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,
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, Case No. A147564,
First Appellate District, One

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

OPENING BRIEF ON THE MERITS

MILES LOCKER, SBN 103510
THERESA BICHSEL, SBN 288558
Division of Labor Standards Enforcement
Department of Industrial Relations
STATE OF CALIFORNIA
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
Telephone: (415) 703-4863

Attorneys for Intervener and Appellant, **LABOR COMMISSIONER**

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A. Issue Stated By Ken Kho

Whether, in light of the Court's decision in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*) holding that any arbitration agreement must be "accessible and affordable," a procedurally unconscionable arbitration provision is also substantively unconscionable where it removes the protections and advantages of the Berman hearings and also imposes all heightened obligations of civil litigation that significantly burden individual wage claimants?

B. Issues Stated By the Labor Commissioner

(1) Whether an arbitration agreement that not only evidences an "extraordinarily high" degree of procedural unconscionability, but also eliminates the Labor Code's free, informal Berman process and forces a *pro per* worker to advance his wage claim instead in an arbitral forum similar in complexity to regular civil litigation in superior court, yet neither provides nor incentivizes affordable counsel, satisfies the "affordable and accessible" mandate established by this Court in *Sonic II*?

(2) Whether mere notice of an arbitration agreement on the same day the Berman process is to commence divests the Labor Commissioner's jurisdiction to proceed with the Berman process?

C. Issues Stated By OTO, LLC

(1) Whether an arbitration agreement that requires that the rules and procedures of a California Superior Court be applied in arbitration as if it were in Superior Court makes the arbitration agreement unconscionable if it is still affordable as a Superior Court action?

(2) Whether the Labor Commissioner should stay the Berman proceedings once it gets notice and copies of the filings where a Superior Court action has been commenced to determine whether the matter should proceed to arbitration; or should the Labor Commissioner be permitted to hold a Berman hearing where it would not be allowed to do so under Code of Civil Procedure section 1281.4 if it were a trial court?

(3) Whether the Labor Commissioner violated OTO's right to a fair administrative hearing, as determined by the Superior Court, where the Labor Commissioner conducted the Berman hearing in the absence of the employer, after the employer had given the Labor Commissioner notice of the pending petition to compel arbitration?

INTRODUCTION

In *Sonic II*, this Court considered the enforceability of arbitration agreements that waive statutory protections afforded to wage claimants in

the State's "Berman" administrative hearing process.[1] The Court concluded that an arbitration agreement could be substantively unconscionable if it failed to provide wage claimants with a forum that is "accessible and affordable." (*Sonic II*, *supra*, 57 Cal. 4th at p. 1146.) As this Court instructed, "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 block[s] every forum for redress of wage disputes, including arbitration itself.'" (*Id.* at p. 1148 [citation omitted].)

Here, it is undisputed that OTO's arbitration agreement bars Kho from redressing his wage claims not only in the civil courts, but also through the Berman process. The question in the present case, then, is whether the arbitration agreement "effectively blocks" Kho from redressing his wage claims in arbitration.

For Kho, a low-wage worker with no legal sophistication, who sought to quickly resolve a claim for unpaid wages after being fired from

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[1] The Berman process "is designed to provide a speedy, informal, and affordable method of resolving wage claims."[1] (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858.) By utilizing this process, parties may avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims. (*Id.* at p. 869.)

his job, the answer is "yes." The agreement strips Kho of benefits from the Berman process that are intended to "level[] a playing field that generally favors employers with greater resources and bargaining power." (*Sonic II*, *supra*, 57 Cal.4th at p. 1134.) While the waiver of the Berman protections "does not necessarily render an arbitration agreement unenforceable" (*Sonic II*, *supra*, 57 Cal.4th at p. 1146), the arbitration agreement here is nonetheless unenforceable because the waiver is coupled with rules that force Kho to redress his wage claims in an opaque, costly, and formal forum akin to civil litigation. The resulting playing field is so overtly tilted in OTO's favor that Kho is left without an accessible and affordable forum in which he can effectively redress his wage claims. The Court of Appeal misconstrued and misapplied this Court's holding in *Sonic II*, and thereby reached the erroneous conclusion that OTO's arbitration agreement was enforceable against Kho.

The other issue presented by this case is no less critical – whether the mere filing and notice of petition to compel arbitration operates in effect as an automatic stay so as to prohibit the Labor Commissioner from moving forward with the Berman hearing and issuing an Order, Decision, or Award (ODA). There is nothing in the Federal Arbitration Act, the California Arbitration Act, or the Code of Civil Procedure that would require the Labor Commissioner to stay proceedings absent a court order. Treating the mere filing of a petition to compel arbitration as an automatic stay of the

Berman proceeding encourages employer delay, fosters misuse of the Labor Commissioner's scarce resources, and is contrary to policies favoring the prompt resolution of disputes.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Arbitration Agreement

Kho began working for OTO as an auto mechanic in early 2010. (CT 109:3-5.)[2] Three years later, in early 2013, a low-level human resources employee approached him while he was working at his station. (CT 109:9-15.) She handed him several documents, asked that he sign them, and waited at his workstation until he did. (*Ibid.*) She did not tell Kho anything about the nature of the documents. (CT 109:18-20.) Nor did she tell Kho that he could take time to review the documents. (CT 109:12-14.)

The first document was titled "Automotive Technician Compensation Plan," so Kho believed the documents pertained to his compensation. (CT 115-116.) Pages three and four of that document were titled "Comprehensive Agreement Employment At-Will and Arbitration." (CT 117-118.) The bulk of the arbitration provision is a densely-packed, single spaced paragraph consisting of more than 1,000 words in tiny 7 point font

[2] CT refers herein to the Clerk's Transcript, followed by the Bates page number and (if applicable) line numbers. RT refers to the Reporter's Transcript, followed by page and line numbers.

that takes up approximately 7/8th of an 8.5 by 11 inch page. (CT 117; *OTO v. Kho* (2017) 14 Cal.App.5th 691, 709, fn. 3.)

With OTO's representative standing by, waiting for him to sign documents that he thought pertained to compensation, Kho signed and returned the papers without reviewing, much less negotiating, the terms. According to OTO's manager, the arbitration agreement "is presented to all persons who seek or seek to maintain employment with [OTO]." (CT 21:1-5.) "[A]ll personnel who commence or continue employment at [OTO] are required to comply with the company's alternative dispute resolution policy." (CT 21:6-7.) This, however, was never explained to Kho. Nor did OTO explain to Kho that he had signed an arbitration agreement, waiving his right to bring a wage claim before the Labor Commissioner. (CT 109:21-22.) OTO never provided Kho with a copy of any applicable rules of arbitration, nor did OTO ever inform Kho how he could initiate arbitration or how the arbitration procedures would work. (CT 109:18-27.) The Court of Appeal found the degree of procedural unconscionability associated with OTO's arbitration agreement to be "extraordinarily high." (*OTO, supra*, 14 Cal.App.5th at p. 709.)

The agreement provides that "all disputes which may arise out of the employment context" are to be resolved in binding arbitration. (CT 5.) The stated purpose of the agreement is to "reduce[] expense and increase[] efficiency." (*Ibid.*) Despite this, the agreement adopts technical civil

litigation-like procedures, mandating use of rules applicable to civil actions in California courts, including "all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8." (*Ibid.*) The agreement also states that it "shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act . . . including section 1283.05 and all the Act's other mandatory and permissive rights to discovery." (*Ibid.*)

Though the agreement specifies that "any arbitrator herein shall be a retired California Superior Court Judge," the agreement is silent on how such a person may be found or selected, let alone how an arbitration may be initiated. (CT 5-6.) The agreement is also silent regarding potential liability for attorneys' fees and costs and who will pay the arbitration costs and fees. The agreement only states, "[i]f CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2." (CT 5.)

B. The Proceedings Before the Labor Commissioner

After signing the arbitration agreement, Kho continued to work for OTO for another year until OTO terminated him in April 2014. (CT 110:4-5.) Kho subsequently filed a wage claim with the Labor Commissioner on

October 9, 2014, seeking unpaid wages for: (1) hours during which he attended mandatory meetings with no compensation; (2) hours during which he performed mandatory multi-point inspections with no compensation; and (3) standby time with no compensation. (CT 9.) Kho also sought liquidated damages, waiting time penalties, and statutory interest. (CT 9.)

On October 17, 2014, the Labor Commissioner notified OTO and Kho that a settlement conference was scheduled for November 10, 2014. (CT 123:9-11, 127.) OTO appeared at that conference with counsel; Kho appeared *in pro per*. (CT 123:12-14.) The conference proceeded, but the parties were unable to reach a settlement. (CT 123:12-14.) Though OTO asserts that it provided a copy of the arbitration agreement to Kho during this settlement conference, there is no written record reflecting this interaction and both Kho and the deputy who conducted the conference deny that the issue of arbitration was ever raised. (CT 172:8-21.)

The Labor Commissioner subsequently notified OTO on January 30, 2015, that Kho had requested a Berman hearing. In the notice, the Labor Commissioner informed OTO that "although we have been unsuccessful in the settlement of the dispute, lines of communications remain open if you wish to resolve this matter prior to the hearing." (CT 131.) Having not heard anything from OTO, the Labor Commissioner set the hearing for August 17, 2015. (CT 133-136.)

On Friday, August 14, 2015—one court day before the scheduled hearing—OTO filed a petition to compel arbitration in Alameda Superior Court. (CT 1.) In that petition, OTO sought an order compelling Kho to "arbitrate all claims against [OTO] arising from or associated with his employment at [OTO], including but not limited to those claims currently before the [Labor Commissioner]." (CT 3:11-14.) OTO also requested that the Berman hearing the following Monday be stayed. The hearing on the petition to compel and request for a stay was scheduled for October 14, 2015. (CT 42.)

Though OTO filed its petition on Friday, August 14, 2015, it delayed serving that petition on the Labor Commissioner until the following Monday—the day of the hearing. (CT 41, 61.) In a letter accompanying the faxed petition, OTO demanded that the administrative hearing scheduled for 1:00 p.m. that day be taken off calendar "until the completion of arbitration under the signed agreement between the parties." (CT 41.) At approximately 11:09 a.m., the Labor Commissioner responded to OTO, stating that the Berman hearing would proceed that afternoon as scheduled months earlier. (CT 63-64.)

The Berman hearing proceeded as scheduled. (CT 68:25.) Kho appeared *in pro per*. OTO appeared through counsel, but only to serve Kho with the petition to compel arbitration. OTO's counsel then left. (CT 68:27, 69:23-27, fn. 1.) The afternoon of the Berman hearing was the first

time since Kho filed his wage claim that he learned that OTO intended to enforce the arbitration agreement. (CT 110:16-19.)

Following the Berman hearing, on August 25, 2015, the Labor Commissioner issued her order, decision, or award ("ODA") as required by Labor Code section 98.1. (CT 66-75.) In it, the Labor Commissioner awarded Kho $158,546.21 for unpaid wages, liquidated damages, interest, and waiting time penalties. (CT 67, 75:10-16.)

C. The Civil Proceedings

On September 15, 2015, OTO filed an appeal of the ODA. (RJN Ex. 1, at 1-12.)[3] One day later, OTO filed a motion to vacate the ODA under the same case number as OTO's petition to compel arbitration. (CT 1, 81.) The Labor Commissioner filed a Notice of Representation of Kho in the de novo appeal. (RJN Ex. 4, at 16-17.) OTO stipulated that the Labor Commissioner could intervene in the proceeding on the petition to compel arbitration to protect her jurisdiction over Kho's wage claims. (CT 86.) The trial court consolidated the hearings on OTO's petition to compel arbitration and motion to vacate the ODA. (CT 194-199.)

On December 11, 2015, the trial court issued an order finding the arbitration agreement procedurally unconscionable because Kho was:

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[3] RJN refers to the Labor Commissioner's Request for Judicial Notice, filed with the Court on March 2, 2018. The exhibit number is followed by the Bates stamped page number(s).

(1) presented with the documents at his work station and asked to sign and return them immediately; (2) given no explanation of the nature of the documents; (3) not provided with a copy of the documents after he signed them; and (4) given no information in the agreement about the rules governing the arbitration and how to initiate arbitration. (CT 212.) According to the court, "[t]hese facts are all consistent with the conclusion that the arbitration provision was imposed on [Kho] under circumstances that created oppression or surprise due to unequal bargaining power." (*Ibid.*)

The trial court also found the arbitration agreement substantively unconscionable because it: (1) adopts complex civil litigation-like rules of procedure and evidence; (2) "fails to provide a speedy, informal and affordable method of resolving wage claims and has virtually none of the benefits afforded by the Berman hearing procedure;" (3) "does not include an attorney's fees clause;" (4) is "intended to have the effect of eviscerating the protections provided by the Berman procedure . . . [and] seeks, in large part, to restore the procedural rules and procedures that create expense and delay in civil litigation;" and (5) "is also unconscionable as a deprivation of the rights to speedy resolution of employee claims for wages." (CT 220-222.)

As to OTO's motion to vacate the ODA, the trial court noted that "[OTO] had provided notice prior to the hearing of the existence of the

arbitration agreement and its petition to compel arbitration." (CT 204.) The court further noted that though there was no court order finding the arbitration agreement to be enforceable or any order staying the proceeding, OTO was nonetheless substantially justified under the circumstances in refusing to participate in the hearing. (*Ibid.*)

OTO appealed the trial court's order denying its petition to compel arbitration. (CT 296). The Labor Commissioner cross-appealed the order vacating the ODA. (CT 301.)

On August 21, 2017, the Court of Appeal issued a decision. It acknowledged that the circumstances surrounding the arbitration agreement's execution presented an "extraordinarily high" degree of procedural unconscionability. (*OTO, supra*, 14 Cal.App.5th at p. 709.) Specifically, the agreement was "presented on a take-it-or-leave-it basis" under circumstances "intended to thwart, rather than promote, voluntary and informed consent." (*Id.* at p. 708.) The court characterized the agreement as "a parody of the classic adhesion contract," noting that the tiny font and lack of separate paragraphs "challenged the limits of legibility," with technical language that "require a specialist's legal training to understand." (*Id.* at pp. 708-09.)

The court nonetheless found the arbitration agreement not to be substantively unconscionable. (*OTO, supra*, 14 Cal.App.5th at p. 709.) It concluded that because the Berman process may end in a de novo civil trial

if the employer appeals the ODA, arbitral procedures that track what might happen in that de novo proceeding are "presumably not inaccessible for purposes of *Sonic II.*" (*Id.* at p. 710.)

In justifying this conclusion, the court found that the loss of the right to free representation by the Labor Commissioner in an employer-filed de novo appeal following a Berman hearing, and its replacement by an arbitral procedure under which the claimant must either represent himself or bear the cost of paying for counsel, does not make arbitration unaffordable for purposes of *Sonic II.* (*OTO, supra*, 14 Cal.App.5th at p. 711.) The court also determined that the arbitration agreement was not substantively unconscionable because of its silence regarding how claims should be initiated, whether one party could recover attorney's fees from another, and who would be liable for all arbitration fees and costs. (*Id.* at pp. 709-13.)

Finally, the court denied the Labor Commissioner's cross-appeal of the order vacating the ODA on the ground that it was moot. (*OTO, supra*, 14 Cal.App.5th at p. 715.)

STANDARD OF REVIEW

Generally, a trial court's denial of a petition to compel arbitration is reviewed under an abuse of discretion standard, but where the court's denial presents a pure question of law, the order is reviewed de novo. (*Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 912; *Mendez v.*

Mid-Wilshire Health Center (2013) 220 Cal.App.4th 534, 541.) Where, as is the case here, there are no meaningful factual disputes as to the evidence, unconscionability is a question of law subject to de novo review. (*Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal.App.4th 494, 502.)

ARGUMENT

I. OTO'S ARBITRATION AGREEMENT IS UNCONSCIONABLE BECAUSE IT IS ADHESIVE AND IT ELIMINATES THE PROTECTIONS OF THE BERMAN PROCESS THAT REDUCE THE COSTS, RISKS AND DIFFICULTIES OF PURSUING WAGE CLAIMS, AND REPLACES THEM WITH A PROCESS THAT IS NEITHER ACCESSIBLE NOR AFFORDABLE

To determine whether an arbitration agreement that substitutes binding arbitration for the Berman process is substantively unconscionable, courts must examine and compare the dispute resolution procedures eliminated by the agreement with those established by the agreement. (*Sonic II, supra*, 57 Cal.4th at p. 1146.) This comparison is central to determining whether the arbitration process "imposes costs and risks on a wage claimant that make resolution of the wage dispute inaccessible and unaffordable," thereby blocking every forum for redress of disputes, including arbitration. (*Id.* at p. 1148.)

The Court of Appeal misapplied this test. Specifically, the Court of Appeal failed to evaluate the accessibility and affordability of the dispute resolution procedures of the challenged arbitration agreement against the

accessibility and affordability of the Berman process that the arbitration agreement displaces. Instead, the Court largely assessed the accessibility and affordability of OTO's arbitral procedures by reference to ordinary civil litigation, reasoning that because an appeal of an ODA results in a de novo proceeding in the superior court, an arbitration agreement that mandates use of the same formal procedures is presumably not inaccessible. (*Id.* at p. 712.)

In reasoning this way, the Court of Appeal discounted protective features of the Berman process that exist in a de novo proceeding, features specifically "designed to lower the costs and risks for employees in pursuing wage claims." (*Sonic II, supra*, 57 Cal.4th. at p. 1146.) The absence of these protections effectively block Kho from redressing his wage claims, even in arbitration. And there is no legitimate commercial need furthered by arbitral rules that effectively require the same level of cost and complexity as civil litigation, while removing the statutory protections that alleviate these burdens to wage claimants. Those terms operate in a fundamentally lopsided manner to dramatically favor OTO in wage disputes.[4] (See *Armendariz v. Foundation Health Psychcare*

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[4] Supplanting the informality of a Berman hearing with the rigors of civil litigation procedures is entirely inconsistent with the promotion of the "fundamental attributes of arbitration," particularly where there is no legitimate commercial need to do so. (See *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 685 [fundamental

Services, Inc. (2000) 24 Cal.4th 83, 117.) Accordingly, this Court should reverse the Court of Appeal and find OTO's arbitration agreement unconscionable and unenforceable against Kho.

A. The Court of Appeal Erred by Comparing the Accessibility and Affordability of the Arbitral Procedures with Civil Litigation Rather than the Berman Process

In evaluating the accessibility and affordability of an arbitration scheme that displaces the Berman process, the arbitral rules should not be measured against the requirements of formal civil litigation. As this Court instructed in *Sonic II*, courts must consider the "features of dispute resolution the [arbitration] agreement eliminates." (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) Accordingly, the Berman process should serve as the touchstone for determining whether OTO's arbitration agreement meets *Sonic II's* test for accessibility and affordability, not the formal procedures of civil litigation. (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.)

This is not a trivial command. It gives weight to the settled premise that the Legislature created the Berman processes because the formal requirements of ordinary civil litigation are ill-suited for resolving wage

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goal of arbitration is to provide a forum that provides for greater informality, lower costs, greater efficiency and speed, and expert adjudicators].)

disputes for workers like Kho.[5] For those disputes, a forum akin to ordinary civil litigation can be inaccessible and unaffordable, effectively blocking workers from redressing their wage disputes, contrary to the State's public policy.

Commentators have recognized that "Americans who cannot afford legal representation in court routinely forfeit basic rights, not due to the facts of their case or the governing law, but due to the absence of counsel." (*Access to Justice – Civil Right to Counsel – California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties*, 123 Harv. L. Rev. 1532 (April 2010).) "[I]n most situations, enforcing or defending a legal right requires the assistance of an attorney. Complex legal rules, stringent procedural requirements, and an adversarial system that functions best when both sides are represented by competent attorneys leave the unrepresented at a substantial, and in most situations insurmountable, disadvantage." (Robert R. Kuehn, *Undermining Justice: The Legal*

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[5] As this Court stated: "[g]iven the dependence of the average worker on prompt payment of wages, the Legislature has devised the Berman hearing and posthearing process as a means of affording an employee with a meritorious wage claim certain advantages, chiefly designed to reduce the costs and risks of pursuing a wage claim, recognizing that such costs and risks could prevent a theoretical right from becoming a reality." (*Sonic II*, *supra*, 57 Cal. 4th at p. 1131.)

Profession's Role in Restricting Access to Legal Representation (2006) 2006 Utah L. Rev. 1039.)

Recognizing these barriers, the Legislature guaranteed free counsel under Labor Code section 98.4, to those wage claimants unable to afford counsel. This guarantee was both the means of ameliorating the "justice gap" that makes wealth a prerequisite for access to justice, and a reflection of the State's long-standing policy affording the highest priority to wage claims.[6] That OTO has wielded its power to prevent access to counsel compels "the need to protect access, at least at a level commensurate with that available [under section 98.4], otherwise arbitration becomes a tool to thwart legal claiming." (*Nothing for Something? Denying Legal Assistance to Those Compelled to Participate In ADR Proceedings*, 37 Fordham Urb. L.J. 273, 283 (2010).)

As detailed above, the arbitration agreement here expressly mandates use of all rules of pleading including the right of demurrer, all rules of evidence, and preserves the right to bring motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil

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[6] "It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker, and in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (*In re Trombley* (1948) 31 Cal.2d 801, 809.)

Procedure Section 638.1. Where an arbitration agreement imposes the daunting technical pleading, discovery, evidentiary, and motion practice rules of civil litigation, it creates a barrier to claimants. But, the relaxed administrative procedures in Berman hearings remove that barrier. Pleadings are limited to an informal complaint and an answer. (Lab. Code, § 98, subd. (d).) Hearings are to be held within 90 days of the filing, but prior to that the Commissioner's staff assist to help settle claims. (Lab. Code, § 98, subd. (a).) There is no discovery before hearing. The hearings themselves are not governed by technical rules of evidence; any relevant evidence is admitted if it is the sort of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs. The hearing officer is authorized to assist parties in cross-examining witnesses and to explain issues and terms not understood by the parties. (*Sonic II, supra,* 57 Cal.4th at p. 1128, citing DLSE Policies and Procedures for Wage Claim Processing.) And the Commissioner provides qualified interpreters to assist the parties. (Lab. Code, § 105.) In total, these features effectively remove the barriers inherent in formal civil litigation for workers who lack legal expertise, English-language ability, or the means to pay for representatives and translators, in seeking and obtaining a quick, impartial resolution of their wage disputes.

In addition, the Berman statutes remove not only key barriers to pursuing one's claims in the first place; they also remove barriers in the de

novo appeal of an ODA in superior court where the rules of civil procedure could otherwise present formidable impediments to workers like Kho to defend the ODA reached in their favor. For instance, if the claimant is financially unable to afford counsel and is not objecting to any part of the ODA, the Labor Commissioner must provide representation for the claimant in the case that the employer files a de novo appeal. (Lab. Code, § 98.4.) The Berman provisions also require the employer to post a bond in the amount of the award as a condition to filing an appeal of an ODA in order to dissuade frivolous appeals that only serve to make a forum ineffectual and unaffordable by delaying the recovery of wages. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 376; *Palagin v. Paniagua Construction, Inc.* (2013) 222 Cal.App.4th 124, 136.)

Critically, none of these rights and benefits that render both the Berman hearing and a subsequent de novo appeal accessible and affordable apply where an individual initially files suit for unpaid wages in superior court. Thus, comparing the features of dispute resolution that OTO's arbitration agreement eliminates (*i.e.*, all of the protections of the Berman process, including those that attach post-hearing, upon the issuance of an ODA) against the features it contemplates (*i.e.*, civil litigation-like procedures with all of their complexity and costs), it is clear that OTO's arbitral procedures are substantially less accessible and affordable than the procedures associated with the Berman process. The absence of the

Berman procedures or other provisions that provide for accessibility and affordability, in practical terms, effectively blocks Kho from redressing his wage claims in any forum, including arbitration.

Concluding that the arbitral scheme here is inaccessible and unaffordable to Kho does not rely on an asserted "superiority" of the Berman process. Rather, it is based simply on the evidence in the record that OTO—despite having every opportunity to construct arbitration procedures that would provide realistic accessibility as the Berman process does—nonetheless elected to use a contract of adhesion to impose a process equivalent to formal civil litigation, thereby imposing costs, risks, and barriers that would otherwise not exist for Kho to resolve his wage claims.

B. The Substantive Terms of OTO's Arbitration Agreement in Their Totality, Fail To Provide an Accessible and Affordable Forum for the Resolution of Wage Claims

The Court of Appeal concluded that OTO's arbitration agreement was not substantively unconscionable. This erroneous conclusion flowed from its mistaken use of a court proceeding as the standard for measuring accessibility instead of the Berman wage claim process and was compounded by its failure to consider that and other facets of the arbitration agreement in their totality. The Court of Appeal drew additional erroneous or unsupported conclusions regarding the legal consequences of OTO's arbitral procedures vis-à-vis Berman procedures. Correcting these errors invariably leads to the conclusion that the arbitration procedures mandated

in OTO's arbitration agreement are neither affordable nor accessible for Kho.

1) The Court of Appeal Failed to Examine the Totality of the Arbitration Agreement's Substantive Terms

"The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, *in view of all relevant circumstances*, that a court should withhold enforcement." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 912 [emphasis added].) Accordingly, determining an agreement's unconscionability requires an evaluation of the totality of the agreement's substantive terms. (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.)

The Court of Appeal failed to conduct such an evaluation. It instead dissected the arbitration agreement and analyzed each term in isolation, failing to grasp both the substantively unconscionable character of individual terms—the failure to identify how to initiate arbitration, the requirement of formal civil litigation rules without the assistance of counsel due to Kho's inability to afford it, and the lack of post ODA benefits— as well as the combined impact of multiple terms in their totality. Had the court considered the totality of terms it could not have avoided the unmistakable conclusion that the agreement was marked by considerable substantive unconscionability, notwithstanding its mistaken use of court procedures as the yardstick for accessibility.

The court's approach of looking at individual threads, but not the entire fabric, reflects the fallacy of composition. (Ruggero J. Aldisert, *Logic For Lawyers: A Guide To Clear Legal Thinking* (1989), at p. 215.) As the United States Supreme Court recently commented, "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation." (*District of Columbia v. Wesby* (2018) 138 S.Ct. 577, 588].) By focusing on each of the terms in the arbitration agreement separate from the other terms, the Court of Appeal never considered the impact of the totality of those terms. As discussed further below, correcting this error reveals that the arbitration procedures here *as a whole* effectively block Kho from redressing his wage claim even in arbitration.[7]

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[7] The trial court recognized the practical impact of the terms in their totality, and their underlying intent, with clarity:

> This [agreement] 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 wage[] 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.

(Order On Petitioner's Motion to Compel Arbitration and Stay Proceedings, CT 221.)

2) The Court of Appeal Drew Erroneous and Unsupported Conclusions Regarding the Affordability and Accessibility of OTO's Arbitral Procedures

Compounding its failure to account for the totality of OTO's arbitration agreement's substantive terms, the Court of Appeal erred by misapprehending the legal effect of OTO's arbitration agreement.

First, the OTO agreement's failure to specify how to initiate an arbitration claim is another indicator of inaccessibility and substantive unconscionability. The OTO agreement provides a worker wishing to bring a wage claim no information as to how to initiate the process. Under the OTO arbitration scheme a worker unable to afford counsel must not only be prepared to confront the demands of formal litigation, but must surmise how to start a case, all without the assistance of counsel.

The Court of Appeal also failed to properly consider that Kho's right to Labor Commissioner counsel in a de novo appeal was mandatory under Labor Code section 98.4, which provides for legal counsel where the claimant cannot afford counsel and is attempting to uphold the ODA without objecting to any part of the ODA.[8] And the Court of Appeal misapprehended the practical impact of the arbitration agreement's silence

[8] The record here establishes that Kho was unable to afford counsel due to insufficient assets (CT 1, ¶19), and after OTO filed its de novo appeal, the Labor Commissioner filed its notice of representation of Kho in accordance with Labor Code section 98.4. (RJN, Ex 4, at 16-17.)

on the payment of arbitration costs and fees on making the arbitral forum inaccessible and unaffordable under *Sonic II*.

With respect to the award of attorneys' fees that help make a forum accessible and affordable by incentivizing the participation of counsel to navigate the challenges of civil litigation's technical rules, the Court of Appeal found that the arbitration agreement would provide Kho with attorneys' fees through Labor Code section 218.5 to the same extent as would be available in the Berman process through section 98.4. But as demonstrated below, Labor Code section 218.5 does not operate in this manner.

(a) Failing to Specify How to Initiate Arbitration Creates Heightened Costs, Risks, and Barriers to Utilizing the Arbitral Forum and Weighs in Favor of Finding Substantive Unconscionability

The arbitration agreement's failure to specify the process for initiating an arbitration claim further demonstrates inaccessibility and substantive unconscionability. This obstructs Kho's ability to commence arbitration even more than had OTO only failed to provide him copies of the relevant rules for the arbitration. (See *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 690 ["failure to attach the arbitration rules could be a factor in support of a finding of procedural unconscionability"].) Here, the only provisions that are referenced are some of the statutes that make up the California Arbitration

Act, none of which provide any guidance as to how or where to direct a claim under OTO's arbitration agreement. Instead, it is left to the employee to guess how to initiate arbitration, or perhaps to pay an attorney to review the agreement and make an effort to proceed.

By contrast, there is a wealth of information available on "How to File a Wage Claim" with the Labor Commissioner via the Internet. (RJN, Ex 21, at 148-184, at http://www.dir.ca.gov/dlse/HowToFileWageClaim.htm.) Comparing this to the paucity of instruction in the arbitration agreement highlights what has been lost through the substitution of arbitration for the Berman process and makes clear that OTO's failure to provide to potential claimants such essential information on how to initiate a claim is substantively unconscionable. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1151.)

Though the Court of Appeal characterized this "failure to designate a manner of commencing arbitration" as a factor that "introduces flexibility since an arbitration can presumably be commenced in any reasonable manner," this assumption is not based upon any evidence in the record, and instead, seems founded upon a belief that unsophisticated wage claimants should possess some innate knowledge as to the "reasonable manner[s]" by which one might commence an arbitration. (*OTO, supra,* at p. 712.) While the Court of Appeal characterized Kho's filing of his wage claim with the Labor Commissioner as effectively commencing arbitration by inviting

OTO to move to compel arbitration, filing a wage claim is scarcely an effective method to commence arbitration given the ten-month delay from the date Kho filed his wage claim until the date OTO filed its petition to compel arbitration. Nor does it solve the initial problem of how Kho would commence the arbitration after being compelled to do so.

In practice, the failure to specify how to initiate arbitration dramatically decreases the likelihood that an employee will attempt to initiate claims and guarantees delay in the event that the employee initiates a claim in a venue that the employer does not like. OTO's failure to specify how arbitration should be commenced, therefore, strongly supports finding OTO's arbitration agreement unconscionable due to the practical barrier it creates for Kho to access the arbitral forum.

(b) The Arbitration Agreement's Elimination of Post-ODA Protections Effectively Blocks Kho from Redressing His Wage Claim, Even in Arbitration

As this Court explained in *Sonic II*, "the unconscionability inquiry 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.) This Court has recently re-emphasized that evaluating unconscionability is highly dependent on context. (*Sanchez*, *supra*, 61 Cal.4th at p. 911; *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th

1257, 1270, review denied (June 14, 2017) ["An evaluation of unconscionability is highly dependent on context."].) Courts, therefore, must "examine the context in which the contract was formed and the 'respective circumstances of the parties' as they existed at the formation of the agreement." (*Tompkins v. 23andMe, Inc.* (9th Cir. 2016) 840 F.3d 1016, 1023.)

The upshot of this contextual examination is that an arbitration agreement that is unconscionable with respect to one employee may not be unconscionable with respect to a differently-situated employee. For this reason, this Court remanded *Sonic II* for the trial court to determine "[w]hether Moreno, who was not a low-wage worker at Sonic and whose wage claim alleged vacation wages for 63 days at the rate of $441.29 per day, had comparable bargaining power."[9] (*Sonic II, supra*, 57 Cal.4th at p. 1148.)

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[9] As this Court explained in *Sonic II*, such case-by-case application of the unconscionability doctrine to agreements that require employees to forgo Berman procedures that in and of themselves promote the very objectives of informality, lower costs, greater efficiency and speed, and the use of expert adjudicators that the United State Supreme Court has deemed "fundamental attributes of arbitration" actually promotes the FAA's objectives. (*Sonic II, supra*, 57 Cal.4th at p. 1149.) Ironically, it is the procedures set out in OTO's arbitration agreement that will tend to hinder those purposes by increasing the cost, procedural rigor, and complexity and formality of any proceedings brought thereunder.

The Court of Appeal, however, analyzed the substantive unconscionability of OTO's arbitration agreement without regard to the fact that Kho is a low-income immigrant with no legal sophistication, and could not afford representation. (CT 109; CT 110-111, ¶ 19.) It therefore failed to apprehend the way in which OTO had required Kho to forgo all the rights and protections set forth in Labor Code sections 98, *et seq.* specifically targeted at balancing the playing field for laypersons like Kho who lack the wherewithal and sophistication to engage OTO on OTO's terms, and decisively tipped the playing field in its own favor.

The deprivation of Kho's right to free representation most clearly shows the way in which OTO blocked Kho from redressing his wage claim effectively and efficiently. The Court of Appeal concluded that this loss did not contribute to any substantive unconscionability because wage claimants do not have absolute rights to counsel in the de novo appeal of an ODA. But it is undisputed that Kho was entitled to free legal representation pursuant to Labor Code section 98.4. He was financially unable to afford counsel, would have attempted to uphold the amount awarded by the Labor Commissioner, and would not have objected to any part of the ODA. (CT 108-0109, ¶19.)[10] Losing this right to free counsel necessarily means that

[10] Moreover, the Court of Appeal is incorrect in its view that a contingent right to such representation is not in itself a valuable benefit that must be considered in assessing unconscionability of an arbitration agreement. In

Kho, who cannot afford to hire his own private counsel, would risk losing his wage claim because of his lack of knowledge and familiarity with the complexities of civil litigation.[11] This expense and risk naturally tends to block wage claimants like Kho from obtaining redress for their wage claims, particularly through arbitration.[12] Though OTO could have created an arbitral procedure that mitigated such added expenses and risks, OTO

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making such an assessment, this Court has never distinguished between rights that are "contingent" and those that are not. For example, *Armendariz* recognized the long-standing principle that arbitration agreements cannot limit statutory remedies such as punitive damages and attorneys' fees. (*Armendariz,* at 103.) Remedies are clearly contingent upon prevailing. Yet, this Court struck down an arbitration provision that eliminated an employee's right to reinstatement or injunctive relief in any potential dispute, without the need for any showing that the employee was likely to prevail in the dispute. (*Id.*, at 103-104.)

[11] The Court need only look to the rules of evidence and, specifically, the rule on hearsay to see how a *pro per* plaintiff could "haplessly bumbl[e] through his own litigation" under OTO's arbitration agreement. (*Alan S., Jr. v. Super. Ct.* (2009) 172 Cal.App.4th 238, 257.)

[12] In its opinion, the Court of Appeal overemphasized this Court's choice in *Sonic II* to not categorically hold that an arbitration agreement that fails to provide free counsel to claimants is substantively unconscionable. But as this Court recognized, there is a multiplicity of ways an employer could structure an arbitration proceeding without free representation that might nonetheless provide a wage adjudication process that approximates the affordability and accessibility of the Berman process. (See *Sonic II, supra*, 57 Cal.4th at p. 1147 ["There is no single formula for designing an arbitration process that provides an effective and low-cost approach to resolving wage disputes."].) Accordingly, it would be inappropriate to create any bright line rule regarding unconscionability. The fact remains, however, that this case would be a different case if OTO's arbitral procedures provided some of the rights and protections that the Berman process affords wage claimants. This case, however, involves an employer who has created an arbitral forum that has *none* of the features of a Berman hearing and *all* of the features of civil litigation.

did not. Instead, OTO created an arbitral procedure that maximizes expense and risk to the claimant. Such arbitral procedures are entirely one-sided and benefit only OTO.

In this context, the Court of Appeal's holding that the loss of representation does not contribute to any substantive unconscionability because the agreement permits the claimant to proceed *in pro per* is misplaced. As noted earlier, "a court applying the unconscionability doctrine must consider [both the] features of dispute resolution the agreement eliminates [and the] features it contemplates." (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) Accordingly, "[a]n assessment of what a party has lost through an arbitration agreement often involves consideration of what specific rights, benefits or protections would otherwise apply." (*Id.* at p. 1151.) Here, the elimination of Kho's right to representation and its replacement with the option to proceed *in pro per* in a complex, civil litigation-like arbitration, can only be reasonably understood as a means of making it more difficult, if not practically impossible, for Kho to proceed and prevail in his wage claim.

(c) *Labor Code Section 218.5 Does Not Provide for the Award of Attorneys' Fees and Costs in Arbitration to the Extent Available in the Berman Process*

Labor Code section 98.2, subdivision (c), is a "one-way" attorneys' fees shifting provision, in which employees are entitled to recover

attorneys' fees if the court makes an award of greater than zero to the employee respondent in a trial de novo. The availability of fees and costs provides an incentive for attorneys to take on potentially meritorious cases, thereby helping to make the adjudicatory forums affordable and accessible to wage claimants.

The Court of Appeal concluded that the lack of an express employee-favorable attorneys' fees provision in the arbitration agreement similar to that in Labor Code section 98.2, subdivision (c), does not make the agreement unconscionable because a similarly favorable fee provision—Labor Code section 218.5—is otherwise available. The premise for the Court's conclusion, however, is incorrect. Section 218.5 does not have the same legal effect as section 98.2, subdivision (c).

The legal effect of section 218.5 is substantially more restrictive than that of Labor Code section 98.2, subdivision (c). Fees are awardable under section 218.5 only "if any party to the action requests attorney's fees and costs upon the initiation of the action." Section 98.2 does not impose this condition. Relying on section 218.5 as a source for fees when the agreement is silent on this matter therefore works against claimants in two ways.

First, *pro per* claimants are unlikely to know that they will need to request attorneys' fees at the time they present their claim in arbitration. Second, claimants are unlikely to risk the expense of retaining an attorney

and attorneys are unlikely to accept the case if they are unable or uncertain about their ability to recover fees if successful; particularly if the individual claim is of relatively low value considering the complexity of the civil trial-like proceeding required by this agreement. And, if, during the course of the arbitration proceedings, that claimant manages to secure legal representation, it would seemingly be too late to request attorney's fees. In short, replacing Labor Code section 98.2, subdivision (c), with section 218.5 as the potential source for an award of attorneys' fees makes it significantly more expensive for legally unsophisticated workers like Kho to pursue their wage claims, particularly where legal counsel is necessary—as in the case of civil litigation and OTO's arbitral procedures—to level the playing field. The absence of an attorney representative incentivized by the prospect of recovering a fee heightens the practical inaccessibility and unaffordability of OTO's arbitral forum here.

(d) *Failing to Specify Who Will Pay the Arbitration Costs and Fees Increases the Inaccessibility and Unaffordability of the Arbitral Forum and Weighs in Favor of a Finding of Unconscionability*

OTO's arbitration agreement does not expressly acknowledge that the employer will pay all costs and fees associated with the arbitration. The agreement only states that "[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 5.)

Though this Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 requires that an employer pay the costs of arbitration notwithstanding section 1284.2, an unsophisticated wage claimant will not know this. While the Court of Appeal reasoned that the arbitration agreement's silence on arbitration costs "must be interpreted under *Armendariz* to require OTO to pay the costs of arbitration," *OTO, supra*, 14 Cal.App.5th at p. 710, the more reasonable interpretation is that the agreement's silence regarding arbitration costs and fees will chill the filing of claims against OTO given the uncertainty the agreement creates over who would pay those costs and fees. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 110 ["As we held in *California Teachers Assn.*, 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 the constitutional right of due process."].)

Though the Court of Appeal found it to be "not surprising" that the agreement "does not contain any provision specifically addressing the allocation of costs for wage claim arbitration" given that "the Agreement was intended to deal with a wide variety of legal claims potentially asserted by an employee," this Court's holding in *Armendariz* prohibiting arbitration

agreements from imposing unique arbitral fees and costs against employees would apply to all statutorily-based employment claims. (*OTO*, *supra*, 14 Cal. App. 5th at p. 710.) Ultimately, there is no reasonable justification for OTO's failure to expressly state, in plain English, that an employee subject to the arbitration agreement will not be required to pay for arbitral costs and fees. 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 requirement that Kho pursue his wage claim utilizing formal civil procedures, notwithstanding his inability to afford counsel, establishes it as unconscionable and therefore unenforceable. But even if that single aspect of OTO's arbitration agreement is not deemed to render it unconscionable on its own, the net effect of all of its features is to effectively block Kho from obtaining redress for his wage claims, rendering the agreement as a whole unconscionable and unenforceable. Accordingly, this Court should reverse the Court of Appeal.

C. The Court of Appeal Erred by Requiring More Substantive Unconscionability than Warranted Given the "Extraordinary" Procedural Unconscionability

This Court has repeatedly noted that there is a "sliding scale" between procedural unconscionability and substantive unconscionability such that where one is more prevalent, less evidence is needed of the other before a contract can be found to be unconscionable. (*Sanchez*, *supra*, 61

Cal. 4th at p. 910 ["the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa"].) Moreover, this Court has also noted that the adhesive nature of an employment contract requires courts to be "particularly attuned" to claims of unconscionability. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal. 4th 1237, 1245.)

Despite this and the conclusion that OTO's arbitration agreement embodied an "extraordinarily high" level of procedural unconscionability, the Court of Appeal subjected OTO's arbitration agreement to just as high a standard for substantive unconscionability as if there had been no procedural unconscionability. While the Court recognized "a high degree of procedural unconscionability "*ordinarily* imposes 'closer scrutiny' of the agreement's substantive fairness," it treated *Sonic II's* evaluation of accessibility and affordability for the purposes of determining an agreement's overall unconscionability as divorced from procedural unconscionability, stating "*Sonic II* appears to establish affordability and accessibility as a *safe harbor* when the claim of substantive unconscionability is premised on the waiver of Berman procedures." (*OTO*, 14 Cal. App. 5th at p. 713 [emphasis added].) This was fundamental error.

Sonic II did not purport to alter the established unconscionability analysis wherein the greater the showing of procedural unconscionability,

the lesser the amount of substantive unconscionability required to render a contract unenforceable. In abandoning *Sonic I's* categorical rule that the right to a Berman hearing could not be waived, this Court did not replace it with a different categorical safe harbor for evaluating unconscionability as whole. Rather than creating a binary evaluation of substantive unconscionability, *Sonic II* requires courts to consider the level of arbitral forums' barriers to accessibility and affordability to individual wage claimants.

Removing statutory benefits that, by design, make a dispute resolution forum affordable and accessible to wage claimants, results in a lopsided agreement whose terms favor only the employer. But more importantly, this Court has emphasized that unconscionability, and specifically "affordability" of an arbitration must be determined on a "case-by-case basis." (*Sanchez, supra,* 61 Cal.4th at p. 920.) Thus, whether an agreement's substantive terms make arbitration "unaffordable or would have a substantial deterrent effect" on the ability to use arbitration exists on a continuum, with the individual's circumstances as the point of reference. (*Ibid.*) Recognizing that variable levels of costs and complexities create different barriers to individuals based on their financial resources and legal sophistication, is fully consistent with the settled approach to evaluating unconscionability. Where certain levels of costs and complexity could create absolute bars to a wage claimant's ability to access an arbitral forum,

lesser amounts may nonetheless create substantial deterrents that constitute degrees of substantive unconscionability. And, when evaluated in conjunction with procedural unconscionability, courts are well-suited to apply the traditional approach to determining whether the contract as a whole may not be enforced. *Sonic II* does not permit courts to deviate from this thorough and critical evaluation.

Here, had the Court of Appeal applied the correct standard, it would have had to conclude that the necessary showing had been readily satisfied given that the arbitral procedures effectively block Kho from obtaining redress for his wage claims. OTO's arbitral forum, therefore, is, in practice, inaccessible and unaffordable for Kho. To require more as the Court of Appeal did is reversible error. (See *Mercuro v. Super. Ct.* (2002) 96 Cal. App. 4th 167, 175 ["Given Countrywide's highly oppressive conduct in securing Mercuro's consent to its arbitration agreement, he need only make a minimal showing of the agreement's substantive unconscionability."].)

II. THE LABOR COMMISSIONER'S ORDER, DECISION OR AWARD WAS PROPERLY ISSUED AND THE POST-ODA PROTECTIONS MUST APPLY IN OTO'S DE NOVO APPEAL

OTO filed its petition to compel arbitration one court day before the scheduled Berman hearing and served the Labor Commissioner with the petition a few hours before it began. Kho was served at the hearing, at which point OTO's representative walked out and refused to participate.

Despite being on notice of the Berman hearing for 10 months, OTO did not seek a court order staying the Berman proceeding pending the issuance of a court decision on the petition to compel arbitration. Accordingly, the Labor Commissioner held the hearing as scheduled and issued the ODA eight days later, consistent with: (1) her duty under Labor Code sections 98, subdivision (a), and 98.1 to promptly hold the Berman hearing and issue an ODA; (2) the State's public policy favoring the prompt payment of wages (see, e.g., *Smith v. Super. Ct.* (2006) 39 Cal.4th 77, 82); (3) Kho's right as a wage claimant to have his wage claim resolved expeditiously; (4) the absence of any provision in the California Arbitration Act or the Federal Arbitration Act requiring an administrative agency to stay its adjudicatory proceedings pending the resolution of a petition to compel arbitration filed in a state or federal court; (5) and the absence of a court order staying the proceeding.

After the trial court vacated the ODA, the Court of Appeal found the Labor Commissioner's cross appeal moot in light of the court's conclusion that the motion to compel arbitration should have been granted. However, regardless of whether OTO's arbitration agreement is enforceable, the ODA should not have been vacated.

A. The Labor Commissioner Properly Exercised Her Authority to Hold the Berman Hearing and Issue the ODA While the Motion to Compel Arbitration Was Pending

The right to compel arbitration of disputes is not self-executing. There is nothing "to prevent one of the parties to a contractual arbitration provision from resorting initially to an action at law." (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795.) Rather, the party seeking to compel arbitration must "take active and decided steps" to compel arbitration and stay the pending lawsuit. (*Ibid.*) Though filing a petition to compel arbitration under Code of Civil Procedure section 1281.2 "is in essence a suit in equity to compel specific performance of the arbitration agreement" (*ibid*), filing a petition to compel arbitration alone is not sufficient to stay any pending action. (*Brock*, *supra*, 10 Cal.App.4th at p. 1796.) Rather, "[t]he party seeking resolution via contractual arbitration must also file a motion in the action at law to stay it [citations]; it will not be stayed automatically." (*Ibid.* [citing Code of Civil Procedure sections 1281.4 and 1292.8]; see also *Ross v. Blanchard* (1967) 251 Cal.App.2d 739, 742 ["It follows that the remedy of arbitration by no means automatically ousts a court of general jurisdiction from the scene."].)

Against this backdrop, any holding that Code of Civil Procedure section 1281.4 should somehow operate to stay the Labor Commissioner from proceeding with a Berman hearing upon the filing of a petition to

compel arbitration ignores two critical legal principles. First, as indicated above, a stay under Code of Civil Procedure section 1281.4 is not automatic. Second, any stay only applies to a pending judicial action in the court in which the motion to stay was filed. While the superior court might have stayed the administrative proceeding, *pendent lite*, as it evaluated the petition to compel arbitration, no order stayed the proceedings at the time the Berman hearing was held. OTO had been on notice of the hearing for ten months yet only sought to stay the hearing one court day before it was scheduled. Even then, OTO could have at least moved ex parte or sought an order shortening time to allow the trial court to act before the ODA was issued. OTO chose not to.

Importantly, the Labor Commissioner's policy to proceed with Berman hearings absent a court order is fully consistent with the FAA's fundamental attributes of arbitration. Implementing that policy does not demand procedures incompatible with arbitration, or make arbitration in any manner less informal, more costly, or more procedurally complex.

B. Upon the Issuance of a Valid ODA, Kho Was Entitled to All Post-ODA Protections, and Those Protections Must Apply in Any De Novo Forum.

The trial court vacated the ODA, in part, because it found OTO to be "substantially justified" in refusing to participate in the hearing on the basis of the arbitration agreement. (CT 204.) According to the trial court, it would have been unfair under the circumstances to enforce the ODA.

(*Ibid.*) However, there is no unfairness to "enforcing" the ODA in the present case. After all, OTO timely appealed the ODA. "The timely filing of the notice of appeal (1) forestalls the finality of the Labor Commissioner's decision; (2) terminates the jurisdiction of the Labor Commissioner; and (3) vests jurisdiction to conduct a trial de novo in the appropriate court." (*Pressler v. Donald L. Bren Company* (1982) 32 Cal.3d 831, 836.) The Commissioner's decision becomes final and enforceable only if a notice of appeal is not timely filed. (*Id.* at 837.) OTO's appeal, therefore, forestalled any unfairness such that there is no basis to vacate the ODA that was effectively already vacated by virtue of the appeal.

Though the court reasoned that "employers are not required to participate in a Berman hearing prior to arbitration if there is an enforceable arbitration agreement,"[13] the court ignored the lack of any determination that the agreement in the present case was enforceable. As this Court has explained, however, "the parties to a contract must have an opportunity to determine whether the arbitration agreement should be enforced: the FAA does not require arbitration when there are valid contract defenses to the enforcement of the arbitration agreement." (*Sonic II*, *supra*, 57 Cal.4th at p. 1142.) Despite this and ample opportunity to obtain a determination on the enforceability of the arbitration agreement, OTO chose not to act in a

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[13] CT 204.

timely manner, precluding it from obtaining a decision before the scheduled date of the Berman hearing. Nor did OTO choose to avail itself of the opportunity to seek a court order staying the Labor Commissioner's proceedings. Instead, according to OTO, it was the Labor Commissioner's obligation to stop the proceedings upon the filing of the petition to compel arbitration. But, as discussed, neither California nor federal law imposes such an obligation. The Labor Commissioner had jurisdiction to proceed on the Berman claim, which she did absent any court order otherwise.

As a consequence, the Court of Appeal was incorrect in reasoning that the trial court's order vacating the ODA was moot. As discussed, by virtue of OTO's delay and operation of law, Kho was entitled to proceed with the Berman hearing. Having done so and having received a favorable ODA, Kho accrued certain rights that should remain even if the dispute is ordered into arbitration. Notably, ordering a dispute into arbitration should not revert the parties to "square one" in their dispute, particularly where the dispute is subject to de novo trial. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1135 [quoting *Sonic I's* account that de novo appeal would proceed in arbitration subject to post-ODA Berman protections, rather than as a trial de novo in superior court].)

As discussed previously, the substantive legal rights claimants gain post-ODA carry great importance in enabling them to recover unpaid wages: 1) the right to no-cost legal representation by the Labor

Commissioner in the de novo proceedings pursuant to Labor Code section 98.4, (2) the requirement that the employer appealing the ODA post an undertaking in the amount of the ODA pursuant to Labor Code section 98.2(b), (3) one way fee shifting under Labor Code section 98.2(c), and (4) Labor Commissioner assistance in collecting amounts owed under any judgment under Labor Code section 98.2(j), and (5) attorney's fees as provided by Labor Code section 98.2(k) for enforcing the judgment. At the point in which the petition to compel arbitration was denied, these protections constituted substantive rights possessed by Kho.

Rather than stripping Kho of these rights, the trial court, having found the arbitration agreement unenforceable, should have denied the motion to vacate the ODA so as to permit these vested statutory protections to apply in OTO's de novo superior court proceeding. Similarly, even in holding the arbitration agreement enforceable, the Court of Appeal should have reversed the trial court's order vacating the ODA, so as to ensure that these post-ODA protections and benefits would apply in any de novo arbitral proceeding. By failing to reinstate the ODA, the Court of Appeal also deprived Kho of these legal rights that, similar to other substantive laws, may apply in the arbitral forum.

By effectively treating OTO's last-day filing of its petition to compel arbitration as the functional equivalent of an order compelling arbitration, the courts below invite employers to delay invoking arbitration until the eve

of the scheduled Berman hearing, resulting in a concomitant waste of the Labor Commissioner's scarce resources and unfairness to wage claimants whose rights to seek prompt recovery of their unpaid wages—in any forum—will be delayed or denied. This Court should forestall that outcome by reversing the courts below and reinstating the ODA.

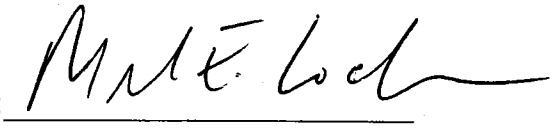
CONCLUSION

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: April 24, 2018

Respectfully submitted,

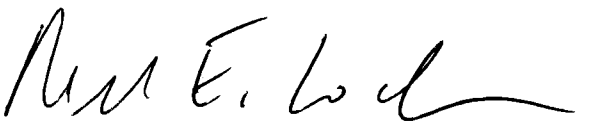
STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement

By: 

Miles E. Locker
Theresa Bichsel
Attorneys for the Labor Commissioner, Intervenor and Appellant

CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.520, subdivision (c), I hereby certify that the foregoing document contains 10,442 words, excluding the parts of the document that are exempted by Rule 8.520, subdivision (c)(3).



Miles E. Locker
STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement

Attorney for the Labor Commissioner,
Intervenor and Appellant

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

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

I, Joanne M. LeDuc, 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 April 24, 2018, I served the following document(s):

OPENING BRIEF ON THE MERITS.

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.
Oakland, CA 94612

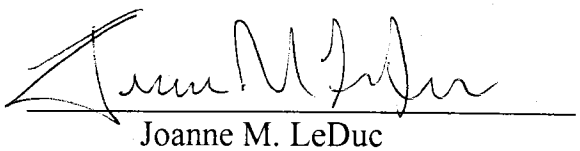
X by transmitting a PDF version of this document to each of the following using the e-mail addresses indicated below:

WEINBERG, ROGER & ROSENFELD
David A. Rosenfeld, Esq.
drosefeld@uioncounsel.net
Caroline Cohen, Esq.
ccohen@unioncounsel.net

FINE, BOGGS & PERKINS, LLP
John P. Boggs, Esq.
jboggs@employerlawyers.com
Roman Zhuk, Esq.
rzhuk@employerlawyers.com

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

Executed this 24th day of April, 2018, at San Francisco, California.



Joanne M. LeDuc