Case No. S244630

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OTO, LLC an Arizona Limited Liability Company, dba ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND,
Plaintiff and Respondent,

v.

KEN KHO,
Real Party in Interest and Appellant,

JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

Intervenor and Appellant

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

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

REPLY BRIEF

MILES E. LOCKER, SBN 103510
THERESA BICHSEL, SBN 288558
Division of Labor Standards Enforcement
Department of Industrial Relations
STATE OF CALIFORNIA
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
Telephone: (415) 703-4863

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

Case No. S244630

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OTO, LLC an Arizona Limited Liability Company, dba ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND,
Plaintiff and Respondent,

v.

KEN KHO,
Real Party in Interest and Appellant,

JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

Intervenor and Appellant

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

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

REPLY BRIEF

MILES E. LOCKER, SBN 103510
THERESA BICHSEL, SBN 288558
Division of Labor Standards Enforcement
Department of Industrial Relations
STATE OF CALIFORNIA
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
Telephone: (415) 703-4863

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

The central issue in this case is whether the adhesive arbitration agreement that Petitioner and Respondent—One Toyota of Oakland (OTO)—seeks to enforce against Ken Kho is so unreasonably one-sided in OTO's favor, without legitimate commercial justification, that it is unconscionable. Though private arbitration agreements may be constructed in an even-handed manner to resolve disputes more quickly and at less cost than judicial proceedings, they "may also become an instrument of injustice imposed on a 'take it or leave it' basis." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115.) This Court's task, then, is to "distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness." (*Ibid.*)

Here, the arbitral forum OTO constructed effects the latter. Under *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), an arbitration agreement is substantively unconscionable if—considering the totality of the circumstances—it creates a forum for a particular wage claimant that is not accessible and affordable. Applying this test to the present case demonstrates that it will be unconscionable to enforce OTO's arbitration agreement against Kho. Not only is the arbitration agreement rife with procedural unconscionability, it is also substantively unconscionable given its unjustified imposition of burdens that fall only on

Kho, while simultaneously conferring benefits only on OTO. The net effect of OTO's agreement is that it effectively blocks every forum for Kho to redress his wage claims, including arbitration. The Court should reverse the decision of the Court of Appeal and affirm the trial court's order denying the petition to compel arbitration. The Court should also reverse the trial court's order vacating the Labor Commissioner's order, decision or award (ODA) and reinstate that award.

ARGUMENT

I. THE PROCEDURAL CIRCUMSTANCES AND SUBSTANTIVE TERMS OF OTO'S ARBITRATION AGREEMENT RENDER THE AGREEMENT UNCONSCIONABLE

It is undisputed that "[u]nconscionability has both a 'procedural' and a 'substantive' element." (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.) But these two elements "need not be present in the same degree." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) Rather, a "sliding scale is invoked" such that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to hold the agreement unenforceable, and vice versa. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244 [quoting *Armendariz*, *supra*, at p. 114]; accord *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910.) Accordingly, where there is a high degree of procedural unconscionability, "even a low

degree of substantive unconscionability [can] render the arbitration agreement unconscionable." (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85.)

As addressed in the Labor Commissioner's Opening Brief and again below, the record here establishes an "extraordinarily high" degree of procedural unconscionability consisting of both oppression and surprise.

The record also manifests a surfeit of substantive unconscionability, particularly given the high degree of procedural unconscionability. OTO's agreement imposes an opaque, complex and expensive process on Kho in lieu of the informal and easily accessible Berman procedures otherwise available to Kho, and consequently strips Kho of the benefits to which he would have been entitled in pursuing his wage claim before the Labor Commissioner. (See *Sonic II, supra*, 57 Cal.4th at p. 1146 [unconscionability analysis must take into account "not only what features of a dispute resolution agreement eliminates but also what features it contemplates"].) Notably, the agreement does not provide any corresponding benefits to Kho in exchange. Rather, all the benefits under the agreement inure to OTO, which is shielded by the agreement from the risks that would otherwise attend it if it were sued in court. The net result is an arbitration agreement that, by design, operates to solely favor OTO by effectively blocking employees like Kho from being able to redress their wage claims. The agreement, therefore, is substantively unconscionable.

A. The Level of Procedural Unconscionability in this Case Is "Extraordinarily High"

Notwithstanding the fact that both the trial court and Court of Appeal below found an "extraordinarily high" degree of procedural unconscionability, OTO argues that there is no oppression or surprise in the circumstances surrounding the formation of the agreement.[1] (Answer at pp. 20-23.) The record demonstrates otherwise.

1) The Record Demonstrates Oppression

Oppression arises when there is "an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." (*Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519, 1532.) Contracts of adhesion, by definition, are oppressive.[2] (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817 [contract of adhesion is a standardized contract "which, imposed and drafted by the party of superior bargaining strength

---

[1] OTO contends that in order to find any procedural unconscionability, the Court must find both oppression and surprise. (Answer at pp. 20-23.) But that is incorrect; procedural unconscionability requires only a finding of either oppression or surprise. (*Armendariz*, *supra*, 24 Cal.4th at p. 114; accord *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247.) The presence of both oppression *and* surprise simply heightens procedural unconscionability. (*Carmona*, *supra*, 226 Cal.App.4th at p. 85; *Pinnacle*, *supra*, at p. 247; accord *McCaffrey Group, Inc. v. Super. Ct.* (2014) 224 Cal.App.4th 1330, 1349.)

[2] See also *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 ["The procedural element of an unconscionable contract generally takes the form of a contract of adhesion"]; accord *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 853 ["A finding of a contract of adhesion is essentially a finding of procedural unconscionability"].

relegates to the subscribing party only the opportunity to adhere to the contract or reject it."].) This is particularly so in the employment context. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704.)

Though OTO denies as much in its Answer, the record in this case clearly demonstrates that the arbitration agreement here is a contract of adhesion. The agreement was drafted entirely by OTO (or on its behalf) and was presented to Kho under circumstances that were plainly intended to lead him to believe that he was required to sign the document on the spot, as part of his employee responsibilities. (CT 109.) Not surprisingly, both the trial court and Court of Appeal below easily found an extraordinarily high degree of procedural unconscionability. (*OTO, L.L.C. v. Kho* (2017) 14 Cal.App.5th 691, 709; CT 213.)

OTO's contentions discounting the evidence of oppression are specious. OTO faults Kho for not asking questions and contends that Kho was never specifically told that he had to sign the agreement in order to continue working for OTO and that Kho never specifically said in his declaration that the agreement was presented on a take-it-or-leave-it basis. But, under the circumstances, Kho reasonably understood (and indeed, OTO intended Kho to understand) that he was required to sign the presented documents if he wanted to keep his job. Moreover, OTO has admitted that "[t]here are no employees of One Toyota of Oakland who are

not required to agree to the dispute resolution provisions, which require binding arbitration of disputes." (CT 002:3-7; see also CT 060:6-8.) This admission in OTO's petition to compel arbitration forecloses any later suggestion that OTO would have permitted Kho to negotiate the terms of the arbitration agreement.

2) The Record Demonstrates Surprise

OTO contends that there was no surprise in the present case because the agreement was laid bare in a stand-alone document written in "easily readable" font prefaced with the block heading "COMPREHENSIVE AGREEMENT EMPLOYMENT AT-WILL AND ARBITRATION." (Answer at p. 22.) It strains credulity, however, to describe the document—printed in tiny, seven-point font, and mostly presented in one very long, dense, block paragraph containing numerous references to statutes and various legal concepts—as "easily readable." (See CT 005-006.)

Even if the agreement could be considered "easily readable," OTO's contention is nonetheless misplaced given that "conspicuousness and clarity of language alone may not be enough to satisfy the requirement of awareness," particularly where a contract is one of adhesion. (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 359; accord *Penilla v. Westmont Corporation* (2016) 3 Cal.App.5th 205, 217; *Parada v. Super. Ct.* (2009) 176 Cal.App.4th 1554, 1572.) Accordingly, courts have found

that surprise "covers a variety of deceptive practices and tactics" beyond simply hiding terms in plain sight. (*Penilla, supra*, 3 Cal.App.5th at p. 216.) Such other practices include "phrasing a clause in language that is incomprehensible to a layperson" and using "confusing and sometimes contradictory" language. (*Ibid.*) Even where the terms are clear, surprise can arise if the "representatives fail[] to draw . . . attention to the arbitration provision or explain its import." (*Id.* at p. 217.) Failing to translate the agreement—or at least its key terms—into a worker's native language also constitutes surprise. (*Carmona, supra*, 226 Cal.App.4th at p. 85; accord *Penilla, supra*, at p. 216.)

The arbitration agreement in the present case exemplifies each of these "surprises." The agreement is in English even though Kho's first language is Chinese. The agreement also includes confusing and sometimes contradictory language with no explanation of the import of the agreement. Further, as the trial court found, the agreement's vague reference to federal and state laws and procedures "does not provide notice to a reasonable person of the procedures that will be used during the arbitration, or how information about those procedures can be obtained." (CT 213.) Last, as discussed in the Commissioner's Opening Brief, the agreement fails to provide any instructions on how Kho could even commence arbitration. These deficiencies all constitute surprise, which,

when combined with oppression, result in an extraordinarily high degree of procedural unconscionability.

B. OTO's Arbitration Agreement Is Substantively Unconscionable

OTO incorrectly asserts that this case is "merely a rehash of the identical arguments already addressed by this Court" in *Sonic II*. (Answer at p. 8.) But the instant case presents a question this Court did not reach in *Sonic II*: is an arbitration agreement that evidences an extraordinarily high degree of procedural unconscionability and replaces all of the procedures and protections of a Berman hearing with a forum mirroring formal civil litigation unconscionable with regard to a worker like Kho? Rather than upholding an agreement identical to OTO's in *Sonic II*, this Court set out the relevant standard for making this determination and remanded the case for further factual development. Further development was necessary because the unconscionability inquiry is fact-specific and requires a court "to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided." (*Sonic II, supra*, 57 Cal.4th at p. 1146.) Here, the record is set and reveals both extreme procedural unconscionability, as well as unjustifiable barriers that Kho must face in attempting to utilize the forum OTO designed.

As the Labor Commissioner set out in her Opening Brief, in *Sonic II* this Court held that an arbitration agreement that waives the Berman hearings would be substantively unconscionable if it eliminates the Berman process and replaces it with a forum that is not "accessible and affordable" to the wage claimant. (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) This standard requires courts to evaluate the rights and remedies conferred by the arbitration agreement against the rights and remedies that are taken away, with a focus on whether the arbitral scheme imposes costs and risks on a wage claimant that effectively render the forum inaccessible and unaffordable.

In its Answer, OTO essentially ignores this standard and instead employs the same flawed logic the Court of Appeal applied to deny the existence of any substantive unconscionability—identifying and then discounting each separate aspect of the Berman waiver individually as insufficient to create any substantive unconscionability. As discussed in the Labor Commissioner's Opening Brief, this reflects the fallacy of composition (Opening Brief p.28-29) by neglecting to consider the combined impact of the agreement's numerous obstacles on Kho's ability to utilize the forum. In doing so, OTO fails to follow this Court's direction in *Sonic II* to evaluate the totality of all the relevant facts and circumstances. Under *Sonic II*, the determination of unconscionability does not turn on whether individual aspects of the arbitration agreement are each

sufficient, on their own, to support a finding that the arbitral forum is neither accessible nor affordable; the test is whether the agreement's terms work together as a whole to create an arbitral forum that is neither accessible nor affordable under the totality of the circumstances.

Here, OTO's arbitration readily satisfies this test given that it displaces the informal Berman processes specifically designed to reduce the costs and risks of pursuing a wage claim, and installs in their place the requirements of formal civil litigation without the guarantee of free attorney representation to navigate that forum. OTO's attempts to minimize the impact that the requirements of its arbitral forum have on Kho's ability to redress his claims are misplaced. Even if each of its barriers to Kho were insufficient on its own to render the arbitration agreement substantively unconscionable, the impacts together render the entire agreement unconscionable and unenforceable, particularly considering the high degree of procedural unconscionability shown.

1) OTO's Attempts to Discount the Effects of the Berman Waiver on Kho Are Unavailing

(a) The Loss of Free Representation under Section 98.4 Is Real and Consequential

As discussed, OTO's arbitration agreement both compels Kho to pursue his claim in a legally complex forum, and denies him the right to free representation by the Labor Commissioner in a civil trial de novo pursuant to Labor Code 98.4, that he possessed under the Berman

processes. In its Answer, OTO mistakenly contends that the loss of free representation by the Labor Commissioner pursuant to Labor Code section 98.4 does not give rise to any unconscionability because "there is nothing stopping the Labor Commissioner from representing Kho in the arbitration process itself if the Labor Commissioner desires to do so." (Answer at p. 26.) To the contrary, the Labor Commissioner has no authority to represent wage claimants in arbitration except in the context of Labor Code section 98.4. (See *Noble v. Draper* (2008) 160 Cal.App.4th 1, 12 ["Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by Constitution or statute"]; see also *Water Replenishment Dist. of Southern Cal. v. City of Cerritos* (2012) 202 Cal.App.4th 1063, 1072.) Accordingly, OTO's attempt to minimize the consequences of substituting an informal dispute resolution forum for one that requires an attorney to navigate it is misplaced.

More importantly, OTO's argument essentially concedes a fundamental and pivotal truth—that absent legal representation, the technical complexities of civil litigation that render that forum inaccessible and unaffordable for Kho to resolve his wage disputes, render an arbitral forum that imposes the same complexities equally inaccessible and unaffordable. This is the practical reality recognized by the superior court. (CT 220 ["An employee seeking to vindicate the right to unpaid wages under the agreement will almost necessarily be required to hire counsel."].)

Though OTO insists that the agreement's opaque fee-shifting provisions provide sufficient incentive for counsel to accept Kho's case on a contingency basis, the record offers no support for this assumption. (Answer at p. 27 ["While empirical evidence concerning the willingness of the plaintiffs' bar to take even small-value cases is admittedly not in the record, the generous fee-shifting provisions set up by the Legislature and the Court's own experience should allow it to easily deduce there is no problem here."].) Such unsupported speculation should not control this Court's determination.

In contrast, the record establishes that the arbitration agreement both deprives Kho of the ability to pursue his wage claims in an informal, uncomplicated setting, while simultaneously preventing him from benefiting from the free legal representation by the Labor Commissioner in a formal civil setting upon de novo appeal. While it might not be significant for Kho to have lost the right to free representation in an informal arbitration that did not mandate use of formal rules of pleading and evidence, it is materially different for Kho to lose the right to representation in an arbitration that mimics civil litigation—a forum widely recognized, as the trial court did, as being inaccessible and unaffordable to low-wage workers like Kho even in the presence of fee shifting. OTO's arbitration agreement imposes the very formalities and procedures that can render civil litigation inaccessible and unaffordable, even with fee shifting.

In conjunction with all the other aspects of OTO's arbitration agreement, these terms are substantively unconscionable.

(b) *The Loss of Fee Shifting under Section 98.2 in OTO's Formal Litigation Forum Is Also Significant*

OTO contends that the loss of fee shifting under section 98.2 (which provides for attorneys' fees to successful employees in a trial de novo, thereby reducing the costs and risks of civil litigation to wage claimants) does not create any unconscionability given that the arbitration agreement requires application of controlling law, which would provide fee shifting through Labor Code sections 218.5, 1194, and 2802. (Answer at p. 27.) The "background" existence of these fee-shifting provisions, however, does not remedy the agreement's failure to provide for attorneys' fees in the manner prescribed by Labor Code section 98.2, subdivision (c).

As an initial matter, section 2802 has no relevance in the existing case given that Kho's underlying wage claim does not assert any claims for unreimbursed expenses so as to implicate section 2802. Moreover, as set out in the Labor Commissioner's opening brief, section 218.5—which provides for an award of attorneys' fees "[i]n any action brought for the nonpayment of wages . . . if any party to the action requests attorney's fees and costs upon the initiation of the action"—does not have the same legal effect as section 98.2, subdivision (c), and is substantially inferior to Kho's

interests. (Opening Brief at pp. 38-39 [addressing distinctions between sections 218.5 and 98.2, and the effect on workers such as Kho].)

In its Answer, OTO does not dispute that its agreement fails to cite the availability of fees under Labor Code section 218.5. Nor does OTO dispute that, unlike section 98.2, subdivision (c), section 218.5 requires a party to request fees "upon the initiation of the action". Coupled with the agreement's lack of instruction on invoking arbitration and its mandate to comply with the rules of formal pleading in the arbitration proceeding, these factors heighten the likelihood that Kho would not appreciate the possibility that he may obtain counsel and have fees paid if he prevails, as well as the risks that Kho will not timely and properly plead a request for fees. These barriers and risks substantially impede Kho's ability to access OTO's arbitral forum.

OTO's reliance on Labor Code section 1194 is also misplaced. That section only provides for reasonable attorneys' fees in a civil action to recover unpaid minimum and overtime wages. (Lab. Code, § 1194, subd. (a).) Kho, however, asserts other claims—including claims for wages at his contract rate[3] that are not recoverable as minimum or overtime wages. Kho also asserts a claim for waiting time penalties under Labor Code section

[3] Kho claimed OTO failed to pay for all hours worked at the "flat" contract rate of $24 per hour applicable to "flag hours", as opposed to the minimum wage rate of $8 per hour then in effect. (CT 69-70.)

203—which would provide up to 30 days' pay at Kho's daily rate in order to incentivize timely payment of his final wages. (CT 009.) Such a claim has no attendant right to attorneys' fees. (See *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1260-61.) Notably, the only statute to provide for attorneys' fees for claims brought under Labor Code section 203 is Labor Code section 98.2, subdivision (c). Depriving Kho the attorneys' fees under that section forces Kho to have to pay for the time spent by an attorney litigating his right to section 203 penalties. The relief that section 1194 provides regarding attorneys' fees, therefore, is inadequate.

While OTO recognizes that the public policy rationale for fee-shifting provisions is to ensure wage claimants do not have to pay portions of their wages in order to collect owed wages (Answer at p. 27), OTO fails to recognize the detriment to Kho of forcing him to pay attorneys' fees to recover wage-based penalties owed him. (See *Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 ["the aim of fee-shifting statutes is 'to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific.'"]; *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 325 [fee shifting "encourage[s] injured parties to seek redress—and thus simultaneously enforce public policy—in situations where they otherwise would not find it economical to sue."].) Not surprisingly, requiring Kho to pay fees to recover his wage-based

penalties imposes affordability and accessibility obstacles for Kho to pursue his claims in OTO's arbitral forum, by reducing the ultimate potential value of those penalties to Kho. That disincentive operates in the same fashion as would the need to pay attorneys' fees to recover wages, contrary to Kho's interests. Again, as opposed to an informal arbitration, it is significant that OTO's arbitration agreement compels procedures that only a lawyer may feasibly navigate. The failure to fully provide for attorneys' fees for Kho to proceed in an arbitration in which an attorney is necessary to pursue the claim is a significant obstacle to Kho's ability to obtain counsel. OTO's arbitration agreement, therefore, blocks Kho from effectively redressing his wage claims in any forum, including arbitration.

(c) The Agreement's Silence Regarding the Allocation of Arbitration Costs Heightens Barriers to its Accessibility

As discussed in the Commissioner's Opening Brief (Opening Brief Opening Brief 39-41), the arbitration agreement's discussion of the allocation of arbitration costs is obtuse and opaque, stating: "[i]f CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2." (CT 005.)

Though OTO contends in its Answer that the agreement's failure to explain that applicable law requires OTO to pay all the costs does not

contribute any substantive unconscionability, this contention belies practical experience. Only an attorney with expertise on this issue would know that precedent requires OTO to pay all the arbitration costs. A layperson such as Kho would be left unaware that arbitration would be "free" as OTO contends.

Instead, a layperson like Kho would more likely believe that he would have to pay some costs and fees as he might have to in court. This is significant given that this Court has previously recognized that "it is not only the costs imposed on the claimant but the *risk* that the claimant may have to bear substantial costs that deters the exercise of [rights]." (*Armendariz*, *supra*, 24 Cal.4th at p. 110.) The agreement's lack of clarity then deters the filing of claims, effectively rendering arbitration in the present case inaccessible for Kho. To hold otherwise invites employers to conceal this fundamentally significant fact from employees weighing the pros and cons of pursuing wage claims. Ultimately, OTO's complex legalese creates an artificial and unjustified barrier to utilizing the arbitral forum that, working in concert with other characteristics of the agreement and forum, make it inaccessible to Kho.

(d) *The Failure to Provide Instructions Regarding How to Commence Arbitration Is Material*

In response to Kho's and the Labor Commissioner's assertion that the arbitration agreement is substantively unconscionable because it does

not inform Kho how he may initiate arbitration, OTO contends that such silence merely provides flexibility by allowing Kho to initiate arbitration in any reasonable manner, going so far as to contend that Kho could have initiated arbitration simply by saying to a representative of OTO, "I want to arbitrate that I didn't get paid right." (Answer at p. 28.)

However, OTO cites no evidence in either the agreement itself or the record to support this assertion. Indeed, it is undisputed that the agreement does not inform Kho that arbitration could be commenced by informing an OTO representative. OTO's post-hoc clarification does not provide assistance to the Court in construing the requirements of OTO's arbitration agreement. (*Parada*, *supra*, at 176 Cal.App.4th at p. 1584 [courts should "not consider after-the-fact offers by employers . . . [given that] the drafter is saddled with the consequences of the provision *as drafted*." (Emphasis in original.)[4]

---

[4] See also *Sandquist v. Lebo Automotive*, Inc. (2016) 1 Cal.5th 233, 248 ["[I]t is a 'well established rule of construction' that any ambiguities must be construed against the drafting employer and in favor of the nondrafting employee. [Citations.] Moreover, '[t]he rule requiring the resolution of ambiguities against the drafting party "applies with peculiar force in the case of a contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language. [Citations.]" ' "