Case No. S244630

SUPREME COURT
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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,
Plaintiff and Respondent,

v.

KEN KHO,
Real Party in Interest and Appellant,

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 a Decision of the Court of Appeal, Case No. A147564,
First Appellate District, One

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

REPLY BRIEF

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INTRODUCTION

The central issue in this case is whether the adhesive arbitration agreement that Petitioner and Respondent—One Toyota of Oakland (OTO)—seeks to enforce against Ken Kho is so unreasonably one-sided in OTO's favor, without legitimate commercial justification, that it is unconscionable. Though private arbitration agreements may be constructed in an even-handed manner to resolve disputes more quickly and at less cost than judicial proceedings, they "may also become an instrument of injustice imposed on a 'take it or leave it' basis." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115.) This Court's task, then, is to "distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness." (*Ibid.*)

Here, the arbitral forum OTO constructed effects the latter. Under *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), an arbitration agreement is substantively unconscionable if—considering the totality of the circumstances—it creates a forum for a particular wage claimant that is not accessible and affordable. Applying this test to the present case demonstrates that it will be unconscionable to enforce OTO's arbitration agreement against Kho. Not only is the arbitration agreement rife with procedural unconscionability, it is also substantively unconscionable given its unjustified imposition of burdens that fall only on

Kho, while simultaneously conferring benefits only on OTO. The net effect of OTO's agreement is that it effectively blocks every forum for Kho to redress his wage claims, including arbitration. The Court should reverse the decision of the Court of Appeal and affirm the trial court's order denying the petition to compel arbitration. The Court should also reverse the trial court's order vacating the Labor Commissioner's order, decision or award (ODA) and reinstate that award.

ARGUMENT

I. THE PROCEDURAL CIRCUMSTANCES AND SUBSTANTIVE TERMS OF OTO'S ARBITRATION AGREEMENT RENDER THE AGREEMENT UNCONSCIONABLE

It is undisputed that "[u]nconscionability has both a 'procedural' and a 'substantive' element." (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.) But these two elements "need not be present in the same degree." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) Rather, a "sliding scale is invoked" such that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to hold the agreement unenforceable, and vice versa. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244 [quoting *Armendariz*, *supra*, at p. 114]; accord *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910.) Accordingly, where there is a high degree of procedural unconscionability, "even a low

degree of substantive unconscionability [can] render the arbitration agreement unconscionable." (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85.)

As addressed in the Labor Commissioner's Opening Brief and again below, the record here establishes an "extraordinarily high" degree of procedural unconscionability consisting of both oppression and surprise.

The record also manifests a surfeit of substantive unconscionability, particularly given the high degree of procedural unconscionability. OTO's agreement imposes an opaque, complex and expensive process on Kho in lieu of the informal and easily accessible Berman procedures otherwise available to Kho, and consequently strips Kho of the benefits to which he would have been entitled in pursuing his wage claim before the Labor Commissioner. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1146 [unconscionability analysis must take into account "not only what features of a dispute resolution agreement eliminates but also what features it contemplates"].) Notably, the agreement does not provide any corresponding benefits to Kho in exchange. Rather, all the benefits under the agreement inure to OTO, which is shielded by the agreement from the risks that would otherwise attend it if it were sued in court. The net result is an arbitration agreement that, by design, operates to solely favor OTO by effectively blocking employees like Kho from being able to redress their wage claims. The agreement, therefore, is substantively unconscionable.

A. The Level of Procedural Unconscionability in this Case Is "Extraordinarily High"

Notwithstanding the fact that both the trial court and Court of Appeal below found an "extraordinarily high" degree of procedural unconscionability, OTO argues that there is no oppression or surprise in the circumstances surrounding the formation of the agreement.[1] (Answer at pp. 20-23.) The record demonstrates otherwise.

1) The Record Demonstrates Oppression

Oppression arises when there is "an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." (*Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519, 1532.) Contracts of adhesion, by definition, are oppressive.[2] (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817 [contract of adhesion is a standardized contract "which, imposed and drafted by the party of superior bargaining strength

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[1] OTO contends that in order to find any procedural unconscionability, the Court must find both oppression and surprise. (Answer at pp. 20-23.) But that is incorrect; procedural unconscionability requires only a finding of either oppression or surprise. (*Armendariz, supra*, 24 Cal.4th at p. 114; accord *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247.) The presence of both oppression *and* surprise simply heightens procedural unconscionability. (*Carmona, supra*, 226 Cal.App.4th at p. 85; *Pinnacle, supra*, at p. 247; accord *McCaffrey Group, Inc. v. Super. Ct.* (2014) 224 Cal.App.4th 1330, 1349.)

[2] See also *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 ["The procedural element of an unconscionable contract generally takes the form of a contract of adhesion"]; accord *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 853 ["A finding of a contract of adhesion is essentially a finding of procedural unconscionability"].

relegates to the subscribing party only the opportunity to adhere to the contract or reject it."].) This is particularly so in the employment context. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704.)

Though OTO denies as much in its Answer, the record in this case clearly demonstrates that the arbitration agreement here is a contract of adhesion. The agreement was drafted entirely by OTO (or on its behalf) and was presented to Kho under circumstances that were plainly intended to lead him to believe that he was required to sign the document on the spot, as part of his employee responsibilities. (CT 109.) Not surprisingly, both the trial court and Court of Appeal below easily found an extraordinarily high degree of procedural unconscionability. (*OTO, L.L.C. v. Kho* (2017) 14 Cal.App.5th 691, 709; CT 213.)

OTO's contentions discounting the evidence of oppression are specious. OTO faults Kho for not asking questions and contends that Kho was never specifically told that he had to sign the agreement in order to continue working for OTO and that Kho never specifically said in his declaration that the agreement was presented on a take-it-or-leave-it basis. But, under the circumstances, Kho reasonably understood (and indeed, OTO intended Kho to understand) that he was required to sign the presented documents if he wanted to keep his job. Moreover, OTO has admitted that "[t]here are no employees of One Toyota of Oakland who are

not required to agree to the dispute resolution provisions, which require binding arbitration of disputes." (CT 002:3-7; see also CT 060:6-8.) This admission in OTO's petition to compel arbitration forecloses any later suggestion that OTO would have permitted Kho to negotiate the terms of the arbitration agreement.

2) The Record Demonstrates Surprise

OTO contends that there was no surprise in the present case because the agreement was laid bare in a stand-alone document written in "easily readable" font prefaced with the block heading "COMPREHENSIVE AGREEMENT EMPLOYMENT AT-WILL AND ARBITRATION." (Answer at p. 22.) It strains credulity, however, to describe the document—printed in tiny, seven-point font, and mostly presented in one very long, dense, block paragraph containing numerous references to statutes and various legal concepts—as "easily readable." (See CT 005-006.)

Even if the agreement could be considered "easily readable," OTO's contention is nonetheless misplaced given that "conspicuousness and clarity of language alone may not be enough to satisfy the requirement of awareness," particularly where a contract is one of adhesion. (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 359; accord *Penilla v. Westmont Corporation* (2016) 3 Cal.App.5th 205, 217; *Parada v. Super. Ct.* (2009) 176 Cal.App.4th 1554, 1572.) Accordingly, courts have found

that surprise "covers a variety of deceptive practices and tactics" beyond simply hiding terms in plain sight. (*Penilla*, *supra*, 3 Cal.App.5th at p. 216.) Such other practices include "phrasing a clause in language that is incomprehensible to a layperson" and using "confusing and sometimes contradictory" language. (*Ibid.*) Even where the terms are clear, surprise can arise if the "representatives fail[] to draw . . . attention to the arbitration provision or explain its import." (*Id.* at p. 217.) Failing to translate the agreement—or at least its key terms—into a worker's native language also constitutes surprise. (*Carmona*, *supra*, 226 Cal.App.4th at p. 85; accord *Penilla*, *supra*, at p. 216.)

The arbitration agreement in the present case exemplifies each of these "surprises." The agreement is in English even though Kho's first language is Chinese. The agreement also includes confusing and sometimes contradictory language with no explanation of the import of the agreement. Further, as the trial court found, the agreement's vague reference to federal and state laws and procedures "does not provide notice to a reasonable person of the procedures that will be used during the arbitration, or how information about those procedures can be obtained." (CT 213.) Last, as discussed in the Commissioner's Opening Brief, the agreement fails to provide any instructions on how Kho could even commence arbitration. These deficiencies all constitute surprise, which,

when combined with oppression, result in an extraordinarily high degree of procedural unconscionability.

B. **OTO's Arbitration Agreement Is Substantively Unconscionable**

OTO incorrectly asserts that this case is "merely a rehash of the identical arguments already addressed by this Court" in *Sonic II*. (Answer at p. 8.) But the instant case presents a question this Court did not reach in *Sonic II*: is an arbitration agreement that evidences an extraordinarily high degree of procedural unconscionability and replaces all of the procedures and protections of a Berman hearing with a forum mirroring formal civil litigation unconscionable with regard to a worker like Kho? Rather than upholding an agreement identical to OTO's in *Sonic II*, this Court set out the relevant standard for making this determination and remanded the case for further factual development. Further development was necessary because the unconscionability inquiry is fact-specific and requires a court "to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided." (*Sonic II, supra*, 57 Cal.4th at p. 1146.) Here, the record is set and reveals both extreme procedural unconscionability, as well as unjustifiable barriers that Kho must face in attempting to utilize the forum OTO designed.

As the Labor Commissioner set out in her Opening Brief, in *Sonic II* this Court held that an arbitration agreement that waives the Berman hearings would be substantively unconscionable if it eliminates the Berman process and replaces it with a forum that is not "accessible and affordable" to the wage claimant. (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) This standard requires courts to evaluate the rights and remedies conferred by the arbitration agreement against the rights and remedies that are taken away, with a focus on whether the arbitral scheme imposes costs and risks on a wage claimant that effectively render the forum inaccessible and unaffordable.

In its Answer, OTO essentially ignores this standard and instead employs the same flawed logic the Court of Appeal applied to deny the existence of any substantive unconscionability—identifying and then discounting each separate aspect of the Berman waiver individually as insufficient to create any substantive unconscionability. As discussed in the Labor Commissioner's Opening Brief, this reflects the fallacy of composition (Opening Brief p.28-29) by neglecting to consider the combined impact of the agreement's numerous obstacles on Kho's ability to utilize the forum. In doing so, OTO fails to follow this Court's direction in *Sonic II* to evaluate the totality of all the relevant facts and circumstances. Under *Sonic II*, the determination of unconscionability does not turn on whether individual aspects of the arbitration agreement are each

sufficient, on their own, to support a finding that the arbitral forum is neither accessible nor affordable; the test is whether the agreement's terms work together as a whole to create an arbitral forum that is neither accessible nor affordable under the totality of the circumstances.

Here, OTO's arbitration readily satisfies this test given that it displaces the informal Berman processes specifically designed to reduce the costs and risks of pursuing a wage claim, and installs in their place the requirements of formal civil litigation without the guarantee of free attorney representation to navigate that forum. OTO's attempts to minimize the impact that the requirements of its arbitral forum have on Kho's ability to redress his claims are misplaced. Even if each of its barriers to Kho were insufficient on its own to render the arbitration agreement substantively unconscionable, the impacts together render the entire agreement unconscionable and unenforceable, particularly considering the high degree of procedural unconscionability shown.

1) <u>OTO's Attempts to Discount the Effects of the Berman Waiver on Kho Are Unavailing</u>

(a) <u>*The Loss of Free Representation under Section 98.4 Is Real and Consequential*</u>

As discussed, OTO's arbitration agreement both compels Kho to pursue his claim in a legally complex forum, and denies him the right to free representation by the Labor Commissioner in a civil trial de novo pursuant to Labor Code 98.4, that he possessed under the Berman

processes. In its Answer, OTO mistakenly contends that the loss of free representation by the Labor Commissioner pursuant to Labor Code section 98.4 does not give rise to any unconscionability because "there is nothing stopping the Labor Commissioner from representing Kho in the arbitration process itself if the Labor Commissioner desires to do so." (Answer at p. 26.) To the contrary, the Labor Commissioner has no authority to represent wage claimants in arbitration except in the context of Labor Code section 98.4. (See *Noble v. Draper* (2008) 160 Cal.App.4th 1, 12 ["Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by Constitution or statute"]; see also *Water Replenishment Dist. of Southern Cal. v. City of Cerritos* (2012) 202 Cal.App.4th 1063, 1072.) Accordingly, OTO's attempt to minimize the consequences of substituting an informal dispute resolution forum for one that requires an attorney to navigate it is misplaced.

More importantly, OTO's argument essentially concedes a fundamental and pivotal truth—that absent legal representation, the technical complexities of civil litigation that render that forum inaccessible and unaffordable for Kho to resolve his wage disputes, render an arbitral forum that imposes the same complexities equally inaccessible and unaffordable. This is the practical reality recognized by the superior court. (CT 220 ["An employee seeking to vindicate the right to unpaid wages under the agreement will almost necessarily be required to hire counsel."].)

Though OTO insists that the agreement's opaque fee-shifting provisions provide sufficient incentive for counsel to accept Kho's case on a contingency basis, the record offers no support for this assumption. (Answer at p. 27 ["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 set up by the Legislature and the Court's own experience should allow it to easily deduce there is no problem here."].) Such unsupported speculation should not control this Court's determination.

In contrast, the record establishes that the arbitration agreement both deprives Kho of the ability to pursue his wage claims in an informal, uncomplicated setting, while simultaneously preventing him from benefiting from the free legal representation by the Labor Commissioner in a formal civil setting upon de novo appeal. While it might not be significant for Kho to have lost the right to free representation in an informal arbitration that did not mandate use of formal rules of pleading and evidence, it is materially different for Kho to lose the right to representation in an arbitration that mimics civil litigation—a forum widely recognized, as the trial court did, as being inaccessible and unaffordable to low-wage workers like Kho even in the presence of fee shifting. OTO's arbitration agreement imposes the very formalities and procedures that can render civil litigation inaccessible and unaffordable, even with fee shifting.

In conjunction with all the other aspects of OTO's arbitration agreement, these terms are substantively unconscionable.

(b) The Loss of Fee Shifting under Section 98.2 in OTO's Formal Litigation Forum Is Also Significant

OTO contends that the loss of fee shifting under section 98.2 (which provides for attorneys' fees to successful employees in a trial de novo, thereby reducing the costs and risks of civil litigation to wage claimants) does not create any unconscionability given that the arbitration agreement requires application of controlling law, which would provide fee shifting through Labor Code sections 218.5, 1194, and 2802. (Answer at p. 27.) The "background" existence of these fee-shifting provisions, however, does not remedy the agreement's failure to provide for attorneys' fees in the manner prescribed by Labor Code section 98.2, subdivision (c).

As an initial matter, section 2802 has no relevance in the existing case given that Kho's underlying wage claim does not assert any claims for unreimbursed expenses so as to implicate section 2802. Moreover, as set out in the Labor Commissioner's opening brief, section 218.5—which provides for an award of attorneys' fees "[i]n any action brought for the nonpayment of wages . . . if any party to the action requests attorney's fees and costs upon the initiation of the action"—does not have the same legal effect as section 98.2, subdivision (c), and is substantially inferior to Kho's

interests. (Opening Brief at pp. 38-39 [addressing distinctions between sections 218.5 and 98.2, and the effect on workers such as Kho].)

In its Answer, OTO does not dispute that its agreement fails to cite the availability of fees under Labor Code section 218.5. Nor does OTO dispute that, unlike section 98.2, subdivision (c), section 218.5 requires a party to request fees "upon the initiation of the action". Coupled with the agreement's lack of instruction on invoking arbitration and its mandate to comply with the rules of formal pleading in the arbitration proceeding, these factors heighten the likelihood that Kho would not appreciate the possibility that he may obtain counsel and have fees paid if he prevails, as well as the risks that Kho will not timely and properly plead a request for fees. These barriers and risks substantially impede Kho's ability to access OTO's arbitral forum.

OTO's reliance on Labor Code section 1194 is also misplaced. That section only provides for reasonable attorneys' fees in a civil action to recover unpaid minimum and overtime wages. (Lab. Code, § 1194, subd. (a).) Kho, however, asserts other claims—including claims for wages at his contract rate[3] that are not recoverable as minimum or overtime wages. Kho also asserts a claim for waiting time penalties under Labor Code section

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[3] Kho claimed OTO failed to pay for all hours worked at the "flat" contract rate of $24 per hour applicable to "flag hours", as opposed to the minimum wage rate of $8 per hour then in effect. (CT 69-70.)

203—which would provide up to 30 days' pay at Kho's daily rate in order to incentivize timely payment of his final wages. (CT 009.) Such a claim has no attendant right to attorneys' fees. (See *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1260-61.) Notably, the only statute to provide for attorneys' fees for claims brought under Labor Code section 203 is Labor Code section 98.2, subdivision (c). Depriving Kho the attorneys' fees under that section forces Kho to have to pay for the time spent by an attorney litigating his right to section 203 penalties. The relief that section 1194 provides regarding attorneys' fees, therefore, is inadequate.

While OTO recognizes that the public policy rationale for fee-shifting provisions is to ensure wage claimants do not have to pay portions of their wages in order to collect owed wages (Answer at p. 27), OTO fails to recognize the detriment to Kho of forcing him to pay attorneys' fees to recover wage-based penalties owed him. (See *Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 ["the aim of fee-shifting statutes is 'to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific.'"]; *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 325 [fee shifting "encourage[s] injured parties to seek redress—and thus simultaneously enforce public policy—in situations where they otherwise would not find it economical to sue."].) Not surprisingly, requiring Kho to pay fees to recover his wage-based

penalties imposes affordability and accessibility obstacles for Kho to pursue his claims in OTO's arbitral forum, by reducing the ultimate potential value of those penalties to Kho. That disincentive operates in the same fashion as would the need to pay attorneys' fees to recover wages, contrary to Kho's interests. Again, as opposed to an informal arbitration, it is significant that OTO's arbitration agreement compels procedures that only a lawyer may feasibly navigate. The failure to fully provide for attorneys' fees for Kho to proceed in an arbitration in which an attorney is necessary to pursue the claim is a significant obstacle to Kho's ability to obtain counsel. OTO's arbitration agreement, therefore, blocks Kho from effectively redressing his wage claims in any forum, including arbitration.

(c) The Agreement's Silence Regarding the Allocation of Arbitration Costs Heightens Barriers to its Accessibility

As discussed in the Commissioner's Opening Brief (Opening Brief Opening Brief 39-41), the arbitration agreement's discussion of the allocation of arbitration costs is obtuse and opaque, stating: "[i]f 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." (CT 005.)

Though OTO contends in its Answer that the agreement's failure to explain that applicable law requires OTO to pay all the costs does not

contribute any substantive unconscionability, this contention belies practical experience. Only an attorney with expertise on this issue would know that precedent requires OTO to pay all the arbitration costs. A layperson such as Kho would be left unaware that arbitration would be "free" as OTO contends.

Instead, a layperson like Kho would more likely believe that he would have to pay some costs and fees as he might have to in court. This is significant given that this Court has previously recognized that "it is not only the costs imposed on the claimant but the *risk* that the claimant may have to bear substantial costs that deters the exercise of [rights]." (*Armendariz*, *supra*, 24 Cal.4th at p. 110.) The agreement's lack of clarity then deters the filing of claims, effectively rendering arbitration in the present case inaccessible for Kho. To hold otherwise invites employers to conceal this fundamentally significant fact from employees weighing the pros and cons of pursuing wage claims. Ultimately, OTO's complex legalese creates an artificial and unjustified barrier to utilizing the arbitral forum that, working in concert with other characteristics of the agreement and forum, make it inaccessible to Kho.

(d) The Failure to Provide Instructions Regarding How to Commence Arbitration Is Material

In response to Kho's and the Labor Commissioner's assertion that the arbitration agreement is substantively unconscionable because it does

not inform Kho how he may initiate arbitration, OTO contends that such silence merely provides flexibility by allowing Kho to initiate arbitration in any reasonable manner, going so far as to contend that Kho could have initiated arbitration simply by saying to a representative of OTO, "I want to arbitrate that I didn't get paid right." (Answer at p. 28.)

However, OTO cites no evidence in either the agreement itself or the record to support this assertion. Indeed, it is undisputed that the agreement does not inform Kho that arbitration could be commenced by informing an OTO representative. OTO's post-hoc clarification does not provide assistance to the Court in construing the requirements of OTO's arbitration agreement. (*Parada*, *supra*, at 176 Cal.App.4th at p. 1584 [courts should "not consider after-the-fact offers by employers . . . [given that] the drafter is saddled with the consequences of the provision *as drafted*." (Emphasis in original.)[4]

[4] See also *Sandquist v. Lebo Automotive*, Inc. (2016) 1 Cal.5th 233, 248 ["[I]t is a 'well established rule of construction' that any ambiguities must be construed against the drafting employer and in favor of the nondrafting employee. [Citations.] Moreover, '[t]he rule requiring the resolution of ambiguities against the drafting party "applies with peculiar force in the case of a contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language. [Citations.]" ' "

Ultimately, the agreement's silence regarding how arbitration can be initiated necessarily impairs the ability of a layperson like Kho to access arbitration by needlessly and unjustifiably placing additional burdens on Kho to initiate arbitration, including, but not limited to, researching how arbitration can be initiated generally as well as identifying the specific person within OTO's hierarchy to whom Kho could assert his claim specifically. OTO also fails to account for the possibility that OTO's representative could ignore Kho, or reject his request based on a belief that more formal processes are required to trigger arbitration. The agreement provides no direction on how Kho might compel OTO to commence its arbitral proceedings. Moreover, the record here is illustrative, as OTO waited ten months after Kho pursued his rights through the Berman processes rather than providing Kho with the expeditious arbitral forum it now touts. These uncertainties and delays, almost by definition, act to make OTO's forum inaccessible. It is plain, then, that the burdens imposed by the arbitration agreement fall solely on Kho. Such one-sided burdens that lack any reasonable business justification are the hallmark of substantive unconscionability. (*Armendariz*, *supra*, 24 Cal.4th at pp. 117-18.)

(e) <u>*OTO's Focus on the Non-Binding Nature of the Berman Process Overlooks the Benefits of that Process*</u>

OTO makes much in its Answer of the benefit that the binding nature of arbitration confers on the parties to this case, in contrast to the non-binding nature of the Berman process and ensuing appeals. (See Answer at pp. 9, 11, 31.)

But OTO is incorrect to suggest that the Berman process confers no benefit because the result of that process is non-binding.[5] Indeed, in articulating the consequences of its failure to participate in the hearing, OTO itself delineates several post-hearing protections Kho gained that come into play during a de novo trial. (Answer at pp. 37-38.) As previously set out in the Labor Commissioner's Opening Brief, these numerous protections lower the costs and risks of pursuing wage claims and level a playing field that otherwise generally favors employers with greater resources and bargaining power. (Labor Commissioner's Opening Brief at pp. 25-27; see *Sonic II*, *supra*, 57 Cal.4th at p. 1134 [quoting *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659].) Those important post-ODA benefits include the requirement that an appealing employer

[5] The Court of Appeal similarly erred stating: "The result of a Berman hearing, however, is nonbinding. An appeal by either party effectively nullifies the result, in favor of a de novo proceeding in superior court—in other words, in favor of ordinary civil litigation." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 712.)

submit an undertaking in the amount of the judgment prior to the appeal, the guarantee of free representation by the Labor Commissioner in the de novo proceedings, and assistance from the Labor Commissioner to collect any judgment entered in her favor. (*Sonic II*, *supra*, at p. 1146.)

As this Court recognized, these benefits are conferred even though the Berman process is non-binding. (*Sonic II*, 57 Cal.4th at p. 1149 ["the value of benefits provided by the Berman statutes . . . go well beyond the hearing itself."]) In removing these protections, OTO's arbitration agreement significantly increases the risks to Kho of pursuing his wage claim, thereby contributing to the arbitral forum's inaccessibility and unaffordability. The requirement of a bond discourages frivolous appeals that can delay recovery of wages, as well as ensures a source of funds for the payment. The right of free Labor Commissioner representation ensures competent counsel to assist in pursuing a wage claim in a complicated legal forum as opposed to the mere prospect of retaining counsel confident that he or she will be able to recover attorneys' fees. And the right to Labor Commissioner assistance in collecting wages again decreases the costs to Kho in obtaining paying on any award. These all substantially lower the risks and costs to Kho in pursuing a wage claim through the Berman processes as opposed to a regular civil proceeding, or through an arbitral proceeding that mirrors and mandates its complexity.

OTO also insists that "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 [that] . . . is lengthier and more expensive." (Resp. at 9-10.)

But the trial court disagreed, concluding that "[c]ontrary 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." (CT 221.) Indeed, the record offers no support for OTO's assertion.

2) The Totality of the Circumstances Demonstrates that the Arbitration Agreement Effectively Blocks Kho from Redressing His Wage Claims in any Forum

In *Sonic II*, this Court recognized "that arbitration, no less than an administrative hearing, can be designed to achieve speedy, informal, and affordable resolution of wage claims" (*Sonic II*, *supra*, 57 Cal.4th at p. 1149.) But OTO's agreement is not designed to do that. While mandating use of the complicated rules of civil litigation, the forum fails to provide the type of legislatively afforded protections that this Court noted "mitigate the risks and costs of pursuing" wage claims for workers such as Kho. (*Id.* at p. 1152.) And in doing so, OTO further imposes still greater barriers to use.

As set out in the Labor Commissioner's Opening Brief, OTO's failure to specify in the agreement how a worker would initiate arbitration creates unnecessary and unjustified heightened costs, risks, and barriers to the ability of workers like Kho to utilize the arbitral forum. The arbitration agreement's elimination of post-ODA protections specifically intended to balance the playing field for laypersons like Kho, who lack the legal knowledge and sophistication to engage OTO on OTO's terms (including the provision of counsel when an award to the worker is appealed), also creates unnecessary and unjustified heightened costs, risks, and barriers to the ability of workers like Kho to utilize the arbitral forum. Finally, OTO's failure to specify in the agreement that OTO would bear all responsibility for the costs of arbitration further increases these real and perceived barriers for low-wage workers like Kho. Together, these features of OTO's arbitration agreement make OTO's arbitral forum unaffordable and inaccessible for a worker like Kho.

Significantly, OTO ignores in its Answer all of the facts related to Kho's circumstances that bear on the reasons why OTO's arbitral forum is not affordable and accessible to Kho—namely his financial status and relative lack of sophistication—evidence in the record that the trial court considered in finding the agreement unconscionable. Among the facts established are that Kho: (1) did not know the technical rules of law that were set out in the arbitration agreement; (2) did not believe that he could

go to arbitration under OTO's agreement without an attorney to help him understand what laws apply and how the rules work; (3) did not understand the law and the procedures applicable to his claims and arbitration; (4) and most importantly, was unable to afford counsel. (CT 109; CT 110-111, ¶ 19.)

These factors are material under *Sonic II's* unconscionability test because they allow a court to concretely determine the degree to which the terms of the arbitral forum realistically create a forum foreclosed to that impacted worker. That is, a highly legally sophisticated worker may not be deterred from undertaking the pleading and motion practice requirements of OTO's arbitral forum; and therefore, it may not be inaccessible to that worker. Similarly, a worker with robust financial resources may have the ability to bear the risk of employing counsel to pursue the claim in the type of forum OTO constructed, such that it is not unaffordable to that worker. However, for a worker lacking both legal sophistication and financial means to employ an attorney, OTO's formal complicated arbitral forum is realistically neither accessible nor affordable. Significantly, these are the types of facts about the arbitral process and impacts on the worker that were absent from the record in *Sonic II,* and the type of facts this Court instructed the trial court to consider on remand. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1147.)

As previously noted, this is not a case where the parties have equal bargaining power or where the contract at issue is not a contract of adhesion. This is also not a case that involves an arbitration agreement that confers on Kho at least one of the rights and protections that would be conferred on him through the Berman process. Rather, this case is a case that concerns an adhesive contract that institutes complex, civil-litigation style procedures in lieu of the Berman process and the specific rights and protections that are intended to balance the playing field between employer and employee. Without these protections—or any comparable protections—the complex playing field OTO constructed necessarily tilts strongly in its favor, so much so that it is almost inconceivable that an unsophisticated, low-wage employee like Kho could ever successfully redress his wage claims.

While OTO implies the Court should evaluate the accessibility and affordability of the arbitral forum in isolation from the Berman process, doing so runs afoul of this Court's instruction that an integral part of the unconscionability analysis is a consideration of "the rights and remedies that otherwise would have been available to the parties." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 922; accord *Sonic II*, *supra*, 57 Cal.4th at p. 1146 ["a court applying the unconscionability doctrine must consider [both the] features of dispute resolution the agreement eliminates [and the] features it contemplates."].) Although a

Berman waiver does not per se render an arbitration agreement unconscionable, "waiver of these protections in the context of an agreement that does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability." (*Sonic II*, *supra*, at p. 1146.)

The net effect of OTO's arbitration agreement is to create a forum that is unreasonably one-sided in OTO's favor, effectively blocking Kho from obtaining redress for his wage claim in any forum, including arbitration. (*Sonic II*, *supra*, 57 Cal.4th at p. 1148.) This conclusion is compelled by all of the circumstances addressed above, as well as the specific rights and remedies that Kho was forced to forego (*i.e.*, the Berman process), and what he obtained in that exchange: formal legal procedures akin to civil litigation that embody none of the traditionally recognized benefits of arbitration—low cost, speed and informality. Moreover, the lack of any benefit to Kho under the arbitration demonstrates that the driving reason for OTO imposing the arbitration agreement is to reduce the number and impact of wage claims brought against it. OTO has not, and cannot, justify these terms on any identifiable legitimate business need other than insulating OTO from liability. Enforcing the agreement against Kho and his legitimate wage claims in this context, therefore, is manifestly unconscionable.

II. THE TRIAL COURT LACKED A PROPER BASIS FOR VACATING THE ODA

The trial court found that the ODA should be vacated because "enforcing the ODA would violate the right of Petitioner [OTO] to a fair administrative hearing." (CT 204.) In its response, OTO makes much of this finding, contending that "[p]arties to administrative proceedings, such as the Labor Commissioner's Berman hearing process, enjoy the protection of procedural due process." (Answer at p. 34.) However, OTO's due process argument is misplaced given that OTO has been afforded all the due process to which it is entitled.

1) OTO's Waiver of Its Due Process Rights Cannot Create Unfairness

Procedural due process in an administrative setting "requires notice of the proposed action; the reasons therefor; a copy of the charges and materials on which the action is based; and the right to respond to the authority initially imposing the discipline 'before a reasonably impartial, noninvolved reviewer.'" (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581 [quoting *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736]; see also *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.)

In the present case, the Labor Commissioner accorded OTO all of these rights. The Labor Commissioner provided OTO the right to respond to Kho's complaint before a reasonably impartial, noninvolved reviewer.

Moreover, OTO could have introduced and rebutted evidence, called and examined witnesses, cross-examined and impeached witnesses. (Cal. Code of Regulations, tit. 8, § 13505.) OTO's strategic decision to decline participation in the Berman hearing cannot create unfairness; particularly so where the Legislature has empowered the Labor Commissioner to proceed with a hearing, and issue an order in the event that an employer fails to appear. (Lab. Code § 98, subd. (f); see *People v. Hillery* (1974) 10 Cal.3d 897, 900 [right to fair trial can be waived]; see also *Verdon v. Consolidated Rail Corp.* (S.D.N.Y. 1993) 828 F.Supp. 1129, 1138 ["a claim for denial of due process at one's own hands is not actionable"].)

The gravamen of OTO's complaint is that the Labor Commissioner proceeded despite OTO's filing of the petition to compel arbitration. But as discussed in the Labor Commissioner's Opening Brief, the filing of such a petition does not deprive the Labor Commissioner of jurisdiction over claims presented through the Berman process. To stay the hearing, OTO was obligated to have acted sooner, and obtained a court order enjoining the hearing.[6] (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795.)

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[6] OTO's contention that allowing the Labor Commissioner to proceed absent a court order enjoining the Berman hearings or compelling arbitration "would lead to a marked increase in court proceedings and expense to the parties related to petitions to compel arbitration" (Answer at p. 12) ignores that California law requires parties seeking to compel

OTO nonetheless argues that the Labor Commissioner "caused the unfairness by prohibiting [it] from participating in the Berman process without risking waiver." (Answer at p. 35.) But as OTO set out in its Answer,[7] participating in the Berman hearing would not have waived anything. (See generally *Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187.) Moreover, the hearing officer informed OTO hours prior to the start of the hearing that participating in the hearing would not waive the right to compel arbitration. (CT 063-064.) Accordingly, OTO's claim that the Labor Commissioner forced OTO to choose between participating in the Berman hearing and preserving its right to seek to compel arbitration, is false.

As discussed in Kho's and the Labor Commissioner's Opening Briefs, by vacating the ODA, the trial court deprived Kho of essential post-ODA Berman protections. OTO mistakenly suggests that vacating the ODA did not create any unfairness because the court's remand preserved those protections. (Answer at p. 45.) The plain language of the statutes granting Kho these rights, however, contradicts OTO's claims, as the protections do not operate absent a valid ODA. For instance, there can be

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arbitration to also seek to stay any proceedings that would otherwise implicate the claims to be arbitrated.

[7] Answer at pp. 38-43; *id.* at p. 40 ["No authority supporting the notion that these factors of waiver of arbitration agreements are somehow applicable to the Berman process."]

no requirement for an undertaking "in the amount of the order, decision, or award" if there is no order, decision, or award in the first place. (Lab. Code, § 98.2, subd. (b).) Likewise, absent the Labor Commissioner's determination through the ODA that the claim has merit, the claimant has no right to the Labor Commissioner's no-cost legal representation. (Lab. Code, § 98.4.) OTO's efforts to minimize the prejudice to Kho from the trial court's actions, therefore, is unavailing.

2) Code of Civil Procedure Section 1094.5 Is Inapplicable

In vacating the ODA, the trial court relied on Code of Civil Procedure section 1094.5 as the sole basis for its ruling. That section, however, cannot support the trial court's ruling given that section 1094.5 does not apply to Berman hearings. (*Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 55 ["Section 98 administrative hearings are not subject to review under Code of Civil Procedure section 1094.5."].) That section provides for review of an administrative decision, by way of a petition for writ of administrative mandamus, where "the final administrative order or decision [was] made as the result of a proceeding in which by law a hearing is required to be given." (Code Civ. Proc., § 1094.5, subd. (a).) Because section 1094.5 only applies when a hearing is "required to be given,"[8] it follows that if no hearing is required, section 1094.5 will not apply even if a

[8] *Taylor v. State Personnel Bd.* (1980) 101 Cal.App.3d 498, 502.

hearing was actually granted. (*Weary v. Civil Serv. Comm'n* (1983) 140 Cal.App.3d 189, 195; *Keeler v. Super. Ct.* (1956) 46 Cal.2d 596, 599.)

In this context, it is significant that the Labor Commissioner is not required to hold a Berman hearing after a wage claim is filed; a hearing is discretionary. (Lab. Code, § 98, subd. (a) ["The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation …"].) More importantly, section 98.2 provides the *exclusive* means of review of an ODA. Permitting challenges pursuant to Code of Civil Procedure section 1094.5 in addition to *de novo* review under Labor Code section 98.2 would disregard the Legislature's design and burden courts with multiple proceedings.

3) <u>OTO's Due Process Complaints Are Procedurally Barred</u>

Inasmuch as OTO complains that absent some sort of review under the "fair trial" component of section 1094.5, a hearing officer could impinge an employer's due process rights without judicial review, OTO overlooks and fails to advise the Court that the Legislature has specifically enacted procedures to afford employers relief. To wit, Labor Code section 98, subdivision (f), provides that a defendant "failing to appear or answer, or subsequently contending to be aggrieved in any manner by want of notice of the pendency of the proceedings, may apply to the Labor Commissioner for relief in accordance with Section 473 of the Code of

Civil Procedure." (Lab. Code, § 98, subd. (f).) The Legislature has moreover commanded that such an application be made before any relief can be sought in court. (*Ibid.* ["No right to relief, including the claim that the findings or award of the Labor Commissioner or judgment thereon are void upon their face, shall accrue to the defendant in any court unless prior application is made to the Labor Commissioner in accordance with this chapter."]; *Gonzalez v. Beck* (2007) 158 Cal.App.4th 598, 606.)

In the present case, OTO never filed a motion under Labor Code section 98, subdivision (f), with the Labor Commissioner. That failure is fatal to OTO's contention and the order vacating the ODA. This Court, therefore, should reverse the trial court and reinstate that award.

CONCLUSION

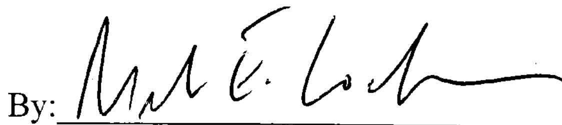
For all of the foregoing reasons, the Labor Commissioner respectfully requests that this Court reverse the decision of the Court of Appeal and affirm the order of the trial court denying the petition to compel

arbitration. The Court should also reverse the order of the trial court vacating the order, decision or award of the Labor Commissioner and reinstate that award.

Date: July 6, 2018

Respectfully submitted,

STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement

By: 

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CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.520, subdivision (c), I hereby certify that the foregoing document contains 7,424 words, excluding the parts of the document that are exempted by Rule 8.520, subdivision (c)(3).

Date: July 6, 2018

Respectfully submitted,

STATE OF CALIFORNIA
Department of Industrial
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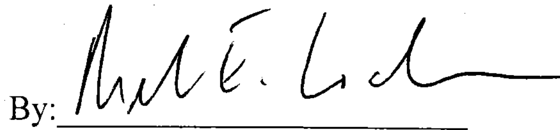
Division of Labor Standards
Enforcement

By: 

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PROOF OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY E-MAIL

One Toyota of Oakland v.
Alameda Superior Court Case No.: RG15781961
First District Court of Appeal Case No.: A147564
Supreme Court Case No.: S244630

I, Mary Ann E. Galapon, do hereby declare that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, California, 94102.

On July 6, 2018, I served the following document(s):

REPLY BRIEF

X by placing a true copy thereof in sealed FedEx envelopes for Standard Overnight delivery with all fees prepaid and addressed as follows:

1st District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

Honorable Evelio Grillo
Clerk of the Superior Court
Alameda County Superior Court
2233 Shoreline Drive
Department 303, 2nd Floor.
Alameda, CA 94501

X by transmitting a PDF version of this document to each of the following using the e-mail addresses indicated below:

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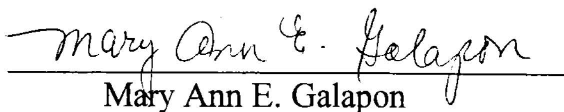
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed this 6th day of July, 2018, at San Francisco, California.



Mary Ann E. Galapon