Supreme Court Copy

Case No. S174475

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SONIC-CALABASAS A, INC.,

Plaintiff and Appellant,

vs.

FRANK MORENO,

Defendant and Respondent,

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

Appeal from the Superior Court of Los Angeles County,
Case No. BS107161, Honorable Aurelio N. Munoz, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Contrary to the assertions of Plaintiff Sonic-Calabasas A, Inc. ("Sonic"), no one in this proceeding is seeking to preclude the arbitration of the underlying dispute. What Defendant Frank Moreno ("Moreno") does seek to preclude is the enforcement of a provision within an arbitration provision that would result in an arbitral proceeding that would drastically undercut his ability to vindicate non-waivable statutory rights under California wage and hour law.

This is not a case about *whether* the dispute over Sonic's failure to pay accrued vacation wages to Moreno upon his separation from employment should proceed to arbitration. It is, rather, a case about *how* this arbitration should be conducted – namely, whether Sonic can enforce a provision in the agreement that would undercut an employee's ability to vindicate his non-waivable statutory rights under California wage and hour law. This is a case about *when* this arbitration may proceed – that is, whether it must proceed prior to allowing the employee the opportunity to have the Labor Commissioner adjudicate his wage claim, or whether it can only proceed after the Labor Commissioner has had an opportunity to hear the claim, thereby allowing the employee to proceed to a *de novo* arbitration armed with the remedial tools that will allow him to effectively vindicate

his statutory rights in the arbitral forum.

Sonic misleadingly seeks to recast Moreno's position as an attack on *whether* this dispute should proceed to arbitration. By deliberately setting up this straw man argument, Sonic seeks to distinguish this case from *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83 and *Gentry v. Superior Court* (2007) 42 Cal.4th 443. In truth, the only distinguishing feature of this case is that neither *Armendariz* nor *Gentry* involved an employer's attempt to enforce a waiver of an employee's right to have a statutory wage claim adjudicated by the Labor Commissioner before proceeding to *de novo* arbitration. But like this case, both *Armendariz* and *Gentry* involved employer efforts to enforce provisions in arbitration agreements that would have the effect of extracting *de facto* waivers of unwaivable statutory rights, by depriving employees of effective means of vindicating those rights. And in both *Armendariz* and *Gentry*, this Court held that such provisions in an arbitration agreement violate public policy, and as such, will not be enforced. In the words of this Court, "*Armendariz* makes clear that for public policy reasons we will not enforce provisions contained within arbitration agreements that pose significant obstacles to the vindication of employees' statutory rights." (*Gentry v. Superior Court, supra,* 42 Cal.4th 443, 463.)

THE BERMAN HEARING WAIVER CONTAINED IN SONIC'S ARBITRATION AGREEMENT PREVENTS WAGE CLAIMANTS FROM EFFECTIVELY VINDICATING THEIR STATUTORY WAGE AND HOUR RIGHTS

Confronted with these clear pronouncements in *Armendariz* and *Gentry*, Sonic asserts that a waiver of an employee's right to have a wage claim heard by the Labor Commissioner does not deny the employee any remedial tools that are *necessary* for the vindication of non-waivable statutory rights. The test, though, is not whether the remedial tools are *necessary,* but whether the denial of those tools through enforcement of a provision in an arbitration agreement would deprive employees of a significantly more effective way of vindicating statutory rights. This was the test that was adopted in *Gentry*, when this Court concluded that access to a class arbitration procedure is required whenever "class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." (*Gentry, supra,* 42 Cal.4th 443, 450.)

This standard provides the proper framework for the analysis required in assessing the remedial procedure at issue in this case. The question presented here is whether a *de novo* arbitration after the conclusion of the Labor Commissioner's wage adjudication (or "Berman") hearing process provides a significantly more effective way of vindicating statutory

vacation pay rights than arbitration that is not preceded by access to the Labor Commissioner. As *Gentry* makes clear, a remedial procedure provides a significantly more effective way of vindicating statutory rights if it is evident that in the absence of access to that procedure, employees are much less likely to pursue – or be able to effectively pursue – enforcement of their unwaivable statutory rights.

For the typical small to medium size individual wage claims heard by the Labor Commissioner, there cannot be any serious doubt that denial of access to the Berman procedure would substantially impede the ability of these wage claimants to effectively pursue their statutory wage claims, and would inexorably result in substantial numbers of these workers abandoning their claims. The reasons why are painfully obvious:

- The risks of having to pay the employer's attorney's fees pursuant to Labor Code § 218.5. This is a risk that would be present in every type of statutory wage claim except for payment of minimum wages, overtime, and indemnification for business expenses, which are covered by one-way fee shifting statutes. (Labor Code §§ 1194 and 2802.) This risk is removed if the employee files his wage claim with the Labor Commissioner and prevails, as any employer filed *de novo* appeal would then be governed by the one-way fee shifting provision in Labor Code §98.2(c). But without this

one-way fee shifting, we must recognize that large numbers of employees will abandon their small to medium sized wage claims because of the very legitimate fear that if they do not prevail, they will face liability for the employer's attorney's fees in amounts that can substantially exceed (in large multiples) the value of the employee's claim.

- The expense of having to pay for an attorney and for the costs of the arbitral process, including the cost of an interpreter, if needed (where the wage claimant, or any witness, is not fluent in English). Faced with the high cost of obtaining legal counsel (again, a cost that will often exceed the value of any low to medium sized individual wage claim), employees will either abandon their claims or proceed in arbitration without legal representation, in a grossly uneven playing field against represented and well financed corporate defendants.1 Sonic seeks to minimize the impact of the deprivation of access to the Labor Commissioner's expert appointed counsel with its assertion that "wage claims are consistently taken on a contingency basis." (Answer Brief, p. 25) With all due respect, we would question whether there is any sort of pool of competent attorneys "consistently" taking contingency cases for the average value of a Labor

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1 Under the arbitration agreement at issue herein, the unrepresented wage claimant could potentially be confronted with a demurrer, a motion for summary judgment, or a motion on the pleadings. (Clerks's Transcript, p. 9.)

Commissioner wage claim, or, for that matter, even for the slightly higher value of Moreno's wage claim. Sonic also seeks to prevent this Court from considering the information provided in an amicus letter, signed by two former chief counsels for the Labor Commissioner (who together had 16 years of experience in that position, the highest ranking attorney position at the DLSE), regarding the extremely high percentage of wage claimants determined by the Labor Commissioner to be unable to afford private counsel. (Stevason and Cadell, Amicus Letter In Support of Petition for Review, filed August 7, 2009, p. 5.) We believe it is proper to consider that information, and note that the case cited by Sonic for the proposition that it is not proper to consider such information, *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, does not stand for the proposition for which it was cited.2

- The uncertainty and difficulty of collection even if an award is rendered in favor of the employee. A primary purpose of the required bond or undertaking pursuant to Labor Code § 98.2(b) is to facilitate the collection of a judgment issued in favor of the employee in any employer filed *de novo* appeal. Without that bond or undertaking, an employee, the

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2 An examination of this case shows that it merely holds that amici cannot argue issues which exceed the scope of review and which were not raised by the parties. (*Id.*, at 1047, fn. 12.)

employee who prevails in arbitration may have to spend more time and money enforcing the arbitration award and collecting the amount owed – or not, and just give up, discouraged and unable to take the final steps to vindicate his statutory rights.

This recitation of exactly what it is than an employee loses when access to the Labor Commissioner's Berman process is denied makes clear that the completion of the Berman process prior to a *de novo* arbitration provides a significantly more effective way of vindicating statutory rights than arbitration without prior access to the Berman process.

Basing its argument on attacking a standard that doesn't exist, Sonic urges this Court to hold that the panoply of remedial tools that flow to an employee who prevails before the Labor Commissioner - - one-way fee shifting in the employer's subsequent *de novo* appeal, the provision of a Labor Commissioner attorney to represent the employee in these *de novo* proceedings, the provision of an interpreter if needed for the *de novo* hearing, and the requirement that the employer post a bond or undertaking when filing the *de novo* appeal - - are "not necessary because they are procedural features of the administrative process, not substantive, unwaivable rights in their own right." Here, Sonic confuses what it is that is unwaivable – the underlying statutory right to payment of accrued

vacation wages upon separation of employment – with the remedial tools that flow from the Labor Commissioner's wage adjudication process. Of course, as Sonic points out, an employee can choose to by-pass the Labor Commissioner entirely and file a lawsuit in court, thereby "waiving" the remedial tools that are tied to the administrative hearing process. For that matter, the employees in *Gentry* could have chosen to file individual lawsuits, thereby "waiving" their right to proceed on a class-wide basis. Contrary to Sonic's assertion, the determinative factor is not whether the employee *must* have his claim heard by the Labor Commissioner (or through the vehicle of a class action or class arbitration). If the employee *chooses* to proceed before the Labor Commissioner (or on a class-wide basis), and the employer seeks to enforce a provision in an arbitration agreement that would deprive the employee of the right to have his claim adjudicated in that manner, the court must determine whether the enforcement of that provision would "pose significant obstacles to the vindication of [the employee's] statutory rights." The fact that the employee could have hypothetically chosen to attempt to vindicate these rights without recourse to the Labor Commissioner (or by proceeding on a class-wide basis) is of no consequence in determining whether the employer can enforce a pre-dispute arbitration agreement that waives recourse to the

Labor Commissioner (or the right to proceed on a class-wide basis).

ALL STATUTORY WAGE CLAIMS, INCLUDING THOSE FOR PAYMENT OF ACCRUED VACATION UPON SEPARATION FROM EMPLOYMENT, TRIGGER *ARMENDARIZ* PROTECTIONS

Sonic's next line of attack is directed at the question of whether the underlying wage claim – for unpaid accrued vacation wages, the payment of which is required upon separation of employment pursuant to Labor Code §227.3 – constitutes one of the "fundamental, unwaivable rights that would trigger the heightened protections set out in *Armendariz.*" (Answer Brief, p. 22.) Sonic argues that in the wage and hour arena, only minimum wage and overtime claims are worthy of *Armendariz* protections. That is certainly not the way this Court has construed *Armendariz*: "In *Armendariz* ... we held that when an employee is bound by a predispute arbitration agreement to adjudicate **unwaivable statutory employment rights** (in that case, rights conferred by the Fair Employment and Housing Act (FEHA)), the arbitration will be subject to certain minimum requirements." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456.) Indeed, in *Little v. Auto Steigler, Inc.* (2003) 29 Cal.4th 1064, this Court extended these protections, holding that the *Armendariz* requirements for arbitration of unwaivable statutory claims apply also to claims of wrongful termination in violation of public policy. Sonic's novel argument would deny *Armendariz* protections

to employees bringing the following types of non-waivable statutory wage claims:

- Recovery of unlawfully forfeited accrued vacation wages (Labor Code § 227.3)
- Recovery of unlawful deductions or kick backs from wages (§§ 221-224)
- Payment of meal or rest period premium pay (§ 226.7)
- Recovery of gratuities unlawfully taken by the employer (§ 351)
- Recovery of amounts an employee is unlawfully compelled to pay to an employer for uniforms, employment applications, or other items of value (§ 450)
- Recovery of necessarily incurred business expenses (§ 2802)
- Payment of statutory penalties for failure to timely pay wages due upon separation of employment (§ 203)
- Payment of statutory penalties for payment of wages with a dishonored check (§ 203.1)

Sonic looks to *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276 (and misleadingly, and repeatedly, refers to it as a decision of "this Court') as support for its assertion that minimum wage and overtime claims are the only statutory claims deserving of *Armendariz*

protections. (Answer Brief, p. 22-23) *Giuliano* involved a claim for a $5 million to $8 million bonus and a $500,000 severance payment. The court of appeal rejected the employee's argument that this was a statutory claim, and instead characterized the lawsuit as "a breach of contract claim." (*Id.*, at 15-16.) The court held that *Armendariz* did not apply to this breach of contract claim, noting that it did not implicate "a fundamental public policy that is tied to a constitutional or statutory provision." (*Id.*, at 16.) While it is true that the court of appeal unfavorably compared this breach of contract claim with minimum wage and overtime claims under the federal Fair Labor Standards Act ("FLSA"), it defies logic to read that decision to mean that except for FLSA claims, no statutory wage claims implicate "a fundamental public policy ... tied to a ... statutory provision." That the right to payment of accrued vacation implicates fundamental public policy is already well-established under California law. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137.) *Giuliano* most certainly did not change that.

Sonic misstates the facts and ignores the law in its effort to portray Moreno as a claimant who could vindicate his statutory wage and hour rights without the protections of *Armendariz.* According to Sonic, "[Moreno] would have the Court view his individual claim for more than

$40,000 (when penalties are included) as a simple claim for a more modest sum.... Moreno is pursuing a claim large enough to provide sufficient individual incentive to vigorously pursue" without recourse to the remedial tools of the Labor Commissioner's hearing process. Moreno's claim before the Labor Commissioner was for unlawfully forfeited vacation wages in the amount of $18,203.54, plus Section 203 waiting time penalties at the rate of $441.24 per day, for up to the maximum of 30 days. (Clerk's Transcript 000178.) At the maximum, the claim for penalties amounts to $13,237.20. Thus, the claimed unpaid wages and penalties, when added together, amounts to $31,440.74, not "more than $40,000" as represented by Sonic.

And this very Court, in *Gentry v. Superior Court, supra,* 42 Cal.4th 443, 458, approvingly cited to *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 745, for "reject[ing] the argument that even an award as large as $37,000 would be 'ample incentive' for an individual lawsuit for overtime." This is telling, as an overtime lawsuit is governed by the one-way fee shifting provisions of Labor Code § 1194, so that the plaintiff never risks paying the employer's attorneys fees. That remedial tool notwithstanding, this Court conclude that class action waivers may "impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." (*Gentry, supra,* 42 Cal.4th at p.

457.)

Here, in contrast, there is no one way fee shifting for claims for recovery of unlawfully forfeited vacation wages, unless the claim is successfully pursued through the Labor Commissioner's wage adjudication process, and the employer files a *de novo* appeal. That is what an employee must do in order to get out from the bilateral fee exposure mandated by Labor Code § 218.5, for all statutory wage claims other than minimum wage, overtime, and business expense reimbursement claims. (See Labor Code §§ 1194 and 2802.) And that is precisely what Sonic seeks to prevent through enforcement of the waiver of the right to access to the Labor Commissioner's adjudicatory hearing process.

Likewise, it is only through the Labor Commissioner's adjudicatory process that statutory wage claimants (including minimum wage and overtime claimants) become entitled to the no-cost services of an attorney appointed by the Labor Commissioner. Sonic argues that because Labor Code § 98.4 only requires the Labor Commissioner to represent those claimants who are "financially unable to afford counsel," such representation is "not a fundamental right." This is akin to arguing that because some criminal defendants can afford private counsel, or because other criminal defendants choose to represent themselves, the right to ask

for representation by a public defender, and get such representation when the defendant meets the financial criteria, is not a "fundamental right."

The genius of the Berman hearing process is that it permits the Labor Commissioner to screen claims, separating those that have merit from those that do not. As to those claims that have merit, the Labor Commissioner is required to provide representation at no-cost to those claimants who are unable to afford private counsel and who seek to uphold the Labor Commissioner's award in employer filed *de novo* proceedings. Of course, as to such claimants, the right to a no-cost attorney provided by the Labor Commissioner is a fundamental right. But beyond that, *all* wage claimants have a fundamental right under California law to present their wage claim to the Labor Commissioner; and if successful before the Labor Commissioner, to request no-cost representation from the Labor Commissioner should the employer seek *de novo* review following the Labor Commissioner's determination, and finally, to receive no-cost representation from the Labor Commissioner pursuant to the criteria set out in Labor Code § 98.4.

Sonic attacks this fundamental right by engaging in unfounded and irrelevant speculation as to whether Moreno would meet the criteria for representation under Labor Code § 98.4. Sonic points to Moreno's wage

claim, arguing that his claimed earnings of an amount "in excess of $440 per day" indicates that he is not financially unable to afford counsel. (Answer Brief, p. 26.) What Sonic neglects to mention is that the "wage claim" (actually, the DLSE Notice of Claim and Conference, dated December 8, 2006) shows that Moreno's employment with Sonic ended on July 15, 2006. (CT 178) It goes without saying that Moreno's earnings at a job that ended three and a half years ago are not in the least bit probative as to whether he would now meet the criteria for no-cost representation under Section 98.4.

Sonic then argues that because there is nothing in the record to suggest that Moreno would qualify for representation under Section 98.4, such representation cannot be considered essential to the vindication of his statutory right to unpaid vacation wages. This argument ignores the holding of *Gipe v. Superior Court* (1981) 124 Cal.App.3d 617, 624-625, that the determination by the Labor Commissioner that a wage claimant is financially unable to afford counsel is not reviewable in the *de novo* proceeding, as the responsibility for determining the wage claimant's financial eligibility rests solely with the Labor Commissioner. Sonic would instead require Moreno, and every other wage claimant subject to an arbitration agreement that contains a Berman waiver, to successfully litigate

the issue of financial eligibility for no-cost Labor Commissioner representation as a pre-condition for gaining access to the Labor Commissioner's Berman process. Under Sonic's approach, those wage claimants least able to afford private counsel would be the most disadvantaged, as they would have no effective means of litigating this issue, and therefore, no effective access to the procedure for obtaining free legal representation. This is an approach guaranteed to prevent overwhelming numbers of California workers from vindicating their statutory wage claims.

THE LABOR COMMISSIONER'S JURISDICTION OVER AN EMPLOYEE'S STATUTORY WAGE CLAIM IS NOT DIVESTED BY THE FEDERAL ARBITRATION ACT UNDER *PRESTON v. FERRER*

In Sonic's view, this case begins and ends with *Preston v. Ferrer* (2008) 552 U.S. 346, 128 S.Ct. 978. While it is undeniably true that *Preston* involved a Federal Arbitration Act ("FAA") challenge to a type of proceeding before the California Labor Commissioner, it is equally undeniable that it did not present any issues as to the enforceabilty of an arbitration agreement on public policy or unconscionability grounds. As succinctly noted, "while *Preston* concerns the FAA, it does not address unconscionability, so its application here," in a challenge to a class arbitration waiver, "is questionable." (*Steiner v. Apple Computer, Inc.*

(N.D. Cal. 2008) 556 F.Supp.2d 1016, 1022 fn. 7.)

As we explained in our Opening Brief, at pages 26-30, *Preston* does not mandate enforcement of a Berman waiver contained in an arbitration agreement, as *Preston* has no application to the issue of whether such a Berman waiver is unenforceable under *Armendariz* and *Gentry* on public policy grounds. *Preston* holds that the FAA applies to state administrative proceedings: "when parties agree to arbitrate all questions arising out of a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." (*Preston v. Ferrer, supra,* 522 U.S. 346, 128 S.Ct. 978, 981.) And it is the FAA which expressly provides that an arbitration agreement may be invalidated "upon such grounds as exist at law or equity for the revocation of any contract." (9 U.S.C. § 2; *Armendariz, supra,* 24 Cal.4th at p. 98.) "The *Armendariz* requirements are ... applications of general state law contract principles regarding the unwaivability of public rights to the unique context of arbitration, and accordingly, are not preempted by the FAA." (*Little v. Auto Steigler, supra,* 29 Cal.4th 1064, 1079.)

Indeed, just within the past few months, the Ninth Circuit held that *Preston* is inapplicable to any challenge to the validity of an arbitration agreement on public policy or unconscionability grounds. (*Laster v. AT&T*

Mobility LLC (9th Cir. 2009) 584 F.3d 849, 858-859.) The Court explicitly ruled that "nothing in *Preston* undercuts the rationale ... that the FAA does not impliedly preempt California unconscionability law." (*Id.,* at 859.) The Court further explained that under *Preston* and *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 126 S.Ct. 1204:

> when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance.... Thus, in *Preston,* the Supreme Court held that because Ferrer's allegation that Preston was acting as an unlicensed talent agent was a challenge to the validity to the contract as a whole, as opposed to the validity of the arbitration clause itself, the [Talent Agencies Act's] attempt to lodge primary jurisdiction in another forum was superseded by the FAA. The Court expressly recognized, however, that attacks on the validity of the entire contract are distinct from attacks aimed solely at the arbitration clause. **Thus, by its terms, *Preston* is inapplicable to our case because the [plaintiffs] are not challenging the validity of their service contract with [defendant] as a whole, but only the validity of the arbitration agreement.**

(*Laster v. AT&T Mobility LLC*, supra, 584 F.3d 849, 858-859.)

Sonic ignores the arguments we advanced in our Opening Brief as to why *Preston* and the FAA do not divest the Labor Commissioner's jurisdiction over a statutory wage claim. Instead, Sonic re-argues the contentions that were advanced during the superior court proceedings, in 2007 (before *Preston* was decided) on whether *Ferrer v. Preston* (2006) 145 Cal.App.4th 440 (subsequently reversed by *Preston)* was controlling.

While perhaps of some historical interest, it is yet another straw dog argument, set up by Sonic to divert attention away from the actual arguments that have been presented by Moreno, since *Preston* was decided, as to why it is not controlling where there is an *Armendariz* challenge to the validity of a Berman waiver contained within an arbitration agreement.

Again, at the risk of repeating what we have already explained in the Opening Brief, the Berman hearing process provides for one-way fee shifting if a party pursues a *de novo* appeal from a Labor Commissioner decision. (Labor Code § 98.2(c).) The Talent Agencies Act does not. (Labor Code § 1700.44.) The Berman hearing process provides for an attorney to be provided at no-cost to an employee who is unable to afford private counsel, whose employer pursues a *de novo* appeal. (§ 98.4) The Talent Agencies Act contains no provision for appointment of counsel for representation in *de novo* proceedings. (§ 1700.44.) The Berman hearing process provides for no-cost interpreter services at any hearing – which obviously includes any *de novo* hearing at which the Labor Commissioner is providing representation to a wage claimant. (Labor Code § 105(b), see also Govt. Code §§ 7290, *et seq.* (Dymally-Alatorre Bilingual Services Act).) The Talent Agencies Act contains no requirement for no cost interpreter services at a *de novo* proceeding. (Labor Code § 1700.44.)

In view of these differences, it is not surprising that there was no *Armendariz* challenge to the arbitration agreement in *Preston.*[3] But here, there is, and that is why *Preston* is not controlling, and cannot serve as a basis for compelling enforcement of a Berman waiver contained in an arbitration agreement.

This then brings us to Sonic's contention that *Preston* expressly rejected "the idea that permitting a non-binding agency process to delay the eventual arbitration of the parties disputes could be acceptable." (Answer Brief p. 18.) Certainly, the *Preston* court found no justification for delaying arbitration where it was not even argued (much less shown) that the administrative process that would occasion such delay was a more effective means than arbitration in vindicating any party's statutory rights under the Talent Agencies Act. That is not the case here.

It was not the case in *Armendariz,* where this Court imposed a

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[3] Sonic's contention that Ferrer advanced any *Armendariz* arguments is ludicrous on its face. Nothing in *Preston* indicates that Ferrer ever made the argument that enforcing a waiver of his right to have the matter heard by the Labor Commissioner would substantially undercut his ability to vindicate statutory rights under the Talent Agencies Act. The argument that it would "undermine the Labor Commissioner's ability to stay informed of potentially illegal activity" has nothing whatsoever to do with his vindication of his statutory rights. The argument that it "would deprive artists protected by the TAA of the Labor Commissioner's expertise" is woefully insufficient, by itself, to make any kind of *Armendariz* showing. The Supreme Court recognized this: "[Ferrer] made no discrete challenge to the validity of the arbitration clause." (*Preston, supra,* 128 S.Ct. at p. 984.)

requirement for adequate discovery in arbitral proceedings, notwithstanding the fact that greater expeditiousness could be achieved by restricting or even eliminating discovery. And it was not the case in *Gentry,* where this Court concluded that class arbitration waivers that undermine the ability of employees to effectively vindicate their statutory rights should not be enforced, notwithstanding the fact that greater expeditiousness could be achieved by enforcing all class arbitration waivers. In *Armendariz* and *Gentry,* the goal of an expedited arbitral process gave way to the greater need to ensure that arbitration does not become the vehicle for extracting *de facto* waivers of substantive statutory rights, and a means of depriving workers of the ability to effectively vindicate those rights. The same result is required here. And this result is entirely consistent with the teachings of the United States Supreme Court: "We ... reject the suggestion that the overriding goal of the [Federal] Arbitration Act was to promote the expeditious resolution of claims." (*Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 219.)

THE INVALIDITY OF THE BERMAN WAIVER CANNOT BE CURED BY REWRITING THE ARBITRATIONAGREEMENT TO GIVE THE ARBITRATOR NEW POWERS

Sonic contends that the Berman waiver should be enforced, and that Moreno's wage claim be sent to binding arbitration, "in a proceeding designed to ensure that any unwaivable statutory rights are maintained." (Answer Brief, p. 33.) But without allowing a wage claimant access to the Labor Commissioner's Berman process prior to the arbitration, it is not possible to devise arbitral procedures that will ensure effective vindication of the claimant's statutory wage and hour rights.

First, turning to the one-way fee shifting under Labor Code § 98.2(c), this is only available to wage claimants who prevailed in the Berman hearing process – that is, the one-way fee shifting becomes operative as a matter of law only after the employer files a *de novo appeal.* How could an arbitrator impose one-way fee shifting without the preliminary determination of the Labor Commissioner? Surely there cannot be across-the-board one-way fee shifting in every wage claim filed before an arbitrator, as that would operate to the detriment of employers with arbitration agreements, as all other employers are not subject to one-way fee shifting under Section 98.2(c) until the Labor Commissioner makes a determination as to the merits of the wage claim.

Next, turning to the Labor Commissioner's appointment of an attorney to represent the claimant, at no cost, in the *de novo* proceedings pursuant to Labor Code § 98.4, this too is only available to claimants who prevailed at the Berman hearing and who were determined, by the Labor Commissioner, to be financially unable to afford counsel. It is obviously not appropriate to have any other person or entity make the determination of inability to afford counsel because it is the Labor Commissioner who is supplying the no-cost attorney to the claimant. How precisely does Sonic propose to have the arbitrator make this determination? Surely Sonic is not suggesting that the Labor Commissioner will provide a no-cost attorney to represent an employee who never appeared before the Labor Commissioner and whose case may lack merit in the eyes of the Labor Commissioner. Is Sonic suggesting that the arbitrator make a determination as to whether the wage claimant qualifies for free legal representation, and if so, that the arbitrator order the employer to pay for the claimant's attorney? How will this attorney be selected and what will she be paid? Such a solution would operate to the detriment of employers with arbitration agreements, as other employers would not be exposed to the employee's attorney's fees until the stage of employer initiated *de novo* proceedings.

Any attempt made to provide for one-way fee shifting and no-cost

legal representation in the arbitral context, without prior access to the Labor Commissioner, would require this Court to completely rewrite the parties' arbitration agreement, so as to give the arbitrator new powers which the arbitrator now lacks. It would be necessary to reform the contract, not through severance or restriction, but by augmenting it with additional terms. But, as this Court has explained, "Civil Code section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute. Code of Civil Procedure authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful." (*Armendariz, supra,* 24 Cal.4th 83, 125.) In short, the only way to make this arbitration agreement fair to Moreno or any other employee seeking to vindicate a statutory wage claim is to deny enforcement until the completion of any employee-initiated Berman proceeding before the Labor Commissioner.

CONCLUSION

For all of the reasons set forth above, we ask this Court to reverse the Court of Appeal decision, and hold that Berman waivers violate public policy, and that a Berman waiver can never be enforced prior to the conclusion of the Labor Commissioner's administrative proceedings on an employee's statutory wage claim.

Respectfully submitted,

LOCKER FOLBERG LLP

Dated: January 28, 2010

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

The text of this Reply Brief on the Merits consists of 5,129 words as counted by the Corel Word Perfect X4 word processing program used to generate this document.

Dated: January 28, 2010

By: _____
Miles E. Locker
Rachel Folberg
Attorneys for Defendant and Respondent
Frank Moreno

PROOF OF SERVICE AND DELIVERY

I, the undersigned, hereby certify that I am a citizen of the United States, over the age of 18 years, and am not a party to the within action. I am employed in the City and County of San Francisco, California, and my business address is 235 Montgomery Street, Suite 835, San Francisco, California 94104. I am readily familiar with my business practice for collection and processing of correspondence for mailing with the United States Postal Service. On January 28, 2010, following ordinary business practice, I served the following document(s):

REPLY BRIEF ON THE MERITS

on the party(ies) in this action, through his/her/their attorneys of record, by placing true and correct copies thereof in sealed envelope(s), addressed as shown on the attached Service List for service as designated below:

David Reese, Esq.
John Boggs, Esq.
Fine, Boggs & Perkins LLP
2450 S. Cabrillo Hwy., Suite 100
Half Moon Bay, CA 94019

Attorneys for
SONIC-CALABASAS A, INC.

William Reich, Esq.
Div. of Labor Standards
1000 South Hill Road, Suite 112
Ventura, CA 93003

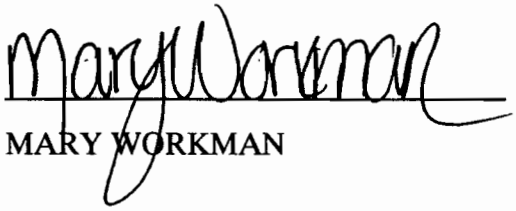
Attorneys for
STATE LABOR COMMISSIONER

Second Appellate District, Div. 4
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Los Angeles County Superior Court
Central District
111 North Hill Street
Los Angeles, CA 90012

(X) (By First Class Mail) I placed, on the date shown below, at my place of business, a true copy thereof, enclosed in a sealed envelope, with postage fully pre-paid, for collection and mailing with the United States Postal Service where it would be deposited with the United States Postal Service that same day in the ordinary course of business, addressed to those listed on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Proof of Service was executed on January 28, 2010 at San Francisco, California.



MARY WORKMAN