S174475

IN THE SUPREME COURT OF CALIFORNIA

SONIC–CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent

Following an Order of the U.S. Supreme Court (Oct. 31, 1011) Docket No. 10–1450, 132 S.Ct. 496, Granting Review, Vacating the Decision of the California Supreme Court, and Remanding for Further Consideration

Following a Decision of the California Supreme Court (Feb. 24, 2011) Case No. S174475, 51 Cal.4th 659, 181 Cal.Rptr.3d 58, 247 P.3d 130

Following a Decision of the California Court of Appeal (May 29, 2009), Case No. B204902, 174 Cal.App.4th 546, 94 Cal.Rptr.3d 544

Appeal from an Order of the Superior Court of California, County of Los Angeles (Nov. 2, 2007) Case No. BS107161, HON. AURELIO N. MUNOZ, Judge

REPLY BRIEF ON THE MERITS RE: SIGNIFICANCE OF AT&T MOBILITY LLC v. CONCEPCION (Apr. 27, 2011) 563 U.S. ___, 131 S.CT. 1740

FINE, BOGGS & PERKINS LLP
John P. Boggs (Bar No. 172578)
David J. Reese (Bar No. 184682)
80 Stone Pine Road, Suite 210
Half Moon Bay, California 94019
Tele: (650) 712-8908 Fax (650) 712-1712

Attorneys for Plaintiff and Respondent
SONIC–CALABASAS A, INC.

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Attorneys for Plaintiff and Respondent
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INTRODUCTION

The legal issues have shifted significantly since this case was first before this Court. The issue now presented to this Court is: Whether a state court can condition the enforcement of a binding arbitration agreement under the Federal Arbitration Act upon an employer first proceeding through a state administrative agency's adjudicatory process where that process provides employee-friendly substantive and procedural rights even where the arbitration agreement does not provide for such primary jurisdiction in the administrative agency.

The U.S. Supreme Court has now confirmed in no uncertain terms that a state cannot do so. Respondent Moreno's attempt to try all manner of contortion of the U.S. Supreme Court's plain language—attempting to convince the Justices of the California Supreme Court that they should ignore the plain language, meaning, and impact of the new ruling in favor of what has been plainly and unequivocally decided—should be flatly rejected.

When this Court issued its original decision, based on a narrow 4-to-3 majority of this Court, the issue was very close. Four of the Justices held that California courts can use state public policy as a basis for refusing to enforce arbitration agreements as written. That was because California had long taken the position that state public policy could be used in such a fashion to avoid preemption by the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*, hereinafter "FAA"). (*See e.g.,* Discover Bank v. Superior Court (2005) 36 Cal.4th 148) *and* Gentry v. Superior Court (2007) 42 Cal.4th 443) [both applying state public policy to avoid arbitration].)

But after the United States Supreme Court issued its decision in AT&T Mobility LLC v. Concepcion ((2011) 563 U.S. ___, 131 S.Ct.

1740) and then vacated this Court's prior opinion in this matter, Moreno's arguments were no longer viable. But Moreno's counsel argues in their Initial Brief Following Remand From the United States Supreme Court as though the United States Supreme Court has not settled the issue. Moreno declares that the AT&T Mobility decision does not change this Court's original analysis. Moreno ignores the obvious—the dispute is over and the matter must proceed to arbitration.

Moreno continues to argue that California can, without violating the FAA, apply principles of public policy and unconscionability to prohibit arbitration unless the arbitration agreement first permits a party to take advantage of substantive advantages which are made available to a claimant through the state's administrative adjudication process. Specifically, Moreno argues that because California's statutory scheme under Labor Code section 98 *et seq.* (the "Berman process") grants substantive and procedural advantageous to a wage claimant, those substantive rights cannot be impliedly "waived" by agreeing to submit all claims to binding arbitration in the first instance (*i.e.,* original or primary jurisdiction in the arbitrator). Moreno contends that an arbitration agreement that requires that all claims proceed to binding arbitration (original or primary jurisdiction) operates as a "Berman waiver" because a blanket arbitration agreement results in a claimant not being able to proceed through the state's administrative adjudication process.[1] Moreno argues

[1] Moreno makes great effort to convince this Court that the arbitration agreement in the present case contains a so-called "Berman Waiver." That is simply untrue. No such express waiver exists in the agreement. Instead, the arbitration agreement broadly requires that any and all claims between the parties be submitted to binding arbitration in the first instance and there is no exception spelled out for wage claims. Thus, the agreement merely calls for original jurisdiction of all claims (not even

that this "Berman requirement" is a valid condition precedent to pursuing arbitration even under the FAA.

In an attempt to convince this Court to ignore plain holding of AT&T Mobility, Moreno argues that his case is far different than the situation presented in the AT&T Mobility case because that case dealt with class action procedures and this case does not. That is an overly-simplistic analysis of what the court in AT&T Mobility really ruled. It is true that the AT&T Mobility court held that state public policy and/or principles of unconscionability cannot be used to invalidate an arbitration agreement that did not allow for class action in arbitration. But the high court's analysis was much broader, preempting ***any*** state law requirement imposing obligations or restrictions on arbitration which either prohibit arbitration or frustrate the purpose of the FAA. As explained below, Moreno's "Berman requirement" arguments directly contradict the U.S. Supreme Court's ruling in AT&T Mobility and this Court should hold that parties to an arbitration agreement can vest original/primary jurisdiction in the arbitrator under the FAA notwithstanding any state law to the contrary.

To be clear, this brief does not purport to address the underlying issue of whether a "Berman waiver" is against California's public policy or is unconscionable under California law for some reason other than the fact that the agreement at issue between the parties to this case requires that all claims be submitted to binding arbitration in the first instance. However, Petitioner does contend that, because the obligation to

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specifying wage claims) to be vested in the arbitrator under the Federal Arbitration Act. Moreno argues that this arbitration requirement is a *de facto* waiver of the right to pursue the Berman process and hence refers to it as the "Berman Waiver."

vest original jurisdiction in the arbitrator is the only basis relied upon by the California Supreme Court to find a violation of public policy and overlapping unconscionability, once the U.S. Supreme Court ruled that no state can rely on such a reason for denying arbitration, the only basis for a violation of public policy and/or unconsionability is no longer present—hence the arbitration agreement is not unconscionable and is not against public policy.

In order to understand the impact of the U.S. Supreme Court's ruling in AT&T Mobility, and its effect in the present case before this Court, one must understand what legal standard is to be applied. The principal legal standard addresses the extent of the effect of the "savings clause" contained in the FAA and the U.S. Supreme Court's further pronouncement of the legal "conditions" that are required before a state can apply the "savings clause" to invalidate an arbitration agreement. The U.S. Supreme Court clearly applied "exceptions" to the "savings clause" which prohibit a state from using the "savings clause" to invalidate arbitration, as well as to prohibit states from imposing affirmative obligations on arbitration under the FAA.

Section 2 of the FAA makes arbitration agreements "valid irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract." (*See* 9 U.S.C. § 2.) The "savings clause" only permits states to find arbitration agreements unenforceable under very limited circumstances. For example, if fraud in the inducement were present in a contract, that generally applicable rule of contracts to avoid enforcement could also be enforced in arbitration, even if it operates to avoid the enforcement of an arbitration agreement—that is, if the arbitration agreement were procured through fraud, just as with any

contract on any subject matter. Or, as a further example, if a contract were entered into under duress, such an agreement could be held unenforceable even if the contract subject was arbitration—that is to say, all contracts entered into under duress are unenforceable, regardless of the subject matter of the contract.

However, it is beyond question, after the U.S. Supreme Court's ruling in AT&T Mobility, that neither a state legislature nor a state court can find an agreement unenforceable, even based on general contract principles, if the state's principle either (1) prohibits arbitration outright (131 S.Ct. at 1747), or (2) in a more subversive manner where "a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." (131 S.Ct. 1747.) We refer to these two separate conditions as the "exceptions" to the "savings clause" throughout this Supplemental Reply Brief.

What Moreno now argues on remand is that the Berman Requirement is not preempted by the FAA because it does not prohibit arbitration outright and because it does not frustrate the purposes of the FAA. To reach that outcome, Moreno ignores the U.S. Supreme Court's explanation of what is an outright prohibition and when state law requirements frustrate the purposes of the FAA. Indeed, because imposing the Berman Requirement as a condition enforcing an arbitration agreement both prohibits arbitration in the first instance and disfavors arbitration generally, the Berman Requirement falls squarely within the "exceptions" to the "saving clause" and is preempted by the FAA.

LEGAL ANALYSIS

I. THE BERMAN REQUIREMENT OPERATES AS AN OUTRIGHT PROHIBITION OF ORIGINAL JURISDICTION IN ARBITRATION.

Moreno acknowledges expressly in his Supplemental Brief that a state law rule that prohibits outright the arbitration of a particular type of claim is clearly preempted by the FAA under AT&T Mobility. (*See* Moreno Supplemental Brief, at pp. 17–18, *citing* AT&T Mobility, *supra,* 131 S.Ct. at 1747.) He simply skips immediately to the second type of claim preempted by the FAA under AT&T Mobility: where "a doctrine normally thought to be generally applicable . . . is alleged to have been applied in a fashion that disfavors arbitration." (AT&T Mobility, *supra,* 131 S.Ct. at 1747.) Moreno's eagerness to move quickly past the categorical proscription is understandable, as even a basic analysis demonstrates that this Court's initial decision to enforce Labor Commissioner jurisdiction over wage claims over an arbitration agreement that does not provide for such a pre-arbitration requirement is an example of what the U.S. Supreme Court has already characterized and rejected as a rule that "prohibits outright the arbitration of a particular type of claim." (AT&T Mobility, *supra,* 131 S.Ct. at 1747.) The Berman requirement is such an outright prohibition.

This Court also confirmed that the Berman requirement (*i.e.,* a pre-dispute waiver of the Berman process was against public policy) is a categorical rule against enforcement of arbitration agreements that do not permit employees to proceed first to the Labor Commissioner for original jurisdiction over their wage claims:

> "[T]he Berman hearing and posthearing procedures have been mandated by the Legislature to be available

> to all employees with wage complaints that fall within the scope of the statute. . . . The judgment that such a waiver is contrary to public policy is not contingent upon the determination . . . about whether and to what extent a particular claimant will benefit from the Berman hearing process.

(Sonic–Calabasas A, Inc. v. Moreno (2011) 51 Cal.4th 659, 683.) In other words, this is a categorical rule wresting original jurisdiction over claims subject to arbitration under the FAA away from the parties' contracted arbitral forum and handing it back to the state-created administrative agency for initial adjudication.

This Court made this observation in the course of rejecting the idea that analysis of whether employees would lose essential rights if ordered to comply with their arbitration agreements could be conducted on a case-by-case basis. In fact, the Court contrasted the necessity of access to the Berman process with its own holding that pre-dispute waivers of class action opportunities were not categorically barred, but rather required a factual showing that class treatment was essential to the vindication of rights in the specific situation before the Court. (*See* Sonic–Calabasas A, *supra,* 51 Cal.4th at 683, *citing* Gentry v. Superior Court (Circuit City Stores) (2007) 42 Cal.4th 443, 462, 464.) To the extent that such a distinction is relevant, it only underscores why AT&T Mobility requires a different conclusion by the California Supreme Court now.

First, this Court made a distinction between judicially-created procedures and legislatively-created procedures that has no bearing on the preemption argument. (*See* Sonic–Calabasas A, *supra,* 51 Cal.4th at 683 [distinguishing Gentry as involving a "judicially devised" class arbitration process from the Berman process "mandated by the Legislature"].) The U.S. Supreme Court has never suggested that FAA preemption of

inconsistent state laws depends upon whether the state policy has been expressed by the legislative branch versus the judiciary. (*See, e.g.,* AT&T Mobility, *supra,*131 S.Ct. 1740 [expressly preempting judicially-created rule against class waivers from Discover Bank, *supra*]; Preston v. Ferrer (2008) 552 U.S. 346, 356 [preempting "exclusive jurisdiction" granted to Labor Commissioner by California statute]; Perry v. Thomas (1987) 482 U.S. 483 [FAA preempts legislated Labor Code section 229].) Accordingly, this Court's attempt to justify side-stepping FAA preemption based on the source of the challenged state law rule is not well taken.

Second, by refusing to consider case-by-case analysis as to whether the "posthearing protections"[2] available to employees only through the Berman process, this Court has made it clear that its 2011 ruling in this case is just the type of categorical rule that "prohibits outright the arbitration" per the terms of the agreement. (*See* AT&T Mobility, *supra,* 131 S.Ct. at 1747. Whether it is described as a "Berman waiver" as this Court and Moreno have done throughout this process or simply an arbitration agreement in which the parties assigned exclusive jurisdiction for dispute resolution to an Arbitrator under the FAA, this Court has ruled that the arbitration agreement cannot be enforced as written, holding that the parties lack the capacity to create a pre-dispute contract for arbitration of wage claims that does not carve out an exception permitting the employee to proceed first to a Berman hearing.[3] Such a deviation is even

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[2] This Court has identified five benefits enjoyed by employees following a Berman hearing, describing them as "posthearing protections." (*See* Sonic–Calabasas A, *supra,* 51 cal.4th at 683; *see also* Id., 51 Cal.4th at 674 [listing five benefits].)

[3] Moreno argues that because this Court left open the possibility that an arbitration agreement might avoid the jurisdiction of the Labor

more categorical in its approach than the Discover Bank rule, which the U.S. Supreme Court rejected in AT&T Mobility, that had required arbitration agreements to include specific provisions for class treatment, if the case-specific circumstances might require class treatment to effectively vindicate the rights at issue.

The absence of any express reference to arbitration in the underlying statutory scheme does not make this a more complex analysis. After all, in Preston, *supra,* the U.S. Supreme Court dealt with a jurisdictional statute—California Labor Code section 1700.44(a)—that makes no specific reference to arbitration.[4] Yet the U.S. Supreme Court had no trouble finding this to be a statute that impermissibly attempted to lodge ***primary*** jurisdiction over the claim in another forum, despite an agreement to arbitrate all questions between the parties. (Preston, *supra,*

Commissioner and the formal Berman process if it were somehow designed to provide an employee all the advantages of the Berman hearing and posthearing protections. (*See* Moreno Supplemental Brief, at p. 20 [*citing* Sonic–Calabasas A, *supra,* 51 Cal.4th at 681, n. 4.) But such impositions of preconditions to enforcement of arbitration agreements are plainly preempted by the FAA. (*See, infra,* at II.B; s*ee also* Preston, *supra,* 552 U.S. at 356 [arbitration-specific enforcement prerequisites preempted]; *see also* Doctor's Associates, Inc. v. Casarotto (1996) 417 U.S. 661, 687 [features not required outside of arbitration impermissible conditions on arbitration].)

[4] Preston quotes Section 1700.44(a) of the California Labor Code as: "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo." (Preston, *supra,* 552 U.S. at 355.) The U.S. Supreme Court further determined that this statute "grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate. . . ." (Id., 552 U.S. at 356.)

552 U.S. at 359.) And Moreno himself—in his Supplemental post-AT&T Mobility brief to this Court—has argued the very same point:

> Arguably, Preston also can be considered as an example of a case decided, at least in part, under the 'prohibits outright' prong, as it concerned application of the provision within the TAA, Labor Code § 1700.44(a), giving the Labor Commissioner exclusive primary jurisdiction over disputes between artists and persons alleged to be acting as 'talent agents' within the meaning of the Act.

(*See* Moreno Supplemental Brief, at p. 22.) In fact, Plaintiff acknowledges that Preston, under the TAA, could yet arbitrate his dispute if either party had appealed from the Labor Commissioner's findings, just like in the present case with Moreno. (*See* Moreno Supplemental Brief, at p. 22) In this way, the Preston case is precisely aligned with the instant dispute, as this Court made it very clear in its earlier determination that the *de novo* appeal following the Berman hearing was subject to binding arbitration pursuant to the parties' agreement. (*See* Sonic–Calabasas A, *supra,* 51 Cal.4th at 676 [post-Berman proceedings subject to Petition to Compel, as acknowledged by the Labor Commissioner itself earlier in this litigation].)

That requiring the Berman process notwithstanding a valid arbitration agreement is a rule under the "prohibits outright" prong was articulated with particular clarity by the dissenting opinion that accompanied this Court's February 2011 decision:

> The majority holds that the Berman statutes do precisely what Preston says, under the FAA, a state statute may not do: lodge primary jurisdiction over a dispute in an administrative agency notwithstanding the parties' agreement to arbitrate the dispute. Under Preston, the Berman statutes, so construed, directly conflict with the FAA and violate the supremacy

> clause of the United States Constitution (U.S. Const., art. VI, cl. 2).

(Sonic–Calabasas A, *supra,* 51 Cal.4th at 708 [CHIN, J, Dissenting].)

Given the U.S. Supreme Court's clear reinforcement of its Preston decision in the recent AT&T Mobility opinion, it is clear that this Court's failure to recognize the preemptive effect of the FAA on California's attempts to preserve original jurisdiction in the Labor Commissioner notwithstanding an arbitration agreement in which the parties' reserve all wage claim disputes for an arbitrator can no longer stand following the AT&T Mobility decision.

II. EVEN IF THE BERMAN REQUIREMENT IS NOT AN OUTRIGHT PROHIBITION OF ARBITRATION, IT DISFAVORS ARBITRATION AND IS PREEMPTED.

Not only does mandating the Berman process notwithstanding arbitration agreement language to the contrary fall under the "prohibit outright" analysis from AT&T Mobility, but it also fails to pass muster under the more detailed evaluation of whether the state rule stands as an obstacle to streamlined proceedings and expeditious results by delaying arbitration and requiring procedures contrary to those agreed upon by the parties. If a state law requirement somehow disfavors arbitration, it is preempted by the FAA. A state law requirement disfavors arbitration and is preempted if it (1) "Applies only to arbitration or . . . derives [its] meaning from the fact that an agreement to arbitrate is at issue;" (2) "Stands as an obstacle to the accomplishment of the FAA's objectives;" or (3) Interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. (AT&T Mobility, *supra* 131 S.Ct. at 1746-48.)

A. THE BERMAN REQUIREMENT APPLIES ONLY TO ARBITRATION AND DERIVES ITS MEANING FROM THE FACT THAT AN AGREEMENT TO ARBITRATE IS AT ISSUE

The U.S. Supreme Court unequivocally held that state courts may NOT invalidate arbitration agreements by applying "***defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.***" (AT&T Mobility, *supra,* 131 S.Ct. at 1746 (*emphasis added*).) "[T]he FAA's preemptive effect might extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract.'" (Id., 131 S.Ct. at 1747.) A court "may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." (Id.) Indeed, just because the state law public policy is more desirable to a plaintiff, or that arbitration is arguably exculpatory, is no valid basis for ignoring the preemptive effect of the FAA and requiring special rules outside the parties' agreement to arbitrate. (Id.)

Moreno's only argued basis for unconscionability is that requiring arbitration of wage claims before proceeding through the Berman process results in a *de facto* waiver of the right to the posthearing protections provided by the Berman process (one-way attorney fees, representation by labor commissioner, etc.). (*See* Moreno Supplemental Brief, at p. 7.) This is the viewpoint expressly rejected by the U.S. Supreme Court in AT&T Mobility. Because the only reason for finding a violation of state public policy and/or unconscionability is the requirement to arbitrate, without first going through the state's administrative adjudication process (Berman Requirement), there is no basis for

unconscionability that is independent of the arbitration requirement. AT&T Mobility requires that FAA preemption apply here.

B. THE BERMAN REQUIREMENT INTERFERES WITH FUNDAMENTAL ATTRIBUTES OF ARBITRATION BY CREATING A SCHEME INCONSISTENT WITH THE FULL PURPOSES AND OBJECTIVES OF THE FAA.

The FAA preempts a state's requirement if it "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*See* AT&T Mobility, *supra,* 131 S.Ct. at 1748.) "[S]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (AT&T Mobility, *supra,* 131 S.Ct. at 1753.) Indeed, any state-law requirement that "stands as an obstacle to the accomplishment and execution of the ***full purposes and objectives*** of Congress" is preempted by the FAA. (AT&T Mobility, *supra,* 131 S.Ct. at 1753 (emphasis added).) Thus, boiled down to its essence, the rule announced by the U.S. Supreme Court is this: *Even if there are very, very good reasons for doing so (such as public policy, fairness, etc.), neither state legislatures nor state courts can create a scheme inconsistent with the full attributes, purposes and objectives of the FAA.*

So, this rule begs the question: What are the fundamental attributes of the FAA with which courts and legislatures cannot interfere? Fortunately, the FAA and the U.S. Supreme Court make those attributes crystal clear; and, as stated by the U.S. Supreme Court, it is the ***full purposes and objectives***, not just a partial list, that mandates compliance. (*See* AT&T Mobility, *supra,* 131 S.Ct. at 1753.)

As set forth in more detail below in Section II.B, the Berman Requirement will: (1) delay the arbitration process for months, if not years,

(2) require additional settlement conferences and an evidentiary hearing requiring an employer to marshal its defense in order to try the case before the Labor Commissioner and then again a second time in arbitration, (3) take away the employer's arbitral right to discovery and formal evidentiary rules, as required by the parties' arbitration agreement, before having to marshal its defense, and (4) add a *de novo* review with a bond/undertaking requirement that would not otherwise exist if original jurisdiction vested in the arbitrator.

As a result, all of these very significant differences are imposed upon the parties' even though they are inconsistent with the terms of the original arbitration agreement. As such, those requirements are preempted by the FAA. (AT&T Mobility, *supra,* 131 S.Ct. at 1748–53 [holding that delay and additional requirements not contemplated by the written agreement are burdens on the parties and cannot be required under the FAA because they are outside the terms of the arbitration agreement].)

1. The FAA Was Enacted In Order To Avoid State Hostility Toward Arbitration Agreements—The Berman Requirement Is A Manifestation of That Hostility

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." (AT&T Mobility, *supra,* 131 S.Ct. at 1745.) As recognized by the U.S. Supreme Court, this state judicial hostility has been manifested in a number in a "great variety" of "devices and formulas declaring public arbitration against public policy." (Id. at 1747.)

Moreno denies that the Berman Requirement is but another manifestation of the state judicial hostility toward arbitration. But the flaw in Moreno's position is revealed by examining the logical outcome of his

argument and how that logical outcome results in a full-frontal attack on arbitration generally. According to Moreno and this Court's prior decision, if a state legislature were to pass a law that provides favorable substantive and procedural rights for employee claims, a state court may deny arbitration in the first instance unless the parties first submit to the administrative adjudicatory process, even if the state's administrative adjudication process requires that the parties go through processes not set forth in the FAA or the parties' arbitration agreement.

So any state, including California, could pass a statute tomorrow that prohibits original jurisdiction of any particular type of claims enacting a law that says something like the following:

> *The State of California hereby declares the following to be important public policy. If any employee so chooses he/she may file any employment-related claim he/she may have against his/her employer with Office of the Attorney General. When submitted, the employee shall have the right to be represented by the state Attorney General's office free of charge. The Attorney General's office shall adjudicate the claims without any formal rules of evidence and without the right to discovery. The employee is entitled to attorney-fees upon prevailing. Either party may appeal to the Superior Court for de novo review. If the employer appeals to Superior Court, it must first post an undertaking. Arbitration agreements requiring arbitration of employee disputes are only enforceable after adjudication by the Attorney General.*

This hypothetical example demonstrates exactly why the position that Moreno argues is absurd and directly violates the FAA as announced in AT&T Mobility. Moreno's position would allow a state, in the name of public policy, to stop any claim from vesting original/primary jurisdiction in an arbitration under the FAA simply by providing special advantages to a claimant through an administrative adjudicative process.

The state could effectively make going through a lengthy and costly administrative process a prerequisite to arbitration for any type of claim it wanted—hence chilling the desire to arbitrate at all, hoping employers would simply give up and accepting the administrative adjudicatory process and avoid arbitration altogether. This is exactly what this Court did originally: ***it did what the Legislature cannot do.***

There can be no question that such a law would be struck down by the U.S. Supreme Court according to AT&T Mobility.[5]

Allowing this to happen now would effectively undermine the entire reasoning behind the U.S. Supreme Court's ruling in AT&T Mobility. The fact that arbitration of a claim is required without resort to a state administrative adjudication process first is exactly the type of judicial hostility the U.S. Supreme Court found to be preempted by the Federal Arbitration Act and this Court should so hold now.

2. The Berman Requirement Stands As An Obstacle To The Accomplishment Of The Full Purposes And Objectives Because It Refuses To Enforce The Terms Of Arbitration Agreed To By The Parties

The FAA preempts a state's judicial or legislative requirement if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as set forth in the FAA. (AT&T Mobility, *supra,* 131 S.Ct. at 1753, 1748.) In rejecting

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[5] The California Supreme Court, in its initial decision in this case, relied heavily on Discover Bank v. Superior Court ((2005) 36 Cal.4th 148) and Gentry v. Superior Court ((2007) 42 Cal.4th 443), wherein this Court had previously relied on state public policy as a basis for refusing to enforce the arbitration agreement between the parties unless class action procedures were allowed in arbitration. However, AT&T Mobility expressly rejected California's Discover Bank Rule.

the same legal premise relied upon by this Court in its initial decision and also relied upon now by Moreno, the U.S. Supreme Court stated,

> Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. . . . As we have said, a federal statutes saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be inconsistent with the provisions of the act.

(AT&T Mobility, *supra,* 131 S.Ct. at 1748.)

> [O]ur cases place it beyond dispute that the FAA was designed to promote arbitration. They are repeatedly described the Act as "embodying a national policy favoring arbitration . . . and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."

(AT&T Mobility, *supra,* 131 S.Ct. at 1749.)

One of the principal purposes of the FAA is to ensure that state courts "honor the parties' expectations." The principal purpose of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." (AT&T Mobility, *supra,* 131 S.Ct. at 1748–53.) Hence, if a state-law requirement imposes obligations upon the parties that results in a modification of the terms of the arbitration agreement, the state-law requirement is frustrating the primary purpose of the FAA. It cannot be said that the parties to the arbitration agreement at issue in this case expected that wage claims must proceed first through the Berman process, with its employee-friendly additions. In fact, this Court held that the arbitration agreement at issue here, as a matter of law, did not permit the

Berman process at all.[6] The U.S. Supreme Court expressly rejected any attempt to rewrite the terms of an arbitration agreement to require terms consistent with the state's public policy that were not contained in the arbitration agreement. (AT&T Mobility, *supra,* 131 S.Ct. at 1750–53 [refusing to rewrite arbitration agreement to include class-wide arbitration where no provision for same was made in agreement between the parties]; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp. (2010) 559 U.S. ___, 130 S.Ct. 1758 [same].) Thus, imposing such terms that are not part of the parties' arbitration agreement itself frustrates the principal purpose of the FAA and is preempted.

3. The Berman Requirement Stands As An Obstacle To The Accomplishment Of The Full Purposes And Objectives Because It Delays the Arbitration of Wage Claims.

Respondent argues that "the policy of promoting streamlined arbitration proceedings must yield to the assertion of a ground for revocation of a contract under the § 2 savings clause." (*See* Moreno Supplemental Brief, at p. 31.). However, this argument ignores the U.S. Supreme Court's clear language to the contrary in AT&T Mobility, wherein the Court struck down the Discover Bank rule despite its purported "origins in California's unconscionability doctrine." (AT&T Mobility, *supra*, 131 S.Ct. at 1746.)

Moreover, Respondent's bald assertion that "it is unequivocally clear that arbitration proceedings to go forward at once,

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[6] "By its terms, the agreement precluded Moreno from pursuing any judicial 'or other government dispute resolution forum . . .' [W]e conclude, as a matter of law, that Moreno was barred from pursuing an administrative wage claim under section 98 *et seq.*" (Sonic–Calabasas A, *supra,* 51 Cal.4th at 671.)

without any postponement or delay. . . is not a 'fundamental attribute' of arbitration" (*see* Moreno Supplemental Brief, at p. 31) is controverted by the plain language of the U.S. Supreme Court in both Preston and AT&T Mobility. In AT&T Mobility, the United States Supreme Court explained and reinforced its prior ruling in Preston, *supra,* that states lack the power to establish original jurisdiction before administrative agencies notwithstanding arbitration agreements.

> The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. . . . The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms."

(AT&T Mobility, *supra,* 131 S.Ct. at 1748.)

> "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."

(Id., 131 S.Ct. at 1752–53.)

In decreeing these legal principles, the U.S. Supreme Court held that California's public policy requiring certain substantive and/or procedural advantages cannot be used as the basis for denying arbitration without delays. (AT&T Mobility, *supra,* 131 S.Ct. at 1751–54.). The U.S. Supreme Court has specifically held that merely requiring "procedures incompatible with arbitration" is already a violation of the Federal Arbitration Act; any procedure that interferes with a "streamlined" arbitration proceeding is prohibited. (*See, e.g.,* AT&T Mobility, *supra,* 131 S.Ct. at 1748 [interference with arbitration as drafted interferes with fundamental attributes of arbitration]; Preston, *supra,* 552 U.S. at 358 [agency-hearing delay hinders arbitration enforcement].) Applying Preston,

the Supreme Court confirmed that even where general principles of public policy or unconscionability are at issue, the FAA would prohibit procedures which require that a "dispute be heard by an agency first."

> Thus, in Preston v. Ferrer, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" which objective would be "frustrated" by requiring a dispute to be heard by an agency first. (552 U.S., at 357–358, 128 S.Ct. 978.) That rule, we said, would "at the least, hinder speedy resolution of the controversy." (Id., at 358, 128 S.Ct. 978.)

(AT&T Mobility, *supra,* 131 S.Ct. at 1749 [*citing* Preston v. Ferrer, *supra*].)

In holding that Discover Bank was preempted by the FAA as an obstacle to its objectives, the Court emphasized that the Discover Bank rule made "fundamental" changes to arbitration, emphasizing its denial of "greater efficiency and speed" than that found in arbitration. (AT&T Mobility, *supra*, 131 S.Ct. at 1750-1751.) The U.S. Supreme Court in Preston specifically held that access to arbitration as part of a *de novo* appeal was not enough to avoid preemption. (*See* Preston, *supra,* 552 U.S. at 357–58 ["[t]hat objective would be frustrated even if Preston could compel arbitration in lieu of *de novo* Superior Court review"].)

This Court recognized in its prior decision in this case that the Berman process will delay arbitration on the average four to six months, and in some cases up to several years. (*See* Sonic–Calabasas A, Inc., *supra,* 51 Cal.4th at n. 5.) This delay flatly prohibits employers from proceeding to arbitration expeditiously in direct violation of one of the primary purposes of the FAA and is preempted.

4. The Berman Requirement Stands As An Obstacle To The Accomplishment Of The Full Purposes And Objectives Of The FAA Because It Goes Beyond Mere Delay of Arbitration, Impermissibly Burdening The Parties With Obligations And Penalties.

Even if the delay of the Berman process alone did not mandate FAA preemption—which it does—the additional burdens placed on employers by the Berman process impermissibly alter the terms of arbitration. Substantive changes to the parties' rights, imposed by state law and made without regard to applicable arbitration agreements, are in direct contravention to the "principal purpose of the FAA." (*See* AT&T Mobility, *supra*, 131 S.Ct. at 1748, *citing* Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University (1989) 489 U.S. 468, 478.)

In AT&T Mobility, the U.S. Supreme Court struck down the Discover Bank rule because it interfered with arbitration by making the resolution process "slower, more costly, and more likely to generate procedural morass than final judgment," required procedural formality, and greatly increased risks to defendants. (*supra*, 131 S.Ct. at 1751–52.) Each of these indicia of interference is present here, where the Berman process is required before arbitration of claims may begin. The Berman process is essentially trial by ambush. The process takes months, if not years. The employer must incur substantial costs to investigate the claims and produce relevant evidence, as the wage claimant is made unavailable for discovery. A finding for either party is reviewable *de novo* in arbitration. The parties must undergo formal administrative procedures under the Labor Commissioner's authority. And employers are put at risk to pay the wage claimant's attorney's fees and may be required to post undertakings before even being afforded the opportunity to defend themselves properly in

arbitration. All of these additional burdens on the employer (providing favorable benefits to the employee) are expressly acknowledged by this Court. (Sonic–Calabasas A, *supra,* 51 Cal.4th at 674 [acknowledging all of these additional burdens].) Because California law mandating pre-arbitration Berman processes impermissibly interferes with arbitration and its principal purpose of enforcing arbitration agreements as written, and because achievement of streamlined proceedings and expeditious results is "a prime objective" of arbitration (AT&T Mobility, *supra,* 131 S.Ct. at 1749, *citing* Preston, *supra*, 552 U.S. at 357-358), California's mandate of pre-arbitration Berman hearings interferes with the ability of parties to immediately arbitrate their claims and stands as an obstacle to streamlined proceedings and expeditious results and must be preempted by the FAA.

III. MORENO'S ARGUMENT THAT UNCONSCIONABILITY ANALYSIS MAY SURVIVE THE PREEMPTION REQUIRED UNDER AT&T MOBILITY OVERSTATES LANGUAGE FROM TWO RECENT CASES AND IGNORES THE FACT THAT MORENO WAIVED CHALLENGE BASED ON UNCONSCIONABILITY.

Moreno attempts to rely on recent decisions from the U.S. Supreme Court and the Ninth Circuit Court of Appeals to suggest that even where state-law provisions might be preempted under the "prohibits outright" analysis, other general principles of unconscionability might yet survive preemption, even under AT&T Mobility. But the only unconscionability challenge in this case was made first only in the Supreme Court, and then only after this Court invited briefing on the issue.[7] Neither

[7] It stands to reason that an analysis of unconscionability on any other ground other than the requirement of arbitration in the first instance should not be entertained. Primarily because neither Moreno nor this Court ever raised any other basis for a finding of unconscionability, other than this Court finding, that the arbitration agreement vesting original

Moreno nor the Labor Commissioner (acting as Intervenor at the Superior Court level) raised any unconscionability challenge to the enforcement of the agreement until primary briefing at the Supreme Court had been completed and this Court requested supplemental briefing on the topic much later. (*See* Sonic–Calabasas A, *supra,* 51 Cal.4th at 713 [noted by CHIN, J., in Dissent].) As such, there is no record evidence upon which to base a finding of unconscionability. And under California Supreme Court precedent, the failure to raise the issue below is fatal to Moreno's unconscionability argument. (*See* Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal.4th 665, 681.)

Reliance on the recent U.S. Supreme Court decision in Marmet Health Care Center v. Brown ((Feb. 21, 2012) Case Nos. 11–391, 11–394, __ U.S. __, 132 S.Ct. 1201) does not aid Moreno in this argument. In Marmet, the state court had determined that enforcement of the arbitration agreement was barred by a specific statute reserving judicial jurisdiction for certain claims. (Marmet, *supra,* 132 S.Ct. at 1203–04 [*citing* AT&T Mobility, *supra,* Preston, *supra,* and other decisions].) But in two of the three consolidated cases addressed in Marmet, the lower courts had also found the agreement unconscionable. However, as the U.S. Supreme Court noted, the unconscionability findings appeared tainted by the public policy argument that was unequivocally rejected by the U.S. Supreme Court. (Marmet, *supra,* 132 S.Ct. at 1204 [lower court decision

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jurisdiction of wage claims in arbitration is unconscionable. To engage in such analysis upon remand from the U.S. Supreme Court would deny due process to Petitioner and would ignore Moreno's waiver of such arguments by failing to raise them below.

found agreement clauses unconscionable because they violated public policy].)

In that case, the U.S. Supreme Court reversed and remanded the decision back to "consider whether, absent that general public policy, the arbitration clauses . . . are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." (Marmet, *supra,* 132 S.Ct. at 1204.) This means that the focus will be only on principles of unconscionability that are unrelated to the fact that an arbitration agreement is at issue.

For this decision to have any bearing on Moreno's case, he would have to have argued below that the agreement to arbitrate had been unconscionable even without regard to the fact that it might require him to submit to arbitration without first proceeding before the Labor Commissioner. In this case, the only substantive unconscionability identified by the California Supreme Court is that the so-called Berman waiver was "markedly one-sided" and therefore unenforceable because requiring arbitration gives an advantage to the employer over the Berman process. (*See* Sonic–Calabasas A, *supra,* 51 Cal.4th at 686.) But because this is not a ground for unconscionability that applies generally to all contracts and without disfavoring arbitration, it cannot form a valid basis for a finding of unconscionability not related to the requirement to arbitrate. (*See, e.g.,* AT&T Mobility, *supra,* 131 S.Ct. at 1746–48 [rejecting Discover Bank rule despite California Supreme Court finding that Discover Bank rule applied to any class waiver, not just those found in arbitration agreements]; *see also* AT&T Mobility, *supra,* 131 S.Ct.at 1745 [overturning Ninth Circuit decision below that had rejected preemption

arguments on the theory that class waivers outside of arbitration were treated the same as class waivers outside the context of arbitration].)

Similarly, the Ninth Circuit decision in Kilgore v. Keybank, National Ass'n ((Mar. 7, 2012, 9th Cir.) Case Nos. 09–16703, 10–15934, __ F.3d __, 2012 WL 718344) offers no support for Moreno's unconscionability argument. In that decision, the Ninth Circuit was called upon to review whether the California Supreme Court decisions in Broughton v. Cigna Healthplans of California and Cruz v. Pacificare Health Systems, Inc. could survive FAA preemption under AT&T Mobility, *supra.* (*See* Kilgore, *supra,* 2012 WL 718344, at *1 [*citing* Broughton v. Cigna Healthplans of California (1999) 21 Cal.4th 1066 *and* Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal.4th 303].) Those decisions had prohibited arbitration of claims for broad, public injunctive relief, notwithstanding the FAA mandate.

Overturning previous Circuit authority that had sided with the Broughton-Cruz rule, the Ninth Circuit concluded that "because the rule 'prohibits outright the arbitration of a particular type of claim'—claims for broad public injunctive relief," it could not survive the U.S. Supreme Court ruling in AT&T Mobility, *supra.* (Kilgore, *supra,* 2012 WL 718344, at *10.) This was not a close decision:

> Although the Broughton–Cruz rule may be based upon the sound public policy judgment of the California legislature, we are not free to ignore Concepcion's holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a 'particular type of claim.' Therefore, we hold that 'the analysis is simple: The conflicting [Broughton–Cruz] rule is displaced by the FAA.' Concepcion allows for no other conclusion.

(Kilgore, *supra,* 2012 WL 718344, at *13 [*quoting* AT&T Mobility v. Concepcion, *supra,* 131 S.Ct. at 1747.)[8]

While Moreno skips quickly past this uncomfortable (to him) holding to the discussion of unconscionability, the analysis is no more favorable to him. There, the Ninth Circuit quickly concluded that there had been no procedural unconscionability, as the agreement had not been forced upon the claimants. (Kilgore, *supra,* 2012 WL 718344, at *14.) As such, the Ninth Circuit never even addressed substantive unsconscionability. For this decision to have supported Moreno's position, it would have had to identify some form of substantive unconscionability that would make enforcement of the agreement unfair for reason entirely unrelated to the fact that it was an arbitration agreement at issue. Because there are no such facts in this case, Moreno cannot expect this Court to "manufacture unconscionability where there is none." (*See* Kilgore, *supra,* 2012 WL 718344, at * 14.)

CONCLUSION

The Court's decision in AT&T Mobility dictates the result now facing this Court. The California Supreme Court did not have the benefit of the Supreme Court's holding in that decision when it ordered that

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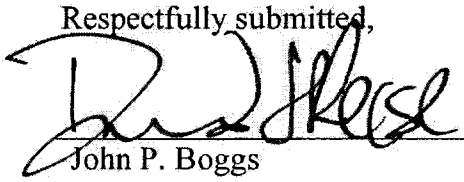
[8] That Broughton and Cruz have been recognized as preempted under the FAA must come as no surprise to at least the three members of this court who dissented in the case below. The dissent specifically identified Broughton and Cruz as decisions inconsistent with FAA preemption requirements. (*See* Sonic–Calabasas A, *supra,* 51 Cal.4th at 711, n. 6 [CHIN, J., dissenting].) Indeed, this position was articulated by Justice Chin in dissents to the Broughton and Cruz decisions when they were issued. (*See* Sonic–Calabasas A, *supra,* 51 Cal.4th at 694, n. 14 [majority opinion recognizes history of dissents by Justice Chin in Broughton and Cruz].)

Respondent's claim proceed first to an administrative adjudication by the California Labor Commissioner instead of to binding arbitration pursuant to the parties' written agreement. With this reconsideration, Petitioner respectfully requests that the Court reverse its vacated decision, ordering the parties to arbitration pursuant to the terms of their arbitration agreement, without first having to exhaust the administrative remedies provided by Labor Code section 98 *et seq.*

Respectfully submitted,

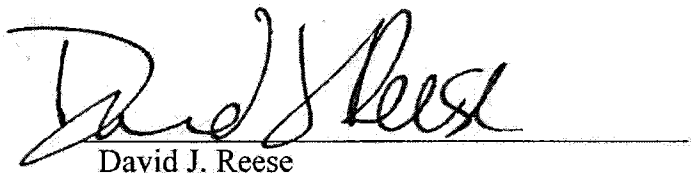


John P. Boggs
David J. Reese
Fine, Boggs & Perkins LLP

Attorneys for Plaintiff and Appellant
SONIC–CALABASAS A, INC.

CERTIFICATION OF WORD COUNT

Pursuant to Rules of Court, Rule 8.520(c)(1), I certify that the text of this **REPLY BRIEF ON THE MERITS RE: SIGNIFICANCE OF AT&T MOBILITY LLC v. CONCEPCION (Apr. 27, 2011) 563 U.S. ___, 131 S.CT. 1740** consists of 8,171 words as counted by the Microsoft Word 2010 software program used to generate this document, inclusive of footnotes, but exclusive of tables, titles, and proof of service, etc.



David J. Reese

PROOF OF SERVICE

I, John P. Boggs, hereby declare and state:

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

- **REPLY BRIEF ON THE MERITS RE: SIGNIFICANCE OF AT&T MOBILITY LLC v. CONCEPCION (Apr. 27, 2011) 563 U.S. ___, 131 S.CT. 1740**

on the interested parties in this action by addressing true copies thereof as follows:

- **MILES E. LOCKER, ESQ.**
  RACHEL FOLBERG, ESQ.
  LOCKER FOLBERG LLP
  235 Montgomery Street, Suite 835
  San Francisco, California 94104

- **WILLIAM REICH, ESQ.**
  Division of Labor Standards Enforcement
  1000 South Hill Road, Suite 112
  Ventura, California 93003

- **CLERK OF THE COURT OF APPEAL**
  California Court of Appeal, Second District, Division Four
  300 South Spring Street, Second Floor
  Los Angeles, California 90013

- **CLERK OF THE SUPERIOR COURT**
  Los Angeles County Superior Court
  111 North Hill Street
  Los Angeles, California 90012

- **CLIFF PALESKY**
  KEITH EHRMAN
  MCGUINN, HILLSMAN & PALEFSKY
  535 Pacific Avenue
  San Francisco, California 94133

- **VALERIE T. McGINTY**
  LAW OFFICE OF DANIEL U. SMITH
  524 Fordhem Road
  San Mateo, CA 94402

- **HINA B. SHAH**
  WOMEN'S EMPLOYMENT RIGHTS CLINIC
  Golden Gate University School of Law
  536 Mission Street
  San Francisco, California 94105-2968

- **CYNTHIA RICE**
  CALIFORNIA RURAL LEGAL ASSISTANCE, INC.
  631 Howard Street
  San Francisco, California 94105-3907

- **JOSE TELLO**
  NEIGHBORHOOD LEGAL SERVICES
  OF LOS ANGELES COUNTY
  9354 Telstar Avenue
  El Monte, California 91731

- **MIYE GOISHI**
  HASTINGS CIVIL JUSTICE CLINIC
  UC HASTINGS COLLEGE OF THE LAW
  100 McAllister Street, Suite 300
  San Francisco, California 94102

- **SILAS SHAWVER**
  LEGAL AID SOCIETY-
  EMPLOYMENT LAW CENTER
  180 Montgomery St., Suite 600
  San Francisco, California 94104

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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 Long Beach, California, on Monday, March 26, 2012.

David J. Reese