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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

LYLE L. BARNES et al.,

Plaintiffs and Appellants,

v.

BAKERSFIELD DODGE, INC., et al.,

Defendants and Respondents.

F063370

(Super. Ct. No. S-1500-CV-271087-  
WDP)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Angela J. Smith for Plaintiffs and Appellants.

Callahan, Thompson, Sherman & Caudill, Robert W. Thompson, Charles S. Russell, George N. Koumbis and John W. Fox for Defendants and Respondents.

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Plaintiffs appeal from the order granting defendants' motion to compel arbitration of the parties' dispute pursuant to an arbitration provision included in a retail installment

sale contract. Based on the undisputed evidence presented, we conclude defendants waived their right to arbitration. Accordingly, we reverse.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs filed a complaint and a first amended complaint against defendants, alleging they purchased a vehicle from defendant, Bakersfield Dodge, Inc., doing business as Haddad Dodge/Kia (Haddad), pursuant to a retail installment sale contract governed by the Automobile Sales Finance Act (ASFA) (Civ. Code, § 2981, et seq.). The contract was later assigned to defendant, Kern Schools Financial Services, LLC, doing business as Kern Schools Federal Credit Union (Credit Union). Plaintiffs alleged the purchase contract violated the ASFA, the Consumers Legal Remedies Act (CRLA) (Civ. Code, § 1750, et seq.), and the unfair competition law (UCL) (Bus. & Prof. Code, § 17200, et seq.) by failing to properly itemize the “registration/transfer/titling fees” separately from the license fees due to the Department of Motor Vehicles for the vehicle they purchased. Plaintiffs’ complaint was brought on behalf of themselves and all persons similarly situated, that is, all persons who purchased a vehicle from Haddad for personal use and signed a retail installment sale contract that failed to accurately disclose and itemize amounts paid for license fees and amounts paid for “registration/transfer/titling fees.”

Ten months after the original complaint was filed, defendants filed a motion to compel arbitration and stay the action. They sought to compel arbitration of plaintiffs’ claims against them pursuant to a clause in the purchase contract which permitted either party to choose arbitration and provided that, “if a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any class claim you may have against us.” (Capitalization omitted.) The arbitration clause also provided: “If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this arbitration clause shall be unenforceable.” Plaintiffs opposed the motion, asserting that defendants

waived their right to arbitrate by failing to promptly demand arbitration and expressly stating they were not demanding arbitration; plaintiffs also argued the arbitration clause was unenforceable because it was unconscionable and it forced a waiver of plaintiffs' unwaivable statutory rights. The trial court granted defendants' motion, staying the litigation pending completion of the arbitration. Plaintiffs moved for reconsideration, relying on newly published cases. Defendants opposed, arguing the new cases cited by plaintiffs did not change the applicable rules of law and added nothing to the authorities cited in opposition to the motion to compel arbitration. The court denied the motion for reconsideration. Plaintiffs appeal from the order granting defendants' motion to compel arbitration, which they assert is appealable because it had the effect of dismissing the class claims.

## **DISCUSSION**

### **I. Appealability of Order**

After completion of the briefing in this case, defendants filed a motion to dismiss the appeal, contending an order granting a motion to compel arbitration is not appealable. Plaintiffs opposed the motion, invoking the "death knell" doctrine.

No immediate, direct appeal lies from an order compelling arbitration, but such an order is subject to review on appeal from the final judgment. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648; Code Civ. Proc., § 1294.) Under the death knell doctrine, however, courts have held that some orders in an action that is brought as a class action, which are not normally appealable, may be appealable when the legal effect of the order "is tantamount to a dismissal of the action as to all members of the class other than plaintiff." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 (*Daar*)). When the order "effectively [rings] the death knell for the class claims, we treat[] it as in essence a final judgment on those claims, which [is] appealable immediately." (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757 (*Baycol*)). In *Daar*, the court applied the rule to an order sustaining a demurrer to a class action complaint

without leave to amend. The plaintiff had brought an action on behalf of himself and all persons similarly situated. The trial court determined plaintiff could neither maintain the action as a class action, nor state a cause of action for his own individual damages in an amount within the jurisdiction of the superior court. (*Daar, supra*, at p. 698.) It sustained a demurrer to the complaint without leave to amend and transferred the action to municipal court pursuant to Code of Civil Procedure section 396. The court concluded the order was appealable, stating:

“[The order] determines the legal insufficiency of the complaint as a class suit and preserves for the plaintiff alone his cause of action for damages. In ‘its legal effect’ [citation] the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. [Citations.] It has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed. This court has observed that it ‘has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment.’ [Citations.] We conclude that the order in the case at bench is in legal effect a final judgment from which an appeal lies.” (*Daar, supra*, 67 Cal.2d at p. 699.)

Other cases have applied the death knell doctrine to orders sustaining demurrers to the complaint (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 359-360), denying class certification (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 811 (*Stephen*)), or granting a motion to strike the class allegations (*Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 641). As the court stated in *Baycol*: “‘to hold the person [whose rights have been finally disposed of] bound to wait until the final judgment against the other party before taking an appeal from the judgment against the first party already rendered is wholly unreasonable and finds no warrant in any provision of the [Code of Civil Procedure].’ [Citations.]” (*Baycol, supra*, 51 Cal.4th at p. 759.)

In *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, without substantive discussion, the court applied the death knell doctrine to an order granting a

petition to compel arbitration. The plaintiff filed an action that included class allegations; the defendant petitioned to compel arbitration pursuant to an agreement that included a waiver of the right to class arbitrations. The trial court granted the petition, ordered the plaintiff to arbitrate his individual claims, and dismissed the civil action. (*Id.* at p. 1285.) The plaintiff appealed from that order, then filed a motion for reconsideration based on new case law. The trial court granted the motion for reconsideration, and again granted the petition to compel arbitration and directed the plaintiff to arbitrate his individual claims. (*Ibid.*) The plaintiff did not appeal the second order. The defendant contended the plaintiff appealed from the wrong order; it asserted reconsideration had the effect of vacating the first order, so the appeal from that order should be dismissed. (*Id.* at p. 1288.) The court disagreed: “The first order found that the class arbitration waiver was enforceable and instructed Franco to arbitrate his claims individually. That was the ‘death knell’ of class litigation through arbitration. Any subsequent motion for reconsideration or renewal in the trial court had no effect on the appealability of the first order. Consequently, Franco filed a proper appeal. [Citations.]” (*Ibid.*) This was the entirety of the court’s death knell discussion.

Defendants contend *Franco* was superseded by *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 (*Arguelles-Romero*). In *Arguelles-Romero*, the plaintiffs, on behalf of themselves and all persons similarly situated, sued the defendants on claims arising out of the purchase and repossession of a vehicle. The defendants petitioned to compel arbitration of the plaintiffs’ individual claims, pursuant to an arbitration clause and a class action waiver in the vehicle purchase contract. (*Id.* at pp. 831-832.) The trial court found both the arbitration provision and the class action waiver valid and enforceable, and granted the petition to compel individual arbitration. (*Id.* at p. 835.) The plaintiffs appealed, and the defendants moved to dismiss the appeal, contending the order compelling arbitration was not an appealable order. The plaintiffs then filed a petition for writ of mandate challenging the same order. (*Ibid.*) The

appellate opinion states, without discussion, that the court dismissed the appeal and issued an order to show cause in the writ proceeding. (*Ibid.*) The opinion contains no explanation of the reasons for this action, and, contrary to defendants' representation, does not hold that the order compelling arbitration was not appealable. By dismissing the appeal and continuing with the writ proceeding, the court effectively avoided determining whether the order was appealable.

Although *Franco* did not discuss its application of the death knell doctrine to an order granting a petition to compel arbitration, we believe the court was correct in concluding the order was appealable to the extent it effectively dismissed the action as to all members of the class other than the plaintiff. The order effectively barred the plaintiff from pursuing the class claims in the arbitration proceeding and in court. It was "in essence a final judgment" on the claims of the class members other than the plaintiff. (*Baycol, supra*, 51 Cal.4th at p. 757.)

Similarly, the order in this case had the death knell effect of preventing further proceedings on the class claims, either in court or in the arbitration proceeding. The arbitration clause invoked by defendants provides: "Either you or we may choose to have any dispute between us decided by arbitration and not in court or by jury trial. If a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations." (Capitalization omitted.) The court granted the motion to compel arbitration "pursuant to the contract between the parties." Thus, it gave effect to both the provision requiring plaintiffs to arbitrate their individual claims and the provision depriving them of the right to pursue class claims. It prevented any further proceedings on the class claims. The order "effectively terminate[d] the entire action as to the class" (*Stephen, supra*, 235 Cal.App.3d at p. 811) and "virtually demolished the action as a class action." (*Daar, supra*, 67 Cal.2d at

p. 699.) The order was appealable under the death knell doctrine, and we deny defendants' motion to dismiss the appeal.

## **II. Waiver of Right to Arbitration**

A trial court must refuse to compel arbitration if it determines that “[t]he right to compel arbitration has been waived by the petitioner.” (Code Civ. Proc., § 1281.2, subd. (a).) Plaintiffs contend defendants waived their right to demand arbitration by delaying their motion to compel arbitration, asserting they were not demanding arbitration, and participating in the litigation of the court action.

“The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 (*Engalla*)). One defense that may be proven is waiver of the right to arbitrate.

“Generally, the determination of waiver is a question of fact, and the trial court’s finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] ‘When, however, 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.]” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*)). The essential facts are undisputed and we treat the question as one of law.

“[N]o single test delineates the nature of the conduct that will constitute a waiver of arbitration.” (*St. Agnes, supra*, 31 Cal.4th at p. 1195.) Waiver has been defined as “the voluntary relinquishment of a known right.” (*Engalla, supra*, 15 Cal.4th at p. 983.) The definition of the term is broader in the context of arbitration waivers, however. “In determining waiver, a court can 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.’” [Citations.]” (*St. Agnes, supra*, at p. 1196.)

Plaintiffs filed their initial complaint on July 21, 2010, followed by a first amended complaint on August 23, 2010. Haddad demurred to the first amended complaint and moved to strike the class action allegations. The trial court overruled the demurrer and denied the motion to strike as premature. Both defendants then answered the first amended complaint, asserting as their sixth affirmative defense: “Defendants have not sought to compel arbitration of the Plaintiffs’ alleged class claims herein. The inclusion of a class action waiver in the arbitration provision does not render the remainder of the Contract unenforceable.” Thus, while defendants implicitly acknowledged the existence of the arbitration provision, they expressly did not invoke it or assert it as a defense to litigation of plaintiffs’ claims.

Haddad’s interrogatory responses repeatedly note that it “did not seek arbitration of this matter.” Defendants’ case management statements did not suggest defendants intended to assert any right to arbitrate plaintiffs’ claims; defendants did not indicate a willingness to participate in any type of arbitration. They requested a jury trial. They did not list a motion to compel arbitration as a motion they anticipated filing; they listed only a motion for summary judgment or summary adjudication. They also indicated they intended to propound written discovery requests and deposition notices to plaintiffs. At the first case management conference (CMC), on January 19, 2011, defendants did not express interest in arbitrating the matter; the matter was set for jury trial on November 21, 2011. At a further CMC on April 26, 2011, the parties discussed the status of the case,

and the trial date remained unchanged. On May 31, 2011, nine months after defendants were served with the first amended complaint and less than six months before the scheduled trial date, defendants filed their motion to compel arbitration.

Defendants' only explanation for the delay in filing the motion was that on August 13, 2010, ten days before the filing of the first amended complaint, the California Court of Appeal, Fourth Appellate District, issued the opinion in *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601 (*Fisher*), which held that an arbitration clause like the one in plaintiffs' purchase agreement violated public policy because it required the buyer to waive the buyer's unwaivable right under the CLRA to bring a class action lawsuit or class arbitration. The *Fisher* case held that this was a defense not preempted by the Federal Arbitration Act (FAA; 9 U.S.C. § 1, et seq.). Defendants contended they "could not bring a motion to compel arbitration as their response to the [first amended complaint] since it would have been denied in light of *Fisher*." They asserted that, on April 27, 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion* (2011) \_\_ U.S. \_\_, 131 S.Ct. 1740 (*Concepcion*), which held that the FAA preempted California case law (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148) holding that most class action or class arbitration waivers in consumer contracts were unconscionable and unenforceable under California law. Defendants asserted *Concepcion* effectively overruled *Fisher*, and they were then able to bring their motion to compel arbitration.

The trial court made no express determination regarding whether defendants waived their right to demand arbitration pursuant to the arbitration clause in plaintiffs' purchase contract. By granting the motion to compel arbitration, however, the trial court implicitly found there was no waiver. The trial court's order stated: "The Court expressed its views on waiver on the record." At the beginning of the hearing, the court stated: "The tentative is to grant the motion to order the matter to arbitration and the stay. The waiver argument, in the Court's mind, while certainly having on its face, because of

the length of time some validity, I think in light of what the U.S. Supreme Court has done makes that claim or abrogates that claim, I think.” Plaintiffs’ counsel argued that defendants’ claim that they could not have filed the motion until the United States Supreme Court decided *Concepcion* was false. The court agreed:

“THE COURT: It is false. I don’t disagree with you there. But, in light of the law in the State of California, wouldn’t it have been pretty much?

“[PLAINTIFF’S COUNSEL]: An uphill battle to be sure.

“THE COURT: Okay. I’ll leave it at that. That is fine.”

Plaintiffs argued that, because *Fisher* was an appellate court case which did not bind other districts of the Court of Appeal, if defendants’ motion had been denied based on *Fisher*, they could have appealed and argued that *Fisher* was incorrectly decided and that the court in this district should reach a different result. Defendants argued that, because *Fisher* was the only case on the subject at the time, they could not have brought the motion; “if we had brought it, we would have been subject to sanctions, we would have been in violation of our professional rulings.” The trial court disagreed, stating, “I don’t think it is inappropriate for a lawyer to act in good faith to challenge an appellate decision that they disagree with.” Defense counsel conceded the trial court was correct, but reiterated that the trial court would have been bound to follow *Fisher* and “so we’re kind of in a moot exercise as far as our standpoint.”

In *Fisher*, the defendant appealed from the denial of its petition to compel arbitration. The arbitration provision was included in a retail installment sales contract for the sale of a vehicle to Fisher. In language identical to that contained in the Barnes’s contract, the provision in issue in *Fisher* included a waiver of the “right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations,” and a waiver of “any right you may have to arbitrate a class action.” (*Fisher, supra*,

187 Cal.App.4th at p. 607.) It also “included language that, if the waiver of class action lawsuits or classwide arbitration was found unenforceable, the entire arbitration clause was unenforceable.” (*Ibid.*) Fisher’s complaint alleged causes of action by Fisher individually, and by Fisher on behalf of herself and a class of similarly situated persons. One of the class causes of action asserted a violation of the CLRA. (*Id.* at p. 606.) The defendant petitioned to compel arbitration, asserting that the arbitration clause was governed by the FAA. (*Id.* at pp. 607-608.) Fisher opposed, asserting that she had a right under the CLRA to file a class action suit, that right could not be waived, and it was not preempted by the FAA. (*Id.* at p. 608.)

The CLRA provided that a consumer could bring an individual claim or, ““if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief.”” (*Fisher, supra*, 187 Cal.App.4th at p. 613, quoting Civ. Code, § 1781, subd. (a).) It also provided that, ““Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.”” (*Ibid*, quoting Civ. Code, § 1751.) The court interpreted these sections to confer on consumers an unwaivable statutory right to pursue remedies under the CLRA on a classwide basis. (*Fisher, supra*, at p. 613.)

The court observed that the FAA makes arbitration agreements ““valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” [Citations.]” (*Fisher, supra*, 187 Cal.App.4th at p. 613.) Because the CLRA’s unwaivable right to pursue classwide relief applied to contracts generally, not just to arbitration agreements, and because California has a general rule of contract law that private contracts that violate public policy are unenforceable, the court held the FAA did not preempt the CLRA. (*Id.* at p. 617.) Consequently, Fisher could not waive her right to bring a class action lawsuit; further, the court could not order arbitration of Fisher’s individual claims, because the “poison pill” provision invalidated

the remainder of the arbitration agreement if the classwide arbitration waiver was unenforceable. The court affirmed the denial of the defendant's petition to compel arbitration. (*Id.* at pp. 619-620.)

In light of the decision in *Fisher*, at the time defendants initially responded to the first amended complaint (in September 2010), it may have appeared likely a motion to compel arbitration would have been unsuccessful in the trial court, at least on the CLRA cause of action. At that time, however, the California Supreme Court's time for granting or denying review had not yet expired.<sup>1</sup> Thus, there was still a possibility that the decision would be reviewed. Additionally, the *Fisher* opinion itself noted that there was contrary federal authority. (*Fisher, supra*, 187 Cal.App.4th at pp. 613-614.) In *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126 (*Ting*), the court determined that the CLRA applied only to consumer contracts; it did not apply to commercial or government contracts, or contracts formed by noncommercial groups. (*Id.* at p. 1148.) Accordingly, "[b]ecause the CLRA applies to such a limited set of transactions, we conclude that it is not a law of 'general applicability.' [Citations.]" (*Ibid.*) Thus, it did not fall within the FAA's exception, requiring enforcement of arbitration agreements, except on grounds applicable to contracts in general. (*Id.* at p. 1147.) The *Ting* court held Civil Code section 1751, the section of the CLRA invalidating any waiver of statutory rights granted by the CLRA, did not render void the class action ban in the arbitration agreement before the court. (*Ting, supra*, 319 F.3d at p. 1147.)

Although the *Fisher* decision had become final and the Supreme Court had denied review by the time defendants filed their answer to the first amended complaint, the law on the subject was not well settled. The *Fisher* decision was still new and had not been

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<sup>1</sup> The California Supreme Court extended the time for granting or denying review to December 22, 2010. (*Fisher, supra*, 187 Cal.App.4th 601 [2010 Cal. Lexis 12279].) It denied review on December 1, 2010. (*Ibid.* [2010 Cal. Lexis 12059].)

followed by any other California decision. Thus, the position of other districts of the Court of Appeal on the issues it addressed was unknown. The Ninth Circuit of the United States Court of Appeal disagreed with *Fisher*. (*Ting, supra*, 319 F.3d at p. 1147.) Rule 3-200(B) of the California Rules of Professional Conduct permits an attorney to “present a claim or defense in litigation that is not warranted under existing law, [if] it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.” As the trial court recognized, an attorney may, in good faith, challenge an appellate court decision with which he or she disagrees, and this is an acceptable means by which changes in the law may be effected.

In response to plaintiffs’ court action against them, defendants did not immediately assert their right to arbitrate the dispute. They did not file a petition to compel arbitration, seeking to enforce the arbitration provision and arguing that *Fisher* was wrongly decided, to preserve that argument for appeal. They did not file an answer asserting as an affirmative defense either the right to arbitrate the dispute or plaintiffs’ class action waiver. Instead, defendants initially sought to limit or eliminate plaintiffs’ claims in the judicial action by filing a demurrer and motion to strike the first amended complaint. Subsequently, they filed an answer in which they expressly confirmed they had not sought to compel arbitration.

Defendants participated in discovery, responding to plaintiffs’ written discovery requests, producing a witness for deposition, and serving notices of the depositions of plaintiffs, which included requests that plaintiffs produce 19 categories of documents. Their interrogatory responses reiterated that they did not seek arbitration of the dispute. Defendants did not advise the court or plaintiffs at either CMC hearing, or in either of their case management statements filed prior to the CMC hearings, that defendants were claiming they were entitled to enforce the arbitration provision and the class waiver, or that defendants intended to file motions seeking to do so in the future. Defendants demanded a jury trial and raised no objection when the court set a trial date. It was not

until eight months after their first appearance in the action, and four months after the trial date had been set, after the United States Supreme Court fortuitously issued an opinion defendants believed was favorable to their position on arbitration and class action waiver, that defendants suddenly brought a motion to compel arbitration, asserting for the first time that they were entitled to arbitrate plaintiffs' individual claims pursuant to the arbitration provision in the purchase contract, and that plaintiffs had waived their right to pursue class claims.

“To properly invoke the right to arbitrate, a party must (1) timely raise the defense and take affirmative steps to implement the process, and (2) participate in conduct consistent with the intent to arbitrate the dispute. Both of these actions must be taken to secure for the participants the benefits of arbitration.” (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 997-998.) Defendants took neither of these actions. In a similar case, where the plaintiff purchased a vehicle from the defendant pursuant to a retail installment sale contract that included an arbitration provision identical to the one in the Barnes's contract, the court addressed the claim that bringing a motion to compel arbitration prior to issuance of the *Concepcion* decision would have been unavailing: “At oral argument, El Cajon argued it waited to compel arbitration because it was unsure of the state of the law regarding the enforceability of the waiver of classwide claims in the arbitration provision at issue here, as evidenced by the U.S. Supreme Court's recent decision in *Concepcion* and by other recent cases [citation]. We find this excuse unavailing. El Cajon cannot proverbially ‘have its cake and eat it too.’ That is, if El Cajon wanted to arbitrate the dispute involving Roberts, it should have promptly invoked arbitration *regardless* of the validity of the waiver provision in the arbitration provision.” (*Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 846, fn. 10 (*Roberts*).) Similarly, in *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices & Prods. Liab. Litig.* (C.D.Cal. Dec. 13, 2011) 2011 U.S. Dist. Lexis 143490, the court stated: “[W]hile *Concepcion* may have strengthened Toyota's chances for compelling

arbitration, it does not mean that Toyota lacked knowledge of its potential right to pursue arbitration prior to that decision. And contrary to Toyota's suggestion, it does not have a right to reset the clock for arbitration based on changing subsequent law, as no party has a right to unfairly play a game of 'wait and see' and not assert its legal rights until and unless the law becomes more favorable to its position." (*Id.* at pp. \*36-\*37, fn. omitted.)

Defendants' denial, in their answer and discovery responses, that they were seeking arbitration showed that they were aware of the arbitration provision in the purchase contract, but that they were not seeking to enforce it. It demonstrated a deliberate relinquishment of the right to enforce the arbitration agreement. Defendants did not simply fail to take action in the face of plaintiffs' filing of a judicial action against them; they made affirmative representations that would have led a reasonable plaintiff to believe defendants were foregoing their right to enforce the arbitration clause.

Defendants' actions were also inconsistent with the right to arbitrate. (*St. Agnes, supra*, 31 Cal.4th at p. 1196.) Defendants delayed for months before expressing any interest in compelling arbitration of the dispute; they actively participated in the litigation, demurring to the first amended complaint, attending case management conferences, responding to discovery requests, and propounding discovery requests of their own. Meanwhile, plaintiffs also proceeded with discovery; defendants stood by and gave them no reason to believe they should not conduct discovery, should limit their discovery to arbitrable issues, or should refrain from pursuing the class claims. Defendants delayed bringing their motion even after a trial date had been set. Thus, defendants substantially invoked the litigation machinery and both parties were well into preparation of the action when defendants moved to compel arbitration. (*St. Agnes, supra*, 31 Cal.4th at p. 1196.)

Further, defendants' actions "'affected, misled, [and] prejudiced'" plaintiffs, who proceeded to litigate the matter in court, in reliance on defendants' representations and acts. (*St. Agnes, supra*, 31 Cal.4th at p. 1196.) Prejudice may be found where the

conduct of the party seeking arbitration has “substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration.” (*St. Agnes, supra*, 31 Cal.4th at p. 1204.) “[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,” and ... “[a]rbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel.” [Citation.]” (*Roberts, supra*, 200 Cal.App.4th at p. 844, fn. 9.) Defendants’ lengthy delay in demanding arbitration deprived plaintiffs of the expediency and efficiency of the arbitration process. It denied them the opportunity to resolve the issue of arbitration at the outset, before they had expended substantial time and funds preparing their case and determining their strategies based upon the belief the merits of their claims, including the class claims, would be tried by a jury in court. Defendants lulled plaintiffs into a false sense of security by their express statements that they did not seek arbitration.

We find no substantial evidence to support a determination that defendants did not waive their right to arbitration. The facts are undisputed and the only reasonable inference to be drawn from them is that defendants waived their right to arbitration by their affirmative representations and their conduct. Because we have concluded that defendants waived their right to arbitrate plaintiffs’ claims, we need not determine whether the arbitration provision in plaintiffs’ purchase contract was unconscionable.

**DISPOSITION**

The order granting defendants' motion to compel arbitration is reversed. The matter is remanded to the trial court with directions to enter a new and different order denying the motion. Plaintiffs are entitled to their costs on appeal.

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HILL, P. J.

WE CONCUR:

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CORNELL, J.

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FRANSON, J.