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via Overnite Express and Facsimile No. (415) 865-7183

Supreme Court of California
350 McAllister Street
San Francisco, California 94102–4797

re: **SONIC CALABASAS A, INC. V. FRANK B. MORENO**
Supreme Court Case No. S174475
Court of Appeal Case No. B204902 [Second District, Div. 4]

Honorable Justices of the Supreme Court:

In response to the *en banc* order of the Court filed October 14, 2010, Plaintiff and Appellant SONIC–CALABASAS A, INC. submits this letter brief to address the issue upon which the Court has requested further briefing:

WAS THE BERMAN WAIVER CONTAINED IN THE ARBITRATION AGREEMENT BETWEEN THE PARTIES UNCONSCIONABLE?

The answer is No.

First, the issue of unconscionability was never addressed at either the Superior Court or the Court of Appeal, and Appellant urges that the Court not make a decision based upon an issue that was raised for the first time at the Supreme Court as the parties did not have the opportunity to submit evidence on the issue of substantive unconscionability.

But more fundamentally, even if the Court were to examine the so-called Berman Waiver for substantive unconscionability, it would only confirm that the parties' arbitration agreement is not unconscionable as the Berman Waiver has no substantive effect on the final forum where the merits will be decided. Respondent Moreno cannot meet his burden to demonstrate such unfairness, so no finding of unconscionability is supportable.

I.

The challenge in this case has been from the outset whether the arbitration agreement operates in violation of public policy by substituting arbitration for the nonbinding administrative adjudicatory process before the Labor Commissioner—the so-called "Berman" process. Indeed, the sole agreement provision challenged from the inception of the dispute to the present has only been that portion of the agreement that mandates arbitration for claims that "would otherwise require or allow resort to any court ***or other governmental dispute resolution forum***," subject to a few exceptions not important in this case other than for the absence of the Labor Commissioner from the limited list of exclusions from arbitration. And the sole challenge was whether the agreement to forego the Berman process in favor of arbitration was a violation of public policy.

Indeed, the Labor Commissioner itself, acting as Intervenor on behalf of the employee, clarified the scope of the dispute in the introduction of its Opposition to the Petition at the Superior Court:

> The issue in this case is not whether petitioner is entitled to arbitration. As respondent and the Labor Commissioner acknowledge, petitioner is most assuredly entitled to arbitration—a right secured to petitioner by the Federal Arbitration Act [*citation*] and the terms of its arbitration agreement. [¶] Rather, the question presented here is . . . whether petitioner can employ the arbitration agreement to deny respondent access to the non-binding administrative remedy afforded by the Labor Commissioner. . . .

(*See* CT 280 [Opposition Brief], at 1:7–17.)

This was repeated by the Labor Commissioner in its Supplemental Brief: "Here, respondent and intervenor are not attempting to deprive petitioner of the right to arbitration. On the contrary, they fully acknowledge petitioner's right to litigate its dispute in an arbitral forum." (*See* CT 316 [Supplemental Brief], at 2:7–9.) And it was repeated again at the hearing, when the Labor Commissioner confirmed that "whether you have to go before the labor commission first or not" was the issue to be appealed. (*See* RT, at B-3:13–17 [Transcript of October 16, 2007 hearing].)

While the Intervenor (Labor Commissioner) chose not file a brief at the Court of Appeal, Respondent Moreno did, reiterating the limited challenge to the arbitration agreement: "There is no dispute as to [Petitioner]'s eventual right to enforce the arbitration agreement and require that the instant vacation pay claim be resolved through arbitration. Rather, the question in dispute is whether the arbitration agreement can also be used to deny Moreno access to the

Labor Commissioner before the matter proceeds to binding arbitration." (*See* Brief of Respondent Frank Moreno, filed January 8, 2009, at p. 1.)

Moreno has maintained this position in its briefing to the Supreme Court on review: "This is not a case about ***whether*** the dispute . . . should proceed to arbitration. It is, rather a case about ***how*** the arbitration should be conducted . . . [and] about ***when*** this arbitration may proceed," whether prior to an administrative adjudication or only thereafter. (*See* Reply Brief on the Merits, at p. 1 [*emphasis in original*].)

This narrow agreement provision selecting arbitration in lieu of governmental dispute resolution tribunals (including but not specifically referencing the Labor Commissioner and its Berman hearing process) has been described by Respondent as a "Berman Waiver." This characterization was not accidental, as it was expressly intended to draw the parallel between the arbitration provision in this case and the arbitration agreement examined in Gentry v. Superior Court (Circuit City) ((2007) 42 Cal.4th 443), where the arbitration provision in question was described as a "Class Waiver" for its preclusion of collective or consolidated arbitrations. But despite this attempt to liken the issues in the two cases, where the Class Waiver in Gentry was sufficiently suspect for the Supreme Court to remand the case back for further trial court analysis, the Berman Waiver in this case is of insufficient consequence to justify nonenforcement of the agreement.

There are some parallels, however. For example, in both this matter and in the Gentry matter the focus was on whether the challenged provisions were in violation of public policy as *de facto* exculpatory provisions, and not on whether the provisions were unconscionable. (*See, e.g.*, Gentry, *supra,* 42 Cal.4th at 472.) This Court in Gentry sent the matter back for the necessary factual development on questions of substantive unconscionability, because the unconscionability analysis from the Court of Appeal had stopped with their conclusion that the agreement was in no way procedurally unconscionable. (Gentry, *supra,* 42 Cal.4th at 472–73.) In fact, in remanding the case to the trial court to address potential substantive unconscionability, this Court noted that Gentry had argued "that several provisions of the arbitration agreement other than the class arbitration waiver [were] substantively unconscionable" and that those arguments were disputed. (Id.) In the case presently at bar, not only has there been no analysis by the Superior Court or the Court of Appeal into procedural or substantive unconscionability questions, there have been no arguments on those issues raised by the parties before either of those tribunals. It has all been about whether the so-called Berman waiver—like the class waiver in Gentry, or the express limitation on damages found in Armendariz—was contrary to public policy and unlawful. (*See* Gentry, *supra,* 42 Cal.4th at 467 [the validity of a class arbitration waiver was analyzed in terms of unwaivable statutory rights rather than unconscionability]; Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 115–16 [unconscionability analysis separate from FEHA issues analyzed with public policy analysis].)

While the Court has discretion to address issues not contested below where they present pure questions of law on undisputed facts (*see, e.g.,* Neumann v. Melgar (2004) 121 Cal.App.4th 152), this is not clearly the case here. Unconscionability analysis requires consideration of both procedural and substantive unconscionability factors, which were never addressed by the parties or the Superior Court in this matter. As this Court has reiterated, unconscionability has both a procedural element—focusing on oppression or surprise—and a substantive element—focusing on whether terms are overly-harsh or too one-sided. (*See, e.g.,* Gentry, *supra,* 42 Cal.4th at 468–69.) While both elements must be present, they need not be present in the same degree:

> 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

(Gentry, *supra,* 42 Cal.4th at 469 [*quoting* Armendariz, *supra,* 24 Cal.4th at 114].)

Specifically, because the degree of substantive unconscionability—just how far the agreement provision must go beyond the normal bounds of fairness to be unenforceable—depends upon how much procedural unconscionability surrounded the agreement formation, the parties must be permitted an opportunity to lay a factual foundation regarding unconscionability. This is absent from the record because neither party nor the Intervenor viewed this as a case about unconscionability. As such, it would be improper for this Court to make a finding of unconscionability without remand for further development of the factual record. For example, the parties should have the opportunity to put on evidence that Respondent signed multiple arbitration agreements at various points throughout his employment, blunting any argument that the agreement was forced upon him. This lessened showing of procedural unconscionability means that a stronger showing of unfairness must be required to find the provision unconscionably unenforceable.

II.

Analysis of whether the so-called Berman waiver may be substantively unconscionable must begin with a reminder that the parties have throughout this process consistently agreed that the arbitration agreement as a whole is enforceable, and that the parties will ultimately end up before an Arbitrator for final determination of their dispute—the only question here is whether the employee should retain the option of proceeding first to a non-binding administrative adjudication before the Labor Commissioner prior to arbitration. (*See* discussion, *supra,* of narrow scope of arguments presented at every judicial level in this matter.)

And the post-Berman review is *de novo*, so the Arbitrator will hear the claim unburdened by any preliminary findings or determinations. Also important is a reminder that the Berman process is not unwaivable: no employee is ever required to bring his or her claim to the Labor Commissioner in the first place. In other words, the question before the Court is whether an arbitration agreement that precludes employees from detouring through an optional, non-binding administrative adjudication on their way to the same ultimate destination—submission of claims to a Retired Superior Court Judge as Arbitrator—is so one-sided as to "shock the conscience." (*See* Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1532 [traditional standard of unconscionability is where contract terms are "so one-sided as to 'shock the conscience'"].)

This Court has held that an agreement may be found to be substantively unconscionable where it fails to meet "minimum levels of integrity" in a way that unjustifiably disadvantages the non-drafting contracting party. (Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807.) In Scissor-Tail, the agreement in question failed to provide a neutral arbitrator, designating an entity affiliated with one of the parties to be the decision-maker. This made the arbitration agreement "essentially illusory." (Scissor-Tail, *supra*, 28 Cal.3d at 825 [agreement becomes "not a contract to arbitrate, but an engagement to capitulate" (*citation omitted*)].) In this case, the arbitration agreement is designed specifically to ensure that an even-handed Arbitrator decides the claims, calling as it does for a retired jurist. In contrast, the Berman process sees the matter submitted first to the Labor Commissioner, an entity whose pro-employee leanings disadvantage the employer. (*See, e.g.*, Brief of Amici Asian Law Caucus, *et al.*, at pp. 25–26 [describing Labor Commissioner's various roles as enforcer, adjudicator, and employee advocate].)

The unconscionability analysis in Armendariz, *supra*, focused on whether the agreement lacked a modicum of bilaterality, obliging one party to arbitrate its claims while the drafting party is free to pursue claims outside of arbitration. (Armendariz, *supra*, 24 Cal.4th at 115–18.) In this case, however, the arbitration agreement does not inequitably exempt the employer from arbitration of claims more likely to be brought by an employer. (*Cf.* Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1330–32 [provision obliging only employee to arbitrate unconscionably one-sided]; Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1073 [conditional appeal threshold offered benefits only to drafting party].) Indeed, to the extent that limited exclusions from arbitration are set forth in the agreement, they overwhelmingly benefit employees, not the employer. In sum, this is not an agreement drafted to unfairly disadvantage employees at all.

While the Court of Appeal decision in this case was focused on the public policy principles that were the sole focus of the parties' briefing, its recognition of the contingent nature of the benefits that could be available to employees who have not agreed to forego the Berman process is instructive on the issue of substantive unconscionability, as well. After all, it is only the absence of these potential procedural benefits that Respondent claims makes the Berman waiver unenforceable as against public policy that Respondent will likely claim effectuate such

unfairness as to "shock the conscience." As Justice Suzukawa noted in that opinion, "all of these statutory protections are only available ***if and when*** an employer appeals from an adverse administrative ruling." (Sonic–Calabasas A, Inc. v. Moreno (2009) 174 Cal.App.4th 546, 565 [emphasis in original].) The Court of Appeal was unwilling to equate these contingent benefits with the significant obstacle to vindication of statutory rights from the Armendariz matter: the express limitation of available damages. (Id.) And while the court below did not view these contingent benefits through the loupe of a substantive unconscionability analysis, it is safe to presume that the panel would conclude that the absence of these contingent benefits would fall short of "shocking the conscience" to bar enforcement of the arbitration provision.

In his submissions to this Court, Respondent Moreno has pleaded not just for a determination that he himself will be denied an avenue for the effective enforcement of his rights if he is not permitted to proceed to a Berman hearing before submitting his claims to arbitration, but that all employees will be similarly denied a chance to vindicate their rights. Along that same vein, we expect Respondent Moreno to argue that the so-called Berman waiver is so universally unfair that it shocks the conscience and should be blocked for all employees as unconscionably unenforceable. But just as he has presented no evidence to suggest that his rights would be impaired if the Berman hearing is unavailable to him in this case—let alone that all others would be such that a blanket ban on Berman waivers should be established as a matter of law—he has no evidence to present to suggest that an arbitration hearing without a prior Berman hearing would be so lacking in minimum standards of integrity as to meet the standard for substantive unconscionability.

Unsubstantiated speculation regarding potential negatives is not enough to dislodge the strong public policy favoring enforcement of arbitration agreements. In Green Tree Financial Corp.–Alabama v. Randolph ((2000) 531 U.S. 79), the U.S. Supreme Court refused to dislodge arbitration on the speculative prediction that the employee might have to bear arbitration costs where the record failed to show that she would bear any such costs. (Green Tree, *supra,* 531 U.S. at 90–91.) "The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." (Id.) In this case, Respondent Moreno fears, *inter alia,* that he would be denied access to counsel, and that he would be denied access to an interpreter. But there is nothing in the record to support that he would ever need an interpreter, or that he would even qualify for representation under the Labor Commissioner's unspecified standard for financial necessity. Such rank speculation cannot supplant the need for record evidence that enforcement of the agreement as written would be unenforceably unfair.

III.

Petitioner Sonic–Calabasas A, Inc., bears the burden of demonstrating the existence of a valid arbitration agreement, and this burden has been roundly met, as demonstrated by repeated acknowledges by and on behalf of Respondent Moreno that the

arbitration agreement exists and will be ultimately enforceable to ensure that the ultimate determination on Moreno's employment claim is made by an arbitrator under the agreement. But the party seeking to oppose arbitration "bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*See* Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 972.) This includes the defense of unconscionability. (Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal.App.4th 1159, 1165 ["Plaintiff's burden was to prove both procedural and substantive unconscionability"].)

In this case, the issues surrounding unconscionability were never raised below, so the factual record is insufficient to make a definitive determination that the so-called Berman waiver is unconscionably unenforceable; this issue is not properly before the Court for determination. But even if it had been argued, the absence of any record evidence to suggest that Respondent Moreno—let alone any other employee—would be so unfairly disadvantaged by enforcing the acknowledged arbitration agreement as to justify nonenforcement of the agreement as written precludes any such finding. Because Respondent Moreno cannot meet his burden to demonstrate actual unconscionability as contrasted with potential unfairness, this theory should pose no obstacle to the enforcement of the parties' agreement to submit disputes to binding arbitration.

We appreciate this opportunity to provide the Court with additional information, and we look forward to responding to any further requests for additional information either in writing or at the upcoming oral argument in this matter.

Very truly yours,

John P. Boggs
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Enclosure: Proof of Service

S174475

IN THE SUPREME COURT OF CALIFORNIA

SONIC–CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent

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

Appeal from an Order of the Superior Court of California, County of Los Angeles
Case No. BS107161, HON. AURELIO N. MUNOZ, Judge

APPELLANT'S PROOF OF SERVICE OF LETTER BRIEF RE UNCONSCIONABILITY

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

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

4. Executed at Half Moon Bay, California, on Friday, October 29, 2010.

Linda Francis