S174475

IN THE SUPREME COURT OF CALIFORNIA

SONIC-CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent.

Following a Decision of the Court of Appeal, Case No. B204902
Second Appellate District, Division Four

Appeal from an order of the Superior Court of California, County of Los Angeles
Case No. BS107161, Hon. Aurelio N. Munoz, Judge

REPLY BRIEF FOLLOWING REMAND FROM UNITED STATES SUPREME COURT

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INTRODUCTION

In addressing the significance of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, 131 S.Ct. 1740, Sonic-Calabasas A, Inc. ("Sonic") proclaims that *Concepcion* "makes clear that any argument of unconscionability that is based on public policy ... is preempted by the FAA." (Sonic Supp. Brief filed 3/12/12, p. 22.) *Concepcion* said nothing of the sort, and there is nothing in the reasoning of *Concepcion* that would support a reading of the Federal Arbitration Act that utterly obliterates its Section 2 savings clause. Quite the opposite – *Concepcion* expressly acknowledged that the Section 2 "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress or unconscionability" that are not arbitration-specific. (*Concepcion, supra,* 131 S.Ct. at 1746, citing *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687, and *Perry v. Thomas* (1987) 482 U.S. 483, 492-493, n. 9.)

Sonic conflates the reasoning expressed in Justice Thomas' solo concurrence with the reasoning of the *Concepcion* majority. The majority decision did not in any way embrace Justice Thomas' unique view that "contact defenses unrelated to the making of the agreement – such as public policy – could not be the basis for declining to enforce an arbitration clause." (*Concecpcion,* Thomas, J., concurring at 1755.) That is no more the majority

view of the United States Supreme Court than the proposition, advanced by Justice Thomas in numerous cases, that the Federal Arbitration Act does not apply to proceedings in state courts. (*Preston v. Ferrer* (2008), 552 U.S. 346, 363 (Thomas, J., dissenting).)

Though *Concepcion* went further than prior United States Supreme Court decisions dealing with the enforceability of arbitration agreements, by holding that the state law rule at issue, a rule based on the doctrine of unconscionability, was preempted by the FAA, *Concepcion* neither said nor suggested that *every* state law rule based on unconscionability, and/or public policy is preempted by the FAA. Preemption under *Concepcion* will only override a generally applicable contract defense that does not discriminate against arbitration agreements where that defense is "absolutely inconsistent with the provisions of the [A]ct," i.e., where the state law rule based on that generally applicable contract defense "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Concepcion, supra,* 131 S.Ct. at 1748.) Preemption resulted, in *Concepcion,* only because the class proceedings required under California's state law rule in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, were held to "interfere[] with fundamental attributes of arbitration." (*Concepcion, supra,* at 1748.) There is no preemption under *Concepcion* when the state law rule is based on a generally applicable Section 2

contract defense that does not "prohibit outright" the arbitration of a particular claim, does not discriminate against arbitration agreements, and does not "interfere with fundamental attributes of arbitration." Here, because the state law rule adopted by this Court in its prior decision was based on generally applicable contract defenses, that neither "prohibits outright" the arbitration of wage disputes, nor discriminates against arbitration agreements, nor "interferes with fundamental attributes of arbitration," there is no FAA preemption under *Concepcion*.

ARGUMENT

1. *Armendariz* Challenges To The Enforceability of Arbitration Agreements Survive *Concepcion*

No matter how fundamentally unfair, oppressive, one-sided, and contrary to public policy a provision may be within an adhesive arbitration agreement imposed by an employer as a condition of employment, in Sonic's view, *Concepcion* "made it clear that the saving clause does not permit state interference with arbitration where, as here, the arbitration procedures are not honored as drafted." (Sonic Supp. Brief, p. 19.) This incredibly sweeping assertion, which reduces the savings clause to a nullity, has no basis in *Concepcion*. It certainly cannot be reconciled with the subsequent U.S. Supreme Court decision in *Marmet Health Care Center v. Brown* (2/21/2012) 132 S.Ct. 1201, in which the Court, after concluding that a state's public policy

of categorically denying enforcement of pre-dispute agreements to arbitrate claims of negligence resulting in injury or death of nursing home residents was preempted by the FAA, nonetheless remanded the matter for consideration "whether, absent that general public policy, the arbitration clauses [at issue] are unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA."

Of course, preemption must be found when a state public policy categorically denies enforcement to arbitration agreements solely on the basis of choice of forum, i.e., that "prohibits outright" arbitration. That was why Labor Code § 229 was preempted in *Perry v. Thomas* (1987) 482 U.S. 483, and Labor Code § 1700.44(a) was preempted in *Preston v. Ferrer* (2008) 552 U.S. 346. Sonic grossly misrepresents this Court's prior decision in an attempt to pigeonhole it along with state law rules solely based upon choice of forum grounds – "[t]he decision would require that any arbitration agreement which required binding arbitration of all wage claims to first proceed through the California Labor Commissioner's administrative adjudication process, notwithstanding the Federal Arbitration Act." (Sonic Supp. Brief, p. 12.) That is not what this Court held. While holding that state public policy prohibits pre-dispute waivers of the various protections and remedies associated with the Labor Commissioner's wage adjudication ("Berman") process, this Court did

not adopt a state law rule that categorically prohibits arbitration as a substitute for the Berman process. "It may be possible for an arbitration system to be designed so that it provides an employee all the advantages of the Berman hearing and posthearing protections. But there is no indication that the present arbitration system is so designed." (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 681, fn. 4.)

In Sonic's view, the FAA gives employers the right to enforce arbitration agreements that were imposed as a condition of employment "according to their terms," even when those terms are substantively unconscionable and contrary to public policy. For this view to prevail, *Concepcion* must be read to overturn *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. As explained in this Court's prior decision: "In *Armendariz*, we concluded that [mandatory employment arbitration] agreements were enforceable, provided they did not contain features that were contrary to public policy or unconscionable. We concluded that arbitration agreements cannot be made to serve as a vehicle for the waiver of [unwaivable] statutory rights." (*Sonic-Calabasas A, Inc., supra,* 51 Cal.4th at 676-677, internal quotation marks and citations omitted.)

Concepcion itself cited *Armendariz* in discussing the elements of unconscionability under California law. (*Concepcion, supra,* 131 S.Ct. at

1746.) Yet, nowhere in the decision did the U.S. Supreme Court so much as question the holding or rationale of *Armendariz.*

Federal court decisions since *Concepcion* confirm the continuing vitality of *Armendariz.* "Arbitration is also recognized as an effective vehicle for vindicating statutory rights, but only 'so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum.'" (*In re American Express Merchants' Litigation* ["*Amex*"] (2nd Cir. 2012) 667 F.3d 204, 214, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 632.) Of course, the Second Circuit decision did not refer to *Armendariz,* as *Amex* did not involve a California state law rule. But the Court's reasoning, in refusing to enforce arbitration where "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws," (*Amex, supra,* 667 F.3d at 217), parallels this Court's reasoning that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights." (*Armendariz, supra,* 24 Cal.4th at 101.) It was this reasoning that led the Second Circuit, in *Amex,* to hold – for the third time – once prior to the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) __U.S.__, 130 S.Ct. 1758, once following remand from the U.S. Supreme Court when it held that its original analysis was unaffected by *Stolt-*

Nielsen, and finally, following supplemental briefing on the impact, if any, of *Concepcion* on the prior decisions – that the FAA does not require enforcement of an arbitration agreement where arbitration would deprive plaintiffs of the opportunity to vindicate their statutory rights. (See discussion of procedural history at *Amex, supra,* 667 F.3d at 206.)

In another post-*Concepcion* case, this one involving a California state rule of law, the Ninth Circuit expressly reaffirmed the continuing validity of *Armendariz*: "*Concepcion* did not overthrow the common law contract defense of unconscionability whenever an arbitration clause is involved. Rather, the Court reaffirmed that the savings clause preserves generally applicable contract defenses such as unconscionability, so long as those doctrines are not 'applied in a fashion that disfavors arbitration.'" (*Kilgore v. KeyBank National Ass'n.* (9th Cir. 2012) __ F.3d __, 2012 WL 71834 *13, citing *Concepcion, supra,* 131 S.Ct. at 1747.) In deciding whether arbitration clauses in student loan agreements were unconscionable under California law, the Ninth Circuit specifically applied the *Armendariz* test:

> Unconscionability under California law "has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one sided results." *Armendariz* [*supra,* 24 Cal.4th at 99] Courts use a "sliding scale" in analyzing these two elements: "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

> No matter how heavily one side of the scale tips, however, *both* procedural and substantive unconscionability are required for a court to hold an arbitration agreement unenforceable. *Id.*

(*Kilgore, supra,* 2012 WL *13.)

2. The State Rule of Law Adopted By This Court In Its Prior Decision Survives *Concepcion*

The focus of the analysis, under *Armendariz,* is simply put and derives from Section 2 of the FAA: "Are there reasons, based on general contract law principles, for refusing to enforce [an] arbitration agreement? In the present case, the answer turns on whether and to what extent the arbitration agreement was unconscionable or contrary to public policy...." (*Armendariz, supra,* 24 Cal.4th at 99.) This Court proceeded to hold, based upon the application of general state law contract principles regarding the unwaivability of public rights (*id.,* at 100) that California courts must refuse to enforce mandatory employment arbitration agreements, or provisions in such agreements, that violate public policy or are unconscionable, including provisions, *inter alia*, that limit statutorily imposed remedies such as attorneys' fees (*id.,* at 103) and that subject employees to any type of expense that the employee would not be required to bear if he or she were free to bring the action in court (*id.,* at 107-111).

In its prior decision in this matter, the Court proceeded, as it had in *Armendariz,* to determine that the underlying claim – here, the right to payment

of unpaid wages – "is not merely an individual right but an important public policy goal .... [that] cannot be contravened by a private agreement." (*Sonic-Calabasas A, Inc., supra,* 51 Cal.4th at 679.) Then, applying *Armendariz,* this Court concluded that the Berman hearing and post-hearing process was "chiefly designed to reduce the costs and risks of pursuing a wage claim," and that the protections provided by that process – including, *inter alia,* the one-way fee provision under Labor Code § 98.2(c) that immunizes an employee from exposure to the employer's attorneys' fees, the provision for no-cost legal representation of the employee by a Labor Commissioner attorney under Labor Code § 98.4, the requirement that the employer post an undertaking under Labor Code § 98.2(b), and the provision for the Labor Commissioner to enforce any judgment under Labor Code § 98.2(i) – are "central to that purpose" of reducing the costs and risks of pursuing wage claims. (*Id.,*at 679-680.) The Court thus held that a Berman waiver – i.e., a waiver of these protections, is contrary to public policy. (*Id.,* at 684.)

The Court also found the agreement to waive these protections was procedurally unconscionable, in that "the agreement was one of adhesion and imposed as a condition of employment," and substantively unconscionable in that the waiver of these protections "can only benefit the employer at the expense of the employee," and thus "is markedly one-sided." (*Id.,* at 685-686.)

Indeed, it is beyond comprehension how any other conclusion could have been reached. How could this sort of agreement not been beyond the reasonable expectations of the weaker party? Not only did Sonic's arbitration agreement result in a sweeping deprivation of substantive rights that are critical for pursuing wage claims (one way fee shifting to immunize employees from the risk of employer attorneys' fees, employee access to no-cost legal representation provided by the Labor Commissioner, the Labor Commissioner's assistance in enforcing any judgment, and the security provided by an employer posted undertaking), but as Sonic itself acknowledges, the deprivation of these rights was hidden from the employee, as the deprivation was not mentioned anywhere in the agreement. In Sonic's words: "Also important to a proper understanding is acknowledging the fact that the arbitration agreement in the present case did not have any so-called 'Berman Waiver.' Instead, the arbitration agreement broadly required that any and all claims between the parties be submitted to binding arbitration in the first instance and there was simply no exception spelled out for wage claims."[1] (Sonic Supp. Brief, at 12.) Instead of an express

[1] Sonic misrepresents its agreement when it asserts that it applies "to any and all claims between the parties." In actuality, the mandatory agreement expressly does not apply to certain types of administrative claims – namely, "claims for medical and disability benefits under the California Workers Compensation Act and Employment Development Department claims." (See Court Transcript 0009.) Notably, these sorts of administrative claims provide for limited and only indirect employer exposure to liability.

Berman waiver that clearly notifies employees of the rights that are forfeited by operation of this mandatory agreement, Sonic cleverly created an agreement that silently operates to deprive employees these rights.

This Court's conclusions, that this arbitration agreement violates public policy and is unconscionable, are not in any way affected by *Concepcion*. As discussed in our Initial Brief Following Remand, *Concepcion* had nothing to say about the standard for determining whether a contractual provision is contrary to public policy or unconscionable under state law. Moreover, as this Court noted in its prior decision, "our conclusion that a Berman waiver is contrary to public policy and unconscionable is equally applicable whether the waiver appears within an arbitration agreement or independent of arbitration." (*Id.*, at 689.) This decision is thus of critical importance, not just for employees subject to mandatory arbitration agreements, but also, for the millions of California employees who are not covered by such agreements, as it prohibits their employers from requiring them to adjudicate any wage disputes in court rather than before the Labor Commissioner, and thereby ensures that they cannot be deprived of the various protections provided by the Berman process. Furthermore, the FAA provides for only partial coverage of employment agreements, as the Act expressly provides that "nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of

workers engaged in foreign or interstate commerce." (FAA § 1.) As the U.S. Supreme Court made clear in *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, Section 1 exempts transportation workers from the FAA, so as to that category of workers, there can be no FAA preemption of the state law rule adopted by this Court in its prior decision.

3. *Concepcion* Does Not Authorize The Enforcement of Mandatory Employment Arbitration Agreements That Deprive Employees of Substantive Rights

This leaves us with the question of whether, as a result of *Concepcion,* there is FAA preemption of the state law rule adopted by this Court in its prior decision as to those employees subject to mandatory arbitration agreements that are covered by the FAA. That could only be so if a provision that is not part of an arbitration agreement that strips employees of substantive rights that are founded upon state public policy, and thus, is unenforceable because it is contrary to public policy and unconscionable, is somehow made enforceable under the FAA for the sole reason that this same provision is contained within an arbitration agreement. This would come as a surprise to the drafters of the FAA, as "[t]he purpose of Congress in 1925 [when it enacted the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so." (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, n. 12.) There is certainly nothing in the text of the FAA that would suggest it was

intended to preempt substantive state law rights of general application. Nor is there anything in *Concepcion* that would suggest that arbitration would have been enforced if the arbitration agreement would operate to deprive a consumer filing an arbitration claim of any individual remedy he or she could obtain in a non-arbitral proceeding. In its decision, the U.S. Supreme Court carefully spelled out not only how the AT&T arbitration agreement provided individual claimants with every conceivable remedy that might be available in a non-arbitral forum, but also, how the remedies provided by the agreement *exceeded* those available in a non-arbitral forum:

> In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims .... and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

(*Concepcion, supra,* 131 S.Ct. at 1744.) The Court further noted:

> The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action....

(*Id.*, at 1753.)

In short, *Concepcion* did not present the issue of whether a mandatory arbitration agreement can be enforced if the agreement deprives the weaker party of substantive rights because the agreement at issue in that case provided the consumer with all substantive rights and more. Having concluded that the arbitration agreement in *Concepcion* did not limit remedies otherwise available to individual claimants in a non-arbitral forum, the Court held that California's state law rule denying enforcement of any agreement that waives class proceedings is preempted by the FAA, because this state law rule is inconsistent with a fundamental attribute of arbitration – individual, non-class adjudications. The fact that this state rule of law was intended to prevent large companies from escaping liability for small dollar claims where individuals with such claims are unlikely to bring individual actions was held to be of no consequence: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for other reasons." (*Id.*)

The issue here is not whether some procedure is more or less desirable than some other procedure; but rather, whether a mandatory employment arbitration agreement must be enforced when it deprives employees with wage claims of substantive rights they would otherwise have in a non-arbitral, administrative forum. The issue here is not whether the FAA preempts a state law rule that is designed to allow individual claimants to prosecute on a class-

wide basis the claims of persons who themselves have not filed claims; but rather, whether the FAA preempts a state law rule that is designed to ensure that an individual employee, who has filed a claim for unpaid wages, will have all of the rights and remedies available to employees under substantive state law.

Concepcion should not be extended beyond its facts to allow – something the Court did *not* do in *Concepcion* – the enforcement of a mandatory arbitration agreement that deprives the weaker party of substantive rights otherwise available in a non-arbitral forum. The United States Supreme Court has never once said or suggested that an arbitration agreement can be used to take away substantive rights. Indeed, in more than one occasion, it has said the precise opposite – that an arbitration agreement is no more than a choice of forum, and the choice of forum must not have any impact on substantive rights. This is exactly what the Court said about this in *Preston v. Ferrer* (2008) 552 U.S. 346, 359, 128 S.Ct. 978, 987:

> Finally, it bears repeating that Preston's petition [to compel arbitration] presents precisely and only a question concerning the forum in which the parties' dispute will be heard. See *supra*, at 983. "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628, 105 S.Ct. 3346. So here, Ferrer relinquishes no substantive rights under the TAA [Talent Agencies Act] **or other California law** may accord him. But under the contract he signed, he cannot escape the resolution of those rights in an arbitral forum.

(Emphasis added.) Arbitration was enforced in *Preston* precisely because the arbitration agreement there did not result in a deprivation of substantive rights provided by *any* California law. Here, in contrast, this Court held, in its prior decision, that compelled arbitration would deprive the employee of substantive rights provided by California laws.

Because Labor Code § 1700.44(a), the TAA provision that vests initial exclusive jurisdiction with the Labor Commissioner, is nothing more than a restriction on choice of forum; i.e., because the TAA process, unlike the Berman process, is not a source of substantive rights, the U.S. Supreme Court had little difficulty holding Section 1700.44(a) preempted by the FAA.

In contrast, the Berman statutes serve as the source of various substantive rights, all of which were "chiefly designed to reduce the costs and risks of pursuing a wage claim" so as to enable employees to effectively vindicate their rights to payment of wages. (*Sonic-Calabasas A, Inc., supra,* 51 Cal.4th at 679.) The effect of depriving the wage claimant in this case of these substantive rights would be dramatic and would undoubtedly spell the end of his pursuit of this wage claim. Most notably, by depriving Mr. Moreno of the protections of one-way fee shifting under Labor Code § 98.2(c), he would be exposed to the

risk of paying his employer's attorneys' fees.[2] It is impossible to overstate how this risk, when put back into the equation if indeed this arbitration agreement can be enforced so as to eliminate this substantive right, would necessarily cause any employee, with anything less than an extraordinarily high value wage claim, to abandon the wage claim in order to forego the exposure to employers' attorneys' fees that are likely to equal, or spectacularly exceed, the value of the wage claim. Likewise, by eliminating access to an attorney, provided by the Labor Commissioner at no cost under Labor Code § 98.4, this arbitration agreement, if enforced, would compel a wage claimant to seek out and pay for his own legal counsel to represent him in the arbitration proceedings, or face the employer unrepresented in proceedings that include "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." (CT 0009.) The recitation of these consequences makes clear that if this arbitration agreement is enforced so as to deprive Mr. Moreno and other employees of Sonic of the substantive rights provided by the Berman statutes, the inexorable result will be that Sonic will gain, through the vehicle of mandatory arbitration,

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[2] Quite the contrast from the AT&T arbitration agreement considered by the U.S. Supreme Court, which expressly denied AT&T any right to seek reimbursement of its attorneys' fees. (*Concepcion, supra,* 131 S.Ct. at 1744.)

wholesale immunity from Labor Code's wage payment laws.

4. *Concepcion* Does Not Authorize the Preemption of the State Rule of Law Adopted by This Court in Its Prior Decision

We are left, then, with Sonic's urging that *Concepcion* somehow super-charged *Preston,* transforming it from a case that had no applicability to a challenge to the enforcement of an arbitration agreement on generally applicable public policy and unconscionability grounds, to a case that makes FAA § 2 an artifact of the past. An examination of the text of *Concepcion* reveals the falsity of Sonic's contention. *Preston* first shows up in *Concepcion* in this passage: "When a state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer,* 52 U.S. 346, 353." (*Concepcion, supra,* 131 S.Ct. at 1474.) Here, in contrast, the state law rule adopted by this Court in its prior decision did not "prohibit outright" the arbitration of wage claims, expressly allowing for such arbitration as an alternative to the Berman process so long as the arbitration agreement provides employees with all of the protections available under the Berman statutes. (*Sonic-Calabasas A, Inc., supra,* 51 Cal.4th at 681, n. 4.)

Concepcion makes only one other reference to *Preston*:

> [I]n *Preston v. Ferrer*, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to

> achieve streamlined proceedings and expeditious results," which objective would be "frustrated" by requiring a dispute to be heard by an agency first. 52 U.S., at 357-358, 128 S.Ct. 978. That rule, we said, would at the least, hinder speedy resolution of the controversy. *Id.*, at 358, 128 S.Ct. 978.

(*Concepcion, supra,* 131 S.Ct. at 1749.) Sonic would take this excerpt from *Preston*, and use it to strike down every conceivable challenge to the enforcement of an arbitration agreement because every single such challenge (particularly those challenges that are successful under the savings clause) will necessarily result in a delay of arbitration. But context is everything, and in ignoring context, Sonic fails to consider whether there are countervailing factors that would justify some delay – or, in some cases (i.e., where unconscionability permeates an agreement, or where the agreement was procured through fraud or duress), permanent derailment of arbitration.

The context in *Preston* was that no Section 2 purpose could be served by the delay, in the delay would result from application of a state law that mandated an administrative hearing before the Labor Commissioner as the forum for any controversy arising under the TAA, without providing the parties to the controversy with any substantive rights or protections founded upon public policy. As such, there could be no basis for any challenge to the arbitration agreement on public policy or unconscionability grounds, and there was no such challenge. In the words of the Supreme Court, by arbitrating this

controversy, "Ferrer relinquishes no substantive rights the TAA or other California law may accord him." (*Preston, supra,* 128 S.Ct. at 359.) Without any Section 2 purpose for the delay of arbitral proceedings, the delay could not be justified under the FAA.

The context in *Concepcion* was that the delay that would result from requiring class proceedings in an arbitration, which the U.S. Supreme Court found to "interfere[] with fundamental attributes of arbitration." (*Concepcion, supra,* 131 S.Ct. at 1748.) The Supreme Court identified specific ways in which required, non-consensual class proceedings are inconsistent with these "fundamental attributes of arbitration." (*Id.,* at 1750-1752.) At the root of all of these inconsistencies, was the fact that "changes brought about by the shift from bilateral arbitration to class action arbitration are fundamental .... as a structural matter." (*Id.,* at 1750.) There are no such "fundamental" or "structural" changes to arbitration brought about by ensuring that employees are not deprived of the protections of the Berman statutes before enforcing a mandatory employment arbitration agreement. Unlike class arbitrations, which require the express consent of the parties because class proceedings are such an unusual sort of arbitration proceeding, i.e., so inherently different from the "model" of bilateral arbitration, the protections of the Berman statutes are not in any way "fundamentally" or "structurally" inconsistent with traditional bilateral

arbitration.

According to *Concepcion,* the resolution of class-wide consumer arbitrations generally takes around 600. (*Id.,* at 1751.) In contrast, on average claims are resolved through the Labor Commissioner's Berman process in four to six months. (*Sonic-Calabasas A, Inc., supra,* 51 Cal.4th at 681, fn. 5, citing *Cuadra v. Millan* (1998) 17 Cal.4th 855, 860-862, n. 7.) So not only are we looking at Berman protections that are consistent with traditional bilateral arbitration, we are looking at a minor and inconsequential delay of arbitration – a delay that is necessary to ensure that mandatory employment arbitration agreements do not become the vehicles of the deprivation of individual employee's rights. This minor delay, for a purpose consistent with Section 2 of the FAA, cannot seriously be said to interfere with any "fundamental attribute" of arbitration.

CONCLUSION

For all of the reasons set forth herein, we respectfully request that this Court reaffirm its prior decision in this matter, and hold that *Concepcion* does not warrant any change in he conclusions set out in that prior decision. A contrary holding, that the FAA preempts the state law rule adopted by this Court in its prior decision – that a predispute waiver of the protections that flow from the Berman statutes, imposed as a condition of employment, violates public

policy and is unconscionable – would represent a radical departure from the legal principle, articulated in an unbroken line of federal and state cases, that mandatory arbitration cannot serve as vehicle for the deprivation of substantive rights. The state law rule denying enforcement to any predispute agreement that deprives employees of the substantive rights set out in the Berman statutes neither "prohibits outright" the arbitration of wage claims, nor discriminates against arbitration agreements, nor stands as an obstacle to the accomplishment of the purposes of the FAA, nor interferes with any of the "fundamental attributes of arbitration." As such, there is no basis for finding preemption under *Concepcion*.

Dated: March 26, 2012

LOCKER FOLBERG LLP

Miles E. Locker
Attorney for Defendant/Respondent

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204)

The text of this REPLY BRIEF FOLLOWING REMAND FROM UNITED STATES SUPREME COURT consists of 5,040 words as counted by the Corel Word Perfect X4 word processing program used to generate this document.

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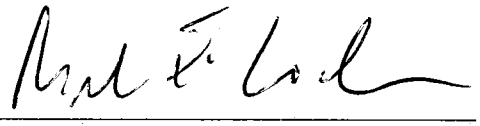
By: 

Miles E. Locker
Attorneys for Defendant/Respondent

PROOF OF SERVICE
(CCP Section 1013a(2))

I, Miles E. Locker, hereby certify that I am an active member of the State Bar of California, and I am not a party to the within action. My business address is Locker Folberg LLP, 235 Montgomery Street, Suite 835, San Francisco, CA 94104.

On the date hereof, I caused to be served the following document:

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

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

Executed at San Francisco, California, on Monday, March 26, 2012.

Miles E. Locker