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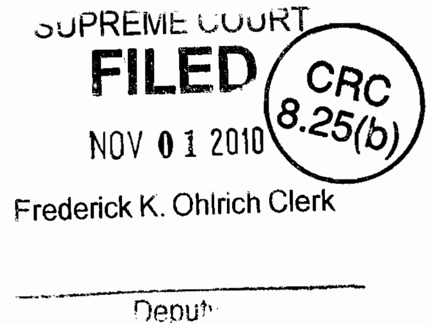

October 29, 2010

The Honorable Ronald M. George, Chief Justice
and the Honorable Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: ***Sonic -Calabasas A, Inc. v. Frank B. Moreno***
Case No. S174475
Supplemental Letter Brief

Honorable Chief Justice and Associate Justices:

This letter brief is filed by Frank B. Moreno ("Moreno") pursuant to the Court's order of October 14, 2010, requesting briefing from Moreno and his former employer, Sonic-Calabasas A, Inc. ("Sonic") on the question: Was the Berman waiver contained in the arbitration agreement between the parties unconscionable? For all of the reasons set forth below, we urge this Court to hold that the Berman waiver contained in this agreement was unconscionable.

I. Standard for Unconscionability

A contract is unenforceable, in whole or in part, if it is unconscionable. (Civil Code § 1670.5; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114.) Both procedural and substantive unconscionability must be present to justify the refusal to enforce a contract or clause based on unconscionability. (*Armendariz, supra,* 24 Cal.4th at p. 114.) The more procedural unconscionability is present, the less substantive unconscionability is required to justify a determination that a contract or clause is unenforceable. Conversely, the less procedural unconscionability is present, the more substantive unconscionability is required to justify such a determination. (*Id.*)

A. Procedural Unconscionability

"The procedural element focuses on two factors: 'oppression' and 'surprise.' 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. 'Surprise' involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by or for the party seeking to enforce the disputed terms." (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.) Surprise will be found when the

arbitration agreement is "hidden in plain sight" on "a dense, single spaced page . . . [on which] the typecase is quite small, and not otherwise distinguished from any other provisions of the employment agreement." (*Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 723; see also *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89.)

"The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, 'which, imposed and drafted by the party of superior bargaining strength, relegates the subscribing party only the opportunity to adhere to the contract or reject it.'" (*Armendariz, supra,* at p. 113.) "[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Id.* at p. 115.)

B. Substantive Unconscionability

"The substantive prong of unconscionability encompasses 'overly harsh' and 'one-sided' results. (*A & M Produce Co., supra,* 135 Cal.App.3d at p. 487.) Stated another way, "the substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner." (*Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1664.)

Exculpatory effect combined with a lack of mutuality are factors that have led to findings of unconscionability: "Class action and [class] arbitration waivers are not, in the abstract, exculpatory clauses. But . . . the class action is often the only effective way to halt and redress [unlawful business practices]. Moreover, such class action or arbitration waivers are indisputably one-sided. Although styled as a mutual prohibition on representative or class actions, it is difficult to envision circumstances under which the provision might negatively impact [the business], because . . . .companies typically do not sue their customers in class action lawsuits. Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 454; *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 160-161.)

If the waiver, as a practical effect, makes it very difficult or unlikely for those injured by unlawful conduct to pursue a legal remedy, the waiver is unconscionable under California law and therefore, will not be enforced. (*Gentry, supra,* at p. 454; *Discover Bank, supra,* at pp. 162-163.) Substantive unconscionability will therefore be found when "although formally bilateral ... the practical effect of [a] clause is to tilt the playing field" in favor of the party with superior bargaining power. (*Saika v. Gold* (1996) 49 Cal.App.4th 1074.)

II. The Arbitration Agreement Between the Parties

A. Analysis of Procedural Unconscionability

1.. The Arbitration Agreement Was A Contract of Adhesion

As acknowledged by Sonic in its petition to compel arbitration, the arbitration agreement was imposed on Moreno as a condition of employment, on a take it or leave it basis. The petition states: "Sonic-Calabasas A, Inc. has established a dispute resolution program to resolve all employment-related claims, disputes and/or controversies which would otherwise require or allow resort to any court or other governmental dispute resolution forum through binding arbitration," and that "[u]se of this dispute resolution program is required of . . . employee." (Petition ¶ 2, at Clerk's Transcript ["CT'] 006.) The petition further states that "all employees of Sonic-Calabasas A, Inc. are subject to the company's arbitration program by accepting or continuing employment with the company." (Petition ¶4, at CT 007.)

2. The Arbitration Agreement Was "Hidden in Plain Sight"

An examination of the arbitration agreement reveals that it consists of one paragraph within a one-page, seven paragraph document entitled 'Applicant's Statement & Agreement.' (CT 009.) The type size is so minute that the document is just barely readable, and the type size of the one paragraph dealing with arbitration is the same as that of the rest of the document. There are no paragraph headings summarizing content. The densely packed "arbitration paragraph" consists of 28 lines of type. A representative line in that paragraph consists of 25 words. There is nothing about the design or lay-out of the printed agreement that would suggest it was actually intended to be read, much less comprehended, by any job applicant.

3. The Arbitration Agreement Was Procedurally Unconscionable

Both elements of oppression and surprise are met, in that the agreement was a contract of adhesion imposed on Moreno and on all of Sonic's job applicants on a take it or leave it basis, and its terms were essentially hidden by the manner in which it was presented by Sonic to Moreno and other job applicants. As such, the arbitration agreement was procedurally unconscionable.

B. Analysis of Substantive Unconscionability

Here, as a preliminary matter, we urge the Court to take this opportunity to reexamine and refine its conclusion, in dicta, that "inclusion of a provision limiting resort to an administrative forum does not render the arbitration agreement unconscionable or unenforceable." (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681.) This seemingly categorical approach, rejecting unconscionability as a defense to any administrative forum waiver, should be

replaced by an approach that carefully analyzes whether the unique role and function of the administrative forum at issue renders it vitally necessary for the vindication of unwaivable statutory rights, and whether the provisions of the arbitration agreement at issue demonstrate that arbitration under that agreement will function as an effective substitute forum for the vindication of those rights.

Under this nuanced approach, the result will depend on first analyzing if and how the administrative agency functions to provide needed assistance to members of a legislatively protected group (here, employees) in securing their rights under protective legislation. If and only if it determined that the administrative agency performs a function that is essential to assisting and enabling claimants to secure their rights, it is then necessary to determine whether the adjudicatory process under the arbitration agreement fails to provide claimants with roughly equivalent protections that are necessary for the vindication of those rights, and whether the adjudicatory process under the arbitration agreement is therefore a markedly less effective method for securing those rights.

Under this approach, a determination as to the unconscionability of a waiver of the Labor Commissioner's adjudicatory processes under the Talent Agencies Act (Labor Code §§ 1700, et seq.) has no relevance to a determination of the unconscionability of a waiver of the Berman wage adjudication process (Labor Code §§ 98-98.5). The finding that the Labor Commissioner does not perform a vitally necessary role in securing the rights of artists in adjudications under the Talent Agencies does not in any way determine whether the Labor Commissioner performs a vitally necessary function in securing the rights of employees under the Berman wage adjudication process.

For the reasons set out below, we believe the protections offered to employees under the Berman wage adjudication process are indeed vital for securing employees' rights under California's wage and hour laws, and that a waiver of those protections – unless the waived protections are somehow recreated in an alternative adjudicatory procedure – is substantively unconscionable. To be sure, we do not suggest that a Berman waiver must *always* be found to be unconscionable. Rather, the waiver is unconscionable if the alternative adjudicatory scheme fails to provide the employee with the vital and necessary protections of the Berman process. This Court has made clear that it will not enforce an agreement that would "impose arbitration on an employee . . . as an inferior forum that works to the employer's advantage." (*Armendariz, supra,* 24 Cal.4th at p. 124.) On the other hand, a Berman waiver that is part of an arbitration agreement that has built into it all of the vital protections of the Berman process should be enforceable. The arbitration agreement that is before this Court, however, does not come anywhere close to providing these necessary protections. For that reason, it is substantively unconscionable.

1. The Berman Wage Adjudication Process

"The public policy in favor of full and prompt payment of an employee's earned wages is

fundamental and well established." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.) Against the backdrop of this policy, which recognizes that wages are critical to the welfare and well-being of employees and their families, the Legislature has determined that wage earners are vulnerable and that they cannot effectively vindicate their wage rights under the complex and technical procedures that govern the litigation of civil disputes in a conventional judicial forum. Accordingly, the Legislature created the two-step Berman process for the resolution of wage claims.

The first step is a non-binding, informal, expeditious and cost-free administrative hearing in which the employee can present his or her claim without incurring any expenses, without having to cope with complex rules of procedure, without a discovery process, without being at risk for attorneys' fees, and without being at a disadvantage if unrepresented by counsel. (Labor Code § 98; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal4th 1094, 1114-1115; *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858-859.) The Labor Commissioner must provide claims assistance and information to both English speaking and non-English speaking wage claimants, and must provide the latter with interpreters at all hearings and interviews. (Labor Code § 105) The Labor Commissioner must decide the claim within 15 days after the hearing. (Labor Code § 98.1.)

The second step is a *de novo* judicial proceeding that is initiated when either party appeals from the administrative decision. Of course, if neither party files a timely appeal, the adjudication of the matter ends at the first step, but the Labor Commissioner is then obligated to file its decision with the clerk of the appropriate court and obtain a judgment in conformity with that decision. (Labor Code § 98.2(d)-(e).) The Labor Commissioner is then required to "make every reasonable effort to ensure that judgments are satisfied . . . ." (Labor Code § 98.2(i).)

The second step of the Berman process – the *de novo* judicial proceeding – implicates the complex and technical rules and procedures of the judicial forum. Without attorney representation, virtually all wage claimants are at a terrible disadvantage in attempting to prosecute their wage claims in this forum. To ensure that wage claimants who prevailed before the Labor Commissioner can effectively present their claims in employer-filed *de novo* proceedings, the Legislature mandated that the Labor Commissioner provide wage claimants with legal representation in such proceedings, at no cost to the claimant, if the claimant is unable to afford private counsel. (Labor Code § 98. 4.)

Other significant protections to employees in the Berman wage adjudication process include the one-way attorney fee shifting provision of Labor Code § 98.2(c) and the appeal bond requirement under § 98.2(b). These provisions are designed and intended to encourage employees to make use of the Berman process in pursuing wage claims and to discourage employers from filing meritless *de novo* appeals. Under the one-way attorney fee shifting provision, an employee who prevailed in a hearing before the Labor Commissioner, and who is then drawn into an employer-filed *de novo* appeal (1) is entitled to recover his or her attorneys' fees if the employer is

"unsuccessful" in the *de novo* appeal, with the employer deemed "unsuccessful" if the court awards any amount in favor of the employee, and (2) is shielded from any liability for the employer's attorney's fees, even if the employer is successful in the *de novo* appeal. (Labor Code § 98.2(c); *Smith v. Rae Venter* (2002) 29 Cal.4th 345, superseded by statute as stated in *Sampson v. Parking Service 2000 Com, Inc.* (2004) 117 Cal.App.4th 212; *Cardenas v. Mission Industries* (1991) 226 Cal.App.3d 952 [overruled by *Smith,* but reinstated by statute]; *Dawson v. Westerly Investigations, Inc.* (1988) 204 Cal.App.3d Supp. 20.)

The genius of the Berman process is evidenced by the tens of thousands of wage claims that are filed and resolved annually. (See Amici Asian Law Caucus, et al., RJN, Exh. 8.) This is a process that works as it was intended – to provide California's wage earners with a procedure that allows them to vindicate their right to payment of "wages in the amount, time or manner required by contract or by statute." (*Cuadra, supra*, at p. 858.) It does not matter whether the underlying claim is founded upon unwaivable statutory rights (such as payment of the minimum wage or overtime or as here, payment of unlawfully forfeited accrued vacation wages), or is no more than a garden variety contract dispute such as where an employer promises to pay a worker $15 an hour but only pays the worker $10 an hour for non-overtime work. The protections of the Berman process must be available to employees with statutory or contract-based claims in order to effectuate the fundamental and well established public policy of "full and prompt payment of an employee's earned wages." (*Smith v. Superior Court, supra,* at p. 82.)[1]

In short, the role of the Labor Commissioner in the Berman wage adjudication process extends far beyond the role of a mere adjudicator to include, for those cases which are adjudicated in favor of the employee and not appealed by the employer, a law enforcement role as evidenced by the Labor Commissioner's statutory obligation to obtain court judgments in conformity with the final Labor Commissioner decision and to take all reasonable steps to enforce those judgments. This wage collection function has no counterpart under the Talent Agencies Act, under which the Labor Commissioner is not authorized to take any actions to collect an amount awarded by the Commissioner in a un-appealed administrative decision.

In Berman cases adjudicated by the Labor Commissioner in favor of the employee that are

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[1] To the extent that *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276 [holding that an employee's breach of contract cause of action, concerning a $5 million to $8 million profit-sharing bonus, and a $500,000 severance payment, was not subject to the minimum requirements for arbitration set forth in *Armendariz*] might be viewed as providing less protection for contract-based Berman wage claims than for statutory Berman wage claims, we ask the Court to expressly limit the reach of that case to avoid such an unwarranted result. Berman waivers that are not tied to an alternative adjudication process that provides employees with the same protections as the Berman process should be found unconscionable without regard to the specific nature of the employee's wage claim.

appealed by the employer, the Commissioner's role extends beyond a mere adjudicator to that of a prosecutor, performed by an attorney provided by Commissioner at no cost to the claimant to represent the claimant in the *de novo* proceedings on his or her wage claim. This prosecutorial function, mandated by Labor Code § 98.4, has no counterpart under the Talent Agencies Act, where the Commissioner has no further involvement in a case that goes up on *de novo* appeal proceedings following the issuance of the administrative decision.

Likewise, the one way attorney fee shifting provisions of Labor Code § 98.2 (c), have no counterpart under the Talent Agencies Act. In summary, the recitation of all of these significant differences between the Berman process and the Talent Agencies Act with respect to the role of the Labor Commissioner and the protections afforded to persons filing claims with the Labor Commissioner makes clear that each administrative process must be analyzed on its own terms, to determine exactly what is being waived by a waiver of the administrative process, and whether any alternate adjudication process provides an adequate substitute for what has been waived.

2.. The Substantive Provisions of the Arbitration Agreement

The arbitration agreement provides for "binding arbitration to resolve all disputes that may arise out of the employment context . . . that either [the job applicant] or the Company . . . may have against the other which would otherwise require or allow resort to any court or governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise (with the sole exception of claims arising out of the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act, and Employment Development Department claims)." (CT 009.)

The agreement requires that such claims "be submitted to and determined by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery)." (*Id.*)

The agreement further provides that "[t]o the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all right to resolution of the dispute by means of motion for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8." (*Id.*)

An arbitration conducted pursuant to express provisions of the agreement must be heard before a retired California Superior Court judge. The arbitrator's decision is subject to review, with a ten day period following issuance of the arbitrator's written decision for either party to to request review. The decision is then reviewed by a second arbitrator, who is required, "as far as

practicable, [to] proceed according to the law and procedures applicable to review by the California Court of Appeal of a civil judgment following a court trial." (*Id.*)

3. The Adjudicatory Procedures of the Arbitration Agreement Are A Woefully Inadequate Substitute for the Berman Wage Adjudication Process

The parties' arbitration agreement requires that a wage claim be resolved exclusively in the arbitral forum. Thus, the arbitration agreement not only displaces the judicial forum where Moreno's wage claim might otherwise have been ultimately adjudicated in *de novo* proceedings; it also completely eliminates pre-arbitration access to the first step of the Berman wage adjudication process. Strikingly, however, the procedural structure that Sonic established to govern the arbitral proceedings pursuant to its arbitration agreement is virtually identical to the formalistic, complex, and technical procedures that govern the litigation of claims in the conventional judicial forum. By combining its elaborate, courtroom like arbitration procedures with a waiver of the Berman hearing, the Sonic arbitration agreement has, in one fell swoop, wholly eviscerated the panoply of statutorily created procedures that are vitally necessary for the vindication of employee's wage rights in the arbitral forum. The operative effect of the evisceration of these Berman protections is manifest and devastating.

Imposition of the Berman waiver eliminates the right that a wage claimant has, at the Berman hearing stage, to have his or her claim heard without incurring any costs. At minimum, just to have his claim heard under Sonic's arbitration agreement, Moreno will have to pay filing fees, administrative fees, and half the costs of at least one (and possibly two) arbitrators. (CCP § 1284.2)

At the Berman hearing stage, the employee is entitled to proceed without facing any liability for the employer's attorney's fees. Again, this right is eliminated by the Berman waiver. Just to have his claim heard under Sonic's arbitration agreement, Moreno will have to risk an award of attorney's fees in favor of his employer. (Labor Code § 218.5.)

At the Berman hearing stage, the employee can proceed by filing a simple informal claim - with assistance from the Labor Commissioner's deputies, if needed. There are no formal pleadings, there are no demurrers or procedural motions allowed, there is no discovery allowed, there are no sanctions for failing to fully respond to the other side's discovery requests, and the formal rules of evidence do not apply. Imposition of the Berman waiver extinguishes the employee's right to present his or her claim informally, and in its place installs an adjudicatory structure which adopts all of the formalistic, complex and technical rules that apply in civil court proceedings: pleadings, demurrers, procedural motions, motions for judgment on the pleadings, motions for summary judgment, broad discovery, potential sanctions for failing to fully respond to the employer's discovery requests, and formal rules of evidence. (CT 009; CCP § 1283.05.) Just to have his claim heard, Moreno will be faced with these insurmountable (to anyone who is not represented by counsel) obstacles.

At the Berman hearing stage, the process is structured so that the employee can easily proceed without being represented by an attorney, Under the procedural minefield created by the imposition of the Berman waiver – coupled with the adoption of arbitral procedures that utterly fail to replicate the protections of the Berman process – Moreno could not conceivably effectively present his claim at a hearing without representation by counsel.

Furthermore, the imposition of the Berman waiver utterly deprives the employee of access to the remedial tools that are made available at the *de novo* stage of the Berman process if the employee prevails at the administrative level – namely, one-way attorney's fees, no-cost representation by an attorney for the Labor Commissioner, and the posting of an appeal bond. As we have explained in prior briefing, without access to these remedial tools, wage earners cannot effectively vindicate their rights in the arbitral forum.

4. Lack of Mutuality in Berman Waiver

The Berman waiver, "although formally bilateral," cannot operate in any practical manner other than as a unilateral waiver of the employee's right to invoke the protections of the Labor Commissioner. Claims under Labor Code § 98 can only be filed by employees against employers. Under section 98(a), "the Labor Commissioner shall have authority to investigate employee complaints" and "may provide for a hearing in any action to recover wages, penalties, and other demands for compensation." There is nothing in the Berman statutory framework that would allow an employer to initiate a claim against an employee. A Berman waiver is therefore necessarily one-sided in that the employer agrees to give up nothing, while the employee waives his or her invaluable right to use a legislatively created process intended and designed to help employees vindicate their rights to payment of unpaid wages. Indeed, the one-sidedness of this waiver is even more striking than the one-sidedness of the class action and class arbitration waiver in *Discover Bank* and *Gentry,* where this Court noted that companies typically do not sue their customers or employees, respectively, in class action lawsuits.

This lack of mutuality is yet another distinguishing feature between a Berman waiver and a waiver of the Labor Commissioner's adjudicatory processes under the Talent Agencies Act. Under the Talent Agencies Act, claims can be filed with the Labor Commissioner both by and against artists. (Labor Code §1700.44 ["in cases of controversy arising under this chapter, the parties shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine same"].) Under the Talent Agencies Act, the Labor Commissioner routinely hears and decides claims against artists for unpaid commissions. (See, e.g., *Lenhoff Enterprises, Inc. v. Anthony Palmieri,* TAC No. 22-05 [available at http://www.dir.ca.gov/dlse/TAC/22-05.pdf].)

5. The Berman Waiver Results in Unreasonable and Unfair Exposure to Attorney's Fees

In *Trivedi v. Curexo Technology Corp.* (2010) ____ Cal.App.4th ____, 2010 WL 3760224, the

court held that an arbitration clause that includes a mandatory attorney fee and cost provision in favor of the prevailing party is unconscionable because it places the employee at a greater risk than if he had retained the right to bring a FEHA claim in court. Under FEHA, a prevailing plaintiff ordinarily recovers attorney's fees unless special circumstances would render the award unjust; whereas a prevailing defendant may recover fees only when the plaintiff's action was found to be frivolous, unreasonable, without foundation, or brought in bad faith. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985.) Attorney's fees awards under FEHA are intended "to make it easier for plaintiffs of limited means to pursue meritorious claims." (*Id.* at p. 984.) Because the arbitration agreement, in *Trivedi*, would allow the employer to recover attorney's fees as a prevailing party, without regard to whether the employee's claims were frivolous, unreasonable, without foundation or brought in bad faith, the court found that "enforcing the arbitration clause and compelling [the employee] to arbitrate his FEHA claim lessens his incentive to pursue claims deemed important to the public interest , and weakens the legal protection provided to plaintiffs who bring nonfrivolous actions from being assessed fees and costs." (*Trivedi, supra,* at *4.)

Here, the arbitration agreement's silence on attorney's fees operates in virtually the same manner, at least as to Moreno's wage claim, as the express fee provision in *Trivedi.* Here, if Moreno loses his claim in arbitration, he will be liable for Sonic's attorney's fees in accordance with Labor Code § 218.5. But absent the Berman waiver, Moreno would never have been exposed to liability for Sonic's attorney's fees. This exposure to potential attorney's fees in the tens of thousands of dollars can only "lessen [the employee's] incentive to pursue claims deemed important to the public interest" and unquestionably "weakens the legal protections" provided to wage claimants under the Berman process. As in *Trivedi,* substantive unconscionability is here established by a Berman waiver that has the effect of placing Moreno at greater risk than if his wage claim had been adjudicated before the Labor Commissioner.

III. Conclusion

For all of the reasons set forth above, we ask this Court to hold that the Berman waiver contained in the parties' arbitration agreement was unconscionable and is therefore unenforceable.

Respectfully submitted,

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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 the date listed below, following ordinary business practice, I served the following document(s):

SUPPLEMENTAL LETTER BRIEF RE: UNCONSCIONABILITY

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:

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(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.

( ) (By Personal Service) Following ordinary business practice, I caused each such envelope, with courier charges prepaid, to be delivered to a courier employed by Western Messenger Attorney Services, who personally delivered each such envelope to the offices of each addressee.

( ) (By U.S. Postal Express Mail) Following ordinary business practice, I caused each such envelope, with Express Mail postage thereon fully prepaid, to be placed in the United States Express Mail depository, at San Francisco, California, for next day delivery.

( ) (By Federal Express) Following ordinary business practice, I caused each such envelope, with shipping charges fully prepaid, to be delivered to a Federal Express agent at Federal Express Corporation at San Francisco, California, for next business day delivery.

( ) (By Facsimile) I caused each such document(s) to be sent by facsimile to all counsel for same day delivery.

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 October 29, 2010 at San Francisco, California.

Cherie A. Milojevich-Moore