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 Appellant.

v.

KEN KHO,

Real Party in Interest,

v.

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 DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION 1
CASE NO. A147564

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF ALAMEDA
CASE NUMBER RG15781961
HONORABLE EVELIO GRILLO, PRESIDING

REPLY TO COMBINED ANSWER TO PETITIONS FOR REVIEW

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I. INTRODUCTION

OTO, LLC ("Employer" or "OTO") described the issue before this Court as presented by Petitioner Kho as follows: "Whether an arbitration agreement that requires that the rules and procedures of a California Superior Court applied in arbitration as if it were in Superior Court makes the arbitration agreement unconscionable if it as [*sic*] still affordable and accessible as a Superior Court action?" (See Answer at pp. 6-7.)

By the statement of the issue, OTO highlights and concedes that its arbitration agreement has imposed on Mr. Kho all of the procedures that would exist in a Superior Court action from commencement to judgment. OTO confirms this point further by proclaiming (if not bragging) that the "arbitration procedure [is] similar to civil litigation . . . ." (Answer at p. 9. See also *id.* at pp. 16-17 [wherein OTO references "an arbitration procedure resembling civil litigation"].)

II. ARGUMENT

A. OTO, LLC'S COMBINED ANSWER HIGHLIGHTS AND CONFIRMS WHY THIS COURT SHOULD GRANT REVIEW

OTO's concession as to the equivalent procedures as between arbitration and civil litigation focuses the issue before this Court. The point of Mr. Kho's Petition for Review is to settle an important question of law raised by the holding in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*) that an arbitration procedure may substitute for the Berman Hearing only so long as it is "affordable and accessible."

Sonic II did not define "affordable and accessible," rather it left to the lower courts to make the determination on a case-by-case basis. As such, an important question of law remains unsettled for this Court to decide. Namely, the question of law is whether the procedural process set

forth in OTO's arbitration agreement (and equivalent agreements of its type) constitutes an "affordable and accessible" means for individual employees to enforce fundamental wage and hour rights.

As formulated by OTO, our Petition for Review, the Petition for Review of the Labor Commissioner as well as the decision of the court below, the issue is whether an employer may impose a procedure with all the burdens and complications of civil litigation on an employee in place of the informality and advantages of the Berman Hearing.[1] Thus, the decision of the court below has the effect of the balance which this Court created because the Arbitration Agreement is wholly one-sided in favor of the employer.

The issues are presented in the context where all the advantages of the informality, simplicity and accessibility of the Berman Hearing are eliminated by the arbitration procedure. What has been put in its place is civil litigation before an arbitrator before a retired Superior Court Judge rather than an active Superior Court Judge.

OTO asserts that this Court approved an arbitration procedure which imposed all the requirements of civil litigation while eliminating the advantages of the Berman hearing because, as it repeatedly argues, the arbitration agreement in *Sonic II* was the same as the arbitration agreement OTO used. (Answer at pp. 8 and 13 ["identical in all material respects"].) The terms of the agreement in *Sonic II* or *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*) are not quoted or mentioned in the record before this Court. Thus, OTO's assertion does not appear in the

[1] The Arbitration Agreement reinforces this point by requiring that the arbitrator be a "retired California Superior Court Judge," presumably to ensure that all the procedures of civil litigation are applied.

reported decisions.[2] This Court was extremely careful not to quote in either *Sonic II* or *Sonic I* the arbitration agreement itself. This Court's opinion contains no reference whatsoever to what provisions are contained in that arbitration agreement. The reason for the absence is self-evident. This Court was very careful in *Sonic II* not to prescribe what form an arbitration procedure would take to be considered unconscionable. Nowhere in the Opinion is there anything said that suggests precisely what the contours would be in an arbitration procedure which is not unconscionable. This Court deliberately remanded and left the issue of determining whether an arbitration agreement is unconscionable to the trial court in that case.

What this Court did make clear, however, is that any arbitration procedure had to be "accessible and affordable."

B. THE OTO ARBITRATION PROCEDURE NOT ONLY UNDERMINES, BUT EFFECTIVELY OVERRULES THIS COURT'S DECISION IN *SONIC II*

The Appellate Court's decision holds that where an arbitration provision eliminates most of the advantages of the Berman Hearing, and then imposes all of the disadvantages of court proceedings, it is still conscionable.[3] Significantly, OTO does not argue that its arbitration agreement preserves any of the advantages of the Berman Hearing for wage

[2] We assume that the record does contain a copy of the arbitration agreement at issue, but it was not otherwise available, nor referred to in this Court's opinions.

[3] The court below suggested that the Arbitration Agreement offered a potential advantage to a wage claimant on the attorney's fees issue by suggesting California Labor Code section 218.5 would apply. (Opinion at p. 18.) This point illustrates exactly the trap of the application of the rules of civil litigation. California Labor Code section 218.5 allows fees and costs only if requested "upon the initiation of the action." No individual like Mr. Kho could be reasonably expected to know about this procedural trap unless he consulted with a lawyer. If he consulted with a lawyer when he realized the complexities of proceeding in front of a "retired California Superior Court Judge," it would be too late to take advantage of this provision.

claimants. Instead, it only argues to this Court that it can impose the complexities and burdens of civil litigation.[4]

OTO and the Court below assumed that this Court ruled on the contours of an arbitration agreement considered to be conscionable. (See Opinion at pp. 15 ["the premises of *Sonic II* however, was that . . ."] and 17 ["[i]f the Sonic court believed an arbitration . . ."].) As noted, OTO claims that the arbitration agreement in this case is the same as in *Sonic II* and *Sonic I*. As stated above, nowhere in the Court's opinion is there any reference to the specific terms of that arbitration agreement. This Court was being very clear that it would not rule on what the contours would be of an acceptable arbitration provision for wage claimants where they were deprived of the Berman Hearings.

OTO is further incorrect in asserting that a factual record needs to be created as to the unconscionability inquiry into the arbitration agreement. OTO asserts that because there is "an undeveloped record on the fact-specific inquiry needed to sustain the opposing party's burden of proof on unconscionability," the determination as to the unconscionability of the arbitration agreement cannot be resolved. (See Answer at p. 13.) OTO seems to be wrongfully asserting that Mr. Kho needed to make a factual record as to the unconscionability of the arbitration agreement beyond the agreement itself. OTO, at page 13, states that the "opposition to the petition to compel arbitration failed to include any evidence (other than the

[4] In the context of other legal regimes, it would not be impermissible to substitute the full procedures of civil litigation by arbitration before a retired judge. However, in those cases, there would be no statutorily-created administrative remedy designed to provide such an informal procedure with advantages to the claimant. This Court has recognized that where the legislature creates such a remedy, the arbitration procedure cannot foreclose the right of workers to utilize that alternative administrative process. *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.

agreement itself) to meet his burden of proof on unconscionability," and again, at page 17, references "in the absence of evidence."

Sonic II's language was very clear, which is even quoted in OTO's Answer, that the unconscionability inquiry would be conducted as follows:

> As with any contract, the unconscionability inquiry requires the 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 1146; Answer at p. 12.)

Here, the court below and the trial court found as a factual basis, the formation of the contract was highly unconscionable. "The circumstances of Kho's execution of the Agreement demonstrated a high degree of oppression." (Opinion at p. 13.) It was forced upon Mr. Kho while working one day without opportunity to consult with anyone or to learn about its effect. (Opinion at pp. 4-5 and 13-14). This factual finding is not contested by OTO.

As to the substantive unconscionability, however, this Court again was clear that such an inquiry would be conducted by reviewing the terms of the arbitration agreement. There is thus no other factual inquiry that has to be made in this case. A court must review the terms of the arbitration agreement. Other than the terms, there is no other factual inquiry that is relevant in the substantive unconscionability inquiry.

OTO is correct that this Court in "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 . . . ." (Answer at p. 12.) OTO's arbitration agreement rejects that balance by eliminating the Berman Hearing process and imposing the full burdens of civil litigation. Such a result is not a balance as anticipated by *Sonic II*.

C. OTHER ISSUES OTO RAISED IN ITS ANSWER DO NOT FORM A SEPARATE BASIS TO GRANT REVIEW

There are two other points to close our Reply. First, Kho agrees with the additional reason the Labor Commissioner submitted in support of her Petition for Review as to whether the Labor Commissioner was divested of jurisdiction in the manner in which the arbitration agreement was raised. Additionally, OTO recites two issues in the section of its Answer entitled "Issues Presented." (Answer at pp. 6-7.) We read the Answer to raise those issues in response to the Labor Commissioner's Petition, and not as separate reasons to grant review.

III. CONCLUSION

In summary, OTO's Answer focuses and forces the issue that warrants this Court's review. Namely, can an employer implement an arbitration procedure in a procedurally unconscionable manner which imposes all the disadvantages and requirements of court litigation while eliminating the advantages of the Berman hearing? We don't think that that's what this Court intended in *Sonic II*, and for that reason review should be granted.

Dated: October 30, 2017

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1)

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, I certify that the attached Reply to Combined Answer to Petitions for Review was prepared with a proportionately spaced font, with a typeface of 13 points or more, and contains 1,743 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: October 30, 2017

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PROOF OF SERVICE
(C.C.P. § 1013)

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I declare under penalty of perjury under the laws of the California that the foregoing is true and correct. Executed on October 30, 2017, at Alameda, California.

/s/ Karen Kempler
Karen Kempler

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **OTO v. KHO (SU)**
Case Number: **S244630**
Lower Court Case Number: **A147564**

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