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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ARSHAVIR ISKANIAN, Plaintiff and Appellant, v. CLS TRANSPORTATION LOS ANGELES, LLC, Defendant and Respondent.	B235158 (Los Angeles County Super. Ct. No. BC356521)

APPEAL from an order of the Superior Court of Los Angeles County. Robert Hess, Judge. Affirmed.

Initiative Legal Group, Raul Perez, Glenn A. Danas, Katherine W. Kehr for Plaintiff and Appellant.

Fox Rothschild, David F. Faustman, Yesenia M. Gallegos, Namal Tantula for Defendant and Respondent.

This is the second appeal in this case. We issued our opinion on the first appeal soon after the California Supreme Court decided *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), which held that a class waiver provision in an arbitration agreement should not be enforced if "class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." (*Id.* at p. 450.) In our prior opinion, in light of *Gentry*, we directed the trial court to reconsider its order granting a motion to compel arbitration and dismissing class claims.

In this appeal, we are faced with an essentially identical order—defendant's renewed motion to compel arbitration was granted and class claims were dismissed. The legal landscape, however, has changed. In April 2011, in *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __ [131 S. Ct. 1740] (*Concepcion*), the United States Supreme Court, reiterating the rule that the principal purpose of the Federal Arbitration Act (FAA) is to ensure that arbitration agreements are enforced according to their terms, held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id.* at p. 1748.) Applying this binding authority, we conclude that the trial court properly ordered this case to arbitration and dismissed class claims.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff in this matter, Arshavir Iskanian, worked as a driver for defendant CLS Transportation Los Angeles, LLC (CLS), from March 2004 to August 2005. In December 2004, Iskanian signed a "Proprietary Information and Arbitration Policy/Agreement" (arbitration agreement) providing that "any and all claims" arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator. The arbitration agreement provided for reasonable discovery, a written award, and judicial review of the award. Costs unique to arbitration, such as the arbitrator's fee, were to be paid by CLS. The arbitration agreement also contained a class and representative action waiver, which read: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in

any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person."

On August 4, 2006, Iskanian filed a class action complaint against CLS, alleging that it failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner. In its March 2007 order granting CLS's motion to compel arbitration, the trial court found that the arbitration agreement was neither procedurally nor substantively unconscionable. *Gentry*, however, was decided soon after the trial court rendered its order, and we issued a writ of mandate directing the superior court to reconsider its ruling in light of the new authority.

Apparently, following remand, CLS voluntarily withdrew its motion to compel arbitration, making it unnecessary for the trial court to reconsider its prior order. The parties proceeded to litigate the case. On September 15, 2008, Iskanian filed a consolidated first amended complaint, alleging seven causes of action for Labor Code violations[1] and an unfair competition law claim (UCL) (Bus. & Prof. Code, § 17200 et seq.). Iskanian brought his claims as an individual, as a putative class representative, and (with respect to the Labor Code claims) in a representative capacity under the Labor Code Private Attorneys General Act of 2004 (the PAGA).[2]

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[1] These were: Labor Code sections (1) 510 and 1198 (unpaid overtime); (2) 201 and 202 (wages not paid upon termination; (3) 226, subdivision (a) (improper wage statements); (4) 226.7 (missed rest breaks); (5) 512 and 226.7 (missed meal breaks); (6) 221 and 2800 (improper withholding of wages and nonindemnification of business expenses); and (7) 351 (confiscation of gratuities).

[2] The PAGA (Lab. Code, § 2698 et seq.) allows an aggrieved employee to bring an action to recover civil penalties for Labor Code violations on his or her own behalf and on behalf of current or former employees.

After conducting discovery, Iskanian moved to certify the class. CLS opposed the motion for class certification. By order dated October 29, 2009, the trial court granted Iskanian's motion, certifying the case as a class action.

On April 27, 2011, the United States Supreme Court decided *Concepcion*. Soon after, CLS renewed its motion to compel arbitration and dismiss the class claims, arguing that *Concepcion* was new law that overruled *Gentry*. CLS contended that, pursuant to *Concepcion*, enforcement of the arbitration agreement on its terms was required, and therefore the class and representative action waivers were effective. Iskanian opposed the motion, arguing among other things that *Gentry* was still good law and, in any event, that CLS had waived its right to seek arbitration by withdrawing the original motion. The trial court found in favor of CLS. On June 13, 2011, it entered an order requiring the parties to arbitrate their dispute and dismissing the class claims.

DISCUSSION

Iskanian appeals from the June 13, 2011 order. Although an order compelling arbitration ordinarily is not appealable (see *Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 591), the order here dismissed class claims. It therefore constitutes a "death knell" for the class claims, and accordingly is appealable. (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757.)

In the absence of material, conflicting extrinsic evidence, we apply our independent judgment to determine whether an arbitration agreement applies to a given controversy. (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685.) If the trial court's decision on arbitrability depended on resolution of disputed facts, we review the decision for substantial evidence. (*Ibid.*) The party opposing arbitration has the burden of showing that an arbitration provision is invalid. (*Franco v. Athens Disposal Co., Inc.*, *supra*, 171 Cal.App.4th at p. 1287.)

Here, the dispute is largely a question of whether the subject arbitration agreement—including its prohibition of class and representative claims—is enforceable

under the law. We therefore must independently review the applicable law to determine whether the trial court's order was correct.

I. The FAA and California arbitration law

Section 2 of the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2) This provision reflects a "'liberal federal policy favoring arbitration,' . . . and the 'fundamental principle that arbitration is a matter of contract.'" (*Concepcion, supra,* 131 S.Ct. at pp. 1742, 1745.) Arbitration agreements, accordingly, are enforced according to their terms, in the same manner as other contracts. (*Ibid.*) Not all arbitration agreements are necessarily enforceable, however. Section 2's "saving clause" permits revocation of an arbitration agreement if "generally applicable contract defenses, such as fraud, duress, or unconscionability" apply. (*Concepcion,* at p. 1746.)

California law similarly favors enforcement of arbitration agreements, save upon grounds that exist at law or in equity for the revocation of any contract, such as unconscionability. (Code Civ. Proc., § 1281; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114.) Under California law, unconscionability, in the context of arbitration agreements as well as contracts in general, "'has both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or "'surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results." (*Id.* at p. 114.)

II. *Concepcion*

In *Concepcion, supra*, 131 S.Ct. 1740, the United States Supreme Court examined the validity of the "*Discover Bank* rule," a rule enunciated in the case *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 153 (*Discover Bank*), in which the California Supreme Court held: "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." Noting the deterrent effect of class actions ("'"class action is often the only effective way to halt and redress . . . exploitation"'") (*id.* at p. 156), the

California Supreme Court explained the reason for its holding in *Discover Bank* as follows: "[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (36 Cal.4th at pp. 162-163.) *Discover Bank* found that class arbitration was "workable and appropriate in some cases," and that class arbitration could be compelled when an otherwise valid arbitration agreement contained an unconscionable class waiver provision. (*Id.* at p. 172.)

The issue before the United States Supreme Court in *Concepcion* was whether the FAA prohibited a state rule, such as the one expressed in *Discover Bank,* that conditioned "the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures." (*Concepcion*, *supra*, 131 S.Ct. at p. 1744.)

Concepcion identified two types of state rules preempted by the FAA. The first type was relatively simple to recognize: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Id.* at p. 1747.) The second type required a more nuanced inquiry. It occurred when a defense seemingly allowed by the FAA section 2 saving clause, such as unconscionability, was "alleged to have been applied in a fashion that disfavors arbitration." (*Concepcion*, at p. 1747.) Such a defense could run afoul of the rule "that a court 'may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" (*Ibid.*, quoting *Perry v. Thomas* (1987) 482 U.S. 483, 493, fn. 9.) Accordingly, the Supreme Court held: "Although *§ 2*'s saving clause preserves generally applicable contract defenses, nothing

in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Concepcion*, *supra*, 131 S.Ct. at p. 1748.)

On this basis, the *Concepcion* court found that the *Discover Bank* rule was preempted. The rule interfered with the "overarching purpose" of the FAA: "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Conception*, *supra*, 131 S.Ct. at p. 1748.)

III. *Gentry*

Concepcion expressly overturned *Discover Bank*. *Gentry*, the case which we previously directed the trial court to consider on remand, was not referenced in *Concepcion's* majority opinion. Iskanian submits that a portion of *Gentry* was directly based on *Discover Bank* and therefore is no longer valid law. He contends, however, that *Concepcion* was limited in scope, and that *Gentry* remains good law to the extent that it prohibits arbitration agreements from "interfering with a party's ability to vindicate statutory rights" through class action waivers.[3] Iskanian asserts that the trial court should have applied *Gentry* in ruling on CLS's renewed motion to compel arbitration, and that if it had done so it would not have dismissed the class claims.

As in this case, the plaintiff in *Gentry* brought a class action claim for violations of the Labor Code, even though he had entered into an arbitration agreement with class

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[3] Iskanian also argues that *Concepcion* does not apply in state courts. Citing to Justice Thomas's dissent in *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 285-286 (*Allied-Bruce*), Iskanian surmises that if the *Concepcion* case had reached the United States Supreme Court from state court, Justice Thomas (who provided the fifth vote) would not have found preemption. This is pure speculation, and it is belied by Justice Thomas's concurring opinion in *Concepcion*, which contains no indication that the holding should apply only in federal court (indeed, Justice Thomas asserted that the FAA has a broader preemptive effect than found by the majority). We also note that Justice Scalia, who authored the *Concepcion* opinion, joined in Justice Thomas's dissent in *Allied Bruce*. Furthermore, following *Concepcion*, the United States Supreme Court has granted petitions for writ of certiorari vacating judgments arising in state courts, and directing the courts to consider *Concepcion*. (See *Sonic-Calabasas A, Inc. v. Moreno* (2011) __ U.S. __ [132 S.Ct. 496]; *Marmet Health Care Center, Inc. v. Brown* (2012) __ U.S. __ [132 S.Ct. 1201].)

waivers. The *Gentry* court, finding that the statutory right to receive overtime pay is unwaivable, concluded that under some circumstances a class arbitration waiver "would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws," and that such a waiver was contrary to public policy. (42 Cal.4th at pp. 453, 457.) The *Gentry* court laid out a four-factor test for determining whether a class waiver should be upheld: "when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.'" (*Id.* at p. 463.) We previously remanded the instant case to the trial court with instructions to reconsider its ruling in light of this "*Gentry* test."

Now, we find that the *Concepcion* decision conclusively invalidates the *Gentry* test. First, under *Gentry*, if a plaintiff was successful in meeting the test, the case would be decided in class arbitration (unless the plaintiff could show that the entire arbitration agreement was unconscionable, in which case the agreement would be wholly void). But *Concepcion* thoroughly rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them. (*Concepcion*, *supra,* 131 S.Ct. at pp. 1750-1751.) The *Concepcion* court held that nonconsensual class arbitration was inconsistent with the FAA because: (i) it "sacrifices the principal advantage of

arbitration—informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"; (ii) it requires procedural formality since rules governing class arbitration "mimic the Federal Rules of Civil Procedure for class litigation"; and (iii) it "greatly increases risks to defendants," since it lacks the multilevel review that exists in a judicial forum. (*Id.* at pp. 1751-1752; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* (2010) 130 S. Ct. 1758, 1775 ["a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so"].) This unequivocal rejection of court-imposed class arbitration applies just as squarely to the *Gentry* test as it did to the *Discover Bank* rule.

Second, Iskanian argues that the *Gentry* rule rested primarily on a public policy rationale, and not on *Discover Bank*'s unconscionability rationale. While this point is basically correct, it does not mean that *Gentry* falls outside the reach of the *Concepcion* decision. *Gentry* expressed the following reason for its four-factor test: "[C]lass arbitration waivers cannot . . . be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees' prosecution of those claims." (*Id.* at p. 464.) *Concepcion*, though, found that nothing in section 2 of the FAA "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," which are "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (131 S.Ct. at p. 1748.) A rule like the one in *Gentry*—requiring courts to determine whether to impose class arbitration on parties who contractually rejected it—cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms.

Third, the premise that Iskanian brought a class action to "vindicate statutory rights" is irrelevant in the wake of *Concepcion.* As the *Concepcion* court reiterated, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (131 S.Ct. at p. 1753.) The sound policy reasons identified in *Gentry* for invalidating certain class waivers are insufficient to trump the far-

reaching effect of the FAA, as expressed in *Concepcion*. *Concepcion*'s holding in this regard is consistent with previously established law. (See *Perry v. Thomas*, *supra*, 482 U.S. at p. 484 [finding that § 2 of the FAA preempts Lab. Code, § 229, which provides that actions for the collection of wages "may be maintained 'without regard to the existence of any private agreement to arbitrate'"]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-11 [holding that the California Supreme Court's interpretation of the Franchise Investment Law as requiring judicial consideration despite the terms of an arbitration agreement directly conflicted with section 2 of the FAA and violated the Supremacy Clause]; *Preston v. Ferrer* (2008) 552 U.S. 346, 349-350 [holding, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA"].)

Because this matter involves analysis of the effect of a federal law, the FAA, on a state rule, we must follow the United States Supreme Court's lead. "'Decisions of the United States Supreme Court are binding not only on all of the lower federal courts [citation], but also on state courts when a federal question is involved . . . .'" (*Elliot v. Albright* (1989) 209 Cal.App.3d 1028, 1034; see also *Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209 ["The determination by this court of [a federal] question is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding"]; *Perkins Mfg. Co. v. Jordan* (1927) 200 Cal. 667, 679 ["we must bow to the supremacy of the federal constitution in this matter as interpreted by the highest court of our country"].)

Accordingly, we find that the trial court here properly applied the *Concepcion* holding—and properly declined to apply the *Gentry* test—by enforcing the arbitration agreement according to its terms. The trial court correctly found that the arbitration agreement and class action waivers were effective, and ruled appropriately in granting the motion to compel arbitration and dismissing Iskanian's class claims.[4]

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[4] Iskanian did not contend that the arbitration agreement was unconscionable on a basis governing *all* contracts, rather than a basis premised on the uniqueness of

IV. ***D.R. Horton***

After Iskanian's opening brief on appeal was filed, the National Labor Relations Board (NLRB or Board) issued a decision analyzing whether and how *Concepcion* and related authority apply to employment-related class claims. In his reply brief, Iskanian contends that this decision, *D. R. Horton* (2012) 357 NLRB No. 184 [2012 NLRB LEXIS 11] (*D. R. Horton*), mandates a finding that the class waiver in the CLS arbitration agreement cannot be enforced.

In *D.R. Horton*, the NLRB held that a mandatory, employer-imposed agreement requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class or collective claims) violated the National Labor Relations Act (NLRA) because it prohibited the exercise of substantive rights protected by section 7 of the NLRA. (*D.R. Horton*, *supra*, 2012 NLRB LEXIS at p. *6.) Section 7 provides in part that employees shall have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." (29 U.S.C. § 157.) The NLRB found that "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by *Section 7 of the NLRA*." (2012 NLRB LEXIS, at p. *9.)

If *D.R. Horton* only involved application of the NLRA we would most likely defer to it. (See *N.L.R.B. v. Advanced Stretchforming Intern., Inc.* (9th Cir. 2000) 233 F.3d 1176, 1180 ["We defer to the Board's interpretation of the NLRA if it is 'reasonable and not precluded by Supreme Court precedent'"]; *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 635 ["we, like the federal courts, defer to the statutory construction adopted by the agency responsible for enforcing the legislation"].) The *D.R. Horton* decision, however, went well beyond an analysis of the relevant sections of the NLRA. Crucially, the decision interpreted the FAA, discussing *Concepcion* and other

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arbitration. Our opinion, therefore, is not inconsistent with *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, 87-89, review granted March 21, 2012, S199119, in which Division One of this Court held that an arbitration provision was unconscionable for reasons that would apply to any contract in general

FAA-related authority in finding that the FAA did not foreclose employee-initiated class or collective actions. (See *D. R. Horton, supra,* 2012 NLRB LEXIS 11 at pp. *32-*55.) As the FAA is not a statute the NLRB is charged with interpreting, we are under no obligation to defer to the NLRB's analysis. "[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute." (*Association of Civilian Technicians v. F.L.R.A.* (9th Cir. 2000) 200 F.3d 590, 592; see also *Hoffman Plastic Compounds, Inc. v. N.L.R.B.* (2002) 535 U.S. 137, 144 ["we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"]; *N.L.R.B. v. Bildisco & Bildisco* (1984) 465 U.S. 513, 529, fn. 9 ["While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel"].)

We decline to follow *D.R. Horton*. In reiterating the general rule that arbitration agreements must be enforced according to their terms, *Concepcion* (which *is* binding authority) made no exception for employment-related disputes. Furthermore, the NLRB's attempt to read into the NLRA a prohibition of class waivers is contrary to another recent United States Supreme Court decision. In *CompuCredit Corp. v. Greenwood* (2012) __ U.S. __, __ [132 S.Ct. 665, 668] (*CompuCredit*), plaintiff consumers filed suit against a credit corporation and a bank, contending that they had violated the Credit Repair Organizations Act (CROA) (15 U.S.C. § 1679 et seq.).[5] The plaintiffs brought the matter as a class action, despite having previously agreed to resolve all disputes by binding arbitration. The Supreme Court rejected their efforts to avoid arbitration, finding that unless the FAA's mandate has been "'overridden by a contrary congressional command,'" agreements to arbitrate must be enforced according to their terms, even when federal statutory claims are at issue. (*CompuCredit*, at p. 669, citing

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5 *D.R. Horton* was issued on January 3, 2012. *CompuCredit* was issued on January 10, 2012.

Shearson/American Express Inc. v. McMahon (1987) 482 U.S. 220, 226.) The Supreme Court held: "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." (*CompuCredit*, at p. 673.)

The *D.R. Horton* decision identified no "congressional command" in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms. *D.R. Horton's* holding—that employment-related class claims are "concerted activities for the purpose of collective bargaining or other mutual aid or protection" protected by section 7 of the NLRA, so that the FAA does not apply—elevates the NLRB's interpretation of the NLRA over section 2 of the FAA. This holding does not withstand scrutiny in light of *Concepcion* and *CompuCredit*.

V. <u>The PAGA claims</u>

The arbitration agreement that Iskanian signed contains a waiver of both class claims and representative claims. In addition to bringing the case as a class action, Iskanian also brought his claims for Labor Code violations in a representative capacity under the PAGA. He contends that the claims brought pursuant to the PAGA are inarbitrable.

The PAGA authorizes an aggrieved employee to bring a civil action to recover civil penalties "on behalf of himself or herself and other current or former employees." (Lab. Code § 2699, subd. (a).) This provision has been interpreted as authorizing an aggrieved employee to recover civil penalties for the violation of his or her own rights, and "to collect civil penalties on behalf of *other current and former employees.*" (*Franco v. Athens Disposal Co., Inc., supra,* 171 Cal.App.4th at p. 1300.)

Division Three of this Court has observed: "[T]he PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties 'on behalf of himself or herself and other current or former employees' (§ 2699, subd. (a)), as an alternative to enforcement by the LWDA [Labor and Workforce Development Agency]. [¶] The Legislature declared its intent as follows: '(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail

to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.' (Stats. 2003, ch. 906, § 1, italics added.)" (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337-338.)

In summary, there is no question that the PAGA was enacted with the intent of promoting the public interest. The PAGA expressly provides for representative actions so that aggrieved employees can pursue violations that state agencies lack the funding to address. Iskanian contends that, given the clear intent of the Legislature to benefit the public by providing for representative actions under the PAGA, the "public right" of representative actions under the PAGA is unwaivable.

Iskanian's view is supported by Division Five's majority opinion in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 (*Brown*). *Brown* held that the *Concepcion* holding does not apply to representative actions under the PAGA, and therefore a waiver of PAGA representative actions is unenforceable under California law. (*Brown*, at p. 494.)

The claims at issue in *Brown* were similar to those here. The plaintiff sought civil penalties (on behalf of herself and others) pursuant to the PAGA for alleged Labor Code violations. The *Brown* majority noted the differences between class actions and PAGA representative actions. "The representative action authorized by the PAGA is an enforcement action, with one aggrieved employee acting as a private attorney general to collect penalties from employers that violate the Labor Code. . . . 'Restitution is not the primary object of a PAGA action, as it is in most class actions.' [Citation.] . . . Our Supreme Court has distinguished class actions from representative PAGA actions in holding that class action requirements do not apply to representative actions brought under the PAGA." (197 Cal.App.4th at p. 499.)

In finding that *Concepcion* did not apply to PAGA representative claims, the *Brown* majority wrote: "[*Concepcion*] does not purport to deal with the FAA's possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code. As noted, the PAGA creates a statutory right for civil penalties for Labor Code violations 'that otherwise would be sought by state labor law enforcement agencies.' . . . This purpose contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration, which right, according to [*Concepcion*], may be waived by agreement so as not to frustrate the FAA—a law governing private arbitrations. [*Concepcion*] does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law." (197 Cal.App.4th at p. 500.)

Respectfully, we disagree with the majority's holding in *Brown*. We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that United States Supreme Court has spoken on the issue, and we are required to follow its binding authority.

In *Southland Corp. v. Keating*, *supra*, 465 U.S. at pages 10-11, the United States Supreme Court overruled the California Supreme Court's holding that claims brought under the Franchise Investment Law required judicial consideration and were not arbitrable. The United States Supreme Court held: "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration*." (*Id.* at p. 10, italics added.) The Court further clarified the reach of the FAA in *Concepcion* by holding: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Concepcion*, *supra*, 131 S.Ct at p. 1747.)

Iskanian argues that a PAGA action can only effectively benefit the public if it takes place in a judicial forum, outside of arbitration. Iskanian could be correct, but his point is irrelevant. Under *Southland Corp. v. Keating*, *supra*, 465 U.S. 1, and

Concepcion, *supra*, 131 S.Ct. 1740, any state rule prohibiting the arbitration of a PAGA claim is displaced by the FAA.

The Ninth Circuit Court of Appeals recently came to a similar conclusion in *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947 [2012 U.S. App. LEXIS 4736]. (*Kilgore*), in which it examined the continuing vitality of the California "*Broughton-Cruz* rule" in light of *Concepcion*. That rule was first expressed in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1083, which held that prohibiting the arbitration of Consumers Legal Remedies Act (CLRA) claims for injunctive relief did not contravene the FAA because the United States Supreme Court "has never directly decided whether a [state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." The rule was extended in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 307, to include claims for public injunctive relief under the UCL.

In *Kilgore*, the plaintiffs brought a class action alleging UCL violations. The district court declined to enforce arbitration agreements between the plaintiffs and defendants. The Ninth Circuit Court of Appeals reversed, finding that the *Broughton-Cruz* rule was preempted by the FAA. The court held that "the very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so. The analysis of whether a particular statute precludes waiver of the right to a judicial forum—and thus whether that statutory claim falls outside the FAA's reach—applies only to *federal*, not state, statutes." (2012 U.S. App. LEXIS 4736 at p. *33.) The court observed that some members of the United States Supreme Court had expressed the view that section 2 of the FAA should be interpreted in a manner that would not prevent states from prohibiting arbitration on public policy grounds, but that view did not prevail. (2012 U.S. App. LEXIS 4736, at p. *34.) "We read the Supreme Court's decisions on FAA preemption to mean that, other than the savings clause, the only way a particular statutory claim can be held inarbitrable is if *Congress* intended to

keep that *federal* claim out of arbitration proceedings . . . ." (2012 U.S. App. LEXIS 4736,. at pp. *34-*35.)

This reasoning is directly applicable here. Following *Concepcion*, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration.

Therefore, giving effect to the terms of the arbitration agreement here, Iskanian may not pursue representative claims against CLS. The law prohibiting such claims applies to both Iskanian's PAGA claims[6] and his UCL claim.[7]

VI. <u>The trial court's finding of no waiver</u>.

As he did in the trial court, Iskanian argues on appeal that, regardless of the effect of *Concepcion*, CLS waived the right to arbitrate by failing to pursue it. Following our prior remand, CLS voluntarily withdrew its motion to compel arbitration. CLS only renewed the motion after the issuance of the *Concepcion* opinion. In granting CLS's renewed motion, the trial court found that CLS had not waived its right to arbitration.[8]

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[6] Although Iskanian may not pursue a representative action, we find that he may pursue his individual PAGA claims in arbitration. Nothing in the arbitration agreement prevents Iskanian from bringing individual claims for civil penalties. We recognize that it has been held that a PAGA claim may not be pursued on an individual basis because of the language of Labor Code section 2699, subdivision (a), which allows an aggrieved employee to bring the action "on behalf of himself or herself *and* other current or former employees." (Italics added.) (See *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124.) We, however, read the function of the word "and" here in a different sense: its purpose is to clarify that an employee may pursue PAGA claims on behalf of others *only* if he pursues the claims on his own behalf. (See *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141.) We do not believe that an individual PAGA action is precluded by the language of the statute.

[7] Iskanian has sought only restitution and disgorgement in connection with his UCL claim, and not injunctive relief. His individual UCL claim is arbitrable. (See *Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at p. 317.)

[8] The trial court was not prevented by our prior opinion from granting the renewed motion by the "law of the case" doctrine, because the doctrine applies only when no

Under both the FAA and state law, a finding of waiver is disfavored. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) Any doubts regarding a waiver allegation are to be resolved in favor of arbitration. (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 25.) "State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver ([Code Civ. Proc.,] § 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes*, *supra*, at p. 1195.)[9]

There is no single test to determine whether a waiver of arbitration has occurred (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195), though our Supreme Court has identified a number of factors that may properly be considered: """(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party."' [Citation.]" *(Id.* at p. 1196.)

In cases where the facts are undisputed, a ruling on waiver of arbitration is subject to de novo review. (See *St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) The determination of

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"intervening change in the law" has occurred. (*Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 146.)

9 Waiver in this context is not used in the ordinary sense of a voluntary relinquishment of a known right, but rather as shorthand for the conclusion that a contractual right to arbitration has been lost. (*St. Agnes*, *supra*, at p. 1195, fn. 4.)

waiver is generally a question of fact, however, in which event the trial court's finding will be upheld if supported by substantial evidence. (*Ibid.*; *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946; *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 841.)

Reviewing the evidence and the history of this case, we find that the trial court did not err by declining to impose the disfavored penalty of waiver. Substantial evidence supported a finding that CLS acted consistently with its right to arbitrate. CLS originally moved to compel arbitration soon after the case was filed. It likely would have been successful in that effort if not for the issuance of *Gentry* while the case was on appeal.

Iskanian argues that despite its original attempt, CLS thereafter abandoned arbitration by withdrawing its motion to compel. CLS counters that pursuing arbitration at that point would have been futile. It concedes that Iskanian would have satisfied his burden under the *Gentry* test, and argues that prior to the *Concepcion* decision, any attempt to pursue arbitration would have been pointless. We agree with CLS that it did not act inconsistently with the right to arbitrate by failing to seek enforcement of the arbitration agreement when, as both parties agree, Iskanian would have satisfied his burden under *Gentry*. (See *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697 [defendant did not act inconsistently with the contractual right to seek arbitration by moving to compel arbitration only after an intervening change in the law].)

Under *Gentry*, even if CLS was able to have the case heard in arbitration, it would have been required to arbitrate the case on a classwide basis (see *Gentry*, *supra*, 42 Cal.4th at p. 463), despite the class waivers in the parties' arbitration agreement. *Concepcion* represented controlling new law, as it clarified that arbitration agreements generally must be enforced according to their terms, and it prohibited the sort of unbargained-for class arbitration that could have been compelled by application of the *Gentry* test. (*Concepcion*, *supra*, 131 S.Ct. 1740, 1748, 1750-1751.)

In *Quevedo v. Macy's, Inc.*, *supra*, 798 F.Supp.2d 1122, the Central District of California addressed a waiver argument nearly identical to the one at issue here. In concluding that the movant did not waive arbitration by failing to pursue it prior to

Concepcion, the Central District court observed: "In light of these disadvantages of class arbitration, it is no surprise that Macy's declined to enforce its arbitration agreement, reasonably believing that, under *Gentry*, it would have to arbitrate Quevedo's claims on a class basis. If Macy's waived any right, it was the right to defend against Quevedo's class and collective claims in arbitration. Because Macy's did not believe that it had the option to defend against Quevedo's individual claims in arbitration, its failure to seek to enforce the arbitration agreement did not reflect any intent to forego that option." (*Id.* at pp. 1130-1131.) Similarly, after *Gentry* and prior to *Concepcion*, CLS had no reasonable basis to believe that only Iskanian's individual claims would be arbitrated. CLS, therefore, did not waive its right to arbitrate these individual claims by renewing its motion following the issuance of *Concepcion*.

Likewise, there is no basis to find that CLS unreasonably delayed in renewing its motion to compel arbitration. The issue of whether a party has sought arbitration within a reasonable time is a question of fact. (*Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 945.) CLS sought to compel arbitration less than three weeks after the Supreme Court rendered its decision in *Concepcion*. The trial court was certainly justified in not finding this an unreasonable delay.

Nor do we discern that Iskanian will suffer any undue prejudice by enforcement of the arbitration agreement. Merely participating in litigation does not result in waiver, and "courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1203.) The fact that Iskanian conducted discovery and submitted extensive briefing in connection with his class certification motion is not particularly germane since, even outside the context of competing arbitration agreements, class certification is not definitively final—defendants may make successive motions to decertify. (See *Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 192 Cal.App.4th 1160, 1171-1172.) Furthermore, although prejudice may lie when the moving party's conduct has substantially undermined the public policy favoring arbitration as a speedy and relatively inexpensive means of dispute resolution (*St. Agnes*, at p. 1204), those concerns are not present here. CLS has not sought to

undermine the efficient nature of arbitration; rather, it has quickly sought arbitration when presented with the opportunity.

Moreover, we see no reason to suspect that CLS intentionally delayed seeking arbitration to gain some unfair advantage. Prejudice may occur when a party uses the judicial process to obtain discovery that it would not be able to get in arbitration. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1204.) But that does not appear to be an issue for concern here—the parties' arbitration agreement allows for reasonable discovery. In addition, it appears from the record that the parties have litigated very little, if any, of the merits of Iskanian's claims. Thus, arbitration still stands as the more efficient venue for addressing the claims. (See *Ibid.*)

In sum, the evidence amply supports a finding that CLS did not waive its right to arbitration.

DISPOSITION

The June 13, 2011 order granting defendant's motion to compel arbitration and dismissing class claims is affirmed.

CERTIFIED FOR PUBLICATION.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.