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,
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
Intervener and Appellant

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

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

CALIFORNIA NEW CAR DEALER ASSOCIATION'S APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF OTO, LLC; AND *AMICUS CURIAE* BRIEF

WENDY MCGUIRE COATS (SBN 240674)
KATHERINE P. SANDBERG (SBN 301117)
FISHER & PHILLIPS LLP
One Embarcadero Center, Suite 2050
San Francisco, California 94111
Telephone (415) 490-9013
Facsimile: (415) 490-9001
wcoats@fisherphillips.com

INTEREST OF AMICI CURIAE

California New Car Dealers Association (CNCDA) is a non-profit mutual benefit corporation representing over 1,100 California new car and truck dealers. CNCDA's members are primarily engaged in the retail sale and lease of new vehicles, automotive service, repair, and part sales. They employ more than 140,000 people statewide.

Like many California businesses, CNCDA's members contract with their employees and include arbitration agreements very similar in character, if not identical, to this one. The arbitration agreements that CNCDA's members use are governed by the Federal Arbitration Act (FAA) and are specifically designed to maximize the efficient, affordable, and easily-accessible benefits of arbitration. The arbitration agreements provide an agreed upon private forum to fully vet and resolve employment disputes, which predictably arise with such a large workforce.

In a wage dispute like this one, both parties realize arbitration's benefits. As with the arbitration agreement here, many CNCDA members incorporate into their agreements some of our traditional and trusted civil litigation processes. Contemplating an arbitration before a retired Superior Court judge complete with familiar pleading and motion practice procedures along with California's Rules of Evidence ensures both parties receive an arbitral forum with our trusted due process benefits and procedural safeguards. And private arbitration provides a forum designed to promptly resolve the

dispute without requiring the parties navigate California's backlogged public court setting.

CNCDA members anticipate that employee disputes are the cost of doing business. New car dealers are especially prone to wage and hour claims given the complex, commission-based pay plans they implement to incentivize and reward employee performance. For CNCDA members, like the many small businesses that drive California's economy, when an employee dispute arises, they should be able to count on the enforceability of their employment agreements. The availability of the arbitral forum affords CNCDA members greater control over the typical costs of court-based litigation. They then pass on the resulting savings to California's car-buying public and the thousands of California employees who receive benefits and compensation from CNCDA employers.

CNCDA members' ability to swiftly address and resolve employment-related disputes ensures that they can anticipate, budget, and manage their overall litigation costs with some level of predictability. This predictability is thwarted by a constantly moving target pertaining to the enforceability of a California employer's arbitration agreement, as illustrated in this Court's *Sonic II* decision. Only this Court can clarify and direct California employers on what they should do to create enforceable arbitration agreements that provide a routine and reliable private forum for resolving disputes.

CNCDA respectfully applies for leave to file the accompanying *amicus curiae* brief in support of OTO, LLC under

rule 8.520(f) of the California Rules of Court. This application is timely made within 30 days after filing of the reply brief on the merits.

NEED FOR FURTHER BRIEFING

CNCDA is familiar with the parties' briefing before this Court. This *amicus curie* brief will assist the Court in evaluating and resolving this case by providing industry perspective and impact as this Court determines the framework within which to determine the affordable and accessible standard for upholding and enforcing arbitration agreements that waive the administrative Berman step for wage claimants.

Amicus, California New Car Dealers and its counsel, the undersigned Wendy McGuire Coats of Fisher & Phillips, LLP, authored this brief in its entirety. Only *amicus*, its members, or its counsel has made any monetary contribution to this brief's preparation or submission. It was not authored, in whole or in part, by counsel for any party.

Dated: July 25, 2018

Respectfully submitted,

By: /s/ Wendy M. Coats
Wendy McGuire Coats
Counsel for *Amicus Curiae*
California New Car Dealers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

United States Code

Codes

INTRODUCTION

OTO, LLC (OTO), like many CNCDA members, depends on a robust workforce to sell and service cars and trucks in California. With a California workforce of over 140,000, CNCDA members routinely navigate employer-employee disputes, which is why many members count on the predictability, affordability, and efficiency that private arbitration provides to resolve work-related claims. CNCDA members are particularly prone to wage and hour claims given the complex, commission-based pay plans they implement to incentivize and reward employee performance.

Although such pay plans comply with the Labor Code, and are even favored by employees, the retail automotive industry is subject to a disproportionate number of wage claims. These wage claims often end up before the Labor Commissioner. The routine nature of workplace disputes, the need to respond and resolve the matter quickly, and the business need to control the escalating costs flowing from traditional litigation align CNCDA with California's long-embraced policy favoring arbitration as the forum for dispute resolution. (*Moncharsch v. Heily & Blase* (1992) 3 Cal.4th 1, 9.)

However, in practice there exists a tension between California's policy favoring arbitration and the hostility California's employers face when seeking to enforce their arbitration agreements. Just five years ago, in the wake of the United States Supreme Court's *AT&T Mobility v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*) decision, this Court

reexamined *Sonic-Calabasas A., Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*) and held that the FAA preempted California's then-state-law categorical rule prohibiting the enforceability of an arbitration agreement that contained a Berman waiver and was required as a condition of employment. (*Sonic-Calabasas, A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*).)

Sonic II, however, brought more confusion than clarity. *Sonic II* not only failed to provide definitive guidance on how employer dealers could secure the promises of private arbitration through compliant and enforceable agreements, it also created a new "affordable and accessible" hurdle when arbitration agreements include waivers of administrative proceedings. Although this Court "emphasized that there is no single formula for designing an arbitration process that provides an effective and low-cost approach to resolving wage disputes[,]" the Court provided no examples of how an agreement can satisfy the "affordable and accessible" hurdle.

Instead, the Court surmised, "There are potentially many ways to structure arbitration, without replicating the Berman protections, so that it facilitates accessible, affordable resolution of wage disputes." (*Sonic II, supra,* 57 Cal.4th at p. 1147.) With little more than the simple assurance that "many ways" exist to craft an enforceable arbitration agreement with a Berman waiver, employers were left to speculate on whether a court would enforce their agreements in the future.

As this case illustrates, the fact-specific unconscionability defense continues to produce a mini-trial on the comparative costs and benefits of arbitration and the Berman procedure just as Justice Chin warned it would in his *Sonic II* dissent. (*Sonic II, supra*, 57 Cal.4th at pp.1180-1182, J. Chin dissent.) But unlike *Sonic II*, this case contains the factual record for the Court to clarify what terms are permissible and enforceable when an employer requires an arbitration agreement with a Berman wavier as a condition of employment. This clarity is needed to empower employers to draft compliant arbitration agreements, and it is also necessary to enable lower courts to determine whether an arbitration agreement is enforceable. This Court should provide clear direction to employers of the parameters necessary to promptly secure the benefits of private arbitration.

The Court of Appeal correctly determined that the arbitral forum contemplated in the parties' agreement was both affordable and accessible, and thus enforceable. Affirming the Court of Appeal's "affordable and accessible" analysis will clearly guide California courts when enforcing arbitration agreements that bypass the Berman process (or other provisional administrative hearings) for a fast and final arbitration. And most important, affirming the Court of Appeal's decision and analysis will provide California employers with a workable model of a compliant and enforceable arbitration agreement with an administrative

hearing waiver. With this model, California employers can confidently conduct their businesses secure in the knowledge that when an employee dispute arises, the Superior Court will promptly enforce the arbitration agreement, stopping the endless litigation raging over enforceability.

Finally, should this Court reverse, *amicus* implore this Court to provide workable guidance and illustrations of what terms this Court would enforce so California employers may evaluate their current agreements and/or draft new compliant agreements, bringing an end to the constant guessing game of enforcement.

ARGUMENT

As discussed in *Sonic I* and *Sonic II*, the Berman hearing procedure legislatively provides one optional avenue for an employee to pursue a wage claim (the other option being that the employee could seek relief directly with a civil action in Superior Court). (*Sonic II, supra,* 57 Cal.4th at p. 1128.) Regardless of the avenue chosen by the employee, when a binding arbitration agreement is present either process yields to the arbitral forum.

Arbitration does not deprive Kho of any substantive rights but only changes the forum where his claims will be resolved. (See *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628.) Consistent with this Court's decisions in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076, and *Armendariz v. Foundation Health Psychare Services*

(2000) 24 Cal.4th 90, p. 103, the arbitration agreement does not waive unwaiveable statutory rights. (See *Sonic II*, *supra*, at 57 Cal.4th at p. 1131.) Thus, at issue here is a party's right to enforce an arbitration agreement according to its terms when the terms permit the parties to bypass the non-binding administrative Berman hearing and go directly and immediately to arbitration.

A. The FAA precludes state courts from refusing to enforce arbitration agreements as written.

The FAA articulates Congress' intent to quickly and easily move parties with arbitrable disputes out of court and into arbitration. (*Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 22; accord, *Preston v. Ferrer* (2008) 552 U.S. 346, 357.) And *Concepcion*'s resulting command was clear: The FAA preempts California's former categorical rule prohibiting the waiver of a Berman hearing in the parties' pre-dispute arbitration agreement. (*Sonic II*, *supra*, 57 Cal.4th at p. 1124.) Put another way, waiving the Berman proceeding is not unconscionable *per se*. But that's essentially what Kho and the Labor Commissioner assert.

Both Kho and the Labor Commissioner's requested unconscionability analysis requires a duplicative process in the same mold of a Berman hearing, including post-Berman hearing ramifications. Using the Berman process as the benchmark for determining unconscionability, instead of the traditional litigation forum, revives the categorical bar of *Sonic I*. But conditioning an arbitration agreement's enforceability

(*i.e.*, a finding it is affordable and accessible) on whether the pro-employee Berman advantages are also secured, undermines the FAA's primary purpose to ensure "enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Concepcion, supra,* 563 U.S. at p. 344.)

Requiring the parties to participate in a pre-arbitration proceeding or conditioning arbitration enforceability on mimicking hyper-technical administrative formalities interrupts the swiftness that a direct route to arbitration contemplates. It forces the parties to engage in a pre-dispute resolution hearing in a forum and before a decision maker the parties have contractually elected to bypass. (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404 [the FAA captures unmistakably clear congressional purpose that when the parties choose arbitration it must be provided without delay or obstruction].) This is inappropriate and must be rejected because it interferes with arbitration's fundamental attributes and benefits: the efficient, cost-effective, and fair resolution of disputes.

B. The Berman process undermines arbitration's promise of securing a swift, binding resolution.

Since the auto dealership industry is subject to a disproportionate number of wage claims, CNCDA members often end up before the Labor Commissioner regardless of whether the parties agreed to arbitrate the claims. Unlike the agreed upon rules and procedures in the parties' arbitration

agreement, providing a predictable format governing the arbitration, Berman hearings vary dramatically due to the individual preferences of each deputy labor commissioner.

A characteristic Berman hearing has no formulated procedural rules, no rules of evidence, and no discovery but includes recorded witness testimony presented under penalty of perjury. The Berman step creates a labor-intensive preparation experience for employers and their counsel that routinely fails to yield a final result. Rather, after moving through the motions of the Berman hearing, employers face the additional requirement of bonding an award made for the employee in order to start over from the beginning in a trial *de novo* and finally secure the benefits of the private arbitration promised in the parties' agreement.

Thus, this non-binding administrative hurdle forces California's small businesses to expend valuable financial resources on legal representation in what typically is a useless and wasteful process. Auto dealers in California take a significant financial hit as a result and are forced to pass on the increased costs of doing business to the consumer.

C. California permits employers to bypass the Berman process in favor of an affordable and accessible arbitral forum.

There is no question the parties' agreement evidences their expectations that their employment-related disputes will be resolved by a retired Superior Court judge as arbitrator and not by a deputy labor commissioner in an administrative

proceeding. Although the unconscionability defense is available, substantive unconscionability has at its core the evaluation of minimum requirements such as a neutral arbitrator, adequate discovery, cost limits, and a written decision to facilitate review. (See *Armendariz, supra,* 24 Cal.4th at p. 91.) Consistent with this baseline analysis, this Court held that an arbitration agreement is not substantively unconscionable when it waives the Berman process if it provides "an accessible and affordable arbitral forum." (*Sonic II, supra*, 57 Cal. 4th at p. 1146.) This Court also explained, "the fact that arbitration supplants an administrative hearing *cannot* be a basis for finding an arbitration agreement unconscionable." (*Sonic II, supra*, 57 Cal.4th at p. 1146 [emphasis added].)

Even when cloaked in terms of affordability and accessibility, bootstrapping the Berman procedures into requirements that are necessary to avoid unconscionability of an arbitration agreement violates *Concepcion*'s mandate. (*Concepcion, supra,* 563 U.S. at p. 342 [prohibiting a finding of unconscionability on an "arbitration agreement's failure to provide for judicially monitored discovery"].) Yet that is exactly what Kho and the Labor Commissioner advocate here, as they attempt to resurrect *Sonic I's* categorical ban on Berman waivers in arbitration agreements. Both press for a finding that the only affordable and accessible forum for resolving wage disputes is the Berman process, and anything varying

from the Berman framework is unaffordable, inaccessible, and consequently unconscionable. This is a bridge too far.

To determine the affordability and accessibility of the arbitral forum in the context of substantive unconscionability, courts should ask a single threshold question:

> Does the arbitration agreement operate to bar the door to any forum in which the employee may resolve their wages dispute?

(*Sonic II*, *supra,* 57 Cal.4th at p. 1148, quoting *Gutierrez v. Autowest* (2004) 114 Cal.App.4th 77, 90 ["effectively blocks every forum for the redress of disputes, including arbitration itself."].) And this "bar the door" baseline should cause a wide variety of tailored arbitration agreements to survive a substantive unconscionability challenge. When viewed through this prism, the Court of Appeal correctly found that the arbitration contemplated in the parties' agreement provided both an accessible and affordable forum: the door was open.

Nothing in *Sonic II* ties the employer's burden of establishing the arbitral forum as affordable and accessible to providing the very Berman-esque features intended to be waived by the agreement. Determining whether an arbitral forum is affordable and accessible does not hinge on whether a different forum or different features could be "more" affordable or "more" accessible. To do so in either case undermines the bedrock principle that courts may not rewrite the parties' agreements, nor may courts impose and enforce terms to which

the parties did not agree. (*Sonic II, supra,* 57 Cal.4th at p. 1143, 1148 [admonishing, "[t]he unconscionability inquiry is not a license for courts to impose their rendition of an ideal arbitral scheme"].) Rather, the unconscionable inquiry is a threshold assessment of whether the arbitration contemplated by the parties' agreement affords an accessible and affordable forum for resolving the wage dispute – nothing more. If yes, the analysis correctly stops and yields to the arbitral forum.

D. CNCDA members and California employers need clarity and confidence to conform arbitration agreements and ensure enforceability.

California businesses must already navigate a plethora of unknowns ranging from constant changes to the Labor Code, their relationships with independent contractors, and an escalating trade war. For California employers, like many of CNCDA's members, who want to secure the predictable, cost-effective, and efficient benefits of private arbitration, the constant guessing-game of surviving a substantive unconscionability attack must end. Definitive direction from this Court will curb the incessant fighting over the enforceability of the parties' agreement. The arbitration agreement here should stand as a model of both fairness and enforceability.

1. The arbitration contemplated in the parties' agreement is a model of affordability.

Affordable does not mean free or no cost. Nowhere in *Sonic II* did this Court condition enforcement of a party's arbitration agreement that bypassed the Berman process on

providing a costless arbitral forum. Neither did this Court in *Sonic II* redefine affordable to mean free or costless.

a. Armendariz already mandates affordability by requiring that the employer pay the costs of the arbitral forum.

As a practical matter, OTO, like all California employers in this position, will – as required – pay the costs of arbitration. Consistent with *Armendariz*'s requirements, nothing in this agreement requires Kho to pay any costs not otherwise required in traditional civil cases. (See *Armendariz, supra*, 24 Cal.4th at pp. 110-111.) The agreement's silence on costs does not change these practical effects nor does it transform an affordable, legally compliant agreement into an unconscionable, unenforceable one. And nothing about the agreement's silence on costs suggests that the pathway to arbitration is blocked, either through inexperience or a lack of financial resources, leaving the employee without an effective forum to recover wages if any recovery is warranted.

Unlike the hostility regularly facing employers seeking to enforce their arbitration agreements, the Court of Appeal correctly presumed that the arbitration agreement met the affordability prong. This Court should also affirm that this agreement is reliably enforceable because no cost-burden blocks Kho, or another employee, from a fair forum to resolve a wage dispute.

b. *CNCDA members and other California employers cannot be forced to provide free counsel in arbitration to satisfy affordability and secure enforceability.*

Arbitration is not unaffordable simply because there is no free representation available to employees. This Court in *Sonic II* correctly declined to hold a claimant must be provided free counsel to avoid a finding of unconscionability. That the Labor Commissioner sometimes may (but sometimes may not) play an active and supportive role on behalf of the employee during the Berman hearing does not transform the traditional arbitral forum into an unaffordable one for the purposes of unconscionability. It would be a drastic step for this Court to apply its reasoning in *Sonic II* to hold that an arbitration agreement that effectively waives the Berman process is *de facto* unaffordable if an employee is not represented by the Labor Commissioner. Even more concerning is any hint that to avoid a finding of unconscionability and to enforce an arbitration agreement requires providing free counsel to an employee. This Court should confront and reject this suggestion head on, as anything short could have sweeping effects on arbitration enforceability, reaching outside the wage recovery context.

Retaining counsel or proceeding *pro per* is an option that faces every litigant in ordinary civil litigation. The costs associated with retaining legal counsel at a party's election do not violate any provision of the Labor Code. Any rule that requires an employer to provide free counsel to employees

bringing wage claims so the employer may enforce the arbitration agreement would undermine California's foundational principle involving attorney's fees. California has long followed and codified the "American Rule," under which parties to litigation pay their own attorney's fees. (Code of Civil Proc. § 1021; see also *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources* (2001) 532 U.S. 598, 602; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, citing §1021.)

c. *The Labor Code's section 218.5 Attorney Fee Shifting Statute sufficiently incentivizes attorneys to pursue meritorious claims.*

Attorneys' fees are available under the Labor Code. (*Aleman v. AirTouch Cell.* (2012) 209 Cal. App. 4th 556, 579.) Specifically, under Labor Code section 218.5, a party may recover reasonable attorneys' fees and costs when prevailing in "any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." Cal. Lab. Code § 218.5(a). Section 218.5 applies to the parties' arbitration agreement. Section 218.5 allows for "two-way" fee shifting – *i.e.*, to the prevailing party, whether employee or employer – but for an employer to recover fees under Section 218.5, the claim must have been made in "bad faith." (Cal. Lab. Code § 218.5(a); see also *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1248.) In employment disputes involving statutory claims, an employee's statutory rights to attorneys' fees and costs are not waived or forfeited, but are

implied in the arbitration agreement. (*Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242.)

The statutory incentive provided by California's Labor Code sufficiently ensures that wage claimants with meritorious claims can retain competent counsel, should they wish to have legal counsel represent them through arbitration. The statute, however, does not incentivize attorneys to pursue frivolous or otherwise meritless cases, which is sound policy.

2. The agreement provides an accessible arbitral forum for resolving wage disputes.

From a basic policy standpoint, California law is settled that substituting arbitration for litigation results in no loss of a benefit, including an accessibility one. (See *Armendariz, supra,* 24 Cal.4th at pp. 98-99.) The general attacks on arbitration and its accessibility go to the heart of the arbitration animus the FAA was designed to combat. This hostility echoes the animus facing CNCDA members and other California employers who prefer to resolve their employee disputes in this private and cost-efficient forum. Instead of garnering the benefits of the more efficient forum, California employers, like CNCDA members, are instead drawn into repeated litigious fights over enforceability of routine and standardized terms. To protect and efficiently target the resources of both the judiciary and California employers, a decision should affirm that the parties' arbitration agreement here is an enforceable model that CNCDA members can continue to use and trust.

This Court has already addressed and correctly rejected the argument in *Little* that incorporating traditional legal formalities mirroring judicial procedures like ordinary civil pleading, rules of evidence, and motion practice render an agreement unconscionable. (*Little, supra,* 29 Cal.4th at p. 1075.) These terms layer into the informal and efficient arbitration framework some of the more basic and expected litigation practices, which are even more familiar to an arbitrator required to be a retired Superior Court judge. That is why the litigation formalities provided in the agreement mutually benefit the employee and the employer. (See *Armendariz, supra,* 24 Cal.4th at pp. 113-117.) They are not one-sided but instead apply equally to both parties, supporting the arbitrator's role of fairly resolving the parties' dispute.

Not only does the arbitration agreement properly bypass the Berman process for arbitration, but it also removes this case (and other similar employment disputes) from backlogged Superior Court dockets. One of the natural efficiencies gained through arbitration is the ability to manage and schedule the arbitral proceedings directly with the arbitrator without the added burdens and considerations occurring because of a court's traditional docket.

And finally, arbitration's unique limited scope of appellate review brings quicker closure and finality to the parties' wage dispute, like neither the Berman process nor traditional litigation in the Superior Court. Getting to finality faster, parties to arbitration forsake traditional broad

appellate review as part of the efficiency tradeoffs gained via arbitration. (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, *supra,* 473 U.S. at p. 628.) Collectively, these traditional elements of arbitration work together to provide an accessible forum for determining wage claims.

3. Regardless of how the court rules, it should provide needed guidance to California employers.

CNCDA members' overriding request is for this Court to guide California employers so they may confidently draft compliant and enforceable agreements that survive substantive unconscionability challenges. CNCDA members routinely rely on either the exact or similar provisions in the agreement here. Should this Court determine these terms are substantively unconscionable, CNCDA urges this Court to provide clear direction on what employers must do to create enforceable arbitration agreements that bypass the Berman process.

While this Court emphasized that "there is no single formula for designing an arbitration process that provides an effective and low-cost approach to resolving wage disputes," if this agreement does not fit the formula, CNCDA members must know why and what formula will work. (See *Sonic II*, *supra,* 57 Cal.4th at p. 1147.) If there truly are, as promised by this Court in *Sonic II*, "many ways to structure arbitration, without replicating the Berman protections, so that it facilitates accessible, affordable resolution of wage disputes,"

then if this arbitration agreement is not one of them, CNCDA members desperately need an example of one that is, in fact, enforceable. It is fundamentally unfair to keep California's employers in the dark and a clue must be given by this Court as to "what it means to be 'accessible,' 'affordable,' 'low cost,' 'speedy,' or 'effective," so that enforceable arbitration agreements may be crafted. (See *Sonic II, supra*, 57 Cal.4th at p. 1180, J. Chin, dissent.) The frustratingly endless cycle of guessing must and should end. But without guidance from this Court, this inefficient cycle will continue.

CONCLUSION

Because this arbitration agreement should be an example for California employers of an enforceable arbitration agreement that correctly survives an unconscionability challenge, CNCDA encourages this Court affirm the decision of the Court of Appeal, First Appellate District, Division One. But if it does not, CNCDA requests this Court provide clear and direct guidance of what California employers should and should not do when creating enforceable arbitration agreements bypassing the Berman process.

Dated: July 25, 2018 Respectfully submitted,

By: /s/ Wendy M. Coats
Wendy McGuire Coats
Counsel for *Amicus Curiae*
California New Car Dealers Association

CERTIFICATION OF WORD COUNT

(Cal. Rules of Ct., rule 8.360(b))

I, Wendy McGuire Coats, appellate counsel for amicus curiae, California New Car Dealers Association, do hereby certify that according to Microsoft Office Word 2010, the word processing program used to generate this brief, the word count of this brief, including footnotes is **3,743.**

Dated: July 25, 2018 Respectfully submitted,

By: /s/ Wendy M. Coats
Wendy McGuire Coats
Counsel for *Amicus Curiae*
California New Car Dealers Association

DECLARATION OF SERVICE BY MAIL

Case No. S244630

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

Plaintiff and Respondent,

v.

KEN KHO,

Defendant and Respondent,

JULIE A. SU,

Intervener and Appellant.

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. My business address is Fisher & Phillips LLP, One Embarcadero Center, Suite 2050, San Francisco, California 94111. On July 25, 2018, I served a true copy of the attached

CALIFORNIA NEW CAR DEALER ASSOCIATION'S APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF OTO, LLC; AND *AMICUS CURIAE* BRIEF

on each of the following, by placing same in an envelope(s) addressed as follows:

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

John Phillip Boggs
Roman Zhuk
Fine Boggs & Perkins
80 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019
Attorneys for Plaintiff and Appellant OTO, L.L.C.

David A. Rosenfeld
Caren P. Sencer
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
Attorneys for Defendant and Respondent Ken Kho

Miles E. Locker
Theresa Johnson Bichsel
Department of Industrial Relations
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
Attorneys for Intervener and Appellant Julie A. Su

Fernando Flores
DIR-Division of Labor Standards Enforcement
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
Attorneys for Intervener and Appellant Julie A. Su

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, each envelope was deposited with the United States Postal Service in San Francisco, California on the above date in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 25, 2018, at San Francisco, California.

By: /s/ Wendy M. Coats
Wendy McGuire Coats