APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

S244630

OTO, L.L.C,
Plaintiff and Appellant,

v.

KEN KHO,
Defendant and Respondent;
JULIE A. SU, as Labor Commissioner, etc.,
Intervener and Appellant

Filed: August 29, 2019

Before: CORRIGAN, CANTIL-SAKAUYE, LIU, CUELLAR, KRUGER, and GROBAN.

CHIN, dissenting.

OPINION

Opinion of the Court by CORRIGAN, J.

Here, we again consider the enforceability of an agreement requiring arbitration of wage disputes. *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*)

concluded that such arbitration agreements are categorically unconscionable because workers waive their statutory rights to a "Berman hearing" and related procedures designed to assist in the recovery of unpaid wages. (See Lab. Code, § 98 et seq.)[1] Rather than invalidating the entire agreement, however, *Sonic I* held that while Berman protections could not be waived, any party dissatisfied with the Berman hearing's result could move the dispute to arbitration. (*Sonic I*, at pp. 669, 675.) The United States Supreme Court vacated that judgment and remanded for consideration in light of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*). Thereafter, we determined *Sonic I*'s categorical rule of unconscionability was preempted by the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.). (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1146 (*Sonic II*).) We held instead that an arbitration agreement is not categorically unconscionable solely because it entails a waiver of the Berman procedure. An agreement to arbitrate wage disputes can be enforceable so long as it provides an accessible and affordable process for resolving those disputes. (Id. at p. 1146.)

We originally granted review in this case to decide whether an arbitral scheme resembling civil litigation can constitute a sufficiently accessible and affordable process. Because the facts here involve an unusually high degree of procedural unconscionability, however, a definitive resolution of that specific question is unnecessary. Even if a litigation-like arbitration procedure may be an acceptable substitute for the Berman process in other circumstances, an employee may not be coerced or misled into accepting

[1] All statutory references are to the Labor Code unless otherwise stated.

this trade. Considering the oppressive circumstances present here, we conclude the agreement was unconscionable, rendering it unenforceable.

I. BACKGROUND

The relevant facts are not in dispute. Ken Kho was hired as a service technician for One Toyota of Oakland (One Toyota) in January 2010.[2] Three years later, a human resources "porter" approached Kho in his workstation and asked him to sign several documents. Kho was required to sign them immediately and return them to the porter, who waited in the workstation. It took Kho three or four minutes to sign them all. He had no opportunity to read them, nor were their contents explained. Kho's first language is Chinese. He was not given copies of the documents in either language.

One document was titled "Comprehensive Agreement—Employment At-Will and Arbitration."[3] As the

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[2] The auto dealership is licensed as OTO, L.L.C., apparently an acronym of One Toyota of Oakland.

[3] According to the parties, this agreement is essentially the same as the one involved in the *Sonic* cases. Although impossible to verify without the *Sonic* record, the assertion may be at least partially true. Both employers are automotive dealerships and the contract appears to be a standardized form. However, the agreements cannot be "identical," as One Toyota claims. The *Sonic II* contract allowed either party to seek review of an award under California appellate rules of procedure. (See *Sonic II, supra*, 57 Cal.4th at pp. 1146-1147.) The agreement here includes no such term. *Sonic II* did not resolve whether the agreement was substantively unconscionable. Instead, noting that details of the arbitration process might not be reflected on the face of the agreement, the case was remanded for additional fact-finding. (See *id.* at pp. 1147-1148.) Here, once again, we are faced with a bare agreement. No additional facts about One Toyota's arbitration process were developed below.

Court of Appeal observed, "Notwithstanding its designation as a 'comprehensive' employment contract, the one and one-quarter page contract is merely an arbitration clause grafted onto an acknowledgment of at-will employment."

The contract's arbitration clause is contained in a dense, single-spaced paragraph, written in a very small typeface that fills almost an entire page.[4] Subject to limited exceptions, nearly any employment-related claim made by either party must be submitted to binding arbitration. Class or collective proceedings are generally prohibited. Arbitrations must be conducted before a retired superior court judge, pursuant to the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), with full discovery permitted (see Code Civ. Proc., § 1283.05). Furthermore, "[t]o the extent applicable in civil actions in California courts," the agreement requires adherence to "all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8."[5] The allocation of arbitration costs is not addressed explicitly. Instead, the agreement refers to Code of Civil Procedure section 1284.2, which generally provides that parties to an arbitration must bear their own expenses. But the agreement also states that "controlling case law" or statutes will prevail over Code of Civil Procedure section 1284.2 if there is a conflict.

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[4] The parties dispute the precise font size. Kho asserts it is 7 points, while One Toyota insists it is 8.5 points. By any measure, the type is quite small.

[5] A motion for judgment under Code of Civil Procedure section 631.8 is the equivalent of a nonsuit motion in a court trial. (See *Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196, 1200.)

Kho's employment ended in April 2014. Several months later, he filed a complaint with the Labor Commissioner for unpaid wages. At a settlement conference before a deputy labor commissioner, One Toyota was represented by counsel; Kho appeared in propria persona. One Toyota contends its attorney demanded arbitration at the conference, presenting Kho with a copy of the signed arbitration agreement, but Kho and the Labor Commissioner dispute this account. Kho rejected One Toyota's settlement offer and requested a Berman hearing. The hearing was set in August 2015, some nine months later.

On the Friday before the Monday Berman hearing, One Toyota filed a petition to compel arbitration and stay the administrative proceedings. It did not serve these papers on Kho. On the morning of the hearing, One Toyota's attorney notified the Labor Commissioner by fax of its petition and asked that the hearing be taken off calendar. The hearing officer refused. One Toyota's attorney appeared at the scheduled time but left after serving Kho for the first time with the petition to compel. Proceeding without One Toyota, the hearing officer awarded Kho $102,912 in unpaid wages and $55,634 in liquidated damages, interest, and penalties. One Toyota sought to vacate the award. The Labor Commissioner intervened on Kho's behalf and opposed the motions to compel and vacate. One Toyota posted the required bond to permit de novo review of the award under Labor Code section 98.2. (See *post*, at p. 8.)

The trial court vacated the Labor Commissioner's award, concluding the hearing should not have proceeded in One Toyota's absence. The court did not compel arbitration, however. It found a high degree of procedural unconscionability attended the agreement's execution,

which "created oppression or surprise due to unequal bargaining power." The court also found the agreement substantively unconscionable under *Sonic II* because it "fails to provide a speedy, informal and affordable method of resolving wage claims and has virtually none of the benefits afforded by the Berman hearing procedure." The court observed, "Contrary to the assumption that arbitration is intended to provide an inexpensive, efficient procedure to vindicate rights, the agreement in this case seeks, in large part, to restore the procedural rules and procedures that create expense and delay in civil litigation." In light of this ruling, the court declined to address the Labor Commissioner's argument that One Toyota waived its right to arbitrate by waiting too long to claim it.

The Court of Appeal reversed. Although it noted an "extraordinarily high" degree of procedural unconscionability in the agreement's execution, it concluded the agreement was not substantively unconscionable. The agreement had no objectionable terms and could be considered "'harsh or one-sided' only in comparison to the various features of the Labor Code that seek to level the playing field for wage claimants." The arbitration would be sufficiently affordable under *Sonic II* because laws external to the agreement require that employers pay both the costs of arbitration (see *Armendariz v. Foundation Health Psychcare Service, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*)) and a successful claimant's reasonable attorney fees (see Lab. Code, § 218.5). Though the selected arbitration procedure is more complex than a Berman hearing, the court observed that those hearings are nonbinding and can progress, at either side's request, to a de novo proceeding in superior court. In specifying an arbitral process that resembles civil litigation, the agreement thus "anticipates a proceeding that is no more complex than will often be required to resolve a wage claim under the

Berman procedures." This resolution made it unnecessary for the court to address the Labor Commissioner's cross-appeal from the order vacating her award. Finally, the court held that One Toyota did not forfeit its right to arbitrate because there was no showing of prejudice from the company's delay in seeking arbitration.

II. DISCUSSION

A. The Berman Process

Before addressing Kho's unconscionability defense, we review the statutory procedures he waived by agreeing to arbitration. We also consider the significance of that waiver in light of *Sonic I* and *Sonic II*.

1. Statutory Procedures Available To Wage Claimants

The Labor Code provides an administrative procedure for recovery of unpaid wages. When an employer does not pay wages as required, the employee may either: (1) file a civil action in court, or (2) file a wage claim with the Labor Commissioner under sections 98 to 98.8. The administrative option was added in 1976 (see Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371) and is commonly known as a "Berman" hearing.[6]

If an employee files an administrative complaint, the Labor Commissioner may either accept the matter and conduct a Berman hearing (§ 98, subd. (a)); prosecute a civil action on the employee's behalf (§ 98.3); or take "no further action . . . on the complaint" (§ 98, subd. (a)). The commissioner's staff may try to settle the complaint before holding a hearing or filing suit. (Dept. of Industrial

[6] The legislation was sponsored by Assemblyman Howard Berman. (*Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 946.)

Relations, Div. of Labor Stds. Enforcement (DLSE), Policies and Procedures for Wage Claim Processing (2012 rev.) p. 2.) Subject to extensions of time, Berman hearings must generally be held within 90 days after a matter is accepted. (§ 98, subd. (a).)

A Berman hearing is conducted by a deputy commissioner, who may issue subpoenas. (Cal. Code Regs., tit. 8, §§ 13502, 13506.) The procedure "is designed to provide a speedy, informal, and affordable method of resolving wage claims." (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858 (*Cuadra*).) Pleadings are limited to a complaint and answer. There is no discovery process. (§ 98, subd. (d).) Technical rules of evidence do not apply, and all relevant evidence is admitted "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Cal. Code Regs., tit. 8, § 13502.) The hearing officer may assist the parties with cross-examination and explain issues and terms involved. (DLSE, Policies and Procedures for Wage Claim Processing, *supra*, at p. 3.) If necessary, a translator will be provided. (*Ibid.*; see § 105, subd. (b).) The claim must be decided within 15 days of the hearing. (§ 98.1, subd. (a).)

Either party may appeal the decision to the superior court, which reviews the claim de novo. (§ 98.2, subd. (a).) An employer who appeals must post an undertaking in the amount of the award. (*Id.*, subd. (b).) On appeal, the Labor Commissioner may represent claimants "financially unable to afford counsel" and must represent any indigent claimant attempting to uphold the award while objecting to no part of it. (§ 98.4.) An unappealed decision is a final judgment, enforceable immediately. (§ 98.2, subds. (d), (e).) The commissioner is responsible for enforcement (*id.*, subd. (i)), which is entitled to court priority (*id.*, subd. (e)).

If an employer's appeal fails, the court determines costs and reasonable attorney fees incurred by the successful employee and orders payment by the losing appellant. (§ 98.2, subd. (c).) Claimants represented by the commissioner may still recover fees, consistent with the statute's goal of discouraging unmeritorious appeals. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 376-378 (*Lolley*).) "An employee is successful if the court awards an amount greater than zero." (§ 98.2, subd. (c).) The statute provides a one-way fee-shifting scheme: An unsuccessful employer must pay attorney fees but a successful one may not recover them. (See *Arias v. Kardoulias* (2012) 207 Cal.App.4th 1429, 1435.) This fee scheme differs from wage claims brought in superior court, where the "prevailing party" may obtain attorney fees. (§ 218.5, subd. (a).)[7]

The Berman process is optional for both claimants and the Labor Commissioner. Aggrieved employees may take their wage claims directly to superior court. (See § 218.) Likewise, the commissioner may decline to act on a filed complaint. (See § 98, subd. (a).) However, Berman procedures can significantly reduce the costs and risks of pursuing a wage claim. They provide "an accessible, informal, and affordable" avenue for employees to seek resolution, with assistance available if necessary. (*Sonic II*, *supra*, 57 Cal.4th at p. 1129.) They discourage unmeritorious appeals through a bond requirement and a fee-shifting

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[7] As amended in 2013, section 218.5, subdivision (a) provides that "if the prevailing party in the court action is not an employee, attorney's fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith." (Stats. 2013, ch. 142, § 1) Although it does not guarantee that wage claimants will be able to recover their attorney fees, this amendment largely eliminates the risk that they will be liable for their employer's fees.

scheme that favors employees. (See *id.* at p. 1130.) They permit the commissioner to represent claimants on appeal and facilitate award collection. (See *ibid.*)

2. The Sonic I and Sonic II Decisions

Sonic I and *Sonic II* addressed the validity of predispute agreements requiring wage claim arbitration. *Sonic I* held that it is against public policy for an employer to require employees to waive their Berman rights as a condition of employment, and that an arbitration agreement effectively waiving Berman rights is substantively unconscionable as a matter of law. (*Sonic I*, *supra*, 51 Cal.4th at pp. 684-687.) However, in construing the agreement to attempt to harmonize the competing policies at issue, *Sonic I* also held that parties could proceed to binding arbitration *after* they had completed a Berman hearing. (*Id.* at p. 675.) In other words, instead of pursuing a de novo appeal in superior court, a party dissatisfied with the Labor Commissioner's ruling could petition to compel arbitration. (Id. at p. 676.)

Sonic I's holdings were short-lived. Two months later, on a related question, *Concepcion*, *supra*, 563 U.S. 333, abrogated our holding from *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 that class arbitration waivers in consumer contracts are unconscionable. (*Concepcion*, at pp. 341-344.) The high court explained that the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Id.* at p. 344.) Because *Discover Bank*'s classwide arbitration rule interfered with the "fundamental attributes of arbitration," such as efficiency and informality, it was preempted as inconsistent with the FAA. (*Concepcion*, at p. 344.) There-

after, the court vacated the *Sonic I* judgment and remanded for our consideration in light of *Concepcion*. (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 565 U.S. 973.)

On remand, we acknowledged the Supreme Court's admonition that states "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Concepcion*, *supra*, 563 U.S. at p. 351; see *Sonic II*, *supra*, 57 Cal.4th at p. 1141.) Because the court identified efficiency as a hallmark of arbitration under the FAA, *Concepcion* taught that "courts cannot impose unconscionability rules that interfere with arbitral efficiency, including rules forbidding waiver of administrative procedures that delay arbitration." (*Sonic II*, at p. 1141; see *Concepcion*, at pp. 344-345.) Accordingly, *Sonic I*'s categorical rule prohibiting a waiver of Berman procedures was preempted. (*Sonic II*, at pp. 1139-1141.)

Nevertheless, we noted that unconscionability remains a valid defense to enforcement, even after *Concepcion*. The overarching unconscionability question is whether an agreement is imposed in such an unfair fashion and so unfairly one-sided that it should not be enforced. Arbitration agreements could not be deemed categorically unconscionable simply because they entail a waiver of the Berman proceedings. (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) However, we provided that an employee's Berman waiver, while not dispositive, remains a significant factor in considering unconscionability. An agreement's failure to "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." (*Ibid.*)

The *Sonic II* majority opinion focused repeatedly on the need for accessible and affordable arbitration, reasoning that these were key benefits of the Berman process that parties to an arbitration agreement had decided to forgo. We stopped short of defining the requirements for an acceptable arbitration framework, however, and emphasized that arbitration can be structured in various ways "so that it facilitates accessible, affordable resolution of wage disputes," without necessarily replicating Berman protections. (*Sonic II*, *supra*, 57 Cal.4th at p. 1147.) So long as the arbitral procedure is relatively "low-cost" (*ibid.*) and provides a forum for wage claimants "to pursue their claims effectively" (*ibid.*), its adoption in lieu of the Berman process will not, in itself, be considered unconscionable (*id.* at pp. 1147-1148). In short, when an adhesion contract requires arbitration, "the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable," thus effectively blocking every forum for redress including arbitration itself. (*Id.* at p. 1148.)

We did not decide whether the *Sonic II* agreement was substantively unconscionable under this standard. Recognizing that unconscionability is a fact-specific defense, we remanded for the trial court to examine additional evidence regarding the particulars of the arbitration process set out in the agreement. (*Sonic II*, *supra*, 57 Cal.4th at pp. 1147-1148.)

B. Unconscionability of the Arbitration Argument

California law strongly favors arbitration. Through the comprehensive provisions of the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), "the Legislature has expressed a 'strong public policy in favor of arbitra-

tion as a speedy and relatively inexpensive means of dispute resolution.'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) As with the FAA (9 U.S.C. § 1 et seq.), California law establishes "a presumption in favor of arbitrability." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971.) An agreement to submit disputes to arbitration "is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281; see 9 U.S.C. § 2.)

"'[G]enerally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening' the FAA" or California law. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*); see *Concepcion*, *supra*, 563 U.S. at p. 339.) Unconscionability can take different forms depending on the circumstances and terms at issue. However, the doctrine's application to arbitration agreements must rely on the same principles that govern all contracts. (*Sonic II*, *supra*, 57 Cal.4th at p. 1133.) The degree of unfairness required for unconscionability must be as rigorous and demanding for arbitration clauses as for any other contract clause. (*Ibid.*)

The general principles of unconscionability are well established. A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. (*Sonic II*, *supra*, 57 Cal.4th at p. 1133.) Under this standard, the unconscionability doctrine "'has both a procedural and a substantive element.'" (*Ibid.*) "The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to

assessments of whether they are overly harsh or one-sided." (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.)

Both procedural and substantive unconscionability must be shown for the defense to be established, but "they need not be present in the same degree." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) Instead, they are evaluated on "'a sliding scale.'" (*Ibid.*) "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to" conclude that the term is unenforceable. (*Ibid.*) Conversely, the more deceptive or coercive the bargaining tactics employed, the less substantive unfairness is required. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487 (*A & M Produce*); see *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 635; *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85 (*Carmona*).) A contract's substantive fairness "must be considered in light of any procedural unconscionability" in its making. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 912 (*Sanchez*).) "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Ibid.*)

The burden of proving unconscionability rests upon the party asserting it. (*Sanchez*, *supra*, 61 Cal.4th at p. 911; *Sonic II*, *supra*, 57 Cal.4th at p. 1148.) "Where, as here, the evidence is not in conflict, we review the trial court's denial of arbitration de novo." (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.)

1. Procedural Unconscionability

The Court of Appeal observed that the arbitration agreement's execution involved an "extraordinarily high" degree of procedural unconscionability. We agree.

A procedural unconscionability analysis "begins with an inquiry into whether the contract is one of adhesion." (*Armendariz*, *supra*, 24 Cal.4th at p. 113.) An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power "on a take-it-or-leave-it basis." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1245 (*Baltazar*); see *Armendariz*, at p. 113.) Arbitration contracts imposed as a condition of employment are typically adhesive (see *Armendariz*, at pp. 114-115; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704), and the agreement here is no exception. The pertinent question, then, is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required. (See *Baltazar*, at pp. 1245-1246; *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1267-1268.) "'"*Oppression* occurs where a contract involves lack of negotiation and meaningful choice, *surprise* where the allegedly unconscionable provision is hidden within a prolix printed form."'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 247, italics added; see *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 983.) This record reveals both oppression and surprise.

"The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348, fn. omitted.) With respect to *preemployment* arbitration contracts, we have observed

that "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz*, *supra*, 24 Cal.4th at p. 115.) This economic pressure can also be substantial when employees are required to accept an arbitration agreement in order to *keep* their job. Employees who have worked in a job for a substantial length of time have likely come to rely on the benefits of employment. For many, the sudden loss of a job may create major disruptions, including abrupt income reduction and an unplanned reentry into the job market. In both the prehiring and posthiring settings, courts must be "particularly attuned" to the danger of oppression and overreaching. (*Armendariz*, at p. 115; see *Baltazar*, *supra*, 62 Cal.4th at p. 1244.)

The circumstances here demonstrate significant oppression. The agreement was presented to Kho in his workspace, along with other employment-related documents. Neither its contents nor its significance was explained. One Toyota admits that Kho was required to sign the agreement to keep the job he had held for three years. Because the company used a piece-rate compensation system, any time Kho spent reviewing the agreement would have reduced his pay. Moreover, as the Court of Appeal explained, "Not only did One Toyota provide no explanation for its demand for his signature, it selected a low-level employee, a 'porter,' to present the Agreement, creating the impression that no request for an explanation was expected and any such request would be unavailing." By having the porter wait for the documents, One Toyota conveyed an expectation that Kho sign them immediately, without examination or consultation with counsel. One Toyota protests that Kho did not ask questions about the

agreement, but there is no indication that the porter had the knowledge or authority to explain its terms. (See *Carmona*, *supra*, 226 Cal.App.4th at pp. 84-85.) Similarly, although One Toyota is correct that Kho did not attempt to negotiate, a complaining party need not show it tried to negotiate standardized contract terms to establish procedural unconscionability. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 244; see *Sanchez*, *supra*, 61 Cal.4th at p. 914.) By its conduct, One Toyota conveyed the impression that negotiation efforts would be futile. Finally, Kho was not given a copy of the agreement he had signed.[8]

The facts also support the trial court's finding of surprise. The agreement is a paragon of prolixity, only slightly more than a page long but written in an extremely small font. The single dense paragraph covering arbitration requires 51 lines. As the Court of Appeal noted, the text is "visually impenetrable" and "challenge[s] the limits of legibility."

The substance of the agreement is similarly opaque. The sentences are complex, filled with statutory references and legal jargon. The second sentence alone is 12 lines long. The arbitration paragraph refers to: the California Fair Employment and Housing Act; title VII of the Civil Rights Act of 1964; other unspecified "local, state or federal laws or regulations"; the National Labor Relations Act; the California Workers' Compensation Act; "California Small Claims" actions; the Department of Fair Employment and Housing; the Employment Devel-

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[8] Nor was Kho offered a version to read in his native language. (See *Subcontracting Concepts (CT), LLC v. De Melo* (2019) 34 Cal.App.5th 201, 211; *Carmona*, *supra*, 226 Cal.App.4th at p. 85.) However, because the record does not reveal the level of Kho's English proficiency, we cannot determine the significance of this omission, and we do not rely on it.

opment Department; the "Equal Opportunity Commission"; the federal and California arbitration acts; and six different sections of California's Civil Code and Code of Civil Procedure. A layperson trying to navigate this block text, printed in tiny font, would not have an easy journey.

With respect to arbitration costs, the agreement states: "If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2." Code of Civil Procedure section 1284.2 states a default rule that, unless the agreement specifies otherwise, parties to an arbitration will bear their own expenses. However, *Armendariz* created an exception to this general rule for arbitrations of employment-related disputes. (See *Armendariz*, *supra*, 24 Cal.4th at pp. 110-111.)[9] Although the agreement anticipates that the "controlling case law" of *Armendariz* would prevail over the statutory default rule, One Toyota's obligation to pay arbitration-related costs would not be evident to anyone without legal knowledge or access to the relevant authorities. It is difficult to envision that Kho would have had any idea what the cited code section says or that a 13-year-old case creates a relevant exception to it. This example illustrates the difficulty a layperson would have in deciphering

[9] Under *Armendariz*, "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz*, *supra*, 24 Cal.4th at pp. 110-111.) *Armendariz* concerned claims under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), but One Toyota does not dispute that its holding applies equally to wage claims.

key terms. It would have been nearly impossible to understand the contract's meaning without legal training and access to the many statutes it references. Kho had neither. Under these circumstances, Kho's signature attesting to have read and understood the agreement appears formulaic rather than informed. We agree with the Court of Appeal that the agreement appears to have been drafted with an aim to thwart, rather than promote, understanding.

The document itself and the manner of its presentation did not promote voluntary or informed agreement to its terms. "Arbitration is favored in this state as a voluntary means of resolving disputes, and this voluntariness has been its bedrock justification." (*Armendariz*, *supra*, 24 Cal.4th at p. 115; see *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 252.) Arbitration contracts are vigorously enforced out of respect for the parties' mutual and voluntary agreement to resolve disputes by this alternative means. (See, e.g., *Moncharsh*, *supra*, 3 Cal.4th at pp. 10-11.) However, an inference of voluntary assent can be indulged only so far and must yield in the face of undisputed facts that undermine it. Where an employee is induced to sign an arbitration agreement through "sharp practices" and surprise (see *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 469 (*Gentry*)),[10] the consent rationale carries less force. "[A]rbitration 'is a matter of consent, not coercion.'" (*Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 681; see *Lamps Plus, Inc. v. Varela* (2019) ____ U.S. ____ , ____ [139 S.Ct. 1407, 1415].) On this record, it is virtually impossible to

[10] In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360, we recognized that *Gentry*'s holding regarding class arbitration waivers had been abrogated by United States Supreme Court precedent.

conclude that Kho knew he was giving up his Berman rights and voluntarily agreeing to arbitration instead.

2. Substantive Unconscionability

Substantive unconscionability examines the fairness of a contract's terms. This analysis "ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as '"'overly harsh'"' (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532), '"unduly oppressive"' (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925), '"so one-sided as to 'shock the conscience'"' (*Pinnacle*[, *supra*,] 55 Cal.4th [at p.] 246), or 'unfairly one-sided' (*Little* [*v. Auto Stiegler, Inc.* (2003)] 29 Cal.4th [1064,] 1071.) All of these formulations point to the central idea that the unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party.'" (*Sonic II*, *supra*, 57 Cal.4th at p. 1145.) Unconscionable terms "'impair the integrity of the bargaining process or otherwise contravene the public interest or public policy'" or attempt to impermissibly alter fundamental legal duties. (*Ibid.*) They may include fine-print terms, unreasonably or unexpectedly harsh terms regarding price or other central aspects of the transaction, and terms that undermine the nondrafting party's reasonable expectations. (*Ibid.*; see *Sanchez*, *supra*, 61 Cal.4th at p. 911.) These examples are illustrative, not exhaustive.

Substantive terms that, in the abstract, might not support an unconscionability finding take on greater weight when imposed by a procedure that is demonstrably oppressive. Although procedural unconscionability alone does not invalidate a contract, its existence requires courts to closely scrutinize the substantive terms "to en-

sure they are not manifestly unfair or one-sided." (*Gentry*, *supra*, 42 Cal.4th at p. 469.) We hold that, given the substantial procedural unconscionability here, even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable. (*Carmona*, *supra*, 226 Cal.App.4th at p. 85; *A & M Produce*, *supra*, 135 Cal.App.3d at p. 487; see *Armendariz*, *supra*, 24 Cal.4th at p. 114.)

Kho and the Labor Commissioner do not focus on the fairness of specific, isolated terms in the agreement. Rather, they contend One Toyota's arbitral process is so inaccessible and unaffordable, considered as a whole, that it does not offer an effective means for resolving wage disputes. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1146.)[11] This is a close question, which cannot be resolved in the abstract. It is important to stress that the waiver of Berman procedures does not, in itself, render an arbitration agreement unconscionable. However, a substantive unconscionability analysis is sensitive to "the context of the rights and remedies that otherwise would have been available to the parties." (*Sanchez*, *supra*, 61 Cal.4th at p. 922.) We must examine both the features of dispute resolution adopted as well as the features eliminated. (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.)

As to accessibility, Kho first observes that, unlike in Berman proceedings, the agreement does not explain how to initiate arbitration. Industrial Welfare Commission (IWC) wage orders, required by law to be posted at the jobsite (Lab. Code, § 1183, subd. (d)), direct employees to

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[11] Separately, Kho asserts the agreement is unconscionable because it potentially extends to enforcement actions that may be brought by the Labor Commissioner. We do not address this new argument because, as Kho concedes, no such claims are at issue here.

contact the Labor Commissioner about wage-related violations, providing for this purpose both the Department of Industrial Relations website and a list of local labor commissioner offices. (See, e.g., IWC wage order No. 4-2001 (Cal. Code Regs., tit. 8, § 11040); IWC wage order No. MW-2019 (Cal. Code Regs., tit. 8, § 11000).) An employee can start the Berman process by filling out a simple form found on the website and in local offices. The form is rendered in many languages, and detailed instructions explain how to complete and file it. In contrast, One Toyota's agreement does not mention how to bring a dispute to arbitration, nor does it suggest where that information might be found.[12] Commercial arbitration providers, for example, frequently provide standardized forms to start the process. Employees can also contact the provider for information on claim initiation. The agreement here, however, identifies no commercial providers. In fact, it does not mention that such providers exist. It mandates that the arbitrator be a "retired California Superior Court Judge" but gives no indication how an employee might find such a person, let alone one willing to arbitrate a wage claim. Although some employees might pursue other avenues for relief and reach arbitration after encountering a motion to compel, these additional steps will inevitably increase the delay and expense involved. Other employees may be so confused by the agreement that they are deterred from bringing their wage claims at all.[13]

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[12] A second document Kho signed the same day requires management to be notified in writing about compensation-related disputes but gives no indication such a notice would be sufficient to initiate arbitration. (See dis. opn., *post*, at p. 31.) Indeed, it would not be, since the agreement imposes no obligation on One Toyota to take any action upon receiving such a notice.

[13] The dissent argues Kho could have deduced how to initiate arbitration by the agreement's reference to the California Arbitration

Kho also contends it would be difficult for an unsophisticated, unrepresented wage claimant to effectively navigate the agreement's arbitral procedure. In the Berman process, a claimant need only fill out a complaint form, possibly assisted by a deputy labor commissioner, then attend a settlement conference and, in some cases, a hearing. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1128.) By contrast, in the arbitration provided for here, the complaint must be framed in a legal pleading, and the claimant must respond to discovery demands and dispositive motions. Whereas a Berman hearing is conducted by a deputy labor commissioner, who can explain terminology and assist with witness examination (see *ibid.*), the arbitration here must be conducted by a retired superior court judge, with procedures similar to a formal civil trial. Evidence must conform to technical rules of evidence, whereas all relevant evidence is typically admitted in Berman hearings. (See *ibid.*; Cal. Code Regs., tit. 8, § 13502.)[14] Collection is

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Act. (Dis. opn., *post*, at p. 31.) While still speculative, this assertion would have more force if Kho had been given a copy of the documents he signed. It is undisputed he was not. It seems quite a stretch to assert that a mere reference to the California Arbitration Act in the "visually impenetrable" (*ante*, at p. 17) paragraph Kho was given an inadequate opportunity to review, and which he would have had to recall without his own copy to assist him, informed Kho how to initiate arbitration.

[14] At oral argument, One Toyota's counsel asserted that these procedural requirements would not apply in wage claim arbitrations because arbitrators would know to use simplified, Berman-like procedures instead. This argument was never previously made and is contrary to One Toyota's position throughout this appeal. In the Court of Appeal, One Toyota defended the complexity of its arbitral process by arguing that the agreement's "rules for discovery and motion practice are *expressly the same* as they would be in court—the same rules that the state legislature deemed fair enough to institute for all civil proceedings—with the only modifications noted in the four corners of the arbitration agreement and not requiring reference to any other

also simplified in the Berman context because the Labor Commissioner is responsible for enforcing the judgment. (§ 98.2, subd. (i).) Or, if the employer unsuccessfully appeals the Labor Commissioner's award, the claimant can collect on a posted bond. (§ 98.2, subd. (b).) In arbitration, a successful claimant must petition to confirm the award and reduce it to an enforceable judgment. (Code Civ. Proc., §§ 1285, 1287.4.)

The Berman process was specifically designed to give claimants a "speedy, informal, and affordable method" for resolving wage disputes. (*Cuadra*, *supra*, 17 Cal.4th at p.

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documents." In its briefing here, One Toyota argued that what "Kho and the Labor Commissioner . . . both truly desire is an arbitration procedure that resembles the Berman hearing process. However, an employee is not entitled to that . . . ." One Toyota never suggested its arbitral process did, in fact, resemble the Berman procedures. Moreover, counsel's representation at oral argument is directly contradicted by the language of the arbitration agreement. It states: "*To the extent applicable in civil courts*, the following *shall apply and be observed*: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. The arbitrator shall be vested with authority to determine any and all issues pertaining to the dispute/claims raised, any such determinations shall be based solely upon the law governing *the claims and defenses pleaded*, and the arbitrator may not invoke any basis (including but not limited to notions of 'just cause') for his/her determinations other than such controlling law." (Italics added.) This language begins in the 32d line of the arbitration paragraph. It clearly requires the parties to follow the same pleading, evidence, and motion practice rules that govern civil litigation. Further, by requiring arbitration before a retired superior court judge, the agreement ensures the arbitrators will be experienced in enforcing these procedural rules. It is difficult, if not impossible, to square the strict language of the contract with One Toyota's belated assertion.

858.)[15] The process advances "the very objectives of 'informality,' 'lower costs,' 'greater efficiency and speed,' and use of 'expert adjudicators' that the high court has deemed 'fundamental attributes of arbitration.'" (*Sonic II*, *supra*, 57 Cal.4th at p. 1149; see *Concepcion*, *supra*, 563 U.S. at pp. 344, 348.)[16] By contrast, the arbitration provided for here incorporates the intricacies of civil litigation. An employee must surrender the benefits and efficiencies of the Berman process but does not gain in return any of the efficiencies or cost savings often associated with arbitration.

We observed in *Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at page 1075, footnote 1, that litigation-like procedures, on their own, are not necessarily so one-sided as to make an arbitration agreement unconscionable. We certainly do not now suggest that a system of statutory and

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[15] Although the resolution of this particular dispute has not been speedy, the delay is largely attributable to One Toyota. Kho filed a claim with the Labor Commissioner in October 2014. A settlement conference was held the next month, and a Berman hearing followed nine months later, in August 2015. The Labor Commissioner issued an award only a week after the hearing, around 10 months after Kho filed his claim. Litigation over One Toyota's motion to compel arbitration then consumed the next *four years*.

[16] The dissent raises the same criticisms of the Berman procedure that this court considered at length, and rejected, in *Sonic II*, *supra*, 57 Cal.4th at pages 1160-1162. The Berman procedures remain the Legislature's best "solution to the real-world problems employees face in recovering wages owed." (*Id.* at p. 1162.) These "informal procedures and incentives . . . make it more likely employees will be able to recover wages without incurring substantial attorney fees or the risk of liability for an employer's attorney fees," and help to "ensure that employees will be able to actually collect a favorable judgment." (*Ibid.*) Now, as in 2013, "[t]he dissent does not persuade us to second-guess the efficacy of this legislative solution or to depart from this court's consistent understanding of the Berman statutes' benefits." (*Ibid.*)

common law carefully crafted to ensure fairness to both sides, and subject to continuous review, is per se unfair.[17] However, that carefully crafted process can be costly, complex, and time-consuming. It is the opportunity to expedite and simplify the process that can motivate informed parties to agree to arbitration. Furthermore, *Little*'s observation was made in the context of a suit alleging wrongful demotion and discharge. (*Id.* at p. 1069.) For such claims, it may well be that an arbitration process closely resembling civil litigation can be as advantageous for the employee as for the employer. (See *id.* at p. 1075, fn. 1.) There is no Berman-like administrative process for wrongful discharge claims.

Our cases have taken a different approach in evaluating the compelled arbitration of wage claims, as compared to the arbitration of other types of disputes. Employees who agree to arbitrate claims for unpaid wages forgo not just their right to litigate in court, but also their resort to an expedient, largely cost-free administrative procedure. We explained repeatedly in *Sonic II* that, while the waiver of Berman procedures does not in itself render an arbitration agreement unconscionable, the agreement must provide *in exchange* an accessible and affordable forum for resolving wage disputes. (*Sonic II*, *supra*, 57 Cal.4th at pp. 1146, 1147-1148, 1150.) No specific procedures are required. (See *id.* at pp. 1147, 1170-1171.) But the arbitral

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[17] It should be evident that our observations here, which the dissent quotes repeatedly (dis. opn., *post*, at pp. 1, 19, 42, 45, 48, 55), pertain to civil litigation in general, not to the importation of civil litigation's formalities into an arbitration scheme that was forced on an employee through oppression and surprise as a substitute for an administrative procedure that we have repeatedly found to be expedient and affordable. (See, e.g., *Sonic II*, *supra*, 57 Cal.4th at pp. 1160-1161; *Cuadra*, *supra*, 17 Cal.4th at p. 858.)

scheme must offer employees an effective means to pursue claims for unpaid wages, and not impose unfair costs or risks on them or erect other barriers to the vindication of their statutory rights. (See *id.* at pp. 1142, 1147-1148, 1157-1158.) When imposed in a procedurally unconscionable fashion, such barriers to the vindication of rights may become unenforceable.

It is true, as One Toyota notes, that the results of a Berman hearing are nonbinding. An appeal by either party will bring the parties to the superior court for de novo review, where litigation formalities may apply.[18] But, as *Sonic II* explained, the prospect of an appeal does not negate the efficiency or accessibility of the Berman process. (*Sonic II*, *supra*, 57 Cal.4th at pp. 1160-1162, 1167.) Appeals are discouraged by the requirement that employers post a bond (§ 98.2, subd. (b)) and pay the costs and attorney fees on appeal of any employee who recovers even a minimal amount (see § 98.2, subd. (c); *Lolley*, *supra*, 28 Cal.4th at p. 376). If the employer does appeal,

[18] The dissent contends efficiencies of the Berman process are illusory because de novo appeals will simply bring the matters to superior court. (Dis. opn., *post*, at p. 30.) However, the Labor Commissioner explained at oral argument that de novo appeals are relatively rare. Most of the 30,000 to 40,000 claims filed with the commissioner each year are resolved at the initial settlement conference, with only around 10,000 proceeding to a Berman hearing. Of those 10,000, fewer than 500 cases result in a de novo appeal. Moreover, although trial courts generally have the power " ' "to adopt any suitable method of practice" ' " in cases before them (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1118), the Labor Commissioner represents that de novo appeals typically proceed directly to trial, without lengthy pretrial proceedings. Formal discovery in the superior court, though permissible, is disfavored except in unusually high-value or complex wage disputes. (*Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757, 763.) One Toyota has not challenged these representations. (See *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, 407, fn. 5.)

Berman claimants who cannot afford counsel may be represented by the Labor Commissioner. Representation in a de novo appeal is guaranteed for indigent claimants who do not object to the commissioner's final order. (§ 98.4.) Absent the agreement, Kho may well have been represented by the Labor Commissioner in any de novo appeal. Moreover, all claimants will have a better understanding of how to support their wage claims as a result of having the commissioner's assistance during the Berman process.

Because the complexity of One Toyota's arbitral process effectively requires that employees hire counsel, there is also force to Kho's argument that the procedure is not an affordable option. An arbitration procedure may not impose such costs or risks on wage claimants that it "'effectively blocks every forum for the redress of disputes, including arbitration itself.'" (*Sonic II*, *supra*, 57 Cal.4th at p. 1148.)

As noted, *Armendariz*, *supra*, 24 Cal.4th 83, requires that employers bear most arbitration costs, which, because they include the arbitrator's compensation, can be substantial. The *Armendariz* rule mitigates the unfairness of expecting that employees bear costs of a procedure to which they were required to agree. Attorney fees are different, however, because they are not unique to arbitration. It is true that employees are free to hire counsel, or not, whether they pursue their claims in court or in arbitration. But wage claimants present a somewhat special case. These employees can secure free legal assistance from the Labor Commissioner, both at the Berman hearing and in any subsequent appeal. While all employees would likely benefit from having a lawyer in the litigation-like arbitration process here, only wage claimants

have to pay for representation that was otherwise available to them for free.[19]

One Toyota notes that employees who hire counsel for wage-claim arbitrations may be able to recover their legal fees under an applicable fee-shifting statute. (See *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1251.) For example, section 218.5, subdivision (a) requires the court to award reasonable attorney fees and costs to the prevailing party in "any action brought for the nonpayment of wages" if fees are requested "upon the initiation of the action." The parties do not dispute that section 218.5 applies to most of Kho's claims. While section 218.5 permits an award of fees to either employees or employers who prevail (see *Kirby*, at p. 1251), employers may recover fees "only if the court finds that the employee brought the court action in bad faith." (§ 218.5, subd. (a); see *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525, 545.)

Although section 218.5 may mitigate some financial burden, employees still face a risk that they will not be designated the prevailing party, rendering their fees unrecoverable. The prevailing party is the one that succeeds

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[19] One Toyota suggests that the Labor Commissioner could represent claimants in arbitration. An administrative agency's authority is limited to that conferred by statute or the Constitution. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103; *Noble v. Draper* (2008) 160 Cal.App.4th 1, 12.) Although section 98.4 allows the Labor Commissioner to represent indigent claimants in de novo court proceedings following a Berman hearing, no statute authorizes the representation of claimants outside this specific context. The commissioner does have the power to prosecute *its own* action for the collection of unpaid wages and penalties on behalf of workers who are unable to afford counsel. (§ 98.3; see § 98, subd. (a).) Whether this discretionary authority extends to representing wage claimants in an arbitration is not readily apparent but, in any event, is a question beyond the scope of this appeal.

"on a '"practical level"'" and has "'realized its litigation objectives.'" (*Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185, 192.) An employer might be deemed the prevailing party on a wage claim if the jury denies most or all of the wages sought, even if the employee prevails on other claims. (See *ibid.*)

In contrast, the Berman statutes provide fee-shifting to wage claimants who secure *any* monetary recovery in an employer's appeal. (§ 98.2, subd. (c).) Considering the simplified administrative procedures that can be navigated in propria persona, and the availability of the Labor Commissioner's representation and favorable fee-shifting in a de novo appeal, claimants can successfully complete the Berman process without paying a cent to an attorney. The calculus is significantly different for employees in the arbitration process here, despite section 218.5. Assuming they can find counsel willing to represent them in One Toyota's complex arbitral process, these employees will have to pay the attorney if they do not prevail and may have to pay their employer's attorney fees upon a finding of bad faith. (See § 218.5, subd. (a).) Moreover, since section 218.5, subdivision (a) requires a fee request "upon the initiation of the action," employees who hire counsel after filing suit or starting arbitration may unwittingly forfeit their right to fees by failing to make a timely request.

Because the arbitration process here is no more complicated than ordinary civil litigation, it might be sufficiently accessible for wage claimants who are sophisticated, or affordable for those able to hire counsel. But an unconscionability analysis must be sensitive to context. Context includes both the commercial setting and purpose of the arbitration contract and any procedural unconscionability in its formation. (*Sanchez*, *supra*, 61 Cal.4th at pp. 911-912.) As noted, the procedural unconscionability showing here is exceptionally strong. Although the

same contract terms might pass muster under less coercive circumstances, a worker who is required to trade the Berman process for arbitration should at least have a reasonable opportunity to understand the bargain he is making. Had One Toyota set out the terms of its agreement in a legible format and fairly understandable language, or had it given Kho a reasonable opportunity to seek clarification or advice, this would be a different case.

Ultimately, the question is whether Kho, through oppression and surprise, was coerced or misled into making an unfair bargain. (See *Gentry*, *supra*, 42 Cal.4th at pp. 469-470; see also *Sanchez*, *supra*, 61 Cal.4th at p. 912.) The substantive fairness of this particular agreement must be considered in terms of what Kho gave up and what he received in return. By signing the agreement, Kho surrendered the full panoply of Berman procedures and assistance we have described. What he got in return was access to a formal and highly structured arbitration process that closely resembled civil litigation *if* he could figure out how to avail himself of its benefits and avoid its pitfalls. Considering the unusually coercive setting in which this bargain was entered, we conclude it was sufficiently one-sided as to render the agreement unenforceable.[20]

3. Consistency with Federal Law

Our holding rests on generally applicable unconscionability principles and heeds *Concepcion*'s counsel that arbitration agreements be placed "on an equal footing with other contracts." (*Concepcion*, *supra*, 563 U.S. at p. 339.) Nevertheless, our dissenting colleague renews several of the preemption arguments he made in *Sonic II*, insisting

[20] In light of this conclusion, we need not decide the Labor Commissioner's claim, raised below, that One Toyota forfeited its right to arbitrate.

once again that this court's approach to unconscionability contradicts the FAA and United States Supreme Court jurisprudence. (See *Sonic II*, *supra*, 57 Cal.4th at pp. 1184-1192 (conc. & dis. opn. of Chin, J.).) We respectfully suggest these complaints are unfounded.

The dissent's primary objection is that our analysis evinces hostility to arbitration, discriminates against arbitration, or improperly prefers a nonarbitral forum. (Dis. opn., *post*, at pp. 44-49.) Yet arbitration is premised on the parties' mutual consent, not coercion (see *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, *supra*, 559 U.S. at p. 681), and the manner of the agreement's imposition here raises serious concerns on that score. Moreover, we have repeatedly stressed that the substantive unconscionability of an arbitration agreement "is viewed in the context of the rights and remedies that otherwise would have been available to the parties." (*Sanchez*, *supra*, 61 Cal.4th at p. 922, citing *Sonic II*, *supra*, 57 Cal.4th at pp. 1146-1148.) The dissent supports its claim with repeated quotations to our observations about *civil litigation*, not the arbitral process under review. The argument is thus premised on a false equivalence between the system of civil litigation and the complex arbitral procedure adopted in this case, which features few, if any, of the benefits typically associated with arbitration and regarded as fundamental. (See *Concepcion*, *supra*, 563 U.S. at pp. 344-345.) While "the Berman statutes promote the very objectives of 'informality,' 'lower costs,' 'greater efficiency and speed,' and use of 'expert adjudicators' that the high court has deemed 'fundamental attributes of arbitration,'" the arbitration agreement here undermines those objectives by causing an "increase in cost, procedural rigor, complexity, or formality." (*Sonic II*, *supra*, 57 Cal.4th at p. 1149, quoting *Concepcion*, *supra*, 563 U.S. at p. 348.)

In comparing Berman's administrative process with One Toyota's arbitral procedure, we have simply evaluated the bargain at issue. We have not said *no* arbitration could provide an appropriate forum for resolution of Kho's wage claim, but only that *this particular* arbitral process, forced upon Kho under especially oppressive circumstances and erecting new barriers to the vindication of his rights, is unconscionable.

Citing the protracted appellate proceedings here, the dissent also complains that evaluating unconscionability claims will erect the type of "preliminary litigating hurdle" to arbitration the high court disfavored in *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 239. For obvious reasons, the duration of this particular litigation can hardly be considered typical. Few cases progress to appeal, and vanishingly few reach this court. More importantly, the issue here is very different from that in *Italian Colors*. Unlike the "judge-made exception to the FAA" the high court found problematic (*Italian Colors*, at p. 235), the unconscionability defense has long been recognized as a permissible ground for invalidating arbitration agreements under the FAA's savings clause. (9 U.S.C. § 2; see, e.g., *Concepcion*, *supra*, 563 U.S. at p. 339; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687.) The FAA thus contemplates that unconscionability claims, like other state law contract defenses, will be resolved before arbitration is enforced. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1167.) If the defense cannot be addressed before arbitration, then the savings clause has no meaning. The dissent also predicts delay from the case-by-case litigation of accessibility and affordability. (See dis. opn., *post*, at p. 52.) But this is an argument with the unconscionability defense itself, which is inherently fact-

specific. Once again, the dissent's view would all but eliminate the unconscionability defense to arbitration agreements, rendering the FAA's savings clause meaningless.

"Under the dissent's sweeping view of FAA preemption, no unconscionability rule may take into account the surrender of statutory protections for certain claimants, whether or not those protections interfere with fundamental attributes of arbitration." (*Sonic II*, *supra*, 57 Cal.4th at p. 1168.) We rejected that view in *Sonic II* and continue to do so. *Sonic II*'s "unconscionability rule does not treat arbitration agreements differently from nonarbitration agreements, does not remotely foreclose the enforceability of agreements to arbitrate wage disputes, and does not require such agreements to adopt any devices or procedures inimical to arbitration's fundamental attributes." (*Id.* at p. 1171.) Our application of that rule today fully complies with the FAA and governing law.

C. Status of the Labor Commissioner's Award

As noted, the trial court granted One Toyota's motion to vacate the Labor Commissioner's award. Because the Court of Appeal concluded the parties must arbitrate their wage dispute, it did not address the Labor Commissioner's cross-appeal from the order vacating her award. We consider the issue because the status of the Labor Commissioner's award has continuing significance on remand.

As One Toyota acknowledges, the issuance of such an award has several consequences even if not reduced to an enforceable judgment. When, as here, a de novo appeal is taken, the employer must post bond in the amount of the award. (§ 98.2, subd. (b).) Employees like Kho who do not contest any aspect of the award can be represented by the Labor Commissioner in the de novo proceedings (§ 98.4) and obtain attorney fees if they recover any amount.

(§ 98.2, subd. (c); see *Lolley*, *supra*, 28 Cal.4th at p. 377.) Kho's access to these benefits on remand depends on the status of the Labor Commissioner's award.[21] A properly vacated award could make these benefits unavailable. However, it appears the order vacating the award was made in error.

On the morning of the scheduled Berman hearing, One Toyota faxed the Labor Commissioner a letter. The company explained it had filed a petition to compel arbitration and requested the hearing be taken off calendar until arbitration was complete. The Labor Commissioner refused, proceeded with the hearing in One Toyota's absence, and made an award for Kho.[22] The trial court found that One Toyota was substantially justified in refusing to participate in the Berman hearing and that enforcing the award would violate One Toyota's right to a fair administrative hearing. The procedural posture here requires reversal of the trial court's order granting relief from the award.

The court purportedly relied on Code of Civil Procedure section 1094.5, subdivision (b). That statute authorizes a writ of mandate if an administrative tribunal "has

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[21] After the trial court vacated the award, One Toyota obtained an order releasing its appeal bond. Whether section 98.2, subdivision (b) requires reinstatement or the posting of a new bond is a matter the trial court may consider on remand.

[22] One Toyota argues the Labor Commissioner created a "catch-22" by asserting that One Toyota would waive its right to arbitrate if it participated in the Berman hearing. The record directly belies this claim. After One Toyota refused to participate in the hearing, the hearing officer notified it in writing: "[I]n the event that your client disagrees with the Order, Decision, or Award in this matter *you will then have the opportunity to file an appeal or compel arbitration at that time*." (Italics added.) One Toyota cites nothing in the record to support its "catch-22" assertion.

proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) The difficulty is One Toyota did not petition for a writ of mandate. (See Code Civ. Proc., § 1094.5, subd. (a).) It simply filed a motion to vacate the award. Moreover, administrative mandate applies only to the results of "a proceeding in which *by law a hearing is required to be given*. . . ." (*Ibid.*, italics added.; see *Keeler v. Superior Court* (1956) 46 Cal.2d 596, 598-599.) There is no requirement that a Berman hearing be held on a wage complaint. The Labor Commissioner has discretion to hold a hearing, prosecute the case in court, or take "no further action . . . on the complaint." (Lab. Code, § 98, subd. (a).) Accordingly, Berman "hearings are *not* subject to review under Code of Civil Procedure section 1094.5." (*Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 55.)

More fundamentally, One Toyota was not entitled to relief on its motion because it failed to exhaust its administrative remedies. The Labor Code outlines two alternatives for challenging a Berman award. (See *Gonzalez v. Beck* (2007) 158 Cal.App.4th 598, 605.) First, either party can file an appeal in the superior court. (§ 98.2.) Second, a defendant who has failed to answer or appear in the Berman proceedings can apply to the Labor Commissioner for relief under Code of Civil Procedure section 473. (Lab. Code, § 98, subd. (f).) Although an application to the Labor Commissioner need not precede a de novo appeal (see *Jones v. Basich* (1986) 176 Cal.App.3d 513, 518), this administrative recourse must be sought before a motion to vacate the commissioner's decision. Section 98, subdivision (f) states: "No right to relief, including the claim that the findings or award of the Labor Commissioner or judgment entered thereon are void upon their face, shall accrue to the defendant in any court unless prior application

is made to the Labor Commissioner in accordance with this chapter." (See *Gonzalez*, at pp. 605-606.) One Toyota tried to pursue both lines of attack. It filed a de novo appeal and made a motion to vacate. Because it failed to seek relief from the Labor Commissioner, however, it was barred from obtaining the latter relief. (§ 98, subd. (f).)

If One Toyota wished to halt the Berman proceedings while pursuing arbitration, it could have requested a stay. The filing of a petition to compel arbitration does not automatically stay ongoing proceedings; the party seeking arbitration must request one. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796.) Under Code of Civil Procedure section 1281.4, "[i]f an application has been made to a court of competent jurisdiction . . . 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 . . . ." (Italics added.) One Toyota's petition to compel did, somewhat vaguely, ask the court to stay "this action," but it gave the court no opportunity to rule on its request. The petition was filed with the court on the Friday before a Monday Berman hearing. One Toyota did not ask the court for an emergency stay in light of its late filing, and no stay order was actually issued before One Toyota's counsel unilaterally left the hearing.

One Toyota argues the terms of Code of Civil Procedure section 1281.4 do not apply because Berman proceedings are not "pending before a court of this State." This assertion undermines One Toyota's attempt to excuse its nonparticipation in the hearing and ignores the rule from *Brock* that a motion to compel does not effect an

automatic stay. Moreover, even if the language of section 1281.4 does not explicitly encompass proceedings before the Labor Commissioner, the superior court likely had the power to stay these administrative proceedings under Code of Civil Procedure section 1281.8, subdivision (a), which authorizes a range of provisional remedies in aid of arbitration, including injunctive relief. Failing that, the court could have issued a stay under its inherent power. "[A] court ordinarily has inherent power, in its discretion, to stay proceedings when such a stay will accommodate the ends of justice." (*People v. Bell* (1984) 159 Cal.App.3d 323, 329.) As the court in *Landis v. North American Co.* (1936) 299 U.S. 248, 254 explained, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."

One Toyota did not obtain a stay, but simply refused to participate in a hearing that had been set months before. Under these circumstances, the Labor Commissioner did not act improperly in proceeding with the hearing after One Toyota and its counsel chose to depart. Vacating that award was error. Nevertheless, One Toyota properly appealed the award under section 98.2, which forestalled the Labor Commissioner's decision, terminated her jurisdiction, and vested jurisdiction in the superior court. (*Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at p. 1116.) Although the appeal terminates the commissioner's jurisdiction, Kho will have the benefit of the Labor Code's post-Berman hearing protections on remand. (See §§ 98.2, 98.4.)

III. DISPOSITION

The decision of the Court of Appeal is reversed. The matter is remanded for return to the trial court for proceedings on One Toyota's de novo appeal from the Labor Commissioner's award.

Dissenting opinion by CHIN, J.

Today, the majority holds that an arbitration agreement is substantively unconscionable—and therefore unenforceable—precisely *because* it prescribes procedures that, according to the majority, have been "carefully crafted to ensure fairness to both sides." (Maj. opn., *ante*, at p. 25.) If you find that conclusion hard to grasp and counterintuitive, so do I. It is based on the majority's view that arbitration with such procedures, though not unaffordable or inaccessible in the abstract or "per se unfair" (maj. opn., *ante*, at p. 25), is not as advantageous for employees with unpaid wage claims as the potentially multitiered, multistep, combined administrative and judicial statutory process known as the Berman procedure. I believe the majority's analysis and conclusion to be incorrect under state law in numerous respects. I also believe the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.), as authoritatively construed in binding United States Supreme Court decisions, precludes the majority from invalidating this arbitration agreement based on its subjective view that, for the purpose of "vindicati[ng]" employees' "statutory rights," the prescribed arbitration procedure is not as effective as the statutory Berman procedure. (Maj. opn., *ante*, at p. 25.) I therefore dissent.

I. DISCUSSION

To explain why I do not join the majority, I begin by summarizing relevant state law unconscionability principles. I then explain my disagreement with the majority's view that "a relatively low degree of substantive" unfairness may be sufficient to render an arbitration agreement unenforceable on the grounds of unconscionability (maj. opn., *ante*, at p. 20), and with the majority's analysis of procedural and substantive unconscionability. Finally, I

explain why I believe the majority's analysis and conclusion are inconsistent with, and therefore preempted by, the FAA, as the United States Supreme Court has construed that law.

A. State Law Principles of Arbitration and Unconscionability

Several state law legal principles must guide our analysis. First, as the majority acknowledges, "California law strongly favors arbitration." (Maj. opn., *ante*, at p. 12.) The clearest expression of this state policy appears in Code of Civil Procedure section 1281, which declares that "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." This section establishes the "fundamental policy" of California's arbitration scheme: "that arbitration agreements will be enforced *in accordance with their terms*." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 836, fn. 10.) It creates "a presumption in favor of arbitrability [citation] and a requirement that an arbitration agreement must be enforced on the basis of state law standards that apply to contracts in general." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971-972.) The majority, after briefly mentioning arbitration's favored status under state law early in its opinion, essentially ignores this principle in its analysis and in its refusal to enforce the arbitration agreement here.

Second, although the doctrine of unconscionability, as a generally applicable contract defense, may be applied to invalidate an arbitration agreement, as the majority notes, the doctrine's "application" in the arbitration context "must rely on the same principles that govern all con-

tracts," and "[t]he degree of unfairness required for unconscionability must be as rigorous and demanding for arbitration clauses as for any other contract clause." (Maj. opn., *ante*, at p. 13.)

Third, under our generally applicable principles of unconscionability, "[a] party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain" (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911 (*Sanchez*)) or by showing that the contract "gives one side a greater benefit" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*)). Under state law, "[n]ot all one-sided contract provisions are unconscionable" (*Sanchez*, at p. 911), and even the "fact that the bargain is a very hard or unreasonable one is not generally sufficient *per se* to induce . . . courts to interfere" (*Boyce v. Fisk* (1895) 110 Cal. 107, 116). Instead, the party seeking to invalidate an arbitration agreement must show "a substantial degree of unfairness *beyond 'a simple old-fashioned bad bargain.'*" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1160, italics added (*Sonic II*).) The contract "must be 'so one-sided as to "shock the conscience"'" (*Pinnacle*, at p. 246), or, as alternatively formulated, "'*overly* harsh,' '*unduly* oppressive,' [or] '*unreasonably* favorable.'" (*Sanchez*, at p. 911.)

Fourth, "contracts of adhesion . . . are indispensable facts of modern life" and "are generally enforced" even though they "contain a degree of procedural unconscionability." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 469 (*Gentry*); see *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 346-347 (*Concepcion*) ["the times in which consumer contracts were anything other than adhesive are long past"].) "[A] contract of adhesion is fully enforceable according to its terms" unless it violates the

"reasonable expectations of the weaker or 'adhering' party" or is "unduly oppressive or 'unconscionable.'" (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819, 820 (*Graham*).)

Fifth, the party seeking to avoid the contract must establish *both* procedural and substantive unconscionability, "the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).) Although both must be present, we have stated that "they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid.*)

B. The Majority's Sliding Scale

At this point, I note my first concern about the majority's analysis: its assertion that "a relatively low degree of substantive unconscionability may suffice to render" an arbitration agreement "unenforceable" if the level of procedural unconscionability is "substantial." (Maj. opn., *ante*, at p. 20.) To begin with, it is unclear what the majority means by "relatively low" (*ibid.*), and the majority sheds no light on this question. The majority's unadorned and unexplained assertion inevitably poses—but does not answer—the following questions: Low "relative[]" to what, and how "low" is enough?

Nor do our precedents support or give meaning to the majority's statement. The only decision from this court the majority cites for its assertion is *Armendariz*. (Maj. opn., *ante*, at p. 21.) However, the majority notably precedes this citation with a "see" signal, which is the signal we use to introduce decisions that provide only "weaker support" for a given proposition, i.e., decisions that, as here relevant, "only indirectly support the text" or contain "supporting dicta." (Cal. Style Manual (4th ed. 2000) § 1:4, p. 9.) Clearly, then, the majority itself does not believe that *Armendariz* provides more than indirect and weak support for its view.

To the extent *Armendariz* bears on the issue, it states, as noted above, that the "'sliding scale'" used in connection with procedural and substantive unconscionability "'disregards the regularity of the procedural process of the contract formation . . . in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) As is obvious, the main point of this passage is that where the degree of *substantive* unconscionability is high—i.e., the contract terms are extremely harsh or unreasonable—"evidence of procedural unconscionability" becomes less important, i.e., a court may "'disregard[] the regularity of the procedural process of the contract formation'" and find the contract unconscionable based solely on the high level of substantive unfairness. (*Ibid.*) This court's use of the phrase "vice versa" at the end of the second sentence (*ibid.*) means only that evidence of procedural unfairness becomes more important to a finding of unconscionability as the degree of substantive unfairness decreases. That is

not the same as saying that "a relatively low degree of substantive unconscionability may suffice" where the degree of procedural unconscionability is "substantial." (Maj. opn., *ante*, at p. 20.) Notably, the majority cites not a single case in which we have applied *Armendariz* in the manner the majority now suggests.

Indeed, the very concept of "a relatively low degree of substantive unconscionability" (maj. opn., *ante*, at p. 20) is inconsistent with our prior pronouncements that a court may not invalidate "one-sided contract provisions" upon a mere showing that "the deal, in retrospect, was unfair or a bad bargain" (*Sanchez*, *supra*, 61 Cal.4th at p. 911) or "gives one side a greater benefit" (*Pinnacle*, *supra*, 55 Cal.4th at p. 246); that the contract "must be 'so one-sided as to "shock the conscience"'" (*Id.* at p. 246), or "'*overly* harsh,' '*unduly* oppressive,' [or] '*unreasonably* favorable'" (*Sanchez*, at p. 911); and that the party alleging unconscionability must establish "a *substantial degree of unfairness beyond 'a simple old-fashioned bad bargain'*" (*Sonic II*, 57 Cal.4th at p. 1160, italics added). The majority's assertion that "a relatively low degree of substantive unconscionability may suffice" (maj. opn., *ante*, at p. 22) simply cannot be squared with these principles, and the majority does not even attempt to do so.

For its assertion, the majority more directly relies on two Court of Appeal decisions (maj. opn., *ante*, at p. 22), but neither is persuasive. In the first—*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85—the Court of Appeal stated: "In light of the high degree of procedural unconscionability, even a low degree of substantive unconscionability could render the arbitration agreement unconscionable." But the court cited no authority of any kind to support this bare assertion. (*Ibid.*) And the statement was dictum because, in the very

next sentence, the court stated that "[t]he degree of substantive unconscionability here was *not* particularly low." (*Ibid*., italics added.)

In the second decision the majority cites—*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487 (*A & M Produce*)—the Court of Appeal stated that the enforceability of a clause containing an "unreasonable risk reallocation[] . . . is tied to the procedural aspects of unconscionability [citation] such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated." But in making this statement, the court cited no supporting decision from either California or any other jurisdiction; indeed, it acknowledged that regarding "the importance of both" procedural and substantive unconscionability, there was "little California precedent directly on point." (*Ibid.*) Moreover, like the statement in *Carmona*, the statement in *A & M* was dictum, because the court never subsequently applied it in analyzing the unconscionability issue. In any event, read carefully, the statement says no more than did *Armendariz*, i.e., that evidence of procedural unfairness becomes more important to a finding of unconscionability as the degree of substantive unfairness decreases. Again, that is not the same as saying that "a relatively low degree of substantive unconscionability may suffice" where the degree of procedural unconscionability is "substantial." (Maj. opn., *ante*, at p. 20.) Thus, neither *A & M* nor *Carmona* constitutes reasoned or persuasive support for the majority's view, and no published California decision has actually applied either that or a similar view to the facts of a case.

This is an important issue, because the majority's new rule will significantly impact the enforceability of virtually *all* mandatory, predispute arbitration agreements in the employment context. This court has observed that "the

economic pressure" employers exert "on all but the most sought-after employees" to sign such mandatory arbitration contracts "may be particularly acute," because the contract "stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz*, *supra*, 24 Cal.4th at p. 115; see *Baltazar v. Forever 21*, *Inc.* (2016) 62 Cal.4th 1237, 1245 (*Baltazar*); *Sanchez*, *supra*, 61 Cal.4th at p. 919; *Sonic II*, *supra*, 57 Cal.4th at p. 1134; *Sonic-Calabasas A*, *Inc. v. Moreno* (2011) 51 Cal.4th 659, 685 (*Sonic I*); *Little v. Auto Steigler*, *Inc.* (2003) 29 Cal.4th 1064, 1071 (*Little*).) Given this observation, in the typical case of an employee who cannot afford to refuse or lose a job because of an arbitration requirement, even were the other procedural circumstances the majority discusses supported by the record and recognized as significant by our case law—considerations I address below—those circumstances would not make the degree of procedural unconscionability here higher in any analytically or legally relevant sense. Supporting this view is the fact that the majority in *Sonic I* found a "significant element of procedural unconscionability" (*Sonic I*, *supra*, 51 Cal.4th at p. 686) based solely on the ground that "the agreement was one of adhesion and imposed as a condition of employment" (*id.* at p. 685, fn. 10).

For this reason, the majority's assurance that an identical arbitration provision "might pass muster under less coercive circumstances" (maj. opn., *ante*, at p. 31) rings hollow. Because of the economic pressures faced by prospective and existing employees, the majority's finding of unconscionability will surely be the rule in the vast majority of cases in the employment context, regardless of the other circumstances the majority cites. In other words, with few exceptions, as to employees presented with a

"sign or you're unemployed" choice, the ability to read, reflect, and understand the agreement does not make the situation "less coercive" in any meaningful sense. (Maj. opn., *ante*, at p. 29.) More broadly, because it would not be difficult for a court to find a "relatively low degree of substantive" unfairness in an adhesion contract (maj. opn., *ante*, at p. 20), the majority's new rule casts significant doubt on the enforceability of many contractual terms in the employment context, not just arbitration provisions.

C. Procedural Unconscionability

I now turn to my next point of disagreement with the majority: its analysis of procedural unconscionability. Several aspects of that analysis are inconsistent with both established California law and the record in this case.

First, in finding "significant oppression" (maj. opn., *ante*, at p. 16), the majority emphasizes that Kho "had no opportunity to read" the documents his employer—plaintiff One Toyota of Oakland (OTO)—asked him to sign (maj. opn., *ante*, at p. 2), and that OTO, by having an employee from its human resources department "wait for the documents, . . . conveyed an expectation that Kho sign them immediately, without examination or consultation with counsel" (maj. opn., *ante*, at p. 16). However, in *Sanchez*, our procedural unconscionability discussion gave no weight to sworn statements of the party resisting arbitration that he "'was presented with a stack of documents,'" "'was simply told . . . where to sign and/or initial each one,'" and "'was not given an opportunity to read any of [them].'" (*Sanchez*, *supra*, 61 Cal.4th at p. 909.) Instead, we explained that "even when a customer is assured it is not necessary to read a standard form contract with an arbitration clause, 'it is generally unreasonable, in reliance on such assurances, to neglect to read a written contract before signing it.'" (*Id.* at p. 915.) Several of our

Courts of Appeal have applied this principle in the context of employment arbitration agreements. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 65-66; *24-Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215.) Moreover, in *Sonic I*, *supra*, 29 Cal.4th at page 686, the majority's discussion of procedural unconscionability noted that "many employees may not give careful scrutiny to routine personnel documents that employers ask them to sign." These precedents are inconsistent with the majority's view that the degree of procedural unconscionability here was higher because Kho did not have an opportunity to read the documents and OTO "conveyed an expectation that [he] sign them immediately, without examination."[1] (Maj. opn., *ante*, at p. 16.)

Second, I disagree with the majority insofar as it emphasizes that "[n]either [the] contents nor significance" of the arbitration agreement "was explained" to Kho, that "there is no indication" in the record the employee who presented the agreement "had the knowledge or authority to explain its terms," and that OTO, by "select[ing] a low-level employee . . . to present the [a]greement, creat[ed] the impression that no request for an explanation was expected and any such request would be unavailing." (Maj. opn., *ante*, at p. 16.) The majority's reliance on the *absence of evidence* regarding the employee's ability

[1] The majority's emphasis on these facts is also inconsistent with its own assertions that the arbitration agreement's text is " 'visually impenetrable' " and virtually illegible (maj. opn., *ante*, at p. 17), and that its "substance" is so "opaque" (*ibid.*) that "[i]t would have been nearly impossible" for Kho "to understand the contract's meaning" (maj. opn., *ante*, at p. 18). If these assertions are accurate, then why does the majority find it significant that Kho had no opportunity to read the agreement?

and authority to explain the agreement's terms is inconsistent with the fact that *Kho* bears "[t]he burden of proving unconscionability." (Maj. opn., *ante*, at p. 14.) More broadly, the majority's consideration of these circumstances is inconsistent with *Sanchez* and with the FAA. In *Sanchez*, regarding procedural unconscionability, we stated that the party seeking to enforce an arbitration agreement "was under no obligation to highlight the arbitration clause of its contract" and was not "required to specifically call that clause to [the other party's] attention." (*Sanchez*, *supra*, 61 Cal.4th at p. 914.) We also stated that "[a]ny state law imposing such an obligation would be preempted by the FAA." (*Ibid.*)

Third, I disagree that the "degree of procedural unconscionability" here was "unusually" or "'extraordinarily high'" (maj. opn., *ante*, at pp. 2, 14) because "Kho was required to sign the agreement to keep the job he had held for three years" and OTO's conduct "conveyed the impression that negotiation efforts would be futile" (maj. opn., *ante*, at pp. 17, 18). These circumstances are what make the contract adhesive in the first place; as the majority earlier explains, "[a]n adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.'" (Maj. opn., *ante*, at p. 14.) They are also characteristics of *all* "mandatory employment arbitration agreements," which this court has defined as "arbitration agreements that are conditions of new or continuing employment." (*Sonic II*, *supra*, 57 Cal.4th at p. 1130.) Thus, these circumstances neither distinguish this case in any way nor support a finding that there was a degree of procedural unconscionability beyond that found with any adhesive, mandatory employment arbitration agreement.

Regarding surprise, the majority begins its analysis by assailing the arbitration agreement as being "a paragon of prolixity." (Maj. opn., *ante*, at p. 17.) However, "prolixity" simply means the state or quality of being lengthy, protracted and drawn out, perhaps unduly or unnecessarily so. (12 Oxford English Dict. (2d ed. 1989) p. 608; Webster's 3d New Internat. Dict. (2002) p. 1814; see Black's Law Dict. (10th ed. 2014) p. 1406, col. 1 ["prolixity" is "[t]he unnecessary and superfluous recitation of facts and legal arguments in pleading or evidence"].) It is doubtful that the arbitration agreement in this case, consisting of a "single" paragraph with "51 lines," meets this definition, let alone constitutes a "paragon"—i.e., a perfect example—of this concept. (Maj. opn., *ante*, at p. 17.)

In any event, contrary to what the majority suggests, our cases establish that prolixity itself is *not* problematic; for purposes of a procedural unconscionability analysis, surprise "'"occurs . . . where the allegedly unconscionable provision is *hidden* within a prolix printed form."'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 247, italics added.) There is nothing hidden about the arbitration agreement in this case. It is not buried in a multipage document that addresses numerous other matters, but appears in a relatively short document that almost exclusively addresses arbitration. In a heading at the top of the agreement's first page, set apart from the body of the agreement, the word "ARBITRATION" appears in large, bolded, all caps type. In a stand-alone provision at the top of the second page, the agreement states, in large, all caps, italicized type, that Kho is "AGREEING TO THIS BINDING ARBITRATION PROVISION." When Kho signed the arbitration agreement, he also signed a separate two-page agreement containing a stand-alone, bolded-type paragraph explaining that the parties understood and were voluntarily agreeing to resolve "any disputes" regarding

Kho's employment "exclusively in accordance with binding arbitration," and setting forth some of the features of the arbitration procedure, i.e., "a retired California Superior Court Judge" will conduct the arbitration and "[t]he arbitration proceedings shall be governed by the Federal Arbitration Act, and carried out in conformity with the procedures of the California Arbitration Act." The separate agreement also expressly stated that Kho had executed or would "execute a more comprehensive arbitration agreement with the Company." In finding surprise, the majority simply ignores these considerations, as well as precedent finding no surprise under analogous circumstances. (*Pinnacle*, *supra*, 55 Cal.4th at p. 247, fn. 12 [in finding no surprise, citing fact that arbitration provisions "appear in a separate article under a bold, capitalized, and underlined caption titled 'ARTICLE XVIII CONSTRUCTION DISPUTES'"]; *Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 737 [no surprise where arbitration clause "located at the top of the second page in a two-page document with the heading 'Arbitration' in boldfaced font"]; *Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1165 [emphasizing that arbitration provision "was printed on a separate page" with "'Arbitration Addendum' at the top," and "was signed separately"].)

For the preceding reasons, I conclude that the arbitration provision here is not unusual and that its substance does not contribute to a finding that the "degree of procedural unconscionability" in this case was, as the majority asserts, "unusually" and "'extraordinarily high.'" (Maj. opn., *ante*, at pp. 2, 14.) Supporting this conclusion is the fact that in cases involving a virtually identical arbitration provision, we did not find an element of surprise that increased the degree of procedural unconscionability.

(*Sonic II*, *supra*, 57 Cal.4th at pp. 1125-1126; *Sonic I*, *supra*, 51 Cal.4th at pp. 669-670; *Little*, *supra*, 29 Cal.4th at pp. 1069-1070.)

The majority concludes its discussion of procedural unconscionability with a line of analysis that California courts have long and uniformly rejected. The majority suggests that the arbitration agreement here is unenforceable because: (1) arbitration "'"is a matter of consent, not coercion"'"; and (2) we cannot "infer[]" that Kho's "consent" to arbitrate was "voluntary," given that his execution of the arbitration agreement was "induced . . . through 'sharp practices' and surprise" and he almost certainly did not know "he was giving up his Berman rights." (Maj. opn., *ante*, at p. 19.) However, almost 40 years ago, we held that contracts of adhesion are "fully enforceable according to [their] terms" absent certain circumstances (*Graham*, *supra*, 28 Cal.3d at p. 819), even though they do not fit "the classical model of 'free' contracting by parties of equal or near-equal bargaining strength," given that the weaker party's only choices are "'to adhere to the contract or reject it'" (*id.* at p. 817). About 20 years later, we held that *mandatory employment arbitration contracts* are enforceable unless they contain "one-sided, substantively unconscionable terms," even though "voluntariness" is the "bedrock justification" for arbitration and almost all employees presented with such contracts are under "acute" "economic pressure" to sign and effectively have no "choice" but to do so. (*Armendariz*, *supra*, 24 Cal.4th at p. 115.) In subsequent years, we have repeatedly affirmed that mandatory employment arbitration agreements are enforceable unless substantively unconscionable. (*Baltazar*, *supra*, 62 Cal.4th 1237, 1241; *Sonic II*, *supra*, 57 Cal.4th at p. 1125; *Sonic I*, *supra*,

51 Cal.4th at p. 677; *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 677; *Little*, *supra*, 29 Cal.4th at pp. 1068-1069.)

Consistent with our decisions, California's Courts of Appeal have expressly rejected the majority's lack-of-consent line of analysis. For example, in *A & M Produce*, *supra*, 135 Cal.App.3d at pp. 486-487, the court explained: "[T]he mere fact that a contract term is not read or understood by the nondrafting party or that the drafting party occupies a superior bargaining position will not authorize a court to refuse to enforce the contract. Although an argument can be made that contract terms not actively negotiated between the parties fall outside the 'circle of assent' which constitutes the actual agreement [citation], commercial practicalities dictate that unbargained-for terms only be denied enforcement where they are also substantively unreasonable." (Fn. omitted; see also *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 956 ["waivers that are obtained as a condition of employment . . . are not categorically invalid or unenforceable"]; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88 ["unbargained-for term" in contract of adhesion, even if "not read or understood by the nondrafting party," is enforceable unless "*substantively* unreasonable"]; *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1129 ["compulsory nature of a predispute arbitration agreement does not render the agreement unenforceable on grounds of coercion or for lack of voluntariness"]; *San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App. 3d 438, 443 ["failing to read the contract is no excuse, otherwise all contracts of adhesion would be unenforceable at the whim of the adhering party"].) Insofar as the majority's analysis

is contrary to this unbroken line of California authority, I disagree with it.[2]

Nevertheless, I ultimately agree there was sufficient procedural unconscionability here—given the adhesive nature of the contract and the circumstances under which OTO presented it to Kho for signature—to warrant scrutiny of the agreement's substantive unconscionability. To that issue, I now turn.

D. Substantive Unconscionability

The majority's analysis of substantive unconscionability is difficult to follow, largely due to its shifting approach to that issue. Initially, the majority seems to suggest that substantive unconscionability is irrelevant because there was "an unusually high degree of procedural unconscionability" here, and "an employee may not be coerced or misled into . . . trad[ing]" the Berman process for "a litigation-like arbitration procedure," "[e]ven if" that procedure "may be an acceptable substitute for the Berman process in other circumstances." (Maj. opn., *ante*, at p. 2.)

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[2] To the extent the majority's FAA preemption analysis raises a similar "concern[]" about "consent" (maj. opn., *ante*, at p. 33), it is erroneous for the same reason. (See *Lamps Plus, Inc. v. Varela* (2019) ____ U.S. ____ , ____ [139 S.Ct. 1407, 1420] (dis. opn. of Ginsburg, J.) ["Arbitration clauses, the Court has decreed, may preclude judicial remedies even when submission to arbitration is made a take-it-or-leave-it condition of employment"]; *Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 600 (dis. opn. of Stevens, J.) ["contracts of adhesion . . . offered on a take-or-leave basis" are enforceable if reasonable, notwithstanding argument that they cannot "justifiably be enforced . . . under traditional contract theory because the adhering party generally enters into them without manifesting knowing and voluntary consent to all their terms"].) The majority's discussion of lack of consent, though off the mark as to Kho's unconscionability claim and FAA preemption, would be apropos had Kho asserted and pursued a separate contract defense: fraud in the execution of the contract.

Later, however, the majority expressly acknowledges that "[b]oth procedural and substantive unconscionability must be shown for the [unconscionability] defense to be established" (maj. opn., *ante*, at p. 13) and asserts that at least "a relatively low degree of substantive unconscionability" is required to void the agreement, notwithstanding "the substantial procedural unconscionability here" (maj. opn., *ante*, at p. 21). At one point, the majority indicates that "'the [substantive] unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable,' thus effectively blocking every forum for redress including arbitration itself." (Maj. opn., *ante*, at p. 12.) At another point, the majority indicates that the question is whether the arbitral scheme "offer[s] employees an effective means to pursue claims for unpaid wages, and [does] not impose unfair costs or risks on them or erect other barriers to the vindication of their statutory rights." (Maj. opn., *ante*, at p. 27.) At still another point, the majority states that the question is whether "the bargain" between the parties "was sufficiently one-sided as to render the agreement unenforceable" (maj. opn., *ante*, at p. 32), i.e., "so unfairly one-sided that it should not be enforced" (maj. opn., *ante*, at p. 11). Finally, shifting gears one last time, the majority declares in the final paragraph of its analysis that the substantively unconscionable "question" here "[u]ltimately" is whether the bargain was simply "unfair." (Maj. opn., *ante*, at p. 32.)

This court's most relevant decision on the issue—*Sonic II*—is quite specific as to the applicable standard. Under the majority opinion in that case, an agreement requiring arbitration of claims otherwise subject to the Berman procedure is not substantively unconscionable "so long as the arbitral scheme, however designed, provides

employees with an accessible, affordable process for resolving wage disputes that does not 'effectively block[] every forum for the redress of [wage] disputes, including arbitration itself.'" (*Sonic II*, *supra*, 57 Cal.4th at pp. 1157-1158.) The majority here expressly acknowledges that the majority opinion in *Sonic II* "focused repeatedly on the need for accessible and affordable arbitration" (maj. opn., *ante*, at p. 11), and that under *Sonic II*, "[a]n agreement to arbitrate wage disputes can be enforceable so long as it provides an accessible and affordable process for resolving those disputes" (maj. opn., *ante*, at pp. 1-2). Indeed, the majority even sets forth the *Sonic II* test at several points. (Maj. opn., *ante*, at pp. 12, 29). Surprisingly, however, it never applies that test; it nowhere states that arbitration under the agreement here is inaccessible or unaffordable to the point that it "'effectively block[s] every forum for the redress of [wage] disputes, including arbitration itself.'" (*Sonic II*, at p. 1158.)

Indeed, in several ways, the majority's analysis supports the conclusion that the arbitration agreement here does *not* meet the *Sonic II* test for substantive unconscionability. To begin with, the majority concedes that that the arbitration process here—which permits "discovery" (maj. opn., *ante*, at p. 3) and calls for "the same pleading, evidence, and motion practice rules that govern civil litigation" (maj. opn., *ante*, at p. 24, fn. 14)—is no more complicated than ordinary civil litigation . . . ." (Maj. opn., *ante*, at p. 31.) Thus, arbitration under the agreement cannot be any more unaffordable or inaccessible for Kho than "ordinary civil litigation" (*ibid.*), a system that, according to the majority, has been "carefully crafted to ensure fairness to both sides" and is not "per se unfair" (maj. opn., *ante*, at p. 26). The majority also concedes that under the arbitration agreement, Kho would be entitled to "reasonable attorney fees and costs" were he to be "the prevailing

party in 'any action brought for the nonpayment of wages.'" (Maj. opn., *ante*, at p. 30.) This aspect of the agreement, the majority observes, "may mitigate some financial burden" of the arbitration. (*Ibid.*)

The majority also recognizes that in *Little*, we held *in the arbitration context* that use of "litigation-like procedures" does "*not* necessarily . . . make" a mandatory employment arbitration agreement "unconscionable." (Maj. opn., *ante*, at p. 26, italics added.) Notably, in reaching this conclusion, we rejected the claim that "such procedures detract from the inherent informality of arbitration" and necessarily "inordinately benefit [employers] rather than [employees]." (*Little*, *supra*, 29 Cal.4th at p. 1075, fn. 1.) Consistent with *Little*'s analysis, the majority concedes that, for certain claims, "it may well be that an arbitration process closely resembling civil litigation can be as advantageous for the employee as for the employer." (Maj. opn., *ante*, at pp. 26-27.)

Inexplicably discarding *Sonic II*'s test for substantive unconscionability, the majority bases it conclusion on the alternative substantive unconscionability tests it sets forth. According to the majority, because "Kho surrendered the full panoply of Berman procedures and assistance," and "received" nothing "in return" but "access to a formal and highly structured arbitration process," his "bargain" with OTO was both "unfair" and "sufficiently one-sided as to render the [arbitration] agreement unenforceable." (Maj. opn., *ante*, at p. 32.)

I disagree with the majority's analysis and conclusion in several respects. Initially, as already explained, our precedents establish that for an agreement to be substantively unconscionable, it is not enough that it is merely "unfair" or "one-sided." (Maj. opn., *ante*, at p. 32.) Rather, it must cause "a substantial degree of unfairness *beyond* '*a simple old-fashioned bad bargain*.'" (*Sonic II*, *supra*,

57 Cal.4th at p. 1160, italics added.) It "must be 'so one-sided as to "shock the conscience"'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 246), or, as alternatively formulated, "'*overly* harsh,' '*unduly* oppressive,' [or] '*unreasonably* favorable.'" (*Sanchez*, *supra*, 61 Cal.4th at p. 911.)

Next, to the extent an evaluation of the benefits Kho relinquished and received is necessary, the majority's analysis is improperly narrow. As the majority acknowledges, "'the unconscionability inquiry requires a court to examine the totality of the agreement's substantive terms'" and to determine the fairness of the parties' "'overall bargain.'" (Maj. opn., *ante*, at p. 11.) Consistent with this observation, under basic contract law, "new and different consideration" is *not* required for "every individual promise in a contract." (*Martin v. World Savings & Loan Assn.* (2001) 92 Cal.App.4th 803, 809.) Instead, "one promise in a contract 'may be consideration for several counter promises.'" (*Ibid*; see *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 679 ["'"[a] single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises"'"].)

Viewed from this perspective, Kho received several substantial benefits "in return" for agreeing to arbitration. (Maj. opn., *ante*, at p. 29.) First and foremost, he received the benefit of continued employment. Kho was an at-will employee and, according to the majority, "was required to sign the agreement to keep [his] job." (Maj. opn., *ante*, at p. 16.) Under our precedents, Kho's "'continuing employment'" under such circumstances constitutes "'consideration'" from OTO that "'support[s]'" the arbitration agreement. (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 14; see *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal.App.4th 629, 638 ["'neither party to an at-

will relationship has any obligation to perform in the future, and so doing so *can* provide valuable consideration for a modification of the contract'"].) Second, the agreement here, considered in its entirety, is not merely a Berman waiver, but is a broad, *bilateral* arbitration provision that applies, with only a few exceptions, to "all disputes" between the parties "arising from, related to, or having any relationship or connection whatsoever with [Kho's] seeking employment with, employment by, or other association with" OTO. It thus confers on Kho the benefits of arbitration as to claims not subject to the Berman procedure, unless it may be said there are no such benefits in *any* covered context. The majority improperly ignores these benefits and incorrectly evaluates the arbitration agreement as if it were only "a waiver of Berman procedures." (Maj. opn., *ante,* at p. 11.)

Moreover, under basic contract law, the receipt of a benefit is *not* the exclusive measure of consideration; "a detriment to" one party is sufficient consideration for a contract even if the other contracting party receives no "benefit for his promise." (*Westphal v. Nevills* (1891) 92 Cal. 545, 548.) As here relevant, "'[a]ny suspension or forbearance of a legal right constitutes a sufficient consideration.'" (*Adolph Ramish, Inc. v. Woodruff* (1934) 2 Cal.2d 190, 207.) In this case, OTO's "promise[] . . . to arbitrate [its] disputes" with Kho and "to forego" its right to "judicial determination" of those disputes—including the right to a jury trial—"provide[d] consideration" for the agreement, as did Kho's similar promise. (*Strotz v. Dean Witter Reynolds, Inc.* (1990) 223 Cal.App.3d 208, 216; see *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1449 ["'mutual promises to submit all employment disputes to arbitration constituted sufficient consideration, because both parties were bound to the promises to arbitrate'"].)

In any event, even insofar as the agreement constitutes a Berman waiver, I disagree that Kho received nothing "in return" but "access to a formal and highly structured arbitration process." (Maj. opn., *ante*, at p. 29.) The Berman procedure is potentially a *three-step* process. First is the administrative hearing, assuming the Labor Commissioner, as a matter of discretion, accepts the matter and decides to hold a hearing. (Maj. opn., *ante*, at p. 7.) Step two is a *trial de novo* in superior court (maj. opn., *ante*, at p. 8), which either party may request without having even participated in the administrative procedure. (*Jones v. Basich* (1986) 176 Cal.App.3d 513.) This de novo proceeding is "'"a trial anew in the fullest sense"'" (*Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 948), in which the superior court proceeds "'as a court of original jurisdiction, with full power to hear and determine [the matter] as if it had never been before the labor commissioner'" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1119). Thus, as the majority notes, in the de novo proceeding, "litigation formalities may apply." (Maj. opn., *ante*, at p. 26.) Moreover, the administrative decision "is 'entitled to no weight whatsoever.'" (*Post*, at p. 948) and the employer "is not bound by the defenses it raised" at the Berman hearing; it may "abandon, change, or add defenses not brought before the Labor Commissioner" (*Murphy*, at p. 1119) and may present "entirely new evidence" (*Post*, at p. 948). Step three of the Berman procedure is "a conventional appeal to an appropriate appellate court" after the trial court's decision upon the de novo hearing. (*Ibid.*)

In signing the arbitration agreement, as to claims covered by the Berman statutes, Kho gained access to a procedure with no preliminary, *nonbinding* administrative process; no potential for formal civil litigation *in court*; only limited judicial review; and *some*, but not all, of the

"litigation formalities" that, as the majority concedes, may apply in a de novo proceeding under the Berman statutes. (Maj. opn., *ante*, at p. 26.) And he gained OTO's legal commitment and obligation to pay any and all costs "unique" to this procedure. (*Armendariz*, *supra*, 24 Cal.4th at p. 113.) Thus, "in return" for waiving the Berman procedure, Kho received considerably more than just "access to a formal and highly structured arbitration process." (Maj. opn., *ante*, at p. 29.) The majority may think he made a "'bad bargain'" (*Sonic II*, *supra*, 57 Cal.4th at p. 1160), that he "could have done better" (*id.* at p. 1148), or that the agreement "'gives [OTO] a greater benefit'" (*id.* at p. 1160), but our precedents *preclude* us from declaring an agreement to be unconscionable and unenforceable on any of those grounds.

In an attempt to diminish the value of what Kho received and inflate the value of what he gave up, the majority asserts that the Berman procedures "discourage[]" de novo proceedings by requiring appealing employers to post undertakings and requiring unsuccessful appellants to pay the other side's costs and reasonable attorney fees. (Maj. opn., *ante*, at p. 26.) But the former requirement would seem to provide little disincentive, given that the employer's only alternative to filing an appeal and posting an undertaking is actually paying the award. And the latter provision also discourages *employees* from appealing, because it requires them to pay costs and attorney fees if they appeal and are "unsuccessful," meaning they do not obtain an "award[] . . . greater than zero." (Lab. Code, § 98.2, subd. (c).) Of course, the record here provides further reason to doubt the deterrent value of these provisions; after the administrative decision, OTO, which declined even to participate in the Berman hearing, filed for a de novo trial, completely *undeterred* by the statutes. In any event, having provisions that assertedly provide some

undetermined and factually unproven disincentive to seeking a trial de novo is not at all the same as having access to an arbitration procedure that enables Kho to eliminate even the possibility that recovery of unpaid wages will require a formal civil trial in court—with attendant "litigation formalities" (maj. opn., *ante*, at p. 27)—after a preliminary and *nonbinding* administrative procedure or as a matter of first resort in lieu of that procedure. As the majority explains, "[i]t is the opportunity to expedite and simplify the process that can motivate informed parties to agree to arbitration."[3] (Maj. opn., *ante*, at p. 26.)

The majority's view that Kho received little or nothing "in return" (maj. opn., *ante*, at p. 32) for the Berman waiver rests on numerous other exaggerations, unproven

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[3] In rejecting my analysis, the majority relies on the statement of counsel for the Labor Commissioner at oral argument that his "understand[ing]" is that there are "probably" fewer than 500 de novo proceedings per year. (See maj. opn., *ante*, at p. 27, fn. 17.) Reliance on this statement of counsel's "understand[ing]," which obviously lacks foundation and is hearsay, is improper under our " 'settled' " rule that " 'on a direct appeal from a judgment [we] will not consider matters outside the record.' " (*People v. Gardner* (1969) 71 Cal.2d 843, 854.) The majority in both *Sonic I* and *Sonic II* followed this settled rule and expressly declined to rely on factual representations about the arbitration process counsel made "[a]t oral argument" in an effort to support the arbitration agreement's validity. (*Sonic II*, *supra*, 57 Cal.4th at p. 1147; *Sonic I*, *supra*, 51 Cal.4th at p. 681, fn. 4.) It is noteworthy that the majority here ignores the rule in order to establish the arbitration agreement's *invalidity*, an issue on which Kho bears the burden of proof. The majority's inadequate response—that OTO did not "challenge[]" counsel's statement (maj. opn., *ante*, at p. 28, fn. 18)—fails to recognize that counsel made the statement *during rebuttal argument*, *after* OTO's argument, so OTO had no opportunity to respond. In any event, the majority's response misses an essential point: By agreeing to arbitration, Kho eliminated any possibility that recovery of unpaid wages would require a formal civil trial in court, either after a nonbinding administrative procedure or in lieu of such a procedure.

or erroneous assumptions, miscalculations, and/or mischaracterizations regarding the value of the Berman procedures. First, as the majority acknowledges, when an employee files an administrative claim, "[t]here is no [statutory] requirement that a Berman hearing be held" (maj. opn., *ante*, at p. 32) and the Labor Commissioner has "discretion to . . . take 'no further action . . . on the complaint'" (*ibid.*, quoting Lab. Code, § 98, subd. (a)). Thus, when Kho signed the arbitration agreement—which is the relevant time for assessing unconscionability (Civ. Code, § 1670.5, subd. (a))—it was entirely speculative whether *any* of the Berman procedure's asserted benefits would be available to him, and the only thing he actually relinquished was the opportunity to *ask* the Labor Commissioner *to exercise discretion* to conduct legally nonbinding administrative proceedings on a claim.

Second, the majority's view that the Berman administrative procedure is more advantageous for employees because it has "no discovery process" (maj. opn., *ante*, at p. 7) is inconsistent with our case law. In *Armendariz*, *supra*, 24 Cal.4th 83, which involved a mandatory employment arbitration agreement, the majority held that "the provision of adequate discovery" is one of the "*minimum requirements*" of a valid and enforceable arbitration provision (*id.* at p. 91, italics added) and explained that "*from* [*an*] *employee's point of view*," more "limited discovery" is typically one of the "potential *disadvantages*" of arbitration (*id.* at p. 115, italics added). In *Gentry*, *supra*, 42 Cal.4th at page 457, the majority extended the discovery requirement to an unpaid wage claim. Kho's actions confirm this court's previous statements regarding the importance of discovery to employees with wage claims; during the administrative Berman proceedings, he "requested that a subpoena be issued for various work related documents."

Third, the Berman procedure is *not*, as the majority asserts, necessarily "'speedy'" or "expedient." (Maj. opn., *ante*, at pp. 24, 25.) As explained above, a Berman procedure is potentially a *three-step*, combined administrative and judicial process, which may include a civil trial in court with "litigation formalities." (Maj. opn., *ante*, at p. 16.) This three-step process has the potential to substantially delay any recovery. Indeed, the first administrative step by itself can take years. (*Sonic I*, *supra*, 51 Cal.4th at p. 681, fn. 5.) [noting several "documented" cases in which it took "slightly under one year" to commence the Berman hearing, and one in which it took "slightly under four years"].) In this case, for example, the Berman hearing was not held for about 10 months after Kho filed his claim, and the Labor Commissioner's award was made some 16 months after Kho's termination. Two weeks later, OTO requested a trial de novo. (Maj. opn., *ante*, at pp. 5, 33.) Thus, nothing at the time that Kho signed the contract—and nothing that actually happened in the Berman proceedings that followed Kho's termination—supports the majority's view that, by signing the arbitration agreement, Kho gave up a "'speedy'" or "expedient" administrative procedure. (Maj. opn., *ante*, at pp. 24, 25.) Nor is there *any* basis in the record for the majority's implicit conclusion that arbitration under the agreement here—which involves no preliminary, nonbinding administrative process and only limited appellate review—would take longer than the Berman procedure. The majority's reliance on *factually unsupported and unproven assumptions* about the Berman procedure's speed is contrary to the fact that *Kho* bears "[t]he burden of proving unconscionability."[4] (Maj. opn., *ante*, at p. 14.)

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[4] The majority concedes that resolution of this case through the Berman administrative process "has not been speedy," but asserts

Indeed, in light of the facts of this case and the *Sonic II* majority's discussion of this issue, the majority's steadfast reliance here on the asserted speediness of the Berman procedure is as ironic as it is legally erroneous. In *Sonic II*, I argued that the potentially three-step Berman procedure is not necessarily "speedier or more streamlined than arbitration." (*Sonic II*, *supra*, 57 Cal.4th at p. 1181 (conc. & dis. opn. of Chin, J.).) The majority rejected my argument, asserting it rested on "bare assertions" that had "no evidentiary support." (*Sonic II*, at p. 1167.) At the same time, the majority left the question open, "direct[ing] the trial court on remand to consider" this issue—and the claim of unconscionability—"in light of any relevant evidence." (*Sonic II*, *supra*, 54 Cal.4th at p. 1162.) Contrary to that admonition, the majority here dismisses the "relevant evidence" in the record showing that the Berman procedure is *not* speedy. (*Ibid.*) Instead of considering that evidence, the majority does precisely what the *Sonic II* majority incorrectly accused me of doing in that case: relying on "bare assertions" that have "no evidentiary support."[5] (*Sonic II*, at p. 1167.)

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that "the delay is largely attributable to" OTO. (Maj. opn., *ante*, at p. 25, fn. 14.) The majority offers no factual basis for this assertion, and nothing in the record supports it. For example, nothing indicates why it took several months just for Kho to receive a response from the Labor Commissioner to his request for a Berman hearing, or why the hearing was finally set for "some 9 months" after he made his request. (Maj. opn., *ante*, at p. 4.) In any event, whether OTO or a representative of the Labor Commissioner was responsible for the delay is irrelevant to my point that the Berman process is not necessarily speedy.

[5] The *Sonic II* majority was incorrect about my analysis because I expressly referenced the fact that the employer in that case had "documented" three cases in which it took "a year or more" just to commence the Berman hearing. (*Sonic II*, *supra*, 57 Cal.4th at p. 1181 (conc. & dis. opn. of Chin, J.); see *Sonic I*, 51 Cal.4th, *supra*, at p. 681, fn. 5 [petition to compel arbitration "documented" two cases in which

Fourth, the Berman procedure is not as "'informal'" as the majority suggests. (Maj. opn., *ante*, at p. 7.) The Labor Commissioner's published policies and procedures stress that Berman hearings "are formal procedures" at which each party has the right to be represented by counsel, to present evidence, to testify under oath, to have other witnesses testify under oath, to cross-examine the opposing party and witnesses, and to subpoena witnesses, documents and records. (Dept. of Industrial Relations, Div. of Labor Stds. Enforcement (DLSE), Policies and Procedures for Wage Claim Processing (2012 rev.) pp. 2-4 (DLSE Policies).) Moreover, the judicial trial de novo procedure to which either side is entitled after a Berman hearing is ordinary civil litigation, including both trial in the superior court and appeal. At both judicial levels, as the majority acknowledges, "litigation formalities may apply." (Maj. opn., *ante*, at p. 26.) Thus, *all* of the features of the arbitration agreement that are problematic for the majority—a superior court judge, discovery, and rules of pleading, evidence and motion practice—are actually *built into* the Berman procedure, and then some.

The majority emphasizes that the deputy labor commissioner who conducts the Berman hearing "can explain terminology and assist with witness examination." (Maj. opn., *ante*, at p. 22.) But nothing *requires* the hearing officer to provide such help; the decision whether to do so is left to the hearing officer's "sole authority and discretion."

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it took "slightly under one year" to commence the Berman hearing, and one in which it took "slightly under four years"].) The *Sonic II* majority simply chose to ignore this reference and the documented evidence in the record. The majority here adopts the same head-in-the-sand approach, simply dismissing evidence that the Berman procedure is not, in reality, speedy, and relying instead on assertions about what the Berman procedure was, in theory " 'designed to provide.' " (Maj. opn., *ante*, at p. 7.)

(DLSE Policies, *supra*, at p. 3.) In any event, nothing in the arbitration agreement precludes the arbitrator from providing similar assistance, and the majority never asserts otherwise. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1164 ["arbitrators have discretion to decide on features of arbitration that are not specified in the agreement"]; *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 177 ["An arbitrator ordinarily has broad discretion with respect to the procedures and law governing the arbitration"].)

Fifth, the majority's discussion of the relative ease of initiating arbitration and the Berman procedure is faulty in several respects. The arbitration agreement is problematic for the majority because it "does not explain how to initiate arbitration." (Maj. opn., *ante*, at p. 21.) However, the second agreement Kho signed when he executed the arbitration agreement informed him that he should "notify the Dealership's General Manager in writing" if he "dispute[d] the amount of wages paid to" him. This agreement informed Kho that all he had to do to initiate arbitration was to submit to OTO a written claim for unpaid wages. Moreover, the arbitration agreement itself expressly referenced and incorporated—by both name and specific statutory citation—the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), which sets forth the petition procedure for initiating arbitration if "a party to the [arbitration] agreement refuses to arbitrate" a controversy. (Code Civ. Proc., § 1281.2.) Notably, although we dealt with similar arbitration agreements in *Sonic I*, *Sonic II*, and *Little*, in none of those decisions did we even mention their failure to explain how to initiate arbitration.

On the other side of its "initiation" equation, the majority, in relying on two wage orders of the Industrial Welfare Commission (IWC) (maj. opn., *ante*, at p. 22), is truly grasping at straws. To begin with, the majority does not

suggest, and nothing in the record indicates, that these wage orders were ever handed to Koh, in his possession, or called to his attention in any way. Indeed, Kho *could not* have seen one of the wage orders, because it post-dated his employment with OTO by almost five years. (IWC Wage Order No. MW-2019.) The other order states, contrary to the majority's assertion, that posting is unnecessary "[w]here the location of work or other conditions make [posting] impractical," in which case the employer need only "keep a copy of th[e] order and make it available to every employee upon request." (IWC Wage Order No. 4-2001, § 22.) Again, the majority does not suggest, and nothing in the record indicates, that the wage order was actually posted at Kho's worksite.

Even had the wage order that actually existed when Kho worked at OTO been posted, nothing suggests Kho ever saw it, let alone read it. And even had he read it, he surely would not have understood it if, as the majority asserts, "[i]t would have been nearly impossible" for him "to understand" the arbitration agreement's meaning given his lack of "legal training and access to" the statutes it references. (Maj. opn., *ante*, at p. 19.) To the extent, if any, the text of the *single paragraph* arbitration agreement is, as the majority asserts, "'visually impenetrable'" (maj. opn., *ante*, at p. 17), the text of the wage order—comprising *10 pages* of densely packed, single-spaced type with 22 sections, multiple subsections, and multiple subparts to the multiple subsections—is far more visually impenetrable. And to the extent, if any, the arbitration agreement's "substance" is, as the majority asserts "opaque" (maj. opn., *ante*, at p. 17), again, the wage order's substance is far more opaque. The wage order contains *more* "statutory references and legal jargon" than the arbitration agreement, and its "legal jargon" is much more complicated than the arbitration agreement's. (Maj. opn., *ante*,

at p. 17.) To borrow the words of the majority, "a layperson trying to navigate" the wage order "text would not have an easy journey." (Maj. opn., *ante*, at p. 18.) Indeed, assuming the wage order applied to Kho—something the majority does *not* actually assert—it would have been hard for him to have understood this fact even had he read it; in complexly structured, multipart sections containing highly technical "legal jargon" and many "statutory references" (maj. opn., *ante*, at p. 18), the first three pages of the wage order set forth 21 definitions and numerous coverage exemptions (Wage Order No. 4-2001, §§ 1, 2).

As for informing Kho about the Berman procedure, the wage order contains not a single mention of that procedure as a means for resolving wage disputes, either by name or by statutory reference. Nor, contrary to the majority's suggestion, does the sentence on which the majority relies even expressly refer to "wage-related violations." (Maj. opn., *ante*, at p. 22.) It refers instead only generally to "QUESTIONS ABOUT ENFORCEMENT of the Industrial Welfare Commission orders and reports of violations." (Wage Order No. 4-2001, p. 9.) For Kho to have known that this sentence related to "wage-related violations" (maj. opn., *ante*, at p. 22), he would have needed to understand that the acts he wanted to challenge were addressed by the wage order *and* constituted violations of its complicated, legally technical provisions. Finally, the sentence in question appears *at the end* of the 10-page wage order, *after the last* of its 22 sections. (Wage Order No. 4-2001, p. 9.) Thus, Kho would not have even come across it unless he first made his way all the way through the rest of the long, complex, legally technical wage order. In other words, this sentence, unlike the arbitration provision, truly is "'"*hidden* within a prolix printed form."'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 247, italics added.)

The other wage order—which, again, did not exist during Kho's employment with OTO—is, in addition, similarly problematic. Though shorter, it comprises five sections of densely-packed, single-spaced, small font type; written in very technical legal jargon; containing both statutory references and references to other wage orders; setting forth exceptions to its application; and including complicated charts. (Wage Order No. MW-2019.) It makes no mention of the Berman procedure, either by name or by statutory reference, and contains no express reference to "wage-related violations." (Maj. opn., *ante*, at p. 22.) Instead, at the bottom, in tiny type, its states that "Questions about enforcement should be directed to the Labor Commissioner's Office." (Wage Order No. MW-2019.)

In short, the wage orders that, according to the majority, demonstrate the Berman procedure's superiority in terms of initiating action, demonstrate just the opposite. To the extent, if any, the arbitration agreement is problematic in the ways the majority asserts, the wage orders are more problematic in each of those ways. And they are problematic in additional ways that the majority does not even assert characterize the arbitration agreement.

In addition, the majority's assertion about only needing to "fill[] out a simple form" to initiate the Berman procedure (maj. opn., *ante*, at p. 21) is inaccurate. Upon examination, the form to which the majority refers turns out not to be so "simple" at all. (Maj. opn., *ante*, at p. 21.) It requires an employee to know and provide a considerable amount of detailed information, including: whether the claim is "about a public works project"; whether there is "a union contract covering [the] employment," in which case a copy should be attached; the "total number of [the employer's] employees"; and a complete breakdown of the unpaid amounts into "regular wages," "overtime wages,"

"meal period wages," "rest period wages," "split shift premium," "reporting time pay," "commissions," "vacation wages," "business expenses," "unlawful deductions," and "other." (DLSE, Initial Report of Claim (DLSE Form 1) (rev. July 2012).) This is far more information than is necessary to file a civil complaint. Indeed, unlike the majority, the DLSE recognizes that the claim initiation form is not so simple; with it, the DLSE offers two pages of densely-packed "Instructions for Filing A Wage Claim" and, attached to the instructions, a densely-packed, three-page "Guide to Completing 'Initial Report or Claim' Form (DLSE Form 1)."

Moreover, initiating the Berman procedure may actually require *more* than filling out that single form. Additional forms must be filled out and submitted "if the claim involves "commission pay" or "vacation wages," or "if the plaintiff's work hours or days of work varied per week or were irregular and the plaintiff is seeking unpaid wages or premium pay for meal or rest period violations." (DLSE Policies, *supra*, at p. 1.) Employees are also directed to submit a variety of other supporting documents—time records, paychecks and paystubs, bounced checks, notice of employment information—if they have them. (*Ibid.*) Given the above, the majority has exaggerated the ease of initiating the Berman procedure.

Sixth, the majority's discussion of how "[c]ollection . . . in the Berman context" is "simplified" compared to arbitration (maj. opn., *ante*, at p. 23) ignores aspects of arbitration that undermine its view. The majority emphasizes that where "the employer unsuccessfully appeals the Labor Commissioner's award, the claimant can collect on a posted bond." (Maj. opn., *ante*, at p. 24.) However, an employee who arbitrates a controversy may obtain provisional remedies—such as an attachment or a preliminary

injunction *requiring payment of wages during the arbitration*—in connection with the controversy. (Code Civ. Proc., § 1281.8.) No comparable provision enables an employee actually to obtain any payment *during the Berman procedure*.

Seventh, the majority's discussion of the relative costs of arbitration and the Berman procedure is misleading and incomplete. According to the majority, by agreeing to arbitrate a wage claim, an employee gives up a "largely cost-free administrative procedure." (Maj. opn., *ante*, at p. 25.) But an employee who requests a subpoena for documents, records or witnesses—as Kho did in this case—is responsible for the "[c]osts incurred in the service of a subpoena, witness fees and mileage." (DLSE Policies, *supra*, at p. 3.) And employees who file de novo appeals from awards by the Labor Commissioner must pay (1) a court filing fee (Lab. Code, § 98.2, subd. (a)) *and* (2) the employer's "costs and reasonable attorney's fees" if they fail to recover "an amount greater than zero" (*id.*, subd. (c)). In any event, as the majority correctly notes, the arbitration agreement "anticipates" that, consistent with *Armendariz*, OTO has the "obligation to pay arbitration-related costs." (Maj. opn., *ante*, at p. 18.) Thus, if there are any costs "unique to arbitration" under the agreement—such as costs incident to discovery, preparation of proper pleadings, and/or motion practice—then OTO must pay them. (*Armendariz*, *supra*, 24 Cal.4th at p. 113.) As the majority explains, this payment obligation "*mitigates the unfairness* of expecting that [Kho] bear costs of a procedure to which [he was] required to agree." (Maj. opn., *ante*, at p. 29, italics added.)

So it turns out that the majority's only real concern about costs relates to "[a]ttorney fees," which, says the majority, are "different" from other costs "because they are not unique to arbitration." (Maj. opn., *ante*, at pp. 26-

27.) According to the majority, "employees can secure free legal assistance from the Labor Commissioner, both at the Berman hearing and in any subsequent appeal." (Maj. opn., *ante*, at p. 27.) By contrast, in the arbitration, they must "pay for [legal] representation." (*Ibid.*)

The majority's analysis is problematic for several reasons. First, to be clear, according to the majority, the commissioner may *not* provide an employee with "representation" by "a lawyer" at a Berman hearing (maj. opn., *ante*, at p. 27), because "no statute authorizes" such representation (maj. opn., *ante*, at p. 27, fn. 13). Instead, in terms of providing "free legal assistance" (maj. opn., *ante*, at p. 27) at the Berman hearing, the commissioner only may "assist . . . with cross-examination and explain issues and terms involved" (maj. opn., *ante*, at p. 8). Second, as noted above, nothing in the arbitration agreement precludes the arbitrator from providing similar assistance, and the majority never asserts otherwise. Third, even as to de novo appeals, not all employees are *eligible* for legal representation by the commissioner, and even fewer are *absolutely entitled* to such representation. Employees who are "financially []able to afford counsel" are not eligible for representation by the commissioner. (Lab. Code, § 98.4.) If they are "financially unable to afford counsel," but are "objecting to any part of the Labor Commissioner's final order," they are eligible for representation, but the commissioner has discretion not to provide it. (*Ibid.*) Thus, employees requesting a trial de novo are *never guaranteed* representation by the commissioner, because they are, by definition, objecting to part of the final order; representation of such employees is always a matter for the commissioner's discretion. Only those employees who are *both* "financially unable to afford counsel"

and "not objecting to any part of the Labor Commissioner's final order" are statutorily guaranteed representation by the commissioner. (*Ibid.*)

Fourth, the majority gives short shrift to OTO's claim that "the Labor Commissioner could represent claimants in arbitration." (Maj. opn., *ante*, at p. 27, fn. 13.) The majority states that "no statute authorizes the representation of [wage] claimants outside th[e] specific context" of de novo proceedings following a Berman hearing. (Maj. opn., *ante*, at p. 27, fn. 13.) However, Labor Code section 98.3, subdivision (a), states that "[t]he Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and the Labor Commissioner believes have claims which are valid and enforceable." The majority asserts that this statute only gives the commissioner "the power to prosecute its *own* action . . . on behalf of workers" (maj. opn., *ante*, at p. 27, fn. 13), but the statutory language on its face does not seem so confined, and the majority offers no analysis for its restrictive reading. Moreover, Labor Code section 98.3, subdivision (b), states that "[t]he Labor Commissioner may prosecute action for the collection of wages and other moneys payable to employees or to the state arising out of an employment relationship or order of the Industrial Welfare Commission." These provisions, and OTO's argument, merit more in depth and definitive consideration if, as the majority reasons, the asserted unavailability of free counsel in arbitration is the primary reason the arbitration agreement is substantively unconscionable.

Finally, the majority's comparison of the employee's ability to recover attorney fees in arbitration and in a Berman procedure is misleading. As noted above, the parties agree—and the majority does not dispute—that were Kho

to hire counsel to assist in an arbitration and were he to prevail, as "to most of [his] claims," he would be entitled to "reasonable attorney fees and costs" under Labor Code section 218.5. (Maj. opn., *ante*, at p. 27.) Nevertheless, the majority continues, he "face[s] a risk that [he] will not be designated the prevailing party" under the fee statute. (Maj. opn., *ante*, at p. 28.) By contrast, the majority asserts, "The Berman statutes provide fee-shifting to wage claimants who secure *any* monetary recovery in an employer's appeal." (Maj. opn., *ante*, at p. 28.) Of course, this means that claimants who recover *nothing* in an employer's appeal are *not* entitled to recover attorney fees. And the majority's use of the limiting phrase "in an employer's appeal" (*ibid.*) means that in an appeal *by the employee*, the employee may *not* recover attorney fees under *any* circumstances, *even upon securing full monetary recovery*. (*Sonic I*, *supra*, 51 Cal.4th at p. 673 [in de novo proceeding, "successful appellants may not obtain [attorney] fees"].) Moreover, appealing employees, even if "financially unable to afford counsel," are not guaranteed representation by the Labor Commissioner, because they would be "objecting to [some] part of the Labor Commissioner's final order." (Lab. Code, § 98.4.) In this respect, arbitration, by making attorney fees potentially available to employees even if they are appealing parties, is actually *more* accessible and affordable for employees.

The majority offers little response to my detailed analysis, other than to say I am simply "rais[ing] the same criticisms of the Berman procedure that [the majority] considered at length, and rejected" in *Sonic II*. (Maj. opn., *ante*, at p. 25, fn. 15.) Although *some* of the points I make here about the Berman procedure are the same as points I made in *Sonic II*, *many are not*. The majority simply ignores the points that are new. It also ignores *the evi-*

dence I cite to refute its assessment of the Berman procedure, which is based solely on this court's assertions about what that procedure was, in theory "'designed to provide.'" (Maj. opn., *ante*, at p. 7.)

Moreover, contrary to the majority's assertion, I am *not* making "criticisms" of the Berman procedure. (Maj. opn., *ante*, at p. 25, fn. 15.) I am simply pointing out relevant aspects of the Berman procedure that are inherent in the statutory provisions themselves or that have revealed themselves through actual administration of those provisions. This level of detailed inquiry is necessary because of the basis for the majority's unconscionability finding: its assessment of the Berman procedure's benefits relative to those of the arbitration procedure. A proper evaluation of that finding requires close examination of the majority's assumptions and of any real, substantive differences between the two procedures. The court should not cavalierly invalidate this arbitration agreement based on erroneous assumptions or assertions about its procedures as compared to the Berman procedure. In light of the above considerations, it is impossible to reach a reliable, accurate, or definitive conclusion that the Berman procedure is less costly than the arbitration procedure. Given the uncertainties regarding such a comparison, the majority's analysis provides an insufficient basis for concluding that Kho has carried his burden to prove that the agreement was "unconscionable at the time it was made." (Civ. Code, § 1670.5, subd. (a).)

Of course, reasonable people may reach different conclusions about the inchoate value, at the time the arbitration agreement was signed, of a Berman procedure's potential benefits in comparison to the inchoate value of the arbitration procedure's potential benefits. But a court's after-the-fact, subjective assessment of the relative bene-

fits of the two procedures should not be the basis for exercising the judicial power to declare that an agreement was "unconscionable at the time it was made" (Civ. Code, § 1670.5, subd. (a)), and thus unenforceable. This should be especially true where, as here, the basis for the court's conclusion is that the arbitration procedure is simply too much like a procedure—ordinary civil litigation—that, according to the majority, has been "carefully crafted to ensure fairness to both sides." (Maj. opn., *ante*, at p. 25.)

Which brings me to my next point of disagreement with the majority: its view that our case law allows invalidation of this arbitration agreement based on the relative benefits of the arbitration procedure and the Berman procedure. To be sure, the majority in *Sonic II*, *supra*, 57 Cal.4th at page 1149, said that a court, "in determining whether an arbitration agreement is unconscionable," may "consider the value of benefits provided by the Berman statutes" that the employee has "surrender[ed]." However, the *Sonic II* majority also emphasized: that an "employee's surrender of such benefits does not necessarily make the agreement unconscionable" (*id.* at p. 1125); that a finding of substantive unconscionability may not be "premised on the superiority of the Berman hearing as a dispute resolution forum" (*id.* at p. 1149); that "the unconscionability doctrine does not mandate the adoption of any particular form of dispute resolution mechanism, and courts may not decline to enforce an arbitration agreement simply on the ground that it appears to be a bad bargain or that one party could have done better" (*id.* at p. 1148); that "[t]he unconscionability inquiry is not a license for courts to impose their renditions of an ideal arbitral scheme" (*ibid.*); that the party seeking to compel arbitration need not "justify the [arbitration] agreement through provision of benefits comparable to those otherwise afforded by statute" (*id.* at p. 1152); that "parties

may opt out of the Berman process with any agreement that provides for accessible, affordable arbitration of wage disputes" (*id.* at p. 1168); that "[o]ur rule requires only that wage claimants have an accessible and affordable mechanism for dispute resolution, not that the mechanism adopt any particular procedure or assume any particular form" (*id.* at pp. 1170-1171); and that "an adhesive arbitration agreement that compels the surrender of Berman protections as a condition of employment" (*id.* at p. 1150) is *enforceable* "so long as" it "provides employees with an accessible, affordable process for resolving wage disputes that does not 'effectively block[] every forum for the redress of [wage] disputes, including arbitration itself' " (*id.* at pp. 1157, 1158).

As noted earlier, the majority acknowledges that the features of the arbitration procedure here were "carefully crafted to ensure fairness to both sides" (maj. opn., *ante*, at p. 25) and are *not* "per se unfair" (maj. opn., *ante*, at p. 25), and the majority does not find that arbitration is so unaffordable or inaccessible for Kho as to effectively block every forum for redress. If the statements of the *Sonic II* majority have any meaning, then that should end the inquiry, and the arbitration agreement should be enforced. But the majority nevertheless invalidates the agreement because, in its view, the arbitration procedure is not *as* advantageous for Kho as the Berman procedure. In this regard, the majority's analysis and conclusion are inconsistent with the *Sonic II* majority's many statements and assurances regarding the enforceability of arbitration agreements in this context, especially its statement that a finding of substantive unconscionability may *not* be "premised on the [purported] superiority of the Berman hearing as a dispute resolution forum." (*Sonic II*, *supra*, 57 Cal.4th at p. 1149.)

The majority here essentially ignores the *Sonic II* majority's statements, proclaiming that "the question" here "[u]ltimately" is whether Kho "was coerced or misled into making an unfair bargain" that is too "one-sided" to be enforced. (Maj. opn., *ante*, at p. 32.) To be sure, the *Sonic II* majority stated that "courts may examine the terms of adhesive arbitration agreements to determine whether they are unreasonably one-sided." (*Sonic II*, *supra*, 57 Cal.4th at p. 1145.) But the *Sonic II* majority also stated that, with respect to claims that qualify for the Berman procedure, "arbitration conducted with many of the formalities of litigation is not unconscionably one-sided" if it provides "accessible and affordable resolution of wage disputes." (*Id.* at p. 1163.) And the *Sonic II* majority expressly "reaffirm[ed]" *Little*'s discussion on this point (*ibid.*), where we said "[i]t is not at all obvious" that provisions incorporating "legal formalities into" an arbitration agreement—i.e., "the rules of pleading and evidence" and "traditional judicial motions such as demurrer and summary judgment"—"would inordinately benefit [the employer] rather than [the employee]" (*Little*, *supra*, 29 Cal.4th at p. 1075, fn. 1). The majority's analysis and conclusion are inconsistent with these statements.

Finally, even were the majority correct that the agreement is one-sided with respect to claims covered by the Berman procedure—and as I have demonstrated, it is not—the majority's analysis is contrary to the *Sonic II* majority opinion's discussion of one-sidedness. Consistent with my earlier discussion of basic contract law, the *Sonic II* majority stated that whether a contract is "unreasonably one-sided" must be determined based on "the overall bargain." (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) Thus, even were it true that the arbitration procedure provides Kho with little or no benefit with respect to claims covered

by the Berman procedure, that would not mean the parties' "'overall bargain'" was "'one-sided,'" let alone "'unreasonably one-sided.'" (Maj. opn., *ante*, at p. 11). Only by evaluating the arbitration agreement as if it were merely "a waiver of Berman procedures" (maj. opn., *ante*, at p. 11) and ignoring the overall benefits Kho received and the detriment OTO suffered—all in disregard of our precedents—can the majority assert that, given what Kho "received in return" for "surrender[ing] the full panoply of Berman procedures and assistance" (maj. opn., *ante*, at p. 32), the agreement is "so unfairly one-that it should not be enforced" (maj. opn., *ante*, at p. 11).

For all of the preceding reasons, the majority's analysis and conclusion are incorrect as a matter of state law.

E. Federal Law—The FAA

The final reason I do not join the majority opinion is that its analysis is inconsistent with—and thus preempted by—the FAA, as the high court has construed that law.

The high court cases applying the FAA authoritatively establish at least two principles that are fatal to the majority's analysis and conclusion. First, an arbitration agreement's enforceability may *not* "turn[] on" a state's "judgment concerning the forum for enforcement of [a] state-law cause of action." (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 446 (*Buckeye*).) Thus, as the *Sonic II* majority stated, the FAA precludes a court from "finding an arbitration agreement unconscionable" based on "the fact that arbitration supplants an administrative hearing." (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) Second, judges may not declare an arbitration agreement to be unenforceable based on their subjective view that the arbitration procedure would not provide "'effective vindication'" of a statutory right, unless the agreement

goes so far as to "forbid[] the assertion of certain statutory rights," and "perhaps" if it imposes "filing and administrative fees . . . that are so high as to make access to the forum impracticable." (*American Express Co. v. Italian Colors Restaurant* (2013) 570 ____ U.S. ____ , ____ [133 S.Ct. 2304, 2310-2311] (*Italian Colors*).)

The majority's analysis and conclusion violate both of these binding FAA principles. Again, the majority, though recognizing that the arbitration procedure here was "carefully crafted to ensure fairness to both sides" (maj. opn., *ante*, at p. 25) and is not "per se unfair," unaffordable, or inaccessible (*ibid.*), nevertheless invalidates the arbitration agreement based on its view that the procedure is not as advantageous for Kho and other employees as the Berman procedure. In other words, contrary to high court precedent, the majority makes the agreement's enforceability "turn[] [entirely] on" a state court's "judgment" that the Berman procedure provides a better "forum for enforcement of [a] state-law cause of action" (*Buckeye*, *supra*, 546 U.S. at p. 446), and that the arbitration procedure "supplants" that more advantageous "administrative" forum (*Sonic II*, *supra*, 57 Cal.4th at p. 1146). Also contrary to high court precedent, the majority expressly has rested its conclusion on the view that the arbitration procedure, as compared to the Berman procedure, "erect[s] . . . barriers to the vindication of [employees'] statutory rights." (Maj. opn., *ante*, at p. 27.) Under binding high court case law, the FAA does not permit invalidation of the arbitration agreement on these grounds.

It is true that under the FAA, enforcement of an arbitration agreement is subject to "such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) It is also true that under this clause—which is known as the saving clause—unconscionability, as a "'generally applicable contract defense[],'" may be the

basis for declining to enforce an arbitration agreement. (*Concepcion*, *supra*, 563 U.S. at p. 339.)

However, the FAA imposes substantial limits on what a court may do in the name of unconscionability. To begin with, "[a] court may not . . . construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." (*Perry v. Thomas* (1987) 482 U.S. 483, 493, fn. 9 (*Perry*).) Nor may a court apply the unconscionability doctrine "in a fashion that disfavors arbitration" or "'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" (*Concepcion*, *supra*, 563 U.S. at p. 341.) In short, the saving clause "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (*Kindred Nursing Centers Ltd. Partnerships v. Clark* (2017) ____ U.S. ____ , ____ [137 S.Ct. 1421, 1426] (*Kindred Nursing*).) As this court has explained, this equal treatment principle mandates that our unconscionability standard "be . . . the same for arbitration and nonarbitration agreements" (*Sanchez*, *supra*, 61 Cal.4th at p. 912) and that we enforce our unconscionability rules "evenhandedly" (*Sonic II*, *supra*, 57 Cal.4th at p. 1143). It preempts any rule of unconscionability that "discriminat[es] on its face against arbitration." (*Kindred Nursing*, at p. 1426.)

But the equal treatment principle extends beyond overt discrimination, "displac[ing] any [state] rule [of unconscionability] that covertly accomplishes the same objective" (*Kindred Nursing*, *supra*, ____ U.S. at p. ____

[137 S.Ct. at p. 1426]) or that employs "more subtle methods" to "target arbitration" (*Epic Systems Corp. v. Lewis* (2018) ____ U.S. ____ , ____ [138 S.Ct. 1612, 1622] (*Epic*)). Thus, as this court has explained, the FAA "preempts even a 'generally applicable' state law contract defense if that defense (1) is 'applied in a fashion that disfavors arbitration' [citation], or (2) 'interferes with fundamental attributes of arbitration' [citation], such as '"lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."'" (*McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 964 (*McGill*).) In other words, although the FAA's "saving clause preserves generally applicable contract defenses," it does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Concepcion*, *supra*, 563 U.S. at p. 343). Nor does it permit state courts, in "addressing the concerns that attend contracts of adhesion," "to take steps" under the rubric of unconscionability that "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." (*Id.* at p. 347, fn. 6.) Thus, "[t]he 'grounds'" for invalidating an arbitration agreement that the saving clause preserves do not "'include a State's mere preference for procedures that are incompatible with arbitration and that "would wholly eviscerate arbitration agreements."'" (*Id.* at p. 343.)

By refusing to enforce the arbitration agreement based on its view that the arbitration procedure is less advantageous for Kho and other employees than the Berman procedure, the majority runs afoul of these governing principles. Given the majority's recognition that the arbitration procedures have been "carefully crafted to ensure fairness to both sides" (maj. opn., *ante*, at p. 25), and are not "per se unfair," unaffordable, or inaccessible (maj. opn., *ante*, at p. 25), the majority's "comparative benefit"

basis for invalidating the agreement constitutes nothing more than a "'mere preference'" for the "'procedures'" prescribed by the Berman statutes. (*Concepcion*, *supra*, 563 U.S. at p. 343.) By insisting that the arbitration agreement have more features comparable to those of the Berman procedure, the majority is "frustrat[ing]" the FAA's "purpose to ensure that private arbitration agreements are enforced according to their terms." (*Id.* at p. 347, fn. 6.) The majority's effort to disguise this obvious preference for the Berman procedure under the cloak of unconscionability does not render its analysis and conclusion valid under the FAA; as explained above, the FAA's equal treatment principle extends beyond overt discrimination, "displac[ing] any [state] rule [of unconscionability] that covertly accomplishes the same objective" (*Kindred Nursing*, *supra*, ____ U.S. at p. ____ [137 S.Ct. at p. 1426]) or employs "more subtle methods" to "target arbitration" (*Epic*, *supra*, ____ U.S. at p. ____ [138 S.Ct. at p. 1622]).

But the majority's effort is perhaps not as subtle or covert as it might at first appear. The high court, in discussing the "'great variety' of 'devices and formulas'" that judges hostile to arbitration have used to invalidate arbitration agreements, has expressly "not[ed] that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." (*Concepcion*, *supra*, 563 U.S. at p. 342.) Any reader of this court's opinions would surely be able to confirm the high court's observation. Any such reader would also be able to discern that the unconscionability analysis and contract principles this court applies in arbitration cases—including the majority's "comparative benefit" rationale for invalidating the arbitration agreement here, its insistence that there be *separate* consideration for Kho's agreement to arbitrate claims covered by the Berman procedure, its

failure to consider the parties' *overall* bargain and the detriment OTO suffered in determining what Kho received in return for his agreement to arbitrate, and its reliance on factors to find procedural unconscionability that our precedents hold are *not* factors—are indeed very different from the analysis and principles the court applies in nonarbitration cases.

Indeed, a majority of this court long ago expressly announced that with respect to arbitration agreements, it would apply "the ordinary principles of unconscionability . . . in forms peculiar to the arbitration context." (*Armendariz*, *supra*, 24 Cal.4th at p. 119.) Here, the majority again explicitly acknowledges that the "approach" it uses in "evaluating" the unconscionability of "compelled arbitration of wage claims" otherwise subject to the Berman procedure is "different" from the approach this court uses in evaluating other unconscionability claims. (Maj. opn., *ante*, at p. 25.) This unique, Berman-specific approach—and the majority's analysis and conclusion in this case—violate, and are thus preempted by, the FAA and its equal treatment principle, which preclude a court from "construe[ing an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law" (*Perry*, *supra*, 482 U.S. at p. 493, fn. 9), from applying the unconscionability doctrine "in a fashion that disfavors arbitration," and from "'rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable'" (*Concepcion*, *supra*, 562 U.S. at p. 341). As this court has held, the FAA's equal treatment principle mandates that our unconscionability standard "be . . . the same for arbitration and nonarbitration agreements" (*Sanchez*, *supra*, 61 Cal.4th at p. 912) and that we enforce our unconscionability rules "evenhandedly" (*Sonic II*, *supra*, 57 Cal.4th at p. 1143). In this case, the

majority, once again, fails to heed this court's own pronouncements.

Moreover, this case confirms my view, as set forth in *Sonic II*, that the unique unconscionability analysis a majority of this court applies to compulsory arbitration of Berman claims is incompatible with, and therefore preempted by, the FAA for another reason: it "'"stand[s] as an obstacle to the accomplishment and execution of [Congress's] *full purposes and objectives*"' in passing the FAA." (*Sonic II*, *supra*, 57 Cal.4th at p. 1187 (conc. & dis. opn. of Chin, J.).) In *Italian Colors*, *supra*, 570 U.S. ____ at pages ____ , ____ [133 S.Ct. 2304, 2311-2312], the high court rejected an approach that would "'require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means'" and "'the size of their claims.'" "Such a preliminary litigating hurdle," the court explained, "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure." (*Id.* at p. [133 S.Ct. at p. 2312].) As I explained in *Sonic II*, the unconscionability inquiry the *Sonic II* majority set forth—by requiring a "minitrial" in superior court "on the comparative costs and benefits of arbitration and the Berman procedure for a particular employee" and possible "appellate review of the trial court's decision"—creates "the very type of 'superstructure'" that, according to the high court, "the FAA prohibits." (*Sonic II*, at p. 1188 (conc. & dis. opn. of Chin, J.).)

In rejecting my view, the *Sonic II* majority confidently responded that its approach would "not erect a 'preliminary litigating hurdle' of the sort prohibited by *Italian Colors*." (*Sonic II*, *supra*, 57 Cal.4th at p. 1167.) To support its view, the majority asserted that a wage claim "is

simpler than the antitrust claim at issue in *Italian Colors*," that courts "have routinely decided whether arbitration is affordable in a given case," and that applicable statutes would facilitate "summary" disposition of unconscionability claims. (*Id.* at p. 1157.)

The facts and the majority's conclusion in this case validate my analysis. OTO moved to compel arbitration in August 2015. The trial court denied the motion four months later, in December 2015. OTO then appealed, and in August 2017—*two years after OTO moved to compel arbitration*—the Court of Appeal disagreed with the trial court and ordered the motion granted. Now, *after another two years of litigation*, a majority of this court is reversing the Court of Appeal based on a different assessment of the arbitration procedure's benefits relative to a Berman procedure. Thus, as the majority acknowledges, the "[l]itigation" in this case just to apply *Sonic II*'s unique unconscionability test *has* "*consumed . . . four years*." (Maj. opn., *ante*, at p. 24, fn. 12, italics added.) Even still, says the majority, its decision does *not* settle the question of whether an *identical* arbitration agreement would be enforceable "under less coercive circumstances." (Maj. opn., *ante*, at p. 32.) The length of this litigation and the majority's case-specific limitation on its holding confirm my view that the unconscionability analysis this court has prescribed for agreements to arbitrate claims the Berman procedure covers creates a preliminary litigating hurdle that, according to *Italian Colors*, is incompatible with, and thus preempted by, the FAA.

The majority's response—that this inordinate delay in arbitration is permissible under the FAA because unconscionability is a generally applicable contract defense that "has long been recognized as a permissible ground for invalidating arbitration agreements under the FAA's sav-

ings clause" (maj. opn., *ante*, at p. 34)—is simply incorrect. Under high court precedent, the unconscionability defense does *not* "qualify for protection under the saving clause" if it is applied so as to "interfere[] with a fundamental attribute of arbitration." (*Epic*, *supra*, ____ U.S. at p. ____ [138 S.Ct. at p. 1622].) Consistent with this precedent, we unanimously stated just two years ago that the FAA "preempts *even a 'generally applicable' state law contract defense* if that defense . . . 'interferes with fundamental attributes of arbitration,'" including "'"lower costs [and] greater efficiency and speed."'" (*McGill*, *supra*, 2 Cal.5th at p. 964, italics added.) Because the extended litigation made necessary by a majority of this court's unique approach to unconscionability in the Berman waiver context substantially interferes with these fundamental attributes of arbitration, the FAA preempts that approach notwithstanding the fact that unconscionability is otherwise a generally applicable contract defense.[6]

The majority opinion here also confirms another aspect of my FAA preemption analysis in *Sonic II*. There, I explained that the *Sonic II* majority's unconscionability analysis is "inconsistent with" the FAA, as the high court construed it in *Southland*, because it "is not a ground that exists at law or in equity for the revocation of *any* contract, but is . . . merely a ground that exists for the revocation of arbitration provisions in contracts subject to the

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[6] The majority's other response—that this case is atypical because "[f]ew cases progress to appeal, and vanishingly few reach this court" (maj. opn., *ante*, at p. 34)—ignores (1) the cost and delay attributable to the superior court proceedings, and (2) the fact that between 10,000 and 15,000 appeals are filed in our Courts of Appeal each year. (Jud. Council of Cal., 2017 Court Statistics Report, Statewide Caseload Trends: 2006-2007 Through 2015-2016, p. 48.)

Berman statutes or to other statutes that 'legislatively' afford to 'a particular class . . . specific protections in order to mitigate the risks and costs of pursuing certain types of claims.'" (*Sonic II*, *supra*, 57 Cal.4th at p. 1190 (conc. & dis. opn. of Chin, J.).) Consistent with my analysis, the majority, in finding unconscionability here, concedes that it is using "a different approach in evaluating the compelled arbitration of wage claims, as compared to the arbitration of other types of disputes." (Maj. opn., *ante*, at p. 25.) That approach, the majority continues, is not appropriate for "wrongful demotion and discharge" claims because "[t]here is no Berman-like administrative process for" such claims (maj. opn., *ante*, at p. 25) and no provision for "free legal assistance" (*id.* At p. 27) as there is with the Berman procedure; "[w]hile all employees would likely benefit from having a lawyer in the litigation-like arbitration process here," "wage claimants present a somewhat special case" because "only [they] have to pay for representation that was otherwise available to them for free" (*ibid.*). Thus, although arbitration with "litigation-like procedures" is permissible for some employment claims, it is unacceptable as a "substitute for [the Berman] administrative procedure." (Maj. opn., *ante*, at p. 16.) These statements reinforce the view I stated in *Sonic II*: This court's rule of unconscionability for agreements requiring arbitration of unpaid wage claims otherwise eligible for the Berman procedure is "inconsistent with" the FAA because it "is not a ground that exists at law or in equity for the revocation of *any* contract, but is . . . merely a ground that exists for the revocation of arbitration provisions in contracts subject to the Berman statutes.'" (*Sonic II*, *supra*, at p. 1190 (conc. & dis. opn. of Chin, J.).)

Under the FAA, "[p]arties may generally shape [arbitration] agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration,

the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. [Citation.] Whatever they settle on, the task for courts and arbitrators at bottom remains the same: 'to give effect to the intent of the parties.'" (*Lamps Plus, Inc. v. Varela*, *supra*, ____ U.S. at p. ____ [139 S.Ct. at p. 1416].)

California law embodies a similar principle; as this court has explained, by enacting the California Arbitration Act, "the Legislature has determined that the parties shall have considerable leeway in structuring the dispute settlement arrangements by which they are bound . . . ." (*Graham*, *supra*, 28 Cal.3d at p. 825.) This "leeway . . . permit[s] the establishment of arrangements which vary to some extent from the dead-center of 'neutrality,'" so long as they meet "certain 'minimum levels of integrity.'" (*Ibid.*) In light of the public policy strongly favoring arbitration, those arrangements should be enforced—and "the matter should be permitted to proceed to arbitration"—absent a "clear[]" showing that they "essentially preclude the possibility of a fair hearing." (*Id.* at p. 826, fn. 23.) "If, in the course of arbitration proceedings, the resisting party is actually denied a fair opportunity to present his position, ample means for relief are available through a subsequent petition to vacate the award." (*Ibid.*)

The majority violates these federal and state law principles by invalidating the arbitration rules to which the parties in this case agreed—even though those rules have been "carefully crafted to ensure fairness to both sides" (maj. opn., *ante*, at p. 25) and do not make arbitration "per se unfair," unaffordable, or inaccessible (*ibid.*)—because they are not, in the majority's view, as advantageous for Kho as the Berman procedure. This conclusion is both inconsistent with California law and preempted by the FAA.

For the foregoing reasons, I dissent.

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

A147564

OTO, L.L.C.,
Plaintiff and Appellant,

v.

KEN KHO,
Defendant and Respondent;
JULIE A. SU, as Labor Commissioner, etc.,
Intervener and Appellant

Filed: August 21, 2017

Before: MARGULIES, HUMES, and BANKE, JJ.

OPINION

Opinion of the court by MARGULIES, J.

Ken Kho filed a claim for unpaid wages with the California Labor Commissioner (commissioner) against his former employer, OTO, L.L.C., doing business as One

Toyota of Oakland (hereafter One Toyota). After settlement discussions failed, One Toyota filed a petition to compel arbitration. Under the arbitration agreement, which One Toyota required Kho to execute without explanation during his employment, the wage claim would be subject to binding arbitration conducted by a retired superior court judge. Because the intended procedure incorporated many of the provisions of the Code of Civil Procedure and the Evidence Code, the anticipated arbitration proceeding would resemble ordinary civil litigation.

The trial court denied the petition to compel. Under *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), an arbitration agreement that waives the various advantageous provisions of the Labor Code governing the litigation of a wage claim is substantively unconscionable if it fails to provide the employee with an affordable and accessible alternative forum. The trial court concluded that the alternative anticipated by One Toyota's arbitration agreement failed this standard because it effectively required Kho to retain counsel and did not expressly provide for him to recover his attorney fees if he prevailed. We reverse, concluding the arbitration proceeding satisfies the *Sonic II* requirements of affordability and accessibility.

I. BACKGROUND

Kho worked as an auto mechanic for One Toyota from January 2010 through April 2014, when his employment was terminated. Several months later, in October 2014, Kho filed a wage claim with the commissioner.

In November 2014, Kho and One Toyota participated in an unsuccessful settlement conference, mediated by a deputy labor commissioner. The parties continued settlement discussions for the following month, until, in mid-December, One Toyota requested that the commissioner's

office forward a proposed settlement agreement to Kho. After Kho "decided not to accept" the offer, he requested a so-called "Berman hearing" on his claim.[1]

On January 30, 2015, the commissioner notified One Toyota of Kho's request, and in March the hearing was scheduled for the following August. In July, Kho requested the issuance of a subpoena for records from One Toyota in preparation for the hearing. The subpoena was issued, requiring One Toyota to bring the requested documents to the hearing.

On the morning of the Berman hearing, a Monday, One Toyota's attorney faxed a letter to the commissioner's office, requesting that the hearing be taken off calendar because One Toyota had filed a petition to compel arbitration and stay the administrative proceedings on the prior Friday.[2] By return fax, the commissioner's office informed counsel that the hearing would proceed as scheduled. At the appointed time, counsel for One Toyota appeared, served Kho with the petition to compel and stay proceedings, and left. Undeterred, the hearing officer proceeded with the hearing in One Toyota's absence and later issued an extensive "Order, Decision, or Award"

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[1] Apparently Kho's refusal of the offer was not communicated to One Toyota by the commissioner until March 2015, at which time One Toyota told the commissioner it would continue to try to settle the matter. By that time, of course, One Toyota had received notice of the scheduled Berman hearing.

[2] The parties dispute whether this was the first time One Toyota raised the issue of arbitration. In a declaration filed later, One Toyota's attorney claimed to have informed Kho at the time of the settlement conference that it intended to seek arbitration of his claims. Both Kho and the deputy commissioner who conducted the hearing denied that the issue of arbitration was raised, and One Toyota acknowledged there is no written record reflecting this interaction. The trial court did not resolve this issue of fact.

(ODA) finding Kho entitled to $102,912 in unpaid wages and $55,634 in liquidated damages, interest, and penalties.

One Toyota thereafter sought de novo review of the ODA in the trial court pursuant to Labor Code section 98.2, posting the requisite bond to secure payment of the award. (*Id.*, subd. (b).) At the same time, One Toyota supplemented its petition to compel arbitration with the filing of a motion to vacate the ODA. By stipulation, the commissioner was allowed to intervene in the trial court proceedings.

One Toyota's petition to compel arbitration was premised on a "Comprehensive Agreement—Employment At-Will and Arbitration" (Agreement), executed by Kho on February 22, 2013, three years into his employment. The substance of the Agreement appears to be quite similar to the arbitration agreement addressed in the *Sonic* decisions. (See *Sonic II*, *supra*, 57 Cal.4th at pp. 1125-1126, 1146; *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 680 (*Sonic I*).) Notwithstanding its designation as a "comprehensive" employment contract, the one and one-quarter page contract is merely an arbitration clause grafted onto an acknowledgment of at-will employment. The clause, written in a tiny font size, consists of a dense, single-spaced paragraph that occupies nearly the entirety of the first page.[3] The terms of the clause are broad, requiring arbitration of "any claim, dispute, and/or controversy" by either party against the other. Although arbitration under the Agreement purports to be subject to the procedures of the California Arbitration Act (CAA; Code Civ. Proc., § 1280 et seq.), the clause requires any arbitration to be conducted by a retired California superior court

[3] The clause is written in seven-point font size. For purposes of demonstration, this sentence is written in seven-point font. A copy of the Agreement is attached as an appendix to this decision.

judge and in conformance with California laws governing pleading and evidence. Accordingly, the clause permits the full extent of discovery authorized by the CAA, authorizes demurrers and motions for summary judgment, among all other California pleadings, and requires the arbitration hearing to be conducted pursuant to the Evidence Code. It anticipates, in short, ordinary civil litigation, followed by the equivalent of a civil bench trial, except that one or both parties must finance the judge and facilities. With respect to the allocation of the costs of arbitration, the clause states: "If [Code of Civil Procedure section] 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of [Code of Civil Procedure section] 1284.2."[4]

In opposing the petition to compel, Kho explained the circumstances of his execution of the Agreement: "After working for One Toyota of Oakland for approximately 3 years, Alba, who was a 'porter' employed with [the human resources department of] One Toyota of Oakland, brought . . . paperwork for me to sign. This happened approximately in February 2013. [¶] . . . I remember working at my station and Alba asked me to sign several additional documents in February 2013. I was not asked to come into the human resources office to review the documents and I was required to sign and return them immediately to Alba, who was waiting in my work station for

[4] Code of Civil Procedure section 1284.2 states: "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit."

me to finish signing them. It took about 3-4 minutes for me to sign these documents. After I signed them, I gave the documents back to Alba and I was not given an opportunity to read what those documents were. [¶] . . . I was not provided with a copy of the documents signed on [*sic*] February 2013. No one from One Toyota of Oakland read to [*sic*] the contents of the documents to me nor did they explain to me that I was signing an arbitration agreement and waiving any of my rights. [¶] . . . [A]t no point during my employment with One Toyota of Oakland did I receive a copy of the arbitration agreement. My first language is Chinese and a copy of this agreement was not provided in my native language."

One Toyota did not dispute Kho's account.

The trial court denied the petition to compel. In an extensive written decision, the court found "that there was a high level of procedural unconscionability connected with the execution of the arbitration agreement in this case." It noted Kho was not given time to review the Agreement, was given no explanation of it, and was not given a copy afterward, which the court found "consistent with the conclusion that the arbitration provision was imposed on [Kho] under circumstances that created oppression or surprise due to unequal bargaining power." The court also found the Agreement substantively unconscionable under *Sonic II* because it deprived Kho of the advantages of the commissioner's procedures, which provide for a relatively quick, inexpensive method for resolving wage claims that is designed to accommodate pro se claimants, like Kho, without providing an "accessible and affordable" alternative. As the court noted, the Agreement anticipates close to a full trial, which would necessitate the hiring of counsel, but it does not provide for the recovery of attorney fees to incentivize counsel. Because

the court denied the petition to compel, it declined to address Kho's argument that One Toyota's last-minute assertion of its right to arbitrate waived that right. Although the court denied the petition to compel, it did grant One Toyota's motion to vacate the ODA, concluding that the agency abused its discretion in proceeding with the hearing after having been informed that Kho had executed an agreement to arbitrate that could moot the proceeding.

One Toyota has appealed the denial of its petition to compel arbitration, while the commissioner, as intervener, has cross-appealed the order vacating the ODA. Kho has not appeared personally or by counsel, but the commissioner has filed a respondent's brief asserting arguments on his behalf.

II. DISCUSSION

A. Governing Law

1. Unconscionability

"'A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' [Citation.] A party seeking to compel arbitration of a dispute 'bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability.'" (*Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal.App.4th 1, 8.) The Supreme Court summarized the doctrine of unconscionability in the context of arbitration agreements in *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899 (*Sanchez*):

"'"One common formulation of unconscionability is that it refers to '"an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."'

[Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results."' [Citation.]

"'"The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.] But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.] Courts may find a contract as a whole 'or any clause of the contract' to be unconscionable. [Citation.]

"As we stated in *Sonic II*: 'The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as "'"overly harsh"'" [citation], "'unduly oppressive'" [citation], "'so one-sided as to "shock the conscience"'" [citation], or "unfairly one-sided" [citation]. All of these formulations point to the central idea that unconscionability doctrine is concerned not with "a simple old-fashioned bad bargain" [citation], but with terms that are "unreasonably favorable to the more powerful party" [citation]. These include "terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or

boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction."'" (*Sanchez*, *supra*, 61 Cal.4th at pp. 910-911.)

When, as here, the evidence is not in dispute, we review de novo a trial court's decision on a petition to compel arbitration. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683.)

2. Litigation of Wage Claims

Claims for unpaid wages filed by California workers are investigated by California's Division of Labor Standards Enforcement, headed by the commissioner. (*Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1237 (*Aleman*).) The handling of such claims was explained in *Sonic I*, *supra*, 51 Cal.4th 659, which held that the right to the commissioner's procedures cannot be waived:[5]

"'If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. [Citations.] Or the employee may seek *administrative* relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in [Labor Code] sections 98 to 98.8. The latter option was added by legislation enacted in 1976 (Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371) and is commonly known as the

[5] This holding was overruled by *Sonic II, supra*, 57 Cal.4th 1109.

"Berman" hearing procedure after the name of its sponsor.' [Citations.]

"Once an employee files a complaint with the Labor Commissioner for nonpayment of wages, [Labor Code] section 98, subdivision (a) '"provides for three alternatives: the commissioner may either accept the matter and conduct an administrative hearing [citation], prosecute a civil action for the collection of wages and other money payable to employees arising out of an employment relationship [citation], or take no further action on the complaint. [Citation.]"' [Citation.] . . . [P]rior to holding a Berman hearing or pursuing a civil action, the Labor Commissioner's staff may attempt to settle claims either informally or through a conference between the parties. [Citation.]

"A Berman hearing is conducted by a deputy commissioner, who has the authority to issue subpoenas. [Citations.] 'The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. In brief, in a Berman proceeding the commissioner may hold a hearing on the wage claim; the pleadings are limited to a complaint and an answer; the answer may set forth the evidence that the defendant intends to rely on, and there is no discovery process; if the defendant fails to appear or answer no default is taken and the commissioner proceeds to decide the claim, but may grant a new hearing on request. [Citation.] The commissioner must decide the claim within 15 days after the hearing. [Citation.]' [Citation.] The hearings are not governed by the technical rules of evidence, and any relevant evidence is admitted 'if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.' [Citation.] The hearing officer is authorized to assist the parties in cross-examining witnesses and to explain issues and terms not understood by the

parties. [Citation.] The parties have a right to have a translator present. [Citations.]

"Once judgment is entered in the Berman hearing, enforcement of the judgment is to be a court priority. [Citation.] The Labor Commissioner is charged with the responsibility of enforcing the judgment and 'shall make every reasonable effort to ensure that judgments are satisfied, including taking all appropriate legal action and requiring the employer to deposit a bond as provided in [Labor Code] Section 240.' [Citation.]

"Within 10 days after notice of the decision any party may appeal to the appropriate court, where the claim will be heard de novo; if no appeal is taken, the commissioner's decision will be deemed a judgment, final immediately, and enforceable as a judgment in a civil action. [Citation.] If an employer appeals the Labor Commissioner's award, '[a]s a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award.' [Citation.] The purpose of this requirement is to discourage employers from filing frivolous appeals and from hiding assets in order to avoid enforcement of the judgment. [Citation.]

"Under [Labor Code] section 98.2, subdivision (c), 'If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.' This provision thereby establishes a one-way fee-shifting scheme, whereby unsuccessful appellants pay attorney fees while successful appellants may not obtain

such fees. [Citation.] This is in contrast to [Labor Code] section 218.5, which provides that in civil actions for nonpayment of wages initiated in the superior court, the 'prevailing party' may obtain attorney fees.[6]

"Furthermore, the Labor Commissioner 'may' upon request represent a claimant 'financially unable to afford counsel' in the de novo proceeding and 'shall' represent the claimant if he or she is attempting to uphold the Labor Commissioner's award and is not objecting to the Commissioner's final order. [Citation.] Such claimants represented by the Labor Commissioner may still collect attorney fees pursuant to [Labor Code] section 98.2, although such claimants have not, strictly speaking, incurred attorneys fees, because construction of the statute in this manner is consistent with the statute's goals of discouraging unmeritorious appeals of wage claims. [Citation.]

"In sum, when employees have a wage dispute with an employer, they have a right to seek resolution of that dispute through the Labor Commissioner, either through the commissioner's settlement efforts, through an informal Berman hearing, or through the commissioner's direct prosecution of the action. When employees prevail at a Berman hearing, they will enjoy the following benefits: (1) the award will be enforceable if not appealed; (2) the Labor Commissioner is statutorily mandated to expend best efforts in enforcing the award, which is also established as a court priority; (3) if the employer appeals, it is required to post a bond equal to the amount of the award so as to protect against frivolous appeals and evading the

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[6] Following the issuance of *Sonic I*, this contrast between Berman proceedings and Labor Code section 281.5 was substantially mitigated when that section was amended to provide that a prevailing employee in a wage dispute can recover attorney fees, while a prevailing employer can recover such fees only if the employee brought the action in bad faith. (Stats. 2013, ch. 142, § 1.)

judgment; (4) a one-way attorney fee provision will ensure that fees will be imposed on employers who unsuccessfully appeal but not on employees who unsuccessfully defend their Berman hearing award, or on employees who appeal and are awarded an amount greater than zero in the superior court; (5) the Labor Commissioner is statutorily mandated to represent in an employer's appeal claimants unable to afford an attorney if the claimant does not contest the Labor Commissioner's award." (*Sonic I*, *supra*, 51 Cal.4th at pp. 671-674, fn. omitted.)

3. Substantive Unconscionability in the Context of Wage Claim Arbitration

In *Sonic I*, the Supreme Court held an arbitration clause that has the effect of waiving an employee's statutory right to Berman procedures to be substantively unconscionable. (*Sonic I*, *supra*, 51 Cal.4th at p. 686.) The circumstances of *Sonic I* were virtually indistinguishable from those presented here. The respondent was an auto dealership employee who had filed a wage claim with the commissioner. The arbitration clause in his employment contract appears to have been very similar to that in the Agreement. (*Id.* at pp. 669, 680; see *Sonic II*, *supra*, 57 Cal.4th at p. 1146.)

In *Sonic II*, the Supreme Court acknowledged that *Sonic I*'s holding of per se unconscionability was inconsistent with the United States Supreme Court's intervening decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. (*Sonic II*, *supra*, 57 Cal.4th at p. 1141.) At the same time, *Sonic II* recognized that unconscionability remained a valid defense to a petition to compel arbitration of a wage claim, at least under the correct circumstances. (*Id.* at p. 1142.) With respect to an adhesive contract, "the unconscionability doctrine is concerned . . . with terms that are 'unreasonably favorable to the more

powerful party' [citation]." (*Id.* at p. 1145.) Accordingly, the court concluded, "the waivability of a Berman hearing in favor of arbitration does not end the unconscionability inquiry" and remanded the matter to the trial court to conduct a "fact-specific inquiry" regarding "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." (*Id.* at p. 1146.)

In discussing the nature of this inquiry, the court explained, "The Berman statutes include various features designed to lower the costs and risks for employees in pursuing wage claims . . . . 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." (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) While *Sonic II* later reiterated that waiver of Berman hearing protections alone would not support a finding of unconscionability (*id.* at p. 1147), it provided no further guidance regarding the type of "affordable and accessible" procedure that would stand as a suitable substitute. Rather, the court merely repeated that "in the context of a standard contract of adhesion setting forth conditions of employment, the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby 'effectively blocks every forum for the

redress of disputes, including arbitration itself.'" (*Id.* at p. 1148.)

Although *Sonic II* remanded the matter for an inquiry into both the procedural and substantive unconscionability of the arbitration clause in question, we assume that the dual requirements of affordability and accessibility are concerned only with substantive unconscionability. Both of these features are determined by the substantive terms of the arbitration agreement, not by the manner of its execution or its form. The requirements of affordability and accessibility therefore set the minimum standard that an arbitration clause requiring waiver of Berman procedures must meet to avoid a finding of substantive unconscionability as a result of that waiver.

B. Unconscionability of the Agreement

1. Procedural Unconscionability

A contract is adhesive, and therefore procedurally unconscionable to a degree, if "written on a preprinted form and offered on a take-it-or-leave-it basis." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1245; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 243 ["'It is well settled that adhesion contracts in the employment context, that is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability.'"].) Given the circumstances of Kho's execution of the Agreement, there is no question that it was a contract of adhesion. The issue here is whether, as the trial court found, the circumstances of its formation created a greater degree of procedural unconscionability, requiring "'closer scrutiny' of the agreement's substantive fairness." (*Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1268.) We conclude they did.

"Procedural unconscionability pertains to the making of the agreement and requires oppression or surprise." (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 285.) "The 'oppression' component of procedural unconscionability 'arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party.' [Citation.] 'Surprise is defined as "'the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.'"'" (*Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 688.) "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348, fn. omitted.)

The circumstances of Kho's execution of the Agreement demonstrated a high degree of oppression. As noted, the Agreement was not negotiated but presented on a take-it-or-leave-it basis. Further, the Agreement was submitted to Kho for signature at a time when One Toyota was already his employer; in the absence of any explanation, Kho could have inferred that execution of the document was expected of him as a condition of his employment. To avoid this implication, One Toyota could have excused Kho from his work station, submitted the Agreement to him with an explanation of both its purpose and

meaning, and explained its significance, if any, for his further employment. It chose to do none of those things. Instead, the document was presented to him at his work station, where he was under pressure to perform his job. Not only did One Toyota provide no explanation for its demand for his signature, it selected a low level employee, a "porter," to present the Agreement, creating the impression that no request for an explanation was expected and any such request would be unavailing. These circumstances were highly coercive and appear intended to thwart, rather than promote, voluntary and informed consent.

The issue of surprise is less clear-cut, but it is by no means absent. The Agreement seems intended as a parody of the classic adhesion contract. Written in a single block, without paragraphs to delineate different topics, the arbitration clause is visually impenetrable. Because the entire Agreement occupies less than two pages, there was no practical need for One Toyota to choose a small typeface. Yet the font chosen is so small as to challenge the limits of legibility. Further, the language is legalistic, and the text is complex. The second sentence of the arbitration clause manages to occupy 11 lines of text, notwithstanding the tiny typeface. Some of the language, such as the reference to Code of Civil Procedure section 1284.2, requires a specialist's legal training to understand. It cannot be said that One Toyota was attempting to hide the ball by burying the arbitration clause in an otherwise prolix agreement, since the Agreement consists almost entirely of the arbitration clause. Yet the Agreement is drafted and composed in a manner, again, to thwart rather than promote understanding.[7] For these reasons, we

[7] Because the record contains no information about Kho's English facility, we are less concerned with the failure to present him with a version of the Agreement written in Chinese, his native language.

conclude that the degree of procedural unconscionability was extraordinarily high.

2. Substantive Unconscionability

Although we find a high degree of procedural unconscionability, we conclude the Agreement is 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."[8] (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.)

The commissioner first argues that the Agreement is substantively unconscionable under general arbitration law because it is unduly harsh or one-sided. (E.g., *Sanchez*, *supra*, 61 Cal.4th at p. 911.) In the abstract, however, the arbitration provisions of the Agreement are neither harsh nor one-sided. The arbitration clause does not, for example, require arbitration of claims most likely to be filed by an employee while excluding those of an employer. (E.g., *Carbajal v. CWPSC, Inc.*, *supra*, 245 Cal.App.4th at p. 248.) Nor does it contain any other substantive features that appear, on their face, designed to benefit the employer. (See *id.* at pp. 250-251 [arbitration clause required each party to bear own fees, effectively waiving various employee fee recovery statutes].) The

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Many American immigrants who were born speaking another language are fluent in written English.

[8] This requirement applies only to an arbitration clause contained in a contract of adhesion. While we find it unnecessary to review the procedural unconscionability of Kho's execution of the Agreement, we have no doubt that the Agreement was a contract of adhesion, given the circumstances of its execution. (See *Sonic II, supra*, 57 Cal.4th at p. 1133 [a contract of adhesion is drafted by a party of superior bargaining strength and gives to the other party only the opportunity to adhere to the contract or reject it].)

Agreement anticipates a proceeding very much like ordinary civil litigation, with no special procedural features that would tend to favor One Toyota—any more, at least, than the complexity and expense of civil litigation naturally tends to favor a party with greater sophistication and financial resources.

Rather, the Agreement can be argued "harsh or one-sided" only in comparison to the various features of the Labor Code that seek to level the playing field for wage claimants—features that, as the Supreme Court characterized them, are "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." (*Sonic II*, *supra*, 57 Cal.4th at p. 1146.) The premise of *Sonic II*, however, was that these various features lawfully could be waived by an arbitration agreement governing wage claims, and the court presumably factored the permissibility of such a waiver into its unconscionability standard. As the court held, "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." (*Ibid.*) In other words, waiver of the various employee-friendly wage claim provisions of the Labor Code does not make an arbitration agreement unconscionable so long as the resulting arbitration procedure is

"affordable and accessible." We proceed on that assumption in considering the Agreement.

As to the first factor, affordability, One Toyota acknowledges that it must pay all costs of arbitration under the Agreement. As noted above, the Agreement provides that the parties will split the costs of arbitration, as required by Code of Civil Procedure section 1284.2, unless "statutory provisions or controlling case law" provide otherwise. With respect to wage claims, One Toyota concedes that the Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) requires an employer to pay the costs of arbitration, notwithstanding section 1284.2. *Armendariz* held that certain statutory rights cannot be waived and that arbitration agreements encompassing such rights "must be subject to particular scrutiny."[9] (*Armendariz*, at pp. 100, 101.) Given the importance of these rights, *Armendariz* held, an agreement requiring their arbitration must be interpreted to require the employer to pay any costs of arbitration "that the employee would not be required to bear if he or she were free to bring the action in court." (*Id.* at pp. 110-111.)

Accordingly, the Agreement's silence on arbitration costs must be interpreted under *Armendariz* to require One Toyota to pay the costs of arbitration. Because Kho will not be required to pay any costs of arbitration not required by the civil courts, the *Sonic II* requirement of affordability is presumably satisfied here.

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[9] Although *Armendariz* concerned the rights established by the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), One Toyota does not dispute that statutory wage rights are similarly unwaivable.

We find no merit in the commissioner's argument that the Agreement is unconscionable because it does not expressly inform Kho that One Toyota must pay the arbitral costs of a wage claim. The Agreement was intended to deal with a wide variety of legal claims potentially asserted by an employee against his or her employer, or vice versa. It is therefore not surprising that it does not contain any provision specifically addressing the allocation of costs for wage claim arbitration. Although the Agreement does not discuss the law applicable to cost-sharing with respect to any specific claim, it does recognize that there are statutory and common law exceptions to the general rule of cost-sharing established by Code of Civil Procedure section 1284.2, implicitly acknowledging the possibility, with respect to some claims, that One Toyota will be required to pay the costs. The arbitration clause is not unconscionable merely because it does not attempt to characterize those claims.

The trial court held, and the commissioner argues, that the arbitration envisioned by the Agreement is not affordable because it will require Kho to retain counsel, while the Labor Code permits a wage claimant to be represented by the commissioner in a de novo proceeding following the Berman hearing and provides for recovery of attorney fees to a prevailing wage claimant.[10] (Lab. Code, §§ 98.2, subd. (c), 98.4.) We do not agree that the absence of representation by the commissioner makes arbitration

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[10] Labor Code section 98.4 provides: "The Labor Commissioner may, upon the request of a claimant financially unable to afford counsel, represent such claimant in the de novo proceedings provided for in Section 98.2. In the event that such claimant is attempting to uphold the amount awarded by the Labor Commissioner and is not objecting to any part of the Labor Commissioner's final order, the Labor Commissioner shall represent the claimant."

unaffordable for purposes of *Sonic II*. First, legal representation for an employee is the most obvious expense arising in connection with wage claim arbitration. If the *Sonic II* court believed an arbitration agreement must provide for free counsel to avoid unconscionability, it easily could have said so, just as *Armendariz* expressly required the payment of other arbitration costs. *Sonic II* did not articulate this requirement, and its silence on the point is suggestive. Second, it must be understood that a wage claimant has no absolute right to counsel in the de novo portion of wage claim litigation. Representation lies in the discretion of the commissioner, unless the claimant has already prevailed at the Berman hearing and does not challenge that award. The Agreement therefore does not necessarily require an expense beyond that necessary under Labor Code procedures. Third, the claimant is not required to retain counsel for the arbitration but may proceed in pro. per. While this is certainly not the best approach, it is the option facing every litigant in ordinary civil litigation. The type of proceeding envisioned by the Agreement, while it is potentially more complex than a typical arbitration hearing, is no more complex than the civil litigation required for a de novo hearing under the Labor Code. We conclude that the absence of free representation does not make a wage claim arbitration unaffordable.

Nor does the lack of an express employee-favorable attorney fees provision, similar to Labor Code section 98.2, subdivision (c), cause the Agreement to be unconscionable, since the Agreement requires the application of another, similarly favorable provision of the Labor Code. Although the Agreement is silent as to the award of attorney fees, it requires the arbitrator to apply "the law governing the claims and defenses pleaded." Section 98.2 would not apply to an arbitration under the Agreement

because it governs only de novo appeals from a Berman hearing. Labor Code section 218.5, however, applies more generally to "any action brought for the nonpayment of wages" and requires an award of reasonable attorney fees to a prevailing employee, while granting fees to a prevailing employer only if the employee's action was brought in bad faith. (*Id.*, subd. (a).) In some circumstances this provision would be more favorable to an employee than section 98.2, since the latter allows an award of attorney fees to an employer whenever an appealing employee fails to recover any wages, regardless of the employee's good faith. As One Toyota concedes, the required application of Labor Code section 218.5 has essentially the same legal effect as section 98.2, subdivision (c).

While the factors affecting "accessibility" are not explored in *Sonic II*, we find nothing in the proceeding required by the Agreement that would cause it to be inaccessible to an employee. The commissioner argues that the Agreement should be found unconscionable because it replaced the relative simplicity of the Berman hearing with a complex proceeding resembling civil litigation. If the Labor Code required only a Berman hearing to resolve wage claims, the argument might have some force. The result of a Berman hearing, however, is nonbinding. An appeal by either party effectively nullifies the result, in favor of a de novo proceeding in superior court—in other words, in favor of ordinary civil litigation. Because the type of proceeding outlined by the Agreement is similar to civil litigation, it anticipates a proceeding that is no more complex than will often be required to resolve a wage claim under the Berman procedures. Such a proceeding is presumably not inaccessible for purposes of *Sonic II*.

The commissioner contends the proceeding anticipated by the Agreement is inaccessible because the

Agreement does not contain a provision specifying the means for initiating an arbitration. While a well-drawn arbitration clause would have specified such means, the failure to designate a manner of commencing arbitration does not render the clause unconscionable. The failure actually introduces flexibility, since an arbitration presumably can be commenced in any reasonable manner. Although in a roundabout way, Kho effectively commenced an arbitration by filing a wage claim with the commissioner, thereby compelling One Toyota either to litigate under the Labor Code or respond with a petition to compel. A variety of other means would undoubtedly be recognized as sufficient for commencement of an arbitration. Nor do we find the proceeding inaccessible because the Agreement does not refer to a particular arbitration sponsor or set of rules. As noted, the Agreement provides that the proceeding will be governed by the pleading rules of the Code of Civil Procedure and by the Evidence Code, as applicable in California courts.

3. Enforcement of the Agreement

As our discussion likely makes clear, we are disturbed by the manner in which the Agreement was drafted and presented to Kho for signature. Nonetheless, California arbitration law has consistently required both procedural and substantive unconscionability before an arbitration provision will be refused enforcement. (*Sanchez*, *supra*, 61 Cal.4th at p. 910 [unconscionability requires both procedural and substantive unconscionability]; *Aleman*, *supra*, 241 Cal.App.4th 1233, 1248 [where no procedural unconscionability, arbitration agreement could not be found unconscionable].) Although a high degree of procedural unconscionability ordinarily imposes "'closer scrutiny' of the agreement's substantive fairness" (*Farrar v. Direct Commerce, Inc.*, *supra*, 9 Cal.App.5th at p. 1268), *Sonic II*

appears to establish affordability and accessibility as a safe harbor when the claim of substantive unconscionability is premised on the waiver of Berman procedures. Given our conclusion that the Agreement is not substantively unconscionable under *Sonic II*, we must reverse the trial court's order denying the petition to compel arbitration.

C. Waiver

Although the commissioner does not contend on appeal that One Toyota waived its right to arbitrate entirely, it does contend that One Toyota's delay in asserting its right to arbitrate waived its right to avoid a Berman hearing.

We discussed the law relating to waiver of arbitral rights through delay in *Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438: "'State law, like the [Federal Arbitration Act (9 U.S.C. § 1 et seq.)], reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver [citation], waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.' [Citation.]

"'Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. [Citations.] "'In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. . . .'" . . .' [Citation.]

"'[W]hether litigation results in prejudice to the party opposing arbitration is critical in waiver determinations.' [Citation.]' "'The moving party's mere participation in litigation is not enough [to support a finding of waiver]; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration.' [Citation.]" [Citations.] [¶] . . . [¶] . . . "[C]ourts will not find prejudice where the party opposing arbitration shows *only* that it incurred court costs and legal expenses." [Citation.]' [Citation.] 'Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect "'a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution'" and are intended "'to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.'" [Citation.] Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence [citation].'" (*Gloster v. Sonic Automotive, Inc.*, *supra*, 226 Cal.App.4th at pp. 447-448.)

In her briefs, the commissioner did not attempt to demonstrate prejudice accruing from One Toyota's delay in asserting its right to arbitrate, and we find none. The first portion of the Berman procedure involves settlement

discussions. We would be reluctant to require an employer to forego settlement discussions in order to preserve the right to arbitration, since such discussions seem of potential benefit to both sides of a wage dispute. While it would have been preferable for One Toyota to have asserted its right to arbitration immediately upon the failure of settlement discussions in order to avoid inconvenience to Kho and the commissioner, inconvenience does not equal prejudice.[11] Neither Kho nor the commissioner was required to spend substantial time or funds in preparation for the Berman hearing, which is informal by design. At oral argument, the commissioner argued Kho was prejudiced by delay, but we find there was no significant delay. The Berman hearing proceeded as scheduled. Although that will now be followed by an arbitration proceeding, One Toyota's assertion of its right to a trial de novo ensured that Kho's wage claim would not be resolved promptly even in the absence of arbitration. One Toyota's assertion of its right immediately prior to the commencement of the hearing therefore caused no prejudice. In the absence of prejudice, we cannot find One Toyota to have waived its right to assert the Agreement.

Without discussing the extensive case law governing waiver of the right to arbitrate, the commissioner cites

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[11] In finding that One Toyota did not forfeit its right to arbitration by waiting until the 11th hour to file its petition to compel, we do not mean to suggest we condone its conduct. At oral argument, One Toyota insisted it waited until the morning of the hearing to inform Kho and the commissioner of its decision on the chance the matter would settle on the eve of the hearing. Yet the record reveals that One Toyota's last settlement effort occurred months before the hearing, and it made no attempt to settle at the Berman hearing, where its attorney stayed only long enough to serve Kho with papers. While we find no forfeiture in the absence of prejudice, we do find an unacceptable lack of courtesy.

language from *Sonic II* in an attempt to argue that the decision requires a petition to compel arbitration to be filed sufficiently far in advance of a scheduled Berman hearing to allow the petition to be decided prior to the hearing. It is clear, however, that *Sonic II* was not concerned with waiver and did not purport to render any holding with respect to that issue. The commissioner's attempt to construe the decision as establishing a deadline for the filing of a petition to compel must therefore be rejected. (See *People v. Brooks* (2017) 3 Cal.5th 1, 110 ["It is axiomatic that a case is not authority for an issue that was not considered."].)

D. The Commissioner's Cross-appeal

Given our conclusion that Kho waived his right to pursue the Berman procedures in favor of the arbitration procedure contained in the Agreement, the commissioner's appeal of the order vacating the ODA is moot. Even if we concluded the trial court erred in vacating the ODA, we could not render effective relief because Kho was not entitled to a Berman hearing in the first place. (See *McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 375 [matter is moot when the court cannot grant effective relief].) We accordingly affirm the trial court's order vacating the ODA.

III. DISPOSITION

The trial court's denial of One Toyota's petition to compel arbitration is reversed, and its order vacating the ODA is affirmed. The matter is remanded to the trial court with directions to enter a new order granting the petition to compel arbitration. One Toyota may recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

Appendix

COMPREHENSIVE AGREEMENT EMPLOYMENT AT-WILL AND ARBITRATION

1. It is hereby agreed by and between Ken Kho (hereinafter "Associate" and One Toyota of Oakland (hereinafter "Company") that the employment and compensation of Associate can be terminated by the Company or the Associate at any time, with or without cause and/or with or without notice, at the option of the Company or the Associate.

2. I also acknowledge that the Company utilizes a system of alternative dispute resolution that involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable local, state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, associates, agents, and parties affiliated with its associate benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable

law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective, or joint action lawsuit or arbitration (collectively "class claims"). Notwithstanding the prohibition herein against "class claims" in arbitration, where my aggregate claims seek a small amount of damages (*e.g.,* relief that would otherwise require or permit me to proceed in a California Small Claims action), and where the arbitrator makes a specific factual finding after an evidentiary hearing that the prohibition against "class claims" would, for my specific claims, become an exemption to the Company from responsibility for its own alleged willful injury to me and that such prohibition against "class claims" violates fundamental notions of fairness to the extent that the arbitrator determines that the prohibition against "class claims" is substantively unconscionable, I will be permitted to bring "class claims" in binding arbitration subject to all the legal requirements for maintaining "class claims." I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations

Act, including but not limited to challenging the limitation on a class, collective, or join action. I understand and agree that after I exhaust administrative remedies through the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission, I must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business (repairing automobiles and selling automobiles and parts coming from outside the State) and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all the Act's other mandatory and permissive rights to discovery). However in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. The arbitrator shall be vested with authority to determine any and all issues pertaining to the dispute/claims raised, any such determinations shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (included but not limited to, notions of "just cause") for his/her determinations other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in

accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. **Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4), even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to the arbitration: thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement.**

I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY.

3. It is further agreed and understood that any agreement contrary to the foregoing must be entered into, in writing, by the President of the Company. No supervisor

or representative of the Company, other than its President, has any authority to enter into any agreement for employment for any specified period of time or make any agreement contrary to the foregoing. Oral representations made before or after you are hired do not alter this Agreement.

4. This is the entire agreement between the Company and the Associate regarding dispute resolution, the length of my employment, and the reasons for termination of employment, and this agreement supersedes any and all prior agreements regarding these issues.

5. Should any term or provision, or portion thereof, be declared void or unenforceable it shall be severed and the remainder of this agreement shall be enforced.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.

Signed at One Toyota, California, this 22 day of Feb, 2013.

Associate's Signature:	/s/ Ken Kho
Print Name:	Ken Kho
Date:	2/22/13

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA

RG15781961

One Toyota of Oakland
Plaintiff/Petitioner

v.

KHO,
Defendant/Respondent

Filed: February 3, 2016

ORDER
MOTION FOR RECONSIDERATION DENIED

The Motion for Reconsideration was set for hearing on 02/03/2016 at 01:30 PM in Department 14 before the Honorable Evelio Grillo. The Tentative Ruling was published and was contested.

Third Party and Moving Party Labor Commissioner, State of California; Department of Industrial Relations appearing by counsel Fernando Flores.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of the Labor Commissioner for Reconsideration of Order Granting Petitioner's Motion to Vacate Labor Commissioner's Order is denied.

APPENDIX D

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

RG15781961

ONE TOYOTA OF OAKLAND,
Petitioner,

v.

KEN KHO,
Respondent.

LABOR COMMISSIONER, STATE OF CALIFORNIA,
Intervener

Filed: December 11, 2015

ORDER ON PETITIONER'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

The motion by One Toyota of Oakland ("Petitioner") to compel Ken Kho ("Respondent") to arbitrate his claims against Petitioner arising out of his employment, including those pending before the Department of Labor Standards Enforcement; and to stay this action until arbitration is completed, came on regularly for hearing on November

23, 2015, in Department 14 of the above-entitled court, the Honorable Evelio Grillo presiding. Petitioner appeared by counsel David A. Hosilyk and the law firm of Fine, Boggs & Perkins, LLP. Intervenor Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California ("DLSE") appeared by counsel Fernando Flores, Attorney for Labor Commissioner. Following the hearing, the court took the matter under submission, and now rules as follows:

The petition to compel arbitration is DENIED.

Petitioner alleges that it employed Respondent. The employment agreement includes a written arbitration provision requiring the parties to arbitrate all "disputes which may arise out of the employment context." Petitioner alleges that a "controversy" has arisen, within the meaning of the arbitration provision, because Respondent has filed a claim for unpaid wages against Petitioner DLSE. Petitioner seeks to compel arbitration of Respondent's claim for unpaid wages.

On October 9, 2014, Respondent filed an administrative claim with the DLSE under the statutory scheme for adjudication of wage claims under the DLSE non-binding "Berman" administrative procedure. (Labor Code secs. 98-98.8.) Petitioner was first notified of Respondent's administrative wage claim on October 17, 2014, when notice of a Settlement Conference was provided. The Settlement Conference was held on November 10, 2014, and Petitioner and Respondent appeared. Petitioner made a settlement offer in December 2014, which Respondent rejected. Respondent requested a hearing and on January 30, 2015, the DLSE sent notice that a hearing would be scheduled. On March 26, 2015, the DLSE sent notice to Petitioner of the Berman hearing scheduled for August 17, 2015. On July 6, 2015, the DLSE issued a Subpoena

Duces Tecum to compel Petitioner to produce various documents at the August 17, 2015 hearing.

On August 14, 2015, Petitioner filed the Petition to Compel Arbitration in this case. On the morning of the administrative hearing on August,17, 2015, counsel for Petitioner faxed a letter to the DLSE indicating that Respondent and Petitioner had agreed to arbitrate all employment-related disputes and informing the DLSE that a Petition to Compel Arbitration had been filed with this court on August 14, 2015. Petitioner requested that the Berman hearing be taken off calendar until the completion of the arbitration. The Labor Commissioner refused to drop the hearing. Respondent appeared briefly at the hearing, but only to inform the Respondent and the Labor Commissioner of the existence of the arbitration agreement and its demand for arbitration.

After the hearing, the Labor Commissioner issued an Order, Decision, or Award ("ODA") dated August 25, 2015 awarding $158,546.21 to Respondent from Petitioner. Petitioner has appealed the ODA.

Under the Code of Civil Procedure section 1281.2, if a party files a petition alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate that controversy, the court is required to order the petitioner and respondent to arbitrate the controversy if it determines that a written agreement to arbitrate the controversy exists, unless one of the three exceptions provided in section 1281.2 is applicable.

Petitioner has established that Respondent entered into a written agreement to arbitrate all claims, disputes or controversies arising out of his employment with Petitioner. There is also no dispute that a controversy and dispute has arisen with regard Respondent's employment, because Respondent has filed a claim for unpaid wages against Petitioner with the DLSE. Finally, Petitioner has

established that Respondent refuses to arbitrate his claims. Thus, Petitioner has satisfied the prima facie requirements for an order compelling Respondent to arbitrate his claims for unpaid wages and any other claims arising from his employment with Petitioner. (Code. Civ. Proc., sec. 1281.2.)

The DLSE argues that two of the exceptions under section 1281.2 are applicable. First, the DLSE argues that the petition should be denied because the right to compel arbitration has been waived by Petitioner. Second, the DLSE argues that grounds exist for revocation of the agreement based on the fact that it is unconscionable.

I. UNCONSCIONABILITY

A party opposing arbitration on the ground that the agreement is unconscionable has the burden of proof. Under California law, an agreement can only be found unconscionable if it is both procedurally and substantively unconscionable. It is not necessary that procedural and substantive unconscionability be present to the same degree. If there is a strong showing of procedural unconscionability, the burden to show substantive unconscionability is lessened, and vice versa. (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1123-1126.)

The procedural element of unconscionability addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246.) Procedural unconscionability generally takes the form of a pre-printed contract of adhesion imposed by the party with superior bargaining strength on the weaker party on a "take-it-or-leave-it" basis. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.3d 83, 113-114). Although an arbitration

agreement that is an essential part of a "take-it-or-leave-it" employment condition, without more, is procedurally unconscionable (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114), failure to provide information about the applicable arbitration rules is another factor that supports procedural unconscionability. (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 84; *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393.)

The DLSE has made a strong showing of procedural unconscionability. The evidence provided shows that Respondent, who was hired as an automotive technician, signed 3-5 documents on the first day of work, over the course of 5-7 minutes. Additional papers were brought to Respondent for his signature about 3 years later in February 2013, at his work station, and he was asked to sign and return them immediately to the human resources representative. The February 2013 documents include the arbitration provisions at issue in this case. Respondent asserts that he did not have time to review the documents, no one explained them to him, and he was not given a copy of the documents after he signed them. The agreement does not provide any information about the rules governing the arbitration and does not indicate how to initiate arbitration. These facts are all consistent with the conclusion that the arbitration provision was imposed on Respondent under circumstances that created oppression or surprise due to unequal bargaining power.

Contrary to the argument made by Petitioner in reply, the holding in *Nelsen, supra,* 207 Cal.App.4th at 1124 does not reject the rule that failure to provide information about the applicable rules governing the arbitration is a factor that shows procedural unconscionability. In addition, Petitioner argues in reply that the agreement gave

sufficient notice of the applicable rules governing the arbitration by stating that the arbitration and the agreement were controlled by the Federal Arbitration Act, in conformity with the California Arbitration Act, including the California Act's mandatory and permissive rights to discovery. The agreement's vague references to the Federal and California Acts, and to procedures in the California act, including rights to discovery, do not provide the type of notice that is sufficient to avoid procedural unconscionability based on failure to provide information about the arbitral procedures. The reference to the entire Federal and California statutory schemes does not provide notice to a reasonable person of the procedures that will be used during the arbitration, or how information about those procedures can be obtained.

Thus, the court concludes that evidence provided by the DLSE supports the finding that there was a high level of procedural unconscionability connected with the execution of the arbitration agreement in this case. As a result, although the DLSE must also show substantive unconscionability, the level of substantive unconscionability necessary to invalidate the agreement is lessened.

Substantive unconscionability occurs when an agreement is one-sided and the contract as a whole, or a term or clause, creates an overly harsh effect. (*Lhotka v. Geographic Explorations* (2010) 181 Cal.App.4th 816, 824-825.)

The DLSE contends that the agreement in this case is unconscionable because it deprives an employee such as Respondent of the dispute resolution procedures available under Labor Code sections 98-98.8. Under that statutory scheme, an employee seeking to recover wages from an employer is entitled to file a claim with the DLSE Labor Commissioner. Proceedings before the DLSE are

free from filing fees or expenses, there is no right to discovery other than the right to issue subpoenas for documents or the personal attendance of witnesses, and the DLSE will issue the subpoenas on behalf of parties who require that service for free. The administrative process ends with a Berman hearing. The results of the hearing can be appealed to the Superior Court, but an undertaking in the amount of the award is required if the employer appeals, which facilitates the process of recovery if the employee succeeds. When a timely appeal is properly filed, the Superior Court conducts a de novo trial (Lab. Code, sec. 98.2.). In addition, although section 98.2 provides that a party seeking review who does not succeed is liable for the costs and attorney's fees incurred by the other parties on appeal, an employee is considered successful if the court awards an amount greater than zero. In addition, an employee claimant who is unable to afford counsel on appeal may request that the Labor Commissioner represent the claimant in the de novo proceeding before the Superior Court, and the Labor Commissioner is required to represent the claimant if the claimant is seeking to uphold the amount awarded by the Labor Commissioner and is not objecting to any part of the final administrative order. (Lab. Code, sec. 98.4.)

Respondent also asserts that the arbitration agreement is unconscionable because it does not state who will pay for the costs of arbitration, and conveys the misleading impression that the arbitrator may award attorney's fees to an employer when an employee does not prevail. Under the holding in *Armendariz, supra,* 24 Cal.4th at 110-111, an employer cannot impose any type of expense on an employee during the arbitration that the employee would not be required to bear if he or she were free to bring the action in court.

Petitioner contends that the failure to state which side will pay the costs of the arbitration does not support a substantive unconscionability finding, because under the rule in *Armendariz,* Respondent will not be required to pay the costs of arbitration. Petitioner argues that the lack of an explicit provision with regard to payment of the arbitrator's fees is relevant to the issue of "surprise" and procedural unconscionability only. This argument is not persuasive. The fact that the agreement did not give notice that an employee seeking to compel arbitration will not be required to pay the costs of arbitration beyond those costs that would be incurred in a court action creates a disincentive for an employee to initiate arbitration.

Respondent and Petitioner both rely on the holding in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), in which the court provided guidance about when an arbitration agreement that deprives an employee of rights under the Berman statutory scheme is unconscionable:

> Although 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, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer. As we explained in *Sonic I* and reiterate below, the Berman statutes confer important benefits on wage claimants by lowering the costs of pursuing their claims and by ensuring that they are able to enforce judgments in their favor. There is no reason why an arbitral forum cannot provide these benefits, and an employee's surrender of such benefits does not necessarily make the agreement unconscionable. The fundamental fairness of the bargain, as with all contracts, will depend on

> what benefits the employee received under the agreement's substantive terms and the totality of circumstances surrounding the formation of the agreement.

(*Id.* at 57 Cal.4th at pp. 1124-1125.)

The court in *Sonic II* also noted:

> But the waiveability 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.

(*Id.* at pp. 1146-1147.)

Finally, the court in *Sonic II* explained:

We emphasize that there is no single formula for designing an arbitration process that provides an effective and low-cost approach to resolving wage disputes. There are potentially many ways to structure arbitration, without replicating the Berman protections, so that it facilitates accessible, affordable resolution of wage disputes. We see no reason to believe that the specific elements of the Berman statutes are the only way to achieve this goal or that employees will be unable to pursue their claims effectively without initial resort to an administrative hearing as opposed to an adequate arbitral forum. Waiver of the Berman protections will not, by itself, support a finding of unconscionability where the arbitral scheme at issue provides employees with an accessible and affordable process for resolving wage disputes. The unconscionability inquiry is not a license for courts to impose their renditions of an ideal arbitral scheme. Rather, in the context of a standard contract of adhesion setting forth conditions of employment, the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby "effectively blocks every forum for the redress of disputes, including arbitration itself." (*Gutierrez, supra,* 114 Cal.App.4th at p. 90, 7 Cal.Rptr.3d 267.)

In *Sonic I*, we acknowledged that outside the context of an adhesive form contract, other considerations may inform the unconscionability inquiry. Evidence that a Berman waiver is part of a nonstandard contract freely negotiated by parties of comparable bargaining power, "such as may exist between an employer and a highly compensated executive employee," weighs against a finding of unconscionability. (*Sonic I, supra,*

51 Cal.4th at p. 682, fn. 7, 121 Cal.Rptr.3d 58, 247 P.3d 130.) Whether Moreno, who was not a low-wage worker at Sonic and whose wage claim alleges "'[v]acation wages for 63 days: . . . at the rate of $441.29 per day'" (*id.* at p. 670, 121 Cal.Rptr.3d 58, 247 P.3d 130), had comparable bargaining power or freely negotiated his contract are matters for the trial court to determine on remand. Further, when a negotiated or nonstandard contract is at issue, terms of employment unrelated to arbitration may confer substantial benefits that inform the fairness of requiring the employee to surrender statutory protections in favor of arbitration. In addition, Civil Code section 1670.5, subdivision (b) indicates that any evidence concerning the "commercial setting, purpose, and effect" of the agreement is pertinent to the inquiry.

In sum, the unconscionability doctrine does not mandate the adoption of any particular form of dispute resolution mechanism, and courts may not decline to enforce an arbitration agreement simply on the ground that it appears to be a bad bargain or that one party could have done better. The unconscionability doctrine is instead concerned with whether the agreement is unreasonably favorable to one party, considering in context "its commercial setting, purpose, and effect." (Civ.Code, § 1670.5, subd. (b).) In applying the doctrine to the arbitration agreement here, the trial court may consider as one factor Moreno's surrender of the Berman protections in their entirety, although that factor alone does not necessarily render the agreement unconscionable. Because it may not have been clear before our decision today that evidence concerning the specific arbitral scheme at issue in this case is pertinent to the unconscionability inquiry, the parties will have the opportunity to present such evidence in

> order to inform the trial court's unconscionability determination. "Since unconscionability is a contract defense," it will be Moreno's burden on remand to prove "that an arbitration provision is unenforceable on that ground." (*Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708, 123 Cal.Rptr.3d 547.)

(*Id.* at pp. 1146-1147.)

Based on the holding in *Sonic II,* the court concludes that the arbitration agreement in this case is substantively unconscionable. First, the court can consider the fact that the agreement required Respondent to surrender the Berman protections in their entirety in determining whether it renders the agreement unconscionable. And, the waiver of Berman protections in the context of an agreement that does not provide the employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability. (*Sonic II supra,* 57 Cal.4th at 1146.)

In this case, the arbitration provision provides that all rules applicable to civil actions in California are applicable, including the rules of evidence, the rules of pleading including the right to demurrers and motions for judgment on the pleadings, the right to bring a motion for summary judgment, and the right to judgment under Civil Code section 631.8, which allows the defendant to move for judgment at the conclusion of the plaintiffs case. The arbitration provision provides that all mandatory and permissive rights to discovery under the California Action are applicable, including the right to take depositions under Code of Civil Procedure section 1283.05. As discussed above, it is not clear what other procedural rules are applicable.

Based on the evidence before the court, the arbitration agreement in this case deprives employees of the benefits of the Berman hearing process without providing any corresponding benefits to achieve the goal of the Berman hearing procedure. As a practical matter, the process contemplated by the arbitration agreement is similar in nature to litigation in the Superior Court. An employee seeking to vindicate the right to unpaid wages under the agreement will almost necessarily be required to hire counsel. But the agreement does not include an attorney's fees clause, which might be used to induce counsel to agree to represent an employee. Thus, any judgment obtained by an employee under the arbitration agreement in this case would almost necessarily be reduced by the expense of hiring counsel. This has the obvious effect of discouraging, if not precluding, attempts to recover lost wages that do not justify the costs necessary for an attorney to draft pleadings, defend demurrers and motions to strike, attend depositions, introduce evidence at trial, and respond to motions for judgment at trial. In addition, unlike the procedures applicable to an appeal of a Berman hearing, there is nothing in the agreement that provides an efficient method for an employee to recover the judgment. Thus, the agreement fails to provide a speedy, informal and affordable method of resolving wages claims and has virtually none of the benefits afforded by the Berman hearing procedure.

Finally, the agreement appears intended to have the effect of eviscerating the protections provided by the Berman procedure, in violation of the public policy in favor of inexpensive resolution of claims for unpaid wages that underlies the Berman procedures. Contrary to the assumption that arbitration is intended to provide an inexpensive, efficient procedure to vindicate rights, the agreement in this case seeks, in large part, to restore the procedural

rules and procedures that create expense and delay in civil litigation. The intent seems further apparent from the fact that Petitioner, after learning that Respondent had filed a claim with the DLSE in October 2014, failed to seek a stay and asserted its right to compel arbitration on the day of the hearing on August 17, 2015. To the extent that the agreement is construed to permit Petitioner to wait almost 10 months from the time a claim is filed with the DLSE until the day a Berman hearing is scheduled to demand arbitration, thereby creating unnecessary delay and expense for Petitioner and the DLSE, the arbitration agreement is also unconscionable as a deprivation of the rights to speedy resolution of employee claims for wages on that basis.

The DLSE has made a strong showing that the arbitration agreement in this case is procedurally unconscionable, and has also shown that it is substantively unconscionable. On that basis, the agreement is deemed unenforceable and the petition to compel arbitration is DENIED.

II. WAIVER

The DLSE also argues that Petitioner has waived its right to compel arbitration. (Code Civ. Proc., sec. 1281.2(a).) In light of the court's ruling that the arbitration agreement is unenforceable based on procedural and substantive unconscionability, it is not necessary to rule on Respondent's claim of waiver, and the court declines to do so.

III. STAY PROCEEDING

Petitioners' request to stay this action until arbitration is completed is MOOT in light of the court's ruling on the Petition to Compel Arbitration.

APPENDIX E

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

RG15781961

ONE TOYOTA OF OAKLAND.
Petitioner,

v.

KEN KHO,
Respondent.

LABOR COMMISSIONER, STATE OF CALIFORNIA,
Intervener

Filed: December 11, 2015

ORDER ON PETITIONER'S MOTION TO VACATE ADMINSTRATIVE AWARD

The motion by One Toyota of Oakland ("Petitioner") to vacate the Order, Decision or Award ("ODA") issued by the Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, on August 25, 2015, came on regularly for hearing on November 23, 2015, in Department 14 of the

above-entitled court, the Honorable Evelio Grillo presiding. Petitioner appeared by counsel David A. Hosilyk and the law firm of Fine, Boggs & Perkins, LLP. Intervenor Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California ("DLSE") appeared by counsel Fernando Flores, Attorney for Labor Commissioner. Following the hearing, the court took the matter under submission, and now rules as follows:

The motion to vacate the ODA issued on August 25, 2015 is GRANTED. In this case, Respondent Kenneth Kho ("Respondent") filed an administrative claim with the DLSE's office on October 9, 2014, and a "Berman" hearing was scheduled for August 17, 2015. Petitioner asserts that on the morning of August 17, 2015, counsel for Petitioner faxed a letter to the DLSE indicating that Respondent and Petitioner had agreed to arbitration of all employment-related disputes and that a Petition to Compel Arbitration had been filed with this court on August 14, 2015. Petitioner requested that the Berman hearing be taken off calendar until the completion of the arbitration. The Labor Commissioner refused to take the hearing off calendar. After the hearing, the Labor Commissioner issued an Order, Decision, or Award ("ODA") dated August 25, 2015 awarding $158,546.21 to Respondent from OTO, LLC, dba One Toyota of Oakland, One Scion of Oakland.

Under the holding in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142 (*"Sonic II"*), if an employer and employee have entered into an enforceable agreement to arbitrate disputes arising out of employment, employees are not entitled to proceed with a Berman hearing before proceeding to arbitration. Petitioner provided notice of its arbitration agreement with Respondent and the fact that it had filed a petition to compel

arbitration before the Berman hearing was held. Petitioner failed to attend the hearing for that reason.

Under the circumstances presented in this case, the court finds that the ODA should be vacated, because enforcing the ODA would violate the right of Petitioner to a fair administrative hearing. (Code Civ. Proc., sec. 1094.5(b).) The law with regard to the enforceability of arbitration agreements that require employees to waive Berman procedural rights is unsettled, but it is clear that employers are not required to participate in a Berman hearing prior to arbitration if there is an enforceable arbitration agreement. (*Sonic II, supra*, 57 Cal.4th at 1142.) Here, Petitioner provided notice prior to the hearing of the existence of the arbitration agreement and its petition to compel arbitration. Under the circumstances, Petitioner was substantially justified in refusing to participate in the hearing in relying on the arbitration agreement, and it would be unfair to enforce the ODA. Petitioner and Respondent, on the other hand, will not be significantly prejudiced if the ODA is vacated and a new hearing is held, in which Petitioner has the opportunity to present a defense.

In light of the court's ruling denying the Petition to Compel Arbitration, the Labor Commissioner is authorized to schedule and provide notice of a renewed Berman hearing on Respondent's claims.