Case No. **S207536**

Case No. **S207536**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AVERY RICHEY,
Plaintiff and Appellant,

vs.

AUTONATION, INC., et al.,
Defendants and Respondents.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN, NO. B234711.
LOS ANGELES SUPERIOR COURT, HON. MALCOLM H. MACKEY, BC408319.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

FRED J. HIESTAND
Fhiestand@aol.com
State Bar No. 44241
2001 P Street, Suite 110
Sacramento, CA 95811
Tel.: (916) 448-5100
Fax.: (916) 442-8644

Counsel for *Amicus Curiae*

Prometheus Press * Sacramento, CA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

INTRODUCTION: INTEREST OF AMICUS
AND IMPORTANCE OF ISSUE. 1

LEGAL ANALYSIS.. 5

I. ABSENT A CLEAR AGREEMENT BETWEEN PARTIES THAT LEGAL ERRORS ARE IN EXCESS OF ARBITRAL AUTHORITY AND REVIEWABLE BY COURTS, THE MERITS OF AN ARBITRATION AWARD ARE NOT SUBJECT TO JUDICIAL REVIEW.. 5

II. THE ARBITRATOR'S DECISION IN RECOGNIZING AND APPLYING THE "HONEST BELIEF" DEFENSE TO A CLAIM FOR LIABILITY UNDER THE CFRA IS NOT "CLEARLY ERRONEOUS" AS A MATTER OF LAW BECAUSE NO CALIFORNIA OPINION HAS SO HELD AND OPINIONS INTERPRETING THE FEDERAL STATUTORY ANALOGUE – THE FMLA – ARE DIVIDED ON THE ISSUE... 8

CONCLUSION. 13

CERTIFICATE OF WORD COUNT. 14

PROOF OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

At&T Mobility, LLC v. Concepcion
(2011) 131 S. Ct. 1740. 4

Bachelder v. American West Airlines, Inc.
(9th Cir. 2001) 259 F.3d 1112. 12

Cable Connection, Inc. v. DirecTV, Inc.
(2008) 44 Cal.4th 1334. . . . . 5-7, 13

City of Richmond v. Service Employees Internat. Union, Local 1021
(2010) 189 Cal.App.4th 663. 7

Cronus Investments, Inc v. Concierge Services
(2005) 35 Cal.4th 376. 12

Duffy v. Greenebaum
(1887) 72 Cal. 157.. 7

Gradilla v. Ruskin Mfg.
(9th Cir. 2003) 320 F.3d 951. 8

Kariotis v. Navistar
(7th Cir. 1997) 131 F.3d 672. 11

Liu v. Amway Corp.
(9th Cir. 2003) 347 F.3d 1125. 12

Lowe v. Alabama Power Co.
(11th Cir. 2001) 244 F.3d 1305. 11

Medlock v. Ortho Biotech, Inc.
(10th Cir. 1999) 164 F.3d 545. 11

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.
(1985) 473 U.S. 614. 3

Moncharsh v. Heily & Blase
(1992) 3 Cal.4th 1. 5

Nelson v. United Technologies
(1999) 74 Cal.App.4th 597. 8

People v. Bramit
(2009) 46 Cal.4th 1221. 12

People v. Jones
(1997) 15 Cal.4th 119. 12

Reinwald v. The Huntington National Bank
(S.D. Ohio 2010) 684 F.Supp.2d 975. . . . . 8, 9

Rogers v. County of Los Angeles
(2011) 198 Cal.App.4th 480. 8

Seeger v. Cincinnati Bell Telephone Company LLC
(6th Cir. 2012) 681 F.3d 274. . . . . 10, 11

Thorneberry v. McGehee Desha County Hosp.
(8th Cir. 2005) 403 F.3d 972. 11

Vail v. Raybestos Prod. Co.
(7th Cir. 2008) 533 F.3d 904. . . . . 9, 10

Codes and Statutes

9 U.S.C. § 10(a). 2, 3

9 U.S.C. § 11. . . . . 2, 3

29 U.S.C. §§ 2601-2654.. 2

Cal. Code Regs., tit. 2, § 7297.7, subd. (a). 2

Civ. Proc. Code § 1286.2(a). 2, 3, 6

Civ. Proc. Code § 1286.6. . . . . 2, 3

Gov. Code § 12945.1. 1

Gov. Code § 12945.2. . . . . 1, 2

Articles, Texts, Treatises and Miscellaneous

Tresa Baldas, *Spying Employers Raise Legal Hackles: Tactic to Track Family Leave Abuse*, *NAT'L L.J.*, Aug. 19, 2008. 10

Thomas E. Carbonneau, *The Revolution in Law Through Arbitration* (2008) 56 *CLEV. ST. L. REV.* 233. 4

Theodore Eisenberg, *et al.*, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts* (2008) 41 *U. MICH. J.L. REFORM* 871.. 4

Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies* (2006) 8 *J. L. & FAM. STUD.* 1.. 8

Robin R. Runge, *Redefining Leave from Work* (2012) 19 *GEO. J. ON POVERTY L. & POL'Y* 445. 8

Brandon Sipherd & Christopher Volpe, *Evaluating the Legality of Employer Surveillance Under the Family and Medical Leave Act: Have Employers Crossed the Line?* (2010) 27 *HOFSTRA LAB. & EMP. L.J.* 467.. 12

U.S. GEN. ACCOUNTING OFFICE, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution* 7 (1995). 3

U.S. GEN. ACCOUNTING OFFICE, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* 2 (1997).. 4

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AVERY RICHEY,
Plaintiff and Appellant,

vs.

AUTONATION, INC., et al.,
Defendants and Respondents.

INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California (CJAC) welcomes the opportunity to address as *amicus curiae*[1] the important public interest issue this case presents:

> **Where parties to an employment contract agree to submit all future disputes between them to binding arbitration and specify that the arbitrator shall decide those disputes based solely upon "controlling law," but say nothing in that contract about judicially appealing the arbitrator's decision or the standard of review applicable to any such appeal, may an arbitral decision pursuant to that agreement be judicially vacated on the ground that its exoneration of the employer from liability under the California Family Rights Act (Gov. Code §§ 12945.1, 12945.2) due to the "honest belief" defense is "clearly erroneous" as a matter of law?**

This phrasing of the issue combines two intertwined questions identified in the petition for review and on the Court's web page: (1) Is an employer's "honest belief"

[1] By separate application lodged with this brief, CJAC asks the Court's to accept and file the brief.

that an employee was violating company policy or abusing medical leave a complete defense to the employee's claim that the employer violated the [California] Family Rights Act?; (2) Was the decision by the appellate court to vacate the arbitration decision in the employer's favor consistent with the limited judicial review of arbitration awards? Quarrying answers to these questions requires examination of two state statutes – the California Arbitration Act (CAA)[2] and the California Family Rights Act (CFRA)[3] – each of which is modeled upon analogous federal statutes – the Federal Arbitration Act (FAA)[4] and the Family Medical Leave Act (FMLA),[5] respectively – which are informed by a bevy of judicial opinions interpreting their scope and application.

Amicus contends that when this analysis is done, the "honest belief" defense to CFRA liability is – whether one likes or agrees with it – not clearly erroneous as a matter of law because numerous federal opinions are in conflict as to its viability under the FMLA and no California case (save this one) has ruled on its applicability to the CFRA. Moreover, sound law and public policy favor the finality of private, contractual arbitration and countenances against judicial set asides of arbitration awards unless the parties thereto specifically and clearly consent to that authority.[6]

---

[2] Civ. Proc. Code §§ 1286.2(a), 1286.6.

[3] Gov. Code, § 12945.2, subd. (1); Cal. Code Regs., tit. 2, § 7297.7, subd. (a).

[4] 9 U.S.C. §§ 10(a), 11.

[5] 29 U.S.C. §§ 2601-2654.

[6] Both the CAA and the FAA provide only limited grounds for judicial review of an arbitration award. Under both statutes, courts are authorized to vacate an award if it was (1) (continued...)

CJAC is a 35-year-old non-profit organization representing hundreds of business, professional associations and local government groups. The principal purpose of CJAC is to educate the public about ways to make our civil liability laws more fair, certain and economical. Toward this end CJAC has participated in the legislative, initiative and judicial processes to shape laws determining who gets relief or paid money, how much, what kind, and from whom when the conduct of some is alleged to occasion harm to others. The scope and application of voluntary binding arbitration agreements has figured prominently in our efforts because "the informality of arbitral procedure . . . enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution" (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* (1985) 473 U.S. 614, 649); the same goals animating CJAC's purpose.

Amicus believes resolution of the issue in this case will determine the future viability of private contractual, pre-dispute arbitration agreements, an existential "to be or not to be" for arbitration in the employment law context. Today, such agreements are commonplace, the result of rapid growth in the use of arbitration aided by judicial opinions striking down numerous attempts to invalidate arbitration agreements by a variety of challenges ranging from "unconscionability" to "manifest disregard" of the law. In 1995, for example, the U.S. General Accounting Office (GAO) found that only 10% of employers were using arbitration for employment

---

[6](...continued)
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. § 1286.2, subd. (a); 9 U.S.C. § 10(a). An award may be corrected for (1) evident miscalculation or mistake; (2) excess of the arbitrators' powers; or (3) imperfection in form. § 1286.6; 9 U.S.C. § 11.

disputes. U.S. GEN. ACCOUNTING OFFICE, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution* 7 (1995). Just two years later, that number rose to 19%. U.S. GEN. ACCOUNTING OFFICE, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* 2 (1997).

A more recent study showed that businesses require pre-dispute arbitration agreements for employment 76.9% of the time. Theodore Eisenberg, *et al.*, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts* (2008) 41 *U. MICH. J.L. REFORM* 871, 886. Currently, as one commentator has observed, "It is not a hyperbole to state that civil justice or adjudication in the United States . . . is achieved primarily through arbitration." Thomas E. Carbonneau, *The Revolution in Law Through Arbitration* (2008) 56 *CLEV. ST. L. REV.* 233, 236.

If plaintiff succeeds with the relief he seeks in this case, however, the widespread use of pre-dispute employment arbitration agreements will rapidly unravel, first here and then in other states where interests hostile to arbitration can use this Court's opinion to convert the finality of arbitration awards into endless litigation by disregarding the well-recognized rule that such agreements are to be enforced "according to their terms." *At&T Mobility, LLC v. Concepcion* (2011) 131 S. Ct. 1740, 1752-1753. This would condemn our courts (at a time of severe and persistent budget constraints) to further congestion and the people of this state to the ills attendant thereto: longer time periods to resolve disputes, increased costs, and greater uncertainties and complexities accompanying appellate litigation.

LEGAL ANALYSIS

I. ABSENT A CLEAR AGREEMENT BETWEEN PARTIES THAT LEGAL ERRORS ARE IN EXCESS OF ARBITRAL AUTHORITY AND REVIEWABLE BY COURTS, THE MERITS OF AN ARBITRATION AWARD ARE NOT SUBJECT TO JUDICIAL REVIEW.

Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1 holds that courts applying the CAA cannot adopt common-law standards for vacating arbitral awards or review arbitral awards for legal error. That opinion arose out of an attorney employment contract providing for arbitration of a dispute over the allocation of legal fees following termination of employment. In affirming the lower courts' (both superior and appellate) approval of the award in defendant's favor, this Court observed that "it is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both *binding* and *final*. Indeed, '[t]he very essence of the term *arbitration* . . . connotes a *binding* award.'" *Id.* at 9; citation omitted; emphasis added. Later in *Moncharsh*, the Court explains that "it is within the power of the arbitrator to make a mistake either *legally* or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible." *Id.* at 12; citation omitted; emphasis added. In short, *Moncharsh* makes clear that "[a]bsent a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny." *Id.* at 32.

More recent judicial gloss on the scope of judicial review of arbitration decisions is provided by *Cable Connection, Inc. v. DirecTV, Inc.* (2008) 44 Cal.4th 1334 (*DirecTV*). There the Court reaffirmed its adherence to *Moncharsh*, but clarified that

"the parties [to arbitration] may obtain judicial review of the merits by *express* agreement." *Id.* at 1340; emphasis added. The arbitration agreement in *DirecTV* provided that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the *award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error*." *Id.*; emphasis added. This contractual provision dovetails, the opinion points out, with "one of the grounds for review of an arbitration award:" (*id.*) – "[t]he arbitrators exceeded their powers." Code of Civ. Proc. §§ 1286.2, subd. (a)(4), 1286.6, subd. (b). Accordingly, *DirecTV* holds:

> [i]f the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, and *make plain their intention that the award is reviewable for legal error*, the general [statutory] rule of limited review [in the CAA] has been displaced by the parties' agreement.

44 Cal.4th at 1355; emphasis added.

The language of the agreement at issue in *DirecTV*, however, stands in sharp contrast to the language of the arbitration agreement in this case. Here the agreement is *silent* about judicial review of the arbitrator's decision. It merely states 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 . . . other than such *controlling law*." Answer Brief on the Merits ("ABM"), p. 2; emphasis added. This provides guidance to the arbitrator for making his or her decision, but says nothing about what happens if the arbitrator misinterprets "controlling law" or if, as is the case here, there is no clear "controlling law" on an issue the arbitrator decides. This is a far cry from the "clearly expressed" arbitration agreement in *DirecTV* that specifically addressed the scope of judicial review. "To

take themselves out of the general rule that the merits of an award are not subject to judicial review, the parties must clearly agree that legal errors are in excess of arbitral authority that is *reviewable by the courts*." *DirecTV*, *supra*, 44 Cal.4th at 1361; emphasis added.

The most that can be said of the agreement here is that its reference to the arbitrator deciding cases in accordance with "controlling law" *implies* judicial review if a disgruntled plaintiff does not agree with the arbitrator's legal analysis or conclusion. But "[t]he express mention of one thing [i.e., the basis for making an arbitral decision] implies the exclusion of another [unmentioned thing]" – i.e., the standard of review applicable to the arbitral decision. *Duffy v. Greenebaum* (1887) 72 Cal. 157, 159. Indeed, the language in this arbitration agreement is nothing more than a "standard arbitration provision that does not provide for [judicial] review." *City of Richmond v. Service Employees Internat. Union, Local 1021* (2010) 189 Cal.App.4th 663, 669 n. 4. (commenting on an arbitration agreement stating the arbitrator "shall make no decisions in violation of existing law").

DirecTV emphasized that parties who desire judicial review "would be well advised to provide for that review *explicitly and unambiguously*." 44 Cal.4th at 1361; emphasis added. That was obviously not done here with this arbitration agreement and the Court should not rewrite it now to provide for judicial review that is otherwise lacking.

II. THE ARBITRATOR'S DECISION IN RECOGNIZING AND APPLYING THE "HONEST BELIEF" DEFENSE TO A CLAIM FOR LIABILITY UNDER THE CFRA IS NOT "CLEARLY ERRONEOUS" AS A MATTER OF LAW BECAUSE NO CALIFORNIA OPINION HAS SO HELD AND OPINIONS INTERPRETING THE FEDERAL STATUTORY ANALOGUE – THE FMLA – ARE DIVIDED ON THE ISSUE.

The CFRA, which was enacted in 1991 and is the state counterpart to the FMLA, "is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security." *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 606. In fact, "the CFRA was amended once the FMLA was passed so that it would not conflict with the FMLA." Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies* (2006) 8 *J. L. & FAM. STUD.* 1, 25; see also *Gradilla v. Ruskin Mfg.* (9th Cir. 2003) 320 F.3d 951, 956 (observing that the "CFRA was modeled on the federal FMLA"). Thus "the . . . CFRA . . . is almost identical to the FMLA." Robin R. Runge, *Redefining Leave from Work* (2012) 19 *GEO. J. ON POVERTY L. & POL'Y* 445, 461. Not surprisingly, California courts rely on cases interpreting the FMLA because the CFRA so closely parallels it. See, *e.g.*, *Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480.

While there are no published California state court opinions discussing the "honest belief" defense in the context of a CFRA claim,[7] numerous federal opinions are divided on whether the defense applies to FMLA claims. In *Reinwald v. The Huntington National Bank* (S.D. Ohio 2010) 684 F.Supp.2d 975, for instance, the court

[7] A computer search under Westlaw of the database that includes all California appellate opinions using the search query: "California Family Rights Act" CFRA /15 "honest belief" yields only the appellate opinion in this case.

ordered summary judgment in favor of the employer and against the plaintiff's claim of interference with FMLA rights and her retaliation claim. Plaintiff alleged she was unable to work because of pain from an injection for endometriosis. She said she called the employer's absence hotline as required by policy, but the employer checked its call log and did not have a record of receiving such a call. The employer terminated the plaintiff's employment for violating its call-in policy. The court found that the plaintiff did not present competent medical evidence that the injection she received would trigger pain that was sufficiently severe to prevent her from working. As a result, she failed to show she had a serious health condition that entitled her to FMLA leave in the first instance.

In its holding, *Reinwald* adopted the "honest belief doctrine" to dispose of the retaliation claim. Pursuant to that doctrine, an employer does not violate the FMLA by terminating an employee if the employer held an "honest belief" based on particularized facts that the employee abused that leave. The court noted that the employer gave the plaintiff the opportunity to provide evidence of her call to the absence hotline, for example, by providing her cell phone records, at the time of her termination, but she failed to do so. Pursuant to the "honest belief" doctrine, it is not required that the decision be "optimal or that the employer left no stone unturned."

Similarly, *Vail v. Raybestos Prod. Co.* (7th Cir. 2008) 533 F.3d 904, 909-10 extended the honest belief defense not only to apply to adverse action against an employee, but also as a justification to allow the employer to conduct surveillance on an employee it believes is taking FMLA leave under fraudulent pretenses. *Id.* at 905. The plaintiff, Diana Vail, was on FMLA leave due to chronic migraines and was

suspected of lying by her employer, Raybestos. Raybestos hired an off-duty police officer to monitor Vail's activities while on FMLA leave. The officer observed Vail mowing lawns for her husband's landscaping company. The Seventh Circuit upheld the employer's right to spy on an employee who is suspected of abusing FMLA-granted leave. *Id.* at 910. *Vail* holds that the employer's surveillance tactics were legal because they were used to supply the employer with an honest suspicion that the employee was using her leave in order to work another job. *Id.* at 909-10. This ruling has a huge impact on employees willing to take advantage of the FMLA as a way to get off from work with no consequence. See Tresa Baldas, *Spying Employers Raise Legal Hackles: Tactic to Track Family Leave Abuse*, *NAT'L L.J.*, Aug. 19, 2008. If employers are allowed to use surveillance in order to supply their honest belief of improper FMLA use, employees will be much less likely to abuse the statute. *Id.*

Further, *Seeger v. Cincinnati Bell Telephone Company LLC* (6th Cir. 2012) 681 F.3d 274 holds that the employer did not terminate the plaintiff in retaliation for taking FMLA leave where it held an "honest belief" that his attending an Oktoberfest celebration while on that leave was contrary to his claimed need for leave and was, therefore, itself evidence that his request for leave had been fraudulent. Although the employer's decision was based on the statements of only two of his co-workers who saw him at Oktoberfest, those statements were a sufficient basis for an "honest belief," and his tendered evidence that he really did need the leave and that his conduct at Oktoberfest was consistent with his need for leave was irrelevant, as it did not impact the honesty of the employer's belief that the request for leave had been fraudulent. The dissent strongly disagreed, stating that "while this Court does not

require that an investigation 'be optimal or that it left no stone unturned,' the lackluster nature of [the employer's] investigation strains the bounds of credulity. Moreover, at the summary judgment stage the question is not whether [the employer's] investigation was, in fact, 'unworthy of credence,' but whether a reasonable jury could have come to such a conclusion." *Id.*

Numerous other courts from various federal circuits recognize the "honest belief" defense to employee FMLA claims for termination while taking, or in retaliation for taking, medical leave. See, e.g. *Lowe v. Alabama Power Co.* (11th Cir. 2001) 244 F.3d 1305, 1308; *Kariotis v. Navistar* (7th Cir. 1997) 131 F.3d 672; *Thorneberry v. McGehee Desha County Hosp.* (8th Cir. 2005) 403 F.3d 972, 977; and *Medlock v. Ortho Biotech, Inc.* (10th Cir. 1999) 164 F.3d 545, 550. A recent law review article on the subject summarizes the current state of the law:

> One tool . . . courts have allowed employers in the face of FMLA retaliation claims is the honest belief defense. If the employer can establish that it reasonably relied on the particular facts before taking an adverse employment action against the employee, it can prove that its action was not pretextual, meaning that the adverse action was not taken because the employee exercised her right to take FMLA leave. Courts have extended this rule by holding that the employer does not have to leave "no stone unturned" prior to making an adverse decision against an employee when reasonably relying upon the particularized facts. This rule is designed to protect the legitimate business judgment of employers. If the employer honestly believes . . . the employee needs to be disciplined and can give an honest explanation of its actions then it is not up to the court to second guess the employer's decision. Some courts have recently extended this rule to mean that an employer cannot be held liable for retaliation if it can simply prove that it

> would have fired the employee regardless of whether or not the employee took leave in accordance with the FMLA.

Brandon Sipherd & Christopher Volpe, *Evaluating the Legality of Employer Surveillance Under the Family and Medical Leave Act: Have Employers Crossed the Line?* (2010) 27 *HOFSTRA LAB. & EMP. L.J.* 467, 477; citations omitted.

Assume arguendo that there are cases holding to the contrary, including those relied upon by plaintiff, such as *Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1135 and *Bachelder v. American West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1130 when he asserts there is "no 'good faith' honest mistake defense to CFRA violations." ABM, p. 15. Though neither of these opinions discuss the "honest belief" defense and are persuasively distinguished by petitioner from this case,[8] according them the meaning attributed to them by plaintiff evinces, at most, a difference of opinion among federal courts about the viability of the "honest belief" defense to FMLA claims. This Court is not obligated to follow opinions of the Ninth Circuit interpreting federal cognates of California statutes, especially when, as here, there is a split in authority amongst various circuits on the same point of law. See, *e.g.*, *People v. Bramit* (2009) 46 Cal.4th 1221, 1247; *Cronus Investments, Inc v. Concierge Services* (2005) 35 Cal.4th 376, 393; and *People v. Jones* (1997) 15 Cal.4th 119, 162, all expressly "declining" to follow Ninth Circuit opinions on the point of law at issue.

What these aforementioned opinions underscore, is that there is no "controlling law" the arbitrator in this case refused to follow. The circuits are "split" on whether the "honest belief" defense applies to an employee's claim under the FMLA. That the

[8] Pet. for Review, p. 19-21; Opening Brief on the Merits, pp. 30-32, 35.

arbitrator sided with numerous circuits recognizing and applying the "honest belief" defense is not clearly erroneous as a matter of a law or a decision in which the arbitrator exceeded his powers. As Justice Moreno astutely remarked:

> [W]hen an arbitrator's answer to a legal question is not clearly erroneous, for example, when he or she reasonably answers a legal question in which there is *no settled precedent*, the [CAA] does not authorize a court to vacate an arbitrator's award merely because it disagrees with the arbitrator's conclusions . . ..

DirecTV, supra, 44 Cal.4th at 1368 (concurring and dissenting opn. by Moreno, J.); emphasis added.

CONCLUSION

For all the reasons aforementioned, the decision of the Court of Appeal should be reversed and the trial court's judgment confirming the arbitration award should be affirmed.

Dated: August 8, 2013

Respectfully submitted,

Fred J. Hiestand
Civil Justice Association of California
Counsel for *Amici Curiae*

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 4,000 words.

Date: August 8, 2013

Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2001 P Street, Suite 110, Sacramento, CA 95811.

On August 8, 2013, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in *Richey v. AutoNation, Inc., et al.*, S207536 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

Scott O. Cummings, Esq.
Law Offices of Scott O. Cummings
1025 W. 190th Street, Suite 200
Gardena, CA 90248
Attorney for Plaintiff/Appellant

Richard A. Derevan, Esq.
Frank Cronin, Esq.
Erin D. Leach, Esq.
Snell & Wilmer LLP
600 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
Attorneys for Defendants/Respondents

Clerk, Court of Appeal
Second Appellate District, Div. Seven
300 S. Spring Street
North Tower, 2nd Floor
Los Angeles, CA 90013
Appellate Court

The Honorable Malcolm Mackey
Judge, Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012
Trial Court

[X](BY MAIL) I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

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

Executed this 8th day of August 2013 at Sacramento, California.

David Cooper