Court of Appeal Civil Case No. B256415

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FIVE

TOTAL TRANSPORTATION SERVICES, INC.,
Petitioner/Appellant,

vs.

MIGUEL ARMENTA, ENRIQUE CANISALEZ, JOSE GARCIA, OSCAR GONZALEZ, CARLOS MARTINEZ, HUGO MENENDEZ, JOSE PALMA, ALEJANDRO PAZ, OSCAR REYES, JOSE ROSALES, WALTER TRUJILLO, RUBEN VALENCIA, JOSE ZETINO, MANUEL DE JESUS GARAY, and JULIE A. SU, IN HER OFFICIAL CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,
Respondents/Appellees.

APPEAL FROM THE LOS ANGELES SUPERIOR COURT,
SOUTH DISTRICT—LONG BEACH
THE HON. ROSS M. KLEIN, JUDGE PRESIDING
(562) 256-2227
CASE NO. NS028839

RESPONSE BRIEF OF APPELLEES JOSE GARCIA, JOSE PALMA, HUGO MENENDEZ, JOSE ROSALES, AND RUBEN VALENCIA

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CERTIFICATE OF INTERESTED PARTIES

The undersigned hereby certifies that no entities or persons, other than the parties themselves, have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, Rule 8.208(e)(1)); or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves. (Cal. Rules of Court, Rule 8.208(e)(2).)

Dated: October 27, 2014

Respectfully Submitted,

PUBLIC JUSTICE, P.C.

By: /s/Victoria Ni
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INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue in this appeal is whether the superior court abused its discretion in denying petitioner Total Transportation Services, Inc.'s (TTSI's) *ex parte* application for a stay of Respondents' Labor Commissioner proceedings, in which drivers for TTSI sought unpaid wages on the basis of misclassification as independent contractors. Since there are no longer any pending Labor Commissioner proceedings to stay, the issue is moot. Even if that were not the case, TTSI has failed even to attempt to demonstrate that it meets the requirements for such *ex parte* relief.

After the first of the fourteen administrative wage claims at issue was filed with the California Labor Commissioner on May 6, 2013, a full year passed before TTSI took any action to enforce its putative right to arbitrate disputes with its drivers. (CT I: 6, 32.) Its May 7, 2014, petition to compel arbitration *followed* a series of lawsuits brought by TTSI in December 2013 and January 2014 against some of the respondents here to enforce so-called Independent Contractor Agreements, with *no* mention of an arbitration agreement. (CT IV: 858-956; CT V: 957-96.) TTSI now argues that the trial court should have granted an *ex parte* application to stay Labor Commissioner hearings scheduled to begin only one week after it first sought that relief on shortened time—suddenly invoking its alleged arbitration agreement. (After the denial of a stay, those proceedings went forward, and decisions were issued in August 2014.) TTSI's arguments, however, are too little and too late.[1]

First, TTSI fails to adequately explain why this appeal is not moot and why the relief it seeks on this appeal is appropriate. It is seeking reversal of a superior court's denial of an *ex parte* application for a stay of administrative proceedings that are now concluded. Pursuant to California

[1] All references herein to the Clerk's Transcript will be cited as "CT."

Labor Code § 98.2, the decisions of the Labor Commissioner have been appealed to superior court. TTSI's proper recourse is to seek relief from the superior court now charged with reviewing the propriety of the Labor Commissioner's August 2014 decisions (known as orders, decisions or awards, or ODAs).

Second, TTSI's reliance on *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*) (2013) 57 Cal.4th 1109, 311 P.3d 184, to support its argument that the superior court was required to grant the stay is misplaced. *Sonic II* did not address the propriety of a stay where arbitrability is in question, nor criticize the normal processing of Labor Commissioner claims that do not affect the speed with which the enforceability of an arbitration agreement is decided. Here, TTSI slept on its putative right to arbitrate, failing to invoke its arbitration clause even when it sued some of the very same drivers in December 2013 and January 2014 to enforce its independent contractor agreement. The fact that normal processes of the Labor Commissioner went forward before the timely adjudication of TTSI's motion to compel was a product of TTSI's inaction, not an error of the court below. *Sonic II* provides no justification for a court to interfere with the normal processes of the Labor Commissioner absent a finding of the existence of a valid arbitration clause, or to delay Labor Commissioner proceedings when a party seeking arbitration has slept on its rights.

Finally, the trial court did not abuse its discretion in denying TTSI's *ex parte* application because TTSI failed to establish the requirements for injunctive relief: (1) likely harm absent injunctive relief and (2) likelihood of success on the merits. To start, TTSI has failed to explain what harm it suffered as a result of the denial of the stay, nor has it suffered any. The superior court's determination of the validity of the arbitration clause was not delayed by the Labor Commissioner proceedings whatsoever, and TTSI's rights have been entirely preserved by its timely appeal of the Labor

Commissioner decisions. Furthermore, TTSI is unlikely to succeed on the merits of its petition for several reasons: the Federal Arbitration Act upon which TTSI relies does not apply to Respondents; no valid or current arbitration agreement exists between Respondents and TTSI; Respondents' Labor Code claims are outside the scope of any arbitration agreement; the arbitration clause is unconscionable and therefore unenforceable; and TTSI has waived its right to demand arbitration.

The superior court has not yet ruled on TTSI's petition to compel, and it should be permitted to do so in due course. The appeal should be dismissed as the decision below should be affirmed.

STATEMENT OF MATERIAL FACTS

The underlying issue before the superior court—to be briefed next month—is whether the claims against TTSI brought before the Labor Commissioner by the individual Respondents must be arbitrated. (CT I: 1, 6-12.) This appeal, however, concerns only whether the superior court should have granted TTSI's *ex parte* application to stay the Labor Commissioner proceedings pending the court adjudication of the arbitration question. (CT VI: 1400-02.) At the time of the *ex parte* application, the drivers represented in this brief—Jose Garcia, Jose Palma, Hugo Menendez, Jose Rosales, and Ruben Valencia—had not yet been served with TTSI's petition to compel, were not yet represented by counsel, and did not submit briefing to the superior court on TTSI's request for a stay. (CT V: 1026.)

The individual Respondents are all current or former port truck drivers for TTSI. (CT I: 7.) TTSI dispatches its drivers to the ports of Los Angeles and Long Beach to pick up cargo that has been shipped from overseas, usually from Asia, and deliver that cargo to the warehouses of TTSI's customers, many of whom are large national retailers. (*Id.*)

To work for TTSI, drivers were each required to sign a document entitled "Independent Contractor Agreement," several appendices and certifications, as well as two documents each labeled "Purchase Assistance Agreement." (CT II-IV: 249-799.) The key provision on which TTSI relies—the alleged arbitration clause—is contained in the second "Purchase Assistance Agreement" document, called Addendum 2, and it reads:

> Any dispute between the parties concerning their respective rights and obligations under this agreement shall be resolved in arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("A.A.A.")[.][2]

The scope of the arbitration clause is ambiguous at best. Both Addendum 1 and Addendum 2 (containing the arbitration clause) of the "Purchase Assistance Agreement" define "this agreement" to mean the "Purchase Assistance Agreement," and neither reference the "Independent Contractor Agreement" or any other signed document TTSI has submitted into the record.[3]

In addition, each addendum of the "Purchase Assistance Agreement" is predicated on the driver having entered into a lease agreement with an unidentified "Equipment Lease & Finance Company." (*Id.*) It also discusses the driver's responsibility for lease payments pursuant to that agreement, and describes a joint account to be held by the driver and the "Equipment Lease & Finance Company." (*Id.*) Yet nowhere in the record has TTSI identified the "Equipment Lease & Finance Company" nor has it submitted the referenced lease agreements into the record. To Respondents' knowledge and belief, they do not exist.

The term of the "Purchase Assistance Agreement," meanwhile, varies from driver to driver. Some agreements state that the agreements

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[2] (CT II: 344-45, 408-09, 441-42; CT III: 539-40, 599-600.)

[3] (*See*, *supra*, n. 2; CT II: 340-42, 404-06, 437-39; CT III: 535-37, 601-03.)

"shall be in effect for the term of the Lease."[4] The terms of the elusive lease are, of course, unknown. Others state that the agreements "shall be in effect for 119 days from the date of agreement execution" unless renewed.[5] There is no indication that any renewals have taken place. At a minimum, an examination of the alleged agreements to arbitrate and the surrounding text casts serious doubt on TTSI's allegation that there is an enforceable arbitration agreement governing the parties' wage dispute.

In 2013, numerous TTSI drivers, including the individual Respondents, filed claims with the California Labor Commissioner contending that they are employees of TTSI, not independent contractors.[6] The drivers claim that, notwithstanding the "Purchase Assistance Agreement," they do not in fact own or lease their trucks, and they are not treated as true independent contractors.[7] Instead, TTSI exerts a significant amount of control over the work of the drivers, including dispatching drivers to pick up and deliver loads for TTSI customers, unilaterally setting the rate of pay per load, controlling drivers' schedules, and setting strict protocols drivers must follow. (*Id.*) Nonetheless, TTSI deducts basic

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[4] (CT II: 341, 438; CT III: 536.)

[5] (CT II: 405; CT III: 602.)

[6] (CT I: 55-75, 101-22, 128-49, 178-93, 208-29.)

[7] (*Menendez v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029291, Notice of Appeal, Exh. A; *Palma v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029287, Notice of Appeal, Exh. A; *Garcia v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029292, Notice of Appeal, Exh. A; *Valencia v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029288, Notice of Appeal, Exh. A; *Rosales v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029289, Notice of Appeal, Exh. A. *See also* TTSI RJN I: Exhs. 8-9; TTSI RJN II: Exhs. 10-12.)

business expenses—such as fuel, truck maintenance, parking fees, rental of mandatory equipment, and insurance—from the drivers' pay. (CT I: 8.) Given the drivers' alleged economic reality as employees beholden to TTSI rather than true independent contractors, the drivers claim that TTSI illegally deducted business expenses and failed to pay them in accordance with the California Labor Code.[8]

After all but two of Respondents' administrative claims were filed with the Labor Commissioner, TTSI responded by filing declaratory judgment actions against four of the fourteen individual Respondents. (CT IV: 858-65 [filed Dec. 18, 2013], 905-12 [filed Dec. 18, 2013], 945-56 [filed Jan. 23, 2014]; CT V: 993-96 [filed Dec. 18, 2013].) Those actions, which are now settled or stayed, sought judicial declarations that the drivers are independent contractors and that TTSI did not make any illegal deductions from the drivers' pay. (*Id.*) In those suits, TTSI did *not* allege that its disputes with the drivers were subject to any arbitration clause. (*Id.*)

On May 7, 2014, one year after the first of the administrative claims were filed and over five months after it initiated its other lawsuits against the drivers, TTSI filed the current action—a petition to compel arbitration of the claims the individual Respondents brought before the Labor Commissioner. (CT I: 6-12.) Respondents answered the petition, arguing that there are no enforceable arbitration agreements covering Respondents' wage claims and, if even there are, the Federal Arbitration Act (FAA) does not apply. (CT VI: 1419-26 [Labor Commissioner's Response]; Resp. of Jose Garcia, Huge Menendez, Jose Palma, and Jose Rosales, and Ruben

[8] Respondents acknowledge that information regarding the outcome and appeal of the proceedings before the Labor Commissioner is not included in the Clerk's Transcript. However, those proceedings and documents are undisputed by all parties, judicially noticeable, and critical to the Court's determination of the mootness of this appeal. (*See* TTSI Br. 10.)

Valencia to Total Transportation Services, Inc.'s Petition to Compel Arbitration, July 18, 2014; *see* CT 4: 850-54 [arguing that TTSI waived its right to arbitrate].)[9] There is a hearing set on the merits of the arbitration issue in December 2014, and the parties are proceeding with briefing that issue before the court below. (CT I: 1.)

TTSI also sought *ex parte* to stay the proceedings before the Labor Commissioner, and that stay was opposed by the Labor Commissioner. (CT IV: 801-14; 848-54.) The superior court denied TTSI's *ex parte* request on May 13, 2014. (CT VI: 1402.) Upon the denial of the stay, TTSI sought a writ of mandate for an emergency stay from this Court, which was denied on May 15, 2014. (No. B256271.)

Upon the denial of its request for a writ of mandate, TTSI brought this appeal. (CT VI: 1400.) It also sought a writ of *supersedeas* for an emergency stay, which this Court declined to grant on July 8, 2014. The Court held that TTSI was not entitled to an automatic stay and that TTSI failed to meet its burden to demonstrate that its appeal has merit or that it would suffer irreparable harm absent a stay.[10]

In the absence of a stay, the Labor Commissioner conducted hearings on the individual Respondents' wage claims in May and June of 2014. (TTSI Br. 10.) On August 26, 2014, the Labor Commissioner issued ODAs in favor of all of the Respondents. (*See*, *supra*, n.7.) Each ODA

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[9] Respondents acknowledge that their Response to the petition to compel is not in the Clerk's Transcript. Due to delays in service of the petition on Respondents, their Response was not filed until after TTSI brought this appeal. However, the Labor Commissioner indisputably challenged the enforceability of the alleged arbitration agreements prior to the superior court's denial of the *ex parte* request, and Respondents are happy to provide this Court with a copy of their Response.

[10] Respondents Garcia, Palma, Menendez, Rosales, and Valencia take no position on whether this appeal may proceed without a reporter's transcript but note that a transcript has not been made available.

found that each Respondent was an employee of TTSI, not an independent contractor, and awarded each Respondent the value of the wages TTSI illegally failed to pay each Respondent as a result of his misclassification. (*Id.*) On September 11, 2014, TTSI appealed each ODA to Los Angeles Superior Court for *de novo* review pursuant to California Labor Code § 98.2.[11]

ARGUMENT

I. TTSI'S APPEAL IS NOW MOOT.

Given the current procedural posture of this action, this appeal is moot. The stay that TTSI sought below was not a stay of the proceedings before the superior court, but rather of "administrative proceedings before Respondent JULIE A. SU, IN HER OFFICIAL CAPACITY AS THE LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA." (CT I: 7, *see also* CT IV: 802.) Those administrative proceedings have now concluded. Therefore, even if this Court determines that the superior court's denial of a stay was in error, no effective relief can be ordered because there are no proceedings before the Labor Commissioner to stay. TTSI is requesting nothing more than an advisory opinion from the Court on whether the superior court should have issued a stay and, it seems, an advisory opinion on the merits of the arbitration issue, which is not before the Court on this appeal.

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[11] (*Menendez v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029291, Notice of Appeal; *Palma v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029287, Notice of Appeal; *Garcia v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029292, Notice of Appeal; *Valencia v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029288, Notice of Appeal; *Rosales v. Total Transp. Servs., Inc.* [Cal. Super. Ct.—Cnty. of Los Angeles Sept. 11, 2014] No. NS029289, Notice of Appeal. *See also* TTSI RJN III: Exh. 20; TTSI RJN IV: Exhs. 21-24.)

As explained above, the Labor Commissioner concluded its hearings in June 2014 and issued ODAs in favor of all the individual Respondents in August. TTSI appealed those awards to superior court, where the merits of the cases will be adjudicated *de novo*. (*See* Cal. Labor Code § 98.2.) That means there are no longer any administrative proceedings to stay. Since the only question before the Court is whether the district court abused its discretion in declining to stay those proceedings, a reversal of that decision would be "ineffective in providing the parties relief," and this appeal is moot. (*See Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1442, 1451, Cal.Rptr.2d 277.) [12]

TTSI confuses the issue by arguing that, because of the ongoing *de novo* appeals, there remains an "actual controversy" between TTSI and Respondents. (*See* TTSI Br. 15.) True enough, and TTSI will have an opportunity to continue litigating that controversy in the appropriate forum, which, for now, is the superior court. But TTSI's argument avoids the question: What effective relief can the Court order regarding *this* appeal? The answer, as discussed above, is none.

And it is not as if TTSI is without any recourse. Now that the *de novo* appeals will be heard in superior court, TTSI has ample opportunity to request that superior court review be stayed pending the resolution of the arbitrability question, which will be heard by the court below on December 4, 2014. (CT I: 1.)

TTSI also suggests that the resolution of this appeal will "in one stroke resolve the pending *de novo* appeals from the ODAs as well." (TTSI

[12] There was, of course, a period during which this appeal was not moot, before the Labor Commissioner proceedings concluded. In that window, TTSI sought a mandate for an emergency stay and a writ of *supersedeas* from this Court. (*See* No. B256271.) But TTSI failed to obtain that relief, in part, because it failed to demonstrate that it was likely to succeed on the merits.

Br. 16.) But it fails to explain why that is. If the superior court below had initially granted the stay, the relief TTSI would have been granted was a *stay* of Labor Commissioner proceedings pending adjudication of the arbitration agreement, not a dismissal or nullification of the Labor Commissioner proceedings. Therefore, even if the Court agrees that the trial court should have stayed the proceedings in the first instance while arbitrability is being litigated, dismissal of the *de novo* appeals is not the appropriate relief.

II. *SONIC II* DID NOT REQUIRE THE TRIAL COURT TO ORDER A STAY OF THE LABOR COMMISSIONER PROCEEDINGS.

TTSI's primary argument is that the California Supreme Court's decision in *Sonic II* required the superior court to stay the Labor Commissioner proceedings pending its threshold determination of the arbitration clause's validity. However, *Sonic II* is silent regarding whether courts should stay ongoing Labor Commissioner proceedings during the adjudication of the validity of an arbitration agreement and does not aid TTSI's argument.

Rather, *Sonic II* held that the FAA preempts California law that would otherwise prohibit valid and enforceable arbitration agreements from requiring workers to waive their right to administrative adjudication of their wage claims. (*Sonic II*, 57 Cal.4th at 1142, 1171 [reversing *Sonic I*'s conclusion that the FAA permitted the California prohibition on such waiver].) *Sonic II* explains that the FAA requires that "[a] court faced with a petition to compel arbitration under these circumstances must grant the petition to compel arbitration *unless the party opposing the petition asserts a valid contract defense*." (*Id.* at 1171.) Therefore, *if* the FAA applies and *if* a court determines that there is an enforceable arbitration agreement that waives the administrative hearing process, the court must order the parties

to arbitrate their claims rather than proceeding before the Labor Commissioner. In this case, Respondents have asserted numerous defenses—including that the FAA does not apply—and the court has not yet made a determination on the validity of the arbitration agreement. Therefore, TTSI's reliance on *Sonic II* puts the proverbial cart before the horse.

TTSI's discussion of *Sonic II* focuses on its conclusion that the FAA does not permit "delay that results not from adjudicating whether there is an enforceable arbitration agreement, but from an administrative scheme to effectuate state policies unrelated to the agreement's enforceability." (*Id.* at 1142; TTSI Br. 18.) But TTSI's reliance on this holding cuts against its argument because the administrative processes here had no effect on the pace of the court's determination of arbitrability. The speed of the arbitration determination had nothing to do with whether or not there was a stay of the administrative proceedings and everything to do with TTSI's year-long delay in invoking its purported right to arbitration.

Meanwhile, the litigation of the validity of the arbitration agreement is proceeding in a timely fashion in the superior court. That court has set a hearing on the issue for December 4, 2014, and the parties' briefs are due in November. (CT I: 1.)

III. TTSI DOES NOT MEET THE STANDARD FOR A STAY OR INJUNCTION, NOR DOES IT ATTEMPT TO.

Assuming TTSI's request for a stay is properly viewed as a motion for a preliminary injunction, TTSI fails to adequately address either of the requirements for a preliminary injunction: (1) that it is likely to be harmed from the denial of interim injunctive relief; and (2) that it is likely to prevail on the merits. (*See White v. Davis* (2003) 30 Cal.4th 528, 554, 68 P.3d 74, 91.)

A. TTSI Suffered No Harm from the Denial of the Stay.

First, TTSI has failed to identify any harm it incurred as a result of the denial of the stay. Indeed, it is hard to imagine how TTSI could establish any harm. As *Sonic II* explains, the possible harm to employers seeking arbitration is the unnecessary delay the administrative hearings could create. But in this case, because of TTSI's own delay in filing its motion to compel arbitration, the hearings proceeded and concluded *before* the timely adjudication of the arbitration issue could be completed. Therefore, TTSI suffered no delay as a result of the administrative process. The individual wage claims are now before the superior court on *de novo* review, where TTSI can either litigate the validity of the arbitration agreement or seek a stay pending the resolution of the existing petition to compel arbitration. In any event, the administrative hearings will not have caused any delay in the determination of the arbitration issue.

B. TTSI Is Not Likely to Prevail on the Merits of Its Petition to Compel Arbitration.

The merits of TTSI's petition to compel arbitration are not directly before this Court, and will be heard by the trial court in December. To the extent that this Court will consider the likelihood of TTSI's success on the merits of its petition in deciding this appeal, even a condensed summary of the arguments against arbitration reveal that the trial court was well within its discretion in declining to order preliminary injunctive relief, precisely because TTSI's likelihood of success is so low.

The existence of an enforceable, applicable agreement is far from the "fact" that TTSI portrays it to be. As stated in Respondents' Response to TTSI's petition to compel arbitration, the FAA does not govern the alleged arbitration clause, the alleged arbitration clause in Addendum 2 of the "Purchase Assistance Agreement" does not apply to Respondents' wage claims, and the arbitration clause is otherwise unenforceable.

1. The FAA does not apply. Respondents fall under § 1 of the FAA, which explicitly exempts from the reach of the FAA contracts of those working in interstate or foreign commerce. (9 U.S.C. § 1 ["nothing herein shall apply to contracts of seamen, railroad employees, or any other class of workers engaged in foreign commerce"].) It is undisputed that drivers working for TTSI are part of a delivery chain of shipments moving in foreign and interstate commerce (CT I: 7), therefore triggering the § 1 exemption. (*See Harden v. Roadway Package Sys., Inc.* (9th Cir. 2001) 249 F.3d 1137, 1140 [holding that the FAA is not applicable to truck drivers working in interstate commerce].)

Two superior courts in this jurisdiction have already examined whether port truck drivers with Labor Commissioner claims that are substantially similar to Respondents'—namely, that they are misclassified as independent contractors and entitled to illegally deducted and withheld wages—fall under the § 1 exemption of the FAA. Both courts held that port truck drivers are transportation workers in interstate commerce within the meaning of the § 1 exemption. (*Pacific 9 Transp. Inc. v. Labor Comm'r of the State of Cal.* [Cal. Super. Ct—Cnty. of Los Angeles July 8, 2014] No. BC544496, Notice of Ruling, Exh. A, 4-5; *Green Fleet Sys., LLC v. Labor Comm'r of the State of Cal.* [Cal. Super. Ct.—Cnty. of Los Angeles June 23, 2014] No. BS148377, Order on Motion to Compel Arbitration, 2-3.) This means that California law, not the FAA, should govern the enforceability of any arbitration clause, any FAA authority relied on by TTSI is irrelevant, and the FAA cannot be the basis for compelling arbitration here.[13]

[13] Among other things, if the FAA does not apply, *Sonic II*'s holding that the FAA preempts California's prohibition on the waiver of administrative wage claim hearings does not apply either.

2. TTSI documents signed by Respondents contain no viable arbitration clause. The documents relied on by TTSI do not create an enforceable agreement to arbitrate. First, the alleged arbitration agreement is contained in Addendum 2 of a document called the "Purchase Assistance Agreement," and the terms of the arbitration clause itself are limited to requiring arbitration of "this agreement," defined on that page to mean the "Purchase Assistance Agreement." (*See*, *supra*, n.2.) Thus, the agreement to arbitrate on its face covers only disputes arising from the "Purchase Assistance Agreement," and not also the "Independent Contractor Agreement," as TTSI claims.

Furthermore, the agreements to arbitrate, regardless of their initial coverage, have expired. Depending on which iteration of the paperwork each Respondent signed, the "Purchase Assistant Agreement," by its terms, only lasts either 119 days, which has long passed for all Respondents, or for the length of the "lease." (*See*, *supra*, nn.4-5.) TTSI has not alleged or provided documentation that any 119-day period was renewed, nor has it demonstrated that there ever was a "lease" between each Respondent and an unidentified lease and finance company.

For these and other reasons, at the time Respondents filed their claims with the Labor Commissioner, there was no viable arbitration agreement between Respondents and TTSI.

3. Respondents' claims fall outside the scope of any alleged arbitration agreement between Respondents and TTSI. Even if there is an enforceable arbitration agreement between Respondents and TTSI, Respondents' claims are not governed by it.

In *Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 21, this Court held that truck drivers who made allegations similar to Respondents'—that they were misclassified as independent contractors and thus suffered violations of the Labor Code—could not be compelled to

arbitrate their claims. *Elijahjuan* reasoned that the drivers' claims did "not concern the application or interpretation of the Agreements," and, therefore, were not disputes subject to the arbitration clauses in the drivers' independent contractor agreements, which provided for arbitration of disputes involving the "application or interpretation" of the agreements. (*Id.*)

Here, the arbitration clause ostensibly governs "[a]ny dispute between the parties concerning their respective rights and obligations under this agreement [the Purchase Assistance Agreement]." (*See*, *supra*, n.2.) Like in *Elijahjuan*, Respondents' claims are not within any arguable scope of the arbitration clause because they do not rely on any rights or obligations under the agreement—rather, their claims are based on the parties' rights and obligations under the Labor Code. Therefore, Respondents' claims are not covered by the arbitration clause. (*See also Pacific 9*, at 3 [following *Elijahjuan* in the context of port trucker misclassification claims]; *Green Fleet*, at 3-4 [same].)

4. TTSI's alleged arbitration agreement is unenforceable because it is both substantively and procedurally unconscionable. Moreover, even if the arbitration clauses are facially valid and apply to Respondents' Labor Code claims, they are not enforceable because they are both procedurally and substantively unconscionable.

The so-called agreements are procedurally unconscionable contracts of adhesion drafted by sophisticated corporate parties and offered on a take-it-or-leave-it basis to drivers with limited or no proficiency in English. TTSI does not allege that the arbitration provision was explained to drivers, in English or Spanish, nor does it allege that it provided them with copies of the AAA rules, to which the drivers would be subject under the arbitration clauses. (*See Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 115, 6 P.3d 669; *Zullo v. Superior Court* (2011)

197 Cal.App.4th 477, 485; *see also Pacific 9*, at 5-6 [holding that port truck driver agreements presented under similar circumstances are procedurally unconscionable]; *Green Fleet*, at 5 [same].)

The supposed agreements are also substantively unconscionable insofar as they subject drivers to the AAA commercial rules, which assume that all parties can bear the cost of arbitration equally. (*See Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89-92, 7 Cal.Rptr.3d 267 [discussing AAA rules regarding costs and fees and holding that an agreement that required individual plaintiffs to advance fees they could not afford was unconscionable].) Arbitration under the AAA commercial rules would fail to "provide for accessible, affordable resolution of wage disputes" in the way that proceedings before the Labor Commissioner do. (*See Sonic II*, 57 Cal.4th at 1150.) For that reason, the agreements are substantively unconscionable under California law.

5. In any event, TTSI has waived its right to demand arbitration. Finally, regardless of the viability, applicability, or enforceability of TTSI's alleged arbitration agreement, TTSI waived its right to demand arbitration by waiting to seek arbitration until one year after the first of fourteen Respondents had filed their claims with the Labor Commissioner, and then rushing into court to stop the Labor Commissioner proceedings only twelve days prior to when the hearings were scheduled to begin. (CT I: 6, 32.) TTSI repeatedly cites the dates on which it was notified of the Labor Commissioner hearings, April 15 and 25, 2014, to support its claim that it did not sit on its rights. (TTSI Br. 1, 8.) However, the hearing notification date is irrelevant, as TTSI knew about the claims against it a year prior.

That TTSI was well aware of the claims against it is demonstrated by the declaratory actions it filed five months before seeking to compel arbitration. In December 2013 and January 2014, TTSI filed declaratory actions against several of its drivers, including four of the Respondents

here, seeking declarations that the drivers were not misclassified and that TTSI did not violate any other Labor Code provisions, without seeking to arbitrate them. (CT IV: 858-956; CT V: 957-96.)

These actions and inactions of TTSI are inconsistent with those of a party truly wishing to arbitrate claims. Instead, they are consistent with an employer seeking to thwart its employees' ability to effectively vindicate their rights in any forum. Indeed, TTSI's tactics have prejudiced the Respondents by forcing them to participate in adjudications on multiple fronts. (*See St. Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 Cal.4th 1187, 1196, 82 P.3d 727.) TTSI's contrary assertion (at 20) that it cannot waive its right to arbitration because it is analogous to the question of subject-matter jurisdiction is at odds with well-established law. (*See id.*)

* * *

For the foregoing reasons, TTSI is unlikely to succeed on the merits of its petition to compel arbitration and therefore was not entitled to a stay of the Labor Commissioner proceedings.

CONCLUSION

Since there are no longer any pending Labor Commissioner proceedings to stay, TTSI's appeal is moot. Further, because TTSI failed to demonstrate that it is entitled to a stay or a preliminary injunction, the superior court did not abuse its discretion in denying the stay. Therefore, the appeal should either be dismissed as moot or the decision of the superior court to decline to stay the proceedings before the Labor Commissioner should be affirmed.

Dated: October 27, 2014

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204(c), the undersigned counsel hereby certifies that the foregoing Response Brief of Jose Garcia, Jose Palma, Hugo Menendez, Jose Rosales, and Ruben Valencia is one-and-a-half spaced, typed in Times New Roman 13-point text, and contains 5,240 words. The above word count was determined using the Word Count function of the Microsoft Word program and excludes the parts of the brief exempted by Rule 8.204(c)(3).

Dated: October 27, 2014

Respectfully Submitted,

PUBLIC JUSTICE, PC

By: /s/ Victoria W. Ni
Victoria W. Ni

Counsel for Respondents/Appellees Jose Garcia, Jose Palma, Hugo Menendez, Jose Rosales, and Ruben Valencia

PROOF OF SERVICE BY E-MAIL OR ELECTRONIC SUBMISSION

I, Victoria W, Ni, declare as follows:

I am employed in the County of Alameda, State of California. I am over the age of eighteen and not a party to this action. My business address is 555 12th Street, Suite 1230, Oakland, California 94607.

On October 27, 2014, I served the foregoing Response Brief of Jose Garcia, Jose Palma, Hugo Menendez, Jose Rosales, and Ruben Valencia on the following parties via email or electronic submission at the email addresses listed below, and the transmission was reported complete and without error:

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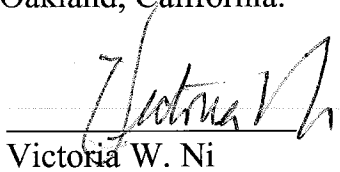
I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct.

Executed on October 27, 2014, at Oakland, California.



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PROOF OF SERVICE BY OVERNIGHT DELIVERY COURIER

I, Leah Nicholls, declare as follows:

I am employed in the County of Washington, District of Columbia. I am over the age of eighteen and not a party to this action. My business address is 1825 K Street NW, Suite 200, Washington, DC 20002.

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I declare under penalty of perjury under the laws of California and the District of Columbia that the above is true and correct.

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