**Case No. S244630**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

OTO, LLC an Arizona Limited Liability Company, *dba*
ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND

*Petitioner and Respondent,*

v.

KEN KHO

*Appellant and Real Party in Interest,*

JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

*Intervenor and Appellant.*



AFTER DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION 1
CASE No. A147564

*Appeal from the Alameda County Superior Court*
*Case No. RG15781961*
*The Honorable Evelio Grillo, Judge*

# PETITIONER AND RESPONDENT'S ANSWER BRIEF

**FINE, BOGGS & PERKINS LLP**
John P. Boggs (Bar No. 172578)
Roman Zhuk (Bar No. 296306)
80 Stone Pine Road, Suite 210
Half Moon Bay, California 94019
Telephone: (650) 712-8909
Facsimile: (650) 712-1712

Attorneys for Petitioner and Respondent
**OTO, LLC**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

## STATEMENT OF ISSUES

This Court summarized the issues on review as:

1. Was the arbitration process at issue in this case sufficiently "affordable and accessible" so as to not be unconscionable and, thus, require an employee to forego the right to an administrative Berman hearing on wage claims?

2. Did the employer waive its right to arbitration where the employer demanded to the employee, in the presence of the Labor Commissioner at an initial claim conference, that the employee proceed to arbitration, where the employer continued to try to resolve the claims through the Labor Commissioner after the initial claim conference, and then when ultimately unable to settle the claims, demanded arbitration again on the morning of the Berman hearing, where the employer served the Petition to Compel Arbitration and refused to participate in the hearing to avoid the Labor Commissioner claiming that there was a waiver if the employer proceeded through the first formal adjudication of the claims?

## INTRODUCTION

Appellant Ken Kho ("Kho") entered into a written agreement to arbitrate all claims arising out of his employment with Respondent OTO, LLC ("Respondent" or "OTO"). This substantively identical arbitration agreement was upheld previously by this very Court in Sonic-Calabasas A Inc. v. Moreno ((2013) 57 Cal.4th 1109 ("Sonic II")). Indeed, this case is merely a rehash of the identical arguments already addressed by this Court in Sonic II, with respect to all issues absent the waiver issue.

After leaving his employment, Ken Kho filed a claim for unpaid wages with the Labor Commissioner. In response, counsel for Respondent appeared at the Initial Claim Conference to meet with the Labor Commissioner and Kho to try to resolve the claims, as is the normal process prior to a Complaint being issued by the Labor Commissioner. At the Initial Claim Conference, Respondent's counsel demanded that Kho arbitrate and asked the Labor Commissioner to halt the administrative proceedings.

The Labor Commissioner concluded the Initial Conference and invited the parties to try to resolve the claims notwithstanding the termination of the Initial Claim Conference. Kho, at the time, did not agree to arbitration. But he also made no effort to refute his obligation to arbitrate. In fact, settlement communications continued between Respondent's counsel and the Labor Commissioner trying to get the claims resolved without the need for moving forward in arbitration.

Kho, instead of resolving the claims or submitting to arbitration, proceeded to have the Labor Commissioner issue a Complaint for the unpaid wages against Respondent for alleged violations of California's wage-and-hour laws. The Complaint attached at a Notice of Hearing on the

Complaint (Berman Hearing). Despite the Complaint, Respondent continued to attempt to resolve the claims with the Labor Commissioner and directly with Kho. When those efforts failed, Respondent filed a Petition to Compel Arbitration with the Superior Court and appeared at the Berman Hearing for the sole purpose of serving Kho and the Labor Commissioner a copy of the Petition to Compel Arbitration and to make its formal objection in the first official proceeding held by the Labor Commissioner (Berman Hearing). Respondent did not participate in any litigation before the Labor Commissioner and demanded arbitration at all stages of the administrative process both before and after the Complaint was issued.

After the Superior Court refused to send this matter to arbitration because the arbitration provision agreed to by Appellant Kho did not expressly replicate all the features of a Berman hearing, the Court of Appeal appropriately recognized that the holding was flatly contrary to established law and reversed the Superior Court.

The issue of whether contracting parties can waive a Berman hearing in favor of arbitration has already been resolved in the affirmative by the California Supreme Court in Sonic II. This aspect of the Sonic II decision was thereafter clarified by the Supreme Court in Iskanian v. CLS Transp. Los Angeles, LLC ((2014) 59 Cal.4th 348, 365 ("Iskanian")): "Under the logic of Sonic II . . . it is clear that because a Berman hearing interferes with fundamental attributes of arbitration, a Berman waiver is not invalid even if the unavailability of a Berman hearing would leave employees with ineffective means to pursue wage claims against their employers."

Here, the arbitration process contemplated by the arbitration agreement offers a cheaper, faster, and more final resolution than the non-

binding Berman hearing followed by a *de novo* appeal to the Superior Court; essentially, the alternative promoted by the Labor Commissioner and Kho is lengthier and more expensive. The arbitration provision here is not exotic—rather, it is one self-evidently designed to, and does, comply with all aspects of California employment arbitration enforcement doctrine as set forth in the California Arbitration Act as codified in the California Code of Civil Procedure, section 1280 *et seq.* This arbitration agreement, whether by silence or its express terms, provides for an arbitration forum that is both accessible and affordable (free, in fact) to the employee. At the absolute minimum, there is nothing to suggest that it could present a system of resolution that is "so unconscionable that it cannot be enforced." And, as held in Sonic II, the arbitration agreement in this case is governed by the Federal Arbitration Act, which would effectively preclude any of the special rules and procedures requested by Kho and the Labor Commissioner as a condition of employment as clarified most recently by the U.S. Supreme Court. (Epic Systems Corp. v. Lewis (May 21, 2018) U.S. Supreme Court Docket Nos. 16–285, 16–300, 16–307, 2018 WL 2292444.)

Indeed, this very Court recognized, in Sonic II, that individuals can waive any statutory right to a Berman hearing through an arbitration provision. Sonic II also recognized that an arbitration proceeding need not replicate the features of a Berman hearing to avoid unconscionability. (Sonic II, *supra,* 57 Cal.4th at 1147.) As long as the arbitral forum is accessible and affordable to the wage claimant, a Berman waiver does make the arbitration provision unconscionable. In lamenting so-called "protections" lost when a claim does not proceed through the optional Berman hearing process, Kho and the Labor Commissioner ignore clear

directive from the California Supreme Court: "[w]aiver of these protections does not necessarily render an arbitration agreement unenforceable, nor does it render an arbitration agreement unconscionable per se." (Id., at 1146.) Any such waiver may only become relevant in an unconscionability analysis when combined with the lack of an accessible and affordable arbitral forum. This is simply not the case here, as Kho has access to an arbitral forum paid for entirely by OTO. This Court has already effectively disposed of this issue via the principles it enunciated in Sonic II; all that remains here is to apply those ruling to the facts here and uphold the Court of Appeal's ruling that, through the arbitral process laid out by the California Code of Civil Procedure and incorporated by the arbitration agreement, Kho has an accessible and affordable forum to avail himself of his claims.[1]

The Labor Commissioner argues that, regardless of the enforceability of the Berman waiver, this Court should reinstate the Order, Decision or Award issued by the Labor Commissioner. Again, Sonic II is dispositive: the "FAA preempts a state-law rule categorically requiring arbitration to be preceded by a Berman hearing." Yet, by proceeding with the Berman hearing while a petition to compel arbitration was pending, the Labor Commissioner trampled upon the right of OTO to enforce the arbitration agreement pursuant to the Federal Arbitration Act and the California Arbitration Act. By reinstating the ODA, the Court would give the Labor Commissioner the unfettered right to ignore ongoing court

[1] It should also be made clear that even under the Labor Commissioner's own position, after the matter proceeded to the Berman Hearing, it would have to go to a *de novo* arbitration proceeding if requested by the employer with the Berman Hearing having no binding effect. (*See* Sonic II.)

proceedings and the arbitration agreement itself so long as the court has not enjoined the Berman hearing or entered a final order compelling the matter into arbitration. This is an absurd result that would lead to a marked increase in court proceedings and expense to the parties related to petitions to compel arbitration as employers would be required to seek immediate injunctive relief upon filing a petition to compel arbitration to enjoin the Berman hearing during the pendency of the petition. This unfettered right, however, is exactly what the Labor Commissioner seeks. (*See* Commissioner's Brief at p. 47.) Such a right would, in practice, reverse Sonic II by interfering with employers' recognized rights to enforce Berman waivers and would be categorically preempted by the Federal Arbitration Act. This Court should not sanction this and instead leave the trial order vacating the ODA undisturbed. The matter should be ordered to arbitration as required by the Federal Arbitration Act.

## STATEMENT OF FACTS AND PROCEDURAL SUMMARY

On or about February 22, 2013, Ken Kho executed a written agreement which expressly provides for binding arbitration of all disputes between him and OTO. Specifically, he confirmed in writing that:

> I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another . . . which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, associates, agents, and parties affiliated with its associate benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, . . . shall be submitted to and determined exclusively by binding arbitration. . . . I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act. . . .

(CT 5-6).

Notwithstanding the arbitration agreement, Kho filed a claim for unpaid wages with the California Labor Commissioner, which scheduled the matter for an Initial Claim Conference. (CT 8-9).

On November 10, 2014, John Boggs, counsel for OTO, and Kho both attended the Initial Claim Conference (*i.e.*, settlement conference) that a Deputy Labor Commissioner typically holds when a claim is brought before it. (CT 172). Boggs demanded Kho arbitrate his dispute and provided him with a copy of the arbitration agreement. (CT 172). Pursuant to the discussions with the Deputy at the Initial Claim Conference, the parties attempted to resolve the claims short of pursuing arbitration. Indeed, a written settlement offer by OTO was made by Boggs through the Deputy the following month (CT 172). In late March 2015, the hearing was set for August 17, 2015, and Boggs was notified that OTO's offer was

rejected; Boggs told the Deputy that he would seek to try to settle the matter (CT 173) still to avoid having the time and expense of litigating in arbitration or otherwise. Boggs made unreturned phone calls to Kho from May 26, 2015 through July 22, 2015 to discuss settlement; and until July 2015, he expected this matter to settle. (CT 173) as do most claims before the Labor Commissioner, which typically settle just before or at the Berman Hearing.

Prior to the Berman Hearing, OTO filed a Petition to Compel Arbitration. Once again, Respondent demanded that the Labor Commissioner stay her proceedings. (CT 1-25). The Labor Commissioner refused to do so, and proceeded (over objection) to hold the Berman Hearing and issue an Order, Decision, or Award (ODA) on August 25, 2015—all while the petition to compel was pending before the Superior Court. (CT 67-76.) On September 15, 2015, OTO appealed the ODA in the superior court and filed the undertaking required by Labor Code section 98.2(b). OTO filed its motion to vacate the ODA on September 16, 2015 (CT 37-83).

On December 11, 2015, the Superior Court denied the petition to compel arbitration on the grounds that the arbitration agreement was supposedly unconscionable (CT 207-223), but granted OTO's motion to vacate the ODA on the basis that enforcing the ODA would violate OTO's right to a fair administrative hearing under California Code of Civil Procedure section 1094.5(b) because the Labor Commissioner proceeded in the Berman Hearing without the participation of the Respondent, based on Respondent's validated concern that the Labor Commissioner might claim that Respondent waives the right to arbitration if it participates in the

Berman Hearing, (CT 202-205.) This waiver is, of course, what the Labor Commissioner now argues.

On January 4, 2016, the Labor Commissioner moved for reconsideration of the order vacating the ODA. (CT 225–59.) The trial court denied the reconsideration motion on February 3, 2016. The Labor Commissioner appealed the order vacating the ODA on February 16, 2016. (CT 301). Respondent OTO also timely appealed the denial of the petition to compel arbitration. (CT 296).

## LEGAL DISCUSSION

### I. Federal and California law are clear that Berman Waivers do not render arbitration agreements unconscionable

California Code of Civil Procedure section 1281.2 mandates that

> [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, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement.

In the order under appeal and review here, the Superior Court correctly reached certain undisputed points:

> [OTO] has established that [Kho] entered into a written agreement to arbitrate all claims, disputes or controversies arising out of his employment with [OTO]. There is also no dispute that a controversy and dispute has arisen with regard [to Kho's] employment, because [Kho] has filed a claim for unpaid wages against [OTO] with the DLSE. Finally, [OTO] has established that Respondent refuses to arbitrate his claims. Thus, [OTO] has satisfied the prima facie requirements for an order compelling [Kho] to arbitrate his claims for unpaid wages and any other claims arising from his employment with [OTO].

(CT 210). Therefore, the issue before the Court is whether grounds exist for the revocation of the Agreement on the basis of unconscionability, without any special rules that might affect the right to arbitration. (*See* Epic Systems, *supra,* 2018 WL 2292444.)

As the United States Supreme Court has held previously and as recently as May, 2018, employee claims covered by an arbitration agreement between an employee and an employer are subject to mandatory, binding arbitration, and must proceed to arbitration on motion or petition by one of the parties. (Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105; *see also* Code of Civil Procedure section 1290; Armendariz v. Foundation Health Psycyhcare Services, Inc. (2000) 24 Cal.4th 83; Epic Systems Corp., *supra.*) Specifically, the United States Supreme Court and California courts have consistently held that wage claims filed with the Labor Commissioner's office must proceed to arbitration in the face of a valid agreement to arbitrate. (Perry v. Thomas (1987) 482 U.S. 483; Baker v. Aubry (1989) 216 Cal.App. 3d 1259, 1268.)

Moreover, consistent with this State's strong public policy in favor of arbitration (Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 9), the California Supreme Court has held that claims by an employee against his or her employer, whether based on statute, common law, or otherwise, must proceed to binding arbitration in the face of a valid agreement between the parties to arbitrate employment-related claims. (Armendariz, *supra,* 24 Cal.4th 83; *see also* 24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199.) Indeed, California courts have held that "arbitration should be ordered unless the agreement clearly does not apply to the dispute in question." (Vianna v. Doctors' Management Co. (1994) 27 Cal.App.4th 1186, 1189.)

In response to attempts by the California judiciary to hold arbitration agreements to extraordinary standards, the federal Supreme Court in AT&T Mobility LLC v. Concepcion ((2011) 563 U.S. 333, 341) was unequivocal that the Federal Arbitration Act ("FAA") categorically prevents states from holding arbitration agreements to stricter standards of enforceability than other contracts.[2]

Prompted by, and consistent with, AT&T Mobility, the California Supreme Court then recognized that any categorical prohibition on waivers of Berman hearings as a condition of employment was prohibited by federal law, thereby upholding the legality of an agreement between an employee and employer to use the arbitral forum in place of Berman hearings. (Sonic II, *supra*, 57 Cal.4th at 1142.) Agreements to arbitrate claims that would otherwise be adjudicated in Berman hearings before the Labor Commissioner may be lawfully enforced. (Sonic II, *supra,* 57 Cal.4th at 1124.) "[A] court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing." (Id.)

The Superior Court found that there was procedural unconscionability, holding that the agreement should be explained to the employee (CT 212-213). This finding completely contradicts long-standing case law on this subject but is not dispositive of this analysis at this time. As to the issue of substantive unconscionability, the Superior Court found as follows:

> Based on the holding in Sonic II, the court concludes that the arbitration agreement in this case is substantively unconscionable. First, the court can consider the fact that the agreement required Respondent to surrender the Berman

[2] This "sort of 'equal-treatment' rule for arbitration contracts" was reiterated by the United States Supreme Court most recently in Epic Systems, *supra,* 2018 WL 2292444.

protections in their entirety in determining whether it renders the agreement unconscionable. And, the waiver of Berman protections in the context of an agreement that does not provide the employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability. (Sonic II, *supra,* 57 Cal.4th at 1146.)

In this case, the arbitration provision provides that all rules applicable to civil actions in California are applicable, including the rules of evidence, the rules of pleading including the right to demurrers and motions for judgment on the pleadings, the right to bring a motion for summary judgment, and the right to judgment under Civil Code section 631.8, which allows the defendant to move for judgment at the conclusion of the plaintiff's case. The arbitration provision provides that all mandatory and permissive rights to discovery under the California Action [sic] are applicable, including the right to take depositions under Code of Civil Procedure section 1283.05. As discussed above, it is not clear what other procedural rules are applicable.

Based on the evidence before the court, the arbitration agreement in this case deprives employees of the benefits of the Berman hearing process without providing any corresponding benefits to achieve the goal of the Berman hearing procedure. As a practical matter, the process contemplated by the arbitration agreement is similar in nature to litigation in the Superior Court. An employee seeking to vindicate the right to unpaid wages under the agreement will almost necessarily be required to hire counsel. But the agreement does not include an attorney's fees clause, which might be used to induce counsel to agree to represent an employee. Thus, any judgment obtained by an employee under the arbitration agreement in this case would be almost necessarily be reduced by the expense of hiring counsel. This has the obvious effect of discouraging, if not precluding, attempts to recover lost wages that do not justify the costs necessary for an attorney to draft pleadings, defend demurrers and motions to strike, attend depositions, introduce evidence at trial, and respond to motions for judgment at trial. In addition, unlike the procedures applicable to an appeal of a Berman hearing, there is nothing in the agreement that provides an efficient method for an employee to recover the judgment. Thus, the agreement fails to provide a speedy, informal and affordable method of resolving wages claims and has virtually none of the benefits afforded by the Berman hearing procedure.

Finally, the agreement appears intended to have the effect of eviscerating the protections provided by the Berman procedure, in violation of the public policy in favor of inexpensive resolution of claims for unpaid wages that underlies the Berman procedures. Contrary to the assumption

> that arbitration is intended to provide an inexpensive, efficient procedure to vindicate rights, the agreement in this case seeks, in large part, to restore the procedural rules and procedures that create expense and delay in civil litigation. The intent seems further apparent from the fact that Petitioner, after learning that Respondent had filed a claim with the DLSE in October 2014, failed to seek a stay and asserted its right to compel arbitration 'on the day of the hearing on August 17, 2015. To the extent that the agreement is construed to permit Petitioner to wait almost 10 months from the time a claim is filed with the DLSE until the day a Berman hearing is scheduled to demand arbitration, thereby creating unnecessary delay and expense for Petitioner and the DLSE, the arbitration agreement is also unconscionable as a deprivation of the rights to speedy resolution of employee claims for wages on that basis.

(CT 219-222). Yet, as demonstrated below, not only was there no more than minimal surprise and oppression in the making of the arbitration agreement, but the terms of the arbitration agreement are not one-sided or unfair and do not deprive Kho of an accessible and affordable forum to pursue his wage claims. Indeed, the Court of Appeal found that the procedures of the rules applicable to civil litigation in Superior Court are not an inferior method of enforcing wage rights, especially considering that the Labor Code specifically provides for civil litigation as an alternative to the Berman process. State law therefore does not provide for grounds for a finding of substantive unconscionability.

## II. The Superior Court erred in finding that the arbitration agreement was unenforceable and the Court of Appeal decision should be affirmed.

### A. The doctrine of unconscionability requires both procedural and substantive unconscionability to bar enforcement of an agreement.

Pursuant to Civil Code section 1670.5(a)—the statute under which arbitration agreements are challenged for unconscionability—"[i]f the court as a matter of law finds the contract of any clause of the contract to have been unconscionable at the time it was made the court may refuse to

enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (*See* Armendariz, *supra,* 24 Cal.4th at 114 [Section 1670.5 applies to arbitration agreements].)

As has been recognized below, unconscionability has both a procedural and a substantive element—both of which must be present in order for a court to exercise its discretion to refuse enforcement. (*See* Armendariz, *supra,* 24 Cal.4th at 114.) "But they need not be present in the same degree. . . . [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, and vice versa." (Id.)

### B. The level of procedural unconscionability here is minute, if it exists at all; the record does not support a finding of adhesion

Procedural unconscionability generally takes the form of a contract of adhesion which is imposed and drafted by a party of superior bargaining strength who places upon the subscribing party only the opportunity to adhere to the contract or reject it. "It is well settled that adhesion contracts in the employment context, this is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.) But assuming the Agreement at issue is adhesive, "this adhesive aspect of the agreement is not dispositive." (Id.)

"Courts have indicated that '[w]hen . . . there is no other indication of oppression or surprise, 'the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless

the degree of substantive unconscionability is high."' (Peng v. First Republic Bank (2013) 219 Cal.App.4th 1462, 1470 [use of a nonnegotiable contract, standing alone, is insufficient to support a finding of procedural unconscionability]; O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245, 259 [adhesive aspect of the contract is not dispositive on issue of unconscionability].)

### 1. The evidence does not support that this agreement was presented on a take-it-or-leave-it basis

In fact, there is ***no*** evidence in the record before this Court that would support a contention that Kho was told that he had to execute the agreement in order to work or continue working for the OTO. While Kho's declaration lays out his claims that he was asked to sign arbitration agreements at the beginning and in the middle of his employment, that he did so in a matter of minutes without reading them, but he never states that it was presented to him on a take-it-or-leave-it basis. (CT 108-111). Even if the Court were to accept a blanket contention that an employee is always in a weaker bargaining position than the employer, it would not show that this was an adhesive contract as no evidence supports it was presented on a take-it-or-leave-it basis.

It does not appear that ***anything*** about the formation of the arbitration agreement may reasonably be interpreted as oppression. (*See* O'Donoghue, *supra,* 219 Cal.App.4th at 259 [procedural unconscionability low where no evidence of surprise or misrepresentation].) There was no evidence presented by Kho for instance, that he made any effort to ask questions about the terms of the relatively short Agreement and such questions were refused so as to leave him not understanding its terms, that he requested additional time to review or consider the terms of the

Agreement, that he tried to negotiate the agreement, or that he indicated to OTO any intent or desire to decline. There is simply no record evidence to support such a position. Additionally, the terms of the Agreement are clear. There is ***no*** evidence of an effort by the OTO to include any hidden terms within the Agreement or to obfuscate their meaning. (Roman v. Superior Court (2009) 172 Cal.App.4th 1462, 1472-1473 [terms written in clear understandable language did not constitute evidence of surprise].)

### 2. Kho's apparent failure to exercise reasonable diligence in agreeing to the arbitration agreement does not fulfill the surprise element

Even if the contract were found to be oppressive, further analysis would be required. This is so because procedural unconscionability has two elements: oppression and surprise. (*See* Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, 621.) Both oppression and surprise must be proved by Kho to support a finding of procedural unconscionability. (Id.)

In fact, there is no evidence to suggest that the "surprise" prong is satisfied in this case. (*See* Armendariz, *supra,* 24 Cal.4th at 113 [procedural unconscionability requires a finding that the contract does not fall within the reasonable expectations of the party in the weaker bargaining position].) The stand-alone arbitration agreement signed by Kho is written in easily readable font prefaced with the block heading "**COMPREHENSIVE AGREEMENT EMPLOYMENT AT-WILL AND ARBITRATION.**" (CT 5-6). The clause itself ends with the following block text: "I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY." (Id.) Immediately above Kho's signature line is a reminder of Kho's commitment made by executing the document: "MY

SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS." (Id.) No straight-faced argument can be made that arbitration fell outside of Kho's reasonable expectations. (*See* Olsen, *supra*, 48 Cal.App.4th at 622 [no attempt to conceal or misrepresent]; Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal.App.4th 1159 [same].)

Without any showing that this was a take-it-or-leave-it contract, there can be no finding this was an adhesive contract, and there can be no finding of procedural unconscionability. Likewise, without any showing of surprise, there can be no finding of procedural unconscionability. (*See* Olsen, *supra*, 48 Cal.App.4th at 621.) And without evidence of procedural unconscionability, the agreement must be enforced.

### C. There is insufficient evidence of substantive unconscionability to deny enforcement of the agreement

"A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.'" (*See* Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246 *citing* 24 Hour Fitness, Inc., *supra,* 66 Cal.App.4th at 1213.) Through its silence on the matter, the agreement at issue here, by operation of law, provides for the OTO to pay the cost of the arbitration, including the cost of the arbitrator.

The arbitration agreement is silent regarding the division of arbitration costs but provides that employees' claims shall be determined in conformity with the CAA. (CT 5). While under Code of Civil Procedure section 1284.2, when an arbitration agreement is silent on allocation of fees, each party is compelled to pay a pro rata share of the associated costs,

this is merely a default rule that is discarded in the employment context. Instead, it is a fundamental tenant that "silence about costs in an arbitration agreement is not grounds for denying a motion to compel arbitration." (Little v. Auto Steigler, Inc. (2003) 29 Cal.4th, 1064, 1084.) Where an employee has asserted an unwaivable statutory claim, as is admittedly the case here, then the Court must "infer from such silence [on costs] an agreement that 'the employer must bear the arbitration forum costs' and that '[t]he absence of specific provisions on arbitration costs would ... not be grounds for denying the enforcement of an arbitration agreement.' (Id., 29 Cal.4th at 1082 [*quoting* Armendariz, *supra,* 24 Cal.4th at 113].)

Yet Appellants persist in arguing that the very fact OTO did not explain to Kho the effects of Armendariz on what he would have to pay for arbitration (i.e. nothing) was in and of itself unconscionable. (To reiterate, the arbitration agreement expressly stated "If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2." (*See* CT 5.) There was never any intent by OTO to get around the mandatory cost-shifting requirements from Armendariz. To the contrary: they are directly contemplated by the express language of the agreement.

There is, of course, no authority cited for this unsupported issue raised by Petitioners, because such authority does not exist and would fly in the face of state Supreme Court precedent if it did. "[S]ilence about costs in an arbitration agreement is not grounds for denying a motion to compel arbitration." (Little v. Auto Steigler, Inc., *supra,* 29 Cal.4th, 1064, 1084.) To require an employer to provide an employee with legal advice regarding the applicability of various state laws to an arbitration agreement—which is

essentially what the Appellants are demanding here—would be an arbitration-specific contract defense disallowed under Concepcion. The Court should enforce the clear precedent set in Little and disregard these attacks on arbitration itself. As these cases show, the arbitration agreement's silence on the cost issue does not render it substantively unconscionable.

Both the Labor Commissioner and Kho's briefs gave great emphasis to the alleged unconscionability arising from the fact that the arbitration agreement did not provide for OTO to pay Kho's attorneys' fees and costs. Indeed, the agreement does not expressly require OTO to cover the cost of Kho's attorney (if he should choose to retain one); yet, there is no legal authority that would make an arbitration agreement unconscionable simply because the employer failed to pay the cost of the employee's legal counsel. The arbitration agreement requires application of controlling law, whatever that may be. Existing authority is contrary to Kho's and the Labor Commissioner's argument. (*See* Armendariz, *supra,* 24 Cal.4th at 110–111 [holding that an agreement is only impermissible where the terms provide for costs ***greater*** than the usual costs of litigation].) In fact, if such were the case, the failure to provide an employee with counsel would be grounds for revoking most, if not all, arbitration agreements in existence. Appellants ignore this Court's powerful language in Sonic II that

> The unconscionability inquiry is not a license for courts to impose their renditions of an ideal arbitral scheme. Rather, in the context of a standard contract of adhesion setting forth conditions of employment, the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby 'effectively blocks every forum for the redress of disputes, including arbitration itself.'

(Sonic II, *supra,* 57 Cal.4th at 1147–1148.) Moreover, there is nothing stopping the Labor Commissioner from representing Kho in the arbitration process itself if the Labor Commissioner desires to do so. Nothing in the arbitration agreement certainly precludes the Labor Commissioner from doing so and in fact nothing in the Labor Code even grants Kho the right to have the Labor Commissioner as his legal counsel unless the Labor Commissioner exercises its discretion to do so.

These assertions about the assistance of counsel are again unsupported by authority or logic. Kho may elect to proceed in arbitration either with or without the assistance of an attorney. There is no authority supporting the proposition that an employee's having to bear the cost of retaining counsel to represent him in the arbitration of a wage claim constitutes imposition of the type of "costs and risks . . . that make the resolution of the wage dispute inaccessible and unaffordable, and thereby 'effectively blocks every forum for the redress of disputes, including arbitration itself.' " (Sonic II, *supra,* 57 Cal.4th at 1148.) An arbitration agreement, like the one here, that does not require the employer to provide the employee with counsel in the arbitration of a wage dispute but otherwise provides the employee with "an accessible and affordable arbitral forum for resolving wage disputes" (Id. at 1146) cannot be deemed substantively unconscionable because the employee will have to pay for his or her own counsel, if the employee chooses to be represented by counsel, as the Court of Appeals correctly stated.[3] This is especially true where

[33] We note that no statute prohibits the Labor Commissioner's staff attorneys from representing Kho in an arbitration, just as they are working on behalf of his position here with regards to arbitration enforcement. Labor Commissioner states that Kho "cannot afford to hire his own private

reality proves that attorneys are readily taking wage and hour case on contingency and for the fee-shifting provisions provided in the Labor Code which also apply in arbitration.

Finally, to the extent that ***any*** substantive unconscionability were to arise from the employee having to bear the cost of counsel, the arbitration agreement's express incorporation of the "law governing the claims and defenses pleaded" (the California Labor Code in this context) greatly ameliorates it via the pro-employee fee shifting provisions of Labor Code sections 218.5, 1194, and 2802 that apply to the types of claims brought to the Labor Commissioner by wage claimants. Labor Code section 218.5 provides that the Court shall award reasonable attorney's fees and costs to the employee should he prevail, but if the employer prevails, it may only recover fees and costs if the action was deemed to have been brought in bad faith. Labor Code sections 2802 and 1194 also have one way pro-employee fee shifting provisions for business expense reimbursement and minimum wage/overtime cases. The Legislature included these provisions to ensure that prevailing plaintiffs do not have to "pay a portion of his wages to collect his wages," as Kho puts it. (*See* Kho's Brief, at 40.) But equally importantly, these fee-shifting provisions were created by the Legislature, and function successfully in this regard, in order to provide a substantial incentive for private counsel to take potentially meritorious claims on a contingency basis, so that even a truly indigent wage claimant can afford counsel, as an alternative to the Berman process. While empirical evidence concerning the willingness of the plaintiffs' bar to take even small-value cases is admittedly not in the record, the generous fee-shifting provisions

---

counsel." (Commissioner's Brief at. 36) Yet, in this very appeal, he is represented by very competent and high-profile private counsel.

set up by the Legislature and the Court's own experience should allow it to easily deduce there is no problem here.

The Labor Commissioner alleges in its brief that the agreement's failure to designate a way of initiating arbitration creates substantive unconscionability. In fact, it is not a failure at all. If the agreement placed specific requirements, it would make the arbitral forum more inaccessible, by making it difficult for Kho to navigate them. Conversely, as the appellate court rightly noted, it introduces flexibility by allowing Kho to initiate arbitration in any reasonable manner. Kho can simply demand arbitration by saying to a representative of OTO, "I want to arbitrate that I didn't get paid right."

Of course, no case law exists to suggest that failure to designate a method of initiating arbitration creates any unconscionability. Similarly, no caselaw is cited, or exists, to support the argument that an arbitration agreement "failing" to notify the employee that the employer pays the cost of arbitration (pursuant to Armendariz) generates its own substantive unconscionability. (Commissioner's Brief at 39-41.) Moreover, arbitration would commence exactly as it did here. If Kho did not know how to commence arbitration and filed a Labor Commissioner claim, occurred here, the employer would then simply notify the Labor Commissioner and Kho of the obligation to arbitrate (as it did here) and the claims would proceed to arbitration. The only reason that did not happen in this case is because Kho and Labor Commissioner refused to go to arbitration. The claims would have been resolved years ago but for Kho's refusal to arbitrate his claims.

Appellants also argue that the fact that elements from the civil litigation system are incorporated into the arbitral process, such as

discovery, is unconscionable because it makes the process too complicated. Conversely, the Labor Commissioner boasts its process provides no discovery. (Commissioner's Brief at 25.) In fact, discovery can be a major benefit to an employee making wage claims, as it allows. If the arbitration agreement did not provide for discovery or allowed only limited discovery, the likely argument against arbitration would be that the arbitration agreement is unconscionable because it deprives the employee of the right to find out crucial information about the practices and policies of the employer that would prove wrongdoing. Conversely, the California Supreme Court has recognized that incorporation of "legal formalities" of rules of pleading, rules of evidence, and motion practice do not render an arbitration agreement substantively unconscionable, as they can benefit both sides in the arbitration. (Little, *supra,* 29 Cal.4th at 1069–70, 1075.) Every system of adjudication has benefits and detriments, which is why the Supreme Court wisely noted it would not seek to impose an "ideal arbitral scheme" for a Berman waiver to be effective. (Sonic II, *supra*, 57 Cal.4th at 1147-48.)

The underlying theme in the briefs by Kho and the Labor Commissioner here is that what both truly desire is an arbitration procedure that resembles the Berman hearing process. However, an employee is not entitled to that under the plain language of Sonic II. Below, the Labor Commissioner stated that a Berman waiver is unconscionable absent "benefits and protections roughly comparable to those found in Berman hearings." (CT 99). In fact, the Supreme Court's holding is ***exactly opposite***; as long as arbitration is accessible and affordable, it is enforceable:

In light of Concepcion, we conclude that because compelling the parties to undergo a Berman hearing would impose significant delays in the commencement of arbitration, the approach we took in Sonic I is inconsistent with the FAA. Accordingly, we now hold, contrary to Sonic I, that the FAA preempts our state-law rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment.

At the same time, we conclude that state courts may continue to enforce unconscionability rules that do not interfere with fundamental attributes of arbitration. Although a court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer. As we explained in Sonic I and reiterate below, the Berman statutes confer important benefits on wage claimants by lowering the costs of pursuing their claims and by ensuring that they are able to enforce judgments in their favor. There is no reason why an arbitral forum cannot provide these benefits, and ***an employee's surrender of such benefits does not necessarily make the agreement unconscionable.*** The fundamental fairness of the bargain, as with all contracts, will depend on what benefits the employee received under the agreement's substantive terms and the totality of circumstances surrounding the formation of the agreement.

* * *

We emphasize that there is no single formula for designing an arbitration process that provides an effective and low-cost approach to resolving wage disputes. ***There are potentially many ways to structure arbitration, without replicating the Berman protections***, so that it facilitates accessible, affordable resolution of wage disputes. We see no reason to believe that the specific elements of the Berman statutes are the only way to achieve this goal or that employees will be unable to pursue their claims effectively without initial resort to an administrative hearing as opposed to an adequate arbitral forum. ***Waiver of the Berman protections will not, by itself, support a finding of unconscionability where the arbitral scheme at issue provides employees with an accessible and affordable process for resolving wage disputes.*** The unconscionability inquiry is not a license for courts to impose their renditions of an ideal arbitral scheme. Rather, in the context of a standard contract of adhesion setting forth conditions of employment, the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby "effectively blocks every forum for the redress of disputes, including arbitration itself.

(Sonic II, *supra*, 57 Cal.4th at 1124-1125, 1147-48, *emphasis added.*) Given the arbitral forum is free of charge to the employee, provides discovery rights, and provides a final, binding, and enforceable decision, it is accessible and affordable and therefore it is not unconscionable. It really is as simple as that.

What is the alternative that is effectively being proposed by the Labor Commissioner and Kho? A non-binding Berman hearing that is likely to be followed by an appeal to the state court system under California Labor Code section 98.2(a). At that point, Kho will have had the supposed "benefits" of the Berman hearing and will not have the defenses regarding the supposed unconscionability of the Berman waiver the Labor Commissioner presents here. Should he choose not to stipulate to arbitration, he will then likely be compelled to arbitrate, as the existence of an enforceable arbitration agreement is not in dispute. (CT 210). The arbitration will be conducted *de novo*, as is undisputed. Substantially, the parties will at that point be in a virtually identical situation to the situation that they would have been at had the Superior Court ordered the matter to arbitration in the first place. All this for a non-binding proceeding. The CAA arbitration procedures (particularly where, as here, the costs are fully paid by the employer) offer a cheaper, more accessible, faster, and more final resolution than this alternative.

### B. Arbitration offers an accessible, affordable, and expeditious alternative to Berman hearings; accordingly, the Berman waiver is not unconscionable

It is far past time to put to rest the canard that employees do not have both an affordable and accessible forum for resolution of wage disputes when the dispute is arbitrated under the court-approved arbitration agreement present here. OTO's arbitration agreement utilizes, with scant

modification, the dispute resolution process envisioned by the California Arbitration Act; it is ironic to see a government agency criticize the procedures the state legislature established. Ultimately, the availability of counsel due to the ample statutory incentives, discussed above, available to take even small-dollar plaintiff's cases works to eliminate the ill-effects on an employee of the complexity of navigating the Code of Civil Procedure, the California Arbitration Act, or the Discovery Act.

Furthermore, the costs of arbitration are borne entirely by the employer, win or lose. These costs, which can amount to tens of thousands of dollars for a weeklong arbitration hearing, thereby create a powerful disincentive for most employers to take all but the most frivolous cases all the way to an arbitration hearing; instead there is tremendous pressure to settle, creating another incentive for private counsel to take even borderline meritorious cases. And while the Labor Commissioner regularly takes a close to a year, and sometimes more, to come to a *non-binding* Berman hearing[4] that will be subject to appeal and a petition to compel to arbitration, an arbitration absent the Berman process can begin within weeks of service by an employee on the employer of a demand for arbitration.

This is not idle theory; this is the reality of employment practice—there simply are not may expenses or barriers to obtaining justice in the arbitration context. Sonic II does ***not*** require recreation of all the "protections" of the Berman hearing process. (Sonic II, *supra,* 57 Cal.4th at 1124, 1125, 1147 48.) Given the arbitral forum here is free of charge to the employee, provides discovery rights, and provides a final, binding, and

[4] In this case, the claim was filed in October 2014, and set for a hearing in August 2015. (CT 9, 68:25.)

enforceable decision, it is accessible and affordable and therefore it is not unconscionable. It really is as simple as that.

## III. The trial court properly vacated the ODA

The trial court's December 11, 2015 Order on Petitioner's Motion to Vacate Administrative Award appropriately vacated the Commissioner's ODA based on lack of due process. Code of Civil Procedure section 1094.5 grants a trial court the authority to review an "administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer. . . ." (Code Civ. Proc. § 1094.5(a).) Subdivision (b) provides:

> (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; ***whether there was a fair trial***; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(Code Civ. Proc. § 1094.5(b) (emphasis added).)

### A. The trial court properly held that the Labor Commissioner violated the right of OTO to a fair hearing.

The Commissioner's first argument—that the trial court erred because the Labor Commissioner had jurisdiction to conduct a Berman hearing pursuant to Labor Code section 98(a) (*see* Commissioner's Brief at p. 46)—presents a classic "red herring" in its failure to address any perceived error in the Superior Court's order. The Superior Court did not base its order on lack of jurisdiction. Rather, the court correctly determined

that the Berman hearing conducted by the Labor Commissioner in this case violated OTO's right to a fair hearing.

Parties to administrative proceedings, such as the Labor Commissioner's Berman hearing process, enjoy the protection of procedural due process. (Nightlife Partners v. City of Beverly Hills (2003) 108 Cal.App.4th 81, 90.) As described by the court in Nightlife Partners:

> The protections of procedural due process apply to administrative proceedings (Richardson v. Perales (1971) 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842); the question is simply what process is due in a given circumstance. (Morrissey v. Brewer (1972) 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; see Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 428–429, 102 S.Ct. 1148, 1153–1154, 71 L.Ed.2d 265.) Due process, however, *always* requires a relatively level playing field, the "constitutional floor" of a "fair trial in a fair tribunal," in other words, a fair hearing before a neutral or unbiased decision-maker. (Bracy v. Gramley (1997) 520 U.S. 899, 904–905, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97; Withrow v. Larkin (1975) 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712.)

(Id., Cal.App.4th at 90 (italics in original).) The "fair trial" requirement of section 1094.5(b) simply requires a "fair administrative hearing" (*ibid.*), which affords the party a " ' "reasonable opportunity to be heard." ' " (Pinheiro v. Civil Service Commission for the County of Fresno (2016) 245 Cal.App.4th 1458, 1463; Rodriguez v. Department of Real Estate (1996) 51 Cal.App.4th 1289, 1297; Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal.3d 541, 555.)

In the present case the superior court correctly ruled that "enforcing the ODA would violate the right of [OTO] to a fair administrative hearing" as mandated by Code of Civil Procedure section 1094.5(b). (CT 204). There is no dispute that, prior to the Berman hearing, OTO provided notice of the existence of the arbitration agreement signed by Kho and of the filing

of the Petition to Compel Arbitration. (CT 204; CT 172-73). Noting that under Sonic II "it is clear that employers are not required to participate in a Berman hearing prior to arbitration if there is an enforceable arbitration agreement," the superior court determined that OTO "was substantially justified in refusing to participate in the hearing" in reliance on the arbitration agreement. (CT 204).

The superior court's order made no reference to the Labor Commissioner's jurisdiction over Berman hearings. Moreover, it is not disputed that Labor Code section 98 grants the Labor Commissioner authority to conduct Berman hearings on wage claims. However, such administrative hearings must comport with the "fair trial" requirement of Code of Civil Procedure section 1094.5(b) discussed above. As the Berman hearing in this case proceeded without regard to OTO's objection based on the arbitration agreement signed by Kho, and under the threat by the Labor Commissioner that the Petitioner will waive its right to arbitration by going through the Berman process, the superior court properly vacated the ODA and remanded to the Labor Commissioner for further proceedings. The Labor Commissioner created the proverbial "catch-22" by proceeding with the Berman Hearing and arguing that the right to arbitration is waived if the Respondent participates. The Labor Commissioner's own position caused the unfairness by prohibiting the Respondent from participating in the Berman process without risking waiver or waiting for the Superior Court to decide the arbitration issue just shortly after.

### B. The trial court properly remanded the case for further administrative proceedings.

In her second argument, the Labor Commissioner contends that upon the perfection of an appeal to the superior court pursuant to Labor Code section 98.2 the ODA was nullified and jurisdiction was properly vested in the trial court, and that the trial court lacked authority to remand the case back to the Labor Commissioner. (Commissioner's Brief p. 48.) Stated differently, the Commissioner argues that the procedural fairness of a Berman hearing cannot be reviewed once a *de novo* appeal is filed.

Labor Code section 98.2(a) provides, in relevant part: "Within 10 days after service of notice of an order, decision, or award the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo." Although labeled an appeal, a trial *de novo* "is 'a trial anew in the fullest sense,' in which the administrative decision is entitled to no weight whatsoever, and the parties may present entirely new evidence to the trial court." (Eicher v. Advanced Business Integrators, Inc. (2007) 151 Cal.App.4th 1363, 1381.) Since the trial court reviews the matter *de novo*, the Labor Commissioner's ***factual findings*** and determinations in the ODA are not subject to review by administrative mandate under the Administrative Procedures Act or under subdivision (a) of Code of Civil Procedure section 1094.5. (*See* Corrales v. Bradstreet (2007) 153 Cal.App.4th 33, 54–55.)

However, the Commissioner has cited no authority—and OTO is unaware of the existence of any relevant authority—which holds that the "fair trial" component of Code of Civil Procedure section 1094.5(b) cannot be reviewed by the trial court. Such a rule would lead to the absurd result

that the Labor Commissioner could deny an employer any modicum of a fair hearing without fear of review by the trial court.

Such a result is clearly counter to the statutory framework since, notwithstanding the contrary claims of the Labor Commissioner, the issuance of an ODA has consequences that survive the timely filing of an appeal by the employer. As recognized by the Supreme Court in Sonic II, the following consequences survive the *de novo* appeal:

- **The employer must post an undertaking:** " 'If an employer appeals the Labor Commissioner's award, "[a]s a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award." (§ 98.2, subd. (b).)' "

(Sonic II, *supra,* 57 Cal.4th at 1129 [*quoting* Sonic I].)

- **An unsuccessful appellant is subject to an attorney fee award:** " 'Under section 98.2, subdivision (c), "If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero." This provision thereby establishes a one-way fee-shifting scheme, whereby unsuccessful appellants pay attorney fees while successful appellants may not obtain such fees. [Citation.] This is in contrast to section 218.5, which provides that in civil actions for nonpayment of wages initiated in the superior court, the "prevailing party" may obtain attorney fees.' "

(Id., [*quoting* Sonic I].)

- **Representation of the Employee by the Labor Commissioner:** " 'Furthermore, the Labor Commissioner "may" upon request represent a claimant "financially unable to afford counsel" in the de novo proceeding and "shall"

> represent the claimant if he or she is attempting to uphold the Labor Commissioner's award and is not objecting to the Commissioner's final order. (§ 98.4.) Such claimants represented by the Labor Commissioner may still collect attorney fees pursuant to section 98.2, although such claimants have not, strictly speaking, incurred attorneys fees, because construction of the statute in this manner is consistent with the statute's goals of discouraging unmeritorious appeals of wage claims. [Citation.]' "

(Id., [quoting Sonic I].)

In light of these lasting consequences of the ODA, OTO's filing of a *de novo* appeal did not nullify the effects of the improperly issued ODA. The trial court's order vacating the ODA and remanding to the Labor Commissioner for further proceedings should therefore be affirmed.

### C. OTO did not "waive" its right to challenge the procedural fairness of the Berman hearing conducted by the Labor Commissioner.

The Labor Commissioner at one point below argued that OTO had waived its right to compel arbitration entirely. (CT 99-106.) Perhaps given the reality that this argument was entirely unavailing in light of the high bar for a finding of waiver in Saint Agnes Medical Center v. PacifiCare of California ((2003) 31 Cal.4th 1187), this argument was abandoned; nowhere in their briefs here do Appellants try to argue that OTO waived its right to compel arbitration. Instead, the Labor Commissioner suggests—without outright invoking waiver doctrine—that OTO waived its right to enforce the appropriate Berman hearing procedures by its delay in filing a petition to compel arbitration. (Commissioner's Brief pp. 49.) She argues that because OTO was on notice for approximately 10 months that the Berman procedure was in play, and because OTO petition to compel arbitration and stay proceedings only one court day prior to the Berman hearing, it is not entitled to the benefit of the Berman hearing waiver

contained in its arbitration agreement. (Commissioner's Brief pp. 47.) However, as the brief fails to cite any relevant statutory or appellate authority for the proposition that OTO somehow waived its right to due process in the Berman hearing proceedings, the argument should be rejected. (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2002) 100 Cal.App.4th 1066, 1078 ["Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review"].)

To argue that because OTO waited a certain period of time, it is no longer entitled to the Berman waiver it contracted for and which is enforceable under Sonic II is to argue waiver in essence. One cannot mistake that this is the argument the Labor Commissioner makes when she says that, even if the Court disagrees with her and finds the Berman waiver enforceable, the ODA should still stand. (Commissioner's Brief at 50.)

But this argument, even disguised as something else, is still unavailing. California law, like the Federal Arbitration Act, "reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims." (Saint Agnes, *supra,* 31 Cal.4th at 1195.) Where the existence and enforceability of an arbitration agreement are not at issue and there are no related, pending court proceedings of third parties, the only remaining defense to enforcement is waiver by the petitioning party. (Cal. Code Civ. Proc. § 1281.2.) However, the party opposing arbitration bears the burden of proving waiver by a preponderance of evidence. (*See* Pinnacle Museum Tower Assn, *supra,* 55 Cal.4th at 236; Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 972.) "Although a court may deny a petition to compel arbitration on the

ground of waiver, waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (Saint Agnes, *supra,* 31 Cal.4th at 1195, emphasis added.)

The California Supreme Court has identified six factors relevant to assessing waiver of arbitration agreements in the Saint Agnes decision. However, the Saint Agnes decision and elements relate exclusively to judicial litigation, not to administrative proceedings such as Berman hearings:

> In determining waiver, a court can consider (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.

(Saint Agnes, *supra,* 31 Cal.4th at 1196, emphasis added, internal citations omitted.) Given that there was no pending "litigation," "lawsuit," or "trial date" prior to the filing of the Petition to Compel, Kho and the Labor Commissioner simply cannot establish any of the elements for waiver of arbitration. A settlement negotiation—such as that which both parties admit occurred prior to the filing of the petition to compel and the DLSE hearing—is not litigation. (CT 110). Administrative proceedings are not aspects of litigation machinery. A Berman hearing is not a trial date. No authority supporting the notion that these factors of waiver of arbitration agreements are somehow applicable to the Berman process.

The California Supreme Court was unequivocal in its recent holding that it is the Labor Commissioner's jurisdiction which must make way for arbitration because it interferes with the expeditious nature of arbitration, not that arbitration must wait until after the Labor Commissioner has conducted a full hearing. (*See* Sonic II, *supra,* 57 Cal.4th at 1141-42.)

In fact, the evidence before this Court reveals that OTO has acted at all times consistently with its intent to arbitrate. In response to the Petition, Kho did not contest the existence of the arbitration agreement to avoid arbitration of his claim. (CT 109). What then is Kho's supposed evidence that OTO has knowingly waived its right to arbitration? Kho filed an administrative complaint with the DLSE in late 2014. Admittedly, both parties attempted for a lengthy period to settle the case. However, once it became clear that no settlement would be reached and that Kho would be pursuing claims through the Berman process, OTO petitioned the Superior Court to obtain an order requiring arbitration and reached out to the Labor Commissioner to inform it that due to the arbitration agreement, it had no jurisdiction in this matter. (CT 124, 144.) Not only has OTO not waived its right to arbitration, it has demanded that Kho comply with his arbitration obligation at all times since Kho made it clear that he sought to pursue employment related claims.

The Court of Appeal's decision in Gloster v. Sonic Automotive, Inc. ((2014) 226 Cal.App.4th 438, 442) is instructive. In Gloster, the defendant employer demanded that the plaintiff arbitrate his claims but did not actually file a petition to compel arbitration until one year after the filing of the complaint. (Id. at 442.) The trial court determined that the defendant had waived its right to arbitration. (Id. at 444.) After reviewing the Saint Agnes standard for waiver, the Court of Appeal explained why the

defendant's admittedly lengthy delay in seeking an order compelling arbitration was not a waiver:

> While we recognize the Melody defendants delayed for an extended period in taking affirmative steps to enforce their right to arbitrate, Gloster failed to carry his "heavy burden" of demonstrating this delay was unreasonable and prejudicial. Importantly, the Melody defendants consistently asserted their intention to arbitrate, insisting on the requirement of arbitration in communications with Gloster and his counsel even before the litigation was filed. They reflected that intent in pleading an appropriate affirmative defense and consistently asserted their intent to seek arbitration in a series of case management statements. Throughout the period of delay, there was no question the Melody defendants wanted to arbitrate; the only question was when they would get around to enforcing their right.
>
> Under the circumstances present here, the delay alone was not sufficient to support a finding of waiver. Answering a complaint and participating in litigation, on their own, do not waive the right to arbitrate. . . Ordinarily, a delay is found unreasonable only when it is combined with the attempt by the party asserting a right to arbitrate to obtain an advantageous litigation position during the delay.

(Gloster, *supra,* 226 Cal.App.4th at 449.) Because the defendant had not attempted to delay so that it might obtain a more advantageous litigation position, the Court of Appeal held that there was no waiver and reversed the trial court's denial of the petition to compel arbitration. (Id. at 451.)

In this case, unlike Gloster, there has been no litigation delay, inasmuch as there has been no litigation. For what it is worth, OTO has in fact demanded that Kho arbitrate his claims since November 2014. (CT 172). From that time, the parties attempted to informally resolve the dispute; it was not until July 2015 that it became clear that settlement would not be possible. (CT 173). The Petition was filed shortly thereafter. (CT 3). As such, there is no question that OTO has timely asserted its intention to arbitrate. And OTO has made no attempt to gain an unfair

advantage prior to filing this action. Thus, OTO has not waived its right to arbitration in this matter.

Moreover, the California Supreme Court has given clear guidelines regarding the level of prejudice necessary to support a finding of waiver; delays, costs, and legal expenses alone will simply not suffice:

> In California, whether or not litigation results in prejudice also is critical in waiver determinations. That is, while waiver does not occur by mere participation in litigation if there has been no judicial litigation of the merits of arbitrable issues, waiver could occur prior to a judgment on the merits if prejudice could be demonstrated.
>
> Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.
>
> Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution and are intended to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. Prejudice typically is found only where the petitioning party's conduct has ***substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.***

(Saint Agnes, *supra,* 31 Cal.4th at 1203-04, internal citations omitted, emphasis added.) In this case, Kho has presented absolutely no evidence of conduct by OTO which has substantially impaired Kho's ability to enjoy the benefits of arbitration. Quite the contrary, it is Kho who has refused to arbitrate his claims and who claims in flagrant violation of the California Supreme Court's recent proclamation on the matter that he can force OTO to engage in a lengthy administrative process prior to arbitration. (*See* Sonic II, *supra,* 59 Cal.4th at 1109.)

Because Kho has no evidence of any conduct by OTO which might possibly be considered a waiver of the right to bypass the Berman hearing, he would never be able to meet his heavy burden. The trial court's vacation of the ODA in spite of the passage of time between Kho first filing his claim and the Berman hearing is correct—OTO believed and continues to believe Kho has waived his right to a Berman hearing, and it was entitled to rely on good faith on that waiver.

Moreover, the Commissioner's "race to the finish line" mentality inappropriately suggests that the Labor Commissioner is free to proceed with a Berman hearing and issuance of an ODA even though the Commissioner is aware of the existence of an arbitration agreement between the employer and employee and the filing of a petition to compel arbitration, so long as the trial court has not either enjoined the Berman hearing or ordered the dispute into arbitration.

Were the Commissioner's position to be adopted, chaos would ensue. The Labor Commissioner would be able to preserve her jurisdiction merely by expediting the Berman hearing procedures. Parties refusing to take part in the "additional delay that results not from adjudicating whether there is an enforceable arbitration agreement, but from an administrative scheme to effectuate state policies," relying in good faith on their arbitration agreements and administrative claim waivers, would find expectations frustrated and their contractual agreements effectively voided through no fault of their own. (Sonic II, *supra,* 57 Cal.4th at 1142.) Because the Commissioner's position runs afoul of both California and U.S. Supreme Court authority, it must be rejected. (*See* AT&T Mobility LLC, *supra,* 563 U.S. 333 ["The FAA's overarching purpose is to

ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings"].)

### D. The trial court's order does not deprive Kho of any Berman protections.

Without citation to any relevant authority, the Labor Commissioner baldly asserts that Kho will somehow be deprived of the Berman protections. (Commissioner's Brief pp. 50.) However, the Commissioner fails to describe how the trial court's order vacating the ODA and remanding to the Labor Commissioner for further proceedings will cause such a deprivation. To the contrary, the remand order preserves the so-called Berman protections by affording the parties a fair Berman hearing in accordance with due process. As such, the order should be affirmed.

### E. *De novo* arbitration is not an adequate remedy for the Labor Commissioner's failure to provide a fair administrative hearing.

In keeping with the contention that the Labor Commissioner can ignore pending court proceedings seeking to compel arbitration of wage claims and issue an ODA following an unfair one-sided Berman hearing conducted without the participation of the employer, the Commissioner contends that the only option available once an invalid ODA is issued is to request a *de novo* review through the superior court and seek to compel arbitration of that *de novo* appeal. Contrary to the Labor Commissioner's incorrect assertion, OTO ***did not file*** an appeal in superior court pursuant to section 98.2, subdivision (a), ***together with*** a petition to compel arbitration. Rather, the following sequence of events establishes that the Petition to Compel Arbitration was filed well prior to the *de novo* appeal:

- OTO filed its petition to compel arbitration on August 14, 2015, and demanded that the Labor Commissioner stay her proceedings. (CT 1-25).

- The Labor Commissioner refused to do so, and proceeded to issue an Order, Decision, or Award (ODA) on August 25, 2015 while the petition to compel arbitration was pending before the Superior Court, based on a Berman hearing on August 17, 2015 in which OTO refused to participate beyond demanding that the arbitration agreement be enforced. (CT 67-76).

- On September 15, 2015, OTO timely appealed the ODA in the superior court and filed the undertaking required by Labor Code section 98.2(b).

- OTO filed its motion to vacate the ODA on September 16, 2015 (CT 37-83).

This chronology establishes that OTO did not attempt to follow the procedure following a Berman hearing suggested in *dicta* by the Supreme Court in the *Sonic* opinions. Rather, OTO appropriately petitioned the superior court for an order compelling arbitration *prior* to the Berman hearing in accordance with the holding in Sonic II that the FAA preempts a state-law rule categorically requiring arbitration to be preceded by a Berman hearing.

Upon being presented with the Supreme Court's holding in Sonic II, the Labor Commissioner chose to thumb her nose at the jurisdiction of the Superior Court over the question of whether the arbitration agreement signed by Kho required that the matter be arbitrated. Instead of granting a brief delay while the superior court considered the Petition to Compel Arbitration, the Commissioner conducted a Berman hearing without OTO's participation, and issued an ODA. The trial court's order correctly determined that this was not a fair hearing, and vacated the ODA and remanded the matter back to the Labor Commissioner for further

proceedings. In essence, the trial court's order did what the Labor Commissioner should have done in the first instance: it placed the parties back in the same procedural setting that would have existed if the Commissioner would have followed Sonic II and continued the Berman hearing until after the superior court's decision on the Petition to Compel Arbitration.

By asserting that the only option available following the issuance of an ODA is *de novo* review, the Labor Commissioner posits that she is free to trample on the parties' rights and conduct unfair Berman hearings without fear of review by the courts. Such a rule would give the Commissioner the unfettered right to ignore ongoing court proceedings so long as the court has not enjoined the Berman hearing or entered a final order compelling the matter into arbitration. This will lead to a marked increase in court proceedings and expense to the parties related to petitions to compel arbitration as employers would be required to seek immediate injunctive relief upon filing a petition to compel arbitration to enjoin the Berman hearing during the pendency of the petition.

In light of the foregoing, the trial court's order vacating the ODA and remanding to the Labor Commissioner must be affirmed.

## CONCLUSION

The California Supreme Court and Courts of Appeal have already consistently upheld identical language to that at issue here as enforceable against unconscionability challenges. (CT 5-6; *see also* Little, *supra,* 29 Cal.4th at 1069–70 [identical provisions]; Kinecta Alternative Financial Solutions, Inc. v. Superior Court (Malone) (2012) 205 Cal.App.4th 506, at fn. 1 [identical provisions]; Fittante v. Palm Springs Motors, Inc. (2003)

105 Cal.App.4th 708, 716–17 [identical provisions]; Nelsen v. Legacy Partners Residential, Inc. (2012) 207 Cal.App.4th 1115, 1120 [identical provisions].) Yet, here we are. Bearing in mind the strong public policy in favor of arbitration and the requirement that we resolve any doubts regarding the arbitrability of a dispute in favor of arbitration (Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal.App.4th 677, 686), Kho and the Labor Commissioner are unable to meet their burden of showing that the subject arbitration agreement is both procedurally and substantively unconscionable. To find the Berman waiver to be unconscionable would be to create the judicial superstructure around arbitration that federal Supreme Court decisions have clearly prohibited—it would substitute the judgment of the judiciary over that of the contracting parties. OTO respectfully requests that the Supreme Court affirm the order of the Court of Appeal directing Ken Kho to resolve all disputes arising out of his employment with OTO via binding arbitration according to the terms of the arbitration provision.

Dated: June 1, 2018

Respectfully submitted,
FINE, BOGGS & PERKINS LLP

By: Roman Zhuk
Attorneys for Respondent OTO

## CERTIFICATION OF WORD COUNT

Pursuant to Rules of Court, Rule 8.520(c)(1), I certify that the text of this PETITIONER AND RESPONDENT'S ANSWER BRIEF consists of 12,490 words as counted by the Microsoft Word 2010 software program used to generate this document, inclusive of footnotes, but exclusive of tables, titles, and proof of service, etc.

Roman Zhuk

**PROOF OF SERVICE**
**(C.C.P. § 1013)**

I, Roman Zhuk, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 80 Stone Pine Road, Suite 210, Half Moon Bay, California, and I am not a party to the cause, and I am over the age of eighteen years.

2. On June 1, 2018, I served the following document in the manner described below:

## PETITIONER AND RESPONDENT'S ANSWER BRIEF

**BY FIRST-CLASS MAIL.** I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.

On the interested parties in this action by addressing true copies thereof as follows:

- **CLERK OF THE COURT OF APPEAL**
  California Court of Appeal, First District, Division One
  350 McAllister Street
  San Francisco, California 94102

- **CLERK OF THE SUPERIOR COURT**
  Alameda County Superior Court
  1225 Fallon Street
  Oakland, California 94612

- **DIVISION OF LABOR STANDARDS ENFORCEMENT**
  Department of Industrial Relations
  State of California
  Mr. Miles Locker
  Ms. Theresa Bichsel
  455 Golden Gate Avenue, 9th Floor
  San Francisco, CA 94102

- **WEINBERG, ROGER & ROSENFELD**
  David A. Rosenfeld
  A Professional Corporation
  Caroline N. Cohen
  1001 Marina Village Parkway, Suite 200
  Alameda, CA 94501

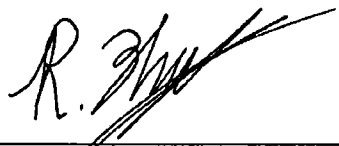
- **KEN BACMENG KHO**
  1650 Vida Court
  San Leandro, California 94579

**BY ELECTRONIC SERVICE.** By electronically mailing a true and correct copy through Fine, Boggs & Perkins, LLP's electronic mail system from rzhuk@employerlawyers.com to the email addresses set forth below on the following part(ies) in this action:

Mr. Miles Locker
mlocker@dir.ca.gov
Ms. Theresa Bichsel
tbichsel@dir.ca.gov
DLSE
Department of Industrial Relations
State of California
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

David A. Rosenfeld
Drosenfeld@unioncounsel.net
Caroline N. Cohen
ccohen@unioncounsel.net
Weinberg, Roger & Rosenfeld
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at San Francisco, California, on Friday, June 1, 2018.



Roman Zhuk