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November 5, 2010

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 in Reply to address the unconscionability arguments presented by Respondent FRANK MORENO on the issue of whether the so-called Berman Waiver is unenforceably unconscionable. As noted herein, Moreno's contention that the Berman Waiver fails to meet minimum standards of procedural and substantive unconscionability is unsupported. Because this agreement makes no attempt to unfairly disadvantage employees, there can be no finding of substantive unconscionability and the agreement should be enforced.

I.

Both parties recognize that for the arbitration agreement to be unenforceably unconscionable, there must be findings of both procedural and substantive unconscionability. But while Appellant acknowledges that its dispute resolution program requiring arbitration of all claims that both the employee and the employer may have against the other is required of all employees, it does not necessarily follow therefrom that the agreement is procedurally unconscionable. Even if the agreement should be viewed as adhesive, that only begins the procedural unconscionability analysis.

As Respondent's supplemental brief notes on its opening page, procedural unconscionability focuses on both "oppression" and "surprise." Whether the dispute resolution program was required as a condition of employment addresses only the "oppression" prong. The "surprise" element requires an analysis of whether the employee was taken by surprise. Was Moreno surprised by the existence of the arbitration obligation and the breadth thereof? And on this issue, there is no evidence in the record to make such a finding.

The record is devoid of any such evidence because the issue of unconscionability was never raised at the Superior Court or at the Court of Appeal. As such, any potential unconscionability argument has been waived by Respondent and should not be inserted into this matter at this level. Because the party seeking to avoid the enforcement of the arbitration agreement bears the burden of proving any defense to its enforcement, Respondent's failure to raise the argument below means he can never meet this burden. (*See, e.g.*, Pearson Dental Supplies, Inc. v. Superior Court (Turcios) (2010) 48 Cal.4th 665, 681 [unconscionability not raised below mandates conclusion that claimant has forfeited this issue].)

Had unconscionability been raised below, then Appellant would have had an opportunity to demonstrate that the arbitration provision was no surprise at all to Respondent Moreno. Appellant would have had a chance to demonstrate that this specific dispute resolution provision, with little or no modifications thereof, is in wide use throughout the retail automotive dealership industry across California and other states. (*See, e.g.*, Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1069–70 [arbitration agreement language at other dealership substantial identical, with exception of appellate threshold not present in Respondent's agreement]; Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 714 [substantially identical "Applicant's Statement & Agreement"].) And Appellant would have had a chance to demonstrate that Respondent had signed multiple acknowledgments of the arbitration requirements throughout his employment with Appellant and throughout his career in the retail automobile industry.[1] Any supposition that the terms were "essentially hidden" to surprise the employee would be easily disproven. The absence of surprise that would have been easily shown had the issue been raised below negates, at least in part, any suggestion of procedural unconscionability.

[1] Appellant would also have the opportunity to counter Respondent's argument that the typeface on the arbitration agreement was "so minute that the document is just barely readable." The agreement at Page 9 of the Clerk's Transcript has been reduced in size through repeated reproduction, including fax transmission; the original is clearly legible, as are numerous other written acknowledgments of the parties' arbitration agreement.

II.

As the Supreme Court has recognized, the public policy analysis is separate from the unconscionability analysis. (*See* Gentry v. Superior Court (Circuit City) (2007) 42 Cal.4th 443, 467 [validity of class arbitration waiver analyzed in terms of unwaivable statutory rights, not unconscionability]; Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 115–16 [unconscionability analysis separate from FEHA issues addressed under public policy analysis].) Much of the effort by Respondent in his supplemental brief to find substantive unconscionability where none exists is a retread of his arguments raised throughout the appellate process seeking to demonstrate that the enforcement of arbitration agreement to the exclusion of the optional Berman Hearing process would violate public policy. He repeats his arguments that because the arbitration agreement does not specifically ensure that all wage claimants get (a) legal representation by the Labor Commissioner; (b) insulation from the statutory fee-shifting favoring the prevailing party; and (c) assistance in collection of favorable awards through an appeal bond, the arbitration agreement is unconscionable. But none of these remedial tools are proscribed by the agreement. And more importantly, even if they were, they would not make the agreement so one-sided as to "shock the conscience." That is Respondent's burden to meet, and he cannot do so.

Respondent begins his analysis with a plea to this Court that its decision in Pearson Dental Supplies, *supra,* be restricted. In that case, the employee had argued to this Court that an arbitration agreement that precluded resort to administrative proceedings, when coupled with a shortened statute of limitations, was substantively unconscionable. (*See* Pearson Dental Supplies, *supra,* 48 Cal.4th at 680–81.) The Supreme Court rejected this argument, not only because it had not been raised in proceedings below, but also because an arbitration agreement precluding resort to administrative proceedings is not unlawful in all circumstances. (*See* Pearson Dental Supplies, *supra,*48 Cal.4th at 681 [*citing* Preston v. Ferrer (2008) 552 U.S. 346, 359–60 [federal law supports enforcement of arbitration agreements subject to Federal Arbitration Act even when restriction of administrative agency access conflicts with state law]. "We therefore conclude that the inclusion of a provision limiting resort to an administrative forum does not render the arbitration agreement unconscionable or unenforceable." (Id., 48 Cal.4th at 682.)

Given the unequivocal language of the U.S. Supreme Court in Preston confirming that the FAA will preempt efforts by a state to require an administrative forum notwithstanding an agreement to submit disputes to binding arbitration, Respondent would have the court focus on distinctions between the roles of the Labor Commissioner under the Talent Agencies Act (as was at issue in Preston) and the Berman Process. Specifically, Respondent describes the role of the Labor Commissioner in the Berman Process as vitally necessary to the effective vindication of employees' rights under California's wage and hour laws, dismissing the agency's role under the Talent Agencies Act as merely adjudicative. But this attempt to puff up the importance of the Berman Process is easily deflated.

First, as briefed extensively in connection with the public policy argument that precluding access to the Berman Process necessarily results in the *de facto* waiver of unwaivable statutory rights, the fact that the statutory Berman Process is entirely optional from the start negates any argument that resort to the agency is "vitally necessary for the vindication of unwaivable statutory rights." No employee is required to participate in the Berman Hearing process; any aggrieved worker can proceed directly to a judicial action, or, having already agreed to binding arbitration, to an action in arbitration to obtain vindication of his or her rights. Had the legislature determined that the process was "vitally necessary" then it would have so provided in the Labor Code. Moreover, the nonbinding nature of the Berman Process means that either party can reject the findings of the Labor Commissioner and proceed to a final and binding adjudication of their rights. As such, the administrative adjudication is hardly "vital" to the administration of justice.

This inflation of the importance of the Berman Process rests on the presumption that the arbitration process cannot provide sufficient protections for employee rights to ensure that the arbitration forum itself does not determine the outcome. As the U.S. Supreme Court has confirmed, arbitration does not modify the substantive rights of the litigants; rather, it merely provides an alternative forum for their vindication. (*See* Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 628 [substantive rights not foregone with arbitration, only forum changes].) Indeed, Respondent acknowledges that where an arbitration agreement establishes a forum that ensures the protection of employee rights, it would not be unconscionable. (*See* Respondent's Supplemental Brief, at p. 4 [analysis is whether the agreement establishes arbitration that will function as an effective substitute forum for vindication of rights].)

Respondent maintains that "all of the vital protections of the Berman process should be enforceable" for the agreement to avoid unconscionability. But this is not the standard that the Court has adopted in Pearson Dental Supplies and in Armendariz. Noting the public policy favoring enforcement of arbitration agreements, this Court noted, that an arbitration provision will be interpreted

> in a manner that renders it lawful, both because of our public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution, and because of the general principle that we interpret a contractual provision in a manner that renders in enforceable rather than void.

(Pearson Dental Supplies, *supra,* 48 Cal.4th at 682.) This followed the approach laid down in Armendariz, where the Court confirmed that an agreement that did not expressly allocate forum costs among the parties would include an implicit agreement to incorporate substantive remedial provisions needed to vindicate the statutory rights. Armendariz, *supra,* 24 Cal.4th at 112-13

[implying employer agreement to cover forum costs where agreement silent as to cost allocation]; *see also* Little, *supra*, 29 Cal.4th at 1080–81.)[2]

In Armendariz, the statutory rights in question arose under the Fair Employment and Housing Act and its protections of civil rights. In this case, the statutory rights in question arise under the Labor Code and its protections of employees' rights to the payment of wages—specifically vacation wages claimed by Respondent. The fundamental right at issue here is not the right to be represented by the Labor Commissioner in pursuing those rights. After all, a claimant can waive that contingent right and proceed directly with a lawsuit or arbitration demand without even notifying the Labor Commissioner. As the Court of Appeal noted, even if an employee were to proceed first to a Berman Hearing, he or she would not be endowed with this right to representation without first prevailing before the Labor Commissioner only to find the award appealed by the employer. (*See* Sonic–Calabasas A, Inc., v. Moreno (2009) 174 Cal.App.4th 546, 565.) In fact, as argued below, the statute in question only permits representation following an appealed administrative decision for "financially disabled" persons unable to afford counsel. (*See* Cal. Labor Code § 98.4 (West 2010) [caption].) In this case, there is no record evidence of whether Respondent Moreno—who made a six-figure income—was even close to this unspecified standard.

Respondent's argument that the arbitration agreement establishes a dispute resolution forum that is too formalistic, complex and/or technical for an employee to navigate is both demeaning and misleading. It is demeaning because it makes the presumption that employees seeking to raise wage claims will be wholly unable to understand the process and will necessarily fall victim to procedural traps. It is also demeaning because it implies that a Retired Superior Court Judge sitting as Arbitrator would just sit back and watch a claimant walk unprotected through what Respondent describes as a "procedural minefield" standing between a claimant and vindication of his or her rights. And it is misleading, because the agreement language itself does not slavishly open some Pandora's Box of procedural nightmares. The language reads, "To the extent applicable in civil actions in California courts, the following shall apply and be observed. . . ." (*See* CT 9.) The agreement goes on to list procedural features that may or may not be applicable to certain claims, including pleadings, evidentiary rules, and dispositive motions. (Id.) Not all of these apply to wage claims brought in arbitration. Again, the mantra of the Supreme Court in Mitsubishi Motors, *supra,* is germane here: arbitration changes the forum, not the underlying substantive rights.

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[2] Respondent's argument at page 8 of his Supplemental Brief that suggests that Moreno will have to pay half the costs of at least one (and possibly two) arbitrators pursuant to Section 1284.2 of the Code of Civil Procedure is a misleading scare tactic. This was the specific provision that this Court found in Armendariz to be implied into the parties contractual agreement where the agreement was otherwise silent on this issue. Nobody involved in this matter would suggest that Respondent would have to pay forum costs in order to get to arbitration.

But even if one were to assume here that complicated arbitration procedures or other features of the arbitration could elevate the potential for representation by the Labor Commissioner to an important right without which the underlying right to payment of wages could not be vindicated (as the Armendariz court did with the issue of potentially significant forum costs), then the outcome is not to reject arbitration altogether. Rather, the Court should do as it did with Armendariz and recognize an implicit agreement by the parties to include within the arbitration provision all procedural features required to effectively vindicate employee rights. The same principle would apply to Respondent's contention that protection against fee-shifting awards is imperative to the vindication of employee rights to full payment of wages. In this case, the arbitration agreement specifically requires that the Arbitrator apply the law, and Armendariz and its requirement that necessary protections be implied into otherwise-silent arbitration agreements in order to vindicate fundamental statutory rights is the law on this issue.

Respondent's other argument—that the absence of an appeal bond makes it more difficult or discouraging for employees to vindicate their rights—is even more flimsy. On this issue, the California Arbitration Act specifically provides for provisional remedies if the award might otherwise be rendered ineffectual without provisional relief. (Cal. Code Civ. Proc. § 1281.8.) In fact, the California Arbitration Act even permits a claimant to seek such remedies in Superior Court. (Id.)

Because the arbitration agreement in this case makes no attempt to effectuate a *de facto* waiver of the employees' rights to collect all wages earned, including vacation wages, there is no basis upon which the Court could conclude that the agreement is substantively unconscionable to the point of unenforceability. There is nothing so one-sided about this agreement that "shocks the conscience." Even if the optional Berman Process could somehow vest in the employee fundamental statutory remedial tools vitally necessary for the vindication of employees' rights to wage payment—which it cannot—the Armendariz standard mandates that the agreement include such protections by implication, to the extent that they are not already included in the California Arbitration Act (*e.g.*, provisional remedies under Section 1281.8).

III.

Following its public policy analysis regarding the protection of unwaivable statutory rights, the Court in Armendariz went on to address the question of mutuality of obligation under an unconscionability standard. So, too, in this case, does Respondent argue that the Berman Waiver in this case establishes a one-sided arbitration obligation, arguing that because the Berman Process is only available to employees to pursue claims against the employer—and not vice-versa—any Berman Waiver must necessarily be one-sided, operating only to the benefit of the employer and to the detriment of the employee. This argument reflects a fundamental misunderstanding of both this arbitration agreement and the mutuality of obligation jurisprudence in this area.

The kernel of this argument lies in the characterization of the arbitration agreement as a "Berman Waiver" as though waiving access to the Berman Process were all that the agreement was designed to address. The agreement in this case is a bilateral arbitration agreement that obliges both the employer and the employee to submit all of their claims against each other to binding arbitration, subject to a limited list of enumerated exceptions, each of which favors the employee, and none of which are implicated in this case. Defining the agreement only as a "Berman Waiver" is like defining a vegetarian as one who does not eat cheeseburgers; it ignores all other implications.

Arguing that the agreement is unconscionably one-sided because it requires arbitration of wage claims, which are claims brought exclusively by employees, ignores the fact that most claims between employees and their employers are not symmetrical. For example, only employees bring wrongful termination claims. For the most part, only employers bring claims of embezzlement or theft of trade secrets. And most harassment and discrimination claims are brought by employees against employers. If the agreement in this case excluded from arbitration employer claims (as for theft or embezzlement) while requiring employees to arbitrate termination or harassment claims, it would be suspect under clear California jurisprudence.

Respondent's argument would effectively ban any arbitration agreement that covered any type of claim brought by employees and not employers. For example, one would only need to describe an arbitration agreement as a waiver of the right to bring wrongful termination actions in court. Because few employers would ever conceive such a claim against an employee, an agreement so described would necessarily appear as a unilateral obligation imposed on the employer at least insofar as claims of wrongful termination were concerned. Yet this is clearly counter to long-standing jurisprudence, as countless cases have found claims of wrongful termination to be subject to arbitration agreements.

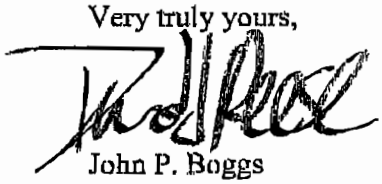
The so-called Berman Waiver only looks unilateral in a vacuum. When properly viewed as a whole, the arbitration agreement applies equally to require both sides to submit all of their claims to arbitration, even if the claims submitted by the employer differ in their specifics from claims submitted by employees.

To the extent that the California Labor Code has set up a system in the Berman Process that imbues employees with rights that cannot be adequately vindicated in an arbitration proceeding, the preemptive effect of the Federal Arbitration Act becomes important. As the U.S. Supreme Court noted in Perry v. Thomas ((1987) 482 U.S. 483) and more recently in Preston v. Ferrer, *supra,* the state is without power to require parties to submit to administrative or judicial adjudication notwithstanding the existence of an arbitration agreement. This Court recognized this in Pearson Dental Supplies, *supra,* and Appellant urges the Court to resist Respondent's call to water down the strong public policies favoring arbitration as a dispute resolution mechanism and favoring the enforcement of the parties' clear and unequivocal contract according to its terms.

Because Respondent cannot carry his burden of demonstrating that the agreement in this case is procedurally unconscionable, the agreement cannot be found unenforceably unconscionable. Likewise, because Respondent cannot carry his burden of demonstrating that the agreement in this case is so one-sidedly unfair as to "shock the conscience" as required for a finding of substantive unconscionability, enforcement of the agreement must be granted and the decision of the Court of Appeal affirmed.

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,



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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 REPLY LETTER BRIEF RE UNCONSCIONABILITY

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PROOF OF SERVICE

I, Julie Dare, hereby declare and state:

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

APPELLANT'S PROOF OF SERVICE OF REPLY LETTER BRIEF RE UNCONSCIONABILITY

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BY FIRST-CLASS MAIL. I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with

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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, November 05, 2010.

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Re:	Sonic-Calabasas A, Inc. v. Moreno	
Pages:	13, including cover page	
Message:	Appellant's Reply Letter Brief Re Unconscionability	
Operator:	jcd	