CASE NO. S244630

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OTO, LLC, AN ARIZONA LIMITED LIABILITY COMPANY, DBA ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND,

Plaintiff and Respondent,

v.

KEN KHO,

Defendant and Petitioner, Real Party in Interest,

v.

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

Intervenor and Appellant.

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

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

ANSWERING BRIEF OF PETITIONER/REAL PARTY IN INTEREST, KEN KHO TO *AMICUS CURIAE* BRIEF OF CALIFORNIA NEW CAR DEALER ASSOCIATION

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I. INTRODUCTION

The only *amicus curiae* brief is filed by the California New Car Dealer Association ("CNCDA"). It represents a narrow segment of California's economy: the new car dealers. It brings to this Court no special expertise except to complain that its "members are particularly prone to wage and hour claims given the complex, commission-based pay plans they implement to incentivize and reward employee performance." (See *amicus curiae* brief ("CNCDA Br.") at p. 9.) CNCDA clearly dislikes the Berman statute process. This dislike is manifest as exemplified by its reference to the Berman process as "a useless and wasteful process." (CNCDA Br. at p. 15. See also *id.* at p. 14 ["hyper-technical administrative formalities"] and p. 17 ["very Berman-esque features"].)

CNCDA seems to dislike the Berman process because, apparently, its members repeatedly violate the law and are faced with numerous wage claims, some of which are brought to the Labor Commissioner's office. That predicament should persuade this Court to preserve the Berman statute process, which was created by the Legislature almost 45 years ago and has been amended several times by the Legislature, which obviously views it as an important part of the protections for workers in California. Before addressing some of the specific points made by the CNCDA, we describe immediately below what has caused the predicament that the CNCDA and its members find themselves in.

II. THE PROBLEMS DESCRIBED IN THE CNCDA BRIEF ARE PROBLEMS OF THE MOTOR CAR DEALERS OWN MAKING

More than three years after Mr. Kho was employed, he was required to sign the Arbitration Agreement on February 22, 2013. The date is significant because it occurred shortly before the oral argument in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, cert. den. (2014) 134 S.Ct. 2724 (*Sonic II*) decided on October 17, 2013. Counsel for OTO is the same counsel who argued *Sonic II.* Thus, OTO required Mr. Kho to sign an agreement which it knew was subject to a pending case in this Court which would review almost identical language. OTO chose to bear that risk, knowing that there was a substantial possibility this Court would find the agreement unconscionable.

Even if OTO could not predict this case's outcome in this Court, the decision was clear in October when this Court held that an arbitration agreement had to be "accessible and affordable" and remanded the issue as to the unconscionability of the Arbitration Agreement to the lower court.

OTO's insistence on retaining this Arbitration Agreement and insisting on its enforceability almost six years after Mr. Kho signed it evidences its insistence on preserving this kind of arbitration agreement in the face of the substantial uncertainty as to its validity.

OTO created its own problem by requiring Mr. Kho to sign a pay plan that is unlawful under California law on the same day he was forced to sign the Arbitration Agreement, February 23, 2013. (CT 109.) Labor Code section 226.2, effective January 1, 2016, requires employers to pay for unallocated time for employees such as Mr. Kho, who was paid at a piece

rate.[1] The plan contains no such provision. Even in 2013, the cases had already established the entitlement to be paid for such unallocated time. (See *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 and *Bluford v. Safeway Inc.* (2013) 216 Cal.App.4th 864.)[2] The insistence on such an unlawful pay plan may explain the complaint of the CNCDA that its members are subject to so many wage and hour complaints.[3]

OTO's predicament is caused by its tactical decision not to show up at the Berman hearing conducted in this matter. Rather, it chose to ignore the Berman hearing and litigate and file an appeal after an adverse decision was reached. It certainly had the choice to appear at the Berman hearing and could well have prevailed in some or all of the claims had it chosen to show up. It chose to run the risk of having the Labor Commissioner's Award found to be enforceable, this eliminating its principal procedural defense.

These circumstances demonstrate that the CNCDA and OTO have caused a problem of their own making. They don't like California law, particularly with respect to its piece rate provisions regarding mechanics.

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[1] See Cal. Dept. of Industrial Relations, Frequently Asked Questions, Piece-Rate Compensation – Labor Code § 226.2 (AB 1513) (Nov. 2017) <https://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FAQs.htm> (as of Sept. 17, 2018).

[2] The Assembly and Senate Bill Analyses both reflected the view that the statute just confirmed existing law as reflected in the two cases. (See, e.g., Sen. Com. on Labor and Industrial Relations, Rep. on Assem. Bill No. 1513 (2015-2016 Reg. Sess.) Sept. 3, 2015; Assem. Floor Analysis, Concurrence in Sen. Amendments to Assem. Bill No. 1513 (2015-2016 Reg. Sess.) as amended Sept. 9, 2015 [additional bill analyses available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1513 (as of Sept. 17, 2018)].)

[3] The Senate and Assembly bill analyses both noted the high level of complaints about the piece rate systems of new car dealers.

In response, they've attempted to erect a substantial barrier to the pursuit of such claims by the enforced use of this Arbitration Agreement.

III. THE ISSUES RAISED BY CNCDA UNDERMINE THE ARGUMENT THAT THE OTO ARBITRATION AGREEMENT IS "ACCESSIBLE AND AFFORDABLE"

A. THE STANDARD OF EVALUATING ARBITRATION AGREEMENTS, ADVOCATED BY CNCDA, HAS BEEN REPEATEDLY REJECTED BY THIS COURT

CNCDA proposes the threshold question as follows: "Does the arbitration agreement operate to bar the door to any forum in which the employee may resolve their wages dispute?" (CNCDA Br. at p. 17.)[4]

The brief deletes in that proposed statement of the issues, the words "effectively blocks every forum," which appear in the quotation in *Sonic II* (quoting a Court of Appeal case) on which CNCDA relies. (*Sonic II*, *supra*, 57 Cal.4th at p. 1148.) The adverb substantially modifies the "bar the door" test now advocated by the CNCDA. No party to this proceeding has argued that the threshold test is whether the Arbitration Agreement blocks or bars a claim. We agree that the hurdles raised by the various litigation requirements, when compared to the informality of the Berman hearing process, is an effective bar, but is not a complete bar, as the CNCDA has advocated should be the standard. (See also Opening Brief of Labor Commissioner at p. 9 ["effectively blocks every forum"].)

Because CNCDA proceeds from this false threshold, its arguments should be wholly disregarded.

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[4] If the arbitration agreement expressly barred a claim, the claim could be pursued in another forum. The OTO Arbitration Agreement completely excludes certain medical and disability benefits claims as well as claims brought before the National Labor Relations Board.

B. THE CNCDA BRIEF IGNORES ALL THE BENEFITS THAT TILT THE BERMAN STATUTE PROCESS IN FAVOR OF WORKERS AND AGAINST EMPLOYERS

Nowhere in the CNCDA brief does it admit that there are substantial advantages to a worker who brings a wage claim through the Berman process. Those advantages are detailed in Real Party in Interest's Opening Brief at pages 30-35. (See also Opening Brief of Labor Commissioner at pp. 30-41.) No party contests the right of the Legislature to establish procedural and substantive protections for workers. This Court's recent decision in *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 again reflects the recognition that California law is substantively tilted in the favor of workers and against employers who do not comply with state law. The brief of the CNCDA decidedly ignores all of the advantages written into the government statutes to provide a favorable forum and process by which workers can collect unpaid compensation and make other relevant claims before the Labor Commissioner.[5]

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[5] It is worth noting that the statutes are filled with substantive procedural protections for merchants, consumers, workers, patients, doctors, medical providers, property owners, and so on, none of which must be abandoned in arbitration procedures. The CNCDA does not propose, for example, that all of the provisions of the lemon laws protecting car buyers should be abandoned or skewed in favor of car dealers in an arbitration process. Nor would the CNCDA argue that the right of its members, as car dealers, be truncated by an arbitration process with an automobile manufacturer. Rather, it has continuously sought to tilt the playing field in their favor and against manufacturers. (See, e.g., Assem. Bill No. 2107 (2017-2018 Reg. Sess.) [extends protections to new car dealers against manufacturers].) Here, the Legislature has decidedly tilted the playing field against employers who don't comply with wage and hour laws. Arbitration cannot be used to undermine those procedures nor the statutory provisions that protect employees from new car dealers.

1. There Is No Requirement in the Berman Statutes that OTO or Any Car Dealer Provide Counsel to a Wage Claimant

The CNCDA argues in its brief, at pages 20-21, that the result proposed by Real Party in Interest and the Labor Commissioner would effectively require California employers to pay for counsel in an arbitration proceeding. That is a misstatement of the Berman statutes. To the exact opposite, the Berman statutes offer a procedure where counsel is not needed by either the wage claimant or the employer. The informality of the process, along with an adjudicator who is trained and familiar with the issues, offers a procedure where counsel is generally not required. In effect, the Deputy Labor Commissioner hears the case and provides assistance to both parties because of her or his familiarity with the law. It's only when the case is appealed by the employer invoking a trial *de novo* that counsel is then provided by the Labor Commissioner. CNCDA's statement that "[r]etaining counsel or proceeding *pro per* is an option that faces every litigant in ordinary civil litigation" is correct in litigation. (CNCDA Br. at p. 20.) But in the Berman process, the Legislature chose to offer an alternative that was not civil litigation, where counsel would not be required but legal guidance would still be provided.[6] CNCDA's unsupported claim that "[t]he Berman step creates a labor-intensive preparation experience for employers and their counsel that routinely fails to yield a final result" (*Id.* at p. 15) is unsupported and contrary to the very

[6] For example, a corporate officer or other representative can represent the entity in the Labor Commissioner hearing while such an officer or representative cannot do so in court without being a licensed attorney.

informality of the Berman hearings.[7]

CNCDA offers no support for its claim that the Berman Procedure is "typically [] a useless and wasteful process." (See CNCDA Br. at p. 15. See also *id.* at p. 17.) CNCDA makes another unsupported statement when it claims that "Berman hearings vary dramatically due to the individual preferences of each deputy labor commissioner." (*Id.* at p. 15.)

Even assuming that some of its complaints may be valid in individual circumstances, this would be even more apparent in the Arbitration Agreement advocated by OTO, where a retired judge of the Superior Court, who is likely to be unfamiliar with wage and compensation issues, hears the case. The Legislature made the determination 45 years ago to establish the Berman process and has obviously found that it is worthwhile because it has repeatedly strengthened and improved its features over the years. In effect, the CNCDA is complaining about the legislative choice, and its complaints should be directly elsewhere, not in an *amicus* brief to this Court. The legislative decision to enact an informal process, which discourages the use of lawyers at the initial stages, is a legitimate legislative choice which the CNCDA wrongly opposes.

2. Labor Code Section 218.5 Doesn't Create a Sufficient Alternative in the Arbitration Process

Like OTO, the CNCDA relies heavily upon Labor Code section 218.5. (See CNCDA Br. at pp. 21-22.) We have addressed that issue previously in Real Party in Interest's Opening Brief at pages 39 and 43 and Reply Brief at pages 24-29. (See also Labor Commissioner's Opening

[7] If that is true, the fee shifting provisions of Labor Code section 98.2, subdivision (c) should be wholly ineffective to discourage employer appeals.

Brief at pp. 31-39, and Reply Brief at pp. 20-22.) The CNCDA brief misstates the law when it ignores all the arguments that have been previously articulated regarding Labor Code section 218.5. The effect of its brief is significantly undermined by its refusal to address those issues.

3. CNCDA's Reference to the American Rule Undermines the "Accessible and Affordable" Argument with Respect to the OTO Agreement Made by OTO

The CNCDA relies upon the traditional rule regarding the allocation of fees as "the 'American Rule,' under which parties to litigation pay their own attorney's fees." (See CNCDA Br. at p. 21.) That argument undermines any argument that the OTO Agreement is accessible and affordable because the Legislature has made fee shifting decisions, which are embedded in the Berman statutory process. CNCDA cannot use this forum to effectively quarrel with the legislative choice, but its argument that the American Rule is the general rule challenges the clear legislative choice to incentivize lawyers to assist wage claimants and to allow the Labor Commissioner's office to collect fees from recalcitrant employers.

4. The CNCDA Refutes the Argument of OTO with Respect to the Costs of Arbitration

The OTO Agreement references costs in arbitration by citing the California Code of Civil Procedure section dealing with cost sharing in arbitration. (See OTO Answer Brief at pp. 23-24. See Code Civ. Proc., § 1284.2.) CNCDA argues that "[t]he agreement's silence on costs does not change these practical effects ...." (CNCDA Br. at p. 19.) Neither the Labor Commissioner, nor Kho, has argued that the Arbitration Agreement is exactly silent. Rather, the Agreement is impenetrable to a worker unless

he researches and understands the application of *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83 ("*Armendariz*").

CNCDA's argument that the Agreement is silent, moreover, runs directly contrary to the argument that it and OTO make, that "an arbitration agreement [should be enforced] according to its terms ..." (See CNCDA Br. at p. 13, and OTO Brief at pp. 45 and 48.) Thus, the suggestion that the cost obligations of *Armendariz, supra*, 24 Cal.4th 83 should be implied in the Agreement runs contrary to their argument that the Agreement should be enforced according to its terms, which do not include payment of the costs of arbitration. Further, if the Arbitration Agreement is enforced according to its terms, the posting of a bond and other procedural requirements, which are part of the Berman statutory process to assist workers in collecting unpaid wages or enforcing other protections within the jurisdiction of the Labor Commissioner, would be foreclosed.

5. The CNCDA Erroneously Equates Claims Before the Labor Commissioner with General Employment Disputes

Throughout the CNCDA brief, it attempts to justify the litigation procedures in the OTO Agreement. It does so by referring to this Court's decisions in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 and *Armendariz, supra*, 24 Cal.4th 83. Both of those cases were employment discrimination cases where this Court made it clear that there is need for some access to discovery and other litigation procedures in order to offer an arbitration procedure that would not be unconscionable. From that, CNCDA, for example, argues: "That is why the litigation formalities provided in the agreement mutually benefit the employee and the employer." (CNCDA Br. at p. 23 [citing *Armendariz*].) It should be

obvious that the full litigation procedures embedded in the OTO Agreement are not necessary in arbitration proceedings involving all employment disputes and undermine the fundamental attributes of arbitration which is "to achieve 'streamlined proceedings and expeditious results.'" (See *Preston v. Ferrer* (2008) 552 U.S. 346, 357-358 [quoting *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614]. See also *Sonic II, supra*, 57 Cal.4th at pp. 1140, 1143, 1147.)

What those cases make clear is that some discovery must be afforded in an arbitration process, but they do not mandate that complete resort to all the processes of discovery and other procedural devices in the Code of Civil Procedure must be incorporated into any arbitration process. Those cases did not stand for the proposition that an employer may effectively bar the worker from bringing his or her wage claims by imposing all the rigors and burdens of litigation before a retired judge. Such burdens may be imposed in other forms of employment litigation, such as discrimination claims not governed by the Berman process, but cannot be used to undermine fundamental worker rights to obtain pay that they did not receive.

C. THE CNCDA ASKS THIS COURT TO GIVE DIRECTION TO EMPLOYERS

As noted above, the motor car dealers in California have placed themselves in a difficult position because of their intransigence, as illustrated by OTO's conduct in this case. The wage plan that OTO implemented in 2013 violates state law. The references throughout the CNCDA's brief make plain the difficulties that its members are encountering in complying with state law. It doesn't appear the state law is

unclear, but the dealers would rather have a different incentive program for flat rate mechanics who are paid on a piece rate basis.[8] Contrary to the CNCDA suggestion, there are viable alternatives. One of them, as we suggested in our Opening Brief, is to allow employees to use the Berman hearing process in Labor Code section 98 and then any appeal by the employer would be to an arbitrator. (See Real Party in Interest's Opening Brief at p. 60.)[9] The CNCDA complains that would require a procedure by which the dealership posted a bond to ensure that any claim would be paid. (See CNCDA Br. at p. 15.) No one argues that the procedure has to exactly mimic the procedures, but the bond requirement for any appeal is important.[10]

CNCDA has also ignored an alternative suggestion, which is consistent with *Little*, *supra*, 29 Cal.4th 1064 and *Armendariz*, *supra*, 24 Cal.4th 83, which can impose some or all the rigors of litigation in

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[8] See also *Encino Motorcars, LLC v. Hector Navarro, et al.* (2018) 584 U.S. ___ in which the Supreme Court held that the Fair Labor Standards Act does not apply to service advisors in auto dealerships. That case is relevant here because California law in many cases does require dealers to provide overtime compensation to service advisors because there is no exemption under California law for service advisors generally, unless the employer implements a pay plan that treats them as inside sales commissioned employees. That is the choice of the employer.

[9] The Arbitration Agreement provides for initial resort to administrative agencies other than the Labor Commissioner for employment disputes involving the Department of Fair Employment and Housing and the Equal Employment Opportunity Commissioner. If it allows initial access to such agencies, it could do the same for the Berman process.

[10] Bond requirements exist for other provisions of the Labor Code. (See, e.g., Lab. Code, §§ 238, 1684, 1703.3 and 2055, subd. (b)(1). Cf. Code Civ. Proc., § 917.1.)

employment claims that are not subject to the Berman process and then exempt claims subject to the Berman process in the arbitration procedure.

Finally, the CNCDA is the only employer association that has raised an issue in this case. Apparently, the rest of them are unconcerned with the problem that CNCDA and its members have created for themselves with these offensive arbitration agreements. By their silence, they apparently have found ways to deal with these problems by either ensuring that their employees are paid correctly or by implementing arbitration agreements that are not unconscionable and deliberately designed to act as an effective barrier to wage claimants.

OTO was well aware of this problem when it forced Mr. Kho to sign the Arbitration Agreement and the piece rate agreement on the same day. It has compounded the problem by litigating this case in the face of the direction of the Legislature, which has amended the Berman process repeatedly and created new statutes to protect workers. OTO and CNCDA have ignored this Court's decisions reinforcing these rights in *Troester v. Starbucks Corp.*, *supra*, 5 Cal.5th 829 and numerous other cases, even since 2013. (See, e.g., *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.)

The CNCDA and its recalcitrant members are not only ignoring the protections afforded to California workers by California law but actively trying to thwart their enforcement. The hostility of the CNCDA to California's law is reflected in the OTO Arbitration Agreement, and this hostility explains why the OTO Arbitration Agreement is unconscionable.

IV. CONCLUSION

For the reasons suggested above, the CNCDA brief supports the arguments that the Real Party in Interest has made that the OTO Agreement is not "accessible and affordable." The judgment of the court below should be reversed.

Dated: September 19, 2018

Respectfully Submitted,

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