Case No. S244630

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioner and Respondent,

v.

KEN KHO

Appellant and Real Party in Interest,

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

Intervenor and Appellant.

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

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

PETITIONER AND RESPONDENT'S ANSWER BRIEF

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STATEMENT OF ISSUES

This Court summarized the issues on review as:

1. Was the arbitration process at issue in this case sufficiently "affordable and accessible" so as to not be unconscionable and, thus, require an employee to forego the right to an administrative Berman hearing on wage claims?

2. Did the employer waive its right to arbitration where the employer demanded to the employee, in the presence of the Labor Commissioner at an initial claim conference, that the employee proceed to arbitration, where the employer continued to try to resolve the claims through the Labor Commissioner after the initial claim conference, and then when ultimately unable to settle the claims, demanded arbitration again on the morning of the Berman hearing, where the employer served the Petition to Compel Arbitration and refused to participate in the hearing to avoid the Labor Commissioner claiming that there was a waiver if the employer proceeded through the first formal adjudication of the claims?

INTRODUCTION

Appellant Ken Kho ("Kho") entered into a written agreement to arbitrate all claims arising out of his employment with Respondent OTO, LLC ("Respondent" or "OTO"). This substantively identical arbitration agreement was upheld previously by this very Court in Sonic-Calabasas A Inc. v. Moreno ((2013) 57 Cal.4th 1109 ("Sonic II")). Indeed, this case is merely a rehash of the identical arguments already addressed by this Court in Sonic II, with respect to all issues absent the waiver issue.

After leaving his employment, Ken Kho filed a claim for unpaid wages with the Labor Commissioner. In response, counsel for Respondent appeared at the Initial Claim Conference to meet with the Labor Commissioner and Kho to try to resolve the claims, as is the normal process prior to a Complaint being issued by the Labor Commissioner. At the Initial Claim Conference, Respondent's counsel demanded that Kho arbitrate and asked the Labor Commissioner to halt the administrative proceedings.

The Labor Commissioner concluded the Initial Conference and invited the parties to try to resolve the claims notwithstanding the termination of the Initial Claim Conference. Kho, at the time, did not agree to arbitration. But he also made no effort to refute his obligation to arbitrate. In fact, settlement communications continued between Respondent's counsel and the Labor Commissioner trying to get the claims resolved without the need for moving forward in arbitration.

Kho, instead of resolving the claims or submitting to arbitration, proceeded to have the Labor Commissioner issue a Complaint for the unpaid wages against Respondent for alleged violations of California's wage-and-hour laws. The Complaint attached at a Notice of Hearing on the

Complaint (Berman Hearing). Despite the Complaint, Respondent continued to attempt to resolve the claims with the Labor Commissioner and directly with Kho. When those efforts failed, Respondent filed a Petition to Compel Arbitration with the Superior Court and appeared at the Berman Hearing for the sole purpose of serving Kho and the Labor Commissioner a copy of the Petition to Compel Arbitration and to make its formal objection in the first official proceeding held by the Labor Commissioner (Berman Hearing). Respondent did not participate in any litigation before the Labor Commissioner and demanded arbitration at all stages of the administrative process both before and after the Complaint was issued.

After the Superior Court refused to send this matter to arbitration because the arbitration provision agreed to by Appellant Kho did not expressly replicate all the features of a Berman hearing, the Court of Appeal appropriately recognized that the holding was flatly contrary to established law and reversed the Superior Court.

The issue of whether contracting parties can waive a Berman hearing in favor of arbitration has already been resolved in the affirmative by the California Supreme Court in Sonic II. This aspect of the Sonic II decision was thereafter clarified by the Supreme Court in Iskanian v. CLS Transp. Los Angeles, LLC ((2014) 59 Cal.4th 348, 365 ("Iskanian")): "Under the logic of Sonic II . . . it is clear that because a Berman hearing interferes with fundamental attributes of arbitration, a Berman waiver is not invalid even if the unavailability of a Berman hearing would leave employees with ineffective means to pursue wage claims against their employers."

Here, the arbitration process contemplated by the arbitration agreement offers a cheaper, faster, and more final resolution than the non-

binding Berman hearing followed by a *de novo* appeal to the Superior Court; essentially, the alternative promoted by the Labor Commissioner and Kho is lengthier and more expensive. The arbitration provision here is not exotic—rather, it is one self-evidently designed to, and does, comply with all aspects of California employment arbitration enforcement doctrine as set forth in the California Arbitration Act as codified in the California Code of Civil Procedure, section 1280 *et seq.* This arbitration agreement, whether by silence or its express terms, provides for an arbitration forum that is both accessible and affordable (free, in fact) to the employee. At the absolute minimum, there is nothing to suggest that it could present a system of resolution that is "so unconscionable that it cannot be enforced." And, as held in Sonic II, the arbitration agreement in this case is governed by the Federal Arbitration Act, which would effectively preclude any of the special rules and procedures requested by Kho and the Labor Commissioner as a condition of employment as clarified most recently by the U.S. Supreme Court. (Epic Systems Corp. v. Lewis (May 21, 2018) U.S. Supreme Court Docket Nos. 16–285, 16–300, 16–307, 2018 WL 2292444.)

Indeed, this very Court recognized, in Sonic II, that individuals can waive any statutory right to a Berman hearing through an arbitration provision. Sonic II also recognized that an arbitration proceeding need not replicate the features of a Berman hearing to avoid unconscionability. (Sonic II, *supra,* 57 Cal.4th at 1147.) As long as the arbitral forum is accessible and affordable to the wage claimant, a Berman waiver does make the arbitration provision unconscionable. In lamenting so-called "protections" lost when a claim does not proceed through the optional Berman hearing process, Kho and the Labor Commissioner ignore clear

directive from the California Supreme Court: "[w]aiver of these protections does not necessarily render an arbitration agreement unenforceable, nor does it render an arbitration agreement unconscionable per se." (Id., at 1146.) Any such waiver may only become relevant in an unconscionability analysis when combined with the lack of an accessible and affordable arbitral forum. This is simply not the case here, as Kho has access to an arbitral forum paid for entirely by OTO. This Court has already effectively disposed of this issue via the principles it enunciated in Sonic II; all that remains here is to apply those ruling to the facts here and uphold the Court of Appeal's ruling that, through the arbitral process laid out by the California Code of Civil Procedure and incorporated by the arbitration agreement, Kho has an accessible and affordable forum to avail himself of his claims.[1]

The Labor Commissioner argues that, regardless of the enforceability of the Berman waiver, this Court should reinstate the Order, Decision or Award issued by the Labor Commissioner. Again, Sonic II is dispositive: the "FAA preempts a state-law rule categorically requiring arbitration to be preceded by a Berman hearing." Yet, by proceeding with the Berman hearing while a petition to compel arbitration was pending, the Labor Commissioner trampled upon the right of OTO to enforce the arbitration agreement pursuant to the Federal Arbitration Act and the California Arbitration Act. By reinstating the ODA, the Court would give the Labor Commissioner the unfettered right to ignore ongoing court

[1] It should also be made clear that even under the Labor Commissioner's own position, after the matter proceeded to the Berman Hearing, it would have to go to a *de novo* arbitration proceeding if requested by the employer with the Berman Hearing having no binding effect. (*See* Sonic II.)

proceedings and the arbitration agreement itself so long as the court has not enjoined the Berman hearing or entered a final order compelling the matter into arbitration. This is an absurd result that would lead to a marked increase in court proceedings and expense to the parties related to petitions to compel arbitration as employers would be required to seek immediate injunctive relief upon filing a petition to compel arbitration to enjoin the Berman hearing during the pendency of the petition. This unfettered right, however, is exactly what the Labor Commissioner seeks. (*See* Commissioner's Brief at p. 47.) Such a right would, in practice, reverse Sonic II by interfering with employers' recognized rights to enforce Berman waivers and would be categorically preempted by the Federal Arbitration Act. This Court should not sanction this and instead leave the trial order vacating the ODA undisturbed. The matter should be ordered to arbitration as required by the Federal Arbitration Act.

STATEMENT OF FACTS AND PROCEDURAL SUMMARY

On or about February 22, 2013, Ken Kho executed a written agreement which expressly provides for binding arbitration of all disputes between him and OTO. Specifically, he confirmed in writing that:

> I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another . . . 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, . . . shall be submitted to and determined exclusively by binding arbitration. . . . 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. . . .

(CT 5-6).

Notwithstanding the arbitration agreement, Kho filed a claim for unpaid wages with the California Labor Commissioner, which scheduled the matter for an Initial Claim Conference. (CT 8-9).

On November 10, 2014, John Boggs, counsel for OTO, and Kho both attended the Initial Claim Conference (*i.e.*, settlement conference) that a Deputy Labor Commissioner typically holds when a claim is brought before it. (CT 172). Boggs demanded Kho arbitrate his dispute and provided him with a copy of the arbitration agreement. (CT 172). Pursuant to the discussions with the Deputy at the Initial Claim Conference, the parties attempted to resolve the claims short of pursuing arbitration. Indeed, a written settlement offer by OTO was made by Boggs through the Deputy the following month (CT 172). In late March 2015, the hearing was set for August 17, 2015, and Boggs was notified that OTO's offer was

rejected; Boggs told the Deputy that he would seek to try to settle the matter (CT 173) still to avoid having the time and expense of litigating in arbitration or otherwise. Boggs made unreturned phone calls to Kho from May 26, 2015 through July 22, 2015 to discuss settlement; and until July 2015, he expected this matter to settle. (CT 173) as do most claims before the Labor Commissioner, which typically settle just before or at the Berman Hearing.

Prior to the Berman Hearing, OTO filed a Petition to Compel Arbitration. Once again, Respondent demanded that the Labor Commissioner stay her proceedings. (CT 1-25). The Labor Commissioner refused to do so, and proceeded (over objection) to hold the Berman Hearing and issue an Order, Decision, or Award (ODA) on August 25, 2015—all while the petition to compel was pending before the Superior Court. (CT 67-76.) On September 15, 2015, OTO appealed the ODA in the superior court and filed the undertaking required by Labor Code section 98.2(b). OTO filed its motion to vacate the ODA on September 16, 2015 (CT 37-83).

On December 11, 2015, the Superior Court denied the petition to compel arbitration on the grounds that the arbitration agreement was supposedly unconscionable (CT 207-223), but granted OTO's motion to vacate the ODA on the basis that enforcing the ODA would violate OTO's right to a fair administrative hearing under California Code of Civil Procedure section 1094.5(b) because the Labor Commissioner proceeded in the Berman Hearing without the participation of the Respondent, based on Respondent's validated concern that the Labor Commissioner might claim that Respondent waives the right to arbitration if it participates in the

Berman Hearing, (CT 202-205.) This waiver is, of course, what the Labor Commissioner now argues.

On January 4, 2016, the Labor Commissioner moved for reconsideration of the order vacating the ODA. (CT 225–59.) The trial court denied the reconsideration motion on February 3, 2016. The Labor Commissioner appealed the order vacating the ODA on February 16, 2016. (CT 301). Respondent OTO also timely appealed the denial of the petition to compel arbitration. (CT 296).

LEGAL DISCUSSION

I. Federal and California law are clear that Berman Waivers do not render arbitration agreements unconscionable

California Code of Civil Procedure section 1281.2 mandates that

> [o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement.

In the order under appeal and review here, the Superior Court correctly reached certain undisputed points:

> [OTO] has established that [Kho] entered into a written agreement to arbitrate all claims, disputes or controversies arising out of his employment with [OTO]. There is also no dispute that a controversy and dispute has arisen with regard [to Kho's] employment, because [Kho] has filed a claim for unpaid wages against [OTO] with the DLSE. Finally, [OTO] has established that Respondent refuses to arbitrate his claims. Thus, [OTO] has satisfied the prima facie requirements for an order compelling [Kho] to arbitrate his claims for unpaid wages and any other claims arising from his employment with [OTO].

(CT 210). Therefore, the issue before the Court is whether grounds exist for the revocation of the Agreement on the basis of unconscionability, without any special rules that might affect the right to arbitration. (*See* Epic Systems, *supra,* 2018 WL 2292444.)

As the United States Supreme Court has held previously and as recently as May, 2018, employee claims covered by an arbitration agreement between an employee and an employer are subject to mandatory, binding arbitration, and must proceed to arbitration on motion or petition by one of the parties. (Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105; *see also* Code of Civil Procedure section 1290; Armendariz v. Foundation Health Psycyhcare Services, Inc. (2000) 24 Cal.4th 83; Epic Systems Corp., *supra.*) Specifically, the United States Supreme Court and California courts have consistently held that wage claims filed with the Labor Commissioner's office must proceed to arbitration in the face of a valid agreement to arbitrate. (Perry v. Thomas (1987) 482 U.S. 483; Baker v. Aubry (1989) 216 Cal.App. 3d 1259, 1268.)

Moreover, consistent with this State's strong public policy in favor of arbitration (Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 9), the California Supreme Court has held that claims by an employee against his or her employer, whether based on statute, common law, or otherwise, must proceed to binding arbitration in the face of a valid agreement between the parties to arbitrate employment-related claims. (Armendariz, *supra,* 24 Cal.4th 83; *see also* 24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199.) Indeed, California courts have held that "arbitration should be ordered unless the agreement clearly does not apply to the dispute in question." (Vianna v. Doctors' Management Co. (1994) 27 Cal.App.4th 1186, 1189.)

In response to attempts by the California judiciary to hold arbitration agreements to extraordinary standards, the federal Supreme Court in AT&T Mobility LLC v. Concepcion ((2011) 563 U.S. 333, 341) was unequivocal that the Federal Arbitration Act ("FAA") categorically prevents states from holding arbitration agreements to stricter standards of enforceability than other contracts.[2]

Prompted by, and consistent with, AT&T Mobility, the California Supreme Court then recognized that any categorical prohibition on waivers of Berman hearings as a condition of employment was prohibited by federal law, thereby upholding the legality of an agreement between an employee and employer to use the arbitral forum in place of Berman hearings. (Sonic II, *supra*, 57 Cal.4th at 1142.) Agreements to arbitrate claims that would otherwise be adjudicated in Berman hearings before the Labor Commissioner may be lawfully enforced. (Sonic II, *supra,* 57 Cal.4th at 1124.) "[A] court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing." (Id.)

The Superior Court found that there was procedural unconscionability, holding that the agreement should be explained to the employee (CT 212-213). This finding completely contradicts long-standing case law on this subject but is not dispositive of this analysis at this time. As to the issue of substantive unconscionability, the Superior Court found as follows:

> 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

[2] This "sort of 'equal-treatment' rule for arbitration contracts" was reiterated by the United States Supreme Court most recently in Epic Systems, *supra,* 2018 WL 2292444.

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 plaintiff's case. The arbitration provision provides that all mandatory and permissive rights to discovery under the California Action [sic] 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 be 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.

(CT 219-222). Yet, as demonstrated below, not only was there no more than minimal surprise and oppression in the making of the arbitration agreement, but the terms of the arbitration agreement are not one-sided or unfair and do not deprive Kho of an accessible and affordable forum to pursue his wage claims. Indeed, the Court of Appeal found that the procedures of the rules applicable to civil litigation in Superior Court are not an inferior method of enforcing wage rights, especially considering that the Labor Code specifically provides for civil litigation as an alternative to the Berman process. State law therefore does not provide for grounds for a finding of substantive unconscionability.

II. The Superior Court erred in finding that the arbitration agreement was unenforceable and the Court of Appeal decision should be affirmed.

A. The doctrine of unconscionability requires both procedural and substantive unconscionability to bar enforcement of an agreement.

Pursuant to Civil Code section 1670.5(a)—the statute under which arbitration agreements are challenged for unconscionability—"[i]f the court as a matter of law finds the contract of any clause of the contract to have been unconscionable at the time it was made the court may refuse to

enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (*See* Armendariz, *supra,* 24 Cal.4th at 114 [Section 1670.5 applies to arbitration agreements].)

As has been recognized below, unconscionability has both a procedural and a substantive element—both of which must be present in order for a court to exercise its discretion to refuse enforcement. (*See* Armendariz, *supra,* 24 Cal.4th at 114.) "But they need not be present in the same degree. . . . [T]he 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." (Id.)

B. The level of procedural unconscionability here is minute, if it exists at all; the record does not support a finding of adhesion

Procedural unconscionability generally takes the form of a contract of adhesion which is imposed and drafted by a party of superior bargaining strength who places upon the subscribing party only the opportunity to adhere to the contract or reject it. "It is well settled that adhesion contracts in the employment context, this is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.) But assuming the Agreement at issue is adhesive, "this adhesive aspect of the agreement is not dispositive." (Id.)

"Courts have indicated that '[w]hen . . . there is no other indication of oppression or surprise, 'the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless

the degree of substantive unconscionability is high."' (Peng v. First Republic Bank (2013) 219 Cal.App.4th 1462, 1470 [use of a nonnegotiable contract, standing alone, is insufficient to support a finding of procedural unconscionability]; O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245, 259 [adhesive aspect of the contract is not dispositive on issue of unconscionability].)

1. The evidence does not support that this agreement was presented on a take-it-or-leave-it basis

In fact, there is ***no*** evidence in the record before this Court that would support a contention that Kho was told that he had to execute the agreement in order to work or continue working for the OTO. While Kho's declaration lays out his claims that he was asked to sign arbitration agreements at the beginning and in the middle of his employment, that he did so in a matter of minutes without reading them, but he never states that it was presented to him on a take-it-or-leave-it basis. (CT 108-111). Even if the Court were to accept a blanket contention that an employee is always in a weaker bargaining position than the employer, it would not show that this was an adhesive contract as no evidence supports it was presented on a take-it-or-leave-it basis.

It does not appear that ***anything*** about the formation of the arbitration agreement may reasonably be interpreted as oppression. (*See* O'Donoghue, *supra,* 219 Cal.App.4th at 259 [procedural unconscionability low where no evidence of surprise or misrepresentation].) There was no evidence presented by Kho for instance, that he made any effort to ask questions about the terms of the relatively short Agreement and such questions were refused so as to leave him not understanding its terms, that he requested additional time to review or consider the terms of the

Agreement, that he tried to negotiate the agreement, or that he indicated to OTO any intent or desire to decline. There is simply no record evidence to support such a position. Additionally, the terms of the Agreement are clear. There is ***no*** evidence of an effort by the OTO to include any hidden terms within the Agreement or to obfuscate their meaning. (Roman v. Superior Court (2009) 172 Cal.App.4th 1462, 1472-1473 [terms written in clear understandable language did not constitute evidence of surprise].)

2. Kho's apparent failure to exercise reasonable diligence in agreeing to the arbitration agreement does not fulfill the surprise element

Even if the contract were found to be oppressive, further analysis would be required. This is so because procedural unconscionability has two elements: oppression and surprise. (*See* Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, 621.) Both oppression and surprise must be proved by Kho to support a finding of procedural unconscionability. (Id.)

In fact, there is no evidence to suggest that the "surprise" prong is satisfied in this case. (*See* Armendariz, *supra,* 24 Cal.4th at 113 [procedural unconscionability requires a finding that the contract does not fall within the reasonable expectations of the party in the weaker bargaining position].) The stand-alone arbitration agreement signed by Kho is written in easily readable font prefaced with the block heading "**COMPREHENSIVE AGREEMENT EMPLOYMENT AT-WILL AND ARBITRATION.**" (CT 5-6). The clause itself ends with the following block text: "I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY." (Id.) Immediately above Kho's signature line is a reminder of Kho's commitment made by executing the document: "MY

SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS." (Id.) No straight-faced argument can be made that arbitration fell outside of Kho's reasonable expectations. (*See* Olsen, *supra*, 48 Cal.App.4th at 622 [no attempt to conceal or misrepresent]; Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal.App.4th 1159 [same].)

Without any showing that this was a take-it-or-leave-it contract, there can be no finding this was an adhesive contract, and there can be no finding of procedural unconscionability. Likewise, without any showing of surprise, there can be no finding of procedural unconscionability. (*See* Olsen, *supra*, 48 Cal.App.4th at 621.) And without evidence of procedural unconscionability, the agreement must be enforced.

C. There is insufficient evidence of substantive unconscionability to deny enforcement of the agreement

"A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.'" (*See* Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246 *citing* 24 Hour Fitness, Inc., *supra,* 66 Cal.App.4th at 1213.) Through its silence on the matter, the agreement at issue here, by operation of law, provides for the OTO to pay the cost of the arbitration, including the cost of the arbitrator.

The arbitration agreement is silent regarding the division of arbitration costs but provides that employees' claims shall be determined in conformity with the CAA. (CT 5). While under Code of Civil Procedure section 1284.2, when an arbitration agreement is silent on allocation of fees, each party is compelled to pay a pro rata share of the associated costs,