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 Appellant.

v.

KEN KHO,

Defendant and Petitioner, Real Party in Interest,

v.

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

Intervenor and Appellant.

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

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF ALAMEDA
CASE NUMBER RG15781961
HONORABLE EVELIO GRILLO, PRESIDING

REPLY BRIEF OF REAL PARTY IN INTEREST, KEN KHO

DAVID A. ROSENFELD, BAR NO. 058163
CAREN P. SENCER, BAR NO. 233488
CAROLINE N. COHEN, BAR NO. 278154
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Tel: (510) 337-1001
Fax: (510) 337-2013
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
ccohen@unioncounsel.net

Attorneys for *Petitioner and Real Party in Interest,* KEN KHO

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 Appellant.

v.

KEN KHO,

Defendant and Petitioner, Real Party in Interest,

v.

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

Intervenor and Appellant.

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

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF ALAMEDA
CASE NUMBER RG15781961
HONORABLE EVELIO GRILLO, PRESIDING

REPLY BRIEF OF REAL PARTY IN INTEREST, KEN KHO

DAVID A. ROSENFELD, BAR NO. 058163
CAREN P. SENCER, BAR NO. 233488
CAROLINE N. COHEN, BAR NO. 278154
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Tel: (510) 337-1001
Fax: (510) 337-2013
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
ccohen@unioncounsel.net

Attorneys for *Petitioner and Real Party in Interest,* **KEN KHO**

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Federal Statutes

State Statutes

I. INTRODUCTION

OTO, LLC's Answer Brief (RAB) has no theme or coherent position. It ignores the more recent decisions of this Court in *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899 (*Sanchez*); *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945 (*Citibank*); and *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237 (*Baltazar*) which have clarified and strengthened this Court's decision in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*). OTO ignores the command of *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*) which reemphasizes the importance in California law of protecting workers.

OTO argues that the procedural unconscionability is "minute," contrary to the court below which found "that the degree of procedural unconscionability was extraordinarily high." (*OTO, LLC v. Kho* (2017) 14 Cal.App.5th 691, 709 (*OTO v. Kho*).) The argument highlights how extraordinarily unfair the employer's process was which forced Mr. Kho, while working, to sign an agreement that he did not understand. The argument ignores the holding of this Court that such a contract of adhesion is unconscionable and requires a court to review the substantive unconscionability of the Arbitration Agreement.

OTO argues that there is no substantive unconscionability without addressing the real issue, that the entire Berman statutes[1] provide important protections and tilt the enforcement process favorably towards the wage claimant and against the employer. Most fundamentally, OTO focuses only on a few provisions of the entire Berman statutes and ignores the entire

[1] In Petitioner's Opening Brief (POB) at 13, we explained that the reference to "Berman statutes" is the entire process from filing claims to the trial de novo to enforcement procedures. References to the "Berman hearing" are to the hearing process before a Deputy Labor Commissioner who issues the Order Decision and Award (ODA).

context, which gives the wage claimant procedural and substantive advantages while providing protections from the employer against whom a claim is made.

OTO furthermore fails to explain why the far more complicated civil proceedings that it imposes on the individual wage claimant do not render the Arbitration Agreement unconscionable. Indeed, OTO concedes that these procedures render the process more complicated, effectively conceding the unconscionability of the process. As we shall address, its only rejoinder is that the wage claimant can use counsel on a contingency basis to move through the minefields of civil litigation because in some cases fees can be obtained, even for small wage claims.

OTO fails to address most of the favorable provisions of the Berman statutes. OTO fails to confront many of the other issues raised by the Petitioner and Real Party in Interest, Ken Kho (Kho or Petitioner).

Finally, Petitioner addresses briefly the question of whether the trial court properly vacated the ODA and the applicability of Code of Civil Procedure section 1094.5. Most strikingly, OTO concedes that Code of Civil Procedure section 1094.5 does not apply but still attempts to rely upon it to argue that the ODA should have been vacated, rather than as the Labor Commissioner and Petitioner argue to conduct a trial de novo as required by Labor Code section 98[2] without vacating the ODA.

[2] All further statutory references are to the California Labor Code unless otherwise stated.

II. THE ARGUMENTS OF OTO EMPHASIZE AND REINFORCE THE UNCONSCIONABILITY, BOTH PROCEDURAL AND SUBSTANTIVE, OF THE OTO AGREEMENT, RATHER THAN JUSTIFY THE AGREEMENT

A. THE GENERAL PRINCIPLES

All seem to agree that both procedural and substantive elements of unconscionability must be present in order to find an agreement unconscionable. (See RAB at 20. See also *Sanchez*, *supra*, 61 Cal.4th at p. 910 [quoting *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*)].)

OTO, however, ignores the elaboration that this Court went at lengths to explain in *Sanchez*, *supra*, 61 Cal.4th at pp. 910-911. OTO claims that the standard remains "shock the conscience." (See RAB at 23.) See also *Baltazar*, *supra*, 62 Cal.4th at pp. 1243-1245.) Among the terms that this Court approved, given the context of the Berman statutes, we believe the phrase that is most applicable is "unreasonably favorable" because the Berman statutes are designed to create a process that is favorable to the wage claimant, and OTO's process is unreasonably favorable to the employer, contrary to the entire statutory scheme. (See *Sonic II*, *supra*, 57 Cal.4th at pp. 1133, 1147, 1159.)

The parties agree that there is a sliding scale, meaning the more procedurally unconscionable, the less substantively unconscionable a contract must be to find it unconscionable and to refuse enforcement, and vice versa. (See RAB at 20.)

The parties agree that the burden is on Kho and the Labor Commissioner to demonstrate the unconscionability. OTO does not expressly make this point, but we agree that the burden lies squarely with the party who asserts unconscionability. (See *Sanchez*, *supra*, 61 Cal.4th at p. 911.)

OTO, however, ignores the important instruction that a contract must be evaluated within its context. This Court made clear that "[a]n evaluation of unconscionability is highly dependent on context." (*Sanchez*, *supra*, 61 Cal.4th at p. 911. See also *Sonic II*, *supra*, 57 Cal.4th at pp. 1147-1148.) This was made evident in *Sanchez*, which this Court described as a commercial case involving the purchase of "a high-end luxury item." (*Sanchez*, at pp. 914, 921.) The purchaser in that case was apparently well financed and the issue of affording litigation in court or before an arbitrator was not at issue. (*Id.* at p. 921.) *Sanchez* also made it clear that the Court continues to recognize the difference between buying a consumer item and the pressures on the wage earner: "a family in search of a job confronts a very different set of burdens than one seeking a new vehicle." (*Id.* at pp. 919-920.)

In summary, OTO has attempted to mischaracterize the standard applied by this Court with respect to determining unconscionability and has deliberately ignored the context in which unconscionability is determined. Here, the framework that is most important to keep in mind is that the Berman statutes provide a very "accessible and affordable" process, which in many respects assists the wage claimant in collecting unpaid wages without cost or the complications of court proceedings.[3] This is the fundamental concept that is missing from OTO's argument.

The finding of the court below that the procedural unconscionability "demonstrated a high degree of oppression" is not undermined by OTO's arguments.

---

[3] *Sanchez* dealt with consumer protection statutes which were designed to protect indigent consumers and not well-financed consumers such as Mr. Sanchez.

B. PROCEDURAL UNCONSCIONABILITY

OTO first argues that a court must find both surprise and oppression with respect to the procedural elements of unconscionability. (See RAB at 22.) This proposition was rejected in *Sanchez*, in which this Court clearly used the word "or." (See *Sanchez*, *supra*, 61 Cal.4th at p. 910 [citing *Sonic II*, *supra*, 57 Cal.4th at p. 1133].) The court below explained the difference, using the word "or" again. (*OTO v. Kho*, *supra*, 14 Cal.App.5th at pp. 707-709.)

OTO submits that the procedural unconscionability is "minute" even in light of the record that the degree of oppression was "extraordinarily high." (See RAB at 20.)

This Court resolved the question of whether a preprinted contract of employment is one of adhesion in *Baltazar*. In that case, the Court found no procedural unconscionability except that the arbitration agreement was a preprinted form that was a requirement of employment. It then went on to analyze the substantive unconscionability and found none in that case. OTO's argument that the Agreement in this case is "not one of adhesion" should be rejected, both because of this Court's decision in *Baltazar* and because here, as noted below, all employees of OTO are required to sign the same contract. (See also *Sanchez*, *supra*, 61 Cal.4th at pp. 913-914 [preprinted contract is adhesive]; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248.)

There are two factual misstatements in OTO's RAB that are of significance and substantially undermine the credibility of its arguments to this Court.

OTO first suggests that Mr. Kho was required to sign the Arbitration Agreement "at the beginning and in the middle of his employment." (RAB

at 21.) There is no evidence that Mr. Kho was asked to sign any arbitration agreement at the beginning of his employment in 2009, although he was required to sign various documents at that time. (CT 109.) OTO never asserted that he signed one at the beginning of his employment before the reference in the brief before this Court, and the only Arbitration Agreement ever submitted to the trial court or considered by the appellate court was the one that he signed in 2013, almost four years after he started work.[4] Since it is also conceded that OTO has the burden of proving that there is an arbitration agreement, OTO certainly would have offered an earlier agreement had it existed. We note this mistake because if Mr. Kho had signed two agreements and if OTO had proven it, OTO would have a better argument in light of *Baltazar*, a case that it does not even cite. Palpably, this position is incorrect.

Second, OTO claims that there is nothing in the record that shows that the Arbitration Agreement was presented on a "take-it-or-leave-it basis." (RAB at 21 and 23.)

When Mr. Kho started his employment, he was required to sign a group of documents while working and was provided no opportunity to review those documents. (CT 109.) This reflects the "take-it-or-leave-it" process by which the employer required employees to sign documents. He was required to "sign them quickly and return them immediately to the human resources representative." (CT 109.)

The same process happened three years later when he was required to sign "additional paperwork." (CT 109.) He was given "about three to four minutes ... to sign those documents." The human resources

---

[4] This assertion is contrary to the statement made in its Memorandum of Points and Authorities in Support of Petition to Compel Arbitration. (CT 55.)

representative waited ("hovered") while he was at his work station to have him complete those documents. He was working piece rate, and any time he took to review and question the documents would have reduced his pay and productivity. The documents included both the Arbitration Agreement and a separate document acknowledging a new pay plan, which likely was of more interest to him. (See CT 115-116.)

What OTO fails to acknowledge is that its own witness stated that all employees were required to sign the very same document: "All personnel who commence or continue employment at One Toyota of Oakland are required to comply with the company's alternative dispute resolution policy, which includes the mandatory arbitration of employment-related claims." (CT 60.)[5] The declaration does not suggest that Mr. Kho was required to sign the document initially upon employment but only in 2013, more than three years after he was employed.

OTO is correct that Mr. Kho didn't ask any questions of the human resources representative. There is no suggestion that the representative was authorized to answer any questions and the person waited while Mr. Kho signed all the documents. Moreover, the employer did not provide copies for Mr. Kho to review. Nor was there even an opt-out provision. This Court in *Sanchez* rejected the necessity of "require[ing], as a prerequisite to finding procedural unconscionability, that the complaining party show it tied to negotiate standardized contract provisions." (*Sanchez*, *supra*,

---

[5] As noted, Mr. Kho was required to sign a new pay plan. That pay plan included elements of a piece rate system and was presented on the same "take-it-or-leave-it" basis. That pay plan does not comply with state law. (See § 226.2, subd. (a) and *Gonzales v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36.) Section 226.2, subdivision (b) and the subsequent subsections would not be applicable to Kho since OTO is a new car dealer. (§ 226.2, subd. (g)(6).)

61 Cal.4th at p. 914.) The same applies with more force to an employee such as Mr. Kho.

Although OTO is correct that the Arbitration Agreement refers to "employment-at-will and arbitration," there is no evidence that Mr. Kho had any idea what he was signing. Compare *Baltazar* (employee was well aware of arbitration and raised questions about it), or *Sanchez* (consumer purchasing high end automobile with financial ability to pay for some arbitration costs), or *Sonic II* (salaried employee at relatively high salary level). All Mr. Kho knew was, consistent with when he was first hired, he was required to sign all the documents and had to do so while he was working. And, as noted above as a flat rate mechanic, any time he takes to read documents and question their meaning directly reduces his earnings, which are dependent upon the amount of work he performs.

The prolix, complicated and legalese language, as well as the small font used, further confirms the take-it-or-leave-it nature of the Arbitration Agreement, which could not be scrutinized by anyone in any reasonable manner.

In summary, the court below was correct that the degree of unconscionability was "extraordinarily high." There are both elements of surprise and oppression. We address below the substantive unconscionability of the Arbitration Agreement. This all demonstrates the correctness of this Court's rule that in the employment context, in particular, a standardized arbitration agreement is normally a contract of adhesion and constitutes the element of procedural unconscionability. It is a contract of adhesion, which "'term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (*Armendariz, supra*, 24 Cal.4th at

p. 113 [quoting *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694].)

C. SUBSTANTIVE UNCONSCIONABILITY

The arguments of OTO do not undermine the arguments made by Kho and the Labor Commissioner that the Arbitration Agreement is substantively unconscionable because it is neither accessible nor affordable.

1. OTO Fails to Analyze the Totality of the Agreement as to Whether It Is Accessible and Affordable

OTO offers no coherent analysis of the Arbitration Agreement to explain why it is on the whole "accessible and affordable." Rather, OTO analyzes four provisions, which it concedes by its argument undermine the accessibility and affordability of the Arbitration Agreement. (RAB 23-29.) OTO does acknowledge indirectly that the "accessible and affordable test governs." (See RAB at 29.) It incorrectly, however, states that Petitioner insists that "an arbitration procedure [must] resemble[] the Berman hearing process." (RAB at 29.) As the Petitioner has made clear, the arbitration process must be "accessible and affordable." Here, however, as we explained in the POB, the Arbitration Agreement fails to meet those conditions because it eliminates the advantage of the Berman statutes. (POB at 30-35.) It furthermore simultaneously imposes significant barriers to wage claimants. (POB at 37-40.)

What *Sanchez* and *Baltazar* emphasize after *Sonic II*, is that the Legislature may create procedures and protections that benefit one side of a transaction. It may provide for protections for individuals who are consumers or employees against employers, or in some cases the reverse. It may do so in protecting some types of entities against others. It can provide protection for health care consumers. It can tilt the playing field substantially or not at all. These are matters of policy, and efforts by one

party to contract a relationship to undermine the balance created by the Legislature are subject to unconscionability analysis.

OTO addresses only four issues: (1) arbitration costs (RAB at 23-24); (2) attorneys' fees (RAB at 25-28); (3) initiation of the arbitration process (RAB at 28); and (4) the imposition of all of the provisions of the Code of Civil Procedure (RAB at 28-29). We address these issues in more detail later. First, we review *Sanchez* and *Baltazar* because the analysis used in those cases supports the finding of unconscionability of the OTO Agreement.

In *Sanchez*, this Court examined only certain challenged provisions of an arbitration agreement. This Court examined three different provisions only after it had found that "the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability." (*Sanchez*, *supra*, 61 Cal.4th at p. 915.) It is worth examining each of those issues because the analysis applies here and leads to the conclusion that the provisions analyzed by OTO support the conclusion that the Agreement, in its totality, is unconscionable.

First, only parties who either received nothing or more than $100,000 were allowed to appeal to an appellate tribunal. Because this Court found in the context of the purchase of this high-end vehicle that "the appeal threshold provision does not, on its face, obviously favor the drafting party" it was not unconscionable. (*Sanchez*, *supra*, 61 Cal.4th at p. 916.) In contrast, in this case, the deprivation of the advantages of the Berman statutes and the imposition of the more complicated litigation procedures considerably benefit the drafting party, namely OTO.

Similarly, in examining the right of appeal to the granting of injunctive relief, this Court recognized that the dealership, Valencia Holding, was entitled to "the extra protection of additional arbitrable

review." (*Sanchez, supra*, 61 Cal.4th at p. 917.) The result under OTO's agreement is the reverse. Analyzed in context, the OTO Agreement deprives the wage claimant, such as Mr. Kho, of the extra protections of the Berman statutes while granting a substantial measure of extra protection to OTO.[6] This is contrary to the statutory purpose.

This Court addressed a second provision, which required the car buyer to pay arbitration costs up to a maximum of $2,500, which could be reimbursed at the arbitrator's discretion. (*Sanchez, supra*, 61 Cal.4th at pp. 917-918.)

This Court contrasted that to "mandatory employment arbitration of unwaivable statutory rights, [where] we have held that arbitration agreements 'cannot generally require the employee to bear 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.'" (*Sanchez, supra*, 61 Cal.4th at p. 918 [citing *Armendariz, supra*, 24 Cal.4th at pp. 110-111].) As noted in the POB, the Berman statute process is entirely free to the wage claimant, including translators, assistance from the Labor Commissioner, and even counsel in the trial de novo; and the OTO Agreement imposes costs that would not be required. Those costs include the time and effort in dealing with the complexities of civil litigation, the possibility of needing an interpreter, and the fees that would have to be paid an attorney on a contingency basis where there is no clear statutory entitlement to fees.

---

[6] In *Sanchez*, this Court declined to address the question of whether claims under the Consumers Legal Remedies Act (CLRA), Civil Code section 1750 et seq., or unfair competition law (UCL), Business and Professions Code section 17200 et seq., could be waived by predispute arbitration. (*Sanchez, supra*, 61 Cal.4th at p. 917.) This Court has addressed that issue in *Citibank*, and found that such waiver "is contrary to California public policy and is thus unenforceable under California law." (*Citibank, supra*, 2 Cal.5th at p. 952.) This supports the finding that the provisions of the Arbitration Agreement are also unconscionable.

Further, this Court recognized that the Legislature had protected indigent consumers by applying "an ability-to-pay approach ... in the context of consumer arbitration agreements." (*Sanchez*, *supra*, 61 Cal.4th at p. 920. See Code Civ. Proc., § 1284.3.) Again, in this case, Mr. Kho, like many wage claimants, is unable to afford counsel or the other costs that were imposed by the OTO Agreement. The procedures established by the Berman statutes eliminate costs to the wage claimant (and the employer) in ways that are undermined by the OTO Agreement. This Court recognized that the Legislature had the right to develop rules that favored the indigent car buyer or, in this case, the low-wage worker and that any agreement that undermined that legislative choice would be unconscionable.

This Court in *Sanchez* recognized that "courts are required to determine the unconscionability of the contract 'at the time it was made.' (Civ. Code, § 1670.5.)" (*Sanchez*, *supra*, 61 Cal.4th at p. 920.) Kho entered into the Agreement while working. But for purposes of this case, the Agreement contemplated that it would extend even after he was terminated to any claims he raised while unemployed. Thus, the unconscionability has to be judged in light of the contemplation that it would apply when he was unemployed and with no income, seeking compensation that was not paid while working. This underscores the unconscionable nature of an agreement that makes it more difficult to obtain unpaid[7] wages.[8]

---

[7] There is some irony about a process where the employee is not paid what he is owed, including the minimum wage and then has to pay for the effort to recover what he was owed.

[8] Part of the claim is the failure of the employer to pay all wages due upon termination under section 203. OTO ignores the fact that no fees are recoverable by Mr. Kho for the pursuit of that claim under any statutory provision except in court after OTO appeals an ODA. (See § 98.2, subd. (c).) Mr. Kho is thus required to pay to recover the statutory penalty, which is designed to ensure prompt payment to protect workers.

Finally, in finding that language enforceable in *Sanchez*, this Court again noted that "[t]he dispute in this case concerns a high-end luxury item." (*Sanchez*, *supra*, 61 Cal.4th at p. 921.) The Court also noted that there was "no evidence in the record suggest[ing] that the cost of appellate arbitration filing fees were unaffordable to him ...." (*Ibid.*)[9] The contrary, of course, is true here and because of the many costs imposed on Kho, the arbitration procedure is unconscionable.

Finally, this Court addressed what appeared to be a one way provision allowing "self-help remedies, such as repossession." (*Sanchez*, *supra*, 61 Cal.4th at pp. 921-922.) In upholding that exclusion, this Court noted several issues.

First, the Court noted that the arbitration had a "contract provision that preserves the ability of the parties to go to small claims court [which] likely favors the car buyer." (*Sanchez*, *supra*, 61 Cal.4th at p. 922.) This Court recognized that that simplified small claims court procedure would favor the car buyer. Here, there is no exception that would favor the wage claimant because both the Berman statutes and small claims court are unavailable.

Second, the Court noted that "self-help remedies are, by definition, sought outside of litigation, and they are expressly authorized by statute." (*Sanchez*, *supra*, 61 Cal.4th at p. 922.) The same is true here because the wage claimant is specifically authorized by statute to use the more simplified procedure of the Berman statutes. Moreover, the Arbitration Agreement would prohibit the self-help remedy of joining with other workers to coordinate and consolidate their claims. It is also broad enough

[9] In *Sonic II*, the claimant Moreno was a highly paid sales person, and this Court was not troubled by his resort to the free Berman statute process. Compare to this case where Mr. Kho is an auto mechanic and paid substantially less.

to require the employee to utilize the arbitration process rather than take collective action of picketing or striking because it requires use of the arbitration procedure for any claim that could be brought in court. Wage claims, for example, could be the subject of public protest, but that would violate the arbitration process.

Finally, this Court noted that "the remedy of repossession of collateral is an integral part of the business of selling automobiles on credit and fulfills a 'legitimate commercial need.'" (*Sanchez*, *supra*, 61 Cal.4th at p. 922 [citing *Armendariz*, *supra*, 24 Cal.4th at p. 117].) The Labor Commissioner in California has had the authority since the nineteenth century to investigate claims. The Berman statute process was adopted in the 1970s. Although this is not "self-help," it is a process that the Legislature has felt to be necessary to protect wage claimants. The history and strength of the worker protections in California discussed in the POB at 55-58, as well as the other statutory provisions that are not waivable, serve the same purpose.

The mode of analysis by this Court in *Sanchez* of each of the three challenged provisions supports a finding in this case that the arbitration agreement is unconscionable.

This Court's analysis recently in *Baltazar* also supports this analysis and conclusion.

In *Baltazar*, this Court analyzed a challenge to the right of the parties to seek a provisional remedy. As this Court noted, it was more likely the employer would have resort to the provisional remedy provision than the employee. (*Baltazar*, *supra*, 62 Cal.4th at pp. 1246-1248.) This Court rejected that argument because the provision was facially neutral and it did not eliminate provisional remedies available to either the employee or the employer. Here, however, there are provisional remedies available to the

wage claimant, which include the initial Berman hearing process, the subsequent requirement of the posting of a bond, the immediate filing of the ODA as a judgment which is enforceable and other remedies which are eliminated by the arbitration process. Furthermore the complicated process of filing a petition to confirm an arbitration award imposes substantial burdens on enforcing an arbitration award. This weighs in favor of finding unconscionability because the OTO Agreement eliminates those provisional remedies available under the Berman statutes.

This Court addressed a second issue in *Baltazar* concerning a claim that the agreement was not a mutual agreement to arbitrate employment-related claims. (See *Baltazar*, *supra*, 62 Cal.4th at pp. 1248-1251.) The OTO Agreement is not mutual and is thus unconscionable on that ground. (See POB at 44 [discussing the fact that persons who are not bound to arbitrate are protected by the arbitration procedure].)[10]

Second, there are other provisions in the OTO Agreement not addressed in *Baltazar*, which relate to the same kinds of procedural impediments as set for wage claimants or workers like Mr. Kho. (See POB at 44-46.) Among those, for example, is the fact that Mr. Kho could jointly

[10] This point needs some clarification. Kho's agreement binds him to arbitrate disputes with the "Company" defined as "One Toyota of Oakland." However, it goes further and states this applies to "the Company (or its owners, directors, officers, managers, associates, agents and parties affiliated with its associate benefit and health plans) ...." The Agreement is not signed but is presumably binding on OTO. It is not signed by any of the other listed persons and so it is not mutual. OTO has not argued in response that because managers and officers have signed a similar agreement it is mutual. At its broadest, it applies to only those who seek or are employed. (CT 21.) It would not apply to others, including owners, directors, and officers and ... parties affiliated ...." Moreover, Kho did not agree with those others that he would be bound to arbitrate with them; the Agreement is only with OTO. OTO did not suggest in its RAB that the Agreement is mutual or respond at all to this point. This undermines the ability of wage claimants to bring actions against owners, directors and others who may be liable for unpaid wages in a single proceeding. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1089 (*Reynolds*).)

file claims with the Labor Commissioner with other employees who have the same claim about overtime or other compensation issues. Because the OTO Agreement prevents any such consolidation, they could not jointly take advantage of the Labor Commissioner process.[11] They could not invoke jointly or together the investigative process of the "field enforcement unit." (§ 90.5, subd. (b).)

Baltazar concerned a third issue. The Court dealt with a claim that the agreement was one-sided "because it provides that, in the course of arbitration, 'all necessary steps will be taken to protect from public disclosure [Forever 21's] trade secrets and proprietary and confidential information.'" (*Baltazar*, *supra*, 62 Cal.4th at p. 1250.) As noted in the POB, the OTO Agreement contains a privacy requirement that is unlimited. (POB at 44.)

In summary, the analysis of *Sanchez* and *Baltazar*, when applied to the totality of the OTO Agreement, demonstrates its substantive unconscionability because it undermines the Berman statute procedures designed to benefit wage claimants who bring claims in the Labor Commissioner.

---

[11] Under *Epic Systems Corp. v. Lewis* (2018) __ U.S.__ [138 S.Ct. 1612] and this Court's decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, the National Labor Relations Act (29 U.S.C § 151, et seq.) would not override the application of the Federal Arbitration Act (5 U.S.C. § 1, *et seq.*) to protect the right of employees to bring class actions or collective actions. *Epic Systems* does not deal with a situation where two employees bringing their claims together. That issue is not posed in this case directly, but this illustrates how the OTO Agreement is substantially one-sided, because it protects the employer from two individuals cooperating to bring their claims in a consolidated matter. For example, two individuals could go to the Labor Commissioner to initiate an investigation of wage issues or to California Occupational Safety and Health Administration to initiate a safety complaint. (See § 6310 [anti-retaliation provision].)

2. OTO's Arguments On Four Areas of the Arbitration Agreement Undermine Its Position

As noted, OTO addresses only four issues regarding provisions of the arbitration agreement, ignoring the remainder of the arguments made by Petitioner as to the wide-ranging unconscionability of the Arbitration Agreement. We address OTO's arguments here.

a. The Cost of Arbitration

Armendariz and *Sonic II* make it clear that Mr. Kho could not be required to bear any costs in the arbitration process. Although wage claimants who are not subject to an arbitration procedure have the choice of proceeding into court, the Legislature created the Berman statute remedy which provides an entirely cost free procedure to resolve claims brought before the Labor Commissioner. Here, the Arbitration Agreement is deliberately misleading. The phrase relied upon by OTO in very small font reads: "If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2." OTO could have said that it will pay all the arbitration costs for any claims which could be brought under the Berman statutes.[12] If it were simple enough to initiate arbitration proceedings by a short demand in simple English (RAB at 28) the Agreement could have directly stated: "OTO will pay all costs of the arbitration."

---

[12] This Court has explained that the employer in an arbitration setting may be required to "pay ... 'all types of costs that are unique to arbitration.'" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1085.) In this case, there are no costs for the alternative forum, so the employer has to pay all of the costs, something that is unclear in the Arbitration Agreement. The only costs that a wage claimant could incur would be if he or she decided to appeal an adverse ODA. Equally, OTO is seeking to avoid the cost of posting a bond if it appeals an ODA.

Unconscionability includes the failure to put in simple, direct terms the provisions of contracts in the context of wage earners.[13]

OTO's argument in this regard fails to address the multiple issues raised by Petitioner on this issue. (See POB at 40-44.) The fact that OTO now owns up to its responsibility under *Armendariz* to pay the cost of the arbitration does not respond to the other costs that would be incurred by Mr. Kho, including the extensive cost of his own time and resources in maneuvering through the complicated burdens of civil litigation, as compared to the Berman hearing process, where the Labor Commissioner provides assistance to both parties in a streamlined procedure. What is unconscionable is the deliberate effort to hide the employer's responsibility, thus leaving it unclear to the wage claimant as to whether he will be encumbered by such burdens and the imposition of other costs that would not have occurred under the Berman statutes.[14]

b. Attorney's Fees

OTO relies only on "Labor Code sections 218.5, 1194, and 2802 that apply to the types of claims brought to the Labor Commissioner by wage claimants." (RAB at 27.) There are problems with each reference.

First, section 218.5 applies only "if any party to the action requests attorney's fees and costs upon the initiation of the action." This is a procedural trap for any wage claimant who would not know about that

---

[13] On the other hand, business partners are in a different relationship where more complicated and dense legalese may be appropriate.

[14] The multiple court costs that can be incurred, such as filing fees, motion fees, service of process fees and so on are not waived by the language in the OTO Agreement, and these costs would not have occurred in the Berman statutes procedure or would have been borne by the Labor Commissioner in representing the claimant in the trial de novo and subsequent enforcement proceedings.

provision. OTO sets its own trap by suggesting that Mr. Kho could initiate arbitration by a simple one sentence statement: "I want to arbitrate that I didn't get paid right." (See RAB at 28.) That sentence, which OTO invites as initiating the proceeding, would not trigger section 218.5's provision.

Second, section 218.5 is not a one way provision. It allows the court to impose fees on a wage claimant if the claim is not brought in good faith. That will dissuade some wage claimants because they will not know whether their claim is in good faith or not. Under the Labor Commissioner process, the Labor Commissioner has the power not to proceed on a claim after initial investigation, thus weeding out claims that are unmeritorious. There is no risk to the wage claimant under those circumstances.[15] Moreover, OTO ignores that section 218.5 applies only for "the non-payment of wages, fringe benefits or health and welfare or pension fund contributions ...."[16] Thus, section 218.5 is limited only to wages. In Mr. Kho's case, his claim was for more than wages. It included the section 203 waiting time penalty for which there is no fee provision.

Section 1194 would encompass Mr. Kho's claim for unpaid wages and overtime but not his claim for waiting time penalties.[17]

---

[15] See section 98, which provides that "[t]he Labor Commissioner may provide for hearing in any action to recover wages ...." It is not mandatory, and the Labor Commissioner's office does not proceed on some claims. This is protection for employers.

[16] Fringe benefits, health and welfare and pension are not at issue, and the provision is probably preempted as to those issues under the terms of ERISA. (29 U.S.C. § 1144.)

[17] OTO could have made a more nuanced argument by relying on sections 1194 and 218.5 that fees are available for all services rendered by an attorney in the arbitration proceedings from start to finish while they may only be available in the trial de novo created by the Berman statutes. Presumably, OTO did not make that argument because it undermines the statutory purpose behind the Berman statutes, which is to create a system where wage disputes are heard in the Berman hearing without counsel and where wage claimants can avoid the cost of an attorney imposed by a contingency fee arrangement.

A fundamental problem with OTO's argument is that although Mr. Kho was making a claim for unpaid wages and the waiting time penalty, the Labor Commissioner has jurisdiction to hear many other claims under the Labor Code, some of which would not be entitled to a fee award.[18] Section 2802 is just of the provisions of the Labor Code that has a specific fee shifting provision. The waiting time penalty does not. Thus, there is a decided advantage to bringing a claim before the Labor Commissioner. No fees would be necessary during the Berman hearing process, and if the individual prevailed on his Labor Code claim, he or she would then be entitled to fees if the employer appealed.

OTO ignores the important proposition that the Berman hearing process is designed to avoid the necessity of lawyers on the part of either the claimant or the employer. "The Berman hearing procedure is designed to provide a speedy, informal and affordable method of resolving wage claims." (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858.)[19]

We have detailed some of these reasons in the POB at pp 30-35. OTO attempts to avoid the fee issue by suggesting that any wage claimant can enter into a contingency fee agreement, including even for a small amount. OTO argues attorneys readily "tak[e] wage and hour case[s] on

---

[18] "The Labor Commissioner may provide for a hearing ... and shall determine all maters arising under his or her jurisdiction." (§ 98, subd. (a). *Reynolds*, *supra*, 36 Cal.4th at p. 1084.)

[19] OTO makes the curious argument that the Labor Commissioner could represent Kho in the arbitration process. (RAB at 26, fn. 33.) Putting aside the practicalities, the Arbitration Agreement is "private binding arbitration," and it is hard to understand how the Labor Commissioner could participate in something that would not be public.

contingency" and "take potentially meritorious claims on a contingency basis." (See RAB at 27.)[20]

However, for wage claimants such as Mr. Kho, they have a much better option. They can proceed through the Berman hearing process, which is favorable to them, and then be represented by the Labor Commissioner at the trial de novo without any risk of paying contingency fees or at that point make the decision to seek a contingency fee arrangement with a competent lawyer. Wage claimants will have to spend a large part of their unpaid wages to collect under the OTO Agreement. Both the issue of fees and arbitration costs are risks imposed on the wage claimant in arbitration, which render it unconscionable. (*Armendariz, supra*, 24 Cal.4th at p. 110.) It is plain that the OTO process is substantially less favorable.[21]

3. Initiation of the Arbitration Process

In its brief, OTO now advises the Court something that it never represented before, that Kho could "demand arbitration by saying to a representative of OTO, 'I want to arbitrate that I didn't get paid right.'" (RAB at 28.) That illustrates again why the OTO Arbitration Agreement is

---

[20] OTO ignores that some wage claims are against employers where collection may be an issue. That would discourage an attorney from taking a case and further explains the importance of the simplified and expedited enforcement procedures.

[21] As we note in our Opening Brief, a claimant cannot have a friend or other person represent him because California law only allows attorneys in arbitration. (See POB at 39.)

inaccessible.[22] That contradicts the plain language of the OTO Agreement, which requires that "to the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of a pleading ...." And also, as pointed out above, this one sentence demand would not satisfy the requirement of section 218.5. In contrast, the Berman statute process is accessible because online forms are available and the assistance of the Labor Commissioner's office is available to a wage claimant.[23]

Inaccessibility is also highlighted because the arbitration agreement provides that the arbitrator must "be a retired California Superior Court Judge ...."[24] This would suggest that the arbitration process would be initiated by contacting a retired judge. The Superior Court Judge may know the rules of pleading, but is not trained, nor likely familiar with the rules of wage cases. The Deputy Labor Commissioners who hear the cases are trained and thus are more closely attuned to the purposes of arbitration than the inaccessible choice of a Superior Court Judge. This undermines

---

[22] OTO asserts, repeating the court below, that this permits "flexibility." The flexibility is the ability of OTO to control the process once the worker has given notice of his intent to make a claim by controlling the selection of arbitrator and the imposition of the burdensome rules of civil litigation rather than adopt a set of rules such as offered by the American Arbitration Association for employment disputes. OTO would use the "flexibility" to its advantage by controlling all the relevant choices such as using a repeat player retired judge.

[23] We are not suggesting that the state could require a clear specification of how the arbitration process could be initiated by, for example, naming the American Arbitration Association and its employment rules. In the context of this case, where the accessibility is at issue because of the availability of the Berman statute process, OTO's contradictory statement that a simple demand for arbitration would suffice where its Arbitration Agreement provides the contrary, renders the Arbitration Agreement inaccessible.

[24] That restriction serves to drastically limit the available group of arbitrators. The repeat player problem is enhanced, where retired judges would hear cases from the same employers or employer groups or the same issues. And, as noted below, it limits choices to a pool of arbitrators who have no expertise in Labor Code matters even though they may be familiar with the complexities of court procedures.

one of the purposes of arbitration, which is "'the ability to choose expert adjudicators to resolve specialized disputes.'" (*Citibank, supra*, 2 Cal.5th at p. 964 [quoting *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 348 (*Concepcion*)].) This choice limits accessibility of wage claims to an adjudicator with expertise and favors the employer with an adjudicator with expertise only in enforcing the burdens of litigation. Moreover it is more intimidating to a wage claim to bring his claim to a judge rather than the Labor Commissioner.

4. The Burdens and Risks of the OTO Arbitration Agreement

OTO concedes "the ill-effects on an employee of the complexity of navigating the Code of Civil Procedure, the California Arbitration Act or Discovery Act." (RAB at 32.) OTO further concedes by relating that "[e]very system of adjudication has benefits and detriments ...." (RAB at 29.) But this statement runs contrary to the very purpose of arbitration, which is to provide "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" (*Concepcion, supra*, 563 U.S. at p. 348 [quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 685 (*Stolt-Nielsen*)].)[25]

OTO makes the unusual argument, however, that the burden on employees should be disregarded because it asserts there is a substantial burden on employers who adopt arbitration systems where they have to pay for the cost of arbitration. (See RAB at 32.) That rationale should be rejected as irrelevant because the burden placed on the employer would not

[25] One court has noted that in the trial de novo, the Superior Court may allow discovery as appropriate: "[T]he court should give effect to the policy of the discovery statutes and of the Labor Code by limiting or precluding discovery." (*Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757, 694.) Because the Arbitration Agreement gives OTO the right to full discovery "to the extent applicable in civil actions," it makes the Arbitration Agreement far less affordable.

exist under the Berman statutes and it suggests that the employer has made a bad choice in choosing arbitration because of potential costs which it may incur. If that were true, OTO would not be litigating this case in this Court and would have consented to allow the Berman statute process to go forward, thus undermining the truthfulness of this claim.[26] This is also the wrong calculus. Employers impose substantial barriers to wage claims to prevent them from ever occurring, even if it means that there will be expense if one is made and actually pursued.

5. OTO Has Ignored All the Other Features of the Berman Hearings and the Entire Berman Statute Procedures, Which Favor Wage Claimants

OTO ignores the argument that the Arbitration Agreement is unconscionable on other grounds. (POB at 44-46.) Each of these concerns undermines the accessibility or affordability of the OTO Arbitration Agreement and tilts the process in favor of OTO. We recognize that none of these specific issues are raised in this case, but they illustrate the effort of OTO to make the Arbitration Agreement very favorable to it and daunting to any employee.

OTO has not responded to the argument that the Arbitration Agreement imposing all of the burdens, as it admits, of the Code of Civil Procedure and the other statutory requirements in litigation runs contrary to "fundamental attribute[s]" (*Sonic II, supra*, 57 Cal.4th at p. 1140) of arbitration in both federal and state law protecting arbitration. (See POB at 46-51.) It is worth quoting from *Concepcion*:

> [T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the

[26] In addition to the barrier to claims, employers are motivated to avoid class actions. Because Mr. Kho brought his claim on an individual basis, that issue is not in this case.

> process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."

(*Concepcion*, *supra*, 563 U.S. at p. 348 [quoting *Stolt-Nielsen*, *supra*, 559 U.S. at p. 685]. See also *Sanchez*, *supra*, 61 Cal.4th at pp. 912-913; *Sonic II*, at p. 1143.)

OTO ignores the public purpose in enforcing the Labor Code. (See POB at 51-55. See also *Citibank*, *supra*, 2 Cal.5th at p. 961, and *Dynamex*, *supra*, 4 Cal.5th at p. 948 [highlighting the importance of statutory purpose in the employment context].)

6. In Summary, the OTO Arbitration Agreement is a Significant Barrier to Employees Who Have Wage Claims as Compared to the Employee Favorable Provisions of the Berman Statutes

OTO fundamentally ignores that this Court was very clear that any arbitration procedure had to be "accessible and affordable." The RAB does not adequately address *Sonic II*. It only responds by suggesting that the Labor Commissioner and Kho require that the procedure replicate the Berman hearing process. We have made no such suggestion. We have offered alternatives. (See POB at 60-61.)

The Berman statutes are for the benefit of workers. This Court recognized this in *Dynamex*:

> These fundamental obligations of the IWC's wage orders are, of course, primarily for the benefit of the workers themselves, intended to enable them to provide at least minimally for

> themselves and their families and to accord them a modicum of dignity and self-respect.

(*Dynamex*, *supra*, 4 Cal. 5th at p. 952.)

The Berman statutes serve the same purpose, and it is unconscionable to undermine them or reduce their effectiveness.[27]

Section 90.5, subdivision (a) provides further:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

The Court should follow this command in preserving the integrity of the Berman statutes.

On the sliding scale of procedural and substantive unconscionability, the procedural unconscionability was "extraordinarily high." This Court should not, however, hold in this case that the arbitration agreement must be extraordinarily or substantially unconscionable. This Court's decisions in *Sanchez*, *Baltazar* and *Sonic II* make it clear that where, in most employment settings, the arbitration agreement is provided on a take-it-or-leave-it basis, it will be procedurally unconscionable requiring a court to be "particularly attuned" to the substantive unconscionability issue. (*Baltazar*, *supra*, 62 Cal.4th at p. 1245.) "An evaluation of unconscionability is highly dependent on context." (*Sanchez*, *supra*, 61 Cal.4th at p. 911.) To the extent that arbitration agreements are contracts of adhesion, which they are for almost all low wage workers, this Court should make it clear in light of *Baltazar* that the substantive

[27] Kho's claim was based in part on the applicable IWC Order.

unconscionability question will have to be faced by the courts in all cases of such contracts of adhesion.[28] In that regard, one provision of the arbitration agreement could be unconscionable. However, *Sonic II* makes it clear the real question when the Berman statutes are being waived is whether the substitute process is "accessible and affordable." The OTO Arbitration Agreement is far from "accessible and affordable."

III. THE ODA SHOULD NOT HAVE BEEN VACATED

OTO goes on at length in its Brief to argue that the trial court correctly vacated the ODA. (RAB at 33-47.) Its argument is contradictory because it relies upon Code of Civil Procedure section 1094.5, but concedes that that provision does not apply. (See RAB at 36 [citing *Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 54-55]. See also *Martinez v. Combs* (2010) 49 Cal.4th 35, 65-66 [describing the nature of the trial de novo as not a review of the Labor Commissioner's decision].)

As argued in the POB, the trial court improperly vacated the ODA. This case should be remanded with the direction to the trial court to conduct a trial de novo contemplated by the Berman statutes.

///

///

///

///

///

[28] OTO has not suggested any provisions could be severed. Indeed, when the issue is the totality of the Arbitration Agreement as compared to the benefits of the Berman statutes, that is not likely. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1146 ["a court ... must consider [both the] features of dispute resolution the agreement eliminates [and the] features it contemplates"].)

IV. CONCLUSION

For the reasons suggested in the POB and this Brief, the decision of the court below should be reversed and this matter remanded to the trial court for a trial de novo. Petitioner should be awarded his fees in this appeal. (Labor Code § 98, subd. (c).)[29]

Dated: July 6, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
David A. Rosenfeld
Caren P. Sencer
Caroline N. Cohen

By: 
David A. Rosenfeld

Attorneys for Petitioner and Real Party in Interest KEN KHO

144087\975835

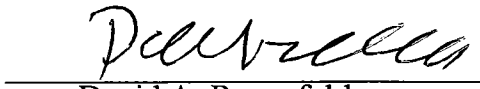
[29] The fees may be awarded by the trial court on remand if Kho is successful by receiving more than $0.00. (*Tabarrejo v. Superior Court* (2014) 232 Cal.App.4th 849, 869.)

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1)

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, I certify that the attached Reply Brief Of Real Party In Interest, Ken Kho was prepared with a proportionately spaced font, with a typeface of 13 points or more, and contains 8,350 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: July 6, 2018

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
David A. Rosenfeld
Caren P. Sencer
Caroline N. Cohen

By: 
David A. Rosenfeld

Attorneys for Petitioner and Real Party in Interest KEN KHO

PROOF OF SERVICE
(C.C.P. § 1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On July 6, 2018, I served the following documents in the manner described below:

REPLY BRIEF OF REAL PARTY IN INTEREST, KEN KHO

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Fine, Boggs & Perkins, LLP
Mr. John P. Boggs
jboggs@employerlawyers.com
Mr. Roman Zhuk
rzhuk@employerlawyers.com
800 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019

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

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

On the following part(ies) in this action:

Fine, Boggs & Perkins, LLP
Mr. John P. Boggs
jboggs@employerlawyers.com
Mr. Roman Zhuk
rzhuk@employerlawyers.com
800 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019

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

California Court of Appeal
First Appellate District, Div. 1
350 McAllister Street
San Francisco, CA 94102

Clerk of the Superior Court
Alameda County Superior Court
1225 Fallon Street
Oakland, California 94612

Ken Bacmeng Kho
1650 Vida Court
San Leandro, CA 94579

I declare under penalty of perjury under the laws of the California that the foregoing is true and correct. Executed on July 6, 2018, at Alameda, California.

Karen Kempler