SUPREME COURT CASE: S 167169

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEARSON DENTAL SUPPLIES, INC., a California Corporation
aka PEARSON DENTAL SUPPLY COMPANY
Petitioner

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT
Respondent,

LUIS TURCIOS
Real Party in Interest

PEARSON DENTAL SUPPLIES, INC.'S ANSWER BRIEF ON THE MERITS

FROM THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLANT DISTRICT, DIVISION 4
APPELLATE COURT CASE B 206740
GRANTING WRIT OF MANDATE, DIRECTED TO THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
CENTRAL DISTRICT COURTHOUSE
HONORABLE ALAN S. ROSENFIELD, JUDGE, PRESIDING
SUPERIOR COURT CASE NUMBER: BC 359 605

LAW OFFICES OF RUSSELL F. BEHJATNIA
Russell F. Behjatnia, Esq.
14401 Gilmore Street, Suite 100
Van Nuys, California 91401
State Bar Number: 172289
Telephone (818) 779-8888

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Is the scope of judicial review, as it applies to an employee's anti-discrimination claim under the **Fair Employment and Housing Act** (**California Government Code, § 12900 et seq.**) that is arbitrated pursuant to a mandatory employment arbitration agreement, extremely narrow, not permitting courts to review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning

Issue 2: 13

DOES the **Fair Employment and Housing Act** (**California Government Code, § 12900 et seq.**), require an employer to permit an employee to seek judicial intervention, even though an existing mandatory arbitration agreement exists between them, that requires the employer and employee to resolve their disputes by arbitration, only, and such judicial review is a breach of the arbitration agreement

Issue 3: 13

DOES the **Fair Employment and Housing Act** (**California Government Code, § 12900 et seq.**), require an employer to litigate the merits of an employer-employee dispute, even though the employee has failed to seek arbitration during the time period in which a mandatory arbitration agreement requires the dispute to be brought to arbitration

Issue 4: 13

DOES the **Fair Employment and Housing Act** (**California Government Code, § 12900 et seq.**), irrespective of the existence of a mandatory arbitration agreement, and irrespective of the breaching conduct of the employee, render extinct, and of no force and effect, the arbitral limitation period term and condition contained in a mandatory arbitration agreement, and, if so, does this wholesale abolition of arbitral limitation period violate the **California Arbitration Act** and/or the **Federal Arbitration Act**

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COMES NOW, petitioner PEARSON DENTAL SUPPLIES, INC., a California Corporation aka PEARSON DENTAL SUPPLY COMPANY, {hereinafter "PEARSON"} and presents to this Honorable Supreme Court of the State of California, its Answer Brief on the Merits.

I.

PREFACE

In this present matter, this honorable Supreme Court is being requested to examine the propriety and efficacy of an arbitral limitation period provision set out within the confines of a mandatory arbitration agreement. The particular limitations provision, was raised and employed by PEARSON, as a mechanism to resolve, completely, an arbitration between it and LUIS TURCIOS, {hereinafter "TURCIOS"} a former employee of PEARSON. Mr. Turcios, the real party in interest in this action, has submitted his Opening Brief on the Merits to this Supreme Court.

TURCIOS, in his Opening Brief, suggests that, irrespective of the

existence of the mandatory arbitration agreement between himself and PEARSON, and regardless of his actual, known and deliberate breach of the mutually applicable terms and conditions of that arbitration agreement, he is accorded, by statute, the absolute right to ignore the terms and conditions set out in the mandatory arbitration agreement, and litigate in a judicial forum disputes which are irrefutably, subject matter of the mandatory arbitration agreement. TURCIOS' erroneous contention that he is permitted to breach, at will, the mandatory arbitration agreement existing between he, and PEARSON, is predicated on a tortured interpretation of the **Fair Employment and Housing Act (California Government Code § 12900 et seq.,)** {hereinafter also referred to as "FEHA"}, and the chronic attempt to depict the mandatory arbitration agreement as a wicked manuscript deviously devised and created for the purpose of undermining fundamental due process rights, and perpetrating employment discrimination against PEARSON'S employees, including Mr. Turcios.

Predicated upon this exaggerated disparagement of the mandatory arbitration agreement, TURCIOS expects this honorable court to protect his anti-arbitral conduct, absolutely. There is little doubt that TURCIOS is attempting to rekindle the anachronistic judicial hostility toward arbitration agreements which the **California Arbitration Act** and the **Federal Arbitration Act** intended to render extinct. [See **Cable Connection, Inc. vs. DIRECTV, Inc. [2008]** 44 Cal.4th 1334, citing **Mitsubishi Motors v. Soler Chrysler-Plymouth [1985]** 473 U.S. 614, 626, fn. 14 [87 L. Ed. 2d 444, 105 S. Ct. 3346]; see also, e.g., **Shearson/American Express Inc. v. McMahon [1987]** 482 U.S. 220, 226 [96 L. Ed. 2d 185, 107 S. Ct. 2332]; **Armendariz v. Foundation**

Health Psychcare Services, Inc. [2000] 24 Cal.4th 83, 97–98 [99 Cal. Rptr. 2d 745, 6 P.3d 669]; **Broughton v. Cigna Healthplans [1999]** 21 Cal.4th 1066, 1073–1074 [90 Cal. Rptr. 2d 334, 988 P.2d 67].) The Opening Brief is further burdened with inflammatory rhetoric, designed to enrage the reader by depicting TURCIOS as a victim, being subjected to the insufferable consequences of a mandatory arbitration agreement, by his employer. Such illustration is neither accurate, nor congruent with truth.

Absent from the exciting scenario presented by TURCIOS, is the fact that he was represented by counsel within less than two [2} weeks of his termination by PEARSON (actually nine [9] days to be exact), and was therefore never subject of any underhanded conduct at the hands of PEARSON. A fact commented on by the Court of Appeal in its opinion. [See Pearson Dental Supplies v. Superior Court {Turcios} [2008] 166 Cal.App.4th 71, – "After his {Turcios} discharge on January 31, 2006, he obtained counsel within two weeks."] Most disturbing, are the unfounded allegations presented as true, by TURCIOS, that his supervisor informed him he was being terminated because of his age. While such is a contention of TURCIOS, PEARSON'S own investigation of that issue revealed that TURCIOS' supervisor, never made such a remark. The presenting to this court such a mere contention, as fact, only serves to improperly attempt to impact and influence the neutral evaluation of this matter by this Supreme Court.

PEARSON, is an employer, who by requiring itself and all of its employees to expediently raise and/or resolve all of their disputes amongst each other, by arbitration, expected to reduce and avoid the substantial costs and expense attendant to administrative and judicial resolve of such disputes. Expedient, complete and less costly resolve

of employee-employer differences are the very reasons, that any employer, like PEARSON, seeks to implement mandatory arbitration as the method of resolving employer-employee differences. Protracted and costly judicial and administrative processes are avoided, and the employer and employee receive concrete and absolute resolve of their disputes. There is also a benefit to the judicial branch of government, as well. The courts are not burdened with the costs of protracted trial litigation or appeals related to employer-employee disputes.

The well known expectations of employers and employees in relation to arbitration, is completely opposite to TURCIOS' urging that he acted with complete impunity when he deliberately attempted to avoid the reasonable terms and conditions of the mandatory arbitration agreement he entered into with his employer, PEARSON. In fact, such a claim of right by TURCIOS, that he is permitted to ignore the mandatory arbitration agreement, and seek administrative and/or judicial resolve of the employer-employee dispute between himself and PEARSON, is a contention and condition that is opposite and aberrant to the **California Arbitration Act** and any applicable provisions of the **Federal Arbitration Act**. Patently, what is being urged by TURCIOS operates to wholly undermine public policy favoring arbitration, especially, as here, where the parties have contracted, exclusively to engage in that particular mode and method of dispute resolution.

Factually, PEARSON, as an employer, entered into a written arbitration agreement with his prior employee LUIS TURCIOS. The Dispute Resolution Agreement, {hereinafter also referred to as the "DRA"}, was mutually bilateral, in that its terms and conditions applied equally to employer PEARSON and employee TURCIOS. PEARSON, was aware of the fact that it was required and expected to pay for any

arbitration proceedings and remit to the arbitrator, all fees which pertained to any employer-employee dispute. The DRA did not favor either the employer or the employee over the other, with the exception that employee TURCIOS could demand arbitration with the expectation that PEARSON would absorb the costs of arbitration proceedings.

Contained within the confines of the DRA was a mutual, arbitral limitation period term and condition that required both PEARSON and TURCIOS to submit WITHIN ONE YEAR, any employer-employee disputes that may have arisen between them. Employee TURCIOS' employment was terminated by PEARSON on **January 31, 2006**, and TURCIOS filed a claim under the FEHA. The FEHA claims of TURCIOS were certainly subject to arbitration, as set forth in **Armendariz vs. Foundation Health Psychare Services, Inc., [2000]** 24 Cal.4th 83.

TURCIOS at all times was represented by counsel, and was fully aware of his mandatory obligation, to submit his dispute only to arbitration. TURCIOS never provided any explanation to the trial court why he had not sought arbitration and why he further resisted arbitration forcing PEARSON to have to file a formal Petition to Arbitrate before the trial court. TURCIOS did, in his return to the Order to Show Cause, in the Court of Appeal, implicitly concede that he knew of his duty to arbitrate, but simply chose not to pursue it.

As a result of TURCIOS' failure to perfect or compel arbitration before the DRA arbitral limitation period expired, {which was a condition precedent required to have been met before TURCIOS was enabled to extract any redress or relief from PEARSON}, all opportunity to seek redress by TURCIOS from PEARSON, was ended and lost. If no tolling provisions of any statute are applicable, then the one [1] year

arbitral limitation period for seeking arbitration by TURCIOS expired on January 31, 2007. This date, of course, is exactly one year after TURCIOS claimed he was informed that he was fired because of his age. If the tolling provisions of **California Code of Civil Procedure § 1281.12**, are applicable, then the one year limitation period expired "thirty [30] days" after either, **April 12, 2007**, when the trial court issued from the bench its final order, or **May 2, 2007**, when the trial court granted PEARSON'S Petition to Arbitrate by Order. [Pet. Apndx Vol. I, Ex. 1, Pgs. 180-183]

While it is true that TURCIOS sought to have the valid, effective and in force Order granting PEARSON'S Petition to Arbitrate, overturned by Writ of Mandate, there was no stay of the trial court's final Order, sought or acquired from the trial court. Nor was any writ of supersedeas sought in the Court of Appeals, to stay the enforcement of the trial court's final Order. With no stay or supersedeas in place, the thirty [30] day tolling provision of **California Code of Civil Procedure § 1281.12**, expired either, on **May 12, 2007,** or **June 1, 2007**. It is understood by PEARSON that it was the impression of the Court of Appeal that the Arbitrator may have misapplied the tolling period of **California Code of Civil Procedure § 1281.12**. However, such a belief is not harbored by PEARSON, nor is it supported by any of the facts existing in this present action. TURCIOS never sought arbitration on his own, and the first notion or claim that he made any atternpt to engage in arbitration was the date of **June 13, 2007**, at least twelve [12] days after the limitations period under **California Code of Civil Procedure § 1281.12**, had expired. It also cannot be forgotten as admitted, in TURCIOS' Opening Brief, {Pgs 18-19}, TURCIOS' first

alleged attempt to seek arbitration on **June 13, 2007**, was two months "OUTSIDE" of the FEHA statute of limitations period. **April 13, 2007**, was the end of the one-year period following the Department of Fair Employment and Housing's issuance of TURCIOS' "Right-to-Sue" letter. It is also acknowledged that TURCIOS attempts to overcome this further and additional statute of limitations dilemma by now, urging that some "equitable estoppel" existed that would permit TURCIOS' deliberate breach of the arbitration agreement to toll the FEHA statute of limitations. Such a contention is contrary to the "reasonable" pursuit and "good faith" requirements of the equitable tolling doctrine. [**Elkins vs. Derby [1974]** 12 Cal.3d 410, 414, **Myers vs. County of Orange [1970]** 6 Cal.App.3d 626, 634.]

Notably, TURCIOS, makes chronic conclusions in its Opening Brief, that, the Arbitrator erred in his arbitral limitation period calculations. Unfortunately, at no time does TURCIOS establish by way of any admissible evidence, that such is truly the case, and PEARSON knows of no facts that would support TURCIOS' claim of inaccurate calculation. Moreover, biting back-and-forth about the "calculation" of the statute of limitations only clouds the true issues, needing consideration by this court. Those issues needing this court's attention and examination are:

(1) whether or not an arbitral limitation period claim must be determined by the arbitrator,

(2) under the circumstances before this court, whether, or not, the appropriate standard of review relating to arbitral limitation period, permits the trial court, or any other court, to examine the evidence produced at the arbitration for its sufficiency, and

(3) whether, or not, in this particular instance, the trial court is

empowered to substitute its analysis and determinations regarding the arbitral limitation period for that of the arbitrator.

Respectfully, and in line with the Court of Appeals, PEARSON contends that only the arbitrator may determine arbitral limitation period issues, and his determination may not be reviewed nor substituted by a different and other determination by the trial court, or any other court.

It also must be raised here that TURCIOS has admitted that the "limitations" issue should only be decided by the arbitrator. Additionally, TURCIOS during the arbitration summary judgment proceeding, used, and utilized, for his own purposes, the arbitral limitation period provision set out in the DRA, which he now claims to be unconscionable. These particular facts diffuse the bias attempted to be infused into this matter by TURCIOS by his denigration and disparagement of the arbitrator, as acting without authority, and in violation of public policy.

Moving forward, PEARSON by way of mandate sought and acquired from the Court of Appeals, the well reasoned opinion that the existing and applicable standard of review, neither permitted the trial court, nor it, to examine the evidence produced at the arbitration for its sufficiency, nor rendered the trial court, or it, capable of substituting their analysis and determinations for that of the arbitrator. [With the Appellate Court citing **Moncharsh vs. Heily & Blase [1992]** 3 Cal.4th 1, 8-10 and **Jones vs. Humanscale Corporation [2005]** 130 Cal.App.4th 401.] PEARSON believes, completely that such a determination by the Court of Appeal, is directly congruent and in comport with the legislative mandates and directives of the **California Arbitration Act** and the **Federal Arbitration Act**.

PEARSON respectfully contends that both the **California Arbitration Act** and the **Federal Arbitration Act** compel and require

that, the DRA terms and conditions, override and stand in the place, and stead, of the statutes of limitations provisions set out in the **Fair Employment and Housing Act**, as well as statute of limitations tolling provisions of **California Code of Civil Procedure § 1281.12**. The expectation that TURCIOS resolve his FEHA claims of discrimination by way of arbitration, and that the arbitration of such a claim be brought in arbitration within one year of the incident, does not infringe upon the rights of TURCIOS to resolve his discrimination claims that arise under the FEHA. All that the DRA arbitral limitation period requires is, that, such discrimination claims be raised within one year, and if there is any question as to whether TURCIOS did, or did not, meet his duty to seek arbitration within the one year period, that such a question be resolved with finality, by the arbitrator.

Irrespective of the urging of TURCIOS in his Opening Brief, it is certain that arbitral limitation periods, limiting the time within which a discrimination claim may be brought, does not inherently deprive a party of redress for "unwaivable" {discrimination} rights. If any arbitral or other limitation periods performed such a function, no statute of limitations, statutory or otherwise, would be tenable under the **California Constitution**, or the **Constitution of the United States of America**. Limitation periods are applied consistently to all "discrimination" matters, and mandate and require that redress for such a claimed offense be instituted within a specific period of time, or such right to redress is closed and ceased. Since statute of limitations merely determine a period within which time a party must seek relief for infringement or impingement of his claimed discriminatory transgressions, the reasonable of arbitral limitations period set out in the DRA, or any other reasonable mandatory arbitration agreement,

cannot be an abject divestment of an employee's fundamental, unwaivable statutory common law rights, as advocated by TURCIOS. The arbitral limitation period in the DRA did not deprive TURCIOS of his right to seek redress for claimed discriminatory charges, it merely directed that such redress must only be sought in arbitration and must be sought therein, within one year.

TURCIOS, unhappy with the consequences he brought upon himself, by deliberately refusing and resisting to arbitrate his employer-employee dispute, now seeks, as he did in the trial court, to shed himself of the results of his actions by confirming his anti-arbitration conduct, as absolutely permissible under public policy purpose. The trial court, post arbitration, to the disappointment of PEARSON, ruled that, irrespective of the deliberate breach of the DRA'S provisions by TURCIOS, particularly the arbitral limitation period term and "condition precedent", TURCIOS could not be prevented from seeking absolute redress of his employer-employee dispute. Such a result is patently unfair and repugnant to public policies concerning the right and power to enforce contracts, and irrefutably undermined the function of "arbitration" in relation to employer-employee disputes.

Such a result as that ordered by the trial court blatantly annulled the function, reason and purpose that an employer seeks to include in employment agreements reasonable arbitration terms and conditions, including limitation periods. Why would any employer, including PEARSON, enter into arbitration agreement with its employees, when it fails to serve its intended purpose? According to TURCIOS and the trial court, an employer is required to submit to months of judicial litigation, and, after that expense, and the expense of compelling arbitration and paying for the arbitration proceedings be deprived of all

remaining advantages of arbitration. Then, the employer, and employee, for that matter, instead of acquiring final, full and complete resolve by arbitration, is required to submit the arbitration decision for judicial review for errors claimed to have been committed by the arbitrator. The claim of TURCIOS that he has been deprived of fundamental, unwaivable rights against public policy is a subterfuge to draw to extinction the function and purpose of arbitration in employer-employee settings.

This is also not a case like that cited by TURCIOS, in his Opening Brief, where the arbitration agreement, by its terms, agreed to judicial review for errors of law committed by the arbitrator. [See **Cable Connection, Inc., vs. DIRECTV, Inc. [2008]** 44 Cal.4th 1334, 1343, noting that the United States Supreme Court has held that the **Federal Arbitration Act**, **Title 9, United States Code § 1 et seq.**, does not permit the parties to expand the scope of review by agreement, and the **California Arbitration Act**, does permit such agreements, which is one of the few deviations between the FAA and the CAA.] This instant happenstance is predicated on an arbitration agreement in which the employer, PEARSON, believed it would reduce its cost of doing business by arbitral resolve of disputes with its employees.

This honorable court, while it may be framing its consideration of this matter as a resolve of the standard of review permissible by a trial court in employee-employer relations, it is further pointedly resolving the impact of the **California Arbitration Act**, and its legislative intent to insure that arbitration agreements in employer-employee settings are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." This consideration of the **California**

Arbitration Act, PEARSON contends, also requires this honorable court to consider:

(1) the United States Supreme Court opinions that direct and opine, that the **Federal Arbitration Act**, which is premised on the same vision and purpose as that of the **California Arbitration Act**, supercedes judicial and administrative forums,

(2) whether the **Federal Arbitration Act**, is applicable in this circumstance, and

(3) if not, does the **California Arbitration Act** also compel a superceding of judicial and administrative forums.

PEARSON advocates firmly that the arbitral limitation period of the DRA overrides and stands in the place and stead, of the statutes of limitations provisions set out in the **Fair Employment and Housing Act**, as well as statute of limitations tolling provisions of **California Code of Civil Procedure § 1281.12.** PEARSON also respectfully burdens this court with his advocation that the scope of judicial review, as it applies to mandatory arbitration agreements subject to the **Fair Employment and Housing Act (California Government Code, § 12900 et seq.)**, must remain, extremely narrow, not permitting courts to review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning. Without the foregoing being resolved, in PEARSON'S favor, arbitration in employer-employee relationships are nothing more than an illusion, completely devoid of substance.

II.

ISSUES PRESENTED

PEARSON, respectfully presents to this honorable Supreme

Court, issues which are necessary for consideration by this honorable court, in this very important matter.

1. Is the scope of judicial review, as it applies to an employee's anti-discrimination claim under the **Fair Employment and Housing Act (California Government Code, § 12900 et seq.)** that is arbitrated pursuant to a mandatory employment arbitration agreement, extremely narrow, not permitting courts to review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning?

2. DOES the **Fair Employment and Housing Act (California Government Code, § 12900 et seq.)**, require an employer to permit an employee to seek judicial intervention, even though an existing mandatory arbitration agreement exists between them, that requires the employer and employee to resolve their disputes by arbitration, only, and such judicial review is a breach of the arbitration agreement?

3. DOES the **Fair Employment and Housing Act (California Government Code, § 12900 et seq.)**, require an employer to litigate the merits of an employer-employee dispute, even though the employee has failed to seek arbitration during the time period in which a mandatory arbitration agreement requires the dispute to be brought to arbitration?

4. DOES the **Fair Employment and Housing Act (California Government Code, § 12900 et seq.)**, irrespective of the existence of a mandatory arbitration agreement, and irrespective of the breaching conduct of the employee, render extinct, and of no force and effect, the arbitral limitation period term and condition contained in a mandatory arbitration agreement, and, if so, does this wholesale abolition of

arbitral limitation period violate the **California Arbitration Act** and/or the **Federal Arbitration Act**?

5. Is an employee, as has been done here, permitted to deliberately breach a mandatory arbitration agreement's limitation period provision, and then avoid and evade the consequences of his deliberate conduct by asserting that his actions are condoned and protected as "unwaivable rights" under the **Fair Employment and Housing Act (California Government Code, § 12900 et seq.)**?

6. Is the standalone arbitral limitation period clause set out in the DISPUTE RESOLUTION AGREEMENT (DRA) not a permissible, reasonable and contractual term and condition of arbitration which was compelled to be enforced by the Arbitrator under the **California Arbitration Act** and the **Federal Arbitration Act**?

7. Does the DRA'S arbitral limitation period clause actually restrict an employee from seeking administrative remedies for violations of the **Fair Employment and Housing Act (California Government Code, § 12900 et seq.)**, and if so, was that restraint and limitation compelled, permitted and required pursuant to the **California Arbitration Act**, {hereinafter "CAA"} and the **Federal Arbitration Act**, {hereinafter "FAA"}?

8. Since the CAA and FAA, are parallel and alike, particularly in relation to the requirement that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.", [See **California Code of Civil Procedure § 1281**; and **Title 9, United States Code § 2**.], does the CAA, supercede state laws lodging primary jurisdiction in another forum, whether judicial or administrative?

9. If the CAA does supersede judicial and administrative forums, then, does the DRA'S arbitral limitation period override and stand in the place and stead of the statutes of limitations provisions set out in the **Fair Employment and Housing Act**, as well as statute of limitations tolling provisions of **California Code of Civil Procedure § 1281.12**?

10. Are the FAA regulations and statutes applicable in this particular employer-employee matter, and if so, does the FAA, mandate and direct, that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA?

11. If the FAA does supersede judicial and administrative forums, then, does the DRA'S arbitral limitation period override and stand in the place and stead, of the statutes of limitations provisions set out in the **Fair Employment and Housing Act**, as well as statute of limitations tolling provisions of **California Code of Civil Procedure § 1281.12**?

12. Was the Arbitrator's order dismissing real party in interest, TURCIOS' claims against PEARSON, in error, and if so, is such a decision insulated from judicial review, and not a proper basis upon which either to deny confirmation of the arbitration award or to vacate the award?

III.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. Valid Arbitration Agreement

PEARSON was the employer of employee TURCIOS from February 8, 1999, [Pet. Apndx Vol. I, Ex. 1, Pg. 153] until the date of January 31, 2006. [Resp. Apndx Ex. 1, Pg. 24] During TURCIOS'

employment, employee, TURCIOS, and employer PEARSON, entered into an Arbitration Agreement, entitled, DISPUTE RESOLUTION AGREEMENT {"DRA"}. [Pet. Apndx Vol. I, Ex. 1, Pg. 131-DRA] The DISPUTE RESOLUTION AGREEMENT provided, among other things, that any:

> ...dispute arising in any way out of , or in any way related to Employee's application for employment with PEARSON, employment with PEARSON and/or TERMINATION OF EMPLOYMENT SHALL BE RESOLVED THROUGH ARBITRATION ...
>
> .... PEARSON and EMPLOYEE further agree that ANY DISPUTE with any party WHICH ARISES FROM EMPLOYEE'S EMPLOYMENT with PEARSON OR TERMINATION OF EMPLOYMENT with PEARSON MUST BE SUBMITTED TO BINDING ARBITRATION WITHIN **ONE YEAR** FROM THE DATE THE DISPUTE AROSE or the Employee or PEARSON became aware of facts giving rise to the dispute. {Emphasis added.}

A certain "Reconocimiento del Recibo del Manual del Empleado", executed by TURCIOS, which was a Spanish Language translation of an "Acknowledgment and Receipt of Employee Handbook", [Pet. Apndx Vol. I, Ex. 1, Pg. 129 -Ack. & Rec.Employee Handbook] also set forth clearly and concisely in Spanish the fact that both PEARSON and TURCIOS must submit any of their disputes to binding arbitration within

the one [1] year period, as established by Declarations of Martha Moreno [Pet. Apndx Vol. I, Ex. 1, Pgs. 17-18] and Russell F. Behjatnia provided in support of PEARSON'S Motion for Summary Judgment. [Pet. Apndx Vol. I, Ex. 1, Pgs. 20-21]

B. Turcios' FEHA Claims Were Not Obstructed by the One-Year Arbitral Limitation Period Provision of the Arbitration Agreement

Nine (9) days after TURCIOS was terminated from his employment with PEARSON on **January 31, 2006**, on **February 9, 2006**, then counsel for TURCIOS, sent correspondence to PEARSON declaring their representation of TURCIOS and requesting his employee file. [Pet. Apndx Vol. I, Ex. 1, Pg. 133] TURCIOS, on **February 10, 2006**, informed the California Employment Development Department that he believed he was terminated because of his age. [Pet. Apndx Vol. II, Ex. 8, Pg. 310] On **February 23, 2006**, TURCIOS' entire Employee File, inclusive of the DRA, was forwarded to counsel for TURCIOS. [Pet. Apndx Vol. I, Ex. 1, Pg. 138] TURCIOS, after waiting two months filed an FEHA Claim, on **April 5, 2006**. [Pet. Apndx Vol. I, Ex. 1, Pg. 175] TURCIOS, as he had the further statutory right to do, sought an immediate "right to sue" letter from the FEHA, which he obtained on **April 14, 2006**. [Pet. Apndx Vol. II, Ex. 8, Pgs. 315-320]

Irrefutably, TURCIOS had easily performed all of the necessary procedures, on his part that he needed to perform in order to act on his FEHA claims against PEARSON. Not only that, in relation to the applicable one-year arbitral limitation period, TURCIOS had almost ten [10] months within which to seek arbitration under the DRA. Certainly the arbitral limitation period in the DRA did not hinder, impede or deny

TURCIOS any opportunity to vindicate his FEHA rights.

C. Turcios Breaches the Mandatory Arbitration Agreement

TURCIOS did not submit his employment dispute with PEARSON, to binding arbitration, as TURCIOS was required to do under the DRA. Instead, TURCIOS, on **October 2, 2006**, almost six [6] months after receiving his right to sue letter, filed a civil action in the Superior Court of the State of California against his employer, PEARSON. [Pet. Apndx Vol. II, Ex. 11, Pg. 436 {Superior Court Complaint, BC 359 605}]

On **October 2, 2006,** TURCIOS, deliberately breached the provisions of the DRA. The breach by TURCIOS was definitely noted and considered by the trial court, with the first judicial officer, Honorable Andrea Richey, Judge presiding, in her decision to grant PEARSON'S Petition to Arbitrate. Judge Richey at the hearing on the Petition to Arbitrate stated:

> COURT:...BUT IF YOU HAD READ THE CASE LAW, IT'S QUITE CLEAR THAT IF A PARTY SIGNS AN ARBITRATION AGREEMENT, WHICH YOUR CLIENT DID, THEY HAVE MADE A CONTRACTUAL PROMISE TO ARBITRATE. I DON'T KNOW WHY YOUR CLIENT CHOSE NOT TO COMPLY WITH THAT. YOUR CLIENT MADE A CHOICE; HE BROUGHT A LAWSUIT INSTEAD OF SEEKING TO ARBITRATE ... [Pet. Apndx Vol. IV, Ex. 27, Pg. 890 {Rptr's Trans April 12, 2007, Pg. 4, L. 8-13}]

In addition, TURCIOS at page 44, of his RETURN, on the Order to Show Cause Re Writ of Mandate, admitted that:

> Turcios did not consider demanding arbitration during the "one year" time period following his termination because he believed that Petitioner wanted to litigate the case.

TURCIOS, in his return to the Order to Show Cause, in the Court of Appeal, implicitly conceded that he knew of his duty to arbitrate, but simply chose not to pursue it. At no time did PEARSON or its counsel ever indicate to TURCIOS or its counsel that PEARSON wanted to litigate the employer-employee dispute, when there was in place a mandatory arbitration agreement and in fact PEARSON had to file a formal Petition to Compel Arbitration over TURCIOS' refusal to do so. TURCIOS, and its counsel knew of the mandatory arbitration agreement and the duty to arbitrate, and had more than ample time to comply with TURCIOS' arbitral contractual mandates and submit the dispute to arbitration. TURCIOS merely failed and refused to do so.

D. PEARSON Notifies TURCIOS of His Failure to Seek Arbitration within the Arbitral Limitation Period

On March 2, 2007, counsel for PEARSON, namely, Russell F. Behjatnia, transmitted a letter to counsel for TURCIOS, informing them of, (1) the one year arbitral limitation period contained in the DRA, and (2) TURCIOS' failure to comply with that term and condition of the DRA. [Pet. Apndx Vol. I, Ex. 1, Pg. 177 {Letter dated March 2, 2007}] The March 2, 2007, letter was transmitted to counsel for TURCIOS, twelve [12] days before PEARSON filed its Petition to Compel Arbitration with the Superior Court. [Pet. Apndx Vol. II, Ex. 12, Pg. 443 {Petition to Compel Arbitration}] Petitioner, PEARSON, sought the arbitral forum,

since it was the only proper and appropriate forum to seek resolve of the arbitral limitation period issue. [**Kennedy, Cabot & Co. *v.* National Assn. of Securities Dealers, Inc. [1996]** 41 Cal.App.4th 1167.]

PEARSON'S application to the Superior Court to compel arbitration, provided as an exhibit, the DRA. Moreover, PEARSON'S Petition to Compel Arbitration also set forth, verbatim, in confines of the Petition the exact provision and paragraph setting out the one year arbitral limitation period agreed upon by PEARSON and TURCIOS. [Pet. Apndx Vol. II, Ex. 12, Pg. 444 {Petition to Compel Arbitration}]

E. PEARSON'S Petition for Arbitration was Granted, and Extraordinary Relief sought by TURCIOS from the Trial Court's Order Compelling Arbitration was Summarily Denied

TURCIOS resisted and objected to PEARSON'S Petition to Compel Arbitration, which was granted by the trial court, stating in its Tentative Ruling:

> .... respondent HAS NOT SHOWN THE AGREEMENT UNCONSCIONABLE, nor has he shown waiver mandates denial of the petition. {Emphasis addedl.} [Pet. Apndx Vol. II, Ex. 13, Pg. 457 {Superior Court, Tentative Ruling, Dept. 31, April 12, 2007}]

The Superior Court at the **April 12, 2007**, hearing, when it issued its final order, informed counsel for TURCIOS that his client did have a contractual duty to arbitrate, and chose not to comply with his known duty. [Pet. Apndx Vol. IV, Ex. 27, Pg. 890 {Rptr's Trans April 12, 2007, - Pg 4, L. 8-13}] On **May 2, 2007**, the trial court further granted PEARSON'S Petition to Arbitrate by written Order. [Pet. Apndx Vol. I, Ex. 1, Pgs. 180-183]

TURCIOS, on **May 1, 2007**, sought review of the trial court's April 12, 2007, final Order to Arbitrate, by way of Petition for Writ of Mandate. TURCIOS at no time attempted to acquire a stay of the trial court's Order to arbitrate. Not only that, TURCIOS did not seek or acquire by way of writ of supersedeas from the court of appeals, any stay of the trial court's final Order to arbitrate. TURCIOS' petition was denied by order on **May 31, 2007**. [Pet. Apndx Vol. I, Ex. 1, Pg. 187 {Order Denying Petition for Writ of Mandate, Case No. B 198 579}]

F. PEARSON Resolves the Arbitral Limitation Period Issue in Arbitration, while TURCIOS Raises the Same Arbitral Limitation Period Provision Contained in the DRA as a Defense In Arbitration Proceedings

Petitioner PEARSON sought resolve of the arbitral limitation period issue, in Arbitration, before the Honorable Robert Feinerman, Presiding Justice {Ret.}, California Court of Appeal, sitting as arbitrator. Petitioner sought determination of this issue by way of "summary judgment". TURCIOS was given the seventy-five [75] day notice period as set out in **California Code of Civil Procedure § 437c**. The arbitral limitation period issue was fully briefed by both PEARSON and TURCIOS. [Pet. Apndx Vol. I, Ex. 1, Pg. 1 through Vol. II, Ex. 10, Pg. 435 {Summary Judgment Pleadings submitted in Arbitration}]

In the arbitration proceeding TURCIOS, at Pages 13 and 14, of his Plaintiff's Memorandum of Points and Authorities in support of his Opposition to Motion for Summary Judgment, Section D., beginning line 9, [Pet. Apndx Vol. I, Ex. 3, Pg. 213 {Turcios' Memorandum in Opposition to Pearson Dental's Summary Judgment}] admitted the following:

Although the issue of whether a party waived

> its right to compel arbitration under Civil Procedure section 1281.2 is determined by the court, WHETHER A DEMAND FOR ARBITRATION IS TIMELY UNDER THE TERMS OF THE AGREEMENT IS AN ISSUE TO BE DECIDED BY THE ARBITRATOR. (See **Kennedy, Cabot & Co. *v.* National Assn. of Securities Dealers, Inc. [1996]** 41 Cal.App.4th 1167, 1177-1178) ["the validity of time-barred defenses to enforcement of arbitration agreements should generally be determined by the arbitrator rather than by the court.] {Emphasis added.}

The foregoing reveals firmly that TURCIOS was well aware of, and absolutely admitted and conceded that, the ARBITRATOR, was the only appropriate person and body, to decide the arbitral limitation period issues in this arbitration. There was no question at the time of arbitration who should, and would be determining the arbitral limitation period issue, and such a determination could not be appropriately determined by the trial court. This is especially true where such subsequent review by the trial court, whether accomplished under the disguise of appropriate judicial review, or any other aggrandized claim of right to do so, usurped from the arbitrator his absolute right and duty to determine the arbitral limitation period issue.

Moreover, TURCIOS, for his own beneficial interest and purpose, in the arbitration matter, particularly the summary judgment proceedings, raised the Arbitral Limitation Period provision set out in the DRA. [Pet. Apndx Vol. I, Ex. 3, Pgs. 213-214] Pages 13 and 14, of

Plaintiff's Memorandum of Points and Authorities in support of Plaintiff's Opposition to Motion for Summary Judgment, Section D., beginning line 21, provided in very relevant part:

> Pearson Dental Supplies, Inc., had sufficient notice of TURCIOS' CLAIMS but failed to submit to arbitration within the one year time limitation. PEARSON DENTAL SUPPLIES, INC., FAILED TO TIMELY DEMAND ARBITRATION AND HAS WAIVED ITS RIGHT TO ARBITRATE THE DISPUTE .... Pearson Dental Supplies, Inc., was GIVEN NOTICE OF TURCIOS' CLAIMS AS EARLY AS FEBRUARY 10, 2006, when it received notice from the Employment Development Department which set forth that TURCIOS BELIEVED HE WAS TERMINATED BECAUSE OF HIS AGE. .... Because Pearson Dental Supplies, Inc., FAILED TO DEMAND ARBITRATION WITHIN ONE YEAR OF TURCIOS' TERMINATION, IT HAS WAIVED ITS RIGHT TO ARBITRATE THIS MATTER. {Emphasis added.}

PEARSON, does not raise the arbitration activity in this court for the purpose of review of the arbitration proceedings, or decision appropriateness. That is the realm of the arbitrator, and the arbitrator, alone. PEARSON has only brought the actions taken in the Arbitration by TURCIOS to establish that, the "arbitral limitation period" provision,

in the DRA, which TURCIOS claims to be oppressive, one-sided and unconscionable, was used and utilized by him, freely and openly. Such being the case, TURCIOS, after employing the DRA arbitral limitation period, to his benefit, cannot possibly establish or plausibly claim that the DRA limitation period provision is prohibitively "unilateral" or "unconscionable".

TURCIOS failed to perfect or compel arbitration before the DRA arbitral limitation period expired, and the Arbitrator in the arbitration made such a finding. Applicability of the arbitral limitation period issue, was considered by the Arbitrator in all scenarios that could have been, and was decided in PEARSON'S favor.

If no tolling provisions of any statute are applicable, then the one [1] year arbitral limitation period for seeking arbitration by TURCIOS expired on **January 31, 2007**. This date, is exactly one year after TURCIOS claimed he was informed that he was fired because of his age. If the tolling provisions of **California Code of Civil Procedure § 1281.12**, were applicable, then the one year arbitral limitation period expired "thirty [30] days" after either, **April 12, 2007**, when the trial court issued from the bench its final order, or **May 2, 2007**, when the trial court granted PEARSON'S Petition to Arbitrate by Order. [Pet. Apndx Vol. I, Ex. 1, Pgs. 180-183] Also, TURCIOS' first alleged attempt to seek arbitration on **June 13, 2007**, was two months "outside" of the FEHA statute of limitations period. **April 13, 2007**, was the end of the one-year period following the Department of Fair Employment and Housing's issuance of TURCIOS' "Right-to-Sue" letter.

TURCIOS did seek to have the valid, effective and in force Order granting PEARSON'S Petition to Compel Arbitration, overturned by Writ of Mandate. However, there was no stay of the trial court's final Order,

sought or acquired from the trial court. TURCIOS also did not seek any writ of supersedeas from the Court of Appeals, to stay the enforcement of the trial court's final Order. With no stay or supersedeas in place, the thirty [30] day tolling provision of **California Code of Civil Procedure § 1281.12**, expired either, on **May 12, 2007,** or **June 1, 2007**. TURCIOS never sought arbitration of his employer-employee dispute and in fact he vigorously resisted and objected to the arbitration. The first notion or claim that TURCIOS made any attempt to engage in arbitration, was the date of **June 13, 2007**, which is at least twelve [12] days, if not thirty-two [32] days, after the limitations period under **California Code of Civil Procedure § 1281.12**, had expired.

Irrespective of the foregoing, the ARBITRATOR'S reasoning for his decision should never have been the subject of review or transformed into controversy by the trial court.

G. PEARSON After Prevailing in Arbitration, Sought to Confirm the Award of Arbitrator which was Not Timely Opposed

PEARSON prevailed in the Arbitration and the Award of Arbitrator was executed and served on the parties to the Arbitration. [Pet. Apndx Vol. II, Ex. 14, Pg. 458 {Award of Arbitrator}] Thereafter, PEARSON served and filed his Petition to Confirm Arbitration Award on **December 5, 2007**. [Pet. Apndx Vol. II, Ex. 15, Pg. 461 {Petition to Confirm Award of Arbitrator}] Opposition to the Petition to Confirm Arbitration was required to be filed and served within ten [10] days, or the allegations of the Petition to Confirm are deemed admitted by statute. [**California Code of Civil Procedure §§ 1290 and 1290.6**] This was not done. TURCIOS filed his untimely responsive

{Opposition} pleading to PEARSON'S Petition to Confirm the Award of Arbitrator, well beyond the ten [10] day period, on **December 26, 2007**. [Pet. Apndx Vol. II, Ex. 16, Pg. 474 {Opposition}]

Since TURCIOS made no attempt to file and serve his Opposition to the Petition to Confirm Arbitration until some twenty-one [21] days after it was filed and served on him, the allegations contained in the Petition to Confirm the Arbitrator's award, were by operation of law, deemed admitted. This fact alone required the trial court to confirm the award of arbitrator.

H. TURCIOS filed an Untimely and Defective Motion to Vacate Not Supported by the Mandatory Evidence Required

TURCIOS did file a separate and distinct Motion to Vacate the Arbitrator's Award, on December 17, 2007. [Pet. Apndx Vol. III, Ex. 19, Pg. 662] This particular motion matter, among other things was not supported by any evidence, including an appropriate and mandatory affidavit or sworn declaration. **Hirsch vs. Ensign [1981]** 122 Cal.App.3d 521.

I. TURCIOS' Motion to Vacate, Etc., was a Motion to the Trial Court to Reconsider the Prior Orders of Judge Richey, the Court of Appeal and a Prohibited Review of the Arbitration

TURCIOS' motion to vacate the Arbitrator's Award consisted of a presentation to the trial court of the very same issues, fact and law that was determined in the Arbitration proceeding. In addition, the Motion to Vacate of TURCIOS, sought and urged the trial court to review the previous orders and findings that had been decided by the prior judicial officer of the same court, judge, Andria Richey, that were

affirmed by the Second District Court of Appeal.

TURCIOS, in his Motion to Vacate failed to include pertinent, pivotal and vital facts surrounding the arbitrated matter, including the fact that the alleged "unconscionable" arbitral limitation period provision of the DRA, was actually employed by TURCIOS. Also omitted was TURCIOS admissions and concession that it was the "Arbitrator" and not the trial court, that was the proper and appropriate person and body to determine the arbitral limitation period issue, which TURCIOS now urged was unconscionable.

Also very important, TURCIOS Motion to Vacate did not include any of the "summary judgment" pleadings, especially the separate statements, which set out the "undisputed" matters presented to the Arbitrator. TURCIOS did provide parts of the summary judgment proceedings, in his untimely and barred Opposition to Confirm Arbitration Award. However, the Motion to Vacate was devoid of any evidentiary support, whether such evidence would have been proper for the trial court to consider, or not. The Motion to Vacate was a "shell" pleading, absent any substance and or evidentiary support that would breathe life into its ability to be considered by the trial court as an effective Motion to Vacate.

TURCIOS inappropriately beseeched the the trial court to supplant new, different and opposite determinations and decisions, in the place and instead of those made by the Arbitrator, Honorable Robert Feinerman, Presiding Justice {Ret.}, California Court of Appeal, who presided over the arbitration.

J. PEARSON Moved to Strike TURCIOS' Untimely Opposition to Confirm Arbitration

PEARSON objected and moved to strike TURCIOS untimely

Opposition to PEARSON'S Petition to Confirm the Arbitration Award, and further objected and moved to strike TURCIOS' Motion to Vacate Arbitrator's Decision. [Pet. Apndx Vol. III, Ex. 23, Pg. 850] Reply to TURCIOS' Opposition to Motion to Confirm Arbitrator's Award [Pet. Apndx Vol. III, Ex. 18, Pg. 613] and Opposition to TURCIOS' Motion to Vacate [Pet. Apndx Vol. III, Ex. 21, Pg. 754] were filed and served by PEARSON.

K. The Trial Court Erroneously Denied PEARSON'S Petition To Confirm the Arbitrator's Award, and further Erroneously Granted TURCIOS' Motion to Vacate the Arbitrator's Award

On January 10, 2008, the trial court, sitting through a new judicial officer for this department, denied petitioner PEARSON'S Motion to Confirm the Award of Arbitrator, and granted real party in interest TURCIOS' Motion to Vacate. At the time of the hearing the trial court expressed its view that absent its ability to bring back the previous judicial officer, Judge Andria Richey, back from retirement, it hoped that this matter would be tested on appeal. [Pet. Apndx Vol. IV, Ex. 26, Pg. 870 {Trans Hrg 10Jan08, Pg. 6, L. 17-18}] Petitioner sought from the trial court a statement of its decision. [Pet. Apndx Vol. III, Ex. 24, Pg. 855] The trial court determined that a comprehensive written order was appropriate, and issued its Order, entitled "Order on Cross-Motions to Confirm or Vacate the Arbitrator's Award". [Pet. Apndx Vol. III, Ex. 25, Pg. 862 {Order, filed January 28, 2008}] This Order was filed on January 28, 2008, and served by mail on all parties.

L. Second District Court of Appeals Issued Peremptory Writ of Mandate Granting Pearson's Petition

PEARSON, sought review of the trial court's order by way of Petition for Writ of Mandate. The Second District Court of Appeal, after

full briefing and oral arguments by the parties, issued a peremptory writ of mandate compelling the respondent trial court to set aside its orders of January 28, 2008, granting the petition to vacate the arbitration award and denying the petition to confirm the arbitration award, and to enter new and different orders granting the petition to confirm and denying the petition to vacate. The Court of Appeals rejected the trial court's finding that the "arbitrator's application of the one-year statute of limitations period in the DRA contravened public policy because it shortened the FEHA limitations period." In its opinion, the Court of Appeals noted that the seminal decision of **Armendariz vs. Foundation Health Psychare Services, Inc., [2000]** 24 Cal.4th 83, which held that FEHA claims are subject to arbitration, did not consider the issue of arbitral limitations periods shorter than the FEHA limitations period. However, **Armendariz** while not striking upon the statute of limitations issue, directly, it did "posit the framework by which to evaluate such a limitation period." That framework being, "is the {limitations} period sufficient to protect a plaintiff's ability to vindicate a statutory discrimination claim?" [**Armendariz vs. Foundation Health Psychare Services, Inc., supra,** 24 Cal.4th 83,106-107.]

The Court of Appeals found that the record in this matter:

> "... leaves no doubt that the one-year arbitral limitation period gave plaintiff adequate time to vindicate his FEHA claim in arbitration."

Moreover the Court of Appeals made pertinent note that:

> "We consider the enforceability of the arbitral limitation period not *before* arbitration had occurred, but *after* it had occurred, and after the arbitrator, as he was authorized to do,

determined that submission to arbitration was untimely under the arbitration agreement. (See **Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc., supra**, 41 Cal.App.4th at p. 1178 [whether demand for arbitration is timely under arbitration agreement is for the arbitrator, not the court].) As we observed at the outset of our discussion, judicial review of an arbitrator's decision is extremely narrow. We cannot review the decision for errors of law and fact, even when the decision causes substantial injustice.

M. Presently

This matter is now pending before the California Supreme Court.

IV.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER BRIEF

A.

INTRODUCTION

In this instant matter now before this court, real party in interest LUIS TURCIOS, has promoted and presented to the trial court, Court of Appeals and this Supreme Court, a judicial mechanism that undermines and defeats the function and purpose of the **California Arbitration Act**. This honorable court in **Armendariz vs. Foundation Health Psychare Services, Inc., [2000]** 24 Cal.4th 83, 93-99, held that FEHA claims are subject to arbitration, so long as the arbitration

agreement contains certain minimum procedural requirements, and is not otherwise procedurally and substantively unconscionable. PEARSON, met those requirements, only to be subjected to the illusory and specious claims that an additional requirement exists under "Public Policy", that permits the courts to review the arbitration for its sufficiency, including the application of an arbitral limitation period defense. Such a "requirement" patently, destroys arbitral finality, and exposes employers to elongated judicial litigation and review which was intended to be avoided, completely, by arbitration.

It is absolute that a trial, or appellate court, is neither empowered, nor permitted, to examine the evidence produced at an arbitration for its sufficiency, nor are the courts authorized to substitute their analysis and determinations for that of the arbitrator. [**Moncharsh vs. Heily & Blase [1992]** 3 Cal.4th 1, 8-10 .] **Jones vs. Humanscale Corporation [2005]** 130 Cal.App.4th 401:

> Generally when faced with a petition to confirm or vacate an arbitration award, a COURT MAY NOT REVIEW THE MERITS OF THE PARTIES' CONTROVERSY OR CLAIMS THAT THE ARBITRATOR'S DECISION IS EITHER LEGALLY OR FACTUALLY ERRONEOUS. [**Moncharsh vs. Heily & Blase [1992]** 3 Cal.4th at p. 11.] "'[A]rbitrators do not exceed their powers merely [by] assign[ing] an erroneous reason for their decision.' [Citations]" (Id. At p.28.) Nor can an award be vacated because the arbitrator reached an erroneous decision.

(Ibid.) {Emphasis Added.}

TURCIOS' new and different standard of review invented to avoid arbitration, irrefutably, usurps the strength from the arbitration of employer-employee related claims, and corrupts completely the reliability of finality under contract arbitration. PEARSON seeks from this court a determination that the DRA arbitral limitation period provision will not be undermined simply because it compelled TURCIOS to seek redress by way of arbitration, only, within a one-year period. If, like in this very case, an employer like PEARSON cannot rely on the reasonable terms and conditions of its Arbitration Agreement, and the doctrine of arbitral finality, then no good reason, whatsoever, exists for it, as an employer, to contract with its employees to arbitrate. Such a condition clearly violates and conflicts with the spirit of both the **California Arbitration Act** and the **Federal Arbitration Act**, especially since such a circumstance as that presented by TURCIOS, undermines and frustrates the policy of enforceability of arbitration agreements under **California Code of Civil Procedure § 1281**; and **Title 9, United States Code § 2**.

B.

TURCIOS ESTABLISHED NEITHER PROCEDURAL NOR SUBSTANTIVE UNCONSCIONABLENESS IN RELATION TO THE DRA ARBITRAL LIMITATION PERIOD PROVISION, AND THAT ITS ENFORCEMENT IN THE ARBITRATION PROCEEDINGS WAS WELL WITHIN THE POWER OF THE ARBITRATOR

TURCIOS, in accord with **Armendariz**, at all times, including this present appellate matter was required to produce admissible evidence,

confirming the existence of both "procedural" and "substantive" unconscionability, in relation to the DRA arbitral limitation period. **Jones vs. Humanscale Corporation [2005]** 130 Cal.App. 4th 401, provides in very relevant part:

> There must be BOTH procedural and substantive unconscionability BEFORE A COURT MAY REFUSE TO ENFORCE a contract on this ground. {Emphasis added.}

Pointedly, in order for a particular provision of an arbitration agreement to be unconscionable, both forms of "unconscionability" must be present. Before this present case, there has been no arbitral limitation period conscionable consideration in the State of California. However, there is helpful federal case law, which uses California Supreme Court direction to resolve and opine that a shortened, statute of limitations, is not substantively unconscionable. [**Soltani vs. Western & Southern Life Ins. Co. [9th Cir. 2001]** 258 F.3d 1038, 1044, holding that, under the facts presented there, shortened limitations provision was not substantively unconscionable.] **Soltani** is a Ninth Circuit Court of Appeals case that was resolved in the "light" of **Armendariz vs. Foundation Health Psychare Services, Inc., [2000]** 24 Cal.4th 83. **Soltani**, applied the unconscionableness standards of **Armendariz**, to decide that a "six [6] month" limitation period in an agreement was not "substantially" unconscionable.

It cannot be overstated that TURCIOS not only did not produce any admissible evidence to support unconscionability of the DRA limitation period provision, he also affirmatively applied the very arbitral limitation period provision which he claimed to be unconscionable, to the very matters upon which he now attempts to base his

"unconscionability" claim. There can be no greater proof of the efficacy of a term and condition contained in any contract, than the voluntary implementation of that very term and condition by all parties to that agreement. Such an application, especially here, establishes conclusively the **MODICUM OF BILATERALITY** which vanquishes any claim of substantive unconscionability by TURCIOS. As set forth, again, in **Jones vs. Humanscale Corporation [2005]** 130 Cal.App. 4th 401:

> But plaintiff failed to establish substantive unconscionability. To do so, one generally MUST SHOW THE LACK OF A "'MODICUM OF BILATERALITY' in an arbitration agreement." **Armendariz vs. Foundation Health Psychare Services, Inc., supra** 24 Cal.4th at p. 117.) {Emphasis Added.}

Undeniably, the arbitral limitation period provision in the DRA is not a one-sided term and condition that solely favors the employer. Both PEARSON and TURCIOS benefitted from, and are subject to, the mandatory terms and conditions, of the arbitral limitation period. Without a showing by TURCIOS that (1) the arbitral limitation period is one-sided, and (2) there is no justification for the subject provision, TURCIOS cannot establish, at all, that the arbitral limitation period provision is substantively unconscionable. [See **Armendariz vs. Foundation Health Psychare Services, Inc., [2000]** 24 Cal.4th 83, 117-118, **Jones vs. Humanscale Corporation [2005]** 130 Cal.App. 4th 401.]

TURCIOS also cannot now, and has not before, made any showing that the arbitral limitation period provision or the DRA, was

procedurally unconscionable. While the DRA appears that it was implemented at the behest and expectation of PEARSON, thus intimating a possible "take-it-or-leave-it" factor, TURCIOS embraced the arbitral limitation period provision which he, again, used it to his own benefit. In addition, the use of the arbitral limitation period provision in the DRA, also trumps any claim by TURCIOS of adhesion.

PEARSON'S arbitral limitation period provision met substantial and procedural conscionable muster, and under **Armendariz**, was competently and appropriately raised in the Arbitration proceedings.

C.

TURCIOS AND THE TRIAL COURT'S CONTENTION THAT THE DRA ARBITRAL LIMITATION PERIOD WAS JURISDICTIONALLY BARRED AS IT RELATES TO FEHA CLAIMS, WHICH IS THE PRIMARY THRUST OF TURCIOS' ENTIRE OPENING BRIEF, IS WHOLLY ERRONEOUS

In the lower court proceedings, the trial court completely ignored procedural or substantive unconscionableness, as it related to the DRA arbitral limitation period provision. Instead, the trial court pronounced that, by its very existence, the arbitral limitation period provision in the DRA, was unconscionable. Such a determination, was not only erroneous, it was incongruent with the firmly entrenched opinions of the California Supreme Court. **Platt Pacific, Inc. v. Andelson [1993]** 6 Cal.4th 307, 24 Cal.Rptr.2d 597; 862 P.2d 158, provides in very relevant part:

> (1b) WHEN, AS HERE, THE PARTIES HAVE AGREED THAT A DEMAND FOR

> ARBITRATION MUST BE MADE WITHIN A CERTAIN TIME, THAT DEMAND IS **A CONDITION PRECEDENT** THAT MUST BE PERFORMED BEFORE THE CONTRACTUAL DUTY TO SUBMIT THE DISPUTE TO ARBITRATION ARISES. .... As we shall see, THE TERM "WAIVER," AS USED IN THE CONTEXT OF THE FAILURE TO TIMELY DEMAND ARBITRATION, REFERS not to a voluntary relinquishment of a known right, but TO THE LOSS OF A RIGHT BASED ON A FAILURE TO PERFORM AN OBLIGATION. {Emphasis added.}

In almost the same breath, the trial court further found and determined that the DRA arbitral limitation period provision was "jurisdictionally" barred, since it did not allow, permit or concede to TURCIOS the absolute power to litigate his FEHA claims, irrespective of TURCIOS' failure to timely submit the matter to arbitration. The trial court made findings that the arbitrator exceeded his jurisdiction by:

> ...disposing of the matter by way of summary judgment on a timeliness issue .... [Pet. Apndx Vol. III, Ex. 25, Pg. 862 {Order, filed January 28, 2008 - Pg 6}]

TURCIOS, has developed and processed the "jurisdiction" findings by the Superior Court, into a "springboard" for its entire Opening Brief. TURCIOS, in his "jurisdictional onslaught" of the DRA arbitral limitation period, references repeatedly that the arbitrator's

award "violates established public policy" and deprives an employee of "fundamental UNWAIVABLE ... rights". Never, however, does TURCIOS' apply his alleged offense of unwaivable violation to the actual facts existing in this action. In the same vein that a "rain man's" repeated drumming will not produce rain, TURCIOS' repeating of the words "public policy" and "unwaivable rights", will not create, from thin air, the existence of an impingement or infringement of unwaivable rights. TURCIOS makes no showing that the arbitral limitation period provision of the DRA in any way deprived him of any "unwaivable" right, simply because the facts in this matter reveal otherwise.

In reality, there exists no jurisdictional bar to a reasonable arbitral limitation period that affects the time period for seeking redress under the **Fair Employment and Housing Act**, **California Government Code § 12900 et seq.**,, {FEHA} claims. As fully discussed in Section C, above, there is no "jurisdictional" bar to reasonable contractual reducing or limiting of a "statutory" statute of limitations. Again as noted above, the scrutiny dwells on whether or not the contractual provisions of an arbitration agreement are unconscionable, not jurisdictional. [**Hambrecht & Quist Venture Partners vs. American Medical Interant, Inc. [1995]** 38 Cal.App.4th1532, **Nyulassy vs. Lockheed Martin Corporation [2004]** 120 Cal.App.4th 1267, **Soltani vs. Western & Southern Life Ins. Co. [9th Cir. 2001]** 258 F.3d 1038, 1044.]

The United States Supreme Court, long ago, dispelled any thought that a statutory statute of limitations was not an issue of jurisdiction. Parties are definitely permitted to contractually agree to shorter limitation periods, so long as the period is reasonable. **Order of United Commercial Travelers vs. Wolfe [1947]** 331 U.S. 586,608,

provides in relevant part:

> In the absence of a controlling statute to the contrary, A PROVISION IN A CONTRACT MAY VALIDLY LIMIT, BETWEEN THE PARTIES, THE TIME FOR BRINGING AN ACTION ON SUCH CONTRACT TO A PERIOD LESS THAN THAT PRESCRIBED IN THE GENERAL STATUTE OF LIMITATIONS provided that the shorter period itself shall be a reasonable period. {Emphasis Added}

The FEHA, has general statutory limitations periods that bars litigation of FEHA claims on the merits based on timeliness. There is no statute that dictates that these limitations periods cannot be modified or changed by an employer-employee agreement, or otherwise. In fact, as demonstrated in the facts of this action, TURCIOS even failed to comply with the FEHA statute of limitations period. However, the primary concern, here, is the fact that TURCIOS cannot rely on the trial court's erroneous finding that a jurisdictional bar exists, that prevented the arbitrator in this matter from considering and resolving this case on timeliness grounds.

D.

THE CALIFORNIA ARBITRATION ACT DERIVING ITS INTENT AND RESOLVE FROM THE SAME CLOTH AS THE FEDERAL ARBITRATION ACT NECESSARILY REQUIRES THAT THE ARBITRATION LIMITATION PERIOD OVERRIDE AND STAND IN THE PLACE AND STEAD OF STATUTES OF LIMITATIONS EXISTING BY

WAY OF CALIFORNIA STATE STATUTES OR ADMINISTRATIVE LAWS

PEARSON, clearly understands that in some particular instances, the **California Arbitration Act** {"CAA"} and the **Federal Arbitration Act** {"FAA"}, have their differences. However, the CAA and FAA, are parallel, and identical in relation to their mutual mandate that arbitration agreements shall be:

> ..."valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.", [See **California Code of Civil Procedure § 1281**; and **Title 9, United States Code § 2**.],

Cable Connection, Inc. vs. DIRECTV, Inc. [2008] 44 Cal.4th 1334, provides in very relevant part:

> In most important respects, the California statutory scheme on enforcement of private arbitration agreements is similar to the [FAA]; the similarity is not surprising, as the two share origins in the earlier statutes of New York and New Jersey. (See Recommendation and Study relating to Arbitration (Dec. 1960) 3 Cal. Law Revision Com. Rep. (1961) p. G-28 (Law Revision Commission Study); Feldman, Arbitration Law in California: Private Tribunals for Private Government (1957) 30 So.Cal.L.Rev. 375, 388, fn. 45.)" (**Rosenthal v. Great**

Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 406 [58 Cal. Rptr. 2d 875, 926 P.2d 1061] (Rosenthal).) THE CAA, LIKE THE FAA, PROVIDES THAT ARBITRATION AGREEMENTS ARE "VALID, ENFORCEABLE AND IRREVOCABLE, SAVE UPON SUCH GROUNDS AS EXIST FOR THE REVOCATION OF ANY CONTRACT." (**§ 1281**; see **9 U.S.C. 2**.) This provision was intended "to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." (**Mitsubishi Motors v. Soler Chrysler-Plymouth (1985)** 473 U.S. 614, 626, fn. 14 [87 L. Ed. 2d 444, 105 S. Ct. 3346]; see also, e.g., **Shearson/American Express Inc. v. McMahon (1987)** 482 U.S. 220, 226 [96 L. Ed. 2d 185, 107 S. Ct. 2332]; **Armendariz v. Foundation Health Psychcare Services, Inc. (2000)** 24 Cal.4th 83, 97–98 [99 Cal. Rptr. 2d 745, 6 P.3d 669]; **Broughton v. Cigna Healthplans (1999)** 21 Cal.4th 1066, 1073–1074 [90 Cal. Rptr. 2d 334, 988 P.2d 67].) Consistent with that purpose, the CAA and the FAA provide only limited grounds for judicial review of an arbitration award.

{Emphasis added.}

Predicated upon the identical legislative intent to insure that arbitration agreements are valid, enforceable and irrevocable, the United States Supreme Court, in an eight [8] to one [1] decision {Justice Thomas, dissenting}, opined that:

> When parties agree to arbitrate all questions arising under a contract, the FAA SUPERCEDES STATE LAWS LODGING PRIMARY JURISDICTION IN ANOTHER FORUM WHETHER JUDICIAL OR ADMINISTRATIVE. {Emphasis added.} [**Preston vs. Ferrer [2008]** 128 S.Ct. 978.]

The **Preston** decision which was a review of a California appeal from the Second District of California, after review was declined by this honorable Supreme Court, made it extremely clear that where FAA jurisdiction vests, all state and administrative processes are prohibited from interfering or obstructing the terms and conditions of the contracted arbitration agreement between the parties, and further prevents the parties to the arbitration agreement from avoiding the terms and conditions of the Arbitration Agreement by raising state statutory or administrative processes. **Preston vs. Ferrer [2008]** 128 S.Ct. 978, provides in further very relevant part:

> Allowing parties to proceed directly to arbitration, Ferrar contends, would undermine the Labor Commissioner's expertise, *id.*, at 41-43.
>
> In **Gilmer vs. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)** , we considered

and rejected a similar argument, namely, that arbitration of age discrimination claims would undermine the role of the Equal Employment Opportunity Commission (EEOC) in enforcing federal law. THE "MERE INVOLVEMENT OF AN ADMINISTRATIVE AGENCY IN THE ENFORCEMENT OF A STATUTE," WE HELD DOES NOT LIMIT PRIVATE PARTIES' OBLIGATION TO COMPLY WITH THEIR ARBITRATION AGREEMENTS. *Id.*, at 28-29 {Emphasis added.}

Ferrer points to our holding in **EEOC vs. Waffle House, Inc.** 534 U.S. 279, 293-294 (2002) that an arbitration agreement signed by an employee who becomes a discrimination complainant does not bar the EEOC from filing an enforcement suit in its own name. He further emphasizes our observation in **Gilmer** that individuals who agreed to arbitrate their discrimination claims would "still be free to file a charge with the EEOC" *500 U.S.@ 528.* Consistent with these decisions, Ferrer argues, the arbitration clause in his contract with Preston leaves undisturbed the Labor Commissioner's independent authority to enforce the TAA. .... And so it may. But in proceedings under § 1700.44(a), the Labor Commission

FUNCTIONS NOT AS AN ADVOCATE ADVANCING A CAUSE BEFORE A TRIBUNAL AUTHORIZED TO FIND THE FACTS AND APPLY THE LAW; INSTEAD THE COMMISSIONER SERVES AS IMPARTIAL ARBITER. THAT ROLE IS JUST WHAT THE FAA-GOVERNED AGREEMENT BETWEEN FERRER AND PRESTON RESERVES FOR THE ARBITRATOR. In contrast, in **Waffle House** and in the **Gilmer** aside Ferrer quotes, the Court addressed the role of an agency, not as adjudicator but as prosecutor, pursuing an enforcement in his own name or reviewing a discrimination charge to determine whether to initiate judicial proceedings.

Finally, it bears repeating that Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard. See *supra*, at 4. "BY AGREEING TO ARBITRATE A STATUTORY CLAIM A PARTY DOES NOT FOREGO THE SUBSTANTIVE RIGHTS AFFORDED BY THE STATUTE; IT ONLY SUBMITS TO THEIR RESOLUTION IN AN ARBITRAL FORUM." **Mitsubishi Motors Corp.**, 473 U.S., at 628. So here, Ferrer relinquishes no substantive rights the TAA or

other California law may accord him. BUT UNDER THE CONTRACT HE SIGNED, HE CANNOT ESCAPE RESOLUTION OF THOSE RIGHTS IN AN ARBITRAL FORUM. {Emphasis added.}

Without considering, at this moment, whether, or not, FAA jurisdiction vests, here, under the **Commerce Clause** of the **Constitution of the United States of America**, is it not true that the **California Arbitration Act**, upon exactly the same premise as the reasoning set out in **Preston**, overrides State of California statutes and administrative procedures that conflict with the terms and conditions of an arbitration agreement governed under the CAA? It appears to be very clear that in order for the CAA to meet its mandatory function of insuring that arbitration agreements are valid, enforceable and irrevocable, that the CAA must override California Statutes and administrative rules that would permit a party to escape resolution under an arbitral forum.

Furthermore, is **California Code of Civil Procedure § 1281.12**, which promotes, permits and sanctions a party duty bound to arbitrate, to breach the Arbitration Agreement, and interpose judicial litigation, by tolling a reasonably agreed upon arbitral limitation period, inapplicable to arbitration agreements such as the DRA, where the seeking of judicial intervention is a known and deliberate breach of the Arbitration Agreement? The intent and purpose of **California Code of Civil Procedure § 1281.12**, is not met where, as here, TURCIOS' knowingly and deliberately instituted the judicial action with the very purpose of avoiding arbitration.

PEARSON firmly contends that the Court of Appeals, in its

decision noted, quite accurately and precisely that:

> Of course, by signing the DRA, the parties in this case explicitly eliminated an administrative proceeding or lawsuit as a dispute resolution vehicle. [Opinion Pg 16, ¶ 2.]

Therefore, it was mandatory that the parties to that DRA were required to resolve their differences in ARBITRATION, that the terms and conditions of the DRA, including the arbitral limitation period provision, were controlling, and it was absolute that the arbitrator render the decision in relation to whether or not, TURCIOS' employer-employee claims were timely raised.

PEARSON further respectfully contends that the FAA in this particular instance cannot be discounted or ignored. A finding that an arbitration agreement in employer-employee circumstances can be purged of finality on limitation period grounds, and judicial review is authorized to the degree that finality by way of arbitration is not attainable, has a potentially significant impact on commerce. Not only that, such findings appear to conflict with the FAA to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." **Chronus Investments, Inc. vs. Concierge Services [2005]** 35 Cal.4th 376, citing **Volt Info. Sciences vs. Leland Stanford Jr. U. [1989]** 489 U.S.468, at page 477 [109 S.Ct. 1248, 103 L.Ed.2d 488.]

It is certain that PEARSON and TURCIOS entered into the DRA, inclusive of its clear, open and obvious arbitral limitation period. TURCIOS cannot, and should not, be permitted to avoid his agreed upon limitation of the period within which he was required to seek

redress by arbitration. TURCIOS should further not be permitted to avoid the decision rendered by the arbitrator in relation to DRA arbitral limitation period, either. PEARSON respectfully contends that the DRA provisions override the statute of limitations provisions set out in the **Fair Employment and Housing Act**, as well as statute of limitations tolling provisions of **California Code of Civil Procedure § 1281.12**.

E.

THE TRIAL COURT, NOR ANY APPELLATE COURT MAY (1) REVIEW THE MERITS OF THE ARBITRATED CONTROVERSY, (2) ERRONEOUSLY SUPPLANT THEIR DECISION IN THE PLACE AND STEAD OF THE DECISION RENDERED BY THE ARBITRATOR NOR CAN THEY AVOID THEIR DUTY TO CONFIRM THE AWARD OF THE ARBITRATOR SIMPLY BECAUSE THEY DISAGREE WITH THE RESULT

Throughout his entire Opening Brief, TURCIOS, shockingly urges that, irrespective of the mandates of the **California Arbitration Act**, "DE NOVO" judicial review of the arbitrator's legal analysis, or application to facts to law, is required where fundamental rights are involved. TURCIOS' Opening Brief states, beginning page 15, as follows:

> To insure judicial protection of these fundamental rights, an arbitrators award must be vacated when the reviewing court concludes that the award violates a clearly stated public policy, BASED ON ITS OWN DE NOVO EVALUATION OF THE EFFECTS

> AND RESULTS OF THE AWARD. An arbitrator's award must also be vacated when, in the context of a mandatory, pre-dispute agreement, THE REVIEWING COURT CONCLUDES, UPON DE NOVO REVIEW, THAT THE ARBITRATOR'S LEGAL ANALYSIS, OR APPLICATION OF FACTS TO LAW deprived the employee claimant of unwaivable statutory rights. {Emphasis Added.}

In other words, in employer-employee mandatory arbitration agreements, where an employee frames his dispute under an FEHA claim, the arbitrator's decision, though no agreement exists otherwise, must be submitted to the Superior Court, not only for confirmation, but "appellate" de novo review. Such a contention undermines the very intent, purpose and reason for arbitration, altogether. The mere fact that fundamental rights will be decided by an arbitrator, AS AGREED BY THE PARTIES, does not give rise to judicial intervention in contravention of the CAA and the FAA, for that matter.

There is no question that private arbitration has an important and accepted role as an expedient and efficient dispute resolution device. **[California Code of Civil Procedure § 1280 et seq., Moncharsh vs. Heily & Blase [1992]** 3 Cal.4th 1, 9.] Arbitration most certainly reduces the costs and expenses of our trial courts, and is a very welcome alternative to the general public, in place of a financially costly and time consuming trial. However, in order to promote the arbitration processes, and render this form of dispute resolve favorable and advantageous to those who would engage such services, it is

mandatory that there be a minimum of judicial intervention. If, like in this very case, an employer like PEARSON cannot rely upon reasonable terms and conditions of its Arbitration Agreement and the doctrine of arbitral finality, then no good reason, whatsoever, exists for its contracting with its employees to arbitrate. [**Moncharsh vs. Heily & Blase [1992]** 3 Cal.4th 1, 8-10 and **Jones vs. Humanscale Corporation [2005]** 130 Cal.App.4th 401.]

As this honorable court is very well aware, PEARSON as an employer is compelled to provide an arbitration format in which the employee does not pay for any of the arbitration expenses, including arbitrator fees. PEARSON is obligated to meet the necessaries set out in **Armendariz vs. Foundation Health Psychare Services, Inc., [2000]** 24 Cal.4th 83, which secures for the employee the opportunity to "vindicate" his rights under the FEHA. On the other hand, the vindication of an employee's rights under the FEHA, was never intended to undermine the provisions of an arbitration agreement that mandated that an employee (1) only arbitrate disputes, and (2) do so within a reasonably expeditious time period. Especially, where, as here, TURCIOS performed all of his FEHA necessaries, with ten [10] months remaining to submit his employer-employee dispute to arbitration.

PEARSON, in arbitration, raised direct failures and breaches of TURCIOS in relation to the arbitration agreement existing between them {DRA}. [Apndx Vol. I, Ex. 1, Pg. 131 {DRA}] Those issues were decided on their merits by the Arbitrator in favor of PEARSON. [Apndx Vol. II, Ex. 14, Pg. 458 {Award of Arbitrator, November 17, 2007}] The issues and matters resolved by the Arbitrator were required not to be searched, prodded or poked in a review fashion by the trial court, or any

other court. This is true, irrespective of whether, or not, the courts were pleased or displeased with the result.

It is an axiom of arbitration that a judicial body is prohibited and proscribed from reviewing the arbitrator's decision for errors of FACT OR LAW. [**Aguilar vs. Lerner [2004]** 32 Cal.4th 974, 981-982.] The arbitration between PEARSON and TURCIOS did not create any exception to this rule.

The Superior Court was irrefutably barred from reviewing any legal or factual error that may have been made by the Arbitrator, irrespective of whether or not, that error appears on the face of the award, which it most certainly does not. [Apndx Vol. II, Ex. 14, Pg. 458 {Award of Arbitrator, November 17, 2007}]

The trial court was further not permitted to review any of the merits of controversy between employer PEARSON and employee TURCIOS, nor was the trial court permitted to engage in any inquiry into the reasoning used and utilized by the arbitrator. Patently, examination of the evidence produced at the arbitration for its sufficiency was barred. [**Moncharsh vs. Heily & Blase [1992]** 3 Cal.4th 1, 8-10 and **Jones vs. Humanscale Corporation [2005]** 130 Cal.App.4th 401.]

Unfortunately, the trial court erred, and reviewed the merits of the decision of the arbitrator. The trial court went as far as to actually direct that:

> For the reasons that will be further explained below, the arbitrator has erred for two reasons: [Pet. Apndx Vol. III, Ex. 25, Pg. 862 {Order, filed January 28, 2008 - Pg 4}]

Thereafter, the trial court, in its order, provided review of the

arbitrator's decision as though it were a sitting court of appeal. The actions of the trial court constituted a prohibited and indiscriminate review of the arbitrators decision for errors in fact and law. [Pet. Apndx Vol. III, Ex. 25, Pg. 862 {Order, filed January 28, 2008 - Pg 4-5}] Surprisingly, the trial court further elected to review the prior orders of the Honorable Andria Richey, and the Second District Court of Appeal. [Pet. Apndx Vol. III, Ex. 25, Pg. 862 {Order, filed January 28, 2008 - Pg 5-6}]

PEARSON is very well aware that the trial court, does have some latitude to consider, whether or not the arbitrator exceeded his powers. However, such was not the circumstance that occurred in this case. The trial court denied PEARSON'S Petition to Confirm the Award of Arbitrator and granted TURCIOS' Motion to Vacate solely due to the court's disagreement on how the facts and law of the arbitration should have been decided. This was error on the part of the trial court. As aptly stated in **Jones vs. Humanscale Corporation [2005]** 130 Cal.App.4th 401:

> Generally when faced with a petition to confirm or vacate an arbitration award, a COURT MAY NOT REVIEW THE MERITS OF THE PARTIES' CONTROVERSY OR CLAIMS THAT THE ARBITRATOR'S DECISION IS EITHER LEGALLY OR FACTUALLY ERRONEOUS. [**Moncharsh vs. Heily & Blase [1992]** 3 Cal.4th at p. 11.] "'[A]rbitrators do not exceed their powers merely [by] assign[ing] an erroneous reason for their decision.' [Citations]" (Id. At p.28.)

> Nor can an award be vacated because the arbitrator reached an erroneous decision. (Ibid.) {Emphasis Added.}

The trial court acted beyond its powers and did so in a transparent attempt to avoid its patent duty to confirm the arbitration award based on the allegations of PEARSON'S Petition to Confirm the Award of Arbitrator. The trial court, at Page 6, of its Order dated January 28, 2008, made the following finding and order:

> Additionally, under the provision of CCP section 1286.4 subd. (b)(2), the court may determine on its own motion to vacate an award as long as the parties are given an opportunity to be heard. The parties were given such an opportunity at the hearing on the cross-petitions to vacate and confirm the arbitrator's award. [Pet. Apndx Vol. III, Ex. 25, Pg. 862 {Order, filed January 28, 2008}]

PEARSON, irrespective of the trial court's patent failure to perform its duty to confirm the Award of Arbitrator, would point out that at no time did the court in the hearing on the Petition to Confirm the Arbitrator's Award or the Motion to Vacate, ever indicate that it was going to act, "on its own motion". [Pet. Apndx Vol. IV, Ex. 26, Pg. 870 {Trans Hrg 10Jan08}] There was also no due process "hearing" as would be required if the trial court, intended to act o its own. The trial court would have been compelled to inform the parties of its intention, and the grounds which it would consider. Most importantly, the trial court was barred from employing **California Code of Civil Procedure § 1286.4**, for the purpose of undermining the **California Arbitration**

Act, and avoiding its duty to recognize that the allegations of petitioner PEARSON'S Petition to Confirm the Arbitration Award were deemed admitted pursuant to **California Code of Civil Procedure § 1290.6**, and **California Code of Civil Procedure § 1290**.

And again, the court cannot avoid the confirming of the arbitrator's award, simply because it neither likes nor agrees with the merits of the decision of the arbitrator. As pointed out in **Lewis vs. Superior Court [1994]** 30 Cal.App.4th 1850:

> Of course, a trial court does not have the luxury of refusing to follow decisions it disagrees with. (**Auto Equity Sales, Inc. vs. Superior Court [1962]** 57 Cal.2d 450, 455 [20 Cal. Rptr. 321, 369 P.2d 937].)

And in further important point, the appellate court in **Jones vs. Humanscale Corporation [2005]** 130 Cal.App.4th 401, stated in its reversal of a trial court decision to errantly review the merits of an arbitrator's decision, the following:

> This is a classic case of the trial court declining to confirm an arbitration award because it disagrees with the merits of the decision.

The trial court, nor any other court, irrespective of how disenchanted it may be with the results of an arbitration, cannot decline to confirm the arbitrator's award. Especially where, as here, such a result undermines the very fabric and soul of the **California Arbitration Act**.

///

F.

TURCIOS HAS RAISED AS AN AFTERTHOUGHT A CLAIM OF EQUITABLE TOLLING, WHICH AS A RESULT OF TURCIOS' OWN KNOWN AND DELIBERATE BREACH OF THE DRA, IS INAPPLICABLE

TURCIOS, upon the realization that he has not met any of the applicable limitation periods under the DRA or the FEHA, has now presented a belated claim that he is entitled to equitable tolling of those limitation periods. While under some circumstances tolling of a statute may be permissible, it is not authorized in this particular circumstance. In this particular case, TURCIOS, knowing that his ONLY option to seek redress, was by way of arbitration, deliberately, and in breach of the DRA, sought judicial relief. The DRA did not authorize, sanction or vest in TURCIOS any right to seek redress for his employer-employee disputes in any other manner, than arbitration.

McDonald vs. Antelope Valley Community College [2008] 45 Cal.4th 88, provides in very relevant part:

> Broadly speaking, the doctrine applies "'[w]hen an injured person has several legal remedies and, REASONABLY AND IN GOOD FAITH PURSUES ONE.'" [**Elkins vs. Derby [1974]** 12 Cal.3d 410, 414, quoting **Myers vs. County of Orange [1970]** 6 Cal.App.3d 626, 634....] {Emphasis Added.}

The present action is not one in which TURCIOS can claim good faith. In addition, TURCIOS, attempts to avoid the arbitral limitation

period by shifting fault for his own breach of the DRA, to PEARSON. TURCIOS, urges that PEARSON'S counsel did not inform him that his breach of the DRA had consequences. TURCIOS had counsel retained in this matter within nine [9] days of his termination, and those attorneys acquired all of the documents in TURCIOS'S employee file, including the DRA. When did it become the responsibility of PEARSON'S counsel to protect the interests of TURCIOS in this litigation, especially when TURCIOS was represented by an attorney. Clearly, it is more than well settled law that an attorney has no duty to protect the interests of an ADVERSARY. [**Shick vs. Lerner [Second District 1987]** 193 Cal.App.3d 1321.]

V.

CONCLUSION

This matter now before this honorable Supreme Court, compels scrutiny in a fashion that will protect the right and ability of employer PEARSON, and others like him, to acquire expedient, full and complete resolve by way of arbitration, disputes between it and its employees. PEARSON, like all other employers seek out and utilize arbitration as a cost and expense of business, which avoids the financial burden attendant with judicial litigation and judicial review.

TURCIOS, on the other hand, has presented to this court an expectation of de novo judicial review that not only undermines arbitration in employer-employee disputes, it turns "arbitration" into nothing more than a "pre-judicial procedure" of employer-employee disputes.

For all of the foregoing reasons, PEARSON DENTAL SUPPLIES, INC., a California Corporation aka PEARSON DENTAL SUPPLY COMPANY, respectfully requests that this honorable court affirm the

decision of the Second District Court of Appeals.

DATED: July 6, 2009

Respectfully Submitted,

By: _____
RUSSELL BEHJATMA, ESQ.
Attorney for Petitioner
PEARSON DENTAL SUPPLIES, INC.

CERTIFICATE OF WORD COUNT

I, RUSSELL F. BEHJATNIA, declare as follows:

1. I am an attorney licensed to practice law in all of the courts of the State of California. My law office is located at 14401 Gilmore Street, Suite 100, Van Nuys, California 91401. I am the attorney of record for Petitioner, PEARSON DENTAL SUPPLIES, INC., in this instant matter. If called upon to do so, I could and would testify competently and completely to the following facts which are of my own personal knowledge.

2. The, ANSWER BRIEF ON THE MERITS, was prepared on a "Word Perfect" computer program. The word count number determined by the computer program, and upon which I rely for this present certificate, totaled the number of words in the subject document to be thirteen thousand three hundred, seventy three [13,373].

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

Executed this 6th day of July, 2009, at Van Nuys, California.

By _____
Declarant Russell Behjatnia, Esq.

PROOF OF SERVICE
CCP §1013A(3)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party of the within action; my business address is 14401 Gilmore Street, Suite 100, Van Nuys, California 91401.

On 7/6/2009 I served the foregoing:

PEARSON DENTAL SUPPLIES, INC.'S ANSWER BRIEF ON THE MERITS

on the interested parties in this action

[X] by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United Stated mail at Los Angeles, California addressed as follows:

California Supreme Court 300 S. Spring Street, 2nd Floor Los Angeles, CA 90013	Original and 13 copies
California Court of Appeals 300 S. Spring Street, 2nd Floor Los Angeles, CA 90013	1 Copy
David M. deRubertis, Esq. 21800 Oxnard St., Suite 1180 Woodland Hills, CA 91367	Attorney for Real Party in Interest 1 Copy
N. Nick Ebrahimian, Esq. 8383 Wilshire Blvd., Suite 840 Beverly Hills, CA 90211	Attorney for Real Party in Interest 1 Copy
Michael Rubin, Esq. 177 Post St., Suite 300 San Francisco, CA 94108	Attorney for Real Party in Interest 1 Copy
Hon. Alan S. Rosenfield Los Angeles Superior Court 111 North Hill Street, Dept. 31 Los Angeles, CA 90012	1 Copy

[ ] I deposited such envelope with postage thereon fully prepaid, in the mail at Los Angeles, California.

[X] I am readily familiar with this firm's practice for correspondence for mailing. Under that practice it would be deposited with the United State Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] **BY FACSIMILE:** I forwarded a copy of the said document by Facsimile (telecopier) to the party whose name and Facsimile number appears above.

[X] **(State)** I declare under penalty of perjury under the laws of the State Of California, that the above is true and correct.

[ ] **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DATED: 7/6/2009

Russell F. Behjatnia