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Supreme Court of California
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No. S244630

IN THE SUPREME COURT OF CALIFORNIA

OTO, LLC an Arizona Limited Liability Company, *dba*
ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND

Petitioner in Superior Court, Appellant and Cross-Respondent,

v.

KEN KHO

Respondent in Superior Court and Real Party in Interest,

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, Respondent and Cross-Appellant.

After decision by the Court of Appeal, First Appellate District, Division 1
Case No. A147564

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

COMBINED ANSWER TO PETITIONS FOR REVIEW

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COMBINED ANSWER TO PETITIONS FOR REVIEW

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

OTO, LLC, an Arizona Limited Liability Company, *dba* One Toyota of Oakland, One Scion of Oakland ("One Toyota"), submits this Combined Answer respectfully requesting this Court to deny the Petition for Review filed by Real Party in Interest Ken Kho ("Kho"), and the separate Petition for Review filed by Intervenor Julie A. Su in her official capacity as the State of California Labor Commissioner (the "Labor Commissioner"), which seek review of the decision of the Court of Appeal, First Appellate District, Division 1 (per Justices Margulies, Humes and Banke) filed and published on August 21, 2017 as OTO, LLC v. Kho (2017) 212 Cal.App.4th 1020.

INTRODUCTION

In Sonic-Calabasas A, Inc. v. Moreno (2013) 57 Cal.4th 1109 ("Sonic II"), this Court held that an employer and its employee can waive the right to a Berman hearing, a dispute resolution forum established by the Legislature to assist employees in recovering wages allegedly owed. In doing so, Sonic II struck a balance between the public policy embodied in the Berman process and the enforcement of arbitration agreements under the Federal Arbitration Act by making the waiver of the Berman process a factor to be considered in the substantive unconscionability analysis. Sonic II remanded the case to the trial court to conduct the fact-specific inquiry necessary to render an unconscionability analysis.

This case involves an arbitration agreement that is, in all material respects, identical to the agreement in Sonic II. However, despite

the guidance in Sonic II regarding the fact-specific inquiry necessary for the unconscionability analysis, the opposition to One Toyota's petition to compel arbitration in the superior court failed to proffer any evidence of the affordability and accessibility of the arbitration forum, or of any other alleged element of substantive unconscionability. Instead, Kho and the Labor Commissioner relied upon analysis of the agreement itself to support their unconscionability claims.

After conducting a de novo review of the factual record, the Court of Appeal reversed the trial court's denial of One Toyota's petition to compel arbitration, holding in a published decision that "the arbitration proceeding satisfies the Sonic II requirements of affordability and accessibility." (OTO, LLC v. Kho, *supra*, 14 Cal.App.5th at 698.)

In their Petitions for Review, Kho and the Labor Commissioner ask this Court to revisit Sonic II's unconscionability analysis for the purpose of establishing a blanket rule that any arbitration agreement that provides for waiver of a Berman hearing in favor of an arbitration procedure resembling civil litigation is substantively unconscionable. However, their Petitions for Review fail to establish any basis under Rule 8.500(b) for review of the Court of Appeal's decision. Moreover, how can an arbitration resembling a trial in court (like the de novo trial that would happen after a Berman anyway), be unconscionable? That result would require that the court find that if the arbitration proceeding required the formal rules of court, the arbitration proceeding is unconscionable. That would be irrational on its face to find that the California procedures in a Superior Court are unconscionable. Moreover, it would violate the preemptive mandate of the Federal Arbitration Act.

Simply stated, the record in this case provides no basis for review of Sonic II, as the opposition to the petition to compel arbitration failed to proffer evidence in support of the fact-specific inquiry that Sonic II believed was necessary to analyze the affordability and accessibility of the arbitral forum, as well as other substantive aspects of the arbitration agreement. Should the Court review the Court of Appeal's decision, and adopt the blanket rule proposed in the Petitions for Review, the result would violate the Federal Arbitration Act and warrant reversal by the United States Supreme Court. Such a finding would also require that his Court overrule its prior decision setting for the standard of unconscionability in Sonic II.

Additionally, the Labor Commissioner seeks review of an alleged implicit finding by the Court of Appeal concerning the Labor Commissioner's jurisdiction over a Berman hearing where she is given notice of the existence of an arbitration agreement. Again, the Petition for Review establishes no basis under Rule 8.500(b) for review by this Court. However, should this Court accept review in this case, the review should be limited to establishing a clear rule for employers, employees and the Labor Commissioner to follow, that the filing of a petition to compel arbitration, coupled with notice to the Labor Commissioner delivered prior to the commencement of the Berman hearing, stays the Berman hearing proceedings until such time as the courts resolve the petition to compel arbitration.

ISSUES PRESENTED

1. Whether an arbitration agreement that requires that the rules and procedures of a California Superior Court be applied in arbitration as if

it were in Superior Court makes the arbitration agreement unconscionable if it as still affordable and accessible as a Superior Court action?

2. Whether the Labor Commissioner should stay the Berman proceedings once it gets notice and copies of the filings where a Superior Court action has been commenced to determine whether the matter should proceed to arbitration; or should the Labor Commissioner be permitted to hold a Berman hearing (trial) where it would not be allowed to do so under Code of Civil Procedure section 1281.4 if it were a trial court?

3. Whether the Labor Commissioner violated One Toyota's right to a fair administrative hearing (Berman hearing), as determined by the Superior Court, where the Labor Commissioner conducted the Berman hearing in the absence of the employer, after the employer had given the Labor Commissioner notice of the pending petition to compel arbitration.

LEGAL DISCUSSION

I. Review Of The Decision Below As Requested By Respondent Is Not Justified Under Rule 8.500(B) Of The California Rules Of Court, As A Supreme Court Decisions Is Not Required To Secure Uniformity Of Decision Or To Settle An Important Unresolved Question Of Law.

There is no basis for Supreme Court review in this case. Neither the Labor Commissioner nor Kho have identified any conflicting appellate court decisions for which a Supreme Court decision is needed to secure uniformity across the state. Nor has the Labor Commissioner described an important-but-unsettled issue of law for which Supreme Court guidance is greatly needed. The Court of Appeal simply applied the standard set forth in Sonic II to the facts of this case and held that the arbitration agreement provides an affordable and accessible forum for wage

claimants. As such, the Supreme Court should reject the Labor Commissioner's and Kho's Petition for Review of the Court of Appeal decision.

Rule 8.500(b) enumerates several situations where Supreme Court review of a lower-court decision may be appropriate. Subsection (b)(1) is the only one potentially implicated here. It provides that review may be ordered "(1) When necessary to secure uniformity of decision or to settle an important question of law." Neither of these disjunctive criteria is met in this case.

Neither of the Petitions for Review filed by Kho and the Labor Commissioner makes any effort to suggest that there is a lack of uniformity among lower courts on the issues addressed in the Court of Appeal decision. In Sonic II, which involved an arbitration agreement identical in all material respects to the agreement signed by Kho in the present case, this Court instructed the Court of Appeal to remand to the trial court to determine whether the arbitration agreement unconscionable under the principles set forth in the opinion. (Sonic II, 57 Cal.4th at 1125.) Since that time, no published opinion other than the Court of Appeal's decision in this case has construed whether a Berman waiver in an arbitration agreement is unconscionable under the standards enunciated in Sonic II. Similarly, the Labor Commissioner fails to cite to ***any*** reported appellate decision discussing the Labor Commissioner's power—or lack thereof—to conduct a Berman hearing once a petition is filed in the superior court to compel arbitration of the wage claim.

Such lack of any other appellate authority—conflicting or otherwise—on the issues presented in the Petitions for Review means the only basis upon which Kho and the Labor Commissioner would have this

Court exercise its discretionary jurisdiction is the suggestion that there is an important-but-unresolved question of law involved. However, there is no such issue that requires this Court's attention on these facts. Based on the undisputed facts presented in the trial court, the Court of Appeal made a factual evaluation of the parties' arbitration agreement and concluded that the agreement was not substantively unconscionable under the standard of Sonic II, "which requires enforcement of a Berman hearing waiver if the arbitration clause provides an 'accessible and affordable arbitral forum.' " (*See* OTO, LLC v. Kho, *supra,* 14 Cal.App.5th at 709.) Finding that the agreement provided an arbitration procedure similar to civil litigation, the Court of Appeal held "nothing in the proceeding required by the Agreement that would cause it to be inaccessible to an employee." (Id., 14 Cal.App.5th at 712.)

Likewise, based on the undisputed procedural facts of this case, the Court of Appeal determined that One Toyota's delay in asserting its right to arbitrate did not waive it right to avoid a Berman hearing, where the petition to compel arbitration was filed prior to the commencement of the Berman hearing, and the Labor Commissioner was notified of the pendency of that petition. "While it would have been preferable for One Toyota to have asserted its right to arbitration immediately upon the failure of settlement discussion in order to avoid inconvenience to Kho and the commissioner, inconvenience does not equal prejudice. . . . In the absence of prejudice, we cannot find One Toyota to have waived its right to assert the Agreement." (Id., 14 Cal.App.5th at 714-715.) Regardless, there was also record evidence that the issue of arbitration was initially raised and arbitration demanded months prior by One Toyota directly to the Labor

Commissioner and Kho at the informal settlement conference held under Labor Code Sec. 98 et seq. (*See* CT 00172.)

Just because Kho and the Labor Commissioner disagree with the results at which the Court of Appeal arrived does not make an issue addressed below an unsettled important question of law. Notably, despite their arguments that the arbitration procedure required by the agreement is not affordable and accessible, neither the Labor Commissioner nor Kho proffered any evidence in the trial court to substantiate the alleged burdens imposed by the arbitration agreement. Instead, their arguments at the trial court and in the Court of Appeal focused on the language of the agreement to speculate that arbitration would not be affordable and accessible.

Despite the absence of a record upon which to make an individual showing—much less a general showing applicable to all wage claimants—Kho and the Labor Commissioner seek review by the Supreme Court in an effort to obtain a blanket rule that would effectively preclude any Berman waiver as a matter of law and policy if the arbitration agreement effectuating that waiver did not essentially mimic the Berman procedure. Because this result cannot be justified by the facts in this records, and in light of this Court's refusal to undertake such speculation when faced with the same agreement in Sonic II, there is no basis upon which to grant the review requested.

II. By Requesting That This Court Revisit Sonic II, Kho and the Labor Commissioner Seek to Establish Restrictions on Arbitration Agreements Which Are Prohibited Under the Federal Arbitration Act and U.S. Supreme Court Authority.

The Petitions for Review seek to establish a rule, applicable only to arbitration agreements effectuating a Berman waiver, requiring such arbitration agreements to incorporate the specific requirements of the

Berman process—this is the same argument made by the employee in Sonic II and rejected by this very Court in Sonic II. As a result, Kho and the Labor Commissioner would have this Court undermine the careful balance struck in Sonic II between the Federal Arbitration Act and the United States Supreme Court's decision in AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333 ("AT&T Mobility"), on the one hand, and the desire to provide wage claimants with an affordable and accessible forum, on the other hand.

In Sonic-Calabasas A, Inc. v. Moreno (2011) 51 Cal.4th 659 ("Sonic I"), this Court held that arbitration agreements effectuating a Berman waiver were unconscionable and contrary to public policy. (Sonic I, 51 Cal.4th at 686.) Despite this holding, "we did not invalidate the arbitration agreement. Instead, we held that an arbitration agreement may be enforced so long as arbitration is preceded by the option of a Berman hearing at the employee's request. If the employee chooses to have a Berman hearing, then the post-Berman hearing protections for employees would apply in arbitration." (Sonic II, 57 Cal.4th at 1135.)

The United States Supreme Court granted *certiorari* in Sonic I and remanded the case back to this Court for further consideration in light of AT&T Mobility, which held that the Federal Arbitration Act ("FAA") categorically prevents states from holding arbitration agreements to stricter standards of enforceability than other contracts. On remand, this Court recognized that any categorical prohibition on waivers of Berman hearings as a condition of employment was prohibited by federal law, thereby upholding the legality of an agreement between an employee and employer to use the arbitral forum in place of Berman hearings. (Sonic II, 57 Cal.4th at 1142.) Agreements to arbitrate claims that would otherwise be

adjudicated in Berman hearings before the Labor Commissioner may be lawfully enforced. (Sonic II, 57 Cal.4th at 1124.) "[A] court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing." (Id.)

Sonic II struck a balance between the public policy embodied in the Berman process and the enforcement of arbitration agreements under the Federal Arbitration Act by making the waiver of the Berman process a factor to be considered in the substantive unconscionability analysis:

> But the waivability of a Berman hearing in favor of arbitration does not end the unconscionability inquiry. The Berman statutes include various features designed to lower the costs and risks for employees in pursuing wage claims, including procedural informality, assistance of a translator, use of an expert adjudicator who is authorized to help the parties by questioning witnesses and explaining issues and terms, and provisions on fee shifting, mandatory undertaking, and assistance of the Labor Commissioner as counsel to help employees defend and enforce any award on appeal. Waiver of these protections does not necessarily render an arbitration agreement unenforceable, nor does it render an arbitration agreement unconscionable per se. But waiver of these protections in the context of an agreement that does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability. As with any contract, the unconscionability inquiry 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. In the present case, we remand to the trial court to conduct this fact-specific inquiry.

(Sonic II, 57 Cal.4th at 1146.)

Although Kho signed an arbitration agreement that is identical in all material respects to the agreement in Sonic II, the opposition to the petition to compel arbitration failed to include any evidence (other than the agreement itself) to meet his burden of proof on unconscionability.

Thus, the Petitions for Review place this Court exactly in the same position as Sonic II: the same arbitration agreement with an undeveloped record on the fact-specific inquiry needed to sustain the opposing party's burden of proof on unconscionability. Given Sonic II's guidance on the unconscionability analysis, the failure of Kho and/or the Labor Commissioner to present such evidence to the trial court dooms their Petitions for Review.

If this Court were to accept review in the absence of the fact-specific inquiry that the Court deemed necessary in Sonic II, and establish the blanket rule sought by Kho and the Labor Commissioner, the likely consequence would be a further rebuke by the United States Supreme Court for once again holding arbitration agreements to stricter standards of enforceability than other contracts in violation of the Federal Arbitration Act and AT&T Mobility. As a result, the Petitions for Review must be denied.

III. To the Extant That The Court of Appeal Erred in its Published Decision, It Did So By Failing to Unequivocally Address the Labor Commissioner's Role Where a Petition to Compel Arbitration Is Filed Prior to the Commencement of a Berman Hearing.

As noted above, the Labor Commissioner has failed to articulate any valid basis upon which this Court should grant the review or the relief she seeks. She has not explained how there is any significant unsettled issue of law that is presented. Moreover, as the Court of Appeal

determined that the issue of the Labor Commissioner's jurisdiction was rendered moot in light of the court's reversal of the order denying the petition to compel arbitration, there is no controversy ripe for review by this Court.

However, if this Court determines that review is appropriate, such review should be limited to delineating the Labor Commissioner's role when given notice of the filing of a petition to compel arbitration of a pending wage claim. In light of the Labor Commissioner's "race to the courthouse" posture in this case, in which she refused to allow the petition to compel arbitration to be decided by the court before conducting the Berman hearing, the Court of Appeal should have enunciated a clear rule for employers, employees and the Labor Commissioner to follow, that the filing of a petition to compel arbitration, coupled with notice to the Labor Commissioner delivered prior to the commencement of the Berman hearing, stays the Berman hearing proceedings until such time as the petition to compel arbitration is resolved by the courts.

If Kho would have been in a Superior Court with his wage claims (instead of before the Labor Commissioner), which he also has the right to do, Code of Civil Procedure section 1281.4 would have required a stay as soon as Petition to Compel Arbitration was filed with any Superior Court in the State. Code of Civil Procedure section 1281.4, in pertinent part, states:

> If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in

> accordance with the order to arbitrate or until such earlier time as the court specifies.
>
> If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

Thus, had Kho's claims been before a Superior Court, that Superior Court would have been required to stay the claims pending the outcome of the Petition to Compel Arbitration and pending any arbitration proceeding. There is absolutely no reason why the Labor Commissioner should not be bound by the same rules, especially given that the Berman hearing would be followed by the Superior Court action under Labor Code section 98.2. Berman hearings held pursuant to this section [Labor Code sec. 98] are to be "conducted in an informal setting preserving the rights of the parties." Even the Labor Commissioner's own Enforcement Manual acknowledges the lack of jurisdiction to hear wage claims governed by the Federal Arbitration Act, like in this case:

> 36.3 **Federal Arbitration Act Restrictions**. The first sentence of Labor Code § 229 provides that an agreement to arbitrate statutory wage claims will not deprive an employee of the right to resort to the Labor Commissioner or the courts to enforce a claim for unpaid wages. If, however, such an agreement is covered by the provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., then the first sentence of section 229 is preempted and cannot be

> invoked by the employee. (*Perry v. Thomas* (1987) 482 U.S. 483.) . . .
>
> 36.3.1 An agreement covered by the FAA will displace the provisions of the first sentence of section 229 only if the statutory claim for unpaid wages is subject to arbitration under the terms of the arbitration clause contained in the agreement. (*Gilmer v. Interstate/ Johnson Lane Corp.* (1991) 500 U.S. 20). Thus, an examination of the arbitration clause must be made in order to determine its scope and coverage with respect to the specific claim.

(Division of Labor Standards Enforcement, Enforcement Policies and Interpretations Manual §§ 36.3 and 36.3.1.)

Instead of following its own rules regarding the jurisdiction of the Labor Commissioner where there is an agreement to arbitrate, the Labor Commissioner simply pushed forward and held a trial (Berman Hearing) and issued a decision awarding unpaid wages to the claimant without even examining the arbitration agreement itself or allowing the Superior Court to first do so. The law requires a Superior Court to wait until the issue of arbitration is decided, why should the Labor Commissioner have the right to trample the rights of arbitration and proceed forward? It should not.

CONCLUSION

Despite their failure to proffer evidence necessary for the superior court to conduct a fact-specific inquiry necessary to support the opposing party's burden of proof on a defense of unconscionability in light of Sonic II, Kho and the Labor Commissioner ask this Court to review the *same* arbitration clause that gave rise to Sonic II, for the purpose of establishing a rule that any arbitration agreement that provides for waiver of a Berman hearing in favor of an arbitration procedure resembling civil

litigation is substantively unconscionable. In the absence evidence to support this fact-specific inquiry, this Court refused to undertake such an analysis in Sonic II. Likewise, the Court should decline review in the present case.

Moreover, the Labor Commissioner fails to articulate any basis for review of her jurisdiction over Berman hearings when given notice of an arbitration agreement, and her articulation of the issue misstates the appellate record by implying that she was only given notice of an arbitration agreement—and not of the petition to compel arbitration itself—prior to the Berman hearing. To the extent that this Court grants any review, the review should be limited to establishing a clear rule for employers, employees and the Labor Commissioner to follow, that the filing of a petition to compel arbitration, coupled with notice to the Labor Commissioner delivered prior to the commencement of the Berman hearing, stays the Berman hearing proceedings until such time as the petition to compel arbitration is resolved by the courts.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d)(1), the undersigned certifies that this Consolidated Answer to Petitions for Review contains 3925 words as counted by the word count feature of the Microsoft Word program used to generate this brief.

/s/ John P. Boggs

John P. Boggs

PROOF OF SERVICE
(C.C.P. § 1013)

I, Julie Dare, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 80 Stone Pine Road, Suite 210, Half Moon Bay, California, and I am not a party to the cause, and I am over the age of eighteen years.

2. On October 19, 2017, I served the following document in the manner described below:

COMBINED ANSWER TO PETITIONS FOR REVIEW

BY FIRST-CLASS MAIL. I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.

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

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  California Court of Appeal, First District, Division One
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- **CLERK OF THE SUPERIOR COURT**
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BY ELECTRONIC SERVICE. By electronically mailing a true and correct copy through Fine, Boggs & Perkins, LLP's electronic mail system from jdare@employerlawyers.com to the email addresses set forth below. On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Half Moon Bay, California, on Thursday, October 19, 2017.

/s/ Julie Dare
Julie Dare