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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JESUS REYES, Plaintiff and Respondent, v. LIBERMAN BROADCASTING, INC., Defendant and Appellant.	B235211 (Los Angeles County Super. Ct. No. BC438669)

APPEAL from an order of the Superior Court of Los Angeles County, Debre Katz Weintraub, Judge. Reversed.

Littler Mendelson, Elizabeth Staggs-Wilson, Carlos Jimenez and Lauren E. Robinson for Defendant and Appellant.

Strategic Law Practices, Payam Shahian; The Law Offices of Robert L. Starr, Robert Starr, Adam Rose; Initiative Legal Group and Glenn A. Danas for Plaintiff and Respondent.

Jesus Reyes filed a class complaint alleging wage and hour violations against Liberman Broadcasting, Inc. (LBI). LBI appeals from the trial court's order denying its motion to compel arbitration. We reverse.

BACKGROUND

Reyes worked as a security officer for LBI from April 24, 2009 until September 28, 2009. Reyes executed LBI's mutual agreement to arbitrate claims (Arbitration Agreement) on April 8, 2009, prior to commencing his employment with LBI.

The Arbitration Agreement is expressly governed by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). The Arbitration Agreement provides that LBI and Reyes "agree to submit to final and binding arbitration all claims, disputes and controversies arising out of, relating to or in any way associated with" Reyes's employment or its termination. Specific claims identified in the Arbitration Agreement include wage claims, unfair competition claims, and claims for violation of federal, state, local, or other governmental law. (*Ibid.*) The Arbitration Agreement does not contain an express class arbitration waiver. However, the Arbitration Agreement does provide that "each party to the arbitration may represent itself/himself/herself, or may be represented by a licensed attorney." The Arbitration Agreement provides for "discovery sufficient to adequately arbitrate [the parties'] claims," but authorizes the "arbitrator to impose . . . appropriate limits on discovery." Reyes signed an acknowledgment of his receipt of the Arbitration Agreement stating that he could read the Arbitration Agreement in both English and Spanish.

On May 27, 2010, Reyes filed a complaint on behalf of a class asserting seven causes of action arising out of alleged wage and hour violations, citing among other statutes Labor Code section 1194.[1] On July 13, 2010, Reyes filed a first amended

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[1] Labor Code section 1194, subdivision (a), provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled

complaint (FAC) adding a representative claim pursuant to the Private Attorneys General Act (PAGA) (Lab. Code, § 2698 et seq.). LBI answered the FAC on August 5, 2010, asserting 22 affirmative defenses. LBI did not assert the existence of an arbitration agreement as an affirmative defense.

That same day, Reyes propounded discovery on LBI. On September 1, 2010, LBI took the first session of Reyes's deposition. On October 11, 2010, LBI responded to the discovery requests by raising objections to each request. The parties then engaged in lengthy meet and confer efforts whereby LBI agreed to produce some class-wide discovery and statistically representative samples of certain requested information. The parties also scheduled a class-wide mediation for July 1, 2011.

On October 6, 2010, the trial court held a case management conference. On December 17, 2010, the trial court held a second status conference. On March 25, 2011, the trial court entered a stipulation between the parties to extend the deadline for class certification. Some time before May 10, 2011, LBI substituted new counsel.

On June 2, 2011, LBI informed Reyes that it intended to move to compel arbitration and had reserved a July 27, 2011 hearing date. LBI filed the underlying motion to compel arbitration on July 5, 2011. On July 27, 2011, the trial court denied the motion on the ground that LBI had waived its right to arbitration by its "failure to properly and timely assert it." LBI timely appealed from this order.

DISCUSSION

I. LBI did not waive its right to compel arbitration.

The denial of a motion to compel arbitration is appealable under Code of Civil Procedure section 1294, subdivision (a).

Public policy strongly favors arbitration and "requires close judicial scrutiny of waiver claims." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th

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to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

1187, 1195 (*St. Agnes*).) "Although a court may deny a petition to compel arbitration on the ground of waiver [citation], waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Ibid.*) "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." (*Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24 [103 S.Ct. 927, 74 L.Ed.2d 765].)

The determination of waiver is generally "a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) However, when "'the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' [Citation.]" (*Ibid.*) The facts in this case are undisputed, and we therefore engage in de novo review.

A written agreement to arbitrate an existing or future dispute can be waived if not properly asserted. (Code Civ. Proc., § 1281.2, subd. (a).) To determine whether a party has waived its right to arbitration, we consider: """(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."""" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) We address each factor in turn.

A. LBI's actions were not inconsistent with the right to arbitrate.

1. The Arbitration Agreement does not authorize class arbitration.

"[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." (*Stolt-*

Nielsen S.A. v. AnimalFeeds Int'l Corp. (2010) 559 U.S. ___ [130 S.Ct. 1758, 1775, 176 L.Ed.2d 605] (*Stolt-Nielsen*); *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 510 (*Kinecta*); but see *Jock v. Sterling Jewelers Inc.* (2nd Cir. 2011) 646 F.3d 113, 127.) As the Arbitration Agreement explicitly covers the type of claims that are the subject of Reyes's lawsuit and provides only for bilateral arbitration, there is no contractual basis for concluding the parties agreed to submit to class arbitration. Therefore, we conclude that the Arbitration Agreement does not authorize class arbitration.

In *Stolt-Nielsen*, the parties "stipulated that the arbitration clause was 'silent' with respect to class arbitration"; they conceded that they had reached no agreement regarding class arbitration and submitted the question of whether the arbitration clause provided for class arbitration to an arbitration panel. (*Stolt-Nielsen, supra,* 130 S.Ct. at p. 1766.) The arbitrators found that class arbitration was permitted. (*Id.* at p. 1769.) The court held that the arbitrators' decision conflicted with the FAA because the parties never agreed to submit their dispute to class arbitration. (*Id.* at p. 1776.) The court reasoned that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." (*Ibid.*) Therefore, the court concluded that because there was no agreement to engage in class arbitration, the arbitration panel exceeded its authority in determining that the clause provided for class arbitration. (*Ibid.*)

In *Kinecta*, the plaintiff signed an arbitration agreement providing for the arbitration of all disputes with the employer-defendant arising out of the employment context. (*Kinecta, supra,* 205 Cal.App.4th at p. 511.) The arbitration agreement made no reference to any parties other than plaintiff and defendant, and did not include an express waiver of class arbitration. (*Id.* at pp. 511, fn. 1, 517.) When defendant moved to compel arbitration and to dismiss plaintiff's class claims, the trial court granted the motion to compel arbitration of plaintiff's individual claims but denied defendant's motion to dismiss class claims. (*Id.* at p. 512.) Division Three of this appellate district reversed the

trial court's denial of defendant's motion to dismiss class claims. (*Id.* at p. 519.) The court reasoned that "the arbitration provision was limited to the arbitration of disputes between [plaintiff] and [defendant]" because the plain language of the provision identified only plaintiff and defendant as parties to the agreement. (*Id.* at pp. 517–518.) Additionally, the court noted that the plaintiff failed to provide any evidence showing that "the parties agreed to arbitrate disputes of classes of other employees." (*Id.* at p. 519.) Therefore, the court held: "[T] he parties did not agree to authorize class arbitration in their arbitration agreement." (*Ibid.*)

Like the arbitration provision in *Kinecta*, the Arbitration Agreement in the instant case makes no reference to any parties other than plaintiff and defendant. It provides only for the "final and binding arbitration" of "all claims, disputes and controversies arising out of" Reyes's employment or its termination. The plain language of the Arbitration Agreement further states that each party may only represent "itself/himself/herself" or "may be represented by a licensed attorney." There is no mention of class action claims in the Arbitration Agreement. (As in *Kinecta*, class actions are not listed among the expressly excluded claims.) Furthermore, Reyes has not presented any evidence showing any intent by the parties to provide for class arbitration in the Arbitration Agreement. Therefore, we hold that because the plain language of the Arbitration Agreement provides only for the bilateral arbitration of Reyes's claims, the Arbitration Agreement does not authorize class arbitration. The Arbitration Agreement, like the arbitration provision in *Kinecta*, bars class arbitration because the parties did not agree to class arbitration.

2. *California case law potentially barred enforcement of the Arbitration Agreement.*

In 2005, the California Supreme Court held that while not all "class action waivers are necessarily unconscionable," "when the waiver is found in a consumer contract of adhesion" where disputes between the parties will "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 cheat large numbers of consumers out of individually small sums

of money, then" the waiver is in practice an exculpatory contract clause. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162–163 (*Discover Bank*).) The court held that such waivers were unconscionable. (*Ibid.*) The court applied the framework in *Armendariz v. Foundation Health Psychcare Services, Inc.*(2000) 24 Cal.4th 83, 99 (*Armendariz*), finding both a procedural and substantive element of unconscionability. (*Discover Bank*, at pp. 160–161.) The court found procedural unconscionability where the contract was amended in the form of a "'bill stuffer.'" (*Id.* at p. 160.) It found substantive unconscionability where the class action waiver in effect acted as an exculpatory clause. (*Id.* at pp. 160–161.)

In 2007, the California Supreme Court extended *Discover Bank* to the employment context, holding: "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" four factors: "the modest size of the potential 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" in deciding whether to enforce the class arbitration waiver. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 463 (*Gentry*).) However, unlike in *Discover Bank*, the court did not apply the *Armendariz* unconscionability framework. Instead, the court reasoned that as the "statutory right to receive overtime pay embodied in [Labor Code] section 1194 is unwaivable," and as a class arbitration waiver could lead to a de facto waiver of these rights, such waivers would "interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws" and thus were unenforceable. (*Gentry*, at pp. 456–457.)

Reyes correctly notes that *Discover Bank* and *Gentry* dealt with express class arbitration waivers, not arbitration agreements silent as to class arbitration. However, in light of *Stolt-Nielsen, supra*, 130 S.Ct. 1758 and *Kinecta*, *supra*, 205 Cal.App.4th 506, arbitration agreements silent on the issue of class arbitration nevertheless have the same

effect of precluding class arbitration so long as there is no evidence that the parties agreed to class arbitration. In other words, an arbitration agreement silent on the issue of class arbitration may have the same effect as an express class waiver. We believe that *Discover Bank* and *Gentry* would have applied in such a situation because both kinds of arbitration contracts would be, under the *Discover Bank* reasoning, exculpatory contracts.

As the Arbitration Agreement is silent on the issue of class arbitration, applying the *Stolt-Nielsen* rationale, it impliedly bars class arbitration as did the express class arbitration waiver at issue in *Gentry*. The Arbitration Agreement therefore has the same effect as one potentially barred under the *Gentry* test.

3. There is a difference of opinion whether AT&T Mobility v. Concepcion impliedly overruled Gentry.

At the end of April 2011, the United States Supreme Court explicitly overruled *Discover Bank* in *AT&T Mobility v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*), holding that the *Discover Bank* rule was preempted by the FAA. (*Concepcion*, at p. 1753.) The court first held 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.'" (*Id.* at p. 1747.) Instead, such a state law rule that conflicts with the arbitration of a claim is preempted by the FAA. (*Ibid.*) The court reasoned that the *Discover Bank* rule interfered with arbitration by allowing "any party to a consumer contract to demand" class arbitration "*ex post*." (*Concepcion*, at p. 1750.) The court held that as class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment," "*requires* procedural formality," and "greatly increases risks to defendants," the *Discover Bank* rule interfered with arbitration. (*Concepcion*, at pp. 1751–1752.) The *Discover Bank* rule was thus preempted by the FAA. (*Concepcion*, at p. 1753.)

In overruling the *Discover Bank* rule, the court first found that the requirement "that damages be predictably small," was "toothless and malleable." (*Concepcion, supra*, 131 S.Ct. at p. 1750.) The court rejected the concern "that class proceedings are

necessary to prosecute small-dollar claims that might otherwise slip through the legal system," stating that, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at p. 1753.) Like *Discover Bank*, *Gentry* requires that the trial court consider "the modest size of the potential individual recovery." (*Gentry*, *supra*, 42 Cal.4th at p. 463.)

The court also determined that even with differential bargaining power between parties, arbitration agreements must be enforced as written. (*Concepcion*, *supra*, 131 S.Ct. 1740, 1749, fn. 5.) This implicates the *Gentry* court's concern regarding "the fact that absent members of the class may be ill informed about their rights." (*Gentry*, *supra*, 42 Cal.4th at p. 463.) Information asymmetry is a hallmark of differences in bargaining power. While "'[o]ppression' arises from an inequality of bargaining power," "'[s]urprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden." (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.) It is not hard to see how informational asymmetry leads to unequal bargaining power; an individual unaware of her rights is unlikely to vigorously bargain over those rights. An unsophisticated party may unknowingly concede her rights without asking for concessions, whereas a knowledgeable party may leverage her rights into a superior bargaining position.

Division Two of this district recently held that *Concepcion* invalidated the *Gentry* test. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949 (*Iskanian*).) In *Iskanian*, plaintiff signed an arbitration agreement which required all disputes arising out of his employment to be arbitrated and included an express class waiver. (*Id.* at p. 954.) After plaintiff filed a class action complaint against defendant, defendant moved to compel arbitration. (*Ibid.*) The trial court granted the motion, but that motion was withdrawn after *Gentry* was decided and the appellate court issued a writ of mandate. (*Iskanian*, at pp. 954–955.) The parties litigated the case for several years until the United States Supreme Court decided *Concepcion*, whereupon defendant renewed its motion to compel arbitration and to dismiss the class claims. (*Iskanian*, at p. 955.) The court held "that the *Concepcion* decision conclusively invalidates the

Gentry test." (*Iskanian*, at p. 959.) The court reasoned that since *Concepcion* "thoroughly rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them," and since *Gentry* imposed class arbitration on the parties if plaintiff could meet the test, *Gentry* was inconsistent with the FAA. (*Iskanian*, at pp. 959–960.) The court additionally rejected the argument that plaintiff "brought a class action to 'vindicate statutory rights,'" reasoning simply that "[t]he 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*." (*Iskanian*, at p. 960.)

Several federal district courts in California have also held that *Concepcion*, in overruling *Discover Bank*, overruled *Gentry*. In *Lewis v. UBS Financial Services Inc.*, (N.D. Cal. 2011) 818 F.Supp.2d 1161, the court held that a class action waiver contained in an arbitration clause in a promissory note securing an "employee forgivable loan" was enforceable under California law. (*Id.* at p. 1166.) In so holding, the court rejected plaintiff's argument that "*Gentry* remains viable because it addresses arbitration agreements contained in employment contracts, while *Concepcion* pertains to consumer contracts." (*Lewis*, at p. 1167.) The court reasoned that "*Concepcion* cannot be read so narrowly." (*Lewis*, at p. 1167.) Rather, because "*Gentry* advances a rule of enforceability that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation . . . *Concepcion* effectively overrules *Gentry*." (*Lewis*, at p. 1167.) (See also *Sanders v. Swift Transportation Company of Arizona, LLC* (N.D.Cal. Jan. 17, 2012) 843 F.Supp.2d 1033, 1037; *Morse v. ServiceMaster Global Holdings Inc.* (N.D.Cal. July 27, 2011, No. C 10-00628) 2011 U.S.Dist. Lexis 82029, 8, fn. 1; *Murphy v. DirecTV, Inc.* (C.D.Cal. Aug. 2, 2011, No. 2:07-cv-06465) 2011 U.S.Dist. Lexis 87625, 11; *Valle v. Lowe's HIW, Inc.* (N.D.Cal. Aug 22, 2011, No. 11-1489) 2011 U.S.Dist. Lexis 93639.)

There is contrary California authority. Justice Mosk, writing for Division Five of this appellate district, implicitly reaffirmed the reasoning in *Gentry* by applying it in reversing a trial court's ruling invalidating a class action waiver for lack of evidence.

(*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497 (*Brown*).) The plaintiff filed a complaint asserting as a class action Labor Code and Business and Profession Code violations. (*Id.* at pp. 494–495.) The plaintiff had signed an arbitration agreement that waived class action claims. (*Id.* at p. 495.) The defendants immediately moved to compel arbitration. The trial court determined that the arbitration provision was unconscionable. (*Id.* at pp. 495–496.) The court of appeal reversed, holding that *Gentry* requires a factual showing under its four-factor test and, because plaintiff failed to make such a showing, the trial court erred in invalidating the class action waiver. (*Brown*, at p. 497.) Justice Kriegler concurred and dissented, adding that "[w]ith the reasoning of *Discover Bank* having been rejected as being in conflict with the FAA, the same fate may be in store for *Gentry*. Nonetheless . . . *Gentry* remains the binding law of this state." (*Brown*, at p. 505 [Kriegler, J., concurring].) The Forth Appellate District has declined to disregard *Gentry* "without specific guidance from our high court," citing *Brown*. (*Truly Nolen of America v. Superior Court* (Aug. 9, 2012, D060519) ___ Cal.App.4th___ [2012 Cal.App. Lexis 871, p. 34].)

In *Kinecta*, the court acknowledged: "A question exists about whether *Gentry* survived the overruling of *Discover Bank* in *Concepcion*, but it is not one we need to decide." (*Kinecta*, *supra*, 205 Cal.App.4th at p. 516.) The court agreed with *Brown*, *supra*, 197 Cal.App.4th 489: "Since it has not been expressly abrogated or overruled, *Gentry* appears to remain the binding law in California." (*Kinecta*, at p. 516.) Nevertheless, it was the plaintiff's burden to provide evidence of the four *Gentry* factors, and the record showed that the plaintiff provided no such evidence. Therefore, even if *Gentry* remained good law, there were no grounds to declare the arbitration agreement unenforceable. (*Kinecta*, at p. 517.) The First Appellate District reached a similar result, concluding "we need not decide here whether *Concepcion* abrogates the rule in *Gentry*," because the plaintiff "submitted no evidence as to any of the factors discussed in *Gentry*." (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1132 (*Nelsen*).)

Like the plaintiffs in *Kinecta* and *Nelsen*, Reyes did not carry his burden to make a

factual showing that the *Gentry* factors made the Arbitration Agreement unenforceable. In opposition to LBI's motion to compel, Reyes submitted his own declaration and that of his attorney, neither of which contains any evidence relevant to the *Gentry* test. We therefore need not, and do not, decide whether *Gentry* remains good law after *Concepcion, supra,* 131 S.Ct. 1740.

4. LBI did not waive its right to arbitration by not moving to compel arbitration prior to Concepcion.

A party does not act inconsistently with a right to arbitrate when it does not seek to enforce an arbitration agreement unenforceable under existing law. (See *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697 (*Fisher*); *Letizia v. Prudential Bache Securities, Inc.* (9th Cir. 1986) 802 F.2d 1185, 1187.) Before *Concepcion*, LBI reasonably concluded that it could not enforce the Arbitration Agreement.

In *Fisher, supra,* 791 F.2d 691, defendant moved to compel arbitration over three years after the filing of the suit, did not raise arbitration as an affirmative defense, filed pretrial motions, and engaged in extensive discovery. (*Id*. at p. 693.) Defendant moved to compel only after the Supreme Court rejected the "intertwining doctrine," which denied arbitration where it was "'impractical if not impossible to separate out nonarbitrable from arbitrable contract claims.'" (*Id.* at pp. 694, 695.) The court reasoned that the defendant "properly perceived that it was futile to file a motion to compel arbitration until" the Supreme Court rejected the intertwining doctrine. (*Id.* at p. 695.) The court thus held that defendants did not act "inconsistently with a known existing right to compel arbitration." (*Id.* at p. 697.)

Several district courts have concluded that class defendants did not act inconsistently with the right to arbitrate when they did not move to compel arbitration (as provided for in their arbitration agreements) until after *Concepcion, supra,* 131 S.Ct. 1740.

In *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, plaintiff filed a class action suit against defendant for failure to timely pay all wages owed upon termination. (*Id.* at p. 1126) Plaintiff signed an arbitration agreement that included an

express class waiver. (*Id.* at p. 1127.) Defendant litigated the case without asserting arbitration, and the court ruled on class certification issues. Defendant moved to compel arbitration about a month following *Concepcion*. (*Quevedo*, at pp. 1126–1127.) The court held that defendants did not act inconsistently "with the right to arbitrate" even though defendant litigated the case for over two years before asserting its right to arbitration. (*Id.* at p. 1129.) The court reasoned: "In light of *Gentry*, [defendant] reasonably concluded that it could not enforce the class action waiver in its arbitration agreement." (*Quevedo*, at p. 1130.) Only after the Supreme Court held in *Concepcion* that the *Discover Bank, supra*, 36 Cal.4th 148 rule was preempted by the FAA did "it become clear that [defendant] had the right to enforce its arbitration agreement as written." (*Quevedo*, at p. 1131.) Because defendant moved to compel arbitration just less than a month after the Supreme Court issued *Concepcion*, the court concluded that defendant's "earlier failure to seek to enforce its partially-unenforceable agreement did not reflect an intent to forego the right to seek arbitration." (*Ibid.*)

In *In re Cal. Title Ins. Antitrust Litig.* (N.D.Cal. June 27, 2011, No. 08-01341) 2011 U.S.Dist. Lexis 71621, plaintiffs signed an arbitration agreement silent on the issue of class action arbitration. (*Id*. at p. 7.) Each plaintiff had purchased title insurance from one of the defendants. (*Ibid.*) Plaintiffs filed a class suit, alleging that defendants manipulated and fixed the cost and price of title insurance. (*Ibid.*) Defendants moved to compel arbitration only after the Supreme Court issued *Concepcion.* (*In re Cal. Title*, at pp. 7–8, 11–12.) The court rejected plaintiffs' argument that defendants had waived arbitration, holding that it "would indeed have been futile for Defendants . . . to have moved to compel arbitration prior to the decision in *Concepcion*." (*In re Cal. Title*, at p. 13.) The court reasoned that *Concepcion* applied to the arbitration agreements at issue even though they were silent "as to class-action waivers" because "'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.'" (*In re Cal. Title,* at p. 12, quoting *Stolt-Nielsen, supra*, 130 S.Ct. at p. 1775.)

Similarly, if LBI had moved to compel arbitration prior to *Concepcion*, LBI faced

the substantial risk that it could have been forced, under *Gentry*, to arbitrate Reyes's claims in class arbitration. That risk diminished substantially when *Concepcion* changed the legal landscape, and LBI promptly informed Reyes of its intent to arbitrate one month after the decision and filed its motion to compel a month later. LBI did not act inconsistently with a right to arbitrate by not moving to compel until after *Concepcion*.

Our conclusion is not inconsistent with *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832 (*Roberts*), in which the court affirmed a trial court's finding that the defendant forfeited arbitration, concluding that substantial evidence supported the finding. (*Id*. at p. 834.) Plaintiff purchased a vehicle from El Cajon, entering into a retail installment sale contract including an arbitration provision and a class arbitration waiver. (*Id.* at pp. 835, 837, 842.) After plaintiff filed a class action complaint, defendant answered with a general denial and asserted 24 affirmative defenses, none of which asserted the existence of an arbitration provision. (*Id.* at p. 836.) Plaintiff served written discovery on defendant and defendant served plaintiff with written discovery. (*Ibid.*) Defendant also contacted putative class members with settlement offers. (*Id.* at pp. 836–837.) Defendant filed a motion to compel arbitration in January 2010, over a year before *Concepcion*, *supra*, 131 S.Ct. 1740 was issued. (*Id.* at pp. 836, 846, fn. 10.)

The court held that defendant "waived arbitration when it waited five months to invoke arbitration." (*Roberts*, *supra*, 200 Cal.App.4th at p. 846.) The court reasoned that as defendant waited months after plaintiff propounded written discovery to notify plaintiff of its intent to arbitrate, and as defendant knew this discovery would be useless in individual arbitration, defendant acted inconsistently with the intent to arbitrate. (*Ibid.*) The court further held that defendant prejudiced plaintiff by identifying, contacting, and offering to settle with putative class members, thus reducing the size of the putative class. Thus, as the defendant acted inconsistently with the right to arbitrate and its acts prejudiced plaintiff, the court upheld the trial court's finding that defendant waived its right to arbitrate. (*Id.* at p. 847.)

Unlike the defendant in *Roberts*, LBI moved for arbitration *after* the Supreme Court issued *Concepcion*, *supra*, 131 S.Ct. 1740. This is a critical distinction. In

rejecting defendant's futility argument, the *Roberts* court noted: "*Concepcion* was not decided until April 2011, more than a year *after* El Cajon moved to compel arbitration," apparently on the assumption "that *Concepcion* would have been decided favorably." (*Id.* at p. 846, fn. 10, italics added.) Here, however, LBI promptly moved to compel arbitration when the law arguably allowed the Arbitration Agreement to be enforced on its terms, and did not act inconsistently with the right to arbitrate.

Reyes cites another unpublished federal district court case, *Borrero v. Travelers Indem. Co.* (E.D.Cal. Oct. 14, 2010, CIV S-10-322) 2010 U.S.Dist. Lexis 114004, and two state appellate cases, *Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634 (*Walnut Producers*) and *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 (*Arguelles-Romero*).) Reyes argues that these cases establish that moving to compel arbitration before *Concepcion*, *supra*, 131 S.Ct. 1740 would only have faced an uncertain outcome, and so LBI acted inconsistently with the right to arbitrate by failing to move to compel prior to *Concepcion*. We reject this argument.

Walnut Producers and *Arguelles-Romero* are not applicable, as both applied the *Discover Bank, supra*, 36 Cal.4th 148 rule to commercial contracts. Only *Borrero v. Travelers Indem. Co.*, *supra*, 2010 U.S.Dist. Lexis 114004 applied the *Gentry* test to an employment arbitration agreement, holding that the express class action waiver was not unconscionable, as plaintiff had not presented evidence on any of the four *Gentry* factors. (*Borrero*, at pp. 8–9.)[2]

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[2] Reyes further cites *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436 (*Fletcher Jones*). In *Fletcher Jones*, however, the plaintiff did not allege a class action, making *Discover Bank, supra*, 36 Cal.4th 148 wholly inapplicable: "*Discover Bank* only applied when a plaintiff filed a lawsuit alleging a class action claim," regardless of whether the arbitration agreement contains a class action waiver. (*Fletcher Jones*, at pp. 447–448.) In an unpublished federal district court case cited by Reyes, *Kingsbury v. U.S. Greenfiber, LLC* (C.D.Cal. June 29, 2012, No. CV08-00151) 2012 U.S.Dist. Lexis 94854, the district court denied defendant's motion to compel arbitration in a class action by home purchasers alleging that the home builder had used defective insulation; the *Gentry*, *supra*, 42 Cal.4th 443 rule was not implicated. Instead,

What Reyes's argument misses is that the futility doctrine does not require entirely clear, uncontradicted authority barring the enforcement of an arbitration agreement. In *Fisher, supra*, 791 F.2d 691, the Ninth Circuit had indicated its approval of the intertwining doctrine in *De Lancie v. Birr, Wilson & Co.* (9th Cir. 1981) 648 F.2d 1255 in June 1981, prior to the filing of the action in August 1981. (*Fisher*, at p. 695.) Additionally, "a number of federal courts had adopted the intertwining doctrine," including two district courts in the Ninth Circuit, and had used it as a basis to refuse to compel arbitration. (*Ibid.*) However, it was not until 1984 in *Byrd v. Dean Witter Reynolds, Inc.* (9th Cir. 1984) 726 F.2d 552, that the Ninth Circuit held that the intertwining doctrine was applicable in its jurisdiction. (*Fisher*, at p. 697.) In other words, the court held that the defendant properly perceived it was futile to move to compel arbitration even when the intertwining doctrine had not yet been expressly held to be applicable in the circuit. (*Ibid.*)

LBI reasonably perceived that it likely would have been futile to seek to compel arbitration in light of *Gentry*, *supra*, 42 Cal.4th 443 and California authority applying *Gentry* to invalidate class arbitration waivers. (See, e.g., *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1282; *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 171.) Just as the defendant in *Fisher, supra*, 791 F.2d 691 was entitled to rely on the Ninth Circuit's "comment in *De Lancie* and the trend of federal authority" to suggest futility in asserting arbitration, LBI was entitled to rely on

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the court noted that the "*Discover Bank* rule applied only to contracts involving predict[t]ably small amounts of damages. [Citation.] This case, in contrast, involves damages arising out of purchases of [defendant's] homes," so it would not make sense to apply the *Discover Bank* rule. (*Kingsbury*, at p. 10.) Further, the defendant had already obtained an adjudication vindicating its rights to enforce its arbitration agreement, and therefore had a reasonable expectation that its class waiver would be enforced in spite of *Discover Bank*. (*Kingsbury*, at p. 11.) LBI had no such guarantee in light of *Gentry*. And unlike LBI, the defendant in *Kingsbury* raised arbitration as an affirmative defense in each of its answers but actively litigated the case, opposing plaintiff's motion to remand and four motions to certify a class, and conducting discovery over the course of more than four years. (*Kingsbury*, at pp. 12–14.)

multiple California decisions invalidating class arbitration waivers to suggest futility. (*Fisher*, at p. 697.)

Even if we were to accept Reyes's contention that LBI would only have faced an "uncertain outcome" had it moved to compel arbitration prior to *Concepcion*, *supra*, 131 S.Ct. 1740, we would still conclude that LBI's actions were not inconsistent with the right to arbitration. The *Fisher* defendant faced an uncertain outcome had it moved to compel arbitration as well. When the action was filed, the Ninth Circuit had not yet expressly adopted the intertwining doctrine, and several federal courts had rejected the intertwining doctrine. (*Fisher*, *supra*, 791 F.2d at p. 696, fn. 2.)

A. **The litigation machinery has not been substantially invoked.**

The second *St. Agnes*, *supra*, 31 Cal.4th 1187 factor examines """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."""" (*Id*. at p. 1196.) This factor appears to be a high hurdle. (See *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1099–1100.)

The litigation machinery has not been substantially invoked in the instant case. The parties have engaged in very limited discovery: Reyes has propounded one set of discovery requests on LBI and LBI has taken Reyes's deposition for one day. The parties have spent 13 months in extensive meet and confer efforts. No discovery has actually been exchanged, prompting Reyes to move to compel responses to discovery. The parties have made only limited use of the judicial process.

The parties in the instant case have invoked the court's litigation machinery even less than the parties in *Quevedo*, where the court "entertained a motion to dismiss by Defendants and a motion for class certification by Plaintiff, and some discovery had occurred." (*Quevedo*, *supra*, 798 F.Supp.2d at p. 1131.) The *Quevedo* court found that this failed to qualify as substantially invoking the district court's litigation machinery, and even if it did, defendant had not used it "beyond the minimum required to defend against the suit." (*Ibid.*) Unlike the defendants in *Quevedo*, LBI has not filed a motion to dismiss, and Reyes has not filed a motion for class certification. While some discovery

has occurred, LBI has not substantially invoked the litigation machinery.

B. LBI has not delayed for a long period before seeking a stay.

Although LBI waited 13 months before asserting the existence of the Arbitration Agreement, LBI informed Reyes that it intended to move to compel arbitration just one month after the Supreme Court issued *Concepcion*, *supra*, 131 S.Ct. 1740, and filed its motion to compel a month later. As LBI could not enforce the Arbitration Agreement as written prior to *Concepcion*, the delay does not support a finding of waiver. This is especially true because LBI informed Reyes that it would seek to compel arbitration almost as soon as *Concepcion* was decided. We further address this below in analyzing the prejudice factor.

C. LBI did not file a counterclaim without seeking a stay.

LBI did not file a counterclaim without seeking a stay of the proceedings. This factor does not apply.

D. No important intervening steps have taken place to justify a finding of waiver.

The fifth *St. Agnes*, *supra*, 31 Cal.4th 1187 factor looks at whether """important intervening steps""" have taken place, such as """taking advantage of judicial discovery procedures not available in arbitration.""" (*Id.* at p. 1196.) We address this below in considering whether the delay in moving to compel prejudiced Reyes.

E. Reyes has not shown prejudice from LBI's delay in moving to compel arbitration.

Courts typically "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.) Instead, courts have found prejudice "only where the petitioning party's conduct has substantially undermined" the important public policy """in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution""" or "substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id.* at p. 1204.) Therefore, prejudice has been found, for example, "where 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 [citation]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence [citation]." (*Ibid.*) In this case, any prejudice to Reyes did not substantially undermine the public policy in favor of arbitration.

Delay alone, at least in the class arbitration context, does not constitute prejudice. While courts have found waiver in cases where the party delayed moving for arbitration for less time than LBI, these cases have additional reasons for finding prejudice. In *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 996, defendant delayed 10 months before moving to compel arbitration but also filed demurrers and engaged in expansive discovery. In *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 213, 217, defendant delayed six months before moving to compel arbitration but also used court discovery procedures not available in arbitration to obtain 1,600 pages of documents from plaintiff, and took plaintiff's two-day deposition.

LBI did not exhibit any other conduct demonstrating prejudice to Reyes. Although LBI took Reyes's deposition, this same deposition could have been taken in arbitration because the Arbitration Agreement entitles the parties to "discovery sufficient to adequately arbitrate their claims."[3] In *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1478–1479 (*Roman*), defendant filed a demurrer, served objections to discovery requests, and filed a motion to compel plaintiff's deposition. The *Roman* court did not find waiver, noting, in particular, that "no substantive discovery responses had been served by either side" and "the discovery requests [defendant] served . . . were authorized under AAA rules." (*Ibid.*) This is similar to the situation here: LBI

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[3] Alternatively, the Arbitration Agreement also provides that "any arbitration shall be in accordance with the then-current JAMS Arbitration Rules and Procedures for Employment Disputes." The JAMS rules provide for discovery. However, LBI has not requested that this court take judicial notice of the then-current JAMS rules and has not included them in its Appellant's Appendix.

responded to Reyes's discovery requests by raising objections to each and every discovery request and took Reyes's deposition. And unlike the defendant in *Roman*, LBI did not file a demurrer. Further, there is no evidence that LBI used the judicial discovery process to gain information which it would not otherwise be able to obtain. LBI's use of the judicial discovery process is akin to the defendant in *Quevedo*, *supra*, 798 F.Supp.2d 1122, who "participated in the litigation" and allowed discovery "to take place only because it reasonably believed that it had no meaningful alternative given that its arbitration agreement was not enforceable as written." (*Quevedo*, at p. 1132.)

Hoover v. American Income Life Ins. Co. (2012) 206 Cal.App.4th 1193 (*Hoover*) is distinguishable. There, the court found waiver where the defendant "did not introduce the question of arbitration for almost a full year," and did not file a motion to compel for almost 15 months. (*Id.* at pp. 1200, 1205.) Unlike LBI, the defendant in *Hoover* actively litigated the case by twice trying to remove the case to federal court, availing itself of "discovery mechanisms like depositions not available in arbitration," and soliciting putative class members "in an effort to reduce the size of the class." (*Id.* at p. 1205.)

The trial court relied on *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553 (*Guess?*) in reaching its finding of waiver. In *Guess?*, the court found waiver where the defendant moved to compel arbitration just three months after the filing of the claim. (*Id.* at p. 556.) However, the defendant also "fully participated in the discovery process," and sent "two sets of lawyers to the third-party depositions and took full advantage of every opportunity to cross-examine the deponents." (*Id.* at p. 558.) The court found prejudice because plaintiff "revealed at least some of its theories and tactics" to defendant. (*Id.* at p. 559, fn. 2.) In contrast, LBI did not take full advantage of the discovery process. LBI deposed only the named plaintiff for one day and responded to each and every discovery request Reyes propounded. Further, in *Guess?*, the defendant offered no explanation for its decision to wait months to demand arbitration. (*Id.* at p. 557.) Here, LBI did not assert arbitration because if it had, it could have been forced into class arbitration.

The record also shows that LBI did not wait until the eve of trial before moving to compel arbitration. Prior to LBI's motion to compel arbitration filed July 5, 2011, there

had been only a series of joint status conferences and other procedural hearings. Reyes's motion for class certification was set to be heard October 17, 2011. Far from waiting until the eve of trial to move for arbitration, LBI promptly moved to compel arbitration as soon as *Concepcion, supra,* 131 S.Ct. 1740 established the likelihood that it had a right to enforce the Arbitration Agreement as written. Finally, there is no indication that LBI's delay has resulted in lost evidence.

However, as Reyes rightly notes, at least one court has suggested that delay alone may constitute prejudice. In *Burton v. Cruise* (2010) 190 Cal.App.4th 939 the court held that "an egregious delay may result in prejudice." (*Id.* at p. 947.) The court in *Burton* explicitly rejected the rule in *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, which found no waiver "'simply from the time and expense of opposing [the petitioning party's] demurrers and drafting amended pleadings.'" (*Burton,* at p. 948.) Instead, the court reasoned that "a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes.'" (*Ibid*.)

The delay in this case was not egregious. If LBI had invoked arbitration prior to *Concepcion, supra,* 131 S.Ct. 1740, it could have been forced under *Gentry, supra,* 42 Cal.4th 443 into class arbitration. Class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment," "*requires* procedural formality," and "greatly increases risks to defendants." (*Concepcion,* at pp. 1751–1752.) Even if delay alone may constitute prejudice in the individual arbitration context, that is not necessarily true in the class arbitration context, as class arbitration does not convey the same advantages as individual arbitration. Here, Reyes was not prejudiced by the 13-month delay alone because for 12 months, LBI could not invoke arbitration without being forced into class arbitration. LBI informed Reyes that it intended to move to compel individual arbitration just one month after the court issued *Concepcion,* and then filed the motion a month later. Just as the three-week delay in *Iskanian, supra,* 206 Cal.App.4th 949 and the one-month delay in *Quevedo, supra,* 798 F.Supp.2d 1122 did not prejudice the party

opposing arbitration, the brief delay here did not prejudice Reyes.

Further, the trial court erred in finding prejudice where privacy notices were mailed to putative class members through a neutral third party and where Reyes had begun interviewing putative class members. It is not enough to establish 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.) Moreover, Reyes cannot even show that he incurred any court costs and legal expenses in mailing out the privacy notices, as according to the parties' December 9, 2010 joint stipulation, LBI agreed to pay for the opt-out privacy notices. While Reyes had been interviewing putative class members, we consider this part of the "court costs and legal expenses" that, without more, are insufficient to constitute prejudice. (*Ibid.*)

More problematic, perhaps, is that LBI agreed to private mediation scheduled for July 1, 2011 on a class-wide basis, through a JAMS mediator selected by LBI. While Reyes argues that the agreement to class mediation is incompatible with arbitration because "any class-wide settlement would require court approval," he has not cited any authority supporting a finding of prejudice where the parties agreed to nonbinding class-wide mediation. Mediation is defined as "[a] method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." (Black's Law Dict. (8th ed. 2004) p. 1003, col. 1.) Mediation is not a form of adjudication, but rather a process for reaching mutually agreeable terms—it is not binding unless the parties agree to be bound. There is no reason to believe that LBI's agreement to nonbinding mediation with Reyes would prejudice Reyes. The agreement to mediate did not guarantee the parties would reach a class-wide agreement.[4] Therefore, we do not find prejudice from LBI's agreement to nonbinding class-wide private mediation.

The trial court also erred in finding bad faith in LBI's request that the court deny the motion to compel arbitration unless the court compelled Reyes to arbitrate on an

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[4] In fact, the agreement to mediate did not survive the substitution of counsel.

individual basis. *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443 (*Adolph*), is distinguishable. In *Adolph*, the defendant filed two demurrers and moved for arbitration only when the second demurrer was overruled. (*Id*. at p. 1446.) Additionally, defendant stalled the depositions of its personnel. (*Id.* at p. 1448.) Finally, the defendant moved for arbitration "only slightly more than three months before the scheduled trial date and two months before the discovery cutoff." (*Id.* at p. 1452.) LBI did not "use court proceedings for its own purposes, while remaining uncooperative with plaintiff's efforts to use those same court proceedings." (*Id.* at p. 1446.) Rather, neither party engaged in significant motion practice until LBI filed its motion to compel arbitration. Likewise, LBI had begun to comply with some of Reyes's discovery requests by supplying a 20 percent sample of employee badge numbers. Finally, LBI moved to compel arbitration well before the scheduled trial date.

"[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." (*Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., supra,* 460 U.S. at p. 24.) For the above reasons, and keeping in mind that when a party alleges waiver we must resolve any close cases in favor of arbitration, we conclude that LBI did not waive its right to compel individual arbitration of Reyes's wage and hour claims.

II. The National Labor Relations Act (NLRA) does not bar enforcement of the Arbitration Agreement because it is inapplicable to the instant case.

Reyes contends that an order requiring individual arbitration would deprive him of the right to engage in collective legal action as protected by section 7 of the NLRA. We reject this argument.

Even though this argument was not raised in the parties' briefs at the trial level, "parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn. 3.) As the facts are undisputed and the enforceability of class arbitration waivers is an important issue of public policy,

especially given the apparent conflict between *Concepcion*, *supra*, 131 S.Ct. 1740 and a recent decision by the National Labor Relations Board (NLRB), we review this issue.

In *D. R. Horton* (2012) 357 NLRB 184 [2012 NLRB Lexis 11 at pp. 3–4], a mandatory arbitration agreement required all employment-related disputes be resolved through individual arbitration, waiving class litigation and arbitration. The NLRB concluded that such an arbitration agreement prohibited the exercise of substantive rights protected by section 7 of the NLRA. (*Id.* at p. 15.) Section 7 of the NLRA "provides in relevant 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." (*D. R. Horton*, at p. 6.) Thus, the NLRB reasoned 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." (*D. R. Horton*, at p. 10.) Additionally, the NLRB found that its interpretation of the NLRA finding class arbitration waivers of employment-related disputes unenforceable did not bring it into conflict with the FAA. (*Id.* at p. 38.)

Iskanian rejected this reasoning, finding the NLRB's analysis of the FAA unavailing. As "the FAA is not a statute the NLRB is charged with interpreting," the court was "under no obligation to defer to the NLRB's analysis." (*Iskanian*, *supra*, 206 Cal.App.4th at p. 962.) In *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. ___ [132 S.Ct. 665, 181 L.Ed.2d 586] (*CompuCredit*), the Supreme Court held 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." (*Id.* at p. 669.) Here, because the NLRB in *D.R. Horton* did not identify any congressional command in the NLRA prohibiting the enforcement of the arbitration agreement according to its terms, its interpretation of the FAA did not apply. (*CompuCredit*, at p. 669; *Nelsen*, *supra*, 207 Cal.App.4th at p. 1134.)

The California district courts addressing this issue reach the same conclusion as the *Iskanian* court. In *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D.Cal. May 7, 2012, No. 11-CV-05405) 2012 U.S.Dist. Lexis 63985, plaintiff signed an arbitration

agreement that contained a class action waiver. (*Id*. at p. 2.) The court rejected the argument that class waivers in employment agreements are prohibited by the NLRA. (*Id.* at p. 25.) The court stated that *CompuCredit* required courts "to enforce agreements to arbitrate according to their terms, 'unless the FAA's mandate has been "overridden by a contrary congressional command."'" (*Morvant*, at p. 32.) The court thus enforced the arbitration agreement because Congress did not expressly override any provision of the FAA when it enacted the NLRA and Norris-La Guardia Act. (*Id.* at pp. 32–33.) (See *Sanders v. Swift Transportation Company of Arizona, LLC*, *supra*, 843 F.Supp.2d at p. 1036; *Jasso v. Money Mart Express, Inc.* (N.D.Cal. Apr. 13, 2012, No. 11-CV-5500) 2012 U.S.Dist. Lexis 52538, p. 27 ["Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms."]; see also *Delock v. Securitas Security Services USA, Inc.* (E.D.Ark. Aug. 1, 2012, No. 4:11-cv-520) 2012 U.S.Dist. Lexis 107117; but see *Herrington v. Waterstone Mortgage Corp.* (W.D.Wis. Mar. 16, 2012, No. 11-cv-779) 2012 U.S.Dist. Lexis 36220, pp. 18–19 [finding *D.R. Horton* "reasonably defensible" and applying it to invalidate a "collective action waiver in the arbitration agreement"]; *Owen v. Bristol Care, Inc.* (W.D.Mo. Feb. 28, 2012, No. 11-04258-CV) 2012 U.S.Dist. Lexis 33671, pp. 12–14.)

California authority finds *D.R. Horton*, *supra*, 357 NLRB 184 unpersuasive. We apply the same reasoning and reject Reyes's argument.

DISPOSITION

The trial court's ruling denying Liberman Broadcasting, Inc.'s motion to compel arbitration is reversed. Costs are awarded to appellant Liberman Broadcasting, Inc.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.