his supervisor because he believed

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1 Power Toyota Cerritos is part of the AutoNation family of companies. To be consistent with the court of appeal opinion, we refer to petitioners collectively as "AutoNation."

2 "FMLA" is the Family and Medical Leave Act of 1993, the federal counterpart to the CFRA. [Typed Op'n at 4.] References to "Typed Op'n" are to the court of appeal's opinion filed November 13, 2012.

the supervisor had misread the handbook and had misstated company policy. [3CT 541.]

Several times after AutoNation sent Richey the letter, supervisors and employees of the dealership saw Richey working at the restaurant. [3CT 541.] Not having heard back from Richey, and because he was violating company policy, AutoNation terminated Richey "based on the company's finding that [Richey] was in violation of policy, to wit: engaging in outside employment while on leave of absence." [3CT 542.] The arbitrator also found that the supervisor who sent the termination letter to Richey "was concerned about two issues: a) Was Mr. Richey honest with the dealership about his medical condition, and b) did [Richey] have another job?" [3CT 553.]

Following his termination, Richey sued several companies in Power Toyota's chain of ownership (AutoNation, Inc., Webb Automotive Group, Inc., Mr. Wheels, Inc.) and his immediate supervisor, Rudy Sandoval (all of which we are collectively calling "AutoNation" in this brief).[3] Richey's complaint alleged a number of theories, including racial discrimination, harassment, retaliation for taking approved leave under CFRA, and failure to be reinstated following approved CFRA leave. [1CT 5, 76, 140.] The trial court granted AutoNation's motion to compel arbitration and ordered the case to be arbitrated. [2CT 252.]

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[3] Mr. Wheels, Inc. is a dba for Power Toyota Cerritos.

B. A retired superior court judge conducts an 11-day arbitration and issues a 19-page award against Richey on all his claims

A retired superior court judge, Luis A. Cardenas, was selected to be the arbitrator. [3CT 537.] The arbitrator tried Richey's claims over an 11-day period, featuring 19 witnesses, all called by Richey. [3CT 537, 563.] The evidentiary hearings were not reported, so no transcript exists of the hearings.

After taking the case under submission, the arbitrator issued a 19-page final award in favor of AutoNation on all of Richey's claims, discussing the procedural history, the evidence, and the legal issues. [3CT 537-55.] With respect to Richey's failure to reinstate claim, the arbitrator stated the legal issue as follows: "[W]hether the law provides a protective shell over Mr. Richey that bars his termination until he is cleared to return to work by his physician, or does the law allow an employer to let an employee go, while on approved leave, *for other non-discriminatory reasons*?" [3CT 548 (emphasis in original); see Typed Op'n at 4-5.][4]

The arbitrator found that Richey's supervisor was concerned whether Richey was being honest with the dealership about his medical condition and whether he had another job in violation of AutoNation policy prohibiting other employment

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[4] Richey's motion to vacate the award challenged only the arbitrator's ruling on Richey's CFRA claims; accordingly this brief will not discuss the arbitrator's disposition of Richey's other claims, including his discrimination and harassment claims.

while on leave. [3CT 553.] In upholding Richey's termination, the arbitrator wrote that "case law, as recited above, allows [AutoNation] to terminate Mr. Richey if it has an 'honest' belief that he is abusing his medical leave and/or is not telling the company the truth about his outside employment." [3CT 553.] The arbitrator concluded that "The weight of the evidence is overwhelming that Power Toyota fired Mr. Richey for non-discriminatory reasons. His CFRA/FMLA status is not an absolute bar to termination. His medical leave status does not protect Mr. Richey from smart decisions, or bad ones, made by [AutoNation], so long as the basis for the decision is legally proper." [3CT 554.]

C. The trial court denies Richey's motion to vacate the award and enters judgment in AutoNation's favor; the court of appeal reverses and this court grants review

Richey sought to vacate the award on limited grounds. He did not challenge the arbitrator's decision as to his racial discrimination claims, but argued only that the arbitrator committed legal error by invoking the honest belief defense to defeat Richey's CFRA reinstatement claim. [2CT 274-282.] The trial court confirmed the award and Richey appealed. [4CT 731, 775.]

On appeal, the court of appeal reversed, holding that the arbitrator wrongly accepted the honest belief defense, made an error of law, and therefore had exceeded his powers. [Typed Op'n at 2.] This court granted AutoNation's petition for review.

Legal Discussion

I

General Principles of Arbitral Review

A. The merits of arbitration awards are generally unreviewable

An arbitration is not a trial. When parties agree to arbitration, in the absence of some specification to the contrary in the arbitration agreement, arbitrators are free to decide a case based upon "broad principles of justice and equity." *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10. "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." *Ibid.*

As such, "the scope of judicial review is strictly limited . . . ." [Typed Op'n at 7 (citing *Moncharsh, supra,* 3 Cal.4th at 10).] In *Moncharsh* this court declared that "'in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.'" *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1357 (quoting *Moncharsh*, 3 Cal.4th at 25). Indeed, *Moncharsh* went so far to say that an award is ordinarily not reviewable "for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." 3 Cal.4th at 6.

Instead, as this court has explained, the California Arbitration Act provides "only limited grounds for judicial review of an arbitration award." *Cable Connection, supra,* 44 Cal.4th at 1344. Those grounds are enumerated in section 1286.2 of the Code of Civil Procedure, which permits an award to be vacated if the award was "(1) procured by corruption, fraud, or undue means; (2) issued by corrupt arbitrators; (3) affected by prejudicial misconduct on the part of the arbitrators; or (4) in excess of the arbitrators' powers." *Id.* at 1344.

This is true even where the arbitration agreement—as this one does [1CT 165]—requires the arbitrators to rule on the basis of the law, rather than general principles of equity and justice.[5] "A provision requiring arbitrators to apply the law leaves open the possibility that they are empowered to apply it 'wrongly as well as rightly.'" *Cable Connection, supra,* 44 Cal.4th at 1360 (quoting *Utah Constr. Co. v. Western Pac. Ry. Co.* (1917) 174 Cal. 156, 163). "Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error . . . ." *Cable Connection,* 44 Cal.4th at 1360. Instead,

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[5] The arbitration agreement provides in part that "[r]esolution of the dispute shall be based solely upon the law governing the claims and defenses set forth in the pleadings and the arbitrator may not invoke any basis (including but not limited to, notions of 'just cause') other than controlling law." [1CT 165.]

as this court continued, "to take themselves out of the general rule that the merits of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that are reviewable by the courts." *Id.* at 1361. Richey has never claimed—and the court of appeal did not find—that this arbitration agreement meets *Cable Connection's* exacting standard for agreements for judicial review. See *City of Richmond v. Service Employees Internat. Union, Local 1021* (2010) 189 Cal.App.4th 663, 669 n.4 (arbitration clause providing that arbitrator "shall make no decisions in violation of existing law is a standard arbitration provision that does not provide for such review").

B. *Moncharsh* identified "limited and exceptional" circumstances permitting judicial review

Moncharsh acknowledged one exception to the general rule that the merits of arbitration awards may not be reviewed and held out the possibility of a second. Quoting an earlier decision involving an unlicensed contractor, *Moncharsh* noted that "'the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable *where the issue of illegality of the entire transaction* is raised in a proceeding for the enforcement of the arbitrator's award.'" *Moncharsh, supra,* 3 Cal.4th at 31 (quoting *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 609) (emphasis in original). *Moncharsh* also acknowledged that "there may be some limited and exceptional circumstances justifying judicial review of an arbitrator's decision when a party claims illegality affects only a portion of the

underlying contract. Such cases would include those in which granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights." *Moncharsh,* 3 Cal.4th at 32. *Moncharsh* did not discuss what form of review the latter question would take.[6]

In cases following *Moncharsh,* courts have invalidated arbitration awards as being in excess of the arbitrator's powers[7] where the state constitution, a governing statute, or an existing court order has prohibited the arbitrator from granting the relief given or where the award contravenes an explicit public policy. E.g., *Board of Education v. Round Valley Teachers Ass'n* (1996) 13 Cal.4th 269, 272 (Education Code preempted remedy provisions in collective bargaining agreement; therefore arbitrator had no power to order those remedies); *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 866 (attorney fee award to defendant based on prevailing party clause in arbitration contract vacated because underlying statute authorized fees to be awarded only to a prevailing *plaintiff*—"the

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6 The standard of review in determining whether arbitrators exceeded their powers by enforcing an illegal contract or making an award that violates public policy is de novo. *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892 n.7 (applying "a de novo standard" to a "claim[] that the entire contract or transaction underlying the award is illegal").

7 In *City of Richmond, supra,* the court said that "whether an arbitration award in violation of public policy may be properly categorized as an award in excess of the arbitrator's power is largely a semantic matter that need not detain us. The key consideration for our purposes is that the public policy exception must be applied with care." 189 Cal.App.4th at 670.

one-way provisions are unwaivable statutory rights"); *Department of Personnel Administration v. California Correctional Peace Officers Ass'n* (2007) 152 Cal.App.4th 1193, 1203 (arbitrator exceeded his powers and violated the Dills Act by reforming memorandum of understanding after its terms had been approved by the legislature); *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 452 (award amounted to unconstitutional gift of public funds in derogation of special statute authorizing arbitration and impliedly limiting amount of award to no more than earlier judgment from which appeal had been dismissed to facilitate arbitration); *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 338-40 (award vacated because it directly conflicted with lawful injunction). Aside from those narrow circumstances which do not apply here, we are not aware of any case refusing to confirm an arbitration award made after a full evidentiary hearing on the theory that the arbitrator made a substantive error of law.

In two cases involving an employee's unwaivable statutory rights, this court has deferred deciding under what circumstances, if any, an arbitrator's asserted error of law makes the award beyond the arbitrator's powers and therefore subject to vacatur on that ground.

In *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 100 this court discussed review of an arbitration award involving an employee's "unwaivable rights." In that case, seeking to avoid arbitration altogether, an employee

argued that the lack of judicial review of arbitration awards makes vindication of rights under the California Fair Employment and Housing Act (Gov't. Code §§ 12900 *et seq.*, FEHA) illusory because "the arbitrator is essentially free to disregard the law." *Armendariz,* 24 Cal.4th at 106. In response, and citing *Moncharsh,* this court stated that "judicial review may be appropriate when 'granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights.'" *Ibid.* (quoting *Moncharsh, supra,* 3 Cal.4th at 32). But because *Armendariz* arose from a court of appeal decision compelling the parties to arbitrate and not from the merits of an arbitration award, this court said that it had "no occasion to articulate precisely what standard of judicial review is 'sufficient to ensure that arbitrators comply with the requirements of [a] statute.'" *Id.* at 107. *Armendariz* merely required that "for such judicial review to be successfully accomplished, 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." *Ibid.*

Ten years later, this court revisited the issue of judicial review of an arbitration award involving unwaivable statutory rights. *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665. In *Pearson Dental,* a 4-3 decision, this court said that it was "faced precisely with the question that was prematurely posed in *Armendariz,* i.e., the proper standard of judicial review of arbitration awards arising from mandatory arbitration employment agreements that arbitrate claims

asserting the employee's unwaivable statutory rights." 48 Cal.4th at 679.

Once again, however, this court did not resolve the scope of review.

In *Pearson Dental,* the "arbitrator's award . . . did not even comply with the requirements set forth in *Armendariz*" (48 Cal.4th at 679) and the arbitrator made what this court called a "clear legal error" on a procedural issue, incorrectly holding plaintiff's case to be time-barred. *Ibid.* Because the arbitrator's clear legal error prevented plaintiff's claims from being heard on the merits, this court said it would articulate only a "narrow[] rule . . . sufficient for [the case's] resolution." *Ibid.* The narrow rule this court stated is that where an "employee subject to a mandatory employment arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award." *Id.* at 680. Stated in other terms, this court said, "an arbitrator whose legal error has barred an employee subject to a mandatory arbitration agreement from obtaining a hearing on the merits of a claim based on such [unwaivable] right has exceeded his or her powers . . . ." *Ibid.*

Before deciding to issue the "narrow" rule, this court passed on the opportunity to issue a more general rule by (i) rejecting the defendant-employer's position "that all *Armendariz* requires is a written arbitral award" and (ii) refusing to consider the plaintiff's

broader argument that the standard of review should be that "all legal errors are reviewable in this context, or that all errors involving the arbitration statute itself are reviewable." 48 Cal.4th at 679. This court left that issue for another day. *Ibid.*

Justice Baxter, joined by Justices Chin and Corrigan, dissented from *Pearson's* call for expanded judicial review where the parties' contract does not call for it as required by *Cable Connection,* stating that he could not "join in this unsupported and unprecedented move to judicialize the arbitration process." *Pearson Dental, supra,* 48 Cal.4th at 683. In the dissent's view, the majority opinion "significantly undermine[s] the strong public policy favoring arbitration as a fair, quick, and inexpensive means of resolving disputes." *Ibid.* The dissent went on to explain that where an employee's arbitration agreement (i) satisfies *Armendariz's* four elements; and (ii) is not subject to revocation for unconscionability, "the risk of arbitral mistake is acceptable because the parties 'voluntarily' submitted to the arbitration and 'agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute.'" *Pearson Dental,* 48 Cal.4th at 686 (Baxter, J., dissenting) (quoting *Moncharsh, supra,* 3 Cal.4th at 11).

As we show below, expanded judicial review is not necessary here to make sure the award is consistent with "the protection of [Richey's] statutory rights." *Armendariz, supra,* 24 Cal.4th at 106.

II

This Arbitrator's Decision Here Should Be Confirmed Based on Ordinary Principles of Arbitral Review

The arbitration award here should be confirmed under ordinary principles of arbitral review.

First, the authority this court cited in *Armendariz* to support expanded judicial review, *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, as Justice Baxter pointed out in his *Pearson Dental* dissent, does not stand for that proposition. *McMahon* did not involve review of an arbitration award at all. The issue in that case was whether by providing for exclusive federal court jurisdiction of claims brought under the 1934 Securities Exchange Act, Congress intended to make a contract calling for arbitration of such disputes invalid. 482 U.S. at 222, 227. A divided court held that Congress did not so intend and enforced the contract. *Id.* at 238 ("We conclude, therefore, that Congress did not intend for § 29(a) to bar enforcement of all predispute arbitration agreements.").

In light of what *McMahon* actually decided, the passage from *McMahon* this court quoted in *Armendariz* as supporting expanded judicial review does not do so. Stating that there is no reason to assume arbitrators will not follow the law, the *Armendariz* court then quoted this passage from *McMahon*: "although judicial scrutiny of arbitration awards necessarily is limited, *such review* is sufficient to ensure that arbitrators comply with the requirements of the statute." 482 U.S. at 232

(emphasis added). The United States Supreme Court's use of the phrase "such review" can only be read to mean standard review of arbitration awards, not some form of enhanced review. See also *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32 n.4 (quoting *McMahon's* "such review" language).[8]

Second, the post-*Moncharsh* cases cited above that invoke expanded judicial review to vacate an arbitrator's award, do not do so just because the reviewing court believed the arbitrator made an error in applying the law to the particular facts of the case. Rather, in each of those cases (see pp. 9-10, *ante*), the court used expanded judicial review to determine if the relief the arbitrator granted was somehow unauthorized by the governing law. In the present case, if the proper conditions are met—and they were here—there is nothing unlawful or against policy to terminate an employee even while the employee is on approved CFRA leave.

That is not what occurred in the cases cited above. In those cases, the courts cited well-established law to determine if the arbitrator exceeded his or her powers and found that to be the case because either a specific statute or public policy disabled the arbitrator from making the ruling that he or she did. For example, in *Round Valley*, this court found that the Education Code preempted the remedies the arbitrator ordered. *Board of Education, supra*, 13 Cal.4th at 272. In *City of Palo Alto*, the

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[8] At the time—and perhaps still now— "such review" included review for manifest disregard of the law. See Part III, *post.*

award contradicted a valid injunction. *City of Palo Alto, supra,* 77 Cal.App.4th at 338-40. And in *D.C.*, a statute prohibited the relief awarded. 176 Cal.App.4th at 866.

The *City of Richmond* case, *supra,* which refused to invoke the public policy or statutory right exception, is instructive. In that case, an arbitrator ordered a city employee who had been accused of sexual harassment to be reinstated because under the terms of the collective bargaining agreement, the sexual harassment claim was time-barred. Seeking to vacate the award, the City argued that the award violated the strong public policy against sexual harassment to reinstate the employee without any findings on what the employee actually did. 189 Cal.App.4th at 668-69.

The court of appeal rejected the argument and reversed the trial court's order vacating the reinstatement award. The court of appeal readily acknowledged that "[t]he existence of a strong public policy against sexual harassment in the workplace is indisputable." *City of Richmond, supra,* 189 Cal.App.4th at 671. Whether there was a strong public policy against sexual harassment, however was not in the court's view, the determinative issue: "The relevant question, however, is not whether there is a public policy against sexual harassment generally but whether according finality to the arbitrator's decision would be incompatible with that public policy." *Ibid.*

As the court went on to say, "There is no absolute public policy against reinstatement of persons who have engaged in

sexual harassment, much less a public policy against reinstatement of persons who may have engaged in sexual harassment and who were ordered reinstated because the accusations were time-barred." *City of Richmond, supra,* 189 Cal.App.4th at 672. The court thus applied *Moncharsh's* general rule of limited review and reinstated the award.

The same is true here. Unquestionably, there is a public policy based on statute granting an employee on leave the right to reinstatement. But that is not the question here, and the arbitrator never found he did not have the power to reinstate. Instead, recognizing that the right to reinstatement is not unlimited, the relevant question is whether a court may second-guess the arbitrator's legal and factual findings determining that Richey was not entitled to reinstatement. That ruling does not violate any public policy, nor does it enforce an illegal contract; at most, it is a mistake of law, which is not a basis to vacate an award. Put another way, the arbitrator's ruling here does not in any way nullify or flout the terms of a statutory right; it simply determines whether in these circumstances the employee is entitled to that right. *See Armendariz, supra,* 24 Cal.4th at 106 ("judicial review may be appropriate when 'granting finality would be inconsistent with the protection of party's statutory rights'").

Moreover, in a situation like this, de novo review would provide more rights than would occur in a court trial and would undermine any incentive for arbitration. This is so for two

reasons. The way *Armendariz* and *Pearson* are written, expanded judicial review, if implemented by this court, would be a one-way street. That is to say, a losing plaintiff could invoke public policy and unwaivable rights to argue for an entitlement to expanded review, but a losing employer could assert only those limited statutory grounds in Code of Civil Procedure section 1286.2.

And in a court trial, in the absence of a statement of decision, a reviewing court engages in all intendments to support the judgment. This is true as to matters of fact and law. See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (in the absence of a statement of decision, reviewing court will presume that trial court made every necessary finding to support the judgment). Thus, even if a court states in a tentative decision an improper rule of law, the judgment will nevertheless be affirmed if it is correct on any legal basis. *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 648 (presumption applies to alleged errors of fact or law). Here, there is no record of the arbitration proceedings because they were not reported. Further, because the award is final when rendered, a party in AutoNation's position has no opportunity through the statement of decision process to seek to add to the arbitrator's stated reasons that would give alternative bases supporting the award. Code Civ. Proc. § 632; Cal. Rules of Court, Rule 3.1590. So, by vacating the award here—in defiance of the general rule of arbitral finality—a defendant receives even less protection than it would in a court trial.

III

If this Court Wishes to Strike a Middle Ground, It Could Adopt as a Standard, "Manifest Disregard" of the Law

We have explained above why we believe this award should have been confirmed under the *Moncharsh* standard of review. If this court wishes to strike a middle ground granting some form of enhanced review, AutoNation suggests that it consider the "manifest disregard" of the law standard applied in federal courts.

Under that standard, it is not enough for an arbitrator to commit legal error for an award to be vacated. Rather, the error must be so egregious as to be tantamount to an intentional disregard of the law:

> "'[M]anifest disregard of the law' means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. It must be clear from the record that the arbitrators recognized the applicable law and then ignored it. As such, mere allegations of error are insufficient. [citation] Moreover . . . '[t]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.'"

Collins v. D.R. Horton, Inc. (9th Cir. 2007) 505 F.3d 874, 879-80 (quoting *Carter v. Health Net of California* (9th Cir. 2004) 374 F.3d 830, 838); *see also Merrill Lynch, Pierce, Fenner & Smith v. Jaros* (6th Cir. 1995) 70 F.3d 418, 421 ("This court has emphasized that manifest disregard of the law is a very narrow

standard of review. [citation] A mere error in interpretation or application of the law is insufficient. [citation] Rather, the decision must fly in the face of clearly established legal precedent.").

In 2008 the United States Supreme Court decided *Hall St. Assocs., L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576 where it held an arbitration award may be vacated solely on the grounds set forth by statute. It made an ambiguous statement regarding whether its holding abrogated the manifest-disregard rule, however, that left the circuit courts in disarray. See *Stolt-Nielsen S.A. v. AnimalFeeds Internat. Corp.* (2010) 559 U.S. 662, 130 S.Ct. 1758, 1768 n.3 ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street* . . . as an independent ground for review or as judicial gloss on the enumerated grounds for vacatur . . . ." but "[a]ssuming *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow."). See generally Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. Rev. 137, 180-81 (2011).

Nevertheless, some circuits continue to apply this standard on the theory that it is based on the arbitrator's "power" and therefore "manifest disregard of the law remains a valid ground for vacatur" because it is "shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4)." *Comedy Club Inc. v. Improv West Assocs.* (9th Cir. 2009) 553 F.3d 1277, 1280. See generally, *Pearson, supra*, 48 Cal.4th at 677 n.3 (acknowledging

disarray in federal circuits following *Hall St.*, but noting that California courts "need not and do not move in lockstep with the federal courts in matters of judicial review of arbitration awards . . . .").

We recognize that this court has not heretofore adopted the manifest disregard of the law standard. But if this court were to adopt some sort of enhanced review of arbitration awards that involve an employee's unwaivable rights, AutoNation suggests that this is the standard the court should adopt. See *Williams v. CIGNA Fin. Advisors Inc.* (5th Cir. 1999) 197 F.3d 752, 761-62 (applying manifest disregard of the law standard to employee's statutory claim); *Chisolm v. Kidder, Peabody Asset Mgmt., Inc.* (S.D. N.Y. 1997) 966 F.Supp. 218, 219 ("the standard of judicial review of arbitral decisions in cases involving statutory rights is no different from the extremely limited review used in arbitration generally"—applying manifest disregard standard to employee's statutory claim).

Under this standard, the trial court's order confirming the award would be easily affirmed. The award shows that the arbitrator thoroughly considered the law and applied it to these facts. While the court of appeal may have disagreed with the result, by no means could it be said that the arbitrator recognized applicable law and then ignored it. See *Luong v. Circuit City Stores* (9th Cir. 2004) 368 F.3d 1109, 1112 (arbitrator thoroughly discussed law; he did not ignore it); *Carter, supra,* 374 F.3d at 838 (to show manifest disregard, it "must be clear from the record

that the arbitrators recognized the applicable law and then ignored it").

IV

This Court Should Adopt the "Honest Belief" Defense[9]

As discussed above, the arbitrator framed the legal issue as "whether the law provides a protective shield over Mr. Richey that bars his termination until he is cleared to return to work by his physician, or does the law allow an employer to let an employee go, while on approved leave, for other non-discriminatory reasons?" [3CT 548 (emphasis omitted).] After discussing the case law, the arbitrator held that (i) the "legal issue for the arbitrator to determine is what was in [the supervisor's] mind when he decided to let Mr. Richey go" and (ii) "case law, as recited above, allows Power Toyota to terminate Mr. Richey if it has an honest belief that he is abusing his medical leave and/or is not telling the company the truth about his outside employment." [3CT 553.] Ruling in AutoNation's favor, the arbitrator found that "[t]he weight of the evidence is overwhelming that Power Toyota fired Mr. Richey for non-discriminatory reasons." [3CT 554.]

The court of appeal reversed the judgment confirming the award on the theory that the arbitrator made an error of law by

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9 If this court adopts AutoNation's position as to review of arbitration awards, the judgment confirming the award may be affirmed without reaching this argument.

accepting the honest belief defense. It is the court of appeal which erred and the judgment should be reinstated.

We start with some background about the CFRA. As the court of appeal explained, CFRA was enacted in 1991 as a state counterpart to the federal FMLA and was "intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security." [Typed Op'n at 10 (quoting *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 606).] CFRA defines the employers who are subject to its regulations, what health conditions qualify for leave, and the procedures for obtaining it. [Typed Op'n at 10-11.]

Leave under CFRA includes the right to be reinstated. Gov't Code § 12945.2(a) (leave "shall not be deemed to have been granted unless the employer provides the employee . . . a guarantee of employment in the same or a comparable position upon the termination of the leave"); Cal. Code Regs., tit. 2 § 7297.2(a) ("Upon granting the CFRA leave, the employer shall guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section 7297.2, subdivisions (c)(1) and (c)(2) . . . ."). In turn, section 7297.2, subdivision (c)(1) makes it clear that being on leave does not provide any immunity to an employee for adverse job actions that could have been taken if the employee were not on leave:

> An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the

> employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement.

Cal. Code Regs., tit. 2, § 7297(c)(1).

Rights and benefits under FMLA are similar to those under CFRA. [See Typed Op'n at 12-13.] And, like CFRA, the right to reinstatement under FMLA is not unlimited. Both the FMLA statute and its implementing regulations on this score are nearly identical to those in CFRA. See 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.816(a). "Because the CFRA and the FMLA contain nearly identical provisions regarding family and medical leave . . . California courts routinely rely on federal cases interpreting the FMLA when reviewing the CFRA." *Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487.

Richey was an at-will employee. Under California law, an at-will employee may be terminated for any legal reason. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 335-36, 358. In turn, CFRA only prohibits an employer from taking an "adverse employment action against the employee based upon—that is, 'because of'—those protected absences." *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1260. Richey was not fired because of his protected absences. He was fired because AutoNation believed he was violating company policy—a reason

for which AutoNation could have legitimately fired Richey even if he were not on leave, and which was not related to his absence.

This is the logic underpinning the leading case discussing the honest belief defense, *Kariotis v. Navistar Internat. Transp. Corp.* (7th Cir. 1997) 131 F.3d 672, a case the court of appeal acknowledged was "strikingly similar" to this one. [Typed Op'n at 15.] In *Kariotis*, plaintiff employee injured her knee and took medical leave under the FMLA. As did Richey, the employee had her leave extended multiple times, prompting an investigation by the employer. The employer's investigator "reported seeing [employee] walking, driving, sitting, bending, and shopping . . . ." *Id.* at 675. Solely on the basis of the investigator's report, the employer fired the employee "because she dishonestly had claimed disability benefits . . . ." *Ibid.* The Seventh Circuit remarked that the investigation "left something to be desired"—the employer never sought out the treating doctor or obtained a second medical opinion—but it had no trouble affirming summary judgment in favor of the employer on the basis of the honest belief doctrine. *Id.* at 681.

The court's rationale is pertinent here because it held that the employer did not have to prove the employee misused her leave, but only that it had an honest suspicion she had done so: "[Employer] need not conclusively prove that [employee] had misused her leave; an honest suspicion will do." *Kariotis, supra,* 131 F.3d at 681. The court's rationale was causation-based. The court explained that "the FMLA's regulations plainly state that

an employee . . . has 'no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.'" *Ibid.* The court went on to say that "because [employer] lawfully could have terminated [employee] after suspecting she committed fraud while on duty" if the employer "had to prove more than an honest suspicion simply because [employee] was on leave, she would be better off (and enjoy 'greater rights') than similarly situated employees (suspected of fraud) who are not on leave." *Ibid.*

The court of appeal here refused to follow *Kariotis* on the twin grounds that it has "little persuasive value in view of the many subsequent decisions that have refused to adopt the honest belief defense or to employ the *McDonnell Douglas* [*Corp. v. Green* (1973) 411 U.S. 792] framework placing the burden on the employee to disprove the employer's subjective intent when a claim alleges interference with substantive FMLA rights." [Typed Op'n at 16.][10] The court of appeal's conclusion is wrong on two levels: (i) the cases the court of appeal cited as refusing to follow *Kariotis* do not for the most part turn on the employer's subjective belief about an employee's conduct while on leave, nor do they cite or discuss *Kariotis.* Those cases involve a different issue, namely, the employer's subjective understanding about *its* own obligations under the FMLA or CFRA; and (ii) the arbitrator

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10 The court of appeal acknowledged that *Kariotis* remains good law in the Seventh Circuit. [Typed Op'n at 16, citing *Scruggs v. Carrier Corp.* (7th Cir. 2012) 688 F.3d 821.]

did not use a *McDonnell Douglas* burden-shifting approach to identify a triable issue, but instead weighed all the evidence following the arbitration.

Taking the latter point first, while the arbitrator did give a nod to *McDonnell Douglas* in the general legal discussion section of his award [3CT 550], the award makes it plain that he did not decide the case on the burden-shifting basis. The arbitrator weighed all of the evidence and decided that AutoNation did not fire Richey *because of* his leave, writing that "The evidence is overwhelming that Power Toyota fired Mr. Richey for non-discriminatory reasons." [3CT 554.] Indeed, the two facts upon which AutoNation based its decision to terminate Richey are indisputable. Company policy prohibits outside employment while on leave and even Richey admitted he was working at his restaurant while on leave. [3CT 541.] AutoNation did not just have an honest belief Richey was violating policy; it is undisputed that he was as a matter of fact. See *Pharakhone v. Nissan North America, Inc.* (6th Cir. 2003) 324 F.3d 405, 407-08 ("And an employer need not reinstate an employee if application of 'a uniformly applied policy, governing outside or supplemental employment'—*i.e.,* a rule against working while on leave—results in the employee's discharge.").

Turning to the second point, only three cases (other than the Seventh Circuit cases following *Kariotis*) the court of appeal cited even discuss *Kariotis*—one favorably—and none of the others involve the employee's conduct while on approved leave,

but instead involve different factual circumstances, typically an employer's mistake about its own obligations under CFRA or FMLA.

The cases relied upon by the court of appeal that cite *Kariotis* are *Clay v. United Parcel Service, Inc.* (6th Cir. 2007) 501 F.3d 695; *Smith v. Chrysler Corp.* (6th Cir. 1998) 155 F.3d 799; and *McDaneld v. Eastern Mun. Water Dist. Bd.* (2003) 109 Cal.App.4th 702.[11] *Clay* was a summary judgment case in which the court applied the *McDonnell Douglas* burden-shifting approach. The court did not reject the honest belief defense, but citing its earlier *Smith v. Chrysler Corp.* decision, said that the Sixth Circuit applied it in a different way than did the Seventh Circuit. Under *McDonnell Douglas* burden-shifting, if on summary judgment, the employer articulates a legitimate, nondiscriminatory reason for its action, the burden shifts to the plaintiff to show that the reason is pretextual. *Clay, supra,* 501 F.3d at 714. The *Clay* court simply said that one way for the plaintiff to demonstrate pretext "is by showing that the reason given by the employer 'is ultimately found to be mistaken, foolish, trivial, or baseless.'" 501 F.3d at 714. Thus, under the Sixth Circuit test of honest belief, on summary judgment the employer is required to show that its honest belief was made in "reasonable reliance on the particularized facts that were before it at the time

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11 The court of appeal decision also cites *Medley v. Polk Co.* (10th Cir. 2001) 260 F.3d 1202 in a "compare . . . with" cite, and again in passing. [Typed Op'n at 21 n.19 & p.23.] *Medley* follows *Kariotis* and reverses a plaintiff's judgment because the trial court refused to give an instruction based on *Kariotis.*

the decision was made" and moreover, the employee is given the opportunity to "produce 'proof to the contrary.'" *Ibid.*

Properly analyzed, *Clay* provides no support to the court of appeal's opinion and no impediment to affirming the arbitration award. The arbitrator did point to particularized facts on which AutoNation relied and more importantly, this case was decided after an arbitration at which all the evidence was presented, not a burden-shifting summary judgment.

McDaneld, supra, is similarly of no support to the court of appeal's conclusion. In *McDaneld*, the plaintiff took CFRA leave to care for his father. While on leave, the employee played golf and worked on his lawn, and he took an extra day off work after his father had recovered. When his employer discovered these facts, it fired him. Employee petitioned for a writ of mandate to obtain reinstatement (employer was a government entity) and lost. Both at trial and on appeal, he argued that the activities the employer witnessed "were not activities inconsistent with providing the necessary physical and psychological care to his father." *McDaneld, supra,* 109 Cal.App.4th at 707. The superior court upheld the dismissal and the court of appeal affirmed.

The court of appeal's attempt here to distinguish *McDaneld* founders on two shoals. First, the court of appeal said that *McDaneld* was not really an honest belief case because "the *McDaneld* court expressly cited administrative findings that the employee had, in fact, engaged in activities incompatible with the intended purpose for his leave . . . ." [Typed Op'n at 23.] But this

ignores the court of appeal's statement that it did not matter whether employee's activities were consistent with the reasons for his leave, provided the employer had a good faith belief the leave was being misused: "The critical issue is whether the [employer] maintained a good-faith, reasonable belief that [the discharged employee] had abused [his] FMLA leave." *Id.* at 707-08 (brackets in original). The court concluded, "the [employer's] justifiable conclusion that he had misused leave . . . allowed the [employer] to terminate him anyway." *Id.* at 708. Moreover, even if *McDaneld* truly rested on a factual finding, and not just the employer's honest belief, the same is true here. As discussed above, it is undisputed that Richey violated company policy.

The cases that do not discuss *Kariotis* the court of appeal relied on to reject the honest belief defense do not involve an employer's assessment of an employee's conduct while on leave. Instead, those cases concern an employer's failure to comply with its own obligations under the FMLA and CFRA. In such a circumstance, the employer's mistake about its own obligations—a very different circumstance from that here—does not relieve it from liability.

For example, the opinion discusses *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112. [Typed Op'n at 16-17.] *Bachelder* had nothing to do with an employee's conduct on leave or the employer's subjective belief about that conduct. Instead, in that case, the employer, America West, fired its employee based on the number of absences she had. But America

West mistakenly included absences during protected FMLA leave in totaling up the employee's absences. The court of appeals rightly held that an employer's mistaken belief about its own obligations under the FMLA was no defense, because "it is the employer's responsibility, not the employee's, to determine whether a leave request is likely to be covered by the Act":

> America West nonetheless contends that "Bachelder's termination could not have been for her exercise of FMLA rights in 1996 because . . . both she and [America West] believed she had exhausted all her FMLA leave." Whether America West or Bachelder believed at the time that her February 1996 absences were protected by the FMLA is immaterial, however, because the company's liability does not depend on its subjective belief concerning whether the leave was protected.
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> [T]he employer's good faith or lack of knowledge that *its conduct* violated the Act is, as a general matter, pertinent only to the question of damages under the FMLA, not to liability.

259 F.3d at 1130. Stating the familiar rule that "[e]mployers cannot use the taking of FMLA leave as a negative factor in employment actions" (*id.* at 1122 n.9), and stating the employer admitted it used the 1996 protected leave as a reason for the discharge, the Ninth Circuit had no trouble concluding that America West violated the FMLA. *Id.* at 1131. The difference here, of course, is that AutoNation did not use Richey's leave as a negative factor; its decision was based on Richey's violation of company policy.

A California court of appeal case the opinion below relied upon is similar to *Bachelder*. *Avila v. Continental Airlines, Inc., supra,* 165 Cal.App.4th 1237. In *Avila*, there was a factual dispute whether the employee had adequately applied for CFRA leave. Having resolved that issue in the employee's favor, the opinion then turned to the employer's defense that the individual supervisors who decided to fire Avila did not *personally* know of his protected status, so therefore, that status could not have been a cause of his termination. 165 Cal.App.4th at 1258.

The court of appeal rejected this defense. It held that the "because of" language in Government Code section 12945.2, subdivision (*l*) "requires only proof of a causal connection between the employee's protected status or conduct and the adverse employment action taken by the employer. . . . Knowledge that the conduct was protected is not required." *Avila, supra,* 165 Cal.App.4th at 1258. *See id.* at 1260 ("Under CFRA and its implementing regulations, the *employer* bears the burden to determine whether an employee's leave is protected . . . ."). Thus, because the employer admitted it had taken the leave into account in deciding to terminate Avila, it was liable:

> We have concluded that plaintiff submitted sufficient evidence to raise a triable issue of fact whether [his application] constituted a request for CFRA-qualifying leave. If the trier of fact concludes that plaintiff requested CFRA-qualifying leave, then Continental's admission that those absences were the cause of plaintiff's discharge is sufficient

> to establish a causal connection between plaintiff's exercise of his right to CFRA leave and his discharge.

165 Cal.App.4th at 1261.

The court of appeal opinion also spends several paragraphs discussing this court's decision in *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, asserting that it "necessarily stands for the proposition that an employer may not, in terminating or failing to reinstate an employee who has been granted CFRA leave, defend a lawsuit from that employee based on its honest belief the employee was abusing his or her leave." [Typed Op'n at 23.] *Lonicki* cannot be read so broadly. In *Lonicki,* the plaintiff had claimed that the stress of working in a level II trauma center after employee layoffs was too much for her and that she needed a medical leave. 43 Cal.4th at 205-06. The employer disagreed and refused to give her medical leave but said she could have limited time off, but that if she did not report back for work on a date certain, she would be terminated. *Ibid.* She did not report back and was terminated. *Ibid.*

Plaintiff then sued, and the trial court granted summary judgment to the employer on the theory that plaintiff's working at another hospital during the same time "showed she could perform the essential functions of her job" for defendant. *Lonicki,* 43 Cal.4th at 208. The court of appeal affirmed, but this court reversed. This court's holding has nothing to do with "honest belief." Instead, this court held, agreeing with plaintiff, that "the relevant inquiry is whether a serious health condition made her

unable to do her job at defendant's hospital, not her ability to do essential job functions generally . . . ." *Id.* at 214. Because there were substantially different conditions at the two hospitals, and because plaintiff was working only limited hours at the second hospital, "whether plaintiff did have a serious health condition that made her unable to do her full-time job for defendant is a disputed issue of fact to be resolved at trial." *Id.* at 216. Here, of course, AutoNation granted leave to Richey, and terminated him because he violated company policy.[12]

Most of the other cases relied on by the court of appeal are similar and do not involve the employer's assessment of the plaintiff's conduct while the plaintiff is on leave. E.g., *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 881 (employer's "failure to establish it complied with employer's obligations under the CFRA precludes it from obtaining summary judgment with respect to [plaintiff's] CFRA claims"); *Sanders v. City of Newport* (9th Cir. 2011) 657, F.3d 772, 774-75 (employer declines to reinstate employee on leave because it determined it

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12 The court of appeal claims that AutoNation contended that "an employer may simply rely on an imprecisely worded and inconsistently applied company policy to terminate an employee on CFRA leave without adequately investigating and developing sufficient facts to establish the employee had actually engaged in conduct warranting dismissal." [Typed Op'n at 23.] In fact, the arbitrator found that the policy was well-understood and that Richey ignored his supervisor's letter explaining the policy. It is undisputed Richey was working at the restaurant. Moreover, as shown above, Richey was an at-will employee who could be terminated for any legal reason, so long as it was not *because of* his leave.

could not provide a safe working environment, given her sensitivity to chemicals); *Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1135-37 (employer mischaracterized protected leave as unprotected leave; triable issue of fact existed whether protected leave taken into account in terminating employee).

And even the closest case on point cited by the court of appeal does not support reversal of this judgment confirming the award. *Smith v. Diffee Ford-Lincoln-Mercury, Inc.* (10th Cir. 2002) 298 F.3d 955. In that case, an employee while on leave for breast cancer treatment was terminated allegedly for work-related issues that preceded her FMLA leave. She sued, claiming the employer interfered with her right to take FMLA leave by not reinstating her following her leave. The case was tried to a jury, which ruled in plaintiff's favor on the FMLA claim.

On appeal, the court of appeals stated that "If an employer interferes with the FMLA-created right to medical leave or to reinstatement following the leave, a deprivation of this right is a violation regardless of the employer's intent." *Smith, supra,* 298 F.3d at 960. At the same time, however, the court said that "a reason for dismissal insufficiently related to FMLA leave will not support recovery under an interference theory." *Id.* at 961. In *Smith,* as the court of appeals said, the jury found as a matter of fact, the causal connection: the plaintiff "presented evidence and argued that she would not have been dismissed had she not taken FMLA leave. This claim was submitted by instructions to the jury and the verdict in Smith's favor was based on this

claim." *Ibid.* Here, by contrast, the arbitrator found as a matter of fact that AutoNation terminated Richey for a nondiscriminatory reason unrelated to his leave, namely, violating company policy.

In sum, the court of appeal's decision is wrong. The "honest belief" defense applies here to negate any showing that Richey's protected leave was a cause of his discharge. The judgment confirming the arbitration award should be affirmed even under the most forgiving—for Richey—standard of review. The arbitrator's decision shows not only that AutoNation had an honest belief that Richey violated company policy, but that he did violate company policy. Since Richey's leave was not a negative factor in his termination, the court of appeal's decision should be reversed whether this court reviews the award under the *Moncharsh* standard, the manifest disregard standard, or de novo.

Conclusion

The trial court got it right. The judgment confirming the arbitration award should be affirmed.

Dated: April 15, 2013

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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 8,909 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

Dated: April 15, 2013

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On April 15, 2013, I served, in the manner indicated below, the foregoing document described as **Opening Brief on the Merits** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

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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 April 15, 2013, at Costa Mesa, California.

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