S174475

IN THE SUPREME COURT OF CALIFORNIA

SONIC–CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent

Following an Order of the U.S. Supreme Court (Oct. 31, 1011) Docket No. 10–1450, 132 S.Ct. 496, Granting Review, Vacating the Decision of the California Supreme Court, and Remanding for Further Consideration

Following a Decision of the California Supreme Court (Feb. 24, 2011) Case No. S174475, 51 Cal.4th 659, 181 Cal.Rptr.3d 58, 247 P.3d 130

Following a Decision of the California Court of Appeal (May 29, 2009), Case No. B204902, 174 Cal.App.4th 546, 94 Cal.Rptr.3d 544

Appeal from an Order of the Superior Court of California, County of Los Angeles (Nov. 2, 2007) Case No. BS107161, HON. AURELIO N. MUNOZ, Judge

SUPPLEMENTAL BRIEF RE: SIGNIFICANCE OF AMERICAN EXP. CO. V. ITALIAN COLORS RESTAURANT (June 20, 2013) No. 12–133, ___ U.S. ___, 133 S.Ct. 2304

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INTRODUCTION

After this Court held oral argument in this case on April 3, the U.S. Supreme Court issued its decision in American Exp. Co. v. Italian Colors Restaurant. ((June 20, 2013) No. 12–133, ___ U.S. ___, 133 S.Ct. 2304.) The very next day, on June 21, this Court requested that the parties brief the significance of this new U.S. Supreme Court on the issues presented in this case.

In Italian Colors, the High Court restated and emphasized that the imposition by a federal statute of "preliminary litigating hurdle[s] would undoubtedly destroy the prospect of speedy resolution" and therefore violates the Federal Arbitration Act ("FAA"). (Italian Colors, *supra*, 133 S.Ct. at 2312.) Such an imposition on the prospect of speedy resolution through arbitration subjects ***state*** laws to preemption under the FAA, as the U.S. Supreme Court confirmed plainly in AT&T Mobility LLC v. Concepcion. ((2011) 131 S.Ct. 1740.) Thus even though the Italian Colors decision applied the principle in the context of a federal statute, the same pro-arbitration public policy that requires enforcement of arbitration agreements pursuant to their terms applies to both federal and state laws that would interfere with arbitration.

The Italian Colors decision made it crystal clear that if a claimant retains the ***right to pursue*** his or her claims in arbitration, laws which change the rules of parties' arbitration agreements or impose preliminary litigation hurdles contrary to the terms of parties' agreements are barred by the FAA. (Italian Colors, *supra,* 133 S.Ct. at 2310.) Read together with the same Court's recent decision in AT&T Mobility—which

applied the same pro-arbitration policies to preemption arguments relating to state-law impositions on arbitration procedures—the U.S. Supreme Court has made it undeniably clear that state laws cannot require procedures that interfere with arbitration agreements at all, and even federal laws cannot do so without an express congressional command intended to exempt certain claims from arbitration under the FAA.

The parties' agreement here provides Moreno with the right to pursue all of his claims for unpaid wages, penalties, and interest. As such, under the plain language of the AT&T Mobility decision—which the Italian Colors decision applied to reject a purported public policy exception to arbitration—the FAA preempts the Berman hearing process, which imposes pre-arbitration procedures by adjudicating the merits. And under Italian Colors, any argument that the Berman process is unwaivable as necessary for the vindication of statutory rights must be rejected, as that process does not affect wage claimants' ***right to pursue*** employment causes of action—it only makes the pursuit of those claims less ***risky*** for claimants. This is especially true here, where the conflict is between the FAA and an inconsistent state law that would interfere. Because the Berman process imposes initial litigation procedures and changes the parties' agreed-upon rules for arbitration, it is preempted by the FAA under the Supremacy Clause of the U.S. Constitution.

Appellant urges this Court to preserve the arbitral rights of the parties and instruct the trial court to order immediate arbitration in accordance with the terms of their agreement.

LEGAL ARGUMENT

The U.S. Supreme Court's decision in Italian Colors makes it clear that State laws which impose "preliminary litigating hurdle[s]" on parties with arbitration agreements are preempted by the FAA, regardless of challenges based on public policy and the "effective vindication" of statutory rights. (Italian Colors, *supra*, 133 S.Ct. at 2312.) And that decision underscores the breadth of the preemptive power of the FAA as articulated by the High Court's opinion in AT&T Mobility. (AT&T Mobility, *supra,* 131 S.Ct. at 1740.) As such, the Berman process cannot prevent the parties from engaging in immediate arbitration in accordance with the terms of their agreement.

I. The Italian Colors Decision Clarifies That The Berman Process Impermissibly Interferes With Arbitration By Imposing Preliminary Litigation Hurdles.

The U.S. Supreme Court has once again reinforced that arbitration agreements must be enforced according to their terms, including "the rules under which that arbitration will be conducted." (Italian Colors, *supra,* 133 S.Ct. at 2309, *citing* Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University (1989) 489 U.S. 468, 479.) Here, Respondent argues that he can require Appellant to engage in the Berman process, despite having agreed to arbitrate "all disputes that may arise out of the employment context . . . that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum." (Sonic–Calabasas A, Inc. v. Moreno (2011) 51 Cal.4th 659, 670, *cert. granted, judgment vacated* (U.S. 2011) 132 S.Ct. 496.) But because such a process necessarily interferes with the speedy resolution of disputes, any law which would

force the parties into Berman hearings violates and is preempted by the FAA.

In Italian Colors, the parties had agreed to arbitrate their disputes, including antitrust claims raised in the Complaint, on an individual basis only. (Italian Colors, *supra*, 133 S.Ct. at 2308.) The Second Circuit Court of Appeals had ruled that the class arbitration waiver was unenforceable because the plaintiffs could not effectively vindicate their substantive statutory rights. (Id.) The U.S. Supreme Court granted review to "consider whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery" and thus arguably making the vindication of substantive statutory rights less efficient. (Id. at 2307.)

The High Court rejected arguments based on a suggestion that public policy would "allow[] courts to invalidate agreements that prevent the 'effective vindication' of a federal statutory right." (Italian Colors, *supra,* 133 S.Ct. at 2310.) Specifically, the Court noted that this doctrine originated from its own prior *dictum* that arbitration agreements will be invalidated if they "operate as a prospective waiver of a party's ***right to pursue*** statutory remedies." (Id., *emphasis in original*, *citing* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985) 473 U.S. 614, 637, fn. 19.) But the High Court concluded that "the fact that it is not worth the expense involved in ***proving*** a statutory remedy does not constitute the elimination of the ***right to pursue*** that remedy." (Id. at 2311, *emphasis in original*.)

The Court went on to note that a doctrine similar to the so-called "effective vindication" exception, which would require courts to

"tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden" in an attempt to make it less costly and risky for plaintiffs to raise claims, had already been rejected. (Italian Colors, *supra,* 133 S.Ct. at 2311, *citing* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer (1995) 515 U.S. 528.) The High Court explained that such requirements "would be unwieldy and unsupported by the terms or policy of the [FAA]." (Italian Colors, *supra,* 133 S.Ct. at 2311.)

In its concluding paragraph, the Italian Colors court emphasized that the legally-imposed preliminary litigation hurdles, created to make a determination as to whether a claimant's rights can be effectively vindicated, necessarily interfere with arbitration and are therefore preempted by the FAA:

> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle 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.***

(Italian Colors, *supra,* 133 S.Ct. at 2312, *emphasis added*.) The U.S. Supreme Court therefore reversed the Court of Appeals' decision which had interfered with the parties' specified arbitral rules and imposed

preliminary litigating hurdles. (Id.) This approach was used even where other federal substantive statutory rights were involved.

Just as the U.S. Supreme Court rejected the arguments of the Italian Colors plaintiffs that their claims would be ***virtually worthless*** without class proceedings because they retained the right to pursue those claims individually, so too must this Court reject arguments that plaintiffs' claims would be ***more risky*** to bring without the Berman process, since they retain the right to pursue those claims in arbitration. Under the terms of the parties' arbitration agreement here, Mr. Moreno retains the ***right to pursue*** his wage claims—albeit without the contingent protections of the Berman process. As such, any argument that public policy considerations require initial Berman proceedings must be rejected as contrary to U.S. Supreme Court precedent under the FAA.

Comparing the facts of this case with those before the Court in Italian Colors illustrates this point. In Italian Colors, the Court noted that the right to pursue claims under the anti-trust statutes at issue there had existed before class procedures were ever adopted; because the individual suit was considered adequate to assure 'effective vindication' of anti-trust rights prior to class action procedures, such individual suits must still be adequate to vindicate those rights even after the class action gained more exposure. (*See* Italian Colors, *supra,* 133 S.Ct. at 2311.) Compare that to the instant case, where California law readily allows wage claimants to bypass the Labor Commissioner and its Berman Process altogether by taking a claim directly to Court. The law already establishes that wage claimants have the ***right to pursue*** claims outside of the Berman Process. Thus, even though the Berman Process may simplify the process for some claimants and reduce risk—just as class treatment of anti-trust claims may

spread costs and risks—it is not necessary for the effective vindication of the underlying rights.

The High Court's resounding rejection of pre-arbitration "preliminary litigating hurdles" is inescapable here. The Berman process is just such a hurdle, destroying the prospect of speedy resolution. Under AT&T Mobility and Italian Colors, where parties have agreed to arbitrate their employment-related disputes, laws purporting to require preliminary Berman proceedings violate and are therefore preempted by the FAA. The U.S. Supreme Court's holding directly rejects this Court's prior ruling that delay of the arbitration is not sufficient to find preemption by the FAA.

II. The Italian Colors Decision Emphasizes The Ironclad Public Policy Behind The FAA As Articulated In AT&T Mobility.

Not only does the Italian Colors decision provide guidance regarding the impropriety of imposing preliminary litigation hurdles on parties with arbitration agreements, it serves to emphasize that the preemptive power of the FAA as set forth in AT&T Mobility is expansive and cannot be ignored. Indeed, the High Court's recent decision has explained that under the FAA, ***not even federal statutory law*** can interfere with the terms of arbitration absent an express, contrary congressional command. Because the Berman process interferes with the terms of the parties' arbitration agreement and Congress has made no express exception for such State-required pre-arbitration hearings, the FAA preempts the imposition of that process.

In Italian Colors, the High Court began its analysis by reiterating that absent a contrary congressional command, courts are required to enforce arbitration agreements in accordance with their terms:

> Congress enacted the FAA in response to widespread judicial hostility to arbitration. . . . This text reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, ***courts must rigorously enforce arbitration agreements according to their term***s, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted. That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command.

(Id. at 2308–09, *internal citations omitted, emphasis changed*.) The Court applied this standard to the antitrust case before it, noting that federal "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim" and rejecting arguments that congressional approvals of federal class action rules "establish an entitlement to class proceedings for the vindication of statutory rights." (Id. at 2309.)

Because there was "no contrary congressional command" applicable to federal antitrust claims, the Court explained that the AT&T Mobility decision "all but resolves this case," as that decision held that class proceedings could not be imposed by State law even if "necessary to prosecute claims that might otherwise slip through the legal system." (Italian Colors, *supra*, 133 S.Ct. at 2309, 2312, *quoting* AT&T Mobility, *supra*, 131 S.Ct. at 1753.) The Italian Colors Court explained that the principal purpose of the FAA—the enforcement of arbitration agreements according to their terms—trumps any contrary public policies, ***even if the result is an absence of litigation***:

> In dismissing AT&T Mobility as a case involving pre-emption and not the effective-vindication exception, the dissent ignores what that case established—that ***the FAA's command to enforce***

> ***arbitration agreements trumps any interest in ensuring the prosecution of low-value claims***. The latter interest, we said, is unrelated to the FAA. Accordingly, the FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its principal purpose is the enforcement of arbitration agreements according to their terms.

(Italian Colors, *supra*, 133 S.Ct. at 2312, *emphasis added*.)

In this case, because the would-be impediment to arbitration enforcement is a creature of state law, the analysis is even more simple than that engaged in by the Italian Colors Court. While Italian Colors concedes that an express congressional command might exclude certain federal claims from the enforcement power of the FAA, when state-created impediments are at issue, no amount of public policy or state legislative intent can override the preemptive power of the FAA and the Supremacy Clause of the U.S. Constitution.

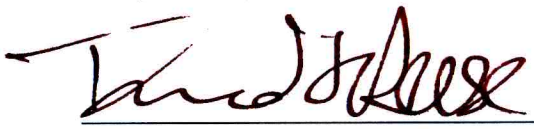
Under the standard set forth by the Italian Colors decision, imposition of the Berman process—which changes the rules of arbitration and imposes preliminary litigating hurdles simply "to reduce the costs and risks of pursuing a wage claim" (*see* Sonic–Calabasas A, *supra*, 51 Cal.4th at 679)—is preempted because it interferes with the principal purpose of the FAA.

CONCLUSION

Time and again, the U.S. Supreme Court has made it clear that the implications of the AT&T Mobility decision cannot be avoided by courts seeking to promote even worthwhile public policy doctrines above arbitration. In Italian Colors, the High Court explained that little analysis apart from its landmark AT&T Mobility decision would be needed to reject

the faulty application of the "vindication of statutory rights" doctrine. (Italian Colors, *supra,* 133 S.Ct. at 2312.) And so it is here. Because imposition of the Berman process notwithstanding the existence of a valid arbitration agreement impermissibly interferes with arbitration in accordance with the terms of the parties' agreement, places primary jurisdiction in a party other than the Arbitrator, and hinders the speedy resolution of the parties' disputes, it is preempted by the FAA.

Respectfully submitted,



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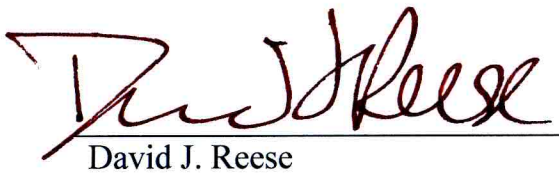

David J. Reese

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1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 330 Golden Shore, Suite 410, Long Beach, California, and I am not a party to the cause, and I am over the age of eighteen years.

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David J. Reese