

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,

Real Party in Interest,

**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, Appellant and Petitioner

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

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

REPLY

FERNANDO FLORES, SBN 256193
Division of Labor Standards Enforcement
Department of Industrial Relations
STATE OF CALIFORNIA
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
Telephone: (415) 703-4814

Attorney for Intervenor and Appellant, **LABOR COMMISSIONER**

TABLE OF CONTENTS

REPLY 1

 INTRODUCTION..... 4

 ARGUMENT 4

 I. THE PETITION SEEKS TO CLARIFY AND APPLY
 THE ANALYSIS REQUIRED UNDER *SONIC II*,
 RATHER THAN OVERTURN IT 4

 II. CCP SECTION 1281.4 APPLIES TO TRIAL COURTS,
 NOT THE LABOR COMMISSIONER’S INFORMAL
 ADMINISTRATIVE PROCEEDING 5

 III. *SONIC II* HELD THAT THE TRIAL COURT
 DETERMINES WHETHER AN ARBITRATION
 AGREEMENT IS UNCONSCIONABLE, NOT THE
 LABOR COMMISSIONER 6

 IV. OTO WAIVED ANY “FAIR HEARING” ARGUMENT,
 AND EVEN IF CONSIDERED BY THIS COURT, THE
 ARGUMENT IS UNSUPPORTED..... 7

 CONCLUSION 9

CERTIFICATE OF WORD COUNT 10

TABLE OF AUTHORITIES

CASES

Sonic-Calabasas A, Inc. v. Frank Moreno (Sonic II)
(2013) 57 Cal.4th 11094, 5, 6, 7

STATUTES

Code of Civil Procedure
Section 1094.5 7

Code of Civil Procedure Code
Section 1281.4 5

Labor Code
Section 98.2, *et seq.*..... 6

RULES

Rules of Court
Section 8.204(c)..... 10

INTRODUCTION

In its answer, OTO, LLC (“OTO”) asks the following question: “[h]ow can an arbitration resembling a trial in court . . . be unconscionable? (Answer at p. 5.) The Labor Commissioner, however, is asking this Court to review a different question: Can an arbitration agreement that 1) waives the informal Berman process and its statutory protections in their entirety, 2) establishes a complex forum resembling a civil trial, 3) in the context of a low-wage, limited English speaking employee be substantively unconscionable under the standard outlined by this Court in *Sonic-Calabasas A, Inc. v. Frank Moreno (Sonic II)* (2013), such that the its substantive and procedural unconscionability precludes enforcement? The issues posed in the petition and, as incorrectly posed in OTO’s answer, require substantively distinct and require different analysis.

ARGUMENT

I. THE PETITION SEEKS TO CLARIFY AND APPLY THE ANALYSIS REQUIRED UNDER *SONIC II*, RATHER THAN OVERTURN IT

OTO argues that any review of the issues presented in this case would lead to this Court to overruling its prior decision in *Sonic II*. This argument is mistaken. The Labor Commissioner requests that this Court not overrule, but instead clarify and apply, its reasoning in *Sonic II*. The Court of Appeal’s failure to properly consider the factual context in this case in evaluating the issue of substantive unconscionability has, in practical terms, overturned this

Court's holding in *Sonic II*. The Court of Appeal clearly noted that this Court had not given sufficient guidance on the substantively unconscionability issue raised below: “[w]hile *Sonic II* later reiterated that waiver of Berman hearing protections alone would not support a finding of unconscionability (*id.* at p. 1147), it provided no further guidance regarding the type of ‘affordable and accessible’ procedure that would stand as a suitable substitute.” The Labor Commissioner believes this case presents an opportunity for this Court to provide such guidance and reapply the principles outlined in *Sonic II*. This is an extremely important and unsettled area of law in which OTO indirectly acknowledges that there is a need for further guidance, for employers and employees alike. (Answer at pp. 6, 15, 17). The Labor Commissioner requests this Court to provide that guidance.

II. CCP SECTION 1281.4 APPLIES TO TRIAL COURTS, NOT THE LABOR COMMISSIONER’S INFORMAL ADMINISTRATIVE PROCEEDING

Unsurprising, absent citation to any case law or applicable statute, OTO argues that Code of Civil Procedure section 1281.4 (“section 1281.4”) should apply to the Labor Commissioner’s informal administrative process. Section 1281.4 applies to the *trial court’s* ability to stay its own proceedings, because the trial court can displace arbitration if it moves forward. Regardless of how OTO frames it, the Labor Commissioner’s process does not displace arbitration and section 1281.4 does not apply to her proceedings.

Once a Berman proceeding is completed, the benefits that flow from that process are vested in the employee. These benefits include the posting of a bond, the right to a Labor Commissioner attorney, and one-way fee shifting. (Labor Code section 98.2, *et seq.*) The issue in this case devolves to OTO attempting to eliminate all of these benefits in favor of a formal, complex, and inaccessible trial-like arbitration.

III. SONIC II HELD THAT THE TRIAL COURT DETERMINES WHETHER AN ARBITRATION AGREEMENT IS UNCONSCIONABLE, NOT THE LABOR COMMISSIONER

OTO also argues that the Labor Commissioner “did not allow the petition to compel arbitration to be decided.” (Answer at p. 14.) OTO, however, did not act promptly to obtain a determination from the trial court as to the validity of the arbitration agreement prior to the Berman hearing taking place. Nothing required the Labor Commissioner to halt her process. OTO could have filed its petition to compel as soon as they received the first notice of the administrative proceedings, but it failed to do so. This was not a delay caused by the Labor Commissioner. OTO did not assert its rights until one day before the administrative hearing and this did not provide the trial court sufficient time to have the issue of the validity of the arbitration agreement resolved.

OTO attempts to further an insupportable argument by stating that the Labor Commissioner should have reviewed the arbitration agreement

(Answer, p. 26 (the Labor Commissioner “issued a decision . . . without even examining the arbitration agreement itself”).) This Court in *Sonic II* held that “[t]o be sure, the parties to a contract must have an opportunity to determine whether the arbitration agreement should be enforced; the FAA does not require arbitration when there are valid contract defenses to the enforcement of the arbitration agreement.” (*Sonic II, supra*, 57 Cal.4th at p. 1142.) This is a determination for the **trial court**, not the Labor Commissioner, and to suggest otherwise is completely incorrect:

In applying the [unconscionability] doctrine to the arbitration agreement here, the **trial court** may consider as one factor Moreno’s surrender of the Berman protections in their entirety, although that factor alone does not necessarily render the agreement unconscionable. Because it may not have been clear before our decision today that evidence concerning the specific arbitral scheme at issue in this case is pertinent to the unconscionability inquiry, the parties will have the opportunity to present such evidence in order to inform the **trial court’s** unconscionability determination.

(*Id.* at 1148.) (Emphasis added.) The Labor Commissioner can intervene where her jurisdiction is challenged, such as in this case, but the trial court ultimately decides the validity of the agreement.

IV. OTO WAIVED ANY “FAIR HEARING” ARGUMENT, AND EVEN IF CONSIDERED BY THIS COURT, THE ARGUMENT IS UNSUPPORTED

OTO also raises the issue of its right to a “fair hearing” and contends that its right was violated. (Answer at p. 7). This argument is a red-herring. While OTO could have requested that the trial court review the “fairness” of the administrative hearing through Code of Civil Procedure section 1094.5,

OTO never made this request. OTO never filed a petition for a writ of mandate. OTO never raised this “fairness” argument before the trial court. Because OTO raised it for the first time on appeal, OTO waived this argument.

If this Court does consider OTO’s fairness argument, it is important to note that in its original briefs, OTO relied on an entirely different basis for vacating the Labor Commissioner’s ODA: *lack of jurisdiction*. OTO never raised any issue of fairness to the trial court and because the Court of Appeal did not entertain OTO’s argument, it now resurrects the argument for this Court.

The Labor Commissioner provided OTO adequate due process that consisted of notice and an opportunity to be heard at all stages of the Berman process. Based on the pertinent chronology, OTO was given sufficient notice of the complaint. (Volume I, Clerk’s Transcript on Appeal (“I CT”) 127, 129, 131, 133-136.) The Labor Commissioner notified OTO of the scheduled settlement conference that OTO attended approximately eight months prior to the hearing date. (I CT 127.) The Labor Commissioner notified OTO of the hearing date five months before the scheduled hearing. (I CT 131.) OTO deliberately chose not to attend the hearing. OTO was well aware of all administrative proceedings, participated in them, and cannot point to any procedural deficiency in the process, because there was none.

CONCLUSION

The Labor Commissioner requests that this Court grant review of the Court of Appeal's decision.

Dated: October 30, 2017

Respectfully submitted,

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

By: /s/ Fernando Flores
FERNANDO FLORES
Attorney for Intervenor and Appellant
LABOR COMMISSIONER

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

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

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

On October 30, 2017, I served the following document(s):

REPLY.

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

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

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

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

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

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

Executed this 30th day of October, 2017, at San Francisco, California.

/s/ Joanne M. LeDuc
Joanne M. LeDuc

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **OTO v. KHO**
(SU)

Case Number: **S244630**

Lower Court Case Number: **A147564**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **fflores@dir.ca.gov**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REPLY TO ANSWER TO PETITION FOR REVIEW	REPLY

Service Recipients:

Person Served	Email Address	Type	Date / Time
David Rosenfeld Weinberg, Roger & Rosenfeld 058163	drosenfeld@unioncounsel.net	e-Service	10-30-2017 6:02:07 PM
Fernando Flores DLSE Legal 256193	fflores@dir.ca.gov	e-Service	10-30-2017 6:02:07 PM
Joanne LeDuc DLSE Legal	JLeduc@dir.ca.gov	e-Service	10-30-2017 6:02:07 PM
John Boggs Fine Boggs & Perkins 172578	jboggs@employerlawyers.com	e-Service	10-30-2017 6:02:07 PM
Karen Kempler Weinberg, Roger & Rosenfeld	kkempler@unioncounsel.net	e-Service	10-30-2017 6:02:07 PM
Roman Zhuk Fine, Boggs & Perkins LLP 296306	rzhuk@employerlawyers.com	e-Service	10-30-2017 6:02:07 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10-30-2017

Date

/s/Fernando Flores

Signature

Flores, Fernando (256193)

Last Name, First Name (PNum)

DLSE Legal

Law Firm