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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JILL BRIGHTWELL HOTVET, Plaintiff and Respondent, v. FIRST WILSHIRE SECURITIES MANAGEMENT, INC., Defendant and Appellant.	B271092 (Los Angeles County Super. Ct. No. EC064430)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph C. Hofer, Judge. Affirmed in part, reversed in part and remanded with directions.

Linda Van Winkle Deacon; Ervin Cohen & Jessup, Michael C. Lieb and Leemore L. Kushner for Defendant and Appellant.

Strauss & Strauss and Michael Strauss for Plaintiff and Respondent.

Jill Brightwell Hotvet sued her former employer First Wilshire Securities Management, Inc. (Management) for wrongful termination in violation of public policy, breach of contract and violation of multiple Labor Code provisions intended to protect employees from wage theft and retaliation. Management petitioned to compel arbitration of Hotvet's complaint in accordance with rules requiring members and associated persons of the Financial Industry Regulatory Authority (FINRA)[1] to arbitrate their disputes arising out of the business activities of a FINRA member or associated person of a FINRA member. The superior court denied the petition, ruling there was no agreement to arbitrate and, in any event, Management had not carried its burden to demonstrate it was a FINRA member or that the dispute fell within the scope of the arbitration agreement. The court's ruling is only partially correct.

Management demonstrated it had been a FINRA member during most, albeit not all, of Hotvet's employment and Hotvet had agreed to arbitrate disputes arising out of her business activities as an associated person of a FINRA member. Several of Hotvet's causes of action, including her wrongful termination claim, fall outside the scope of the arbitration agreement because

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[1] FINRA is a private corporation that acts as a self-regulatory organization under contracts with brokerage firms and trading markets. It was established in 2007 as the successor to the National Association of Securities Dealers (NASD) and the member regulation, enforcement and arbitration operations of the New York Stock Exchange. (See *Valentine Capital Asset Management, Inc. v. Agahi* (2009) 174 Cal.App.4th 606, 608, fn. 2; http://www.finra.org, as of March 6, 2018.)

they indisputably arose after Management had terminated its FINRA membership in 2012. As to those plainly nonarbitrable claims, we affirm the order denying arbitration. However, other claims (the fifth through 10th and 12th causes of action) were premised on Management's conduct when it was a FINRA member and, on the face of the complaint, come within the scope of the arbitration agreement. To the extent Hotvet asserts she was not acting as an associated person of a FINRA member but as an investment advisor not subject to FINRA's arbitration rules, Hotvet bore the burden to demonstrate those claims fall outside the scope of the arbitration provision. She failed to meet that burden. Accordingly, as to those claims, we reverse the order denying arbitration and remand to the superior court to issue a new order compelling arbitration of the fifth through 10th and 12th causes of action and to exercise its discretion under Code of Civil Procedure section 1281.2, subdivision (c), to determine when the arbitration should proceed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Hotvet's Complaint*

Hotvet alleged in her complaint that Management hired her in 2003 on a commission-only basis as director of client relations. She worked hard and helped to grow the company. In 2010 Management changed Hotvet's compensation formula, resulting in a significant reduction in her earnings. In February 2015, after Management insisted Hotvet assume financial responsibility for losses caused by a client's redemption request and withheld $21,000 from her earned commissions for this purpose, Hotvet complained to her supervisors that Management's actions were illegal. On February 13, 2015

Management placed Hotvet on administrative leave and on February 27, 2015 terminated her employment.

Hotvet's complaint, which named Management as the only defendant, alleged causes of action for wrongful termination in violation of public policy, breach of contract, breach of the implied covenant of good faith and fair dealing and various Labor Code violations—unlawful retaliation (Lab. Code, § 1102.5), unlawful deductions of an employee's earned wages (Lab. Code, §§ 221, 224), failure to itemize payments due (Lab. Code, § 226) and failure to pay minimum wage, overtime and wages due at termination (Lab. Code, §§ 1197, 510, 203). Hotvet also sought indemnification for business-related losses she allegedly incurred in performing her job duties (Lab. Code, § 2802) and a declaration that the revised commission agreements she signed with Management in October and December of 2010 were unconscionable and unenforceable. (Hotvet attached three employment agreements as exhibits to her complaint.)[2]

2. *Management's Petition To Compel Arbitration*

Management petitioned to compel arbitration of all Hotvet's claims. It argued Management was Hotvet's employer from 2003 to February 2015; throughout Hotvet's employment Management was a member of FINRA; Hotvet was an associated person of a FINRA member; and FINRA rule 13200 required

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[2] On March 10, 2016, while this appeal was pending, Hotvet filed a first amended complaint in the superior court adding claims for unfair competition (Bus. & Prof. Code, § 17200) and for civil penalties on behalf of herself and others pursuant to California's Private Attorneys General Act (PAGA, Lab. Code, § 2698 et seq.). Whether the superior court had jurisdiction to permit this filing is not now before us.

industry-related disputes between a FINRA member and an associated person to be arbitrated.[3]

In support of Management's petition, Scott W. Hood, the president and chief executive officer of both Management and Management's wholly owned subsidiary, First Wilshire Securities, Inc., stated in a declaration without distinguishing between First Wilshire Management and First Wilshire Securities: "First Wilshire is a brokerage firm and has been a member firm of [FINRA] for all times relevant in this action." Hood explained, when Management hired Hotvet in March 2003, she signed a uniform application for securities industry registration or transfer form, known as a U4 application, which all associated persons of broker-dealers are required to sign before engaging in securities transactions. (See Cal. Code Regs., tit. 10, § 260.210, subd. (a) ["[u]pon employment of an individual as an agent, a broker-dealer shall (1) obtain a properly executed application for registration, on the Uniform Application for Securities Industry Registration, or Transfer Form ('Form U4')"].) The U4 application was attached as an exhibit to Hood's declaration. Management was identified in the application as Hotvet's employer and the member "filing firm." Section 15A of the U4 application contained an arbitration provision requiring Hotvet to arbitrate any dispute, claim or controversy "that may

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[3] Rule 13200 of FINRA's Code of Arbitration for Industry Disputes (Code of Arbitration) provides, "Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: [¶] Members; [¶] Members and Associated Persons; or [¶] Associated Persons."

arise between me and my *firm,* or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* [(self-regulated organizations)] indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction*." Section 4 listed multiple SROs with boxes for the applicant to check to indicate the applicable organizations. None was marked because, as Hotvet stated in her U4 application, she was seeking registration "only as an investment adviser representative" and not to "become a broker-dealer representative." However, in April 2003 Hotvet filed a U4 amendment changing her original registration from investment adviser only to "Full Registration/General Securities Representative" and checked the box in section 4 identifying the National Association of Securities Dealers (NASD), FINRA's predecessor, as the applicable SRO. The U4 amendment was also attached as an exhibit to Hood's declaration.

Hood further declared that Hotvet filed U4 amendments as needed throughout her employment with Management, each time attesting to her status as a representative of a broker-dealer of securities governed by FINRA. Hood also included with his declaration "the most recent" U4 amendment that Hotvet filed in 2014 prior to her termination.

In opposition Hotvet insisted there was no agreement to arbitrate. She argued the arbitration provision in her initial U4 application was enforceable only if she had designated FINRA (or the NASD) as her governing SRO in the application; she had not done so. In any event, she contended, any agreement to arbitrate contained in the initial U4 application had been

superseded by subsequent U4 filings that did not contain arbitration provisions.

Hotvet also argued FINRA arbitration rules were inapplicable because Management was not a FINRA member. To support this assertion, Hotvet included with her opposition papers a copy of a computer-generated printout from FINRA's website dated February 10, 2016 listing all firms regulated by FINRA. First Wilshire Securities was included; Management was not. In addition, Hotvet observed, the 2014 U4 amendment included with Management's moving papers identified First Wilshire Securities as a FINRA member firm, not Management. Management was identified in the 2014 amendment as an "affiliated firm" under common ownership and control with First Wilshire Securities. With respect to Management, Hotvet explained, she had sought registration as "an investment adviser representative" only; and Management was an investment advisory firm regulated by the Securities and Exchange Commission (SEC), not FINRA. That distinction was critical, Hotvet argued, because SEC rules do not mandate arbitration of industry disputes.

In its reply in support of its petition to arbitrate, Management attempted to clarify the ambiguity Hotvet had identified in its initial papers relating to its FINRA membership. In a supplemental declaration Hood stated that from December 26, 1973 to May 26, 2012 Management was a registered member of FINRA (or the NASD), providing services as both a broker-dealer of securities as regulated by the NASD and an investment adviser regulated by the SEC. In 2012 Management spun-off the broker-dealer part of its operations to First Wilshire Securities while the investment adviser practice

remained housed in Management. Hotvet continued as a Management employee after the 2012 transfer, but worked for Management in a dual capacity as a representative of a broker-dealer under the brokerage registration of First Wilshire Securities and as a representative of Management's investment advisory practice. Management also asserted that Hotvet's complaint sought damages, at least in part, for commissions she allegedly had earned for services performed for Management as a representative of its broker-dealer business, whether through the broker-dealer license of Management or, after 2012, under First Wilshire Securities's broker license. Consequently, it argued, all her causes of action were subject to mandatory arbitration under FINRA.

3. *The Superior Court's Order Denying Arbitration*

The superior court denied Management's petition to compel arbitration. The court found any agreement to arbitrate contained in Hotvet's initial U4 application had been superseded by subsequent U4 filings, which did not contain an arbitration clause. In addition, emphasizing that Hood's initial declaration had obscured the roles of two different organizations, one subject to FINRA, the other not, the court found Management had not carried its burden to demonstrate that the dispute was required to be arbitrated under FINRA rules.

DISCUSSION

1. *Standard of Review*

Code of Civil Procedure section 1281.2 requires the trial court to order arbitration of a controversy "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy . . . if it determines that an

agreement to arbitrate the controversy exists." As the language of this section makes plain, the threshold question presented by every petition to compel arbitration is whether an agreement to arbitrate exists. (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228 [133 S.Ct. 2304, 2306, 186 L.Ed.2d 417] [it is an "overarching principle that arbitration is a matter of contract"]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 626 [105 S.Ct. 3346, 87 L.Ed.2d 444] ["the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute"]; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*)*, LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*) [""a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit""]; *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787 ["[t]here is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate"]; *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 204 ["in ruling on a petition to compel [arbitration], the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question"].)[4]

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[4] Management insists Hotvet's employment action involves interstate commerce and is therefore governed by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) Even if the FAA applies, the question whether there exists an agreement to arbitrate a particular controversy is governed by state law. (See *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944 [115 S.Ct. 1920, 131 L.Ed.2d 985] ["[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . [courts] generally. . . should apply ordinary . . . principles that govern the

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence an agreement to arbitrate a dispute exists. (*Pinnacle, supra,* 55 Cal.4th at p. 236; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*); *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 240.) If, after an agreement is proved, the party resisting arbitration claims a defense to the enforcement of the agreement, typically by alleging the agreement is void due to fraud-in-the-execution, waiver or revocation, the burden shifts to that party to prove by a preponderance of the evidence any fact necessary to that defense. (*Rosenthal,* at p. 413; accord, *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; see *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [131 S.Ct. 1740, 179 L.Ed.2d 742] [section 2 of the Federal Arbitration Act "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract'"].)

We review de novo the superior court's interpretation of an arbitration agreement, including the scope of the agreement, when that interpretation does not depend on the resolution of conflicting extrinsic evidence. (*Pinnacle, supra,* 55 Cal.4th at p. 236; see *Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 619,

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formation of contracts"]; *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 961-962 [rejecting argument that FAA preempts state contract principles; the question whether an agreement has been formed to arbitrate a particular dispute is one of contract interpretation under state law]; see generally *E.E.O.C. v. Waffle House, Inc.* (2002) 534 U.S. 279, 289 [122 S.Ct. 754, 151 L.Ed.2d 755] [FAA simply reverses judicial hostility to arbitration agreements by placing them on same footing as any other contract].)

fn. 11 [absent conflicting extrinsic evidence, the "determination whether FINRA's arbitration rules cover a particular dispute" is a question of law subject to de novo review]; *Valentine Capital Asset Management, Inc. v. Agahi* (2009) 174 Cal.App.4th 606, 613 (*Valentine*) [same].)

2. *Management Demonstrated Hotvet Agreed To Arbitrate Those Disputes Required To Be Arbitrated Under FINRA; However, Some of Hotvet's Claims Plainly Fall Outside the Scope of the Arbitration Requirement*

a. *Hotvet agreed to arbitrate any dispute required to be arbitrated under FINRA rules*

In her initial (March 2003) U4 application, included with Management's petition to compel arbitration, Hotvet agreed to arbitrate any dispute between her and her "firm," identified as Management in the application, "that is required to be arbitrated under the rules" of the SRO indicated in section 4 of the U4 form. Although no SRO was designated in section 4, Hotvet modified that provision in her April 2003 U4 amendment when she sought registration with the NASD, FINRA's predecessor, as a general securities representative and identified the NASD as the governing SRO.

As amended, Hotvet's U4 application was an agreement between Hotvet and the NASD/FINRA to arbitrate disputes required to be arbitrated under FINRA rules. (*Valentine, supra,* 174 Cal.App.4th at p. 613 [U4 form was a contract between associated persons and FINRA requiring associated persons to arbitrate industry disputes in accordance with FINRA rules]; *Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 635 [the U4 form is an agreement between the registrant and the NASD requiring employee of NASD member to arbitrate dispute with employer]; see generally *UBS Fin. Services, Inc. v. W. VA.*

Univ. Hosps., Inc. (2d Cir. 2011) 660 F.3d 643, 648-649 ["[u]pon joining FINRA, a member organization agrees to comply with FINRA's rules . . . including its Code and relevant arbitration provisions contained therein"].).

Hotvet's assertion that any agreement she had with the NASD/FINRA to arbitrate disputes was superseded by subsequent U4 amendments that did not contain an arbitration clause is without merit. Contrary to Hotvet's contention, U4 amendments supplement, rather than supersede, the initial application. (See Cal. Code Regs., tit. 10, § 260.210, subd. (b)(3) [FINRA requires an associated person to file an amended U4 form within 30 days of any change in information contained on the initial filing]; see also Lipton, 15 *Broker-Dealer Regulation* (July 2017 update), Appendix 2.05, p. 1 ["[a]n individual is under a continuing obligation to amend and update information required by Form U4 as changes occur"].) Hotvet recognized as much when, in section 15A of her March 2003 U4 application (paragraph 9), she agreed to "update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported" and represented that, "to the extent any information previously submitted is not amended, the information provided in this form [the initial application] is currently accurate and complete."

In fact, the full text of section 15A of the initial U4 application, which contains the arbitration provision and other paragraphs relating to the applicant's acknowledgment of, and consent to be bound by, the rules of the indicated SRO, is not included in forms used for U4 amendments. Rather, the individual/applicant is directed to complete and sign section 15A on his or her initial U4 application. The amendment's cross-

reference to the original application is easily understood. Unlike the identifying personal information and employment-related facts provided in the individual's initial application, which are subject to change, the acknowledgment and consent to be bound by the rules of the indicated SRO as they may be updated from time to time are requirements of membership. They are not facts subject to amendment by the applicant. In sum, Hotvet's suggestion the U4 amendments vitiated her prior agreement to arbitrate is incorrect.

b. *Hotvet's first, second, third, fourth and 11th causes of action arose after Management terminated its FINRA membership and thus fall outside the scope of the arbitration agreement*

Under the terms of the arbitration agreement, a dispute is subject to arbitration under FINRA rule 13200[5] if it arises out of the business activities of a "member or an associated person" of FINRA, as those terms are defined, and is between members, associated persons or members and associated persons. (See *Valentine, supra*, 174 Cal.App.4th at p. 615; *Credit Suisse Securities* (*USA*) *LLC v. Tracy* (2d Cir. 2016) 812 F.3d 249, 254.) The term "member" is defined under FINRA to mean "any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated or cancelled." (Rule 13100(q).) "Associated person" means "a natural person who is registered or has applied for registration under the Rules of FINRA" and includes a "person formerly associated with a member." (Rule 13100(u)(1), (u)(2).)

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[5] Rule references are to the FINRA rules. For the full text of FINRA rule 13200, see fn. 3, above.

The phrase arising out of the "business activities of a member or associated persons" requires that the dispute relate to the business activities conducted by the member or the associated person *as* a member or an associated person of FINRA. That does not mean the plaintiff's claims themselves must be FINRA-related. (*Valentine, supra,* 174 Cal.App.4th at p. 624, fn. 14.) However, there must be "a nexus between the dispute," on the one hand, and the member's business activities or the "associated person's activities *as* an associated person employed by a member firm," on the other hand. (*Id.* at p. 625; see *Lloyd v. J.P. Morgan Chase & Co.* (2d Cir. 2015) 791 F.3d 265, 271 [employment-related dispute between FINRA member and its employee would arise out of business activities of member and associated person and subject to mandatory arbitration under FINRA].)

Although Management established it was a FINRA member when it hired Hotvet in April 2003, the evidence also demonstrated that Management terminated its membership in May 2012 when it spun off its securities business to its subsidiary, First Wilshire Securities. Hotvet's causes of action for wrongful termination in violation of public policy (first cause of action), whistleblower retaliation (second cause of action), unlawful deduction of wages (third cause of action), indemnification for losses incurred (fourth cause of action) and willful failure to pay wages at termination (11th cause of action) are based on events that occurred in 2015, long after Management had terminated its membership, when, according to the allegations in the complaint, Management deducted from Hotvet's commission business losses it had suffered that year and terminated her employment. On the face of the complaint, those post-2012 claims are not arbitrable; and Management supplied

no evidence to suggest they were. As to those claims, the trial court's denial of arbitration was proper. (See *Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 571 [arbitration not available when claims for indemnity on face of complaint clearly fell outside scope of arbitration provision].)

3. *Hotvet Failed To Carry Her Burden To Demonstrate the Remaining Causes of Action, Arbitrable on Their Face, Nonetheless Fall Outside the Scope of the Arbitration Agreement*

On the face of the complaint, Hotvet's remaining claims (the fifth through 10th causes of action and her 12th cause of action for unfair business practices) challenge the validity of, and payment of wages in accordance with, Hotvet's 2010 employment agreement. As to those causes of action, seemingly arising during Management's tenure as a FINRA member, Management satisfied its prima facie burden to show those employment-related claims are subject to FINRA arbitration. (See *Rosenthal, supra*, 14 Cal.4th at p. 413 [to satisfy the moving party's initial burden, the petition must be "accompanied by prima facie evidence of a written agreement to arbitrate the controversy" at hand]; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705 (*Molecular Analytical*) [same]; see generally *Cione v. Foresters Equity Services, Inc., supra,* 58 Cal.App.4th at pp. 644-646 [employee of brokerage company was required under NASD rules to arbitrate employment-related dispute]; *Lloyd v. J.P. Morgan Chase & Co., supra,* 791 F.3d at p. 271 [same]; *Fleck v. E.F. Hutton Group*, *Inc.* (2d Cir. 1989) 891 F.2d 1047, 1053 [those claims based on the employment relationship between broker firm and employee fall within scope of arbitration rules requiring arbitration of disputes

between members of NASD and associated persons of a member].)

In opposing arbitration of those claims, Hotvet contends, as she did in her opposition papers in the superior court, that she worked for Management as an investment advisor only and not a securities representative subject to FINRA arbitration rules notwithstanding her U4 registration as a securities representative. The distinction is critical because her arbitration agreement covered only her activities as securities representative; investment advisors are not subject to FINRA arbitration. (See *Valentine, supra,* 174 Cal.App.4th at p. 618 [work performed for investment advisory firm did not constitute business activity *as* an associated person of a FINRA member; matters arising out of investment advisory services are not under FINRA's purview and are not subject to FINRA arbitration]; see generally 15 U.S.C. § 80b-1 et seq. [investment advisory firms regulated under SEC].)

Skeptical whether an agreement to arbitrate even existed and unable to determine from the face of the complaint and Management's evidentiary presentation whether Hotvet's claims arose from her activities as securities representative or from her role as investment advisor, the court ruled Management had not carried its burden to demonstrate the arbitration agreement covered the dispute. As to all but the first through fourth and 11th causes of action, which on the face of the complaint plainly fall outside the scope of the arbitration agreement, this was a misallocation of the appropriate burdens of proof.

Arbitration, including the definition or scope of the matters subject to arbitration, is a matter of agreement. (See *Molecular Analytical, supra,* 186 Cal.App.4th at p. 705 ["'[t]he scope of

arbitration is a matter of agreement between the parties'"; "'[a] party can be compelled to arbitrate only those issues it has agreed to arbitrate'"].) Nonetheless, once the party seeking arbitration has made a prima facie showing the claims asserted in the complaint are on their face covered by a valid agreement to arbitrate, the party opposing arbitration has the burden of establishing the dispute is not covered. (*Laymon v. J. Rockliff, Inc.* (2017) 12 Cal.App.5th 812, 820; *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 659; see *Molecular Analytical,* at pp.710-711 [where "defendants made a sufficient prima facie showing of an agreement to arbitrate, based not only on the allegations of the complaint but also on their moving papers and on their proffer of the [arbitration] [a]greement," the burden was on the party resisting arbitration to demonstrate its claims were not arbitrable].)

In its papers supporting its petition to compel arbitration (including the U4 application and amendments containing the arbitration clause), Management presented a prima facie case that Hotvet had agreed to arbitrate those claims arising out of her business activities as a securities representative of a FINRA member; Management was a FINRA member until May 2012; Hotvet, a registered securities representative with FINRA, was an associated person of a FINRA member; and it was feasible, based on the allegations in her complaint (albeit by no means conclusive), that Hotvet was acting in her role as a securities representative and not as an investment advisor when her employment claims arose. Once Management made this prima facie showing the dispute was covered by a valid arbitration agreement, it was Hotvet's burden to demonstrate those claims, seemingly arbitrable on their face, fell outside the scope of the

valid arbitration agreement, not Management's burden to demonstrate they came within it.

When Management's petition and Hotvet's opposition to the petition are considered in accordance with the proper allocation of burdens of proof, the court's error in denying arbitration of the fifth through 10th and 12th causes of action is clear. Hotvet presented no evidence to support her assertion that she was acting solely as an investment advisor in connection with those employment-related claims and thus failed to rebut Management's prima facie case those claims come within the scope of the arbitration agreement. Accordingly, the court erred in denying Management's petition to compel arbitration of those claims.

4. *On Remand the Court Must Exercise Its Discretion Under Code of Civil Procedure Section 1281.2*

Some of Hotvet's claims are arbitrable (the fifth through 10th and 12th causes of action) and some are not (the first through fourth and 11th causes of action). In those circumstances, the superior court must exercise its discretion under Code of Civil Procedure section 1281.2 to determine the appropriate order of proceedings. (Code Civ. Proc., § 1281.2 ["[i]f the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies"]; see *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 392 [FAA does not preempt Code

of Civil Procedure section 1281.2's authorization of a stay of arbitration pending the outcome of related litigation]; *Volt Information Sciences, Inc. v. Board of Trustees* (1989) 489 U.S. 468; 478 [109 S.Ct. 1248, 103 L.Ed.2d 488].)

DISPOSITION

The order denying Management's petition to compel arbitration of Hotvet's fifth through 10th and 12th causes of action is reversed, and the superior court is directed to enter a new order granting Management's petition to compel arbitration of those claims. In all other respects the order denying arbitration is affirmed. On remand the superior court will have the opportunity to exercise its discretion under Code of Civil Procedure section 1281.2 to determine the timing of the arbitration. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. BENSINGER, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.