NO. 19-958

In the Name of GOD, Most Gracious, Most Merciful

In The
Supreme Court of the United States

BAHAR MIKHAK,

Petitioner,

v.

UNIVERSITY OF PHOENIX,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fraud on the Court:

Plaintiff discovered fraudulent and material misrepresentation perpetrated by the opposing party. However, the district court issued an order to suppress new submissions from both parties, and it denied Plaintiff relief from the judgment and a new trial under FRCP 60(b)(3).

1. Was the Ninth Circuit's holding wrong for departing from its own precedent and creating a conflict with other circuits over the application of the "clear and convincing evidence" standard by not granting a new trial?
2. Is a *pro se* litigant entitled to protection of her right to Procedural Due Process after a discovery of Fraud on the Court?

Egregious negligence of counsel:

Plaintiff did not participate in the delay tactics of her counsel and after she became convinced that they had abandoned her, lied to her, and were refusing to correct their mistakes/omissions in the record, she parted ways with them.

1. Should a *pro se* litigant under such extraordinary circumstance, who is blameless, be penalized for her former counsel's egregious negligence?
2. Was the Ninth Circuit's holding correct that the district court's denial of relief under FRCP 60(b)(6), despite Plaintiff's extraordinary circumstance, did not warrant relief from the judgment?

Dismissal with prejudice is a harsh sanction:

The Ninth Circuit will create an intolerable conflict among the nation's lower courts if its decision is not corrected immediately.

1. What is the appropriate standard of review to protect parties from unjustified and harsh rulings under FRCP 41(b), for dismissal of an entire civil cause of action with prejudice?
2. Should a *pro se* litigant be allowed excusable delay, knowing the judgment will be final and binding, if she did not feel safe to initiate arbitration with an opposing counsel who had defrauded the court during trial?

PARTIES TO THE PROCEEDINGS

Petitioner Bahar Mikhak was the plaintiff in the United States District Court for the Northern District of California and appellant in the United States Court of Appeals for the Ninth Circuit. Respondents the University of Phoenix were the defendants in the district court proceedings and appellee in the court of appeals proceedings.

RELATED CASES

- *Mikhak v. University of Phoenix*, No. 3:16-cv-00901-CRB, United States District Court for the Northern District of California. Judgment entered June 21, 2016.
- *Mikhak v. University of Phoenix*, No. 3:16-cv-00901-CRB, United States District Court for the Northern District of California. Judgment entered December 5, 2017.
- *Mikhak v. University of Phoenix*, No. 3:16-cv-00901-CRB, United States District Court for the Northern District of California. Judgment entered December 21, 2017.
- *Mikhak v. University of Phoenix*, No. 3:16-cv-00901-CRB, United States District Court for the Northern District of California. Judgment entered April 27, 2018.
- *Mikhak v. University of Phoenix*, No. 17-17535, United States Court of Appeals for the Ninth Circuit. Judgment entered May 22, 2018.
- *Mikhak v. University of Phoenix*, No. 17-17535, United States Court of Appeals for the Ninth Circuit. Judgment entered April 24, 2019.

- *Mikhak v. University of Phoenix*, No. 17-17535, United States Court of Appeals for the Ninth Circuit. Judgment entered June 25, 2019.
- *Mikhak v. University of Phoenix*, No. 17-17535, United States Court of Appeals for the Ninth Circuit. Judgment entered July 25, 2019.
- *Mikhak v. University of Phoenix*, No. 17-17535, United States Court of Appeals for the Ninth Circuit. Judgment entered August 28, 2019.

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PETITION FOR WRIT OF CERTIORARI

Bahar Mikhak ("Mikhak") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. Instead of a flat denial of her certiorari, she kindly requests a summary reversal, requesting relief in the form of "grant, vacate, and remand."

OPINIONS AND ORDERS BELOW

The Ninth Circuit's Judge M. Margaret McKeown, Judge Jay Bybee, and Judge John Owens ("the panel"):

- Denial of petition for a panel rehearing and rehearing *en banc* (App.1)
- Denial of Motion for Clarification (App.2)
- Partial grant of second time extension to file a petition for a rehearing (App.3)
- Denial of Motion to present New Issues and Analyses and its decision to *affirm* the interlocutory ruling of arbitration and the dismissal with prejudice (App.4)
- Denial of Motion to issue subpoenas witnesses (App.7)

The district court's ("the court") Judge Charles Breyer ("the judge"):

- Denial of Motion to issue subpoenas for witnesses (App.8)
- Denial of Motion to set aside the order granting summary judgment and their order to suppress new submissions from both parties (App.10)

- Dismissal of complaint with prejudice for failure to initiate arbitration, as a *pro se* litigant (App.12)
- Granting of arbitration (App.15)

JURISDICTION

The Ninth Circuit entered its opinion on April 24, 2019 (App.4). This action is timely because Mikhak's Motion for a second extension of time was granted in part on June 25, 2019 (App.3), and her petition for panel rehearing and rehearing *en banc* was denied on August 28, 2019 (App.1). On November 15, 2019, Justice Kagan extended the time for this petition to Saturday January 25, 2020. No. 19A543. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V and XIV -- The Fifth and the Fourteenth Amendments (App.70)

Fed. R. Civ. P. 60, Relief from a Judgment Or Order (App.70)

42 U.S.C. § 2000e-2(a)(1) – Title VII of the Civil Rights Act 1964 (App.70)

PROLOGUE

For almost 150 years, the U.S. Supreme Court has repeatedly ruled in favor of individuals against state abuses under the 14th Amendment. The University of Phoenix ("UOP") is a state actor under the provisions of 42 U.S.C § 1983. And despite of being privately incorporated, its private status does not make it a non-state actor.

Mikhak is entitled for relief guaranteed under the 42 U.S.C. § 1983 for deprivation of her Constitutional Substantive Rights (Liberty and Property) and Procedural Due Process Rights; for protection of her right to a full and fair trial under the 42 U.S.C. § 1981; and a guarantee that the Federal Government does not deprive her of Liberty and Property, without Procedural Due Process of the law and receiving Equal Protection of the Laws.

The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing *before* she is deprived of any significant property interest. *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

Mikhak's petition is a discussion of relevant laws and rules that the lower courts misinterpreted and misapplied when they denied her rights of procedural due process and dismissed her entire civil cause of action with prejudice.

In this pursuit of justice, Mikhak was reminded of those who misinterpret GOD's laws in the Qur'an [1], and as a result, they rule unjustly, abusing the name of GOD, which in turn leads to mistrust in GOD and His justice. For example, the practice of cutting off a thief's hand is a practice because of a misinterpretation of GOD's law:

> [5:38] The thief, male or female, you shall mark their hands as a punishment for their crime, and to serve as an example from GOD. GOD is Almighty, Most Wise.

But GOD has provided mathematical proof [2] that the law is to mark the hand of the thief, rather than sever it. The same word "cut" is used in Surah Joseph:

> [12:31] When she heard of their gossip, she invited them, prepared for them a comfortable place, and gave each of them a knife. She then said to him, "Enter their room." When they saw him, they so admired him, that they cut their hands. They said, "Glory be to GOD, this is not a human being; this is an honorable angel."

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[1] The Authorized English translation of the Qur'an by Dr. Rashad Khalifa http://www.masjidtucson.org/quran/frames/

[2] Obviously, the women who so admired Joseph did not cut off their hands; nobody can. It is because of GOD's mercy and His mathematical miracle in the Qur'an, that it is proven that the Qur'anic law calls for marking the hand of the thief, not severing it, as practiced by the corrupted Islam. The sum of surah and verse numbers are the same for 5:38 and 12:31, i.e., 43. It is also the will and mercy of GOD that this mathematical relationship conforms with the Qur'an's 19-based code. Nineteen verses after 12:31, we see the same word (12:50).

STATEMENT OF THE CASE

Factual and Procedural Background

Mikhak's claim is a Religious Rights claim involving a Constitutional Law dispute [3], raising the question if she has the right to say the word "GOD willing" occasionally in the classroom, as long as, she is not proselytizing or suggesting that her religious views are aligned with the university's message. Because the UOP asked Mikhak, to stop saying "GOD willing," as a condition of her employment, and despite of her passing the faculty qualification process, the UOP discriminated against her by not hiring her as a faculty member; because it failed to accommodate her sincerely held religious beliefs, and created a hostile work environment for her; because it retaliated against her for complaining about religious harassment by not hiring her past the Mentorship Stage, despite her faculty mentor's (Dr. Amanuel Gobena) recommendation to hire her, Mikhak filed a complaint against the UOP.

Her claims have not been trialed yet because the UOP tried to compel Mikhak to binding arbitration and the court ruled in favor of arbitration, denying Mikhak of a fair jury trial, and later the court dismissed her case with prejudice for her failure to initiate the forced arbitration. The dismissal came shortly after Mikhak became a *pro se* litigant without any consideration of her extraordinary circumstances.

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[3] Mikhak has provided an exhaustive account of factual background pertaining to her religious discrimination claims. App.78.

The first phase of Mikhak's case started as an ordinary "contract defenses", opposing arbitration. But in the end, it became a complex trial and appellate litigation.

This petition is mainly focused on the events that transpired at the end of trial. In sum, the UOP argued that because Mikhak had clicked the "Accept" box to the arbitration, she entered into an agreement to arbitrate any and all disputes relating to her employment.

Mikhak's former counsel ("her counsel") filed an opposition response arguing: (1) that because there was no mutual assent, the arbitration agreement formed under California and common law contract principles is invalid and unenforceable; (2) that because the contractual language was ambiguous, there was ambiguity in Mikhak's coverage; and (3) the Class Action Waiver clause of the agreement deemed the contract invalid.

There are four essential elements to a valid contract: (1) parties "capable of contracting"; (2) their mutual consent; (3) sufficient consideration; and (4) a lawful object. Cal. Civ. Code § 1550; *United States ex. rel. Oliver v. The Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999) Only mutual consent, was identified by the court as critical to the determination of whether Mikhak fell within the scope of the arbitration agreement. (**dkt.**27, App.15)

At the end of the Show Cause hearing, Mikhak asked her counsel why he did not present the missing evidence. To her surprise, he responded "YOU were the one who had clicked the 'Accept' box to the arbitration agreement." She was perplexed by her

own counsel blaming her. That awkward interaction prompted her to carefully examine all pleadings in her case. That's when she realized her extraordinary circumstances.

One involved her realization that her counsel had made mistakes/omissions and were not willing to correct them, they abandoned her, kept her out of the loop regarding their plans, lied about drafting an appeal, filed pleadings without asking her to review them, and signed a joint agreement with Neda Dal Cielo ("Dal Cielo") the UOP's lead counsel [4] approving the statement: "Mikhak had not passed the faculty qualification process," which was not true.

Next involved Mikhak's discovery that she had become a victim of "identity theft" during trial; Dal Cielo and her UOP witnesses ("the opposing party") [5] produced a great work of "magic" with their perjured testimonies, falsely claiming that Mikhak had self-identified as a faculty member, and not a faculty candidate at the time of contract formation. This amounted to Fraud on the Court because it surprised everyone, including her counsel.

Exhibit O, "Optical Illusion," is used as an analogy to explain the illusion they created. (App. 126) When you stare at this image, depending on which facts you focus your attention on, you will either see a young woman *faculty candidate* or an older woman *faculty member*.

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[4] "Dal Cielo" is used throughout this petition as the representative for the team of counsel. App.78.

[5] Any reference to "the opposing party" includes Dal Cielo and her **THREE** UOP witnesses (Ms. Barbara Taylor, Ms. Kelley Mortensen, and Ms. Kim Spence).

Mikhak showed with clear and convincing evidence, the opposing party's material and fraudulent misrepresentation that had surprised her counsel and had substantially interfered with their ability to fully and fairly prepare and present her contract defenses during trial.

Also, the opposing party deliberately concealed evidence that, if disclosed, would have proved that Mikhak had self-identified as a *faculty candidate* not covered by the arbitration agreement, during her faculty candidacy. Failure to produce material in response to legitimate discovery requests can constitute misconduct under FRCP 60(b)(3). *Abrahamsen v. Trans-State Express. Inc.*, 92 F.3d 425, 428 (6th Cir. 1996).

If the UOP attached double meaning to the faculty member, or if *faculty members* and *faculty candidates* were the same, then this should have been disclosed during discovery so her counsel could have deposed the witnesses as to the veracity of their testimonies.

Mikhak established that the "missing" evidence had worth as meaningful discovery tool and was not merely cumulative. *Anderson v. Cryovac, Inc.,* 862 F.2d 910 (1st Cir.1988), went in depth into a FRCP 60(b)(3) motion premised on an opposing party's misconduct in failing to disclose certain materials that were responsive to discovery requests. Mikhak's case falls well within the parameters of *Anderson*. As in *Anderson*, the court abused its discretion in not granting her a new trial.

The court's reliance on partial evidence and a defected record, including perjured testimonies, forged documents, and concealed information, is the

reason why the court ruled in favor of the arbitration. Its ruling was irretrievably tainted because the existing record shows that it had copied/pasted excerpts from Dal Cielo's pleadings instead of directly examining the Faculty Handbook and fact-checking the evidence.

Mikhak made three attempts, as a first time *pro se* litigant, to appeal directly to the court for reconsideration and relief from its judgment. The district courts generally treat Motions for reconsideration as being filed under FRCP 59 or 60.

Mikhak's post-trial motions for reconsideration, under the CA Local C.R. 7-9(b)(App.72), were timely and meritorious because she showed that a new and material difference (App.87) existed, at the time of the motion for leave; that she exercised reasonable diligence; and did not know of such fact at the time of the interlocutory order.

After becoming a *pro se* litigant, Mikhak filed Motion #1 (**dkt.**44):

a. To request a time extension to find new counsel to explain her delay in initiating arbitration after becoming *pro se*.

b. To request to correct the record pursuant to FRCP 15(a), for leave to amend her complaint.

c. To set aside default for good cause pursuant to FRCP 55(c) and grant a Prove Up hearing or evidentiary hearing to address the appropriate standard for relief under FRCP 60(b)(3).

The judge was made aware of the elements of deception involved. For example, the UOP had induced Mikhak to agree with the arbitration

(**Exhibit T**, App127-130) and Taylor's **Exhibit A** was forged document. But still he denied Mikhak's Motion #1 (**dkt.**44).

The court outright refused to grant Mikhak leave to amend without stating *specific and justifying reasons for such denial.* (**dkt.**47, App.12) *Cf. Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). If the court grants a motion to dismiss, it should provide a statement of its reasons so that plaintiff can make an intelligent decision on whether to amend the complaint. *Griggs v. Hinds Junior* College, 563 F.2d 179, 180 (5th Cir. 1977). This policy is particularly strong in *pro se* civil rights cases. Before dismissing for failure to state a claim, the court should give the *pro se* plaintiff a statement of the complaint's deficiencies. *Eldridge v. Block*, 832 F.2d 1132, 1135-1136 (9th Cir. 1987).

"Courts have strictly enforced the requirement that a party threatened by summary judgment must receive notice and an opportunity to respond." *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414 (11th Cir. 1997)

Mikhak was a *pro se* litigant for only 26 days when she filed her Motion #2 (**dkt.**49):

a. To request a time extension beyond the holiday season to find new counsel.

b. To request leave to amend her complaint and correct the record (FRCP 15(a)).

c. To present the "missing" evidence. For example: Jolley's email stating that Mikhak should self-identify as faculty candidate. (App.91), and to explain the UOP's Actions 5-8 leading up to

asking Mikhak to click "Accept" so to induce the agreement. (**dkt.**49)

d. To request relief from the dismissal ruling and a new trial, citing FRCP 59.

e. To investigate Dal Cielo's unethical legal practices and the UOP's misconduct. Mikhak wanted to avail herself of FRCP 26-37 for discovery. But the judge denied Mikhak's right to discovery and it omitted, in his order, any mention of Dal Cielo's discovery violation of FRCP 37.

Under the Local C.R. 7-3 (App.73), Mikhak had 14 days to file her "letter-reply," or Motion #2 (**dkt.**49) in opposition to Dal Cielo's "letter-response," or Motion to dismiss. But the court dismissed her case with prejudice, one week early (**dkt.**47). Surprise evidence could be combated by granting a continuance to the surprised party. *Klonoski v. Mahlab*, 156 F.3d 255, 274-275 (1st Cir. 1998).

The window of time from the date Mikhak parted ways with her counsel to the date of the dismissal of her case with prejudice lasted only 11 days. (**Exhibit R2**, App. 132). That left Mikhak with the only option of filing a Notice of Appeal at the Ninth Circuit, knowing that her appeal would have been stronger if her rights to procedural due process were not denied in the district court.

Mikhak's case presents a serious error of federal law that necessarily constituted an abuse of discretion.

The panel should have vacated the judge's denial of Mikhak's FRCP 60(b)(3) motion and remanded with instruction to the judge to consider the entire motion with fresh eyes; a complete do over because the judge

failed to draw a presumption of substantial interference and failed to assume the existence of the defendants' culpable misconduct and placed the burden of proof on the wrong party.

Contrary to What the Panel's Decision May Suggest, Mikhak's Petition is Not Fact-bound and it is "Certworthy."

The panel also made a false assertion that "Mikhak's contentions are unsupported by the record," (**dkt.**53, App.4) a statement that is baseless, compromising, and not aligned with the mission of maintaining public's trust of the integrity of the judicial proceedings.

Mikhak displayed and organized the factual background to her case, in detail, as they relate to her contract defenses during trial, post-trial and appeal in App.87 to leave no doubt in the justices' minds that her contentions are supported by the record and are uncontested. The opposing party's misconduct was so pervasive that there is no serious argument that it was anything other than intentional. There is no serious dispute that they made an array of misstatements and withheld documents to defraud the court. For docket activities relevant to Mikhak's contract defenses, see **Exhibit R1** (App.131) for during trial and **Exhibit R2** (App.132) for post-trial.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Decision Conflicts with Its Own Precedent and The Decisions of All Other Circuits.

Because of Mikhak's extraordinary circumstance, as a *pro se* litigant, and her discovery of Fraud on the Court, the panel's holding of the district court's denial of relief under 60(b)(3), and its order to suppress new submissions were not correct.

Mikhak's petition can be a vehicle in which to resolve the conflict over application of the "clear and convincing evidence" standard.

The panel departed even from the Ninth Circuit's precedent in application of the "clear and convincing evidence" standard., *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). Mikhak's case is similar to *Rembrandt Vision Techs., LP v. Johnson & Johnson Vision Care, Inc.* No. 2015-1079 (Fed. Cir. Apr. 7, 2016), where discovery of evidence after trial from a third party demonstrated that the testimony of petitioner's expert was fraudulent and that important documents central to petitioner's claim had not been provided to respondent. The district court denied respondent discovery and relief from the judgment. But the Federal Circuit reversed holding by applying the law of the Eleventh Circuit that applied the clear and convincing evidence standard. *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007).

In fact, every circuit applies the clear and convincing evidence standard. For example, the

Tenth Circuit, *Zurich N. Am. v. Matrix Serv.*, 426 F.3d 1281, 1290 (10th Cir. 2005); the D.C. Circuit, *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004); the Sixth Circuit, *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008); the First Circuit, *Tiller v. Baghdady*, 294 F.3d 277, 280 (1st Cir. 2002); the Federal Circuit, *Hildebrand v. Steck Mfg. Co.*, 292 F. App'x 921 (Fed. Cir. 2008), *Hutchins v. Zoll Med. Corp.*, 253 F. App'x 926, 930 (Fed. Cir. 2007).

The governing precedent used in *Rembrandt* should have been used in Mikhak's case; entitling Mikhak to relief because she established that: (1) the adverse party engaged in fraud or misconduct; and (2) that the opposing party's fraudulent and material misrepresentation substantially interfered with her counsel's ability to develop and present her contract defenses during trial. In Mikhak's case the concealment precluded inquiry into a plausible theory of coverage, closed off to her counsel a potentially fruitful avenue of direct or cross-examination.

Judge Breyer was quoted as saying "the worst thing in the world is the prosecution and conviction of an innocent person, or a conviction based on perjured testimony."

Mikhak recently came across a news release posted on the district court's website about Judge Breyer's prestigious Devitt Award, [6] citing examples

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[6] The news release https://cand.uscourts.gov/news/235 has recently been taken down, but visit the website for the sponsors of the Devitt Award: https://www.prnewswire.com/news-releases/judge-charles-r-breyer-to-receive-the-nations-highest-

for the way he manages his courtroom with moral clarity and fairness to all parties.

The judge's disdain for convictions based on perjured testimony, is a hopeful sign for Mikhak, that one day, he may realize that his court relied on perjured testimonies in the weighing of relevant facts, and "convicted" an innocent person (Mikhak) to undergo forced arbitration with an opposing party who had lied under oath. Mikhak was justified in being extremely cautious, as a *pro se* litigant, knowing that they could defraud the arbitrator too.

A general standard for determining prejudice and making relief appropriate is when a witness testifies falsely and "without [the false testimony], the court might have reached a different conclusion." The court erred by not granting relief because absent the opposing party's perjured testimonies, forged documents, and evidence concealed during discovery and trial, the court would have held that Mikhak was not covered by the arbitration agreement as a faculty candidate.

Judge Breyer's eagerness to protect a defendant's right to a fair trial should not be at the risk of denying a plaintiff's right to procedural due process.

In another example the judge had to balance protecting a defendant's right to a fair trial, while at the same time protecting the identity of an

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undercover agent. Out of concern for the UOP's right to a fair trial, he denied Mikhak's right to a fair trial.

He did not request supplemental briefing from both parties to address the appropriate standard for relief in the Ninth Circuit, as was done in *Venture Indus. Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322, 1332-1334 (Fed. Cir. 2006).

He issued his order of suppression of new submissions from both parties 16 days after he issued the dismissal of Mikhak's case with prejudice (**dkt.**50). And the irony is that the opposing party had not even filed a motion to suppress. The burden of proof never shifted to them because of the protection from the court's order.

Mikhak only had a few days to file a motion for reconsideration of this order, during the holidays, because she did not even have access to legal consultation with the Pro Bono Project. The court had at its disposal FRCP 13(f), FRCP 60(b)(1), FRCP 60(b)(2) and FRCP 6(b) to help enlarge the period of time beyond the 30-days that overlapped with the holiday season to give Mikhak sufficient time to find new counsel.

Mikhak was blocked from availing herself of the same rights to procedural due process that Rozier availed herself of, in which she was granted opportunities for hearing oral arguments and the district court considered briefs and affidavits filed by both parties. *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

Just as the Fifth Circuit did in *Rozier's* appeal, the trial judge's failure to state the reasons for the denial of her motions was significant. *Dollar v. Long Mfg.*,

N.C., Inc., 561 F.2d 613 (5th Cir. 1977).

Later, Mikhak made a third attempt to appeal directly to the judge with her Declarations of New Analyses (**dkt.**73), presented **Exhibits S2-S10** in support of her new allegations of misconduct by the opposing party. But the judge referred to her declarations as "plaintiff's theory." (**dkt.**77, App.8). Contrary to the court's false characterization, Mikhak proved that her contentions were not theoretical or hypothetical. Everything was factually based and proven by the existing record. (App.87)

In Mikhak's Declaration (**dkt.**74), she alleged that Dal Cielo and her **THREE** witnesses had falsely asserted at least **SIX** "alternative facts" about her, requested the court to issue subpoenas to them, and filed interrogatories (**Exhibit Q**).

Dal Cielo was under a continuing obligation to provide responses to interrogatories or requests for production of documents when she learned "that in some material respect the disclosure or response is incomplete or incorrect, ..." FRCP 26(e)(1)(A).

In Mikhak's motion (**dkt.**75), she requested that the court issue subpoenas to **FOUR** new potential witnesses who were faculty candidates in Mikhak's cohort, during the Certification Stage, **THREE** individuals, who were her former instructors during the Certification Stage, and **ONE** individual, the senior vice president of academic operations. She filed **Exhibit W** (Questions for the new witnesses) and **Exhibit T** (A visual timeline of events, App. 127-130.) But the court's characterization of Mikhak's motion omitted any mention of the opposing party's conjured facts, her **Exhibits Q, W** and **T**. (**dkt.**77, App8)

The court abused its discretion when it dismissed Mikhak's case, in a hurry, leaving Mikhak no choice but to appeal, so it could later deny her request to issue subpoenas under FRCP 45, using the excuse that "Plaintiff's case is pending in the Ninth Circuit not in the District Court."

Instead, the court could have offered a short bench trial to reassemble Dal Cielo to hear Mikhak's new witnesses through direct and cross-examination. There was no need to reconvene with a full-blown rerun, as a new trial most often requires.

She filed the same motion to issue subpoenas to old and new witnesses, in the Ninth Circuit but her motions were denied. Instead of a flat denial of her request, the panel could have transferred her request to issue subpoenas back to the district court

The court never affirmatively placed an obligation on the opposing party to respond to Mikhak's discovery request.

The court should have shifted the burden of proof to the opposing party.

Initially, Mikhak had the burden of proof to show a nonfrivolous explanation for her delay, which she did. Then the court should have shifted the burden to them to show that the misbehavior had no prejudicial effect on the outcome of the litigation.

The panel departed from its own and other Circuit's precedent when it failed to apply the shift in burden. *Sellers v. Mineta*, 350 F.3d 706, 715 (8th Cir. 2003); *Tobel v. City of Hammond*, 94 F.3d 360, 362 (7th cir. 1996); *Diaz v. Methodist Hosp.*, 46 F.3d 492,

496 (5th Cir. 1995); *In re M/V Peacock on Complaint of Edwards*, 809 F. 2d 1403, 1404-05 (9th Cir. 1987); *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983); *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 371 (D.C. Cir. 1981); *Venture Indus. Corp. v. Autoliv ASP, Inc.* 457 F.3d 1322 at 1332.

Mikhak's circumstance was similar to *West* arising out of a helicopter accident where *West*, the plaintiff–appellant, claimed he was entitled to a new trial because after the jury's defense verdict, he discovered that the defendants–appellees withheld information. *West v. Bell Helicopter Textron, Inc.*, 803 F.3d 56, 67 (1st Cir. 2015). The First Circuit remanded his case for further proceedings because the judge misconstrued "the requirements of the FRCP 60(b)(3) *Anderson*'s burden-shifting inquiry when it failed to disclose discoverable information" *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir.1988).

Dal Cielo was under an obligation to promptly notify the court of the inaccuracies in the UOP's testimonies. See Mich. R. Profl Conduct 3.3(a)(4), *adopted by reference* Eastern District Mich. Local R. 83.22(b) ("If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."); *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 (Fed. Cir. 2005) ("Once counsel became aware that highly material false statements had been made by a witness....Schreiber and its counsel were under an obligation to promptly correct the record.").

Dal Cielo violated CA Rule 4.1 (Truthfulness) and the court should have issued sanctions to her and the UOP under FRCP 11(b) for acting "flagrantly, willfully, and in bad faith."

The judgment should have been rendered void, assigned this matter to a different judge, and ordered a new trial. If not a new trial and a new judge, then they should have at least vacated and remanded and concluded that the judge had committed an error of law in his application of FRCP 60(b)(3) because he failed to assume that the opposing party culpably withheld materials that should have been produced in discovery and because he placed the burden on Mikhak to prove substantial interference.

As said by this Court, a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Minneapolis, St. Paul & Ste. MR Co. v. Moquin*, 283 U.S. 520, 521-22, 51 S.Ct. 501, 502, 75 L.Ed. 1243 (1931).

The Ninth Circuit's disregard for the weight of evidence in support of Mikhak's contention is inconsistent with their role as a court of review and the deferential "abuse of discretion" standard of review.

The panel was obligated to review whether the district court abused its discretion if it relied on or had rested its decision on clearly erroneous findings of a material fact, applied the incorrect legal standard, and/or misapplied the correct legal standard. *United States v. Chambers*, 441 F.3d 438, 455 (6th Cir. 2006). FRCP 52(a). *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 930 (9th Cir. 2000). The panel had to address two questions: (1) Did Mikhak satisfy the threshold requirements for relief under FRCP 60(b)(3)? (2) If so,

would the granting of a new trial in her case effectuate any policy more significant than that of preserving the finality of judgments? *Engleson v. Burlington Northern Railroad Co.,* 972 F.2d 1038, 1043 (9th Cir. 1992).

Because the panel denied her motion to present New Analyses/Issues (**dkt.**27), they misapplied collateral estoppel and therefore violated Mikhak's fundamental, constitutional right of procedural due process as well as numerous Supreme Court decisions. Collateral estoppel, or "issue preclusion," only blocks an action if it is clearly established by the record that the issue was previously litigated "fully and fairly."

This Court briefly addressed what constitutes "a full and fair opportunity" in *Montana v. United States,* 440 US 147, 164, 99 S.Ct. 970, 59 L.Ed.2d 210, 223, fn. 11 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."). The appropriate deference federal courts have consistently paid to the right of due process embodied in the 5th and 14th amendments is reflected by the wording "in prior litigation."

The fraud issue has not been fully and fairly litigated in Mikhak's case. The Supreme Court emphasized that collateral estoppel violates due process where a party has ("never had a chance to present their evidence... due process prohibits estopping them.") *Blonder-Tongue Labs. v. University Foundation,* 402 US 313, 91 S.Ct. 1434, 28 L. Ed.2d 788, 800 (1971) The point is addressed in *Moore's Federal Practice, 3d.Ed.*: "unlike claim preclusion, issue preclusion does not prohibit a party from

litigating issues that were never argued or decided in the prior proceeding... even though those points might have been tendered and decided at that time" 132.02 [1].

A review of cases where FRCP 60(b)(3) motions have been granted shows that relief is granted only when the misconduct involves material, relevant evidence and when knowing about the misconduct actually could have made a difference, *see Abrahamsen v. Trans-State Express., Inc.,* 92 F.3d at 430 *Rozier v. Ford Mo,* 573 F.2d at 1339, 1342. If it was true that *faculty members* and *faculty candidates* were the same, then this information, for example, should have been disclosed before trial so her counsel could depose the witnesses. App.93-95.

Mikhak was entitled to relief because she adequately demonstrated: "(1) that she exercised due diligence in discovering the cause of misrepresentation, and (2) that her new analysis was material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir.1998).

The policy protecting the finality of judgments is not so broad as to require protection of judgments obtained in a fraudulent manner.

The policy of deterring discovery abuses, which assault the fairness and integrity of litigation, must be accorded precedence over the policy of putting an end to litigation.

"The aim of these liberal discovery rules is to 'make a trial less a game of blind man's bluff and more

a fair contest with the basic issues and facts disclosed to the fullest practicable extent'." *United States v. Proctor Gamble Co.,* 356 U.S. 677, 683, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958).

The opposing party sabotaged the "fair contest," which the Federal Rules of Civil Procedure are intended to assure. Instead of serving as a vehicle for finding the truth, the trial in Mikhak's case accomplished little more than the adjudication of "alternative facts" imposed by the opposing party's selective disclosure of information.

B. The Decision Below Is Incorrect Because It Is a Departure from This Court's Decision.

Mikhak did not participate in the delay tactics of her counsel and after she became convinced that they had abandoned her, lied to her, and were refusing to correct their mistakes/omissions in the record, she parted ways with them.

As a *pro se* litigant, Mikhak's extraordinary circumstance warranted her relief under FRCP 60(b)(6) Motions and penalizing her for counsel's egregious negligence is wrong.

Counsel's "gross negligence" can be grounds for relief under FRCP 60(b)(6), a catchall provision "to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993).

Courts are split on whether dismissal is proper where the client neither knew of nor participated in the attorney's dilatory tactics.

Mikhak's petition can be a vehicle to decide if a *pro se* litigant is responsible for the egregious negligence of her counsel because:

a. Mikhak's counsel refused to correct their mistakes/omissions in the record.

b. Mikhak expressed concern about the delay. But her counsel abandoned her and they would not return her calls, texts, and emails.

c. She had to ask them if they were still interested in representing her. Because two out of three responded "yes" through email and the third later showed his interest, she did not look for new counsel sooner.

d. They failed to provide her with pleadings to review before filing in court, as they had agreed to and had done initially.

e. Despite of her following up with them on their progress with drafting an appeal, they kept her out of the loop and didn't tell her that they had changed their minds about filing an appeal to the interlocutory order. They told her they were working on a draft, but they were not, sabotaging her chances to file an appeal sooner.

The Ninth Circuit held in two cases: (1) *Lal v. State of California*, 610 F.3d 518, 524-525 (9th Cir. 2010)—"attorney's gross negligence resulting in dismissal with prejudice for failure to prosecute constitutes an 'extraordinary circumstance' under

FRCP 60(b)(6) warranting relief from judgment," and (2) *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1102-1104 (9th Cir. 2006)—"... counsel's gross negligence is sufficient ground for FRCP 60(b)(6) relief in case of default judgment..."

The Ninth Circuit joined the Third, Sixth, and Federal Circuits in holding that an attorney's gross negligence constitutes such an extraordinary circumstance warranting relief. The attorney in *Community Dental Services v. Tani* "virtually abandoned his client ... and deliberately deceived his client about what he was doing (or not doing). 282 F.3d 1164 (9th Cir.2002)

Unlike *Al-Torki, Elias,* and *Pioneer,* Mikhak was not indifferent or negligent.

Unlike the plaintiffs in *Al-Torki, Elias,* and *Pioneer*, she parted ways with her counsel as soon as she became convinced of their gross negligence. *Al-Torki v. Kaempen,* 78 F.3d 1381, 1386 (9th Cir.1996); *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 113 S.Ct 1489, 123 L.Ed.2d 74 (1993). Also, *Pioneer, Elias,* and *Al-Torki* were given an opportunity to review the pleadings before filing them in court. But the last document Mikhak received from her counsel was **dkt**.18. All the other pleadings after that were filed in court without her review.

The obvious difference between *Elias* and Mikhak's case is that the court gave Elias' counsel the chance to have the final word

But Mikhak was denied sufficient time to file her "letter-reply" before the court dismissed her case. Elias was not a *pro se* litigant and his counsel was given more than one month to file supporting evidence, but failed to file in a timely manner, while Mikhak was just given one week.

The facts of Mikhak's case are strikingly different from *Pioneer's*

When the panel misapplied *Pioneer* to Mikhak's case, it departed from this Court's precedent. This Court's proper rejection of the Court of Appeals' rationale in *Pioneer,* that it was inequitable to saddle the client with the mistakes of its attorney, does not apply to Mikhak because the facts of her case are strikingly different from the facts in *Pioneer.* The panel's decision to penalize Mikhak for her counsels' mistakes/omissions was unfair because Mikhak was a victim of her counsel's gross negligence, abandonment, and deception. *Pioneer's* case is about what constitutes "excusable neglect"; *Pioneer's* attorney failed to file a timely proof of claim, which was not excusable. But unlike Mikhak, Pioneer did not show proof of his counsel's gross negligence.

I. The "actions or inactions" of Mikhak's attorneys

(A) Their initial omissions or mistakes were excusable.

Unlike *Pioneer,* initially Mikhak's counsel's negligence with the "missing" evidence may not have been because of indifference or willful. Initially, none

of them, including Mikhak, could have anticipated that Dal Cielo and her witnesses would present perjured testimonies, under oath, so her counsel rightly assumed that the arguments and evidence they presented would be sufficient proof that Mikhak identified as a *faculty candidate*; and initially, none of them anticipated that the court would neglect to study the Faculty Handbook directly, and would instead rely on perjured testimonies. It was not until after Mikhak learned about contract law that she realized why the opposing party had to first misrepresent her faculty status as a *faculty member*, before they could falsely argue that the arbitration agreement was valid. But Mikhak's counsel's inactions were not excusable later on when they refused to add the "missing" evidence to the record, during the trial. But Mikhak gave them the benefit of doubt until the end, before parting ways with them.

Even though she was not convinced by the excuse that one of her attorneys gave her: "these arguments may not get us anywhere because the current laws give the leverage to corporations" App.87. If this excuse was true, then that is another form of Fraud on the Court, where a judge overlooks the merit of the evidence brought by an individual in favor of corporate interests.

(B) "Delaying arbitration to 'track *Morris*'"

Mikhak's counsel argued that they were tracking how lower courts would handle *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016)—a decision issued on August 22, 2016—that effected a "change in law" for class action waivers.

Their delay was an "excusable neglect": (1) the timing of Justice Scalia's death, right before an election year, was an act of GOD which led to the confirmation of Justice Gorsuch; and (2) "tracking *Morris*" was done with the intention to save money, time, and resources and not with bad faith. They were not halting movement when they filed a request for leave to file a motion for reconsideration or stay. They sought delay to get a more just result. Also, Mikhak's request for an investigation was to move the case toward a merits resolution. *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1228 (9th Cir. 2006).

They were not concerned about this Court's affirming the Ninth Circuit's decision in *Morris*, they knew it was a change in law as soon as it was decided on. Their delay had to do with acting upon a law that they knew was very likely to change after the appointment of a new conservative justice. If this Court's prospective *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 584 U.S._, 200 L.Ed.2d 889 (2018) decision was in disfavor of *Morris*, then even if the court had ruled in Mikhak's favor, the UOP could have appealed based on the change in law. Whether or not their decision to delay in anticipation of a "cosmic shift in the jurisprudence" was negligent, the delay was something that Mikhak had repeatedly expressed her concern about but could not do anything about. Despite of their inaction, she could not fire them because they had told her they were still committed to her case.

II. Mikhak's own "actions or inactions"

(A) She was not indifferent or negligent and had reasons for not parting ways with her counsel.

Pioneer, despite of his business sophistication and his actual knowledge of the bar date, did not seem to have taken any action prior to the dismissal of his case. But Mikhak did. For example:

- Both *Pioneer* and Mikhak inquired about the deadline for filing, and they were both assured by their attorneys that there was no urgency. (ER2, page 100) But Mikhak was not negligent because she was the one who alerted the court of her attorneys' mistakes/omissions, and did so in a timely manner.

- *Pioneer* did not part ways with his counsel prior to the dismissal of his case. At first, Mikhak did not want to be suspicious and falsely accuse her counsel. She gave them a chance to turn things around. But once she became convinced that they were willfully sabotaging her, she parted ways with them. (ER2, page 106).

- *Pioneer's* ruling suggests that, the cause of both counsel and client's failure to file on time was indifference and negligence. But in Mikhak's case, her counsel had lied to her about the delay and their commitment.

(B) Mikhak's delay to initiate arbitration, as a *pro se* litigant, despite the Court's warning, was an "excusable neglect."

The judge's warning, when taken out of context, is not sufficient. Mikhak was not flouting; she felt

extremely cautious to move forward with arbitration because of Dal Cielo's history of defrauding the court. She even sent an email to her counsels to initiate arbitration, (ER2, page 106) which suggests her intention was to comply with the court's order. But she later realized she could no longer trust their representation.

Mikhak's case is distinguishable from those where the case was properly litigated to a conclusion, and the unsuccessful party then seeks on appeal to challenge the interlocutory order granting a new trial. *15B Charles A. Wright et al.*, Federal Practice and Procedure § 3915.5 (2d ed. 1992 & Supp.1995)

Unlike *Al-Torki*, Mikhak appeared in court every single time, and she did not put her adversary and the Court to the burden of preparing for trial.

Al-Torki has no application to the specific issues in Mikhak's case. 78 F.3d at 1386. The *Al-Torki* court found prejudice to a whole host of participants, such as "failure to appear for trial, without excuse" and after the judge was likely to have gone to considerable trouble.

The panel should have followed the Supreme Court's precedent in *Omstead v. Dell, Inc.* but it misapplied it to Mikhak's case by failing to recognize their striking similarities.

In *Omstead v. Dell, Inc.*, the district court found an abuse of discretion in dismissing a case in which the plaintiffs could not pursue arbitration, and that the

legal basis for being forced to arbitration should be reviewed. 594 F.3d 1081, 1084 (9th Cir. 2010). Thus, *Omstead* sets the standard of review here because the court of appeals reviewed a district court's order compelling arbitration *de novo*, and it reviewed a dismissal for failure to prosecute for abuse of discretion.

Just as in *Omstead,* where the plaintiffs asked the district court to stay the action pending this Court's ruling of a case that was crucial, her counsel asked the court to stay the action pending a ruling on *Morris v. Ernst & Young, LLP*, 834 F.3d 975 by the Supreme Court.

Mikhak was not refusing to prosecute her claim; if she was, she would have never sent an email to her counsel to initiate arbitration. She was only refusing to arbitrate her claim in a manner that could result in disaster. The panel could have construed the FRCP 41(b) dismissal as a FRCP 41(a)(2) voluntary dismissal with prejudice.

Mikhak's case does not fit the "aggravating factors" in *Ferdik v. Bonzelet* to bolster the decision to dismiss her case.

In *Ferdik v. Bonzelet*, the case was dismissed because Ferdik failed to amend his complaint, fixing "et al." 963 F.2d 1258 (9th Cir. 1992). At all stages of these proceedings the district court demonstrated more than adequate sensitivity to Ferdik's inexperience as a *pro se* litigant, and it also went out of its way to assist him. Ferdik was granted leave to file amendments; leave to file a second amended complaint; his motion for reconsideration of the

judgment was granted; and an earlier judgment of dismissal was vacated so he could refile a second amended complaint. Mikhak, however, was never granted such sensitivity and assistance, and the facts of her case did not fit any of the "aggravating factors" to bolster the decision to dismiss her case.

Mikhak was not personally responsible for the delay; and no action of Mikhak was to intentionally or contumaciously cause delay. *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1159 (5th Cir. 1985).

The panel overlooked the Supreme Court's precedent that instructs federal courts to liberally construe the "inartful pleading" of *pro se* litigants. *Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 175, 66 L.Ed.2d 163 (1980); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987); *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir.1986) (should treat *pro se* litigants with great leniency when evaluating compliance with the technical rules of civil procedure). *Ferdik* showed a pattern of negligence or indifference or history of noncompliance. But Mikhak did not.

The fact that the district court first allowed *Ferdik* an additional thirty days in which to amend his complaint constituted an attempt at a less drastic sanction to that of outright dismissal. Mikhak was not disobedient as in *Price v. McGlathery*, in which the plaintiff was given "one last opportunity" to comply with court orders, and after the plaintiff's failure to appear at the pretrial conference, the case was dismissed. 792 F.2d 472, 475 (5th Cir. 1986).

Mikhak's case was dormant for about eleven months, during which there was no activity, while *Ferdik's* dragged on for over a year and a half before it was finally dismissed. *Ferdik's* case consumed large amounts of the Court's valuable time that could have been devoted to other major and serious criminal and civil cases on its docket.

C. The panel's Decision Will Create an Intolerable Conflict Among the Nation's Lower Courts and It Must Be Corrected Immediately.

As a *pro se* litigant, Mikhak should be allowed excusable delay, knowing the judgment will be binding, and given she did not feel safe to initiate arbitration with an opposing counsel who had defrauded the court.

The Ninth Circuit was required to explicitly weigh on at least four of its five *Henderson* factors in favor of dismissal: (1) the public's interest in expeditious resolution of litigation; (2) judicial economy or the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the lack of less drastic sanctions. *Henderson v. Duncan,* 779 F.2d 1421 (9th Cir. 1986); *Ferdik v. Bonzelet,* 963 F.2d at 1260; *Oliva v. Sullivan,* 958 F.2d 272, 273-4 (9th Cir. 1992). Instead, it sacrificed reasoned analysis in departure from its own precedents in a nonpublished opinion, avoiding scrutiny.

Mikhak's petition can be a vehicle to decide on the appropriate standard of review to protect parties from unjustified and harsh dismissal of an entire cause of action.

Nothing justified the panel's decision to affirm the dismissal: (1) there is no evidence that the public was harmed by a stay in her case for this Court to grant certiorari and issue its decision on *Morris*; (2) the stay would not adversely affect the court's docket; (3) there was no risk of prejudice to the defendant; (4) the dismissal actually prevents disposition on the merits and it should be reversed; and (5) there were less drastic sanctions available. *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998) Mikhak's case could have been moved to the bottom of the calendar, or dismissed without prejudice, abeyance of the action, and conditional dismissal of the suit unless new counsel is secured. *In re Phenylpropanolamine (PPA) Products*, 460 F.3d at 1249–50

Dismissal is a harsh penalty, and it should only be imposed in extreme circumstances, as a last resort. *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1429 (9th Cir.1990); *Henderson v. Duncan*, 779 F.2d at 1423, "... only when the plaintiff's conduct has threatened the integrity of the judicial process [in a way which leaves] the court no choice but to deny that plaintiff its benefits" *McNeal v. Papasan* 842 F.2d 787, 790 (5th Cir.1988); *Dahl v. City of Huntington Beach*, 84 F3d 363, 366 (9th Cir. 1996). But Mikhak's conduct has not threatened the integrity of the judicial process.

The UOP was not expending any fees or time, so there was no prejudice to waiting. Dal Cielo presented no proof of an actual prejudice to the defendant (e.g.,

loss of evidence, faded memory of witnesses, etc.). Mikhak's case was not going to be resolved in a public forum so the stay would not adversely affect the management of the court's docket. The delay was not disrupting the orderly and expeditious disposition of cases. Besides, the court's need to manage its docket should not outweigh the plaintiff's right to have her day in court.

The FRCP 41(b) dismissals are rarely granted without adequate notice and opportunity for hearing. Because the court may not know all relevant facts related to a plaintiff's noncompliance, it should first provide her an opportunity to explain her circumstances. *Link v. Wabash R. Co.*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d. 7346 (1962).

Involuntary dismissals are judgments on the merits, the doctrine of *res judicata* bars relitigation, precluding plaintiffs from filing subsequent actions in federal court. If less severe sanctions are available, use of FRCP 41(b) is frowned upon by several appellate courts. *See Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 867-68 (3d Cir. 1984); *U.S. ex rel Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004)

Under the Ninth Circuit law, an appeal from a FRCP 41(b) dismissal does not permit review of interlocutory orders. "[t]hese ... are among the reasons why dismissal ... as a "harsh penalty ... to be imposed only in extreme circumstances." *Henderson v. Duncan*, 779 F.2d at 1423..

Circuit conflicts: there are widespread inconsistent standards for imposing FRCP 41(b) dismissals with prejudice for failure to prosecute.

The circuits are in conflict over what multifactor test would guide the district court's determinations. The panel utilized a test inconsistent with the Ninth Circuit's published test, and what is used in all other circuits.

The Second Circuit considers five factors: (1) the duration of the plaintiff's failures; (2) whether plaintiff received notice that further delays would result in dismissal; (3) whether the defendant is likely to be prejudiced by further delay; (4) striking a balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) the efficacy of lesser sanctions. See *Jackson v. City of New York,* 22 F.3d 71, 74 (2d Cir. 1994).

- Factor 4 is not part of the Ninth Circuit's analysis.

The Third Circuit considers six factors: (1) the extent of plaintiff's personal responsibility; (2) prejudice to defendant; (3) a history of dilatoriness; (4) whether the plaintiff's or attorney's conduct was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of plaintiff's claim. *Poulis v. State Farm Fire and Cas. Co.,* 747 F.2d at 868.

- Factors 3, 4, and 6 are not part of the Ninth Circuit's analysis.

The Seventh Circuit considers seven factors: (1) frequency and magnitude of the failure to comply with

deadlines; (2) apportionment of responsibility for the conduct between plaintiff and counsel; (3) effect of conduct on court's calendar; (4) probable merits of plaintiff's claim; (5) consequences of dismissal for the social objectives of the type of responsibility for the conduct between plaintiff and counsel; (6) prejudice to defendant; and (7) explicit warnings. *Ball v. City of Chicago,* 2 F.3d 752, 759-60 (7th Cir. 1993).

- Factors 1, 2, 4 and 5 are not part of the Ninth Circuit's analysis.

There is also a circuit split on the duration of the delay periods that are considered as "extreme". The panel did not apply the Ninth Circuit's mandate of finding an extreme.

Mikhak's case was dormant for about eleven months. The Second Circuit holds that dismissals are reserved for cases involving years of delay, not months. *Lewis v. Rawson,* 564 F.3d 569 (2d Cir. 2009). The FRCP 41(b) dismissal "must be supported by a showing of unreasonable delay." *Henderson v. Duncan,* 779 F.2d at 1423. For example, in *Boyle v. American Auto Service, Inc.*, the federal court had discretion to dismiss with prejudice, because, first, the delay was unexplained, and second, the delay was 44 months, about 3.6 years. (8th Cir. 2009) 571 F3d 734, 742 (8th Cir. 2009).

Finally, the D.C. Circuit has crystalized the issue by holding that a dismissal *sua sponte* of a *pro se* party for missing a deadline is an abuse when there is no evidence of bad faith, tactical delay, or deliberate misconduct. *Peterson v. Archsdtone Cmtys LLC,* 637 F.3d 416, 418 (D.C. Cir. 2011). This is exactly the factual situation herein: a *sua sponte* dismissal of a

pro se litigant who is blameless. The panel's decision herein is in direct conflict with the Ninth, Second, and D.C. Circuits for dismissing her case with no evidence of indifference, tactical delay, or bad faith.

CONCLUSION

For the foregoing reasons, please kindly grant this petition for certiorari.

Respectfully submitted,

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January 25, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAHAR MIKHAK, Plaintiff-Appellant, v. UNIVERSITY OF PHOENIX, INC., Defendant-Appellee.	No. 17-17535 D.C. No. 3:16-cv-00901-CRB Northern District of California, San Francisco ORDER (Filed Aug. 28, 2019)

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

Mikhak's motion to file an oversized petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 64) is granted.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Mikhak's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 63) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAHAR MIKHAK, Plaintiff-Appellant, v. UNIVERSITY OF PHOENIX, INC., Defendant-Appellee.	No. 17-17535 D.C. No. 3:16-cv-00901-CRB Northern District of California, San Francisco ORDER (Filed Jul. 25, 2019)

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

Mikhak's motion for clarification (Docket Entry No. 60) is denied.

Mikhak's motion for a third extension of time to file a petition for rehearing (Docket Entry No. 61) is denied. Any petition for rehearing remains due on August 1, 2019.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAHAR MIKHAK, Plaintiff-Appellant, v. UNIVERSITY OF PHOENIX, INC., Defendant-Appellee.	No. 17-17535 D.C. 3:16-cv-00901-CRB Northern District of California, San Francisco ORDER (Filed Jun. 25, 2019)

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

Mikhak's motion for a second extension of time to file a petition for rehearing (Docket Entry No. 58) is granted in part. Any petition for rehearing is due on August 1, 2019. No further extensions of time to file a petition for rehearing will be granted.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BAHAR MIKHAK, Plaintiff-Appellant, v. UNIVERSITY OF PHOENIX, INC., Defendant-Appellee.	No. 17-17535 D.C. No. 3:16-cv-00901-CRB MEMORANDUM* (Filed Apr. 24, 2019)

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted April 17, 2019**

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

Bahar Mikhak appeals pro se from the district court's judgment dismissing for failure to prosecute her employment action alleging federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010). We affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court did not abuse its discretion by dismissing Mikhak's action for failure to prosecute because Mikhak did not comply with the district court's orders directing Mikhak to initiate arbitration despite being warned that noncompliance could result in dismissal. *See id.* (discussing the five factors for determining whether to dismiss under Fed. R. Civ. P. 41(b) for failure to prosecute or comply with a court order); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (although dismissal is a harsh penalty, a district court's dismissal should not be disturbed absent "a definite and firm conviction" that it "committed a clear error of judgment" (citation and internal quotation marks omitted)); *see also Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 396 (1993) (holding that clients must be held accountable for the acts and omissions of their attorneys).

Because Mikhak's action was dismissed for failure to prosecute, we do not consider her challenges to the district court's interlocutory orders. *See Al-Torki v. Kampen*, 78 F.3d 1381, 1386 (9th Cir. 1996) ("[I]nterlocutory orders, generally appealable after final judgment, are not appealable after a dismissal for failure to prosecute[.]").

We do not consider documents not presented to the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not part of the record on appeal.").

We reject as unsupported by the record Mikhak's contentions that defendant and its counsel committed perjury, that defendant's counsel and the district court engaged in misconduct, or that Mikhak was denied an opportunity to file reply briefs in response to various filings by defendant.

Mikhak's motion to present new issues and analyses (Docket Entry No. 27) is denied.

Defendant's motion to strike (Docket Entry No. 35) is denied as unnecessary.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAHAR MIKHAK, Plaintiff-Appellant, v. UNIVERSITY OF PHOENIX, INC., Defendant-Appellee.	No. 17-17535 D.C. No. 3:16-cv-00901-CRB Northern District of California, San Francisco ORDER (Filed May. 22, 2018)

Before: W. FLETCHER and CALLAHAN, Circuit Judges.

Appellant's "motion to issue subpoenas for witnesses" (Docket Entry No. 16) is denied. No motions for reconsideration, clarification, or modification of this denial shall be filed or entertained.

The previously established briefing schedule remains in effect.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAHAR MIKHAK, Plaintiff, v. UNIVERSITY OF PHOENIX, Defendant.	Case No.3:16-cv-00901-CRB **ORDER DENYING REQUESTS FOR SUBPOENAS** (Filed Apr. 27, 2018)

The Court has received Plaintiff Bahar Mikhak's (1) "Motion for Subpoena of Those Who Were Faculty Candidates in My Cohort" (dkt. 75) and (2) "My Declaration of ALL the 'Alternate Facts' That Were Made Up About Me in the Previous Testimonies Given Under Oath" (dkt. 74), as well as "Declaration of My New Analysis" (dkt. 73). The Motion asks the Court to issue a subpoena for four individuals who were faculty candidates in Plaintiff's cohort, see Mot. at 1, while the "Alternative Facts" Declaration asks the Court "to issue a subpoena to the opposing party to better understand what they know, about each and every fact upon which, they based their assertion of these 'alternative facts,'" see Alternative Facts Decl. at 1. The New Analysis Declaration makes no specific request of the Court but explains Plaintiff's theory and her desire "to present a strong appeal to the Appellate Court." New Analysis Decl. at 1.

Plaintiff provides no legal basis for her requests, but the Court presumes that she seeks to avail herself

of Federal Rule of Civil Procedure 45. Rule 45(a)(2) provides that "[a] subpoena must issue from the court where the action is pending." Fed. R. Civ. Proc. 45(a)(2). This Court has dismissed Plaintiff's case, and Plaintiff has appealed the Court's ruling to the Ninth Circuit Court of Appeals. See Notice of Appeal (dkt. 52); Order of USCA (dkt. 72) (setting briefing schedule). Plaintiff's case is pending in the Ninth Circuit, not in this Court. Accordingly, the Court DENIES Plaintiff's requests for subpoenas.

IT IS SO ORDERED.

Dated: April 27, 2018

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAHAR MIKHAK, Plaintiff, v. UNIVERSITY OF PHOENIX, Defendant.	Case No.3:16-cv-00901-CRB **ORDER RE "PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE"** (Filed Dec. 21, 2017)

The Court has received "Plaintiff's Opposition to Defendant's Motion to Dismiss Without Prejudice" (dkt. 49).[1] As the Court's December 5, 2017 Order of Conditional Dismissal explained, this case has been dismissed, "provided, however, that if Plaintiff shall certify to this Court, within **thirty** days of this Order, that she has initiated arbitration, the foregoing Order shall stand vacated." See Conditional Dismissal Order (dkt. 47) at 2. Accordingly, the Court will not consider any submissions by the parties in this case, save and except for a certification from Plaintiff, filed on or before **January 4, 2018**, stating that she has initiated arbitration.

[1] No motion to dismiss is pending in this case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAHAR MIKHAK, Plaintiff, v. UNIVERSITY OF PHOENIX, Defendant.	Case No.3:16-cv-00901-CRB **ORDER OF CONDITIONAL DISMISSAL** (Filed Dec. 5, 2017)

The Court compelled arbitration of this case in June 2016. See Order re Arbitration (dkt. 27). The Court denied Plaintiffs untimely motion for reconsideration of that Order in August 2017. See Order re Reconsideration (dkt. 34). The Court denied Plaintiff's motion to stay in October 2017. See Motion Hearing (dkt. 43). At that hearing, the Court explained that it would dismiss Plaintiffs case on November 27, 2017, unless Plaintiff filed a declaration before that date representing that she had initiated arbitration, Id. Just before the November 27, 2017 deadline, instead of initiating arbitration, Plaintiff wrote a letter to the Court, asking for (1) "an extended continuance" to find new counsel with "no time pressure" due to personal circumstances, and (2) reconsideration of the Court's original order compelling arbitration. See Plaintiff Letter (dkt. 44). Defendant has responded to the letter, asking

the Court to dismiss the case for failure to prosecute. See Littler Letter (dkt. 46).[1]

The Court will not reconsider its June 2016 order compelling arbitration. Nor will the Court give Plaintiff a "no time pressure" extension to do something the Court compelled her to do nearly a year and a half ago. Plaintiff asserts that she has "been working on this case for 3 years" and that she does not want to "los[e] all [of her] investment in striving for justice." See Plaintiff Letter at 1. If Plaintiff wishes to pursue her case, she must do so in arbitration. See Order re Arbitration; see also Fidelity Philadelphia Trust Co. v. Pioche Mines Consol., Inc., 587 F.2d 27, 29 (9th Cir. 1978) ("It is a well established rule that the duty to move a case is on the plaintiff and not on the defendant or the court.").

Accordingly, this case is DISMISSED for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b); provided, however, that if Plaintiff shall certify to this Court, within thirty days of this Order, that she has initiated arbitration, the foregoing Order shall stand vacated and this case shall forthwith be restored to the calendar.

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[1] Plaintiff's counsel also submitted a motion to be relieved of further representation, asserting that Plaintiff has discharged them. See Admin. Mot. (dkt. 45). The Court addresses that motion separately.

IT IS SO ORDERED.

Dated: December 5, 2017

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BAHAR MIKHAK,
Plaintiff,
v.
UNIVERSITY OF PHOENIX,
Defendant.
/

No. C16-00901 CRB

ORDER GRANTING MOTION TO COMPEL ARBITRATION

(Filed Jun. 21, 2016)

Now pending is Defendant's Motion to Compel Arbitration. See generally Mot. (dkt. 14) at 2. Defendant University of Phoenix (hereafter "University") is a global higher education institution offering degree programs online and at more than 100 locations across the United States. Id. Plaintiff Bahar Mikhak is a former faculty candidate denied a full-time faculty position. Opp'n (dkt. 18) at 1–2. Upon denial, Mikhak filed unsuccessful employment discrimination claims with the Equal Employment Opportunity Commission. Compl. (dkt. 1) ¶¶ 16–17. Mikhak then filed a complaint in the Northern District of California alleging ten counts of unlawful discrimination on the basis of religion, and related claims in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e)-2(a)(1), the California Fair Employment and Housing Act, Cal. Gov't Code § 12940, and Article 1, Section 8 of the California Constitution. See generally Compl. The University now moves to compel arbitration in accordance with an agreement in the University Faculty

Handbook that Mikhak signed consenting to arbitrate all employment-related disputes. Mot. at 1.

As explained below, the Court hereby GRANTS the Motion to Compel Arbitration and STAYS the action pending the outcome of arbitration.

I. BACKGROUND

The University employed Mikhak for one quarter, from April 28, 2014, until October 13, 2014, as a faculty candidate at its Livermore, California, location. Compl. ¶ 13. During that time, Mikhak participated in the University's three-phased process for faculty hiring: the Assessment, Certification and Mentorship phases. Id. ¶ 21. As part of the Mentorship phase, Mikhak taught "Research Methods for Mental Health Counselors" under the supervision of her assigned mentor. Id. ¶¶ 23, 30.

On several occasions during her Certification and Mentorship phases, Mikhak alleges that she perceived bias against her on the basis of religion. See, e.g., id. ¶¶ 29, 33, 55. Mikhak is a Muslim Submitter of Iranian descent. Id. ¶ 11. In accordance with her beliefs and the daily exercise of her religion, whenever Mikhak contemplates a future action, she utters the phrase "God willing." Id. According to Mikhak, she first perceived bias during her second mock teaching demonstration, when the College Campus Chair, Dr. Ryan Berman, "stood outside [the classroom] . . . awkwardly staring at her." Id. ¶ 28. As her course progressed, Mikhak says that Berman subjected her to in-depth

inquiry, such as conducting unexpected classroom visits and questions about her pedagogical methods. See id. ¶¶ 30–55. At the same time, Berman allegedly demanded her to justify her utterance of "God willing," which he reported offended students. Id. ¶¶ 37–55. Mikhak contends that she faced repeated complaints that appeared religiously motivated, including that "students did not feel comfortable in the classroom," that she would retaliate against them in her grading, and that she changed her behavior when her mentor was present. Id. ¶ 64; see generally id. ¶¶ 47–75. According to her, these experiences detrimentally affected her health and well-being. Id. ¶ 67. At the end of Mikhak's Mentorship phase, despite a positive recommendation from her mentor, the University did not invite her to become a full-time faculty member. Id. ¶¶ 76–85.

The University provided Mikhak with its 2014–2015 Faculty Handbook, which included a new Dispute Resolution Policy and Procedure and a binding arbitration agreement. Mot. at 3. The arbitration agreement "applie[d] to any covered dispute arising out of or related to the faculty member's employment with and interactions with the University" and required resolution of all disputes "only by an arbitrator . . . and not by way of court or jury trial." Id. at 3–4. The University emailed a link to all faculty members and uploaded the document to its eCampus online web portal, "the main University interface between faculty and prospective faculty and his or her students." Id. All faculty members had to acknowledge receipt and understanding of

the handbook by clicking "Accept" on the "Faculty Acknowledgment Detail" webpage. Id. at 3.

According to Mikhak, the University first provided her with an outdated 2011–2012 handbook that lacked any information about arbitration. Mikhak Decl. (dkt. 18-1) ¶ 16. The University shared the updated 2014–2015 version with the provision included on February 28, one week before requiring acknowledgment. Id. ¶ 18; Mot. at 3. Mikhak clicked "Accept" and thereby acknowledged that she "agree[d] to arbitrate employment-related legal claims" on March 7, 2014. Mot. at 4. On September 27, 2014, Mikhak accepted an Addendum Acknowledgment to the handbook, the content of which was unrelated to the arbitration agreement, declaring a second time that she "underst[ood] and agree[d] to abide by the policies set forth in the 2014–2015 Faculty Handbook . . . [her] continued employment with the University is evidence of said agreement." Id. at 5.

After exhausting her administrative remedies to address her alleged discrimination, Mikhak filed her complaint on February 26, 2016. See generally Compl. The University's Motion to Compel Arbitration followed.

II. LEGAL STANDARD

The Federal Arbitration Act (FAA) provides that an agreement to submit commercial disputes to arbitration shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for

the revocation of any contract." 9 U.S.C. § 2. Such commercial disputes include the employment context. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001). The FAA places arbitration agreements on "an equal footing with other contracts and requires that private agreements to arbitrate are enforced according to their terms." Rent-A-Ctr. West, Inc. v. Jackson, 561 U.S. 63, 67 (2010) (internal citations omitted). A party may petition a court to compel "arbitration [to] proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

Generally "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986). However, courts have developed a "liberal federal policy favoring arbitration agreements." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). A district court's role under the FAA is limited to determining "(1) whether a valid agreement to arbitrate exists, and if it does, (2) whether that agreement encompasses the dispute at issue. If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000); see also Howsam v. Dean Witter Reynolds, 537 U.S. 79, 84 (2002).

Arbitration agreements are "a matter of contract" and "may be invalidated by generally applicable contract defenses, such as fraud, duress or unconscionability." Rent-A-Ctr., 561 U.S. at 67–68. Parties may

"agree to limit the issues subject to arbitration" and "to arbitrate according to specific rules." Concepcion, 563 U.S. at 345. "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 81 (2000).

III. DISCUSSION

The University's agreement stipulates that the FAA controls, which Mikhak does not contest. See Mot. at 3; Taylor Decl. Ex. B (dkt. 14-4) ¶ 1; Opp'n at 3. Rather, Mikhak disputes (A) the arbitrability of her claims; (B) the validity of the arbitration agreement; (C) the enforceability of the agreement on unconscionability grounds; and (D) the validity of the agreement to arbitrate Title VII claims. See generally Opp'n.

A. Arbitrability

The "gateway" question of arbitrability refers to "whether the parties have submitted a particular dispute to arbitration." Howsam, 537 U.S. at 83. See also Rent-A-Ctr., 561 U.S. at 68–89. "[T]he federal policy in favor of arbitration does not extend to deciding questions of arbitrability." Oracle Am., Inc., v. Myriad Grp., A.G., 724 F.3d 1069, 1072 (9th Cir. 2013). Courts should presume that they determine arbitrability absent "clea[r] and unmistakabl[e] evidence" that the parties agreed to delegate that question to an arbitrator. Howsam, 537 U.S. at 83; see also First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 939 (1995). Such clear

and unmistakable evidence can include "a course of conduct demonstrating assent . . . or . . . an express agreement." Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011) (omissions in text).[1] Courts should not necessarily resolve ambiguities regarding the delegation of arbitrability in favor of arbitration, see First Options, 514 U.S. at 944–45, nor should they apply "ordinary state-law principles that govern the formation of contracts" as they normally would, Momot, 652 F.3d at 987–88.

Here, the University argues that the agreement "clearly and mistakably delegates gateway issues of arbitrability to the arbitrator" because it covers all "disputes arising out of or relating to interpretation or application of this Arbitration Agreement." Mot. at 11. That the agreement incorporates the National Employment Arbitration Procedures of the American Arbitration Association (AAA), see Taylor Decl. Ex. B ¶ 3, further delegates arbitrability to the arbitrator. See Mot. at 11.

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[1] Some courts have also inquired as to whether the assertion of arbitrability is "wholly groundless." See Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006) (applying Ninth Circuit law); see, e.g., Galen v. Redfin Corp., No. 14-cv-05229-TEH, 2015 WL 7734137, at *5–*6 (N.D. Cal. Dec. 1, 2015) (Henderson, J.); Khraibut v. Chahal, No. C15-04463-CRB, 2016 WL 1070662, at *6 (N.D. Cal. Mar. 18, 2016) (Breyer, J.). Yet Ninth Circuit law has not explicitly required this second step, and many courts have not applied it in their analysis. See generally Brennan, 769 F.3d at 1130–32; see, e.g., Meadows v. Dickey's Barbecue Restaurants (Dickey's), No. 15-cv-02139-JST, 2015 WL 7015396 (N.D. Cal. Nov. 11, 2015) (Tigar, J.).

Brennan held that incorporation of AAA rules constituted clear and unmistakable evidence of intent to arbitrate arbitrability. Brennan v. Opus Bank, 769 F.3d 1125, 1130 (9th Cir. 2015). Oracle previously suggested that its arbitrability delegation rule applied only to agreements between "sophisticated parties." Oracle, 724 F.3d at 1075. Joining the "vast majority of the circuits," Brennan did not wish to "foreclose the possibility" that "unsophisticated" parties whose agreement incorporated AAA rules could also manifest clear and unmistakable evidence of intent to arbitrate arbitrability. Brennan, 796 F.3d at 1130–31. Nonetheless, the court left open the circumstances of unsophisticated parties raised by Oracle and said that it would not " . . . decide here the effect if any of incorporating AAA rules . . . into contracts of any nature between unsophisticated parties." Id. at 1131 (internal quotations omitted); see also Oracle 724 F.3d at 1075 n.2. The court "limit[ed]" its holding to an arbitration clause between two "sophisticated parties" in that case, "an experienced attorney and businessman . . . who executed an executive-level employment contract" and "a sophisticated, regional financial institution." Brennan, 796 F.3d at 1131. Incorporation of AAA rules sufficed to show their intent to delegate arbitrability. Id.

Subsequent to Brennan, district courts within the Ninth Circuit have not resolved if unsophisticated parties can possess the clear and unmistakable evidence of intent to arbitrate.[2] In Dickey's, the court ruled that

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[2] Compare Money Mailer, LLC, v. Brewer, No. C15-1215RSL, 2016 WL 1393492, at *3 (E.D. Wash. Apr. 8, 2016)

an assessment of clear and unmistakable intent to arbitrate between two parties must "first consider the position of those parties." See Meadows v. Dickey's Barbecue Restaurants (Dickey's), No. 15-cv-02139-JST, 2015 WL 7015396, at *6 (N.D. Cal. Nov. 11, 2015) (Tigar, J.) (quoting Rent-A-Ctr., 516 U.S. at 70 n.1 ("explaining that the 'clear and unmistakable' requirement is an 'interpretive rule,' based on an assumption about the parties' expectations")). The Dickey's plaintiffs represented a putative class of franchisees and owners of Dickey's Barbeque Restaurants. Id. at *1. Dickey's moved to compel arbitration based on a franchise agreement that encompassed "all disputes . . . arising out of or relating to this agreement" and "incorporate[d] by reference the commercial rules of the AAA." Id. at *4–*5. The court concluded that it was unreasonable to expect that an "inexperienced individual, untrained in the law," would understand that the language of an arbitration agreement provided clear and unmistakable evidence of arbitrability. Id. at *6. The

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(Lasnik, J.) (on appeal); Vargas v. Delivery Outsourcing, LLC, No. 15-cv-03408-JST, 2016 WL 946112, at *7–*8 (N.D. Cal. Mar. 14, 2016) (Tigar, J.); Dickey's, 2015 WL 7015396, at *5–*7 (Tigar, J.); E & E Co., Ltd. v. Light in the Box Limited, No. 15-cv-00069-EMC, 2015 WL 5915432, at *7 (N.D. Cal. Oct. 9, 2015) (Chen, J.); (all finding the delegation clauses at issue unenforceable and thereby reserving arbitrability questions for the court); with Khraibut, 2016 WL 1070662, at *6 (Breyer, J.), Shierkatz Rllp v. Square, Inc., No. 15-cv-02202-JST, 2015 WL 9258082, at *6 (N.D. Cal. Dec. 17, 2015) (Tigar, J.); Galen, 2015 WL 7734137, at *7 (Henderson, J.); Baysand Inc. v. Toshiba Corp., No. 15-cv-02425-BLF, 2015 WL 7283651, at *6 (N.D. Cal. Nov. 19, 2015) (Freeman, J.) (all finding clear and unmistakable evidence to delegate arbitrability).

individual Dickey's plaintiffs were "each far less sophisticated than Dickey's," and had to agree to a "complicated, 60-page agreement drafted by Dickey's"; they apparently had no "legal training or experience dealing with complicated contracts." Id. Because these parties were not sophisticated, the court held that the Brennan rule did not apply in this context, and the court reserved the question of arbitrability rather than delegating it to an arbitrator. Id. at *7.

Conversely, Galen upheld an arbitrability delegation clause in an independent contractor agreement signed between the employer Redfin and the plaintiff. Galen v. Redfin Corp., No. 14-cv-05229-TEH, 2015 WL 7734137, at *7 (N.D. Cal. Dec. 1, 2015) (Henderson, J.). The agreement encompassed "[a]ll disputes among the parties" and incorporated AAA rules. Id. at *1 ("Any arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect"). The court found that the plaintiffs possessed "at least a modicum of sophistication" because they were real estate agents required to obtain a professional license. Id. at *7. This enabled the court to rule that the parties clearly and unmistakably delegated arbitrability. Id.

Also, in Khraibut, this Court enforced a delegation clause in a non-disclosure agreement between an entrepreneur and the defendant founder of the technology start-up firm Gravity4. Khraibut v. Chahal, No. C15-04463-CRB, 2016 WL 1070662, at *6 (N.D. Cal. Mar. 18, 2016) (Breyer, J.). The agreement stipulated that "any disputes or controversies . . . shall be subject

to binding arbitration" that would be "administered by the [AAA] in accordance with its Rules." See id. at *1. The Court followed Brennan and "defer[red] to the AAA's Rules on arbitrability." Id. at *5. The Khraibut plaintiff was "at least minimally sophisticated," as he was a "savvy entrepreneur in his own right" with previous "dealings in the business world." Id. at *6. Consequently, the Court found that there was "clear and unmistakable evidence of delegation." Id.

The Court first considers the "gateway" question of arbitrability in the instant case. See Rent-A-Ctr., 561 U.S. at 68–69. The University's arbitration agreement "applies to any covered dispute arising out of or related to the faculty member's employment with and interactions with the University . . . [including] disputes arising out of or relating to interpretation or application" of the agreement. Taylor Decl. Ex. B. ¶ 1. The University argues that this broad clause "clearly and unmistakably" demonstrates the parties' intent to arbitrate arbitrability. See Mot. at 11; Reply (dkt. 21) at 4. Mikhak does not directly dispute the arbitrability of the agreement except by seeking to invalidate it through standard contract law defenses, such lack of mutual assent. See Opp'n at 4. Notwithstanding the question of assent to the contract, discussed infra Section B, the presence of an "express agreement" itself is potentially enough to establish potentially clear and unmistakable evidence of intent to arbitrate arbitrability. See Momot, 652 F.3d at 988. Also contrary to Mikhak's briefing, the arbitrability inquiry should not

turn on ordinary contract defenses. See Opp'n at 4; Momot, 652 F.3d at 987–88.

Here, the broad nature of the arbitration agreement should not weigh heavily in the analysis. The agreement's language of "any covered dispute" is similar to the broad language in the challenged clauses in Dickey's, Galen, and Khraibut. See Dickey's, 2015 WL 7015396, at *2; Galen, 2015 WL 7734137, at *1; Khraibut, 2016 WL 1070662, at *1. More critical is whether the parties are "sophisticated," and if that finding is dispositive. There is little question that the University qualifies as a sophisticated party. It operates online and at more than 100 locations across the U.S. and worldwide. Mot. at 2. On the other hand, courts have been unclear on whether a non-law professor qualifies as a sophisticated party in the arbitrability and employment context (if, indeed, sophistication is required). Mikhak is a former researcher and only recently started to apply to teaching positions. Mikhak Decl. ¶ 29. She possesses graduate degrees in Epidemiology and Biostatistics, and Genetic and Molecular Epidemiology, and she has taught epidemiology courses online and in person. Compl. ¶¶ 25–26. Mikhak likely had previously signed employment contracts with universities, and she is undoubtedly intelligent. As an experienced professor, she might have the sufficient "modicum of sophistication" to express intent to arbitrate arbitrability. See Galen, 2015 WL 7734137, at *7. Yet based on her field of study, concluding that she is sophisticated in this context is more difficult. She is not a "savvy entrepreneur" with prior "dealings in the

business world," see Khaibut, 2016 WL 1070662, at *6, she does not possess a professional license in a legal or related field, see Galen, 2015 WL 7734137, at *7, and she certainly is not an "experienced attorney and business[wo]man," see Brennan, 796 F.3d at 1131. Her situation might be more analogous to the inexperienced Dickey's plaintiffs who had no evidence of "legal training or experience dealing with complicated contracts," and who had to sign a "complicated, 60-page agreement" replete with "a myriad of legal terms." See Dickey's, 2015 WL 7015396, at *6. Mikhak had to accept electronically "a number of terms" presented in response to "a number of documents" related to her hiring, including the 2014–2015 Faculty Handbook, which she felt was "misleading" and contained "inconsistencies." Mikhak Decl. ¶¶ 9, 15. Such a barrage of materials might understandably seem confusing to an individual without experience reviewing legal documents or negotiating employment contracts. Because the courts remain divided on whether parties must be sophisticated to delegate arbitrability and because Mikhak's sophistication is subject to dispute, it is not certain that Mikhak clearly and unmistakably delegated arbitrability. Absent that evidence, courts should not presume delegation of arbitrability. See Howsam, 537 U.S. at 83. The Court therefore reserves its authority to determine arbitrability and refuses to delegate that question to the arbitrator.

B. Valid Contract

Even if courts reserve the determination of arbitrability, they can still enforce the remainder of the arbitration agreement by applying state-law contract principles. See Rent-A-Ctr., 561 U.S. at 70–71, 79. Under the FAA, arbitration agreements can be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Yet the FAA controls to "ensur[e] that private arbitration agreements are enforced," as nothing in Section 2 "preserve[s] state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Concepcion, 563 U.S. at 343–44. The FAA preempts "[a]ny general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration." Mortensen v. Bresnan, 722 F.3d 1151, 1159 (9th Cir. 2013).

In California, a valid contract exists if (1) the parties are "capable of contracting"; (2) they manifested "[t]heir consent" to be bound; (3) there was a "lawful object"; and (4) there was "sufficient cause or consideration." Cal. Civ. Code § 1550; United States ex. rel. Oliver v. The Parsons Co., 195 F.3d 457, 462 (9th Cir. 1999). The parties do not contest their capacity to contract, see Mot. at 10; see generally Opp'n at 4–7, the presence of a lawful object, see Mot. at 9; see generally Opp'n at 4–7, or the existence of consideration, see Mot. at 9–10; see generally Opp'n at 4–7. Therefore, the critical issue is if the parties mutually consented to the agreement, and if as a faculty candidate, Mikhak falls within its scope.

1. Mutual Assent

Contracting parties manifest mutual assent when a "specific offer is communicated to the offeree, and an acceptance is subsequently communicated to the offeror." Netbula, LLC v. BindView Dev. Corp., 516 F. Supp. 1137, 1155 (N.D. Cal. 2007) (Jenkins, J.); see also Restatement (Second) of Contracts § 17 (Am. Law Inst. 1981). It is determined through the "reasonable meaning of the words and acts of the parties." Netbula, 516 F. Supp. at 1155. Mikhak accepted the terms of the arbitration agreement by expressly clicking "Accept" on the Faculty Acknowledgment Detail on March 7, 2014, and September 27, 2014. See Mortensen Decl. (dkt. 14-3) ¶¶ 7–8. This indicated that she "underst[ood] and affirm[ed] that by clicking 'accept,'" she agreed "to arbitrate employment-related claims" and to "waiv[e] [her] right to have such claims decided by a judge or jury in federal or state court." Id. Ex. 3. Mikhak acknowledges that she clicked "Accept" to the faculty handbook, but asserts that her acceptance was "prior to the UOP educating the faculty candidates on the [new] Faculty Handbook" which included the arbitration agreement for the first time. Mikhak Decl. ¶ 19. She received email notice on February 28, 2014, that the new handbook was available and would be effective on March 7. See Taylor Decl. Ex. A. She therefore had one week to review the handbook, which should have been sufficient.

According to Mikhak, a valid contract requires "the terms establishing what is covered in the contract." See Opp'n at 4. The University fulfilled this

requirement by making available the handbook that included the arbitration agreement. In California, an employee can agree to arbitration by "signing an acknowledgment form that incorporates the employer's employee handbook and the arbitration policy it contains" as long as "the terms of the incorporated document . . . [are] known or easily available to the contracting parties." Avery v. Integrated Healthcare Holdings, Inc., 218 Cal. App. 4th 50, 66 (Ct. App. 2013); see also Ashbey v. Archstone Prop. Mgmt, Inc., 612 Fed. Appx. 430, 431 (9th Cir. 2015). The email to notify Mikhak and other faculty members made the terms easily available by providing a link to the updated handbook. See Taylor Decl. Ex. A. ("You can access the Faculty Handbook here"). In clicking "Accept" to the Faculty Acknowledgment Detail and the Addendum Agreement, Mikhak consented twice to "understand[ing] and agree[ing] to abide by the policies set forth in the 2014–2015 Faculty Handbook." Mortensen Decl. Exs. 3, 6. Moreover, Mikhak's continued employment after receiving the revised handbook demonstrates her assent to the terms. See Davis v. Nordstrom, Inc., 755 F.3d 1089, 1093 (9th Cir. 2014) ("Where an employee continues in his or her employment after being given notice of the changed terms or conditions, he or she has accepted those new terms or conditions.").

Mikhak's argument that she failed to assent because there was "no written document with signatures affixed to the last, or any page" is also not persuasive. See Opp'n at 4. Electronic signatures and clicking "Accept" are valid means of expressing assent to a

contract. See Cal. Civ. Code § 1633.7(b) (adopting the Uniform Electronic Transactions Act (UETA) and stating that "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation"); see, e.g., Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 22 n.4 (2d Cir. 2002) (Sotomayor, J.) (finding that "clicking on a webpage's clickwrap button . . . has been held by some courts to manifest an Internet user's assent to terms");[3] Tabliabue v. J.C. Penney Corp., 15-cv-01443-SAB, 2015 WL 8780577, at *2 (E.D. Cal. Dec. 15, 2015) (finding that an electronic signature is sufficient to render a valid arbitration contract).

At the motion hearing, Mikhak suggested that under the UETA, the parties must agree that an electronic signature is valid. California's statute adopting the UETA "applies only to a transaction between parties each of which has agreed to conduct the

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[3] Mikhak's counsel did not recall the name of this Second Circuit case at the motion hearing, and offered to submit it following the hearing; the Court explained that it would not allow the introduction of new authorities at that point. Nonetheless, counsel submitted the citation in a letter following the hearing, Pl.'s letter of 6/16/2016 (dkt. 25), and the University objected, Def.'s letter of 6/16/2016 (dkt. 26). Setting aside the propriety of the submission, the Court finds Specht both distinguishable and unfavorable to Mikhak. That case dealt with an arbitration clause in a scrolling webpage acceptance. See Specht, 306 F.3d at 21–25. Specht held that in California, clicking on a button "does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking . . . would signify assent to those terms." Id. at 29–30. Here, the University made it clear that "by clicking 'accept' below I am agreeing to arbitrate employment-related legal claims. . . ." See Mortensen Decl. Ex. 3.

transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." Cal. Civ. Code § 1633.5(b) (emphasis added). Mikhak's counsel referred the Court to J.B.B. Investment Partners, Ltd. v. Fair, 232 Cal. App. 4th 974, 990–91 (Ct. App. 2014), wherein the court held that a defendant's printed name at the end of an email did not amount to an electronic signature sufficient to enforce settlement terms to which the parties allegedly agreed. While the court agreed that "a printed name or some other symbol might, under specific circumstances, be a signature under the UETA," "[a]ttributing the name on an e-mail to a particular person and determining that the printed name is '[t]he act of [this] person' is . . . insufficient, by itself, to establish that it is an 'electronic signature.'" Id. at 988–89. Electronic signatures must be "executed or adopted by a person with the intent to sign the electronic record." Id. at 989 (quoting Cal. Civ. Code § 1633.2(h)). Printing one's name at the end of an email did not evince "any intent to formalize an electronic transaction." Id.

The circumstances here differ from Fair. The University's agreement did not require Mikhak's signature but that she click "Accept" on the Faculty Acknowledgment Detail. See Mortensen Decl. ¶¶ 4–6. The Court determines Mikhak's intent to agree electronically "from the context and surrounding circumstances." See Cal. Civ. Code § 1633.5(b). By clicking "Accept," Mikhak manifested intent to "acknowledge" having read the

handbook and to "understand and agree to abide by the policies set forth" in it. See Mortensen Decl. Ex. 3. Her conduct therefore demonstrated intent "to conduct the transaction by electronic means," see Cal. Civ. Code § 1633.5(b), unlike the simple signing of an email in Fair. See Fair, 232 Cal. App. 4th at 981. By clicking "Accept" on two separate occasions, Mikhak assented to the terms of the arbitration agreement.

2. Contract's Scope

Mikhak next argues that when she clicked "Accept," she understood that the handbook's policies would apply to her only once she became a full-time faculty member. See Opp'n at 5. She asserts that while she was still in the Mentorship phase, she was not yet a "'current' Faculty member" but "considered a 'Faculty candidate.'" Mikhak Decl. ¶ 24.

Whether Mikhak qualifies as a faculty member within the scope of the agreement is a question of contract interpretation. In California, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Courts should construe a contract's language "in the context of that instrument as a whole, and in the circumstances of that case." Cty. of San Diego v. Ace Prop. & Cas. Ins. Co., 37 Cal. 4th 406, 415 (2005).

Mikhak's interpretation is wrong for two reasons. First, by construing the language of the overall handbook "in the context of that instrument as a whole," see

Ace Prop., 37 Cal. 4th at 415, it is clear that faculty candidates who teach a course—like Mikhak, who worked "for one quarter as a faculty candidate of one course"—count as members of the Associate Faculty included in the Faculty Model. See Compl.¶ 13; Mot. at 3; Opp'n at 1; Mikhak Decl. Ex. B. The "Faculty Model," which is the "experienced team of faculty who are involved in the faculty governance and teaching activities," includes "Core Faculty (full-time) and Associate Faculty." Taylor Decl. (dkt. 21-1) ("Taylor Decl. II".) Ex. A. The Core Faculty comprises "Full-Time Faculty, Administrative Faculty and the Lead Faculty," whereas the "Associate Faculty" includes "[t]he remainder of the faculty, those whose teaching assignments are based on individual courses and activities." Id. At the motion hearing, Mikhak cited seventeen instances in the handbook in which the language apparently distinguishes between faculty members and faculty candidates. For example, Mikhak apparently interpreted the language in Section 8.1, that "Faculty candidates are invited to join the faculty after successful completion of both certification and a mentorship course," to mean that she was not yet a faculty member. See Mikhak Decl. ¶ 25 & Ex. B ("8.1 Active Faculty Status"). Yet her interpretation is inconsistent with the rest of the handbook. As the University observes, "faculty member" is an umbrella term used throughout the handbook to apply to numerous provisions relating to those individuals in a teaching capacity. See Reply at 6–7; see also Taylor Decl. II Ex. A. The specific instances her counsel cited fail to alter the interpretation of "faculty" defined in the "Faculty Model," see

Taylor Decl. Ex. A, when "the whole of the contract is . . . taken together," see Cal. Civ. Code § 1641. Additionally, Mikhak agreed to a characterization of herself as a faculty member when she accepted the electronic agreement entitled "Faculty Acknowledgment Detail," and when she signed various hiring forms. See Mortensen Decl. Ex. 3; Taylor Decl. II ¶ 3.

Second, Mikhak's subjective misunderstanding is irrelevant because in California, "the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties . . . controls interpretation." Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 956 (Ct. App. 2003). Despite Mikhak's subjective intent to accept the terms of the handbook "if and when I would become a faculty member, not while being a faculty candidate," the text of the handbook does not stipulate as such. See Mikhak Decl. ¶ 22; see generally Taylor Decl. Ex. B. The agreement's language objectively binds all faculty members, including candidates like Mikhak. See Taylor Decl. Ex. B ¶ 1. Therefore, the Court finds that the parties manifested mutual assent and formed a valid contract.

C. Unconscionability

Mikhak also requests that the Court deny the Motion to Compel on the grounds that the arbitration agreement is unconscionable and therefore unenforceable. See Opp'n at 7. As noted in Section B, supra, the FAA generally preempts state-law contract defenses

like unconscionability. See Mortensen, 722 F.2d at 1159. Nonetheless, "[u]nder the FAA, these defenses may provide grounds for invalidating an arbitration agreement if they are enforced evenhandedly and do not interfere with fundamental attributes of arbitration." Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 906 (2015) (internal quotations omitted). Even assuming against FAA preemption, the Court finds the contract not unconscionable.

Courts may refuse to enforce a contract or a specific clause within it when at the time of its formation it was unconscionable, or they may limit the application of any unconscionable clause. Cal. Civ. Code. § 1670.5(a). Unconscionability refers to "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Sanchez, 61 Cal. 4th at 910. Unconscionability has both procedural and substantive elements and "is a valid reason for refusing to enforce an arbitration agreement." Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000). Procedural unconscionability focuses on the "manner in which the contract was negotiated and the circumstances of the party at the time," Kinney v. United Healthcare Servs., Inc., 70 Cal. App. 4th 1322, 1329 (Ct. App. 1999), and is composed of two factors: oppression and surprise "due to unequal bargaining power." Armendariz, 24 Cal. 4th at 114. Oppression derives from a lack of "real negotiation and an absence of meaningful choice," whereas surprise arises from the terms of the bargain "hidden in a prolix printed form,"

Bruni v. Didion, 160 Cal. App. 4th 1272, 1288 (2008), or drafted in "fine-print terms," Sanchez, 61 Cal. 4th at 911. Substantive unconscionability focuses on the "terms of the agreement and whether those terms are so one-sided as to shock the conscience." Kinney, 70 Cal. App. 4th at 1330. An arbitration provision is substantively unconscionable if it is "overly harsh" or generates "one-sided results." Armendariz, 24 Cal. 4th at 114. Both procedural and substantive unconscionability must be present before a court may refuse to enforce a contract, but they need not be present to the same degree. Armendariz, 24 Cal. 4th at 114. A sliding scale applies such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." Id.

1. Procedural Unconscionability

In California, courts consider adhesive contracts—standardized contracts in which the party with lesser bargaining power lacked an opportunity to negotiate—procedurally unconscionable to some degree. Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1004 (9th Cir. 2010). Yet adhesive contracts are not per se unconscionable, see Sanchez, 61 Cal. 4th at 914; courts can only refuse to enforce those that are "unduly oppressive." See Armendariz, 24 Cal. 4th at 113. In Armendariz, the California Supreme Court found that an arbitration clause requiring employees to arbitrate discrimination claims was adhesive and unconscionable because "[i]t was imposed on

employees as a condition of employment and there was no opportunity to negotiate." Id. at 114–15.

Also, in Circuit City, the Ninth Circuit found that an arbitration clause in a California employment contract was procedurally unconscionable because it was a "contract of adhesion." Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002). The "standard-form contract drafted by the party with superior bargaining power," which job applicants "were not permitted to modify," was a "prerequisite to employment." Id. Ingle held a similar arbitration clause signed by a separate employee also procedurally unconscionable because of the "stark inequality of bargaining power" between Circuit City and the employee. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003). That the job applicant had three days to consider the terms of the agreement before signing it was "irrelevant" because "the availability of other options does not bear on whether a contract is procedurally unconscionable." Id. at 1172. The employee had no "meaningful opportunity to decline . . . the arbitration agreement," which the employer presented on an "adhere-or-reject basis." Id. Thus the agreement was procedurally unconscionable. Id.

The arbitration clause here is at least somewhat procedurally unconscionable due to its oppressive nature. The University argues that an adhesive contract involves the imposition of "coercive pressure to sign" by the party with superior bargaining power. Reply at 10 (citing King v. Larsen Realty, Inc., 121 Cal. App. 3d 349, 358 (Ct. App. 1981)). As noted above, though,

procedural unconscionability only requires "an absence of meaningful choice" in the bargaining process, which is likely present here. See Bruni, 160 Cal. App. 4th at 1288. Mikhak contends that the arbitration agreement was adhesive because she "had to acknowledge and accept the arbitration policy if [she] desired to keep on working at UOP." Opp'n at 9. Mikhak received "a number of documents" concerning her hiring, including the handbook. Mikhak Decl. ¶ 9. It is probably "irrelevant" that Mikhak had received the corrected version one week before accepting it. See Ingle, 328 F.3d at 1172 (declaring "irrelevant" the three-day period the employee had). Mikhak had to express "prompt digital acknowledgment" of the new Faculty Handbook to avoid being "locked out of eCampus." Taylor Decl. Ex. A. The eCampus web portal enabled faculty members to "manage their classes . . . check their class rosters, post grades, and receive student assignments" and served as "their main interface with the University and with their students." Taylor Decl. ¶ 5. While barring continued usage of eCampus for failing to accept the arbitration provision is not the same burden as making agreement to a clause a prerequisite to employment, like in Armendariz or Adams, it likely would severely impede faculty members like Mikhak from carrying on their class activities. See Armendariz, 24 Cal. 4th at 114–15; Adams, 279 F.3d at 893. Moreover, Mikhak lacked any chance to negotiate the terms of the agreement, and the agreement did not enable faculty members to adjudicate their disputes outside of arbitration. See generally Taylor Decl. Ex. B. This is just like in Armendariz, Adams and Ingle, where the employees

had no opportunity to negotiate the terms of the agreement. See Armendariz, 24 Cal. 4th at 114–15; Adams, 279 F.3d at 893; Ingle, 328 F.3d at 1171. The University presented Mikhak with the arbitration agreement on an "adhere-or-reject basis." See Ingle, 328 F.3d at 1171.

On the other hand, the arbitration clause did not involve much "surprise." The University emailed a link to the handbook explicitly instructing recipients to "pay special attention to the new information in the following subsections . . . Section 3.13: Dispute Resolution Policy and Procedure," which included the binding arbitration clause. Taylor Decl. Ex. A. The Faculty Acknowledgment Detail emphasized this provision as well. See Mortensen Decl. Ex. 3 ("[B]y clicking 'Accept' below I am agreeing to arbitrate employment-related legal claims. . . ."). This does not constitute hiding the agreement among "prolix" code, see Bruni, 160 Cal. App. 4th at 1288, or in "fine-print terms," see Sanchez, 61 Cal. 4th at 911. Mikhak also does not state that she was unaware of the clause's presence. See Mikhak Decl. ¶ 18. Therefore, the agreement likely failed to surprise.

Based on the slightly oppressive nature of the adhesive agreement, the Court finds a minimal amount of procedural unconscionability. However, "the agreement will be enforceable unless the degree of substantive unconscionability is high." Peng v. First Republic Bank, 219 Cal. App. 4th 1462, 1472 (2013).

2. Substantive Unconscionability

Mikhak argues that the agreement is substantively unconscionable because: (a) the University could "unilaterally revise the agreement"; (b) it had "control of the selection of the arbitrator"; (c) it "d[id] not state that the University would be responsible for all arbitration costs" and "seem[ed] to saddle the administrative costs on the employee"; (d) it had a "lack of "mutuality or bilaterality" in the class action waiver; and (e) it "force[d] confidentiality of . . . all aspects of the arbitration."[4] Opp'n at 9–10.

a. Unilateral modification

First, the University has the power to "unilaterally revise the agreement." Opp'n at 9. Armendariz held that an arbitration agreement must possess a "modicum of bilaterality" whereby both the employers and the employees could arbitrate their disputes. Armendariz, 24 Cal. 4th at 117. Bilaterality affects the questions of the unilateral modification clause and the class action waiver. In Ingle, the Ninth Circuit ruled that the employer's unilateral modification clause was substantively unconscionable because it "grant[ed] itself the sole authority to amend or terminate the arbitration agreement." Ingle, 328 F.3d at 1179; see also Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 926

[4] Mikhak does not specifically refer to substantive unconscionability in making these arguments. See Opp'n at 9–10. They nonetheless deal with "the terms of the agreement," see Kinney, 70 Cal. App. 4th at 1330, and therefore the Court considers them in the context of substantive unconscionability.

(9th Cir. 2013) (affirming the rule in Ingle). The Ingle agreement required notice of any change through "'posting a written notice by December 1 of each year at all Circuit City locations.'" Ingle, 328 F.3d at 1179 n.21. This "exiguous notice" was "trivial" because it gave the employee "no meaningful opportunity to negotiate the terms of the agreement." Id. at 1179.

On the other hand, Slaughter v. Stewart Enters. Inc., No. C07-01157-MHP, 2007 WL 2255221, at *10 (N.D. Cal. Aug. 3, 2007) (Patel, J.), the court found that a unilateral modification clause was not substantively unconscionable. . The challenged clause stated that the employer would not modify the agreement "without notifying [the employee] and obtaining [his/her] consent," but it "may change or modify the procedures from time to time without advance notice." Id. The clause pertained to the contract as a whole, not to the specific arbitration provision. Id. According to the court, "similar modification provisions—even where they grant an employer the unilateral right to modify the terms of the contract without providing advance notice—are not substantively unconscionable." Id. The modification clause "was limited by the duty to exercise the right of modification fairly and in good faith," and thus was not unconscionable "as a matter of law." Id.

In Mohamed v. Uber Tech., Inc., 109 F. Supp. 3d 1185, 1228–30 (N.D. Cal. 2015) (Chen, J.), the court wrestled with this question and the previous two conflicting cases. Mohamed v. Uber Tech., 109 F. Supp. 3d at 1228–30. The clause at issue permitted Uber to modify the terms and conditions of the employee

agreement "at any time," including the arbitration provision. Id. at 1228. The duty of good faith described in Slaughter failed to persuade the court that Uber would not impose "all one-sided modifications." Id. at 1229. This could enable the drafting party to "abus[e] its modification power to render a contract unfairly one-sided." Id. Noting a split in decisions by the state courts of appeal and the Ninth Circuit, and the absence of controlling state supreme court precedent, the court opted to follow the Ninth Circuit's decision in Ingle and ruled the modification clause substantively unconscionable. Id. at 1229–30.

Here, the unilateral modification clause pertains specifically to the arbitration agreement. See Taylor Decl. Ex. B ¶ 2. Revisions do not apply to any dispute retroactively "after that dispute has been submitted to arbitration" (and so would not apply to Mikhak's dispute), and the University commits to giving "at least thirty (30) days written notice to faculty members" before making any modifications. Id. This written notice is more specific than the yearly notice in the Ingle contract and certainly more than the clause permitting changes "without advance notice" or "at any time" in Slaughter and Mohamed, respectively. See Ingle, 328 F.3d at 1179; Slaughter, 2007 WL 2255221, at *10; Mohamed, 109 F. Supp. 3d at 1228. The notice provides some fair warning to faculty members of changes in the arbitration agreement and might diminish the substantive unconscionability of the agreement. Yet following Mohamed, 109 F. Supp. 3d at 1229–30, and contrary to the University's argument, in practice "the

limits imposed by the covenant of good faith and fair dealing," see Reply at 12, might not substantively protect against one-sided modifications favoring the institution. Furthermore, the clause does not enable faculty members to revise the agreement either; it distinctly grants that sole authority to "[t]he Company," just like the clause in Ingle did. See Taylor Decl. Ex. B ¶ 2; Ingle, 328 F.3d at 1179.

As Mohamed notes, it remains unresolved if a unilateral modification clause is substantively unconscionable. The University's clause weighs less heavily in favor of the drafter because it prohibits retroactive revisions and mandates thirty days' written advance notice, yet it still withholds negotiation power from faculty members. See Taylor Decl. Ex. B ¶ 2. Because the Ninth Circuit's Ingle decision is controlling for this Court, the Court follows the logic in Mohamed and finds that this aspect weighs toward substantive unconscionability.

b. Control over the arbitrator

Second, Mikhak alleges that the University "has control over the selection of the arbitrator," because if the parties cannot agree to a neutral arbitrator, "then the American Arbitration Association will handle the arbitration." Opp'n at 9–10; see Taylor Decl. Ex. B ¶ 3. "[T]he neutral-arbitrator requirement . . . is essential to ensuring the integrity of arbitration process." Armendariz, 24 Cal. 4th at 103. The agreement states: "[t]he parties shall select the neutral arbitrator and/or

arbitration sponsoring organization by mutual agreement." Taylor Decl. Ex. B ¶ 3. Absent mutual agreement, the arbitration is held under the auspices of the AAA. Id. Mikhak fails to explain how delegating the arbitration to the AAA favors the University, especially since delegation would occur only if neither party could agree on a neutral arbitrator. The AAA is a "respected forum" for arbitration. See Azteca Const., Inc. v. ADR Consulting, Inc., 121 Cal. App. 4th 1156, 1168 (Ct. App. 2004). The Court finds this argument unpersuasive.

c. Responsibility for costs

Third, Mikhak contends that the "cost considerations are highly confusing," but that "any imposition of costs would impose a hardship on Plaintiff." Opp'n at 10. Presumably this is because she has "more than $100,000 worth of federal student loans" and sought employment with the University to become "financially stable" and pay off debts. Mikhak Decl. ¶¶ 28–29. Mikhak also alleges that the agreement "seems to saddle the administrative costs on the employee." Opp'n at 10.

"[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." Armendariz, 24 Cal. 4th at 110–11. Armendariz found that a mandatory employment arbitration agreement that covered

claims under the California Fair Employment and Housing Act (FEHA) "impliedly oblige[d] the employer to pay all types of costs that are unique to arbitration." Id. at 113.

The arbitration agreement states that "[t]he University shall initially bear the administrative costs associated with the conduct of the arbitration." Taylor Decl. Ex. B ¶ 7. This is contingent only on "a one-time payment" by the faculty member "equal to the filing fee then required by the court of general jurisdiction . . . " and "any subsequent award by the Arbitrator." Id. The plain language requires the University to pay the administrative costs; the use of the word "initially" does not necessarily mean Mikhak will have to shoulder future payments associated with arbitration. Also, Mikhak's complaint sought relief under the federal Civil Rights Act and state FEHA. See generally Compl. Filings in federal court entail fees. Therefore the agreement is consistent with Armendariz because Mikhak would ordinary bear expenses in federal court that she otherwise would spend in arbitration. See Armendariz, 24 Cal. 4th at 110–11. The Court finds this argument unpersuasive.

d. Class action waivers

Fourth, Mikhak alleges a lack of mutuality because "any claim that all or part of the Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator." Opp'n at 10;

Taylor Decl. Ex. B ¶ 6. This waiver holds that "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class. . . ." Taylor Decl. Ex. B ¶ 6.

Class action waivers in arbitration clauses are not unconscionable. Concepcion, 563 U.S. at 352; see also Sanchez, 61 Cal. 4th at 923 (observing that " . . . to find the class waiver here unconscionable would run afoul of Concepcion"). Mikhak's contention that "only UOP would utilize" this waiver, Opp'n at 10, contravenes the essential holding of Concepcion. The Court finds this argument unpersuasive.

e. Confidentiality

Fifth, Mikhak contends that the agreement requires confidential arbitration procedures. Id. The agreement provides: "[e]xcept as may be permitted or required by law, as determined by the arbitrator, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all parties." Taylor Decl. Ex. B ¶ 9. Mikhak relies on Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, see Opp'n at 10, but it is unclear why this statute is germane.

Confidentiality provisions in an arbitration agreement are not per se unconscionable under California law, but courts must determine their scope in deciding whether to enforce them. Davis v. O'Melveny & Myers, 485 F.3d 1066, 1079 (9th Cir. 2007), overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d

947 (9th Cir. 2013). "Although facially neutral, confidentially provisions usually favor companies over individuals." Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003).

Ting ruled that the confidentiality provision in AT&T's consumer arbitration agreement requiring "[a]ny arbitration to remain confidential" was substantively unconscionable. Id. at 1151–52. Although repeated disputes brought against AT&T would enable arbitrators to "accumulate a body of knowledge on a particular company," the confidentiality clause prohibited plaintiffs from "mitigat[ing] the advantages inherent in being a repeat player." Id. This placed AT&T in a "far superior legal posture by ensuring that none of its potential opponents have access to precedent" while the company could learn "how to negotiate the terms of its own unilaterally crafted contract." Id. at 1152.

Davis also found the confidentiality clause in O'Melveny & Myers's employee arbitration agreement unconscionable because the clause "precludes even mention[ing] to anyone 'not directly involved in the mediation or arbitration.'" Davis, 485 F.3d at 1078. This would "handicap if not stifle an employee's ability to investigate and engage in discovery" and "prevent[] plaintiffs from accessing precedent." Id. Because the clause was "written too broadly," the court ruled it unconscionable. Id. at 1079.

Finally, Mohamed ruled Uber's confidentiality agreement substantively unconscionable in a class action suit. Mohamed, 109 F. Supp. 3d at 1227. The

agreement nearly mirrored the University's here: "[e]xcept as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all the Parties." Id. at 1226. The court observed that, like in Davis, Uber's agreement "precluded any disclosures about an arbitration whatsoever to non-parties." Id. at 1227. "Under Ting and Davis, the confidentiality clause is substantively unconscionable." Id.

Here, like in Mohamed, the arbitrator has the authority to determine that disclosure is permitted or required by law. See id.; Taylor Decl. Ex. B ¶ 9. Neither Ting nor Davis provided such an exception. See Ting, 319 F.3d at 1151 n.16 (excepting confidentiality only "as may be required by law or to confirm and enforce an award."); Davis, 485 F.3d at 1071 (excepting confidentiality only "as may be necessary to enter judgment upon the award or to the extent required by applicable law."). It is difficult to reconcile this case with Mohamed's ruling on an identical provision, but Mikhak does not argue that the confidentiality agreement would handicap her ability to secure a fair resolution to her dispute. Given Mikhak's position on the issue, the Court finds this argument unpersuasive.

Overall, the arbitration agreement appears to show only minor substantive unconscionability due primarily to the unilateral modification clause. This is not strong enough in conjunction with the minimal procedural unconscionability of the agreement to conclude

that the agreement is unenforceable. See Armendariz, 24 Cal. 4th at 114 ("[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable."). Aware of the "liberal federal policy favoring arbitration," see Concepcion, 563 U.S. at 339, the Court finds that the arbitration agreement is not unconscionable and thus enforceable.

D. Arbitration of Title VII Claims

Mikhak finally argues that mandatory arbitration of employment discrimination claims arising under Title VII contravenes the purposes and spirit of the Civil Rights Act of 1964, and thus that the Court should refuse to enforce University's agreement as contrary to public policy. Opp'n at 11. This argument is unpersuasive and unsubstantiated. Employment discrimination cases brought under Title VII and other federal anti-discrimination laws are subject to valid mandatory arbitration agreements. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (ruling that "a claim under the Age Discrimination Employment Act can be subject to compulsory arbitration pursuant to an arbitration agreement."); E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 750–51 (9th Cir. 2003) (en banc) (finding no conflict between "the purpose of Title VII and compulsory arbitration of Title VII claims"). The Ninth Circuit is not alone; "[a]ll of the other circuits have concluded that Title VII does not bar compulsory arbitration agreements." Id. at 748–49 (enumerating holdings by every

other circuit to this effect). Indeed, Congress "has subsequently rejected legislation" that would "preclud[e] waiver of a judicial form for Title VII claims." Id. at 753 n.9. In California, "nothing in the 1991 [Civil Rights] Act prohibits mandatory employment arbitration agreements that encompass state and federal antidiscrimination claims." Armendariz, 24 Cal. 4th at 96.

Here, Mikhak brings four claims arising under Title VII. Compl. ¶¶ 93–120. Because the Civil Rights Act does not preclude arbitration of employment discrimination claims, her claims are arbitrable and the agreement is not unenforceable. See Luce, 342 F.3d at 749.[5]

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Compel Arbitration is GRANTED. The case shall be STAYED pending the outcome of neutral arbitration of the substantive claims in accordance with the arbitration agreement in the 2014–2015 Faculty Handbook.

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[5] In accordance with the principle of stare decisis, the Court also rejects Mikhak's last argument, that due to the passing of Justice Antonin Scalia the Court should refuse to follow the Supreme Court's FAA-related decisions favoring arbitration. "Stare decisis . . . contributes to the actual and perceived integrity of the judicial process" Payne v. Tennessee, 501 U.S. 808, 827 (1991). "Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." Auto Equity Sales, Inc. v. Super. Ct, 57 Cal. 2d. 540, 455 (1962) (en banc).

See 9 U.S.C. § 3. The Court does not delegate arbitrability to the arbitrator.

IT IS SO ORDERED.

Dated: June 21, 2016 /s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JUDGE
CHARLES R. BREYER, JUDGE

BAHAR MIKHAK, PLAINTIFF, VS. UNIVERSITY OF PHOENIX, DEFENDANT.	NO. C 16-901 CRB SAN FRANCISCO, CALIFORNIA THURSDAY JUNE 16, 2016

TRANSCRIPT OF PROCEEDINGS

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[3] THURSDAY JUNE 16, 2016 10:00 O'CLOCK A.M.

PROCEEDINGS

THE CLERK: PLEASE BE SEATED.

CALLING CASE C 13-0901, MIKHAK VERSUS UNIVERSITY OF PHOENIX.

APPEARANCES, COUNSEL.

MR. MCNEILL: GOOD MORNING, YOUR HONOR. WILLIAM –

THE CLERK: COME FORWARD AND SPEAK INTO THE MIC.

MR. MCNEILL: GOOD MORNING, YOUR HONOR. WILLIAM MCNEILL ON BEHALF OF PLAINTIFF.

THE COURT: GOOD MORNING.

MS. MURACO: GOOD MORNING, YOUR HONOR. MARLENE MURACO ON BEHALF OF DEFENDANT.

THE COURT: HI. GOOD MORNING.

SO I HAVE READ THE SUBMISSIONS IN CONNECTION WITH THE MOTION. AND IS THERE ANYTHING THAT ANY PARTY DIDN'T PUT IN THEIR BRIEF THAT NEEDS TO BE ADDRESSED?

MS. MURACO: UNLESS THE COURT HAS QUESTIONS, YOUR HONOR.

THE CLERK: PLEASE COME FORWARD.

MS. MURACO: MY APOLOGIES.

NOT UNLESS THE COURT HAS QUESTIONS, YOUR [4] HONOR.

THE COURT: NO. OKAY.

PLAINTIFF?

MR. MCNEILL: YOUR HONOR, WE'D LIKE THE COURT TO TAKE SOME JUDICIAL NOTICE OF CERTAIN PORTIONS OF THE FACULTY HANDBOOK.

THE COURT: OKAY.

MR. MCNEILL: THERE ARE CERTAIN AREAS WITH REGARD TO THE ARGUMENT THAT WAS MADE BY DEFENDANT THAT THERE WASN'T – THAT THERE WAS A COMPLETE CONTRACT. AND OUR ARGUMENT WAS THAT THERE WAS NOT A CONTRACT. AND WE HAVE SHOWN INSTANCES WHERE PEOPLE SUCH AS MS.

MIKHAK ARE TREATED DIFFERENTLY. THEY ARE NOT FACULTY MEMBERS.

THEY ARE NOT FACULTY. AND I'D LIKE TO POINT THAT OUT TO THE COURT. THE VARIOUS PORTIONS OF THE FACULTY HANDBOOK TEAT WOULD INDICATE THAT –

THE COURT: WHAT WOULD YOU LIKE ME TO NOTICE, TAKE JUDICIAL NOTICE OF?

MR. MCNEILL: CERTAIN PORTIONS OF THE HANDBOOK.

THE COURT: SURE. AND THEY ARE?

MR. MCNEILL: I WAS ABOUT TO GIVE THOSE TO YOU, YOUR HONOR.

THE COURT: YES.

MR. MCNEILL: JUST BEAR WITH ME WHILE I GET MY [5] GLASSES.

THE COURT: SURE.

MR. MCNEILL: IT WOULD BE SECTION FIVE, PAGE 40 OF THE HANDBOOK.

SECTION 3.6 OF THE HANDBOOK. THAT'S PAGE –

THE COURT: THIRTY-SIX OR THREE –

MR. MCNEILL: SECTION 3.6, PAGE 43 OF THE HANDBOOK.

SECTION 3.12 OF THE HANDBOOK. THAT WOULD BE ON PAGE 56.

WE'VE ALREADY IDENTIFIED SECTION 3.13, WHICH IS LOCATED ON PAGE 57. THAT WAS FOR THE NOTE OF THE HANDBOOK.

SECTION 1.6, LOCATED ON PAGES 11 AND 12 OF THE HANDBOOK.

SECTION 2.6, LOCATED AT PAGE 28 OF THE HANDBOOK.

SECTION 7.2, LOCATED AT PAGE 90 OF THE HANDBOOK.

SECTION 8.1, LOCATED AT PAGE 92 OF THE HANDBOOK.

SECTION 9.1, LOCATED AT PAGE TEN – I'M SORRY – 101 OF THE HANDBOOK.

SECTION – PART OF SECTION 9.2, LOCATED AT PAGE 103 OF THE HANDBOOK.

[6] SECTION 3.5, PAGE 40 OF THE HANDBOOK. SECTION 3.6, LOCATED AT PAGE 43 OF THE HANDBOOK.

SECTION 3.12, LOCATED AT 56, PAGE 56 OF THE HANDBOOK.

SECTION 2.6, LOCATED AT PAGE 28 OF THE HANDBOOK.

SECTION 7.2. I THINK I MAY HAVE DONE THAT ALREADY. I APOLOGIZE.

SECTION 6.3, PAGE 87 OF THE HANDBOOK. SECTION 6.2, LOCATED AT PAGE 86 OF THE HANDBOOK.

SECTION 3.11 – I'M SORRY – 12, LOCATED AT PAGE 56 OF THE HANDBOOK.

THE COURT: MAYBE IT WOULD HAVE BEEN BETTER TO HAVE PUT IN THE WHOLE HANDBOOK.

MR. MCNEILL: IT'S A HUNDRED AND –

THE COURT: WELL, WE'RE GETTING THERE.

MR. MCNEILL: – FIFTY PAGES.

AND THE LAST ONE WOULD BE SECTION 2.6 OF THE HANDBOOK, PAGE 28.

THE COURT: AND IT'S YOUR VIEW THAT THESE SECTIONS CONTRADICT THE ASSERTION – I'M SORRY. BETTER FOR YOU TO STATE IT IN YOUR WORDS THAN FOR ME TO STATE IT IN MINE.

[7] SO TELL ME WHAT IS IT THAT YOU ARE – THESE SECTIONS ARE RELEVANT BECAUSE THEY WHAT?

MR. MCNEILL: THEY SHOW THAT THERE IS A DIFFERENCE BETWEEN A FACULTY CANDIDATE AND FACULTY AND FACULTY MEMBER. THE ARGUMENT THAT WAS MADE WAS THAT THERE WAS NO SORT OF SEGREGATION

OUT OF THE VARIOUS COMPONENTS OF TEACHING. THEY SAID FACULTY IS FACULTY IS FACULTY.

THESE ELEMENTS INDICATE THAT THE DOCUMENT ITSELF TREATS FACULTY –

THE COURT: RIGHT. OKAY. THANK YOU. THAT'S HELPFUL.

AND YOUR RESPONSE TO THAT ASSERTION.

MS. MURACO: WELL, I'M NOT EXACTLY SURE WHAT –

THE COURT: I'M SURE – I HAVEN'T LOOKED AT THEM – BUT I'M SURE THAT COUNSEL IS CORRECT THAT IT TALKS ABOUT GROUP A VERSUS GROUP B, OR MAKES DISTINCTIONS EITHER BY WAY OF MAKING AN ABSOLUTE DISTINCTION OR SIMPLY NOT INCLUDING THE MINUTE; IS THAT FAIR TO SAY? I HAVEN'T LOOKED AT THESE THINGS.

MR. MCNEILL: THAT'S CORRECT, YOUR HONOR. THAT WAS JUST TO OFFSET THE ARGUMENT THAT WAS MADE.

THE COURT: RIGHT. SO THAT IS WHAT THAT ADDRESSES. AND YOUR RESPONSE WOULD BE WHAT?

[8] **MS. MURACO:** THAT IN SOME PLACES OF THE HANDBOOK IT MAY DRAW A DISTINCTION, BUT NOT EVERYWHERE. AND I JUST WANT TO CALL THE COURT'S ATTENTION

TO KIND OF WHAT I THINK IS, MAYBE WITH REGARD TO THIS ISSUE, ONE OF THE KEY DOCUMENTS. AND THAT IS EXHIBIT 3 TO THE KELLY MORTONSON DECLARATION, WHICH WAS ENTITLED "FACULTY ACKNOWLEDGMENT DETAIL."

THIS IS THE DOCUMENT THAT PLAINTIFF ACKNOWLEDGED, CLICKED "I ACCEPT." AND AT THE TIME "I ACCEPT" WAS CLICKED PLAINTIFF WAS LOOKING AT A PAGE THAT SAID: "DEAR FACULTY MEMBER."

AND THEN, IT TALKED ABOUT THE RELEASE OF THE FACULTY HANDBOOK AND SAID:

> "MORE SPECIFICALLY, I UNDERSTAND AND AFFIRM THAT BY CLICKING 'ACCEPT' BELOW I AM AGREEING TO ARBITRATE EMPLOYMENT-RELATED LEGAL CLAIMS I MAY HAVE AGAINST THE UNIVERSITY OR ITS AFFILIATED ENTITIES, JUST AS THE UNIVERSITY IS AGREEING TO ARBITRATE ITS EMPLOYMENT-RELATED LEGAL CLAIMS AGAINST ME." SO, SHE SIGNED "ACCEPT" TO A DOCUMENT THAT

IDENTIFIED THE PLAINTIFF AS A FACULTY MEMBER. TALKED ABOUT THE ARBITRATION POLICY AND INDEPENDENT OF THE LANGUAGE OF THE POLICY OR ANYTHING ELSE IN THE HANDBOOK SAID:

[9] "BY CLICKING 'ACCEPT' I AM AGREEING TO THIS."

ONE LAST THING, YOUR HONOR, AND THAT IS THIS QUESTION OF: "WAS THE PLAINTIFF A FACULTY MEMBER? WAS PLAINTIFF NOT A FACULTY MEMBER" IS A QUESTION FOR THE ARBITRATOR AS ADDRESSED IN OUR BRIEF.

THE COURT: OKAY.

ANYTHING FURTHER?

MR. MCNEILL: WITH REGARD TO –

THE COURT: WELL, ANYTHING THAT HASN'T BEEN SAID IN THE BRIEFS. I HAVE EVERYTHING IN THE BRIEFS AND NOW YOU'VE RAISED AN ADDITIONAL POINT, AND I HAVE THOSE IN MIND. SO – OR I'M GOING TO HAVE THEM IN MIND WHEN I HAVE A CHANCE TO TAKE A LOOK AT IT. BUT I DON'T HAVE A CHANCE TO LOOK AT IT NOW.

BUT I DON'T WANT YOU TO REPEAT YOUR ARGUMENTS BECAUSE I HAVE THEM. I SIMPLY WANT TO ASK YOU IS THERE SOMETHING THAT'S NOT IN YOUR PAPERS THAT YOU WANT TO DRAW TO MY ATTENTION?

MR. MCNEILL: ONE OTHER THING, JUST ADDRESSING COUNSEL'S LAST SITUATION.

THERE IS NOTHING THAT INDICATES THAT MS. MIKHAK EVER SIGNED ANYTHING THAT ALLOWED FOR SUCH DETERMINATIONS UNDER THE –

THE COURT: WELL, ARE WE GOING BACK TO WHETHER [10] SHE SAID "I ACCEPT" ELECTRONICALLY?

MR. MCNEILL: YES.

THE COURT: YOU MEAN, THAT'S NOT IN WRITING. I MEAN, IT'S NOT IN THE WRITING.

MR. MCNEILL: NO. NO. NO. CERTAINLY NOT, IT'S NOT IN WRITING, BUT –

THE COURT: NO, BUT, I MEAN, THAT'S THE WAY PEOPLE DO THINGS NOWADAYS IS –

MR. MCNEILL: I UNDERSTAND.

THE COURT: REGRETTABLY THAT'S HOW PEOPLE DO THINGS. THEY LOOK AT SOMETHING, AND IF THEY MOVE THEIR CURSOR OVER TO "I ACCEPT," AND THAT'S CALLED "A WRITTEN ACCEPTANCE."

I DON'T BLAME YOU FOR VIEWING AT LEAST THAT ISSUE THAT WAY SINCE IT'S PROBABLY THE WAY I WOULD HAVE VIEWED IT, HAVING GONE TO LAW SCHOOL.

BUT THAT'S NOT TODAY'S – THAT'S NOT TODAY'S TECHNOLOGY, IS IT?

MR. MCNEILL: NO, IT ISN'T, YOUR HONOR. BUT WHAT I WAS TRYING TO GET TO –

THE COURT: YES, GO AHEAD.

MR. MCNEILL: – THERE'S CERTAINLY CASE LAW THAT SAYS THERE HAS TO BE AN AGREEMENT IN WRITING TO HAVE THESE ELECTRONIC –

THE COURT: WELL, THEN –

[11] **MR. MCNEILL:** COULD I JUST CITE THE CASE TO YOU?

THE COURT: NO. BEFORE YOU CITE THE CASE I WANT TO ASK YOU A QUESTION.

MR. MCNEILL: SURE.

THE COURT: IS IT YOUR VIEW THAT IF SOMETHING SAYS IT MUST BE IN WRITING, OKAY?

MUST BE IN WRITING TO HAVE A CONTRACT OR AN ACCEPTANCE AND SO FORTH.

AND SO ONE PARTY SENDS OR DIRECTS THE ATTENTION OF THE OTHER PARTY TO A DOCUMENT, AND THAT DOCUMENT ELECTRONICALLY HAS THE CAPABILITY OF AN ELECTRONIC ACCEPTANCE.

IS IT YOUR – AND THE PERSON PRESSES THE BUTTON. IS IT YOUR VIEW THAT THAT ISN'T AN ACCEPTANCE WITHIN THE MEANING OF THE LAW?

MR. MCNEILL: IT MAY NOT BE.

THE COURT: WELL, THEN, DON'T WIGGLE ON THIS. I MEAN, I DON'T – YES, A LOT OF THINGS MAY NOT BE. IN OTHER WORDS, EVEN IF I SIGN SOMETHING, IT MAY NOT BE MY SIGNATURE.

I UNDERSTAND THAT. BUT I'M JUST – I'M JUST ASKING YOU – I'M ASKING YOU ABOUT YOUR VIEW OF THE LAW IN THE CONTEXT OF ELECTRONICS, BECAUSE THAT'S A MAJOR DIFFERENCE IN THIS WORLD TODAY.

[12] AND IF YOU ARE GOING TO CITE TO ME A CASE WHICH SAYS EVEN THOUGH IT'S – THAT EVEN WITH ELECTRONIC TECHNOLOGY TO WRITE – TO PUSH A BUTTON WHICH SAYS "I ACCEPT" ISN'T OR DOES NOT COMPORT WITH THE REQUIREMENT THAT SOMETHING BE IN WRITING, I'LL READ THAT CASE. BECAUSE I'VE BEEN LOOKING FOR THAT CASE FOR QUITE A WHILE AND NEVER SEEN IT. BUT THAT'S NOT WHAT THE CASE IS THAT YOU ARE GOING TO GIVE ME, IS IT?

MR. MOORE: YOUR HONOR, JUST ONE STEP. HOWARD MOORE.

THE COURT: WELL, I'M JUST TRYING TO ADDRESS THIS –

MR. MOORE: I'M JUST TRYING TO BE HELPFUL, YOUR HONOR.

THE COURT: I APPRECIATE THAT. WHY DON'T YOU STAND IN FRONT OF THE MIC

WHERE YOU'LL BE A LITTLE BIT MORE HELPFUL IF I HEAR WHAT YOU SAY.

MR. MOORE: YOUR HONOR, SO FAR YOU HAVE GONE – YOU'RE CORRECT AND THERE'S NO ARGUMENT – BUT WHAT YOU'RE LOOKING AT, YOU'RE REFERRING TO IN CALIFORNIA, IS A UNIFORM ELECTRONIC TRANSACTION ACT.

UNDER THAT ACT, UNDER SECTION 1633 (B) (5), THERE MUST BE AN AGREEMENT BETWEEN THE PARTIES THAT ELECTRONIC SIGNATURE IS ACCEPTABLE. IN THIS CASE, THERE IS NO AGREEMENT BETWEEN THE PARTIES.

[13] **THE COURT:** OKAY. I'LL TAKE A LOOK. THAT'S HELPFUL.

MR. MOORE: AND THERE'S A CASE ON THAT.

THE COURT: WHAT IS THE CASE?

MR. MOORE: THE CASE IS J.B. FULLER INVESTMENTS.

MR. MCNEILL: IT'S RIGHT HERE.

MR. MOORE: OKAY.

THE COURT: YOUR CO-COUNSEL ATTEMPTED TO GIVE IT TO ME, AND I CUT HIM OFF.

MR. MCNEILL: IT'S JBB INVESTMENT PARTNERS LIMITED VERSUS FAIR, YOUR HONOR. AND THE CITATION IS 232 CAL APP. 4TH, 974.

THE COURT: GREAT.

MR. MOORE: AND REVIEW WAS DENIED, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH. MATTER SUBMITTED.

MS. MURACO: I JUST WANT TO POINT OUT, YOUR HONOR, THAT THE FAA DOES NOT REQUIRE A WRITTEN –

THE COURT: PARDON?

MS. MURACO: WELL, I GUESS I WOULD SAY THAT'S THE FIRST TIME I'M HEARING OF THAT CASE, YOUR HONOR. SO IF YOUR HONOR IS GOING TO –

THE COURT: I'M GOING TO LOOK AT IT. OKAY. FAIR ENOUGH. I'M GOING TO LOOK AT IT. IF IT GIVES ME [14] PAUSE, IF IT GIVES ME CONCERN I'LL ASK YOU TO ADDRESS IT –

MS. MURACO: THANK YOU.

THE COURT: – IN A LETTER BRIEF.

MS. MURACO: THANK YOU, YOUR HONOR.

THE COURT: THIS IS THE FIRST I'VE HEARD OF IT.

BUT I'LL TAKE A LOOK AT IT. I DON'T HAVE IT WITH ME.

MR. MCNEILL: TWO OTHER THINGS, YOUR HONOR. ONE OTHER PAGE I WOULD LIKE FOR YOU TO TAKE JUDICIAL NOTICE OF, IT'S APPENDIX A.

THE COURT: WAIT A MINUTE, PLEASE.

MR. MCNEILL: OKAY.

THE COURT: APPENDIX A.

MR. MCNEILL: A.

THE COURT: YES.

MR. MCNEILL: AT PAGE 120.

THE COURT: OKAY.

MR. MCNEILL: AND THE OTHER I WOULD LIKE TO SUBMIT TO THE COURT THERE IS A SECOND CIRCUIT CASE THAT DEALS WITH THE ISSUE –

THE COURT: OKAY.

MR. MCNEILL: – OF CLICK AND ACCEPTANCE.

THE COURT: AND THE CITE TO THAT IS?

[15] **MR. MCNEILL:** I DON'T HAVE IT. I WOULD JUST ADDRESS – IF I COULD SEND IT TO THE COURT.

THE COURT: WELL – WELL, I SORT OF THINK THAT WE'VE REACHED THE END OF THE LINE WITH RESPECT TO CITATIONS AND ARGUMENT.

MR. MCNEILL: WELL, THIS IS JUST –

THE COURT: SO I WILL LOOK AT 232 CAL APP. 4TH.

I MEAN, THE SECOND CIRCUIT IS THE SECOND CIRCUIT. THEY ARE AN OUTSTANDING CIRCUIT, BUT THEY ARE NOT THE NINTH.

MR. MCNEILL: THAT WAS JUST IN RESPONSE TO YOUR QUESTION SAYING CAN I CITE YOU A CASE.

THE COURT: OKAY. FAIR ENOUGH. MATTER SUBMITTED?

MS. MURACO: YES.

THE COURT: MATTER SUBMITTED?

MR. MCNEILL: SHALL I GIVE THESE DOCUMENTS BACK TO –

THE COURT: WELL, DIDN'T WE HAVE THEM IN THE RECORD OR THEY ARE NOT IN THE RECORD?

DO WE HAVE THEM IN THE RECORD?

MR. MCNEILL: NO, THAT'S WHY –

THE COURT: YES, PLEASE GIVE THEM.

YOU CAN FIND IT. RIGHT?

[16] **MS. MURACO:** I CAN FIND IT.

THE COURT: RIGHT.

PLEASE GIVE IT TO THE CLERK.

THE CLERK: THANK YOU.

MS. MURACO: THANK YOU, YOUR HONOR.

(THEREUPON, THIS HEARING WAS CONCLUDED.)

STENOGRAPHY CERTIFICATION

"I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER."

JANUARY 21, 2018
/S/ KATHERINE WYATT

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV – The Fourteenth Amendment provides in relevant part:

"[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

42 U.S.C. § 2000e-2(a)(1) – Title VII of the Civil Rights Act 1964 *as amended* provides: It shall be an unlawful employment practice for an employer – (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. The term "religion" includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j) which requires an employer to "accommodate" religious practices and beliefs.

28 U.S.C. §1254(1)
28 U.S.C. § 1292(b)

JUDICIAL RULES

Fed. R. Civ. P. RULE 60, RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an

appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

*2 (1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

OTHER RULES

Circuit Rule 40-1(c), District Court Rule 41(a)(2), District Court Rule 41(b), Fed. R. Civ. P. 15(a), Fed. R. Civ. P. 26, Fed. R. Civ. P. 37, Fed. R. Civ. P. 45(a), Fed. R. Civ. P. 50(a), Fed. R. Civ. P. 59(a), Fed. R. Civ. P. 59(b), Fed.

R. Civ. P. 60, Fed. R. Civ. P. 60(b), Fed. R. Civ. P. 60(b)(1), Fed. R. Civ. P. 60(b)(2), Fed. R. Civ. P. 60(b)(3), Fed. R. Civ. P. 60(b)(4), Fed. R. Civ. P. 60(b)(5), Fed. R. Civ. P. 60(b)(6).

CA Rule 4.1 (Truthfulness).

Rule 11(b) Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions.

Local C.R. 7-9, Motion for reconsideration.

(b) Form and Content of Motion for Leave. A motion for leave to file a motion for reconsideration must be made in accordance with the requirements of Civil L.R. 7-9. The moving party must specifically show reasonable diligence in bringing the motion and one of the following:

(1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or

(2) The emergence of new material facts or a change of law occurring after the time of such order; or

(3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Local C.R. 7-3. Opposition; Reply; Supplementary Material

(a) Opposition. Any opposition to a motion may include a proposed order, affidavits or declarations, as well as a brief or memorandum under Civil L.R. 7-4. Any evidentiary and procedural objections to the motion must be contained within the brief or memorandum. Pursuant to Civil L.R. 7-4(b), such brief or memorandum may not exceed 25 pages of text. The opposition must be filed and served not more than 14 days after the motion was filed. Fed. R. Civ. P. 6(d), which extends deadlines that are tied to service (as opposed to filing), does not apply and thus does not extend this deadline.

OTHER AUTHORITIES

Stephen White, The Universal Remedy for Attorney Abandonment: Why Holland v. Florida and Maples v. Thomas Give All Courts the Power to Vacate Civil Judgments Against Abandoned Clients by Way of Rule 60(b)(6), 42 Pepp. L. Rev. 155 (2014)

BACKGROUND ON THE PLAINTIFF AND THE DEFENDEANT

Plaintiff BAHAR MIKHAK

1. Mikhak is an observant Submitter (Muslim) female of Iranian descent.
2. As a child growing up in Iran, she witnessed the Islamic Republic Revolution that transformed her beautiful country into a completely different nation. Soon after, the Iran-Iraq War

broke out. Along with her family, she left everything behind escaping her hometown of Kermanshah.

3. Mikhak remembers that night as a child when Saddam Hussein's airplanes flew over their heads, their bus driver made a sudden stop and instructed them to go out into the desert to take shelter under an abandoned truck. It was a miracle they survived the war with Iraq. They lost everything and became refugees.

4. She then immigrated with her family to the United States, where she learned a new language, overcame cultural barriers, attended American universities, rebuilt her life, began anew, and became a US citizen.

5. Mikhak believes the Qur'an is her Book of Law and if she follows its guidance, she will have perfect happiness in this life and in the hereafter; a kind of happiness that is a quality of the soul.

6. Qur'an teaches her that when planning to do something in the future, she must utter the phrase "GOD willing." This belief is derived from a religious command encoded in the Qur'an (Surah 18, *The Cave*, 23-24).

Remembering God Every Chance We Get

[18:23] You shall not say that you will do anything in the future,

[18:24] without saying, "**GOD** willing."* If you forget to do this, you must immediately

remember your Lord and say, "May my Lord guide me to do better next time."

7. Submitters believe that the occasional recital of the phrase "God willing" is not for purposes of proselytizing or converting others; rather, it is a practice they must adhere to as a reminder to humble themselves before an Omnipotent God, who is doing everything, so failing to invoke the phrase "God willing" when projecting oneself into the future would displease God. (Sura 68: The Pen, Al-Qalam)

8. Mikhak's training is in genetic, molecular, and nutrition epidemiology, and biostatistics.

9. Her passion is teaching Epidemiology. Most recently, she has taught Epidemiology as an adjunct faculty, at the San Francisco State University (SFSU). But she has also helped in teaching Epidemiology at UCSF and other Universities in the Bay Area.

10. Her past research and publications include etiology and epidemiology of breast cancer research, gene therapy vaccine clinical trials of prostate cancer research, genetic epidemiology of Brain Arteriovenous Malformations (BAVM) and hemorrhage, nutrition and environmental epidemiology of Non-Hodgkin's Lymphoma (NHL), genetic and nutrition epidemiology of prostate cancer, and nutrition epidemiology of cardiovascular disease.

11. Mikhak's vision in pursuing this petition is to strive for justice and equity for graduate students, post-docs, faculty candidates, and junior faculty in academia.

12. Because of the injustices during training programs in academia, over 60% of new STEM PhDs choose not to pursue academic careers.[1]

13. Mikhak's case is a vehicle to advocate for the rights of graduate students, post-docs, and junior faculty, who are a vulnerable sector of the society "deprived" of their civil rights.

14. Mikhak believes that her experience at the University of Phoenix which is a private university, acting as a state actor, is an example of how faculty candidates can be deprived of their rights. For example, the 2014-2015 Faculty Handbook includes a Section **SIX (6.3| Mentorship;** Exhibit P-3) stating that "faculty candidates teaching a mentorship class do not have remediation, grievance, appeal rights, and/or privileges," suggesting that the decision of the director of academic affairs is final.

Defendant UNIVERSITY OF PHOENIX INC.

1. An Arizona corporation, the University of Phoenix (UOP) is an academic institution of higher education that provides undergraduate and graduate coursework and degrees at its various campuses throughout the country and through online programs. UOP offers flexible scheduling, evening classes, and online courses, among other conveniences, to cater

[1] National Science Foundation, National Center for Science and Engineering Statistics. 2016. Doctorate Recipients from U.S. Universities: 2015. Special Report NSF 17-306. Arlington, VA. Available at www.nsf.gov/statistics/2017/nsf17306/. Table 46.

primarily to working adults seeking higher education. UOP employs more than 500 people nationwide and is headquartered in Phoenix, Arizona.

2. UOP is an employer that is subject to both Title VII of the Civil Rights Act of 1964, *as amended*, and the California Fair Employment and Housing Act (FEHA), which makes it unlawful for an employer to subject an employee to severe and pervasive workplace harassment based on their religion that results in a hostile and intimidating workplace environment.

3. The phrase "God willing" is a common phrase used in the Muslim world and in Mikhak's native Iran. Defendant was aware that Mikhak was and is a practicing Muslim, originally from Iran.

BACKGROUND ON THE COUNSEL AND THE LAWFIRMS WHO REPRESENTED THE PARTIES

For the plaintiff

During the trial only:

William C. McNeil III and Noah A. Phillips from LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER and Howard Moore, Jr. from MOORE & MOORE.

During post-trial and the appeal:
The plaintiff represented herself as a *pro se* litigant and a *pro se* appellant-petitioner. In her journey in the

pursuit of justice, Mikhak has learned to trust that GOD is sufficient as her advocate, witness, and judge.

For the defendant-appellee

"**Dal Cielo**" – the name of the lead counsel is used throughout this petition as the representative for the team of counsel from LITTLER MENDELSON, P.C.

During the trial only:
Kimberley Gee Ramos and Ms. Marlene S. Muraco

During both trial and the appeal:
Neda N. Dal Cielo and Cooper J. Spinelli

BACKGROUND ON MIKHAK'S RELIGIOUS DISCRIMINATION CALIM

A Constitutional Law Dispute[2]

1. Because the UOP asked Mikhak, as a condition of her employment, to stop saying "GOD willing," and despite of her passing the faculty qualification process, the UOP unlawfully discriminated against her by not hiring her as a faculty member. Mikhak filed a complaint against the UOP on February 23, 2016.

2. Also, the UOP unlawfully failed to accommodate her sincerely held religious beliefs, harassed her on the basis of religion, and created

[2] These facts are presented for the purpose of providing some context and not as a focus of Mikhak's petition. **18:24 This important commandment gives us daily opportunities to remember God.* Source: QUR'AN THE FINAL TESTEMENT [Authorized English Version] Translated by Rashad Khalifa, Ph.D.

a hostile work environment for her. It retaliated against her for complaining about religious harassment by not hiring her past the Mentorship Stage, to a permanent faculty position as a faculty member, despite her faculty mentor's (Dr. Amanuel Gobena) recommendation to hire her.

3. Mikhak filed her complaint so as to secure redress for the UOP's violation of Title VII of the Civil Rights Act of 1964, *as amended*, as well as violation of the FEHA to be free from employment discrimination on the basis of her religious practices. (**dkt.1**, ER2: 336-344).

4. She provided an exhaustive account of factual background pertaining to her religious discrimination claims. Much of that detail is unnecessary to the resolution of her appeal. Some facts regarding the hostile work environment during her eight-week mentorship phase are described here.

5. After the initial screening, Mikhak participated in the UOP's three-staged faculty qualification process at its Livermore, California location: the Assessment Stage (January 31, 2014), the Certification Stage (February 21, 2014 to March 14, 2014) and the Mentorship Stage (August 18, 2014 to October 13, 2014) (**Exhibit T**, App. 127-130).

6. She had invested more than one year into the UOP's hiring process, which is atypical for a faculty teaching appointment, in the hopes of being hired as a faculty member.

7. Although arbitration may be an appropriate forum to litigate cases arising under Title VII claims, Mikhak believes it is not an appropriate forum for controversial cases like hers because her case is not a typical employment discrimination case arising as a religious discrimination. Her claims involve a constitutional law dispute, raising a controversial question about freedom of religious expression in academia. Thus, the mandatory arbitration should be contra to Title VII of the Civil Rights Act when they involve freedom of religious speech in academia.

8. Mikhak believes that it is her constitutional right to free speech to be able to say the word GOD occasionally in the classroom, as long as she is not proselytizing or suggesting that her religious views are aligned with the university's message.

9. She believes that universities should not have the right to censor or oppress her if she has to occasionally say "GOD willing" in class, in order to obey GOD's commandment. They should not have the right to retaliate or block her promotion or fire her, even if a student is offended by her occasional mention of the word GOD, because this oppressive policy of the UOP is not conducive to promoting tolerance and diversity, especially in a course where students are working towards becoming mental health professionals.

A Hostile Work Environment During the Eight-Week Mentorship Stage

1. Mikhak began the two-month "Mentorship Phase," which consisted of teaching the Research Methods for Mental Health Counselors course under the supervision and assistance of a faculty mentor, specifically, Dr. Amanuel Gobena.

2. At the end of her first class of the term, Mikhak told her students that she would occasionally say "God willing" during class due to her religious beliefs, but she in no way expected any students to say it, and that the occasional recital of this phrase was not an attempt to proselytize or convert anyone.

3. After informing the students of this religious practice, Mikhak remembers all her students pleasantly smiling at her, that one of them (Maryam) even remarked, "[w]e love it when you say God willing," and that no student objected.

4. During the second week of the course, Dr. Ryan Berman, who was the College Campus Chair at the time, unexpectedly attended Mikhak's class without giving proper notice to her or to her mentor, Dr. Gobena. Proper notice would have consisted of an email or phone call giving Mikhak sufficient time to prepare. Dr. Gobena was offended and Mikhak felt confused at Dr. Berman's intrusion because he was not supposed to attend a mentee's class without first making arrangements with Mikhak and her mentor.

5. Mikhak wondered if there was something wrong because of Dr. Berman's surprise visit. Mikhak was informed and believes, and thereon alleges, that Dr. Berman later apologized on two separate occasions to Dr. Gobena for interfering while justifying his unannounced visit by saying he was just trying to "help out."

6. However, he had already interfered with Mikhak's chance to build a trusting relationship with her students. His interference created a dynamic between Mikhak and her students where they would run to him if they had any issues instead of coming to Mikhak directly.

7. A few days after the second week of classes, Mikhak got a call from Dr. Berman informing her that one of her students was offended by her saying "God willing." During the same phone conversation, Dr. Berman then asked Mikhak to stop saying "God willing" in class. Mikhak replied that she could not stop saying "God willing" in class because if she did so, she would not be true to her beliefs.

8. Mikhak asked Dr. Berman to share the nature and the specific wording of the student's complaint about her saying "God willing," so that she could be in a better position to address the concern. But he declined. Instead of hiring Mikhak as a faculty member, the UOP insisted that Mikhak submit to a second mentorship. Dr. Berman then asked Mikhak to email him to explain the religious reasons why she was

required to and could not stop saying "God willing."

9. On the third week of the term, Dr. Berman notified Mikhak via email that he would attend her class that same day. Mikhak felt shocked and immediately called Dr. Berman to remind him that their original plan was for him to visit her class during the fourth week. She told him that she could not accommodate his visit on such short notice because she had already informed her students of the agenda for the third week of class and it did not include any guest speaker visits. Dr. Berman then recanted and agreed to comply with their original plan to visit her class on the fourth week.

10. Mikhak sent an email to Dr. Berman, where she thanked him for bringing to her attention that a student had complained about her saying "God willing" during class. She further wrote that she would be willing to give the requested statement explaining why she could not comply with Dr. Berman's demand for her to stop saying "God willing" during class. But first, she needed to learn more about the exact nature of the student's complaint. Mikhak was not requesting that the identity of the student be revealed to her; rather Mikhak was simply requesting to learn what exactly the student had shared with Dr. Berman regarding her use of the phrase. However, Dr. Berman did not respond to Mikhak's email.

11. Mikhak and Dr. Berman had a meeting to discuss the class activity he planned to introduce

to Mikhak's students during his visit on the fourth week of class.

12. Mikhak attempted to present Dr. Berman with evidence for saying "God willing," but he remarked that "he was not interested in seeing it" and refused to accept the proof he had formerly requested.

13. Dr. Berman then stated that he had spoken with UOP attorneys who had told him that UOP's faculty policies prohibited faculty from saying "God willing" in class for fear of being perceived as anti-Semitic. Mikhak felt intimidated.

14. Mikhak felt that few, if any, other accusations generate such disfavor and opprobrium. To her, "anti-Semitic" is a loaded phrase. It is defined as belief or behavior hostile toward Jews just because they are Jewish. It may take the form of religious teachings that proclaim the inferiority of Jews, for instance, or political efforts to isolate, oppress, or injure them. It may also include prejudiced or stereotyped views about Jews. Dr. Berman then added that he had given Dr. Gobena, Mikhak's assigned mentor, a copy of the abovementioned UOP's faculty policies to share with her.

15. Mikhak was informed and believes and thereon alleges that Dr. Gobena never received any document from Dr. Berman outlining these policies. When Mikhak later asked her mentor to show her the faculty policies, Dr. Gobena told her that there was no such policy in the faculty handbook and that Dr.

Berman had only given him the student's complaint. Dr. Berman raised offense to Mikhak and her religious practice amid a captured population consisting of her students, her faculty mentor, and colleagues. Dr. Berman compounded and aggravated the negative impact of UOP's failure and refusal to accommodate Mikhak's religious beliefs, by suggesting that her religious beliefs were anti-Semitic.

16. He undermined Mikhak's standing as a member of UOP's faculty by stereotyping her as a Muslim or an Iranian who hates Jews. It was pervasive and touched every aspect of her relationship with UOP and her students.

17. During the fourth week of the term, Dr. Berman attended Mikhak's class as planned. However, he stayed about 30 minutes longer than what they had agreed, which took away precious time from completing class activities relevant to the learning objectives for that week.

18. After Dr. Berman left the class and due to his visit, Mikhak's students acted more aggressively and were disrespectful towards her for the remainder of the class, which made it difficult for her to regain control of her class. Mikhak was informed and believes and thereon alleges that throughout the term, Dr. Berman intermeddled in Mikhak's relationship with her students, which created an atmosphere of hostility. For example, after Dr. Berman's visit to her class, Rachael, one of her students,

interrupted her lecture to assert that Mikhak posted too many helpful learning tips on the classroom portal, and then reminded Mikhak that Dr. Berman was the College Campus Chair, implying he had power over Mikhak and that Mikhak should be intimidated by any students' complaints made to him.

19. Based on information and belief, these actions establish that UOP failed to engage with the students on the issue and failed to counsel them regarding the religious accommodation requirement of Title VII. On or about October 4, 2014, the weekend of the sixth week of the term, Gail, one of Mikhak's students, informed her that two students, Amanda and Jenny, had approached Gail and asked her to sign a petition that they had created to pressure and intimidate Mikhak to stop saying "God willing." Gail had noticed the pervasive and increasing hostility towards Mikhak, as evidence from her private message sent to Mikhak on October 4, 2014, that reads: "Prof Bahar . . . I know you must be frustrated with the way things are going, but I hope that will not effect [*sic*] you teaching here again. I do not know what the other students have against you, but I have notice [*sic*] somethings [*sic*] that are very disturbing to me. Gail." Gail, who had exposed those two students, ended up dropping Mikhak's course right before the last session without UOP informing Mikhak. Later, Mikhak found out that Gail had cited "illness" as the reason. Also, Mikhak later found out that Gail was not given permission by UOP to fill out a final evaluation

for Mikhak's course, despite having completed almost 90% of her course.

THE CONTRACT DEFENSES ARE PROOF THAT MIKHAK'S PETITION IS "CERTWORTHY" AND IT'S NOT FACT-BOUND, CONTRARY TO THE FALSE IMPRESSION THE PANEL'S DECISION MAY GIVE.

Using the preserved contract defenses and her findings that the opposing party had materially and fraudulently misrepresented Mikhak's faculty status during the trial, Mikhak established with clear and convincing evidence that there was no mutual assent.

Her careful analysis focused on at least eight types of clear and convincing evidence that undeniably and irrefutably proved the arbitration agreement is invalid:

Evidence #1: The deliberate concealment of evidence during trial.

Evidence #2: The visual timeline of events during Mikhak's faculty qualification process. (**Exhibit T**, App. 127-130).

Evidence #3: The contractual language in the **Faculty Acknowledgement Detail** (or the arbitration agreement).

Evidence #4: Perjured testimonies under oath.

Evidence #5: Forged documents under oath.

Evidence #6: The Faculty Handbook.

Evidence #7: Sections of the district court's order copied/pasted verbatim from Dal Cielo's briefs.

Evidence #8: The transcript of the court hearing on June 16, 2016.

Contract defense #1. Mikhak showed that because there was no mutual assent, the arbitration agreement is invalid and unenforceable.

1. The opposing party had to first prove that Mikhak was a faculty member before it could prove that "parties manifested mutual assent."

2. During the trial, Mikhak's former counsel referenced several provisions, including Section **EIGHT (8.1| Active Faculty Status)** of the Faculty Handbook against the *mutual assent* argument on the grounds that there was ambiguity in Mikhak's coverage under the arbitration agreement (**dkt.**18, pgs. 11-12):

   > "faculty candidates" are invited to join the faculty after successful completion of both certification and a mentorship course. Once joining, the new faculty member on active faculty status . . . "

3. Also, Section **SIX (6.3| Mentorship; Exhibit P-3)** of the Faculty Handbook states that "faculty candidates <u>teaching a mentorship class</u> **do not have** remediation, grievance, appeal rights, and/or privileges" suggesting that the Dispute Resolution Policy

and Procedures do not apply to faculty candidates.

Evidence #1: The deliberate concealment of evidence during trial.

1. Dal Cielo and the UOP witnesses deliberately concealed these evidences during the trial, so to mislead the court into believing that the there was no distinction between faculty candidates and faculty members so the parties manifested mutual assent.

2. Mikhak proved that there is a distinction between the two and that she had self-identified as a faculty candidate. For example, she showed the "missing" evidence:

   - That her instructors addressed her as faculty candidate.

   - And that they did so even after she had clicked "Accept" to the arbitration agreement, and even after she had signed the various hiring HR forms.

   - They never addressed her as faculty member, or as associate faculty member. (**Exhibits S2-S10, dkt.**15-3, ER4: 420-434).

3. After the trial ended, Mikhak presented the "missing" evidence as proof that, during her faculty qualification process, Mikhak self-identified as a faculty candidate:

Proof #1 Dr. Gobena's Final Evaluation Report of Mikhak is proof that the UOP could not have identified Mikhak as a faculty member or an associate faculty member, because Dr. Gobena recommended the UOP to invite Mikhak to join the faculty. Dr. Gobena wrote: **"Recommendation: Invite mentee to become a faculty member."** (**dkt.**49-4, pgs.1-6)

Proof #2 In a letter from the director of Academic Affairs (Ms. Malone), the UOP offered Mikhak a *second* mentorship instead of assigning her to teach a course without mentorship. This is proof that the UOP could not have identified Mikhak as an "experienced" faculty (i.e., a faculty member or an associate faculty member), who was covered by the arbitration agreement (**dkt.**49-3, pg.1). Malone wrote: "Dear Bahar . . . the Local Campus Faculty **Candidate** Certification is an interview process for both our and University of Phoenix. As a . . . We would like to offer you an opportunity to complete a second mentorship . . . "

Proof #3 In an email reminder, Malone wrote: "Dear Bahar . . . certification is just one step in this process and the completion of a successful mentorship is the second step in becoming a faculty member. At this time, you are still a **faculty candidate**. This is not a decision that requires any further evidence or appeal . . . if you choose to have a second mentorship, we can discuss the selected course and the expectation of faculty candidates . . . " (**dkt.**47, pages 14-15)

Proof #4 In an email Jolley wrote: "Dear **faculty candidate**, we are pleased to inform you . . . Final acceptance as a University of Phoenix faculty member is predicated upon completion of your HR files, **Faculty Candidate** Certification, and completion of your first mentorship course. You will remain a **faculty candidate** until after successful completion of these processes and activities." (**dkt.**44, pg.4)

Proof #5 Paden's message posted on eCampus proves the same: "Dear faculty certification candidate, . . . Welcome to Faculty Certification . . . We designed our Faculty Certification and Mentorship process to prepare our faculty member for . . . we immerse candidates in our teaching and learning model by having them participate in a 4-week certification to gain an understanding of the skills a faculty member needs . . . During the second stage, **candidates** . . . teach a class with the guidance of an experienced faculty mentor. During the certification and mentorship stages, **faculty candidates** interact with . . . 30,000 faculty members" (**dkt.**73, pg.5)

Evidence #2: The visual timeline of events during Mikhak's faculty qualification process (Exhibit T, App. 127-130)

1. A careful analysis of the visual timeline of events shows the manner and timing in which the contract was formed, which is another proof for there was no mutual assent.

2. Mikhak was still in the middle of her Certification Stage when the UOP induced her to click "Accept" to the arbitration agreement and sign various "extrinsic hiring forms," or else risk failing the Certification Stage.

Evidence #3: The contractual language in the Faculty Acknowledgement Detail (or the arbitration agreement)

1. Dal Cielo only had one "proof" in support of her claim that Mikhak had self-identified as faculty member and that was the phrase "Dear faculty member" in the **Faculty Acknowledgement Detail. Exhibit 3** in Mortensen's testimony (**dkt.**15-5, ER4:473).

2. At the time, Mikhak found it surprising, that all of a sudden, the UOP addressed us as "Dear faculty member," even though she was still faculty candidate.

3. But she was induced to click "Accept" so she could continue with finishing the Certification Stage of her faculty qualification program and get access to the course material.

Evidence #4: Perjured testimonies under oath.

1. The opposing party presented perjured testimonies so to make up for the clear and convincing evidence in support of Mikhak's claim that she had self-identified as faculty candidate, which substantially interfered with Mikhak's former counsel from fairly and fully

presenting her contract defenses that the arbitration agreement was invalid.

2. During a court hearing Muraco (UOP's counsel) called attention to the phrase "Dear faculty member" in the Faculty Acknowledgement Detail. (Exhibit S1B9, ER3: 392-393)

3. Mikhak's former counsel objected to this misrepresentation during the trial, but because they were surprised, they had no strategy to depose or cross examine the counsel and the UOP witnesses.

4. Muraco argued that it is up to the arbitrator to determine the answer to the question "was the Plaintiff a faculty member? or was the Plaintiff not a faculty member?"

5. This is proof that they knew which answer would help them win and that's why Muraco was asking the district court to leave it to the arbitrator to decide.

6. They argued that if a faculty candidate clicked the "Accept" box to the arbitration agreement, then she must have been a faculty member at the time. But that was not true.

7. During trial, Mikhak did not know what was the opposing party's intent to confuse the issue for the court. After she learned about contract law, she was able to connect the dots and expose their fraudulent and material misrepresentation.

8. Mikhak made several arguments for why her assent was for, when and if, she gets invited to

join the full-time faculty, not for during her faculty qualification process.

9. For example, she argued that the only sensible interpretation of Section **THREE (3.13 | Dispute Resolution Policy and Procedures; Exhibit P-4)** is that this policy will apply to her when, and if, she was to be invited to join the **full-time** faculty.

10. Dal Cielo and her **three** witnesses (Taylor, Spence, and Mortensen) falsely testified repeatedly to create an illusion that there was no distinction between faculty members and faculty candidates:

    Proof #1: "Faculty and faculty candidates, collectively, are hereinafter, referred to as "faculty"." (**Exhibit S1A2,** ER3: 357-358)

11. Without offering any meaningful justification, they referred to these **two** distinct categories as one generalized category of faculty, throughout their false testimonies, thus giving the illusion that they are the same. They are not.

12. There is no way that a faculty candidate, who is being evaluated and compared to her peers, could have equal bargaining power as that of a faculty member, who has already been selected as "best-qualified."

13. At the time of contract formation, Mikhak had no equal bargaining power, was not on the payroll, and was not even an employee in a "teaching capacity."

14. The UOP did not give faculty candidates equal bargaining power when it gave them an email address or access to its main web-portal eCampus, or when it assigned them to teach one course with a mentor. (**dkt.**24, pgs.22, 34, 35, 38, 41 and 42)

15. The UOP had to conceal the distinction between faculty candidates and faculty members, and had to misrepresent Mikhak's faculty status. Without their Fraud Upon the Court, they could not prove that the extent of Mikhak's unequal bargaining power was minimal.

16. If it was true that "faculty members" and "faculty candidates" were the same, then this information should have been disclosed during discovery and before trial so Mikhak's former counsel could depose the witnesses.

17. Failing to disclose this information prevented Mikhak's former counsel from fully and fairly preparing for her meritorious claim that the arbitration agreement was invalid; it substantially interfered with Mikhak's counsel from strategizing their deposition of the UOP's witnesses.

18. The UOP's other strategy was to confuse the issue with several ways of defining the term faculty member. For example:

    Proof #2 "faculty member is an umbrella term used . . . relating to those individuals in a teaching capacity"

19. The concept that the faculty member is an "umbrella term" was not defined anywhere in the Faculty Handbook.

20. During the trial, Mikhak's former counsel argued that Mikhak was not perceived as a "current" faculty member because she was still being considered for hire as a faculty member by the UOP. (**dkt.**18, pg.11)

21. Even though Mikhak was later assigned to teach one course, under a mentor, she did not self-identify as a faculty member because her "teaching capacity" was yet to be determined.

22. At the time when Mikhak clicked the "Accept" box, she had no job title because faculty candidates don't have job titles. She was not on payroll, not a *part-time* employee in a "teaching capacity," and not yet qualified to be invited to join the faculty.

23. During the Mentorship Stage, she was not among the faculty listed under the Faculty Model so she was not covered by the arbitration agreement.

24. Dal Cielo's claim that "faculty member is an umbrella term used to apply to all University faculty whether they work . . . , or whether they are faculty candidates, . . . or some other faculty-related capacity" is not reconcilable and is conflicting to the facts stated in the Faculty Handbook:

    - The "faculty candidates are invited to join faculty" suggests that they're not part of the faculty before finishing qualification;

- The Faculty Model does not have faculty candidate as a distinct category;
- The faculty candidates have no appeal or grievance privileges.

25. Dal Cielo presented Spence's perjured testimonies:

    Proof #3: "Mikhak had ***expressly*** agreed to arbitration for a second time by clicking "Accept" to the **Course Assignment Detail**."

26. The Course Assignment Detail is not real proof. Dal Cielo only presented it to confuse the issue. (**dkt**.24, pgs.26-27) She has no proof that Mikhak had ***expressly*** accepted the arbitration agreement ***at least twice***.

27. The UOP asked Mikhak only once, not three times, to click "Accept" to the **Faculty Acknowledgment Detail**: If Dal Cielo is truthful, where is her proof?

    Proof #4: "Mikhak had ***expressly*** accepted the terms of the arbitration agreement *at least twice* by clicking "Accept" to the **Addendum**," which had nothing to do with ***expressly*** accepting the terms of the arbitration agreement.

28. Mikhak showed the inconsistencies in Dal Cielo's testimony when compared to Taylor and Mortensen's testimonies, the latter suggesting that the **Addendum** *did not modify or in any way relate to* the arbitration agreement. (**dkt.**24, pgs.25-26)

Evidence #5: Forged documents

1. Because the opposing party lacked sufficient evidence in support of their claim that Mikhak had self-identified as faculty member, they had to forge some documents and admit them in court as evidence (e.g., the preprinted HR New Hire forms (Taylor's **Exhibit B**) and an email the UOP claims to have sent to Mikhak (Taylor's **Exhibit A**).

2. Doing so allowed them to create an element of surprise that substantially interfered with Mikhak's former counsel's ability to fully and fairly proceed in trial. It was almost impossible for them to come up with contract defenses, without discovering the opposing party's material and fraudulent misrepresentation on the spot.

3. Instead, Mikhak's counsel strategized their contract defenses on the Class Action Waiver clause of the arbitration agreement and waited for this Court's decision on "*Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016)

   Proof #1. Taylor's perjured testimony for **Exhibit B** claimed that Mikhak had filled out the "Faculty Member's Name" box of the Human Resource (HR) form, name in the "Name" box." (**Exhibit S1A3**, ER3: 359)

- But Mikhak had not filled out this standard pre-printed HR form; the handwriting on this HR form did not match her handwriting.
- Mikhak showed her handwriting from previous pleadings filed in court to compare with the handwriting on this form. (Exhibit S1A4, ER3: 360)
- Also, Mikhak showed that the signature printed at the bottom right hand corner of the HR form (dated August 24, 2014) was of Faculty Services personnel Linda Phillips, who had filled out this HR form. (**Exhibit S1A4**, ER3: 360)
- After Mikhak exposed Taylor's testimony as forged evidence, instead of retracting the evidence, Dal Cielo changed the testimony in her Answering Brief:

  > **BEFORE: Dal Cielo's** witness **Taylor** stated " . . . On the faculty "New Hire Information Form", Plaintiff completed the section titled "faculty information" by filling her name in the "faculty member's Name" box." (**Exhibit S1A3**, ER3: 359)
  >
  > **AFTER:** "On a Faculty New Hire Information Form, for example, "Bahar Mikhak" was in the box entitled "Faculty Member Name."" (**dkt.**33, page 23)

4. The opposing party can't pretend that they are not guilty of perjury; the damage has already been done because the district court has

already relied on their forged evidence for its unfair ruling.

5. Mikhak does not deny signing the various standard HR hiring forms, but she does recall being surprised to see the HR forms making reference to the term "faculty member."

6. Her signature on the HR forms was dated March 18, 2014. At that time, she was not yet assigned to teach a course for her Mentorship Stage. Her intention in signing the forms was to agree to the terms for when they will apply to her, which was after her successful completion of the Mentorship Stage. (**dkt**.21-1, pg.30)

Proof #2 Taylor's **Exhibit A** (**dkt.**14-4, pgs.6-7) is forged evidence.

- Mikhak showed that she could not have been the recipient of Taylor's **Exhibit A** email sent from the address **"Academic Operations" <internal@communications.apollo.edu**, by comparing it to the email her instructors sent her on February 12, 2014 (with the **Subject:** RE: Participant Information for Local Campus Faculty Candidate Certification Training (2/15/2014-3/14/2014)), from the address **"Faculty Certification Team" <facultytrain@phoenix.edu**.

- Taylor's email address includes the term "internal", suggesting that the email is intended for and sent to "internal" employees only. In contrast, because the

UOP identified Mikhak among the faculty trainees, the emails sent from her instructors include the term "facultytrain" in the email address. (**dkt.**49-9, pg.1)

7. Taylor's **Exhibit A** falsely suggests that the UOP had given Mikhak "plenty of time" to review the Faculty Handbook: "On February 28, 2014, the University's Academic Operations department emailed a copy of the 2014–2015 Faculty Handbook to all faculty members, including Mikhak"

8. Mikhak argued that she was not the recipient of such an email. And that she was only given one day, not *one week*, to review the Faculty Handbook.

Contract defense #2: Because the contractual language was full of ambiguities, inconsistencies, and contradictory provisions, that were never explained by the UOP, there was ambiguity in Mikhak's coverage under the purported arbitration agreement.

Evidence #6: The Faculty Handbook.

1. Although the district court acknowledged in its ruling that Mikhak's former counsel cited *seventeen* instances in the Faculty Handbook in which the language apparently distinguishes between faculty members and faculty candidates, the district court determined that these specific instances do not alter the interpretation of "faculty" defined in the "Faculty Model," and thus, it erroneously concluded

that the parties manifested mutual assent and formed a valid contract. (**dkt.**27, ER1: 29)

2. It was reasonable for the district court to conclude that when it comes to certain policies such as the "dress code" etc., there is no distinction between faculty candidates and faculty members. But that's not true when it comes to the dispute resolution policy and procedures.

3. Dal Cielo mischaracterized and attacked Mikhak's interpretation of the Faculty Handbook in many ways to distract the court from the fact that the contractual language was full of ambiguities, inconsistencies, and contradictory provisions.

4. But Mikhak defended her interpretation and she showed proof from the Faculty Handbook that **two** of its provisions related to the dispute resolution policies were contradictory (**Exhibit S1B7,** ER3: 388-390):

   - Section **THREE (3.13| Dispute Resolution Policy and Procedures; Exhibit P-4)**, which includes the arbitration agreement, specifically mentions **two** categories of faculty, current and former and it makes no mention of faculty candidate.

   - Section **SIX (6.3| Mentorship; Exhibit P-3)** states that "faculty candidate teaching a mentorship class **do not have** remediation, grievance, appeal rights, and/or privileges" suggesting that the

Dispute Resolution Policy and Procedures do not apply to faculty candidates.

5. And she showed that there are least **two** provisions in the Faculty Handbook that state that a faculty candidate can join the faculty after the successful completion of both the Certification and Mentorship stages:

   - Section **EIGHT (8.1| Active Faculty Status; Exhibit P-2, dkt.**15-5, ER4: 445)
   - Section **SIX (6.3| Mentorship; Exhibit P-3, dkt.**15-5, ER4: 462).

6. The UOP failed to explain that its intended reading of the arbitration agreement was that it applies to both faculty members and faculty candidates because the only sensible interpretation of Section **THREE 3.13** and Section **SIX 6.3** is that this policy will apply to Mikhak only when, and if, she gets invited to join the faculty.

Evidence #7: Sections of the district court's order copied/pasted verbatim from Dal Cielo's briefs.

1. A careful examination of the district court's ruling reveals that the district court copied, pasted, and paraphrased content from the perjured testimonies, under oath, echoing Dal Cielo's attack of Mikhak's contractual interpretation as subjective and irrelevant. (**Exhibit S1D1, ER3: 413**)

2. In fact, the only correct interpretation is that the agreement's language binds all types of faculty listed under the Faculty Model, EXCEPT the faculty candidate, which is not a category listed under the Faculty Model.

3. The district court erred by relying on the perjured testimonies instead of directly studying the Faculty Handbook and the **Faculty Acknowledgment Detail**.

4. If the district court had verified this information for itself, it would have deemed the mutual assent as nullified because the contract formed was invalid.

Evidence #8: The transcript of the court hearing on June 16, 2016.

1. One of Dal Cielo's outright fabrications was her claim that Mikhak's former counsel failed to raise the "misrepresentation" argument, included subsequently. But Mikhak nullified Dal Cielo's contention using excerpts of the transcript that show Mikhak's former counsel objected to this mischaracterization based on specific sections of the (2014-2015) Faculty Handbook that they admitted to court as proof (**Exhibit S1A1**, ER3:353-356).

2. Judge Breyer's response is proof that the "misrepresentation" argument was raised sufficiently for the trial court to rule on, so it is not deemed waived on appeal:

MR. MCNEILL: " . . . PEOPLE SUCH AS MS. MIKHAK ARE TREATED DIFFERENTLY. THEY ARE NOT FACULTY MEMBERS. THEY ARE NOT FACULTY . . . THE VARIOUS PORTIONS OF THE FACULTY HANDBOOK THAT WOULD INDICATE THAT –" . . . "THEY SHOW THAT THERE IS A DIFFERENCE BETWEEN A FACULTY CANDIDATE AND FACULTY AND FACULTY MEMBER. THEY SAID FACULTY IS FACULTY IS FACULTY. THESE ELEMENTS INDICATE THAT THE DOCUMENT ITSELF TREATS FACULTY"

THE COURT: "I'M SURE – **I HAVEN'T LOOKED AT THEM – BUT I'M SURE THAT COUNSEL IS CORRECT THAT IT TALKS ABOUT GROUP A VERSUS GROUP B, OR MAKES DISTINCTIONS** EITHER BY WAY OF MAKING AN ABSOLUTE DISTINCTION OR SIMPLY NOT INCLUDING THE MINUTE; IS THAT FAIR TO SAY? **I HAVEN'T LOOKED AT THESE THINGS**." " . . . I HAVE EVERYTHING IN THE BRIEFS AND NOW YOU'VE RAISED AN ADDITIONAL POINT, AND I HAVE THOSE IN MIND. SO – OR **I'M GOING TO HAVE THEM IN MIND WHEN I HAVE A CHANCE TO TAKE A LOOK AT IT. BUT I DON'T HAVE A CHANCE TO LOOK AT IT NOW . . . "**

Contract defense #3. Because the level of procedural and substantive unconscionability in the arbitration agreement was major, not minor, the arbitration agreement was invalid.

Proof #1: Mikhak showed that the level of procedural unconscionability of the arbitration agreement was major because it was **unduly oppressive**.

1. In at least three cases in California, the arbitration provisions in employment contracts were ruled procedurally unconscionable because they were a "contract of adhesion," were imposed on employees as a condition of employment and there was no opportunity to negotiate. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002), *Armendariz*, 24 Cal. 4th 83 (2000); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003).

2. The district court acknowledged that the UOP presented Mikhak with an arbitration clause on an "adhere-or-reject basis," and thus it was at least somewhat procedurally unconscionable due to its oppressive nature. (**dkt.**27, ER1: 31)

3. The arbitration agreement was imposed on Mikhak as a condition of employment and continuing onto the Mentorship Stage, which proves the oppressive nature of this contract and establishes that the procedural unconscionability was major, not minor. *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76, 87 (2003).

4. Mikhak argued that because, as a faculty candidate, she was asked to adhere to the contract, or else risk being barred from usage of eCampus and being denied access to the course material to finish her Certification Stage, the "adhere-or-reject basis" of the arbitration agreement was unduly oppressive.

5. If Mikhak had refused to click "Accept," 1) she would have been blocked from attending **WEEK 3**, and as a result, she would have "failed" the Certification Stage; 2) she would not have been assigned to teach a course under a mentor during the Mentorship Stage; 3) she would have wasted about **five months** of her time, money, and mental energy that she could have invested into other employment opportunities; 4) she would not have been invited to join the faculty; and 5) because of the **five-months** gap on her C.V., she would have had to explain to her future potential employers why she had "failed" the faculty qualification process at the UOP.

Proof #2: The level of procedural unconscionability of the arbitration agreement was major because it involved much **surprise**.

1. The UOP had scheduled **WEEK 4** on March 14, 2014 to familiarize Mikhak with the UOP's policies and procedures. But **one week** prior to that session, on March 7, 2014, the UOP surprised her by requiring her to click "Accept" before she got the chance to familiarize herself with the arbitration agreement. (**Exhibit S1C2,** ER3: 400)

2. Also, the UOP gave Mikhak a homework assignment based on an outdated (2011-2012) Faculty Handbook, even though the updated (2014-2015) Faculty Handbook, which included the arbitration agreement, was available. Essentially, the UOP asked her to study and take a quiz on "*Contract A*" but later required that she click "Accept" to "*Contract B*" which included a brand-new provision that she had not studied.

3. Mikhak felt manipulated into signing the arbitration agreement because she was asked to click "Accept" right after she studied and took a quiz on an outdated (2011-2012) Faculty Handbook that had no mention of the arbitration agreement.

4. The opposing party claims to have given Mikhak b or "plenty of time" to familiarize herself with the arbitration agreement, which is not true. The updated (2014-2015) Faculty Handbook was activated/published on eCampus on March 06, 2014, only **one day** prior to March 07, 2014, the date the UOP required her to click the "Accept" box to the arbitration agreement. (**Exhibit S1C2,** ER3: 400)

5. Dal Cielo's argument that there was no surprise, but just unfamiliarity with the terms, is baseless.

6. What is the logic of creating confusion about whether the arbitration agreement applies to the faculty candidates by introducing an outdated Handbook that does not include the

arbitration agreement, right around the same time as contract formation?

7. Why make a reference to "**full-time**" faculty and employees in the **Faculty Acknowledgment Detail**, without any explanation?

8. Mikhak's case is not a case of being unfamiliar with the terms of the contract. Mikhak's case is about her interpreting a contract that included contradictory provisions that should have been explained.

Proof #3: Mikhak showed that the level of substantive unconscionability of the arbitration agreement was major because the arbitration agreement was **overly harsh**.

1. If Mikhak had declined to click "Accept", her setback would have been twofold: she would fail to get certified AND fail to get an offer of employment as a faculty member.

2. A contract is unconscionable when there is deliberate misrepresentation of the facts by one party so as to deprive the other party of their rights and to take unconscionable advantage of them.

3. Typical employment cases dealing with arbitration agreements require the candidate to accept arbitration as a condition of employment and at the commencement of employment. Such candidates are already qualified or certified.

4. The key difference between Mikhak's case and a typical employment case is that the

UOP's arbitration agreement was a one-sided contract of adhesion as a condition for both faculty qualification AND employment; Mikhak first had to go through a lengthy faculty qualification process, investing a lot of time, money, and mental energy to become qualified for employment at the UOP.

5. The purported arbitration agreement was concealed from Mikhak for about five months, until needed by UOP. See Cal. Civil Code § 1710(3) (deceit includes "the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.")

6. If the UOP's contract formation was done in the beginning, after the phone interview, that would have allowed Mikhak to either accept or reject the arbitration agreement before investing her time, mental energy, and money into the faculty qualification process.

7. Alternatively, the contract formation could have taken place after she completed her Certification and Mentorship Stages and at the commencement of her employment. This way, at least she would have earned her Certification even if she declines to "Accept" the arbitration agreement.

8. It is overly harsh to subject a qualified faculty candidate to a label of "failure" in their career trajectory just because they declined to click "Accept" to the arbitration agreement.

Proof #4: Mikhak showed that the UOP breached the implied covenant of good faith and fair dealing by not honoring the agreement's modification provision, which rendered the agreement substantively unconscionable and, thus, unenforceable. (**dkt.**24, pgs.51-53)

1. What the UOP should have done instead was to give Mikhak thirty-days written notice before soliciting the acknowledgment of the updated (2014-2015) Handbook.

2. The UOP's disregard for the agreement's modification provision, would necessarily lead the faculty candidate to rely on the outdated Handbook.

Contract defense #4. <u>Two out of ten</u> strategies that Dal Cielo used in her counterarguments are described below:

Strategy #1: Dal Cielo used after-the-fact explanations as a justification for her fraudulent and material misrepresentation.

1. Dal Cielo's explanations are called "after-the-fact explanations" because they are nowhere to be found in the Faculty Handbook or in the arbitration agreement.

2. They simply help prove Mikhak's point that the UOP failed to explain the ambiguity in the contractual language.

3. Mikhak presented all the terms in **Exhibit TB-4** (ER6-738-743) that the UOP should

have explained at the time of contract formation.

4. Dal Cielo's post hoc explanation of the UOP's intended meaning cannot take back the negative impact of misleading Mikhak's former counsel and the court during trial. The damage has been done.

Dal Cielo's after-the-fact explanation #1 "the UOP "often uses "faculty member" or "faculty" as a shorthand and all-encompassing term for ease of reference."

1. There are provisions in the Faculty Handbook that clearly distinguish between faculty candidates and faculty members and are proof that the suggestion that a "faculty member" has double meaning, and when used alone, it refers to the all-encompassing meaning, and that Mikhak should have interpreted "Dear Faculty Member" as "Dear Faculty Candidate" are irreconcilable and conflicting:

    1. The provision **Section SIX 6.3 Mentorship** (ER2-166); not to be confused with a provision about the dress code or alcohol drinking, etc.

    2. **The Faculty Acknowledgement Detail** (ER6, pages 741-742) states "to the extent that I am a **full-time** employee" suggesting that the arbitration agreement covers those faculty members who are **full-time** "faculty members" only.

Dal Cielo's after-the-fact explanation #2 "the ""faculty member" is a synecdochical term, where a

part refers to the whole," or that it refers to the "subtype AND the whole."

> "faculty member is a synecdochical term, is conflicting and irreconcilable to the statement "faculty candidates will be invited to join faculty."

Dal Cielo's after-the-fact explanation #3 ""there was, in short, more than sufficient common meanings attached to faculty member," that meaning (#1) "when faculty member is coupled with another term like faculty candidate, it can denote a particular faculty type," but that meaning (#2) "when faculty member is used alone, it refers to all types of faculty."

1. To expose that Dal Cielo's meaning (#1) is illogical, Mikhak provided an example with "faculty members" in Section **SEVEN (7.2 |** (ER3-383): "The CMT serves as . . . an on-going assessment of faculty candidates and faculty members . . . "; and an example with "faculty" in Section **EIGHT (8.1|** (ER3-374): "faculty candidates" are invited to join the faculty after successful completion of both certification and a mentorship course."

2. In both examples, because "faculty members" or "faculty" are coupled with faculty candidates, they denote a particular faculty type; one that is distinct from faculty candidates.

3. This is proof that one cannot be a faculty candidate and a faculty member at the same time; it would be a contradiction in terms.

4. To expose that Dal Cielo's meaning (#2) is also illogical, in the UOP's president's welcome message, Mikhak found an example of when faculty members is used alone: " . . . by selecting the best-qualified faculty members." (ER2-208) The term "faculty members" was used here, specifically, because once the UOP selects the best-qualified, they are then identified as faculty members so as to distinguish them from faculty candidates.

5. This is proof that when "faculty members" is used alone, it does not refer to "all types of faculty," because that would mean the UOP identifies all faculty candidates, at any stage of their faculty qualification process, as best-qualified!

6. That there is only one meaning attached to faculty members, regardless of how it is used in a sentence.

7. Mikhak uses the analogy of "comparing apples to oranges" to illustrate that Dal Cielo's argument that "faculty member has double meaning" is invalid.

8. Using a simple analogy of apples and oranges both being under the umbrella of fruits. A seller writes a sales contract, including the term "apples," suggesting the price of apples is $5 per apple and includes several provisions suggesting apples are distinct from oranges.

9. Let's assume the buyer is only interested in apples, and the seller induces a buyer to sign the contract to buy apples. But when the

buyer arrives home, she opens her shopping box and realizes the seller had given her oranges instead of apples!

10. The buyer goes back to the shop to return the oranges and get her money back but the seller tells her that the oranges are non-refundable because the term "apples" in the sales contract has double meaning; it means apples AND fruit!

11. When "apples" is used alone, it has the meaning of "fruits" but when "apples" is coupled with another term it has a particular meaning of "apples." The buyer feels that the seller's misrepresentation of apples was fraudulent and material.

12. When the buyer writes a negative consumer report about her experience, the seller defends himself by suggesting that "this is all a mutual misunderstanding" because the term "apples" has double meaning, the buyer should have associated the term "apples" in the sales contract with any fruit, oranges or blueberries or watermelon, etc. because they all fall under the umbrella of fruit.

13. But the buyer explains that this may be a mutual misunderstanding had the seller given her any other fruit instead of oranges, because the sales contract included several provisions specifically making a distinction between "apples" and "oranges." Thus, what the seller has done is considered fraudulent and material misrepresentation.

14. Dal Cielo states that "for ease of reference, the UOP often uses "faculty member" or "faculty" as a short-hand and all-encompassing term" (**dkt.**33, page 22). This is like saying for ease of reference, the seller often uses the word "apples" or "fruits" as a short-hand and all-encompassing term (fruits).

15. Even though an "apple" is a particular type of "fruit," the seller treats "apples" as an all-encompassing term. "Apple" cannot be used as a short-hand for "fruit" because "apple" is a type of fruit and it does not encompass all fruits. Similarly, "faculty member" is a type of "faculty" and it cannot encompass all the different types of faculty.

16. Thus, Dal Cielo's argument falls apart when she tries to justify her perjury by stating that because "faculty member" has double meaning, then there was a mutual misunderstanding and Mikhak should have self-identified as a "faculty member" at the time of contract formation.

17. If "faculty member" has double meaning, then the UOP must explain this clearly in the contract before asking the faculty candidate to sign it. The UOP's failure to write a clear contract must have been willful negligence to benefit the UOP.

18. The panel overlooked the fact that Dal Cielo's logic is flawed in claiming that when "faculty member" is coupled with another term like "faculty candidate," then "faculty member"

can denote a particular faculty type, but when used alone, it refers to all (like a faculty).

19. Using the same analogy of "apples" having double-meaning, the seller claims that if, in his contract, he had given the price of "apples" and the price of "oranges," then he could not have denied the buyer apples by giving her oranges, because when "apples" coupled with "oranges," it can denote "apples" but when used alone, it can refer to any fruit including "oranges"!!

20. Dal Cielo is suggesting that when Mikhak was addressed as "Dear Faculty Member" in the **Faculty Acknowledgment Detail**, the "faculty member" was used alone so the UOP's meaning attached to "faculty member" was the all-encompassing meaning of "faculty."

21. But because Mikhak self-identified as a faculty candidate at the time of contract formation, she assumed she had no appeal or grievances privileges and the arbitration agreement would apply to her when and if she were to be invited to join the faculty as a "faculty member."

22. As a faculty candidate, Mikhak could not even self-identify as a "faculty," let alone a "faculty member," because as the email communications from both her instructors (Jolley and Malone) suggest, she had <u>to be invited</u> to join the faculty.

Strategy #2: Dal Cielo presented 25 *new* perjured testimonies, under oath, including taking Mikhak's words out of context

Mikhak presented all of Dal Cielo's new perjury in (**Exhibit TB-2**, ER6-717-728), showing how Dal Cielo confused the issue by suggesting that because faculty member has double meaning, "this is all a mutual misunderstanding."

Dal Cielo's new perjured testimony #1 " . . . Just as "lecturer" can have a particular meaning at certain universities (to distinguish between full-time or tenured faculty), so too can it refer to all who lecture, regardless of whether they are tenured. "Faculty member" is therefore susceptible to both meanings attached to it: the sub-type and the whole."

1. A lecturer can refer to all who lecture, but a part-time lecturer, who is an adjunct faculty and is not tenured cannot have the same benefits and privileges as a faculty member who lectures but is tenured. Thus, these two terms are conflicting and irreconcilable when it comes to understanding of one's benefits and privileges to file a complaint.

2. Mikhak showed that if she uses the term "faculty member" alone, it means "faculty" (the whole, the all-encompassing) but it will be conflicting and irreconcilable to the fact that faculty candidates are not even considered "faculty" until they pass their faculty qualification process and are invited to join the "faculty."

3. Jolley's and Malone's reminder emails to Mikhak, are examples of when the UOP used "faculty member" coupled with "faculty candidate," to denote a particular faculty type (the part), suggesting that "faculty candidates" are distinct from "faculty member."

4. Even if these two meanings for "faculty member," are reconcilable with respect to "faculty" and "faculty member," they are conflicting and irreconcilable with respect to "faculty member" and "faculty candidate"

5. Faculty member maybe susceptible to both meanings. But a faculty candidate cannot be susceptible to both contrasting policies: one suggesting faculty candidates "have no appeals rights" and the other suggesting faculty candidates are "covered by arbitration."

Dal Cielo's new perjured testimony #2 Dal Cielo's revised definition of associated faculty member.

> **BEFORE:** "As defined in the Faculty Handbook, associate faculty are part-time employees, whose teaching assignments are based on individual courses or activities."
>
> **AFTER:** "As defined in the Faculty Handbook, associate faculty are part-time employees, **(such as "faculty candidates"),** whose teaching assignments are based on individual courses or activities."

Dal Cielo's new perjured testimony #3 "The UOP hired Mikhak as an "adjunct" faculty."

1. The "adjunct" faculty don't go through a faculty qualification process like Mikhak did.

2. At the commencement of their employment, the adjunct faculty are asked to sign hiring paperwork. Also, if Mikhak was an "adjunct" faculty, why was it that she was never invited to any of the faculty meetings to meet her fellow faculty members?

Dal Cielo's new perjured testimony #4 "There was no stated qualification, condition, or exception of when the agreement applied."

1. The stated qualification and condition for assenting to the agreement was the successful completion of BOTH the Certification AND the Mentorship Stages.

2. The UOP fulfilled a specific purpose when it omitted the conditions and qualifications, in the text of the arbitration agreement. Their deliberate omission amounts to willful negligence.

3. The UOP's willful negligence resulted in fraudulent and material misrepresentation just as it is stated in the illustration 3 in Dal Cielo's APPENDIX to her Answering Brief on page 157, where A omits the provision for assumption and B does not notice the omission and is induced by A's statement to sign the writing.

4. The specific purpose is for the benefit of the UOP so it can pretend the faculty candidate is

one thing in one situation but another thing in another situation.

5. This allows the UOP to discourage the faculty candidate, at any point, from filing a complaint, by reminding her she has no appeals or grievances privileges as a faculty candidate.

Dal Cielo's new perjured testimony #5 "the University imposed no hard deadline for the faculty candidate to accept the agreement."

1. This is not true because the UOP's "hard deadline" is implicit in Taylor's **Exhibit A** (ER3-364):

   "**Digital acknowledgement needed**. The new Faculty Handbook will require your prompt digital acknowledgment. If you do not acknowledge the new Faculty Handbook, you will be locked out of eCampus . . . " and "As soon as you've digitally acknowledged the Faculty Handbook, you will be able to proceed to eCampus and your Classroom environment."

Dal Cielo's new perjured testimony #6 "A faculty candidate, who was assigned to teach only one course, for one quarter, under a mentor, could self-identify as an "experienced" associated faculty member."

1. This is not true because the associated faculty members are, according to Taylor's testimony, an "experienced" team of faculty. (**dkt.**27, pg.13)

2. Although Mikhak is an educated and capable woman, she did not self-identify as "experienced" at the UOP because her "teaching capacity" was yet to be determined.

3. Dal Cielo falsely claimed that Mikhak must have clicked "Accept" to the arbitration agreement, not knowing she self-identified as an "experienced" associated faculty member."

4. Mikhak was being paid a "stipend" during her training, which to her, is not the same as being employed as a *part-time* associated faculty member or a **full-time** faculty member.

5. Dal Cielo explains that the Faculty Handbook has three categories of core faculty (full-time, admin, and lead), and everyone else, including the faculty candidate, falls under the category of *part-time* associate faculty member.

6. But Mikhak could not have simultaneously self-identified as BOTH a **full-time** faculty member AND a *part-time* associate faculty member, at the time of contract formation, because these two faculty identities are conflicting and irreconcilable.

7. Also, there is no suggestion in the Faculty Handbook, that faculty candidates falls under associate faculty members.

8. The text of **Faculty Acknowledgment Detail**, specifically addresses those faculty who are **full-time** faculty, which is what Mikhak clicked "Accept" to for when, and if, she joins the faculty as a **full-time** faculty.

9. Mikhak presented Exhibit 3, (ER6-740–742) as proof that the **Faculty Acknowledgement Detail** or the arbitration agreement only covered the **full-time** faculty members.

10. Dal Cielo's many illogical post hoc explanations are proof that the UOP's negligence was willful and this is not just a "mutual misunderstanding" as Dal Cielo claims.

Dal Cielo's new perjured testimony #7 Dal Cielo omitted crucial language in the **Faculty Acknowledgment Detail** to mislead the court.

> Dal Cielo's version: "I also acknowledge that I am a **full-time** employee of the University or the Apollo Education Group Inc., the Employee Handbook." The correct version: "**to the extent** I am a full-time employee of the University or the Apollo Education Group Inc., the Employee Handbook **will control**."

1. Dal Cielo's version of the **Faculty Acknowledgment Detail** is missing "**to the extent**" and "**will control**"

2. The "**to the extent**" in can be interpreted such that the arbitration agreement will become relevant (when and if) the faculty candidate is invited to join the faculty as a faculty member, a **full-time** employee of the UOP.

3. Mikhak had no misunderstanding when she interpreted this ambiguity as that the arbitration agreement covers those who are **full-time** employees AND faculty (**dkt.**21, pg.9)

4. In the Faculty Model, a specific category is designated for "**full-time** faculty" to distinguish them from the associate faculty who are *part-time*.

5. Dal Cielo had the same understanding of the *part-time* and full-time faculty as Mikhak's, when she wrote: "As associate faculty, faculty candidate must pass three probationary-type stages before they can become **full-time** faculty" (**dkt.**33, pg.23)

Dal Cielo's new perjured testimony #8: Because "faculty member" has double meaning, this is all a "mutual misunderstanding" and not a fraudulent and material misrepresentation.

1. Mikhak showed that the usage of "faculty member," as a term with double meaning, is a fraudulent and material misrepresentation.

2. To convey her point, Mikhak cited a verse from the Qur'an that showed the usage of words that have multiple- or double- meanings is done to fulfill a specific purpose. Of course, in the Qur'an, that purpose is a righteous one:

- [3:7] He sent down to you this scripture, containing straightforward verses—which constitute the essence of the scripture—as well as multiple-meaning or allegorical verses. Those who harbor doubts in their hearts will pursue the multiple-meaning verses to create confusion, and to extricate a certain meaning. None knows the true meaning thereof except **GOD** and those well founded in knowledge. They

say, "We believe in this—all of it comes from our Lord." Only those who possess intelligence will take heed. **3:1 See Footnote 2:1 and Appendix One.*

3. The UOP fulfilled two specific purposes with its willful negligence to address the faculty candidate as "Dear Faculty Member":

   - **Purpose #1:** to give the appearance that the UOP does not deny the faculty candidate her employment rights;
   - **Purpose #2:** to give the UOP the option, to discourage the faculty candidate from filing a complaint, as it is shown in Malone's email to Mikhak: " . . . This is not a decision that requires any further evidence or appeal . . . "

Exhibit O ("Optical Illusion"): "Faculty Candidate" or "Faculty Member"?

Exhibit T: A Visual Display of The Factual Background Related to The Arbitration Agreement During Mikhak's Faculty Qualification Process

Exhibit R1: Overview of the Procedural Background for When Mikhak Had Counsel During Trial

Exhibit R2: Overview of the Procedural Background After Mikhak Parted Ways with Her Counsel Post-Trial.

Exhibit O (Optical illusion):
"faculty candidate" or "faculty member"?

Bahar Mikhak 04/19/18

EXHIBIT O

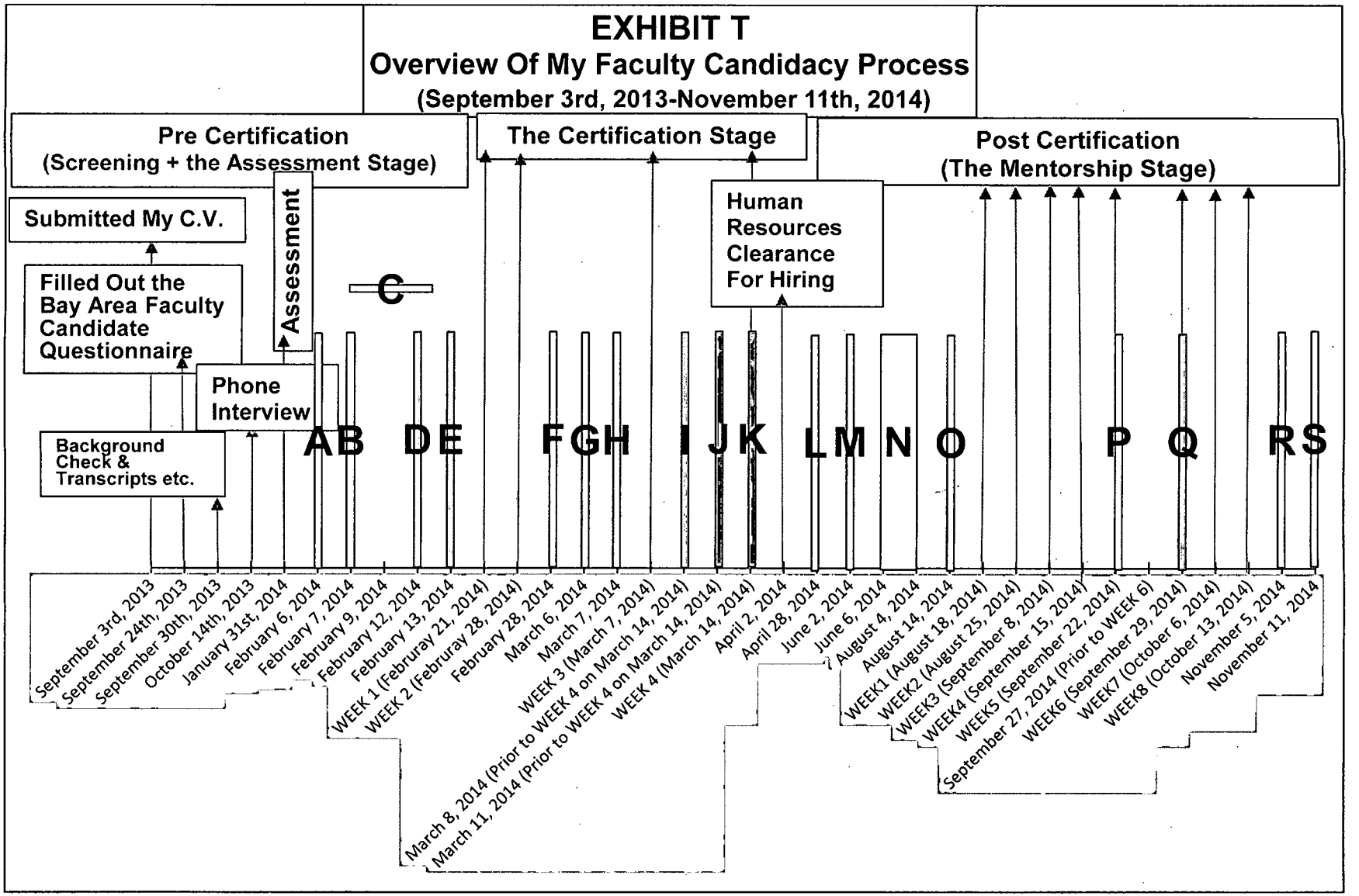
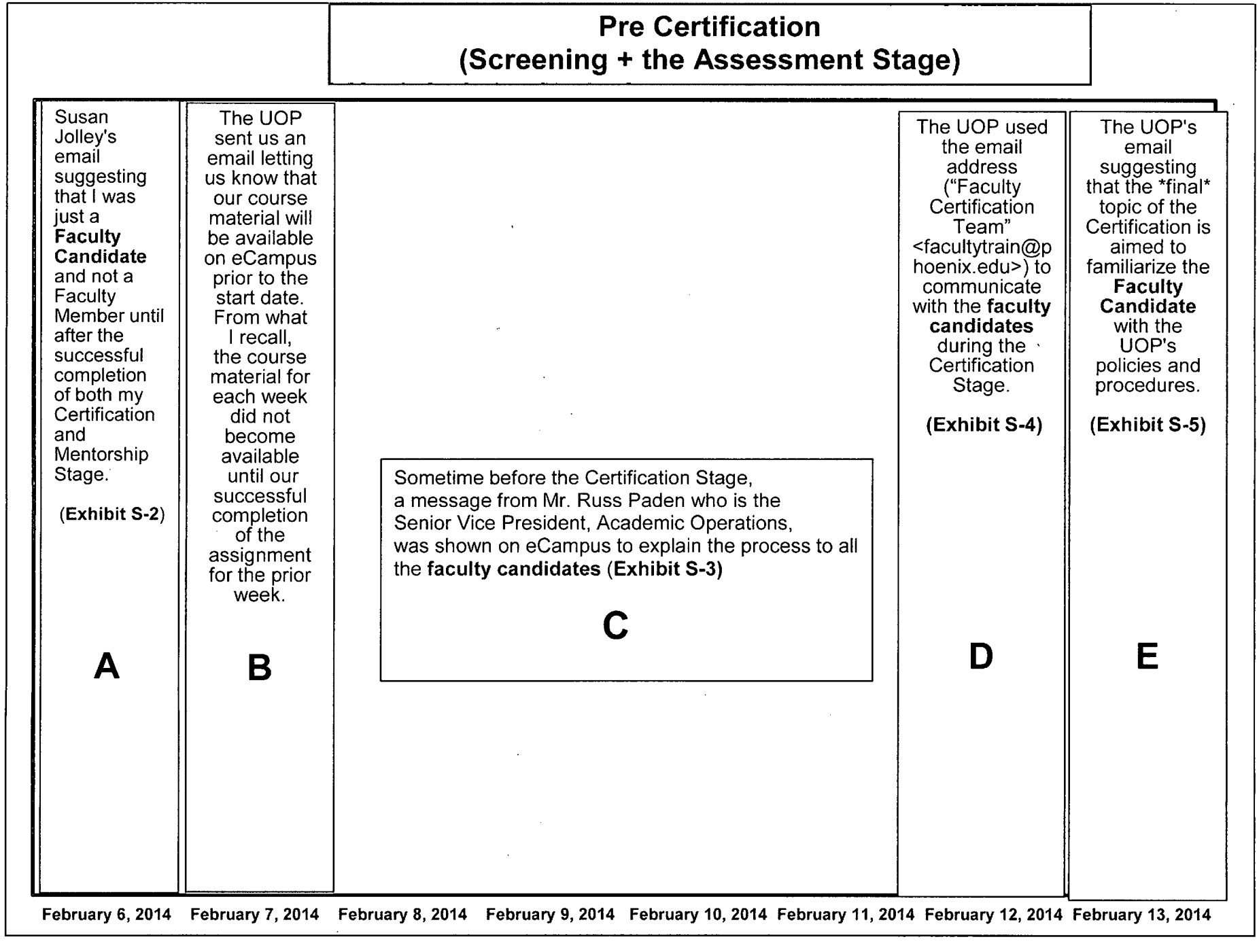
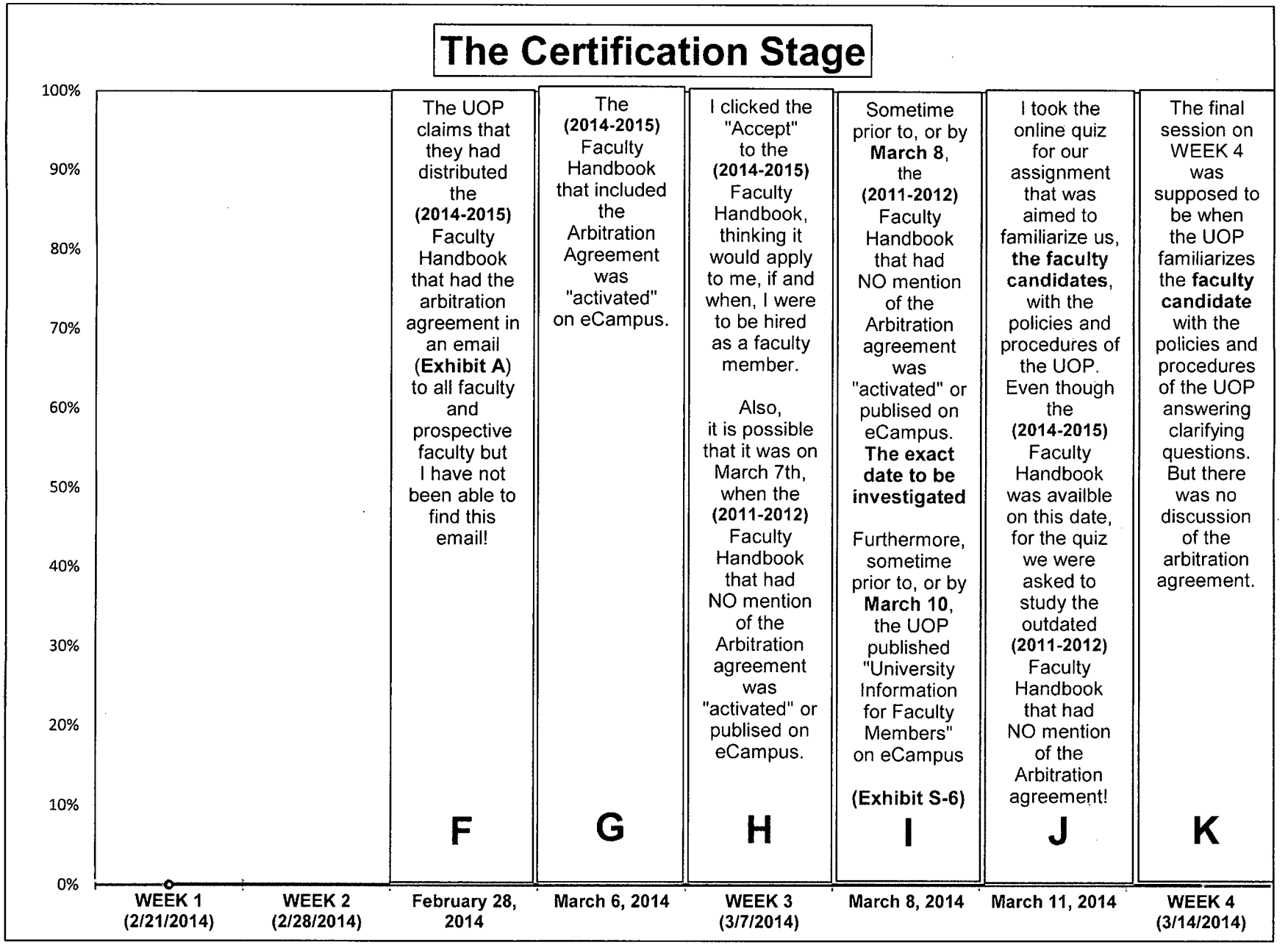
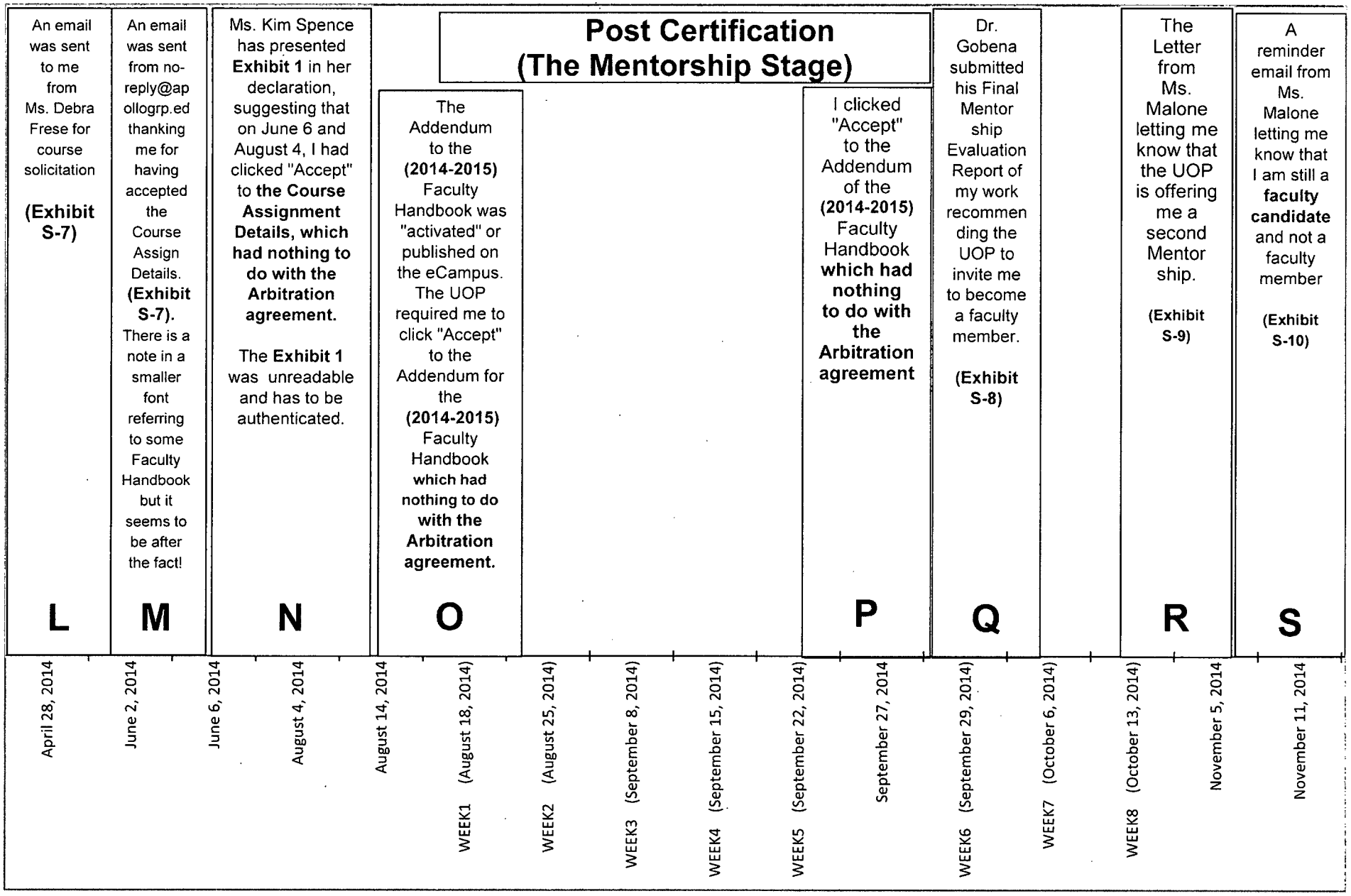
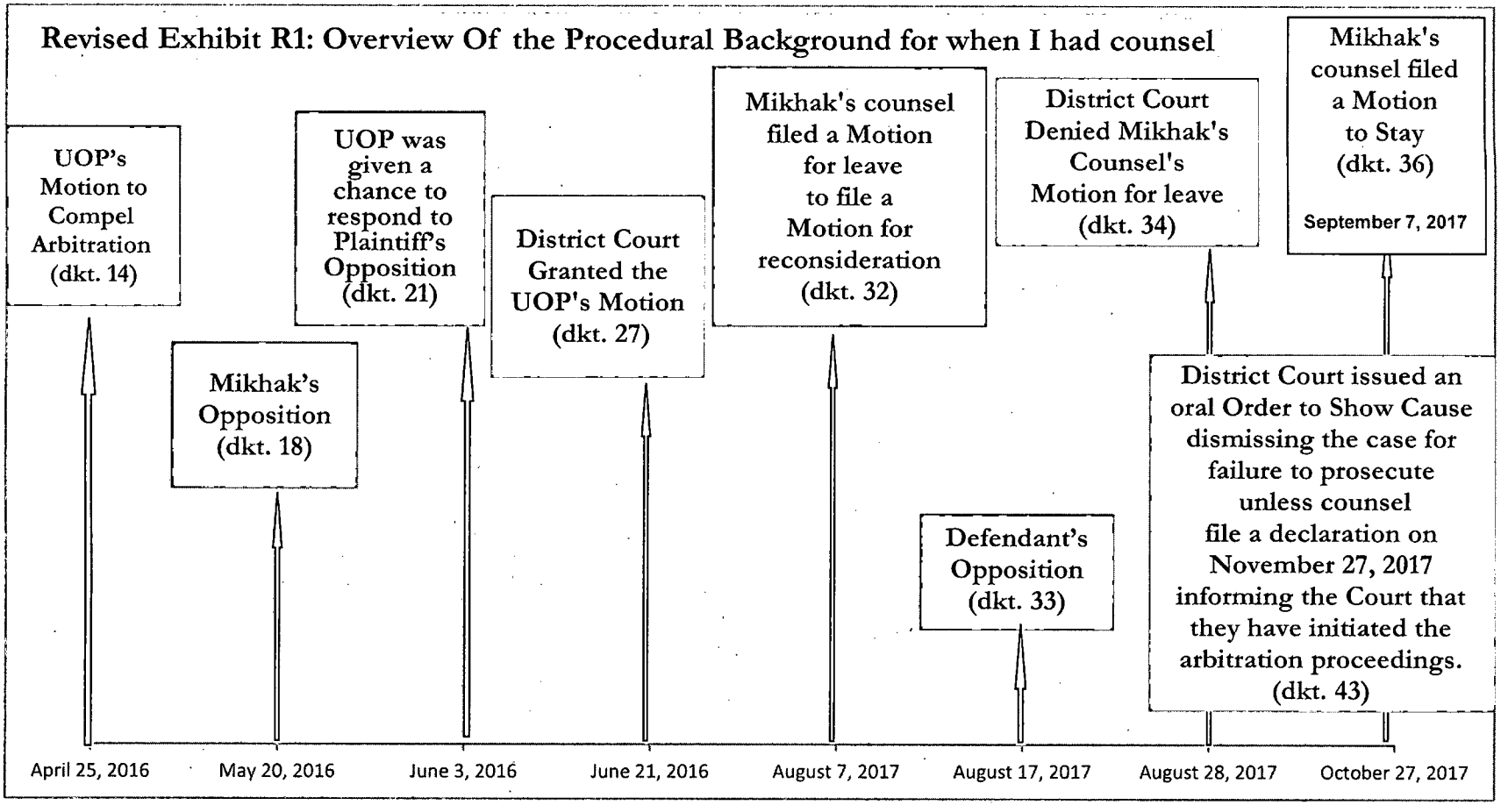


EXHIBIT T
Overview Of My Faculty Candidacy Process
(September 3rd, 2013-November 11th, 2014)
Pre Certification
(Screening + the Assessment Stage)
The Certification Stage
Post Certification
(The Mentorship Stage)
Submitted My C.V.
Filled Out the Bay Area Faculty Candidate Questionnaire
Phone Interview
Background Check & Transcripts etc.
Assessment
C
Human Resources Clearance For Hiring
AB DE FGH IJK LMN O P Q RS
September 3rd, 2013
September 24th, 2013
September 30th, 2013
October 14th, 2013
January 31st, 2014
February 6, 2014
February 7, 2014
February 9, 2014
February 12, 2014
February 13, 2014
WEEK 1 (Februray 21, 2014)
WEEK 2 (Februray 28, 2014)
February 28, 2014
March 6, 2014
March 7, 2014
WEEK 3 (March 7, 2014)
WEEK 4 on March 14, 2014)
March 8, 2014 (Prior to WEEK 4 on March 14, 2014)
March 11, 2014 (Prior to WEEK 4 on March 14, 2014)
WEEK 4 (March 14, 2014)
April 2, 2014
April 28, 2014
June 2, 2014
June 6, 2014
August 4, 2014
August 14, 2014
WEEK1 (August 18, 2014)
WEEK2 (August 25, 2014)
WEEK3 (September 8, 2014)
WEEK4 (September 15, 2014)
WEEK5 (September 22, 2014)
September 27, 2014 (Prior to WEEK 6)
WEEK6 (September 29, 2014)
WEEK7 (October 6, 2014)
WEEK8 (October 13, 2014)
November 5, 2014
November 11, 2014

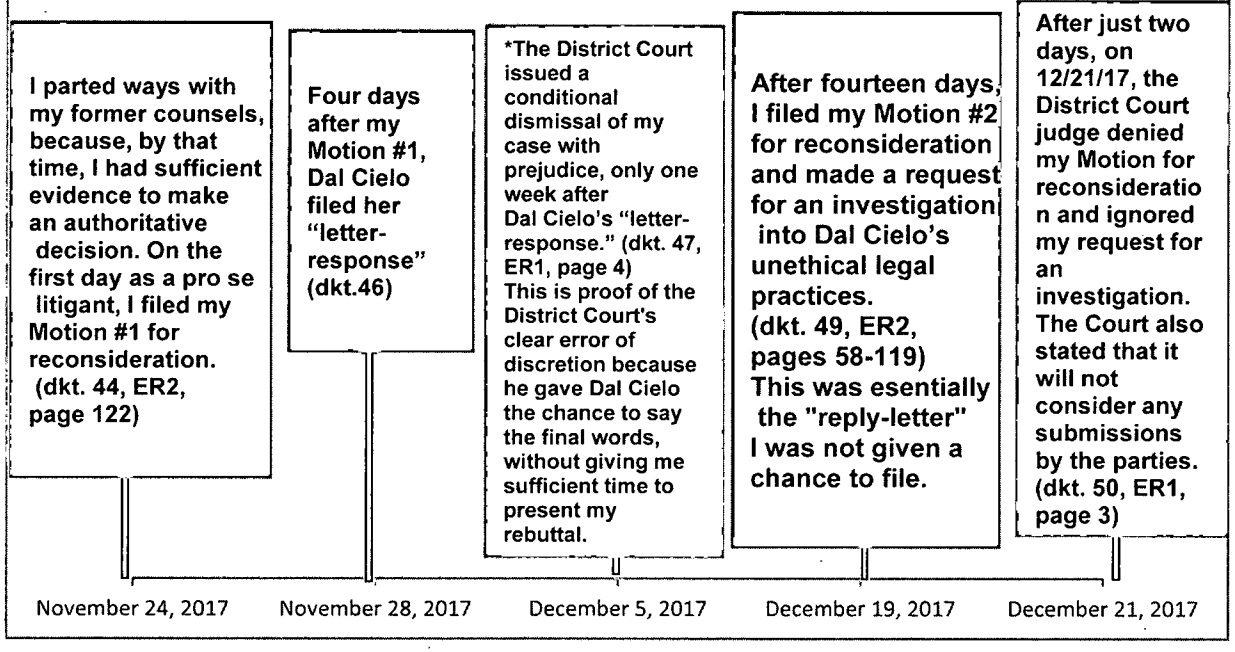

Pre Certification
(Screening + the Assessment Stage)
Susan Jolley's email suggesting that I was just a **Faculty Candidate** and not a Faculty Member until after the successful completion of both my Certification and Mentorship Stage.
(**Exhibit S-2**)
A
The UOP sent us an email letting us know that our course material will be available on eCampus prior to the start date. From what I recall, the course material for each week did not become available until our successful completion of the assignment for the prior week.
B
Sometime before the Certification Stage, a message from Mr. Russ Paden who is the Senior Vice President, Academic Operations, was shown on eCampus to explain the process to all the **faculty candidates** (**Exhibit S-3**)
C
The UOP used the email address ("Faculty Certification Team" <facultytrain@phoenix.edu>) to communicate with the **faculty candidates** during the Certification Stage.
(**Exhibit S-4**)
D
The UOP's email suggesting that the *final* topic of the Certification is aimed to familiarize the **Faculty Candidate** with the UOP's policies and procedures.
(**Exhibit S-5**)
E
February 6, 2014
February 7, 2014
February 8, 2014
February 9, 2014
February 10, 2014
February 11, 2014
February 12, 2014
February 13, 2014


The Certification Stage
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
WEEK 1 (2/21/2014)
WEEK 2 (2/28/2014)
February 28, 2014
March 6, 2014
WEEK 3 (3/7/2014)
March 8, 2014
March 11, 2014
WEEK 4 (3/14/2014)
The UOP claims that they had distributed the (2014-2015) Faculty Handbook that had the arbitration agreement in an email (Exhibit A) to all faculty and prospective faculty but I have not been able to find this email!
F
The (2014-2015) Faculty Handbook that included the Arbitration Agreement was "activated" on eCampus.
G
I clicked the "Accept" to the (2014-2015) Faculty Handbook, thinking it would apply to me, if and when, I were to be hired as a faculty member.
Also, it is possible that it was on March 7th, when the (2011-2012) Faculty Handbook that had NO mention of the Arbitration agreement was "activated" or publised on eCampus.
H
Sometime prior to, or by March 8, the (2011-2012) Faculty Handbook that had NO mention of the Arbitration agreement was "activated" or publised on eCampus. The exact date to be investigated
Furthermore, sometime prior to, or by March 10, the UOP published "University Information for Faculty Members" on eCampus
(Exhibit S-6)
I
I took the online quiz for our assignment that was aimed to familiarize us, the faculty candidates, with the policies and procedures of the UOP. Even though the (2014-2015) Faculty Handbook was availble on this date, for the quiz we were asked to study the outdated (2011-2012) Faculty Handbook that had NO mention of the Arbitration agreement!
J
The final session on WEEK 4 was supposed to be when the UOP familiarizes the faculty candidate with the policies and procedures of the UOP answering clarifying questions. But there was no discussion of the arbitration agreement.
K


Post Certification
(The Mentorship Stage)
An email was sent to me from Ms. Debra Frese for course solicitation
(Exhibit S-7)
L
April 28, 2014
An email was sent from no-reply@apollogrp.ed thanking me for having accepted the Course Assign Details. (Exhibit S-7). There is a note in a smaller font referring to some Faculty Handbook but it seems to be after the fact!
M
June 2, 2014
June 6, 2014
Ms. Kim Spence has presented Exhibit 1 in her declaration, suggesting that on June 6 and August 4, I had clicked "Accept" to the Course Assignment Details, which had nothing to do with the Arbitration agreement.
The Exhibit 1 was unreadable and has to be authenticated.
N
August 4, 2014
August 14, 2014
The Addendum to the (2014-2015) Faculty Handbook was "activated" or published on the eCampus. The UOP required me to click "Accept" to the Addendum for the (2014-2015) Faculty Handbook which had nothing to do with the Arbitration agreement.
O
WEEK1 (August 18, 2014)
WEEK2 (August 25, 2014)
WEEK3 (September 8, 2014)
WEEK4 (September 15, 2014)
WEEK5 (September 22, 2014)
I clicked "Accept" to the Addendum of the (2014-2015) Faculty Handbook which had nothing to do with the Arbitration agreement
P
September 27, 2014
Dr. Gobena submitted his Final Mentor ship Evaluation Report of my work recommending the UOP to invite me to become a faculty member.
(Exhibit S-8)
Q
WEEK6 (September 29, 2014)
WEEK7 (October 6, 2014)
The Letter from Ms. Malone letting me know that the UOP is offering me a second Mentor ship.
(Exhibit S-9)
R
WEEK8 (October 13, 2014)
November 5, 2014
A reminder email from Ms. Malone letting me know that I am still a faculty candidate and not a faculty member
(Exhibit S-10)
S
November 11, 2014


Revised Exhibit R1: Overview Of the Procedural Background for when I had counsel
UOP's Motion to Compel Arbitration (dkt. 14)
Mikhak's Opposition (dkt. 18)
UOP was given a chance to respond to Plaintiff's Opposition (dkt. 21)
District Court Granted the UOP's Motion (dkt. 27)
Mikhak's counsel filed a Motion for leave to file a Motion for reconsideration (dkt. 32)
Defendant's Opposition (dkt. 33)
District Court Denied Mikhak's Counsel's Motion for leave (dkt. 34)
District Court issued an oral Order to Show Cause dismissing the case for failure to prosecute unless counsel file a declaration on November 27, 2017 informing the Court that they have initiated the arbitration proceedings. (dkt. 43)
Mikhak's counsel filed a Motion to Stay (dkt. 36)
September 7, 2017
April 25, 2016
May 20, 2016
June 3, 2016
June 21, 2016
August 7, 2017
August 17, 2017
August 28, 2017
October 27, 2017

Revised Exhibit R2-Overview Of the Procedural Background after I parted ways with my counsel



*The speed in which the Court issued its ruling (only <u>one week</u> after Dal Cielo's "letter-response") did not give me sufficient time to file a "letter-reply" to Dal Cielo's "letter-response" to explain that because Dal Cielo could obstruct justice again, I was reluctant to move forward with Arbitration with her.