S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,

Appellant,

vs.

CLS TRANSPORTATION LOS ANGELES, LLC, et al.,
Respondents,

After Decision By The Court Of Appeal,
Second Appellate District, Division Two
Case No. B235158
From the Superior Court for Los Angeles County
Assigned for All Purposes To Judge Robert Hess, Department 24
Case No. BC356521

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

There is a strong public policy in favor of arbitration under both state and federal law. Arbitration agreements are to be enforced according to their terms. Any state statute or judicial rule that applies only to arbitration agreements, and not to contracts generally, is preempted by the Federal Arbitration Act (FAA). The United States Supreme Court recently made this clear in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, 131 S.Ct. 1740 (*Concepcion*). In *Concepcion*, the Court specifically rejected the notion that California's rule invalidating class action waivers in arbitration agreements in the consumer context was merely a refinement of the unconscionability analysis applicable to all California contracts. The Court determined that the holding of *Discover Bank v. Superior Ct.* (2005) 36 Cal.4th 148 (*Discover Bank*), interfered with the FAA's purpose of enforcing arbitration agreements according to their terms. Under the FAA, an arbitration agreement can be invalidated "only upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2 (emphasis added).) Under the Supremacy Clause of the U.S. Constitution, any statute or court decision that interferes with the enforcement of an arbitration agreement is preempted and invalid under the FAA.

Appellant's Opening Brief (OB) rests on the misguided premise that waiver of a class or representative claims in the employment context is somehow different from such a waiver in a consumer setting. Appellant incorrectly contends that such a waiver prevents "effective vindication" of substantive "unwaivable" rights, and that *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), is still good law. There is simply no principled basis, however, on which to distinguish *Gentry* from the now-overruled *Discover Bank.* Both *Gentry* and *Discover Bank* rested on a similar analysis to determine that class waivers in arbitration agreements are

unenforceable. *Gentry* relied heavily on *Discover Bank. Concepcion* makes it clear that "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (131 S.Ct. at 1753.) Thus, the holding in the U.S. Supreme Court's *Concepcion* must be extended to *Gentry*.

Appellant's oft-repeated description of class and representative actions as "unwaivable rights" does not transform them into such. There is no support for the contention that class and representative actions are substantive rights not subject to waiver. The underlying substantive rights in this case, which Respondent concedes may not be waived, are found in the wage and hour provisions of the California Labor Code. Those unwaivable rights can be vindicated in individual arbitrations. Sixty members of the putative class have opted-out and are doing just that. It is pure fiction to contend that participation in a class or representative action is somehow an "unwaivable" right. (See *Gentry*, 42 Cal.4th at 473-81 (Dissent, Justice Baxter).)

Similarly, the preemptive effect of the FAA requires enforcement of the waiver of Appellant's representative action under the Private Attorney General Act (PAGA), Cal. Labor Code § 2698 et seq. PAGA does not confer any "substantive right." Individuals hold no entitlement to bring a PAGA representative action. PAGA does not provide employees with property or any other substantive right, and PAGA penalties are discretionary. PAGA provides an *alternative* procedure to the State's enforcement of the Labor Code that is only available to an individual if the State does not take action, and if no other individual makes it to the courthouse first. As this Court has held, PAGA is merely procedural. (*Amalgamated Transit Union Local 1756 v. Superior Ct.* (2009) 46 Cal.4th 993, 1003.) An individual can still vindicate his or her statutory rights under the Labor Code in an arbitration without the procedural mechanism

of a private attorney general representative action. In this case, Appellant did not even perfect his PAGA claim in a timely manner.

Appellant's assertion that the waivers of class and representative actions infringe on his statutory rights under the National Labor Relations Act (NLRA) is based on *D.R. Horton* (2012) 357 N.L.R.B. 184, a controversial administrative decision that is not entitled deference. An agreement to arbitrate must be enforced according to its terms, even when federal statutory claims are at issue, unless Congress has stated otherwise. (*CompuCredit Corp. v. Greenwood* (2012) 565 U.S. ___,132 S.Ct. 665, 668.) Absent a clear statement in a federal statute showing Congressional intent to override the use of arbitration, the FAA must prevail. (*Id.*) Neither *CompuCredit* nor *Concepcion* made any exception for employment-related disputes. There is no "congressional command" in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms. Appellant's attempt to hold arbitration agreements in the employment context to a different standard than other contracts directly conflicts with the FAA's mandate that arbitration agreements will must be enforced. (9 U.S.C. § 2. See *Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050.)

Finally, Appellant has not met his heavy burden to show that Respondent waived its right to arbitrate. Respondent never acted inconsistently with its right to enforce arbitration. Respondent immediately sought to arbitrate Appellant's individual claims just weeks after Appellant filed a putative class action. Respondent had no choice but to engage in the litigation process when its arbitration clause became unenforceable, as conceded by both parties, under *Gentry*. It is ridiculous to claim that a party acts inconsistently with a right to arbitrate where it does not seek to enforce an arbitration agreement that is unenforceable under existing law. The resulting participation in litigation cannot result in a waiver. Further,

Appellant has not shown that he suffered prejudice. Based on substantial evidence in the record, the trial court found no waiver.

Accordingly, the judgment of the court below must be affirmed. The FAA controls, and Respondent did not waive its right to compel arbitration.

II. STATEMENT OF THE CASE

CLS Transportation Los Angeles LLC ("Respondent") provides limousine and other transportation services. Appellant worked as a chauffeur for Respondent for 17 months, from March 8, 2004 through August 2, 2005. (1 Appellant's Appendix ("AA") 66-69.)

A. Appellant Voluntarily Signed An Arbitration Agreement Waiving His Participation In Class And Representative Actions.

In December 2004, Appellant voluntarily signed a Proprietary Information and Arbitration Policy/Agreement ("Arbitration Agreement") in conjunction with a settlement agreement in which Appellant received $1,350.00. (1 AA 66-69, 71-73, 75-83.) He agreed not to file any complaint against the Company in state court. (*Id.* at 72.) Rather, he agreed to arbitrate all disputes and specifically promised not to file a "class action" or a "representative action". (*Id.* at 72, 81.) He was provided an opportunity to consult counsel before signing. (*Id.* at 72-73.) Similar settlement and arbitration agreements were offered to other chauffeurs. (*Id.* at 67.) Some signed it and others did not. (*Id.*) Appellant voluntarily signed the Arbitration Agreement. (*Id.*) After briefing and a hearing on the matter, the trial court held that this Arbitration Agreement was neither procedurally nor substantively unconscionable. (*Id.* at 300, 2 AA 301-09.)

Appellant and Respondent agreed to arbitrate "any and all claims" arising out of Appellant's employment. (1 AA 80-83.) The Arbitration Agreement provided for a neutral arbitrator, reasonable discovery, a written

award, and judicial review of the award. (*Id.*) It also stated that Respondent would pay the arbitrator's fees, costs, and any expenses that were unique to arbitration. (*Id.*) Further, the Arbitration Agreement expressly stated that it "shall be governed by and construed and enforced pursuant to the Federal Arbitration Act ... and not individual state laws regarding enforcement of arbitration agreements." (*Id.* at 81.) Finally, it contained a class and representative action waiver, which read:

> Except 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.

(*Id.* (emphasis added).)

B. Prior to *Gentry*, Respondent Sought To Compel Arbitration Of Appellant's Individual Claims In Response To A Purported Class Action Filed By Appellant.

On August 4, 2006, Appellant filed a Class Action Complaint in the Superior Court for the County of Los Angeles (Case No. BC356521) against Respondent alleging various wage and hour claims ("first Complaint"). (1 AA 7-20.) On February 9, 2007, Respondent immediately filed a motion to compel Appellant to arbitrate his claims *on an individual basis*. (1 AA 32-84.) The trial court granted the motion, and concluded that the Arbitration Agreement was voluntary and "neither procedurally nor substantively unconscionable." (1 AA 300, 2 AA 301-09.) Appellant appealed this decision. (2 AA 310-311.) While the appeal was pending, the California Supreme Court decided *Gentry, supra,* which held that class

action waivers in arbitration agreements were unenforceable. (42 Cal. 4th at 450.)

C. *Gentry* Required Respondent to Litigate.

In response, the Appellate Court directed the trial court to "reconsider [its March 13, 2007 Order] in light of *Gentry*" on May 27, 2008. (2 AA 324-29.) Respondent conceded, and Appellant agreed, that Respondent could not prevail under the test set forth in *Gentry*. Thus, Respondent was forced to litigate.

Meanwhile, on November 21, 2007, Appellant filed a second complaint pursuant to PAGA (Case No. BC381065) against Respondent, alleging violations of the California Labor Code (PAGA Complaint). (1 Respondent's Appendix ("RA") 1-19.) On March 7, 2008, Respondent filed its answer, and raised as an affirmative defense the fact that Appellant's PAGA claims were time-barred. (1 RA 20-26.)

On August 28, 2008, the trial court consolidated Appellant's first Complaint with his PAGA Complaint. On September 15, 2008, Appellant filed a Consolidated First Amended Complaint ("Consolidated FAC") including the time-barred PAGA claim, and alleging eight causes of action: (i) unpaid overtime; (ii) failure to pay wages upon termination; (iii) improper wage statements; (iv) missed rest breaks; (v) missed meal breaks; (vi) improper withholding of wages and non-indemnification of business expenses; (vii) confiscation of gratuities; and (viii) unfair competition law ("UCL"). (2 AA 330-53.) It is the operative Complaint here. Respondent filed its Answer to the Consolidated FAC on September 24, 2008. (2 AA 354-358.)

As to the UCL claim, Appellant sought: (1) disgorgement; (2) restitution; (3) the appointment of a receiver to manage any disgorged funds; (4) reasonable attorneys' fees; (5) costs; and (6) other and further

relief as the Court deemed equitable and appropriate. (*Id.* at 352.) Appellant never sought injunctive relief. (*Id.*)

D. In 2011, *Gentry* Was Impliedly Overruled By The U.S. Supreme Court In *Concepcion*, and Respondent Immediately Renewed Its Petition To Compel Arbitration.

On April 27, 2011, in *Concepcion*, *supra*, the U.S. Supreme Court held that class action waivers in arbitration agreements are enforceable under the FAA. *Concepcion* explicitly overruled *Discover Bank, supra,* the decision upon which *Gentry* was based, and ruled that arbitration agreements must be enforced "according to their terms." (*Concepcion,* 131 S.Ct. at 1745-46, 1753.)

In response to *Concepcion*, on May 16, 2011, Respondent immediately filed a Motion for Renewal of its Prior Motion for an Order Compelling Arbitration, Dismissing Class Claims on the basis that the class and representative action waiver in its Arbitration Agreement was valid, and that Appellant should be compelled to arbitrate his *individual claim* only. 7 AA 1806-1941.

On June 13, 2011, the trial court properly granted Respondent's motion, and expressly rejected Appellant's argument that Respondent had somehow waived is right to arbitrate. 7 AA 2062-63, 1 RA 33, 36-37. Appellant appealed the trial court's decision, but the Court of Appeal unanimously affirmed the trial court, rejecting the majority opinion in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, *review denied* (Oct. 19, 2011, Case No. S195850). The court below held that the trial court correctly found that the arbitration agreement and class action waivers were effective, that the National Labor Relations Board's decision in *D.R. Horton* was not binding, and that Respondent did not waive its right to arbitrate. This Court granted review on September 19, 2011.

III. DISCUSSION

In determining whether a matter is subject to arbitration, courts apply the presumption in favor of arbitration, and should invoke ordinary rules of contract interpretation. (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metro. Trans. Auth.* (2003) 107 Cal.App.4th 673, 684 (*Local 1277*).) "Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." (*Id.*; *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24-25 (given "the federal policy favoring arbitration[,]...any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including "the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").) When there is no conflicting extrinsic evidence regarding the interpretation of the arbitration agreement, as is the case here, whether an arbitration agreement applies to a controversy is a question of law. (*Local 1277*, 107 Cal.App.4th at 685.)

A. Federal Law Mandates Enforcement Of The Arbitration Agreement.

Arbitration agreements in the employment context receive no special exceptions from the FAA. (*Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123.) The FAA mandates that an arbitration agreement "shall be valid, irrevocable, and enforceable save upon such grounds exist at law or in equity for the revocation of **any** contract." (9 U.S.C. § 2 (emphasis added).) This permits agreements to arbitrate to be invalidated only by "generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion, supra,* 131 S.Ct. at 1746 (internal citations omitted).)

State laws that conflict with the mandates of the FAA are preempted. (*Perry v. Thomas* (1987) 482 U.S. 483, 493 (FAA preempts the California Labor Code.); *Screen Extras Guild v. Superior Court* (1990) 51 Cal.3d 1017, 1022-1023 ("Where the issue is one of substantive conflict with federal law, **the relative importance to the State of its own law is not material** since the framers of the Constitution provided that the federal law must prevail.") (emphasis added).) Indeed, *Concepcion* held that state laws that are hostile to arbitration agreements are invalid under the FAA, and class and representative action waivers must be enforced "according to their terms." (*Concepcion, supra,* 131 S.Ct. at 1750, 1752-53.) *Concepcion* makes it clear that participation in a class or representative action is **not** a substantive right.

The FAA governs the instant Arbitration Agreement. Not only does the Agreement itself state that it "shall be governed by and construed and enforced pursuant to the Federal Arbitration Act ... and not [by] individual state laws regarding enforcement of arbitration agreements or otherwise" (1 AA 81), but to the extent California law does apply to the Agreement, it is preempted by the FAA.

B. *Gentry* Is No Longer Good Law.

Appellant does not argue that the class and representative action waiver is unconscionable under California law. This argument would surely be rejected under *Concepcion.* (131 S.Ct. at 1746, 1753 (finding that the *Discover Bank* rule, defined as "California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable", "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is therefore "preempted by the FAA").) Instead, Appellant argues that the waiver is unenforceable because, if compelled to individual arbitration, he and other employees

would lack the ability to effectively vindicate their statutory rights. Appellant argues that this "firmly grounded" principle is consistent with the FAA and federal law, that it is the basis of *Gentry*, and that therefore, it is not overruled by *Concepcion*. These arguments misrepresent the holding and effect of *Gentry*.

1. The Arbitration Agreement is consistent with Federal law.

Respondent acknowledges that an arbitration agreement cannot waive substantive rights. (See, e.g., *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth* (1985) 473 U.S. 614, 638 (finding that when a party agrees to arbitrate a statutory claim, that party does not waive the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum).) But participation in class or representative actions is not a substantive right, Appellant's incessant protestations to the contrary notwithstanding. The cases relied upon by Appellant for the claim that the class action waiver here improperly forces him to waive substantive rights are irrelevant. No case other than *Concepcion* evaluated the enforceability of a class action waiver in an arbitration agreement. Moreover, the cases cited by Appellant do not stand for the proposition he indicates; rather, they involve competing federal statutes where the issue presented regarded whether Congress intended certain federal claims to be exempt from the FAA. (See, e.g., *Mitsubishi, supra*, 473 U.S. at 628 ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself [in the Sherman Antitrust Act] has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.")(emphasis added); *Green Tree Fin. Corp. v. Randolph* (2000) 531 U.S. 79, 90-91 (*Green Tree*) (concerning the waiver of federal "rights", the court asked "whether Congress has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue.") (emphasis added); *Gilmer v.*

Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 23-24, 26 (motion to compel arbitration of an ADEA claim granted where the Court stated that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"); *Equal Emp't Opportunity Comm'n v. Waffle House, Inc.* (2002) 534 U.S. 279, 290, 296, fn. 1 (Americans with Disabilities Act); *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 121, 123 (interpreting FAA and holding it applies in the employment context).) Regardless of the number of times Appellant says class and representative actions are unwaivable substantive rights (approximately 50 times in the OB), the law does not support this contention.

Further, those cases that discuss the "effective vindication" of rights indicate that an arbitration agreement **cannot be invalidated** on the speculation that the agreement might not be effective because it would "reflect the very sort of 'suspicion of arbitration' the Supreme Court has condemned as "'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" (*Booker v. Robert Half Int'l* (D.C. Cir. 2005) 413 F.3d 77, 82 (citing *Gilmer,* 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989) 490 U.S. 477, 481). See also *Green Tree,* 531 U.S. at 89 ("In considering whether an agreement to arbitrate is unenforceable, we are mindful of the FAA's purpose to reverse the longstanding judicial hostility to arbitration agreements." (internal citations omitted)).) "[T]he notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with *Concepcion.*" (*Kaltwasser v. AT&T Mobility LLC* (N.D. Cal. 2011) 812 F.Supp.2d 1042, 1048.)

2. Justice Baxter's dissent in *Gentry* is directly on point.

Ultimately, Appellant confuses the means with the ends. "Class actions are provided only as a means to enforce substantive law." (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 918.) It is a procedural mechanism, not a substantive right. In *Discover Bank*, Justice Baxter noted in his dissenting opinion that a class action "must not be confused with the substantive law to be enforced. Even if the unavailability of class relief makes a plaintiff's pursuit of a particular claim less convenient, such claims may nevertheless be pursued on an individual basis." (*Discover Bank*, 36 Cal.4th at 178-79.) He reiterated this position in the *Gentry* dissent, in which he explained that "[n]o finding is made that a class remedy is *essential*, as a practical matter, to vindication of the "unwaivable" statutory right to overtime wages." (*Gentry*, *supra*, 42 Cal.4th at 475 (emphasis in original).) A class action simply is not necessary to protect individual substantive claims. Indeed, more than 60 of Respondent's former employees and putative class members have opted out of this class and pursued individual wage claims before the California Division of Labor Standards Enforcement and with the American Arbitration Association pursuant to the Arbitration Agreement. (*See, e.g.,* 7 AA 2005-2049.) Clearly, they have not been deterred from vindicating their individual statutory rights.

Justice Baxter was prescient in his dissent in *Gentry*, predicting that both *Discover Bank* and *Gentry* would run afoul of the FAA. (*Id.* at 479.) This Court "may not elevate a mere judicial affinity for class actions as a beneficial device for implementing the wage laws above the policy expressed by . . . Congress . . . ." (*Id.* at 477.) Justice Baxter strongly disagreed with the notion that "whenever, in an overtime wage case, the court could otherwise find a class proceeding appropriate, it may do so

notwithstanding a free and fair agreement for individual arbitration." (*Id.* at 476, fn2.) As in this case, Justice Baxter noted that there was "no indication in Gentry's own claim is too small to warrant individual legal action," *id.* at 479, fn5, and that "even if class relief were a significantly more effective way for . . . employees, as a group, to establish their . . . claims . . . this does not justify invalidating [a] voluntary agreement to resolve . . . claims by individual arbitration." (*Id.* at 478-79 (emphasis in original).) Here, unless Appellant's agreement to resolve *his* claims by individual arbitration "constitutes a de facto waiver of *his own* statutory rights, he should not be allowed to act, contrary to his agreement, as a representative plaintiff." (*Id.*) The "strong public policy that arbitration agreements are to be enforced according to their terms should prevail." (*Id.*)

3. The *Gentry* test derives its meaning from the fact that an agreement to arbitrate is at issue.

Contrary to Appellant's claim, *Gentry* is much broader than the basic premise that an arbitration agreement cannot waive substantive rights. (OB, p. 8.) *Gentry* sets forth a specific, unlawful test to determine whether the **means** of enforcing substantive rights is "effective" enough to vindicate those substantive rights. (42 Cal.4th at 463.) *Gentry* further impermissibly holds that if after consideration of these factors the court concludes that "a class arbitration is likely to be **a significantly more effective practical means for 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." (*Id.*) Under the FAA, a court is not entitled to make such a determination. The substantive rights involved here are under wage and hour laws in the California Labor

Code. No such rights have been waived. That a class or representative action may be "more effective" is irrelevant under the FAA. Thus, *Gentry* incorrectly holds that despite a valid arbitration agreement between parties, the trial court may certify a class in an overtime wage case, "in any circumstance where it could otherwise do so." (*Id.* at 476 (Dissent, Justice Baxter).)

Gentry's test is aimed directly at the efficacy of arbitration agreements, and it is thus at odds with the primary objective of the FAA, which is to enforce arbitration agreements according to their terms. As described in *Concepcion,* it is not the intent of the FAA to "preserve state-law rules that stand as an obstacle" to enforcing arbitration agreements according to their terms. (131 S.Ct. at p. 1748.) "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at 1753.) Moreover, "[w]hen 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 1747 (citing *Preston v. Ferrer* (2008) 552 U.S. 346, 353).) The test set forth in *Gentry* is thus prohibited by the FAA.

4. There is no principled distinction between *Gentry* and *Discover Bank.*

Appellant also attempts to distinguish *Gentry* from *Concepcion* on the grounds that the latter rested on the doctrine of unconscionability in consumer contracts, while *Gentry* concerned "important public policies" stemming from employees' statutory rights. (OB, p. 5.) Appellant's attempt to distinguish *Concepcion* from *Gentry* to avoid enforcement of the Arbitration Agreement between the parties is flawed. *Concepcion* applies to *Gentry* with equal force as it does to *Discover Bank.* An "important public policy" is simply not sufficient to trump the FAA.

Concepcion overruled *Discover Bank*, which was the foundation of *Gentry*. In *Gentry,* the Court deferred rendering an opinion until after it issued *Discover Bank.* (*Gentry,* 42 Cal.4th at 453-455, 462.) Further, the *Gentry* Court "granted review to clarify our holding in *Discover Bank"* and repeatedly cites *Discover Bank* throughout the opinion. (*Id.* at 452.)

Despite framing the *Gentry* opinion in terms of "statutory rights", as compared to *Discover Bank*'s "unconscionability" standard, *Gentry* echoes *Discover Bank* in its analysis. Each decision impermissibly considered the modest size of the individual's potential recovery, unequal bargaining power in the contractual relationship, and "other real world obstacles" to vindication of the individuals' rights. (Compare *Discover Bank,* 36 Cal.4th at 162-163 with *Gentry*, 42 Cal.4th at 463.) *Concepcion* rejected these issues as barriers to the enforcement of class action waivers in arbitration agreements under the FAA. The case held that the relative size of the recovery does not trump public policy favoring arbitration, and that even with differential bargaining power between parties, where there is the potential for retaliation against class members, arbitration agreements have been enforced. (*Concepcion*, 131 S. Ct. at 1753, 1749 n. 5 ("Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held... that agreements to arbitrate in that context are enforceable."..."allowing arbitration of claims arising under the Age Discrimination in Employment Act of 1967 despite allegations of unequal bargaining power between employers and employees.").) In addition, the fact that class members may be ill informed or may not be able to vindicate their rights applies to all class actions, yet *Concepcion* rendered the class action waiver in that case enforceable.

Further, like *Discover Bank*, the Court in *Gentry* rejected the notion that class actions are incompatible with arbitration. (42 Cal.4th at 465.) *Concepcion* directly addressed and overturned this view, finding that "[t]he

overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (131 S.Ct. at 1748.) Accordingly, Appellant's attempt to distinguish *Gentry* from *Discover Bank* fails.

Subsequent to *Concepcion* was issued, numerous courts have held that *Gentry* has been implicitly overruled. (*See, e.g., Valle v. Lowe's HIW, Inc.* (N.D.Cal. Aug. 22, 2011) No.11-1489 SC, 2011 WL 3667441, *1-3 ("[L]ike *Discover Bank*, *Gentry* provides a rule of enforceability that applies only to arbitration provisions. Both opinions rely on the same California precedent and logic. Because of these similarities, many courts have found that *Concepcion* overrules or abrogates *Gentry*."); *Murphy v. DirecTV, Inc.* (C.D.Cal. Aug. 2, 2011) No. 2:07-cv-06465, 2011 WL 3319574, *4-5 ("**[I]t is clear to the Court that *Concepcion* overrules *Gentry*,**"); *Lewis v. UBS Fin. Servs. Inc.* (N.D.Cal. 2011) 818 F.Supp.2d 1161, 1167 ("[L]ike *Discover Bank*, *Gentry* advances a rule of enforcement that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation. As such, ***Concepcion* effectively overrules *Gentry***."); *Morse v. Servicemaster Global Holdings Inc.* (N.D.Cal. July 27, 2011) No. C10-00628, 2011 WL 3203919, *3-4, n.1 (defendant's motion to compel arbitration granted because "*Concepcion* rejected reasoning and precedent behind *Gentry*."); *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1127, 1140 (class action waiver was "valid and enforceable" because *Concepcion* "undercut the reasoning" of *Discover Bank* and *Gentry*,); See also *Brown, supra,* 197 Cal.App.4th at 505-09, J. Kriegler dissenting (viability of *Gentry* questioned).) Indeed, **the majority of judges who have considered the issue have found that *Gentry* has been overruled**. The only case cited by Appellant for the proposition that

the *Gentry* was not overruled by *Concepcion* is *Franco v. Arakelian Enterprises, Inc.*, (2012) 211 Cal.App.4th 314. (OB, p. 18) That case is no longer citable because review this Court granted review of it on February 13, 2013. Appellant's citations to other jurisdictions are irrelevant as they do not opine on the specific test set forth in *Gentry*. Further, the courts in each of the cases cited by Appellant to suggest that *Concepcion* does not overrule *Gentry* because the *Gentry* test is not "malleable" or "toothless" (OB, p. 20) expressly declined to evaluate whether *Gentry* was overruled by *Concepcion*. (See *Kinecta v. Alternative Fin. Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 516 ("A question exists about whether *Gentry* survived the overruling of *Discover Bank* in *Concepcion,* but it is not one we need to decide."); *Brown, supra,* 197 Cal.App.4th at 497 ("Accordingly, we do not have to determine whether, under [*Concepcion*], the rule in [*Gentry*] concerning the invalidity of class action waivers in employee-employer contract arbitration clauses is preempted by the FAA); *see also Arguelles-Romero v. Superior Court.* (2010) 184 Cal.App.4th 825, 839-43 (decided before *Concepcion* and specifically regarded the application of the now-overruled *Discover Bank* unconscionability analysis to a class action waiver).)

The class action waiver in the Arbitration Agreement is enforceable because no grounds exist at law or in equity for its revocation. It cannot be invalidated by the defenses raised by Appellant because those arguments apply only to arbitration and derive their meaning from the fact that an agreement to arbitrate is at issue.

C. The Waiver of a PAGA Representative Action Is Enforceable.

Under *Concepcion*, the FAA applies to waivers of representative actions under PAGA no less than to waivers of class actions. There is

simply no principled distinction between a PAGA representative action and a class action under California Code of Civil Procedure § 382. Appellant argues that by barring representative actions in any forum, the Arbitration Agreement eliminates an employee's supposed unwaivable statutory entitlement to bring a claim under PAGA. This assertion, however, is entirely unsupported by the facts or the law.

1. PAGA is unconstitutional.

As a threshold matter, PAGA is unconstitutional. The California Constitution expressly provides for the separation of government powers. (Cal. Const. of 1849, art. III, §1, now art. III, §3.) When a state legislature crosses the line by significantly interfering with the judicial function, courts do not hesitate to declare the statute unconstitutional. (See *In re Application of Lavine* (1935) 2 Cal.2d 324, 328; *Merco Constr. Eng'rs, Inc. v. Mun. Ct.* (1984) 21 Cal. 3d 724, 731.) Here, PAGA is unconstitutional because it usurps the judiciary's power to ensure the neutrality of counsel who prosecute public actions because it authorizes such representation without government oversight. (*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 57 ("[I]t is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done."); *Clancy v. Superior Court* (1985) 39 Cal.3d 740, 743, 750 (Attorneys acting on behalf of the public or the government need to be neutral and should not have a financial stake in the outcome of the action because it is "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public [interest].")) PAGA actions are prosecuted on behalf of the State. (Cal. Lab. Code §2698; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 (PAGA enacted because of inadequate staffing levels for labor law enforcement government agencies; thus, under PAGA, aggrieved

employees are deputized to enforce the labor code and collect penalties for the government.)) PAGA by its very terms empowers private attorneys to litigate public actions in a manner that directly violates the applicable ethical standard enunciated by the California Supreme Court in *Clancy* and *Santa Clara*. Neutral, government attorneys do **not** "retain control over critical discretionary decisions," as required by that standard. In fact, they retain no control whatsoever over any aspect of PAGA litigation. Thus, the state legislature has authorized private attorneys with a financial stake in the litigation to represent the public in PAGA actions without requiring any government control or supervision over the litigation. By doing so, it has imposed a lesser standard for attorney conduct than the Supreme Court imposed in *Clancy* and *Santa Clara*. Consequently, PAGA impermissibly intrudes upon the judiciary's inherent authority over attorney ethical standards and conduct in violation of the doctrine of separation of powers. Accordingly, PAGA is unconstitutional.

2. Appellant's PAGA claim is time-barred.

In any event, Appellant's ability to assert a PAGA claim on behalf of himself, or anyone else, is barred by the statute of limitations. The statute of limitations for a PAGA claim is one-year. (*Thomas v. Home Depot USA Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1003, 1007 (holding PAGA statute of limitations is one year, and rejecting claim that relevant limitations period is that of the underlying claims).) Respondent has consistently raised as an affirmative defense the fact that Appellant's PAGA claim is time-barred. (1 RA 20-21 and 27-29.)

Here, Appellant's employment ended on August 2, 2005, and he did not file a PAGA claim until November 21, 2007. (1 AA 66-69, 1 RA 1-19.) Further, any attempt to preserve the PAGA claim by arguing that it "relates back" to the first Complaint is unjustified for two reasons. First, the PAGA Complaint was brought in a unique action, separate and apart

from the first Complaint, so the relation back doctrine does not apply. Second, even if the rule of relation back applied here, the rule does not operate to assign the performance of a condition precedent (e.g., the exhaustion of administrative remedies by sending notice to the LWDA and the employer) to a date prior to its actual occurrence. (*Wilson v. Department of Public Works,* 271 Cal.App.2d 665, 669 (1969) ("A subsequent pleading which sets out the subsequent performance of a statutory condition precedent to suit cannot relate back to the time of the filing of the original complaint and thereby toll the running of the period of limitation, since the rule of relation back does not operate to assign the performance of a condition precedent to a date prior to its actual occurrence.").) Appellant provided written notice by certified mail to the LWDA and the employer, required under the PAGA, on August 4, 2006, over a year after Appellant's termination. Because Appellant did not even serve the required notice until after the statute of limitations had passed, the proposed PAGA claim does not relate back to the date of filing of the first Complaint, and it is consequently time barred. (See, e.g., *Moreno v. Autozone, Inc.,* (N.D.Cal. June 5, 2007), No. C05-04432 MJJ, 2007 WL 1650942, *4.) Consequently, Appellant's pursuit of statutory remedies under PAGA in any event is futile.

3. A PAGA claim may be brought as an individual action.

Appellant's argument that bringing a representative action under PAGA is a "substantive right" is falsely premised upon the assertion that a PAGA claim cannot be brought on behalf of an aggrieved individual. Appellant, however, can pursue an individual claim for civil penalties under PAGA in arbitration. (*Quevedo, supra,* 798 F.Supp.2d at 1141.) As the District Court in *Quevedo* explained:

> "[R]equiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA. A claim brought on behalf of others would, like class claims, make for a slower, more costly process. In addition, representative PAGA claims `increase[] risks to defendants' by aggregating the claims of many employees. *See* [*Concepcion,* 131 S.Ct.] at 1752. Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would `go uncorrected' given the `absence of multilayered review.' *See id.* Just as `[a]rbitration is poorly suited to the higher stakes of class litigation,' it is also poorly suited to the higher stakes of a collective PAGA action. *See id.* The California Court of Appeal's decision in *Franco* shows only that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions. *See Franco* [*v. Athens Disposal Co.,* 171 Cal.App.4th 1277, 90 Cal.Rptr.3d 539 (2009)]. *AT&T v. Concepcion* makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA. *See Concepcion,* 131 S.Ct. at 1753."

(*Quevedo,* 789 F.Supp.2d at 1142.) The fact that Appellant must split any recovered penalties with the State does not change this analysis. The rationale of *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 119, 1123, is unpersuasive. *Reyes* incorrectly states that PAGA does not enable a single aggrieved employee to litigate his claims alone, but requires an aggrieved employee to sue on behalf of himself *and* other employees. (*Id.* at 1123-1124.) PAGA, however, does not "require" anything. It simply says that penalties under relevant Labor Code provisions "**may** . . . be recovered by an aggrieved employee on behalf of himself or herself and other current or former employees." (Cal. Labor Code § 2699(a) (emphasis added).) The legislative history of PAGA explains that under PAGA, "private suits for Labor Code violations could be brought only by an employee or former employee of the alleged violator against whom the alleged violation was committed. This action ***could*** also include fellow employees also harmed

by the alleged violation." (Assembly Committee on Judiciary, Labor Code Private Attorneys General Act of 2004, Date of Hearing June 26, 2003, available online at: http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0751-0800/sb_796_cfa_20030626_110301_asm_comm.html.[1]) Further, even the title of Labor Code section 2699 reads "Actions brought by an aggrieved employee **or** on behalf of self **or** other current or former employees." (West's Ann. Cal. Labor Code § 2699 (emphasis added). See also *Arias, supra,* 46 Cal.4th at 981, fn5 ("Actions under the Labor Code Private Attorneys General Act of 2004 **may** be brought as class actions.") (emphasis added).)

PAGA does not have a numerosity requirement, and by "deputizing" private citizens, PAGA has left the discretion of how to bring an action with the private citizen. (*Arias, supra*, 46 Cal.4th at 984-988.) Indeed, Appellant acknowledges the fact that an individual can seek penalties under PAGA without notice to other employees. (OB, p. 23) It follows that an aggrieved individual can seek civil penalties under PAGA for himself or herself, like a class action, regardless of the existence of other current or former employees.

4. A PAGA representative action is merely a procedural mechanism not a substantive right.

Appellant's argument that PAGA is an unwaivable, substantive, public right is without support. This Court has held that the "Labor Code Private Attorney General Act of 2004 **does not create property or any other substantive rights**." (*Amalgamated Transit Union Local 1756, supra,* 46 Cal.4th at 1003 (emphasis added).) It is not the same as a claim for overtime, meal breaks, or minimum wage, and "is simply a procedural

[1] "[J]udicial notice of legislative history materials generally available from published sources" is "unnecessary." (*Sharon v. Superior Court* (2003) 31 Cal.4th 417, 440 fn.18.)

statute." (*Id.* at 1003 (emphasis added); *Amaral v. Cintas Corp. 2* (2008) 163 Cal.App.4th 1157, 1199 ("PAGA did not impose new or different liabilities on defendants based on their past conduct. . . . It merely changed the procedural rules governing *who* has authority to sue for certain penalties.").)

A PAGA representative action and a class action are nearly identical in their nature. They are both initiated for the benefit of a specific group of aggrieved individuals, and both provide for the possibility of an incentive award for the representative and his or her counsel. *Concepcion* held that one can permissibly waive such a procedural right. Further, the waiver clause upheld in *Concepcion* specifically included "any purported class **and representative proceeding**". (*Concepcion*, 131 S.Ct. at 1744, n. 2.) It made no distinction between representative actions and class actions. The language of Appellant's Arbitration Agreement is virtually identical to the clause upheld in *Concepcion*. (1 AA 80-81) ("(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.").) Moreover, the clause in *Discover Bank*, which was expressly overruled by *Concepcion*, precluded both sides from participating in classwide arbitration, consolidating claims, or arbitrating claims "as a representative or member of a class or in a private attorney general capacity." (*Discover Bank,* 36 Cal.4th at 153-54.) Thus, the representative waiver here must be enforced.

PAGA, by itself, does not confer any right on Plaintiff. There is no such thing as a "violation of PAGA". The civil penalties available under PAGA are for violations of other substantive sections of the Labor Code, and are discretionary. (Cal. Labor Code § 2699(e)(2).) Rather, the

"substantive rights" conferred on Appellant are found in the underlying Labor Code provisions at issue. PAGA is simply one of several ways by which an employee may seek to enforce that substantive right. Indeed, by its own terms, PAGA is "an alternative" to the prosecution of a Labor Code violation by "the Labor and Workforce Development Agency ("LWDA"), or any of its departments, divisions, commissions, boards, agencies or employees." (Cal. Labor Code § 2699(a).) Thus, contrary to Appellant's suggestion, employees have no entitlement to bring a PAGA representative action. (See OB, p. 21) Notably, Appellant fails to acknowledge that the alleged "empowerment of an individual to recover penalties on behalf of the state, himself, and other employees" (OB, p. 23) must be with "the understanding that labor law enforcement agencies were to **retain primacy** over private enforcement efforts." (*Arias*, *supra,* 46 Cal.4th at 980.) Indeed, an aggrieved employee must provide written notice to the LWDA before he or she can file a PAGA representative action, and thereafter he or she can only file a representative action if the LWDA declines to investigate or if the LWDA fails to respond to the notice in a timely manner, Cal. Labor Code § 2699.3, and if no other employee files first.

In addition, arbitration does not limit an employee's individual recovery of penalties under PAGA. For this reason, the Arbitration Agreement does not conflict with the principles advanced by this Court in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, because *Armendariz* held only that "an arbitration agreement may not limit statutorily imposed remedies." (*Id.* at 103-04.) Appellant's Arbitration Agreement does not limit the remedies for any of the alleged violations.

Further, the notion that a PAGA action cannot be contravened by a private arbitration agreement because it was established for a so-called "public reason" is contrary to well-established law. (See, e.g., *Southland*

Corp. v. Keating (1984) 465 U.S. 1, 10-11 (California Franchise law preempted by the FAA); *Perry v. Thomas* (1987) 482 U.S. 483, 490-491 (California Labor Code Section 229 preempted by the FAA); *Preston v. Ferrer* (2008) 552 U.S. 346, 359 (California Talent Agencies Act preempted by the FAA).) "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*, 131 S.Ct. at 1747 (holding that the waiver of a class action, a statutory procedure that presumably benefits the public, is enforceable); See also *Kilgore v. Keybank Nat'l Assn.* (9th Cir. 2012) 673 F.3d 947, 962 ("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.").) Arguably, anything a state legislature does is for a "public reason." Such is not enough to avoid scrutiny under the FAA.

Appellant's citations to *Armendariz* and *Gentry* on this point are inapposite. The FEHA rights at issue in *Armendariz* and the overtime rights at issue in *Gentry* are substantive rights in and of themselves, regardless of the fact that they may have been established for a "public reason". PAGA, on the other hand, is simply a tool to enforce substantive law. As set forth above, PAGA does not contain any substantive right, and there is nothing in the language of PAGA that precludes a waiver of representative actions in employment agreements. Is Appellant arguing that a private citizen is *required* to bring a PAGA action on behalf of others and the State? It is unreasonable to hold that individuals cannot waive a claim that they do not have a right to bring, particularly when they have several other means to achieve the same remedies. Regardless of whether a state statute "benefits the public," it will be preempted by the FAA if it contravenes the prevailing law that arbitration agreements are to

be enforced according to their terms. (*Concepcion*, 131 S.Ct. at 1747. See also *Grabowski v. C.H. Robinson Co.* (S.D.Cal. 2011) 817 F.Supp.2d 1159, 1180 ("[Plaintiff's] PAGA claim is arbitrable, and that the arbitration agreement's provision baring him from bringing that claim on behalf of other employees is enforceable."); *Valle, supra,* 2011 WL 3667441 at *6 ("[T]o the extent that Plaintiffs argue that no PAGA claim is arbitrable, the court rejects this argument as unsupported by the law. Plaintiffs' PAGA claim is a state-law claim, and states may not exempt claims from the FAA."); *Nelson v. AT&T Mobility LLC* (N.D. Cal. Aug. 18, 2011) No. C10–4802, 2011 WL 3651153, *4 ("*Concepcion* preempts California law holding PAGA claim inarbitrable."); *Quevedo,* 798 F.Supp.2d at 1141 (motion to compel arbitration was granted because "Quevado's PAGA claim is plainly arbitrable.").)

D. The Class and Representative Action Waiver Does Not Infringe On Employee Rights Under Federal Labor Laws.

Appellant's reliance on the National Labor Relations Board ("NLRB" or "Board") controversial and highly politicized decision in *D.R. Horton, Inc.* (Jan. 6, 2012) 357 NLRB 184, 2012 WL 36274, is misguided. Not only was the arbitration agreement in *D.R. Horton* easily distinguished from Appellant's, but the decision should be given no deference because the NLRB exceeded its authority by interpreting the FAA and by ignoring the clear and unambiguous holdings of the U.S. Supreme Court in *Concepcion* and *CompuCredit, supra,* 132 S.Ct. at 668.

D.R. Horton considered whether an employee precluded from exercising section 7 rights ***in all forums*** violated the NLRA. (*D.R. Horton,* 357 NLRB 184.) Ultimately, the NLRB held that the FAA must yield to the NLRA because class claims are protected "concerted activity." The

arbitration agreement at issue in *D.R. Horton*, however, was more restrictive than Appellant's, and explicitly prevented any concerted action.

The arbitration agreement in *D.R. Horton* was mandatory, precluded the employee from seeking class action relief in civil court, prohibited the arbitrator from consolidating the employees claims with the claims of other employees pending in arbitration, precluded the arbitrator from presiding over a collective action; and precluded the arbitrator from awarding relief to a *group* of employees. (*D.R. Horton, Inc.*, 2012 WL 36274 at *1.) As a result of the language in the *D.R. Horton* arbitration agreement, the employee was barred from filing a class action arbitration under the Fair Labor Standards Act, which prompted him to file an unfair labor practice charge against his employer with the NLRB. (*Id. at* *2.) The NLRB held that the class action waiver in the arbitration agreement violated the employee's right to concerted activity under Section 7 because it precluded the employee from pursuing a collective or class action claims in all forums. (*Id.* *5.)

In stark contrast, Appellant voluntarily signed the Arbitration Agreement as part of a settlement with Respondent, during which he received $1,350.00, and which other employees refused to sign without consequence. (1 AA 66-69, 71-73, 75-83; see *Webster v. Perales* (N.D. Tex. Feb. 1, 2008), No. 3:07-CV-00919-M, 2008 WL 282305 *4 (holding there could be no violation of Section 7 rights because plaintiffs' consent to arbitration was "voluntary and without duress, pressure or coercion.").) Further, the instant Arbitration Agreement does not prohibit Appellant from filing joint claims in arbitration (60 employees have done so), does not preclude the arbitrator from consolidating Appellant's claims with claims of other employees, and does not prohibit the arbitrator from awarding relief to a group of employees. (1 AA 75-83.) Respondent's Arbitration Agreement therefore, does not hinder Appellant from engaging in

"concerted activity" in an arbitrable forum. Accordingly, the holding of *D.R. Horton* is distinguished and not applicable here.

In any event, the Board exceeded its authority in *D.R. Horton* when it interpreted the FAA, and this Court therefore owes no deference to its decision. (*Hoffman Plastic Compounds Inc. v. NLRB* (2002) 535 U.S. 137, 144 ("...we have never deferred to the [b]oard 's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"); *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1133 (California appellate courts are not bound by federal administrative interpretations); *Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050, 1054 ("[A]lthough no court of appeals has addressed *D.R. Horton*, nearly all of the district courts to consider the decision have declined to follow it.").) Further, the decision's persuasive value is also limited because it "reflects a novel interpretation of section 7 and the FAA" and "only two Board members subscribed to it, and the subscribing members therefore lacked the benefit of dialogue with a full board or dissenting colleagues." (*Nelsen*, 207 Cal.App.4th at 1133-34; See *Noel Canning v. NLRB*, __ F.3d __ (D.C. Cir. Jan. 25, 2013), 2013 WL 276024 at *16 (finding the current appointments to the Board invalid and stating that "Because the Board lacked a quorum of three members when it issued its decision in this case . . . its decision must be vacated.").) At this time, however, this Court is bound by the direct, controlling authorities which hold that arbitration agreements, including class and representative action waivers contained therein, must be enforced according to their terms unless the FAA's mandate has been "overridden by a contrary congressional command". (*CompuCredit, supra,* 123 S.Ct. at 669; *Concepcion*, 131 S.Ct. at 1745; *Gilmer, supra,* 500 U.S. at 26 ("[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude waiver of judicial remedies for

the statutory right at issue.").) Appellant is unable to cite any evidence of any Congressional intent to limit arbitration in deference to any policy inherent in the NLRA. The FAA must therefore override any alleged statutory right to collective litigation or arbitration as suggested in *D.R. Horton*. (See *Nelsen,* 207 Cal.App.4th at 1133-34 (not bound to follow *Horton* because the policy favoring arbitration in the FAA must not yield to the NLRA); *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D.Cal. 2012) 870 F.Supp.2d 831, 845 (rejecting *D.R. Horton* because it failed to "overcome the direct controlling authority [in *Concepcion* and *CompuCredit*] holding arbitration agreements, including class action waivers contained therein, must be enforced according to their terms").) "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that is may wholly ignore other and equally important congressional objectives." (*Hoffman Plastic Compounds, supra,* 535 U.S. at 143-44.) The NLRB's "remedial preferences" are not to be deferred to "where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." (*Id.*)

Despite Appellant's allegation to the contrary, there is no "unambiguous" Section 7 right to pursue class or collective action. (OB, p. 38.) "[T]o find any employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not only by and on behalf of the employee himself." (*Myers Indus. & Prill* (1984) 268 NLRB 493 *(Myers I),* remanded, 755 F.2d 941 (D.C. 1985), reaffirmed, 281 NLRB 882 (1986) (*Myers II),* affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).) Class and representative actions are thus the antithesis of "concerted activity" within the meaning of the NLRA because in a class or representative action the employee can simply file suit on the employee's own behalf and on behalf of all other

putative class members, regardless whether the individual's fellow employees want to file suit.

Here, Respondent could not have violated Appellant's Section 7 rights by requiring arbitration on an individual basis. First, Appellant had no Section 7 rights to exercise at the time he filed his lawsuit because he was no longer an employee of Respondent. (See *Grabowski, supra,* 817 F.Supp.2d at 1169 (filing of a class action complaint by an individual who was no longer an employee was not "concerted activity" under the NLRA).) Second, there is no evidence that Appellant at any relevant time or in any manner joined forces with employees, who unlike him, were still employed with Respondent at the time he consulted with counsel and filed suit. Further, there is no evidence that Appellant had the authority of Respondent's employees to pursue the putative class action. On the contrary, about one-half of the putative class members expressly disavowed Appellant's claims upon learning of the case. (See, e.g., 7 AA 2005-2041.) There is also no evidence that by his activities, Appellant intended to enlist the support of Respondent's employees in a common endeavor. In fact, in the course of the litigation, Appellant admitted under oath that when he met with his attorneys for the first time, he sought to file a *religious discrimination* lawsuit on his *own behalf.* (7 AA 2005, 2042-2048.) Moreover, it should be noted that Section 7 of the NLRA encompasses not just the right to engage in Section 7 activity, but also includes the right to *refrain* from such activity. (29 U.S.C. § 157.) Thus, Appellant's decision to waive his right to engage in class, collective, or representative action by voluntarily signing the class action waiver and receiving consideration for that action should be equally protected by the NLRA.

Accordingly, there is no remote possibility of any "concerted activity" at issue, and the enforcement of the arbitration agreement is lawful.

E. Respondent Did Not Waive Its Right To Arbitrate.

Appellant continues to make this facetious "waiver" argument that was rejected by the appellate court and trial court based on substantial evidence in the Record.

1. The trial court's ruling based on substantial evidence in the Record is entitled to deference.

Waiver is highly disfavored. "[California] law, like the FAA, reflects a strong public policy favoring arbitration agreements." (*Saint Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 Cal.4th 1187, 1195 ("*Saint Agnes*").) "[W]aivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Id.* (emphasis added).) "[A]ny doubts...should be resolved in favor of arbitration." (*Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24.) Whether a party has waived arbitration is an issue of fact, which will not be disturbed by the appellate court if substantial evidence supports the trial court's decision. (*Engalla v. Permanente Med. Grp., Inc.* (1997) 15 Cal.4th 951, 983.) The trial court below held that there was no waiver.

Waivers only occur if a party: (1) previously took steps inconsistent with an intent to arbitrate, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. (*Saint Agnes,* 31 Cal.4th at 1196.) Mere delay, without some resultant prejudice to a party, cannot carry the day. (*Christensen v. Dewer Dev.* (1983) 33 Cal. 3d 778, 782.) None of these factors are present here, and there is no cognizable "prejudice."

2. Respondent acted consistently with its intent to arbitrate.

A party does not act inconsistently with the right to arbitrate by failing to seek to enforce an arbitration agreement that would be

unenforceable under prior existing law. (*Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697 (holding that defendant did not waive arbitration by seeking to compel arbitration three years after litigating the case because defendant's motion was prompted by a change in the law that gave it the right, for the first time, to obtain the relief requested); see also *Letizia v. Prudential Bache Secs., Inc.* (9th Cir. 1986) 802 F.2d 1185, 1187.)

Here, Respondent sought individual arbitration just weeks after Appellant filed the lawsuit. (1 AA 32-84.) When Appellant refused to arbitrate, Respondent filed its first motion to compel arbitration and the trial court granted it. (1 AA 32-84, 300; 2 AA 301-09.) Appellant appealed. During the appeal, *Gentry* held that class action waivers were invalid if a plaintiff met "the *Gentry* test." Both Appellant and Respondent agree that Appellant would have met this test. (OB, p. 4, 8; 7 AA 1961,1963-82; Appellant's Opening Brief to the Court of Appeal, pp. 18-20.) It is undisputed, therefore, that individual arbitration would not have been ordered by the trial court. Thus, Respondent was forced to litigate. Thereafter, *Concepcion* overruled *Discover Bank*, and impliedly overruled *Gentry*. *Concepcion* thus provided Respondent with a renewed opportunity to compel arbitration. Accordingly, three weeks later, Respondent filed its second motion to compel arbitration which the trial court granted. (7 AA 1806-1941, 2062-63.) Appellant appealed again. In response, the Appellate Court below summarily rejected Appellant's waiver argument, recognized the trial court's factual finding, and stated that "CLS acted consistently with its right to arbitrate."

There is no evidence that Respondent ever delayed in seeking to compel arbitration. The only arguable "delay" was caused when *Gentry* paralyzed Respondent's ability to compel individual arbitration. Appellant essentially argues that Respondent's admission that it would not survive the

Gentry test, without a court order, is not justification for abandoning its motion to compel arbitration. Appellant agrees that the trial court had been overruled by Gentry. (OB, p. 4, 8; 7 AA 1961, 1963-82; Appellant's Opening Brief to the Court of Appeal, pp. 18-20.) At least a dozen cases, including California appellate cases, recognize that defendants did not waive arbitration despite months or years of litigation if defendants reasonably believed the court would not have enforced the class action waivers in their arbitration agreements after *Gentry,* and prior to *Concepcion.* (See, e.g., *Philips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 773 (compelling individual arbitration after *Concepcion* and finding that "waiver should not be found on the basis of a party's failure to undertake a futile act", even after several years of litigation and certification of a class); *Quevedo, supra,* 798 F.Supp.2d at 1126, 1131 (holding that the defendant did not waive the right to arbitrate because defendant reasonably believed that it had no right to compel individual arbitration *post-Gentry* and pre-*Concepcion*, even after two years of litigation, a motion to dismiss, and a motion for and in opposition of class certification was filed); *Grabowski, supra,* 817 F.Supp.2d at 1166-67 (finding that defendant did not waive its right to arbitrate because prior to *Concepcion*, defendant reasonably believed the court would not have compelled individual arbitration); *Plows v. Rockwell Collins, Inc.* (C.D.Cal. 2011) 812 F.Supp.2d 1063, 1068 (holding that defendant did not waive its right to arbitrate because "Defendant reasonably could have believed that [*Concepcion*] altered the legal landscape surrounding the arbitration clause in plaintiff's contract and that, prior to [*Concepcion*], the arbitration clause in plaintiff's employment agreement would have been deemed unenforceable."); *Lima v. Gateway, Inc.* (C.D.Cal. Aug. 7, 2012) No. SACV 09-01366, 2012 WL 3594341 at *3-4 (No waiver because Defendant "had no right to compel arbitration prior to April 27, 2011 – the date that *Concepcion* was decide because California

law previously held that class-action waiver provisions...are unconscionable."); *Estrella v. Freedom Financial Network LLC* (N.D.Cal. Jan. 24, 2012) No. CV 09-03156 SI, 2012 WL 214856 at *3 (finding that when the Supreme Court abrogated the *Discover Bank* rule in *Conception,* it resuscitated the class action waivers in the plaintiffs' arbitration agreements.).) The cases which Appellant claims show it was possible to compel individual arbitration after *Gentry* and before *Concepcion* are inapposite. In *Walnut Producers of Cal. v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 649-50, the court failed to discuss the G*entry* test, and did not deal with a motion to compel arbitration, the seminal issue in this case. In *Borrero v. Travelers Indemnity Co.* (E.D.Cal. Oct. 15, 2010) No. CIV S–10–322 KJM, 2010 WL 4054114 at *2, the Court determined that the plaintiff **did not** meet the *Gentry* test and ordered the case to arbitration. This is clearly distinguishable as both parties here agree that Appellant would have met the *Gentry* test, and would have been forced into the kind of class wide arbitration disfavored in *Concepcion.*

The purported "wait and see" approach cited by Appellant that allegedly improperly incentivizes delay is not applicable to Respondent's circumstances. Respondent sought to compel arbitration at the inception of this case. It never affirmatively represented that it would forgo arbitration, and immediately renewed its motion to compel arbitration after *Concepcion.* Thus, the case law cited by Appellant that Respondent somehow wanted to "have its cake and eat it too" is irrelevant. (See *Kingsbury v. Greenfiber LLC* (C.D.Cal. June 29, 2012), No. CV08–00151–AHM (AGRx), 2012 WL 2775022, *4-5 (Defendant was aware that *Discover Bank* did not apply to its arbitration agreement, and could not rely upon *Discover Bank* to justify the four month delay after *Concepcion* was issued to seek arbitration); *In Re Toyota* (2011) 828 F.Supp.2d 1150, 1154, 1163 (the defendant waived its right to compel arbitration because

defendant failed to compel arbitration until 6 months after *Concepcion* was issued).) Respondent moved immediately after *Concepcion* to compel arbitration.

3. Appellant has not shown prejudice by the supposed "delay."

A party's mere participation in litigation and discovery without prejudice to the opposing party, will not compel a finding of waiver of the right to arbitrate. (*Sobremente v. Superior Court* (1998) 61 Cal.App.4th 980, 995; *Saint Agnes,* 31 Cal.4th at 1205; *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co.* (9th Cir. 1978) 572 F.2d 1328, 1330.) Prejudice typically is found only where: (1) the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration; (2) where a party unduly delayed and waited until the eve of trial to seek arbitration; or (3) where the lengthy delays associated with the petitioning party's attempts to litigate resulted in lost evidence. (*Saint Agnes,* 31 Cal.4th at 1204; *Davis v. Cont'l Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211-12; see *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1196.) None of these factors are present here.

Appellant's citation to *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832 does not change this analysis. In *Roberts*, the appellate court "assume[d]" that under *Concepcion*, the class action waiver in defendant's arbitration provision was enforceable. (*Id.* at 846.) It concluded, however, that defendant waived its right to arbitrate because: (i) it never informed plaintiff of its intent to arbitrate and instead litigated for seven months; (ii) plaintiff was prejudiced because plaintiff engaged in "substantial" discovery on the class action allegations that, pursuant to *Concepcion*, would now be useless in arbitration; and (iii) the evidence revealed defendant intentionally delayed to seek arbitration in order to reduce the size of the putative class by settling with class members. (*Id.* at

845-47.) These facts are clearly distinguishable. Most notably, Appellant has been on notice of Respondent's intention to arbitrate since he filed his original lawsuit. (1 AA 48-65.) When Appellant refused to arbitrate without the "class action mechanism," Respondent promptly moved for an order compelling Iskanian to arbitrate his individual claims. (1 AA 32-84.) Although *Gentry* subsequently overruled Respondent's ability to compel Iskanian to arbitrate his individual claims, Respondent promptly moved to compel arbitration a second time based on *Concepcion's* new intervening law. (7 AA 1806-1941.) Against this backdrop, Appellant is hard-pressed to argue that he was never put on notice of Respondent's desire to arbitrate his individual claims. Further, unlike *Roberts,* there is no finding or evidence here that Respondent had engaged in *bad faith* by intentionally delaying an effort to seek arbitration. Respondent promptly renewed it motion to compel arbitration in response to the *Concepcion* decision when it became apparent that the Respondent arbitration agreement would be enforced according to its terms.

Furthermore, delay alone does not cause prejudice to an opposing party. "Mere delay in seeking a stay of the proceedings without some resulting prejudice to a party [citation] cannot carry the day." (*Christensen*, 33 Cal.3d at 782.) To establish "prejudice," Appellant must clearly show that the purported "delay" resulted in lost evidence, disclosure of information in the course of discovery not otherwise available in arbitration, or in some other prejudicial act. (*Saint Agnes*, 31 Cal.4th at 1204.) Appellant has failed to make this showing. In six of Appellant's cases, the party seeking arbitration never provided notice of their intent to arbitrate, conducted extensive discovery which could not be used in arbitration, and failed to provide an explanation for the delay. More importantly, none of these cases had an intervening law which created a new right to compel arbitration. Indeed, the parties always had the right to

compel arbitration, but simply failed to do so. (*Guess?, Inc. v. Super. Ct.* (2000) 79 Cal.App.4th 553, 557-58 (Defendant did not demonstrate any intent to arbitrate for four months, never explained why it delayed compelling arbitration, and there was no change in the law); *Davis, supra,* 9 Cal.App.4th at 213 (Defendant obtained 1600 pages of documents, sought discovery even though plaintiff did not have the same right to discovery in arbitration, and there was no new right to arbitration); *Augusta v. Keen & Associates* (2011) 193 Cal.App.4th 331, 338, 342 (defendant did not demand arbitration for over six months, did not offer an explanation for the delay, conducted extensive discovery on the merits but refused to reciprocate discovery, and there was no new intervening change in the law); *Sobremonte, supra,* 61 Cal.App.4th at 993-95 (Defendant filed multiple motions, refused to turn over documents, did not compel arbitration for 10 months, and there was no change in the law); *Burton v. Cruise* (2011) 190 Cal.App.4th 939, 949 (plaintiff never demonstrated an intent to arbitrate, waited 11 months to compel arbitration, and there was no change in the law); *Adolph v. Coastal Auto Sales* (2010) 184 Cal.App.4th 1443, 1451 (defendant delayed six months, filed a motion to compel after its demurrer was overruled to take advantage of plaintiff, and there was no change in the law); *Hoover v. Am. Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1198, 1206 (Defendant did not have an agreement to arbitrate the alleged claims, the Court did not consider *Concepcion*, and there was no new right to arbitrate); *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446-48 (the plaintiff did not file a class action, so the class action waiver was not an issue, and there was no intervening change in the law).) Here, the only "prejudice" is to class counsel who have been denied access to the promised land of class action status.

a. Nothing was gained in litigation that could not be gained in arbitration.

The record is devoid of evidence showing that Respondent used court discovery procedures to gain information about Appellant that it could not have otherwise gained in arbitration. (See, e.g., *Grabowski, supra,* 817 F.Supp.2d at 1167 (holding plaintiff was not prejudiced by defendant's delay in seeking arbitration because there was no evidence that in that time defendants obtained discovery which would not have been available in arbitration); *Quevedo, supra,* 798 F.Supp.2d at 1132 (defendant did not unfairly benefit from discovery procedures because it only responded to discovery requests and did not propound any discovery); *cf. Davis, supra,* 59 Cal.App.4th at 213-14 (holding defendants unreasonably delayed compelling arbitration in order to take advantage of court discovery procedures to learn plaintiff's strategies, evidence and witnesses and to pin plaintiff down to a particular version of the facts when defendants obtained 1,600 pages of documents from plaintiff in 86 categories, took two days of plaintiff's videotaped deposition, and obtained other discovery that would not have otherwise been available to defendant in arbitration).) When Respondent was forced to defend itself in litigation, Respondent took one day of Appellant's deposition, and received 77 pages of documents pertaining to Appellant's *individual* wage claim. (6 AA 1540, 1572-1612.) The discovery obtained by Respondent was precisely the type of discovery it could have obtained in arbitration because Respondent's arbitration agreement provides for "reasonable discovery." (1 AA 80-82.) Respondent gained nothing from the "delay." Respondent had to expend time and money in litigation, which could have been prevented if Appellant submitted to the Arbitration Agreement, as Respondent requested.

b. The expense of time and money is not dispositive.

In addition, any argument that Appellant has invested a substantial amount of money in defending the litigation is unavailable. Mere participation "in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*Saint Agnes*, *supra*, 31 Cal.4th at 1203 (citing *Groom, supra,* 82 Cal.App.4th at 1197).) Regardless, there is no evidence in the record that Appellant himself spent a single dime in the litigation. Moreover, even if class counsel was "prejudiced" by the investment of time and money in this case, courts have routinely characterized such prejudice as "self inflicted." (See, e.g., *Christensen, supra,* 33 Cal.3d at 782 ("[a] party who brings a suit over a dispute which he has agreed to arbitrate has acted in violation of his agreement"); *Quevedo, supra,* 798 F.Supp.2d at 1132 (plaintiff's investment of time and resources in the litigation in the case did not amount to prejudice because the "wound [wa]s self-inflicted" when plaintiff chose the judicial forum in contravention of the arbitration agreement).) Indeed, Appellant complains that he was forced to conduct class discovery, yet it was class counsel's decision to file a class action and resist arbitration.

Appellant fails to cite any relevant, dispositive law on this topic. Substantial evidence supports the trial and appellate court's decision that Respondent did not waive its right to compel arbitration.

IV. CONCLUSION

The FAA is the law of the land and must be respected. The analysis of the FAA in *Concepcion* overrules *Gentry,* and instructs that the Arbitration Agreement must be enforced according to its terms, including any waiver of PAGA representative claims. There is no principled distinction between *Gentry* and *Discover Bank*; there is no principled

distinction between a class action and a PAGA representative action. Further, there is no "congressional command" in the NLRA or the NLGA that excepts employment arbitration agreements from the FAA's purview. Finally, there is substantial evidence in the record to support the conclusion that Respondent did not waive its right to seek arbitration. Respectfully, the decision of the court below should be affirmed.

Date: February 19, 2013 FOX ROTHSCHILD LLP

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, the text of the Respondents' Brief does not exceed 14,000 words. The text of the Respondents' Brief contains 11,880 words as determined by the word counting tool of Microsoft Word, the computer program used to prepare the brief.

Date: February 19, 2013 FOX ROTHSCHILD LLP

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action; my business address is: 235 Pine Street, Suite 1500, San Francisco, CA 94104.

On February 19, 2013, I served the following documents: **RESPONDENT'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action by sending true and correct copy thereof in sealed envelopes to:

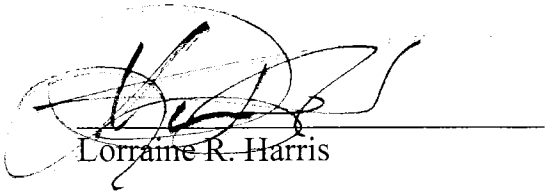
SEE ATTACHED SERVICE LIST

[X] **BY PERSONAL SERVICE**: I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[X] **BY OVERNIGHT DELIVERY**: I am readily familiar with the firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The package are picked up by the carrier at our offices or delivered by our office to a designated collection site.

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

Executed this 15th day of February 2013 at San Francisco, California.



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