

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MILTON BROWN et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SANTA  
CLARA COUNTY,

Respondent;

MORGAN TIRE & AUTO, LLC,

Real Party in Interest.

H037271

(Santa Clara County

Super. Ct. No. 1-10-CV178451)

This matter has been transferred here from the Supreme Court (S211962) with directions to vacate our previous decision (*Brown v. Superior Court* (2013) 216 Cal.App.4th 1302) and to reconsider the cause in light of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*). Like *Iskanian*, this case concerns the enforceability of class action waivers of employees' right to bring a representative action under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). In our earlier opinion, we held that such class action waivers are unenforceable because they prevent "the exercise of a statutory right intended for a predominantly public purpose" and because no case "has held that the FAA<sup>[1]</sup> requires enforcement of" such agreements. In *Iskanian*, the Supreme Court likewise concluded that "an arbitration

---

<sup>1</sup> Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.).

agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy” and that “the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.” (*Iskanian, supra*, at p. 360.)

The parties have filed supplemental briefs, which we have considered.<sup>2</sup> (Cal. Rules of Court, rules 8.528(f), 8.200(b).) We hereby vacate our previous decision. Having reconsidered the cause in light of *Iskanian*, we again conclude that plaintiffs cannot be compelled to waive their PAGA claim.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs Milton Brown and Lee Moncada were employed by defendant Morgan Tire & Auto, LLC, doing business as Wheel Works. Both plaintiffs were nonexempt hourly employees.

On July 29, 2010, plaintiffs filed a putative class action lawsuit against defendant alleging violation of California’s wage and hour laws. The operative first amended complaint alleges that defendant did not pay its hourly employees for all hours worked, did not pay overtime, failed to provide meal and rest periods, did not issue complete and accurate wage statements, did not issue pay on time, and delayed final paychecks to discharged employees. Plaintiffs also allege one cause of action under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Plaintiffs seek restitution and damages. In addition, plaintiffs claim civil penalties on behalf of themselves and all other aggrieved employees as allowed by the PAGA.

---

<sup>2</sup> According to defendant, a petition for writ of certiorari is pending before the United States Supreme Court in *Iskanian*. We decline defendant’s request that we defer reconsideration of this appeal until disposition of that petition. We of course remain bound by the holding in *Iskanian* unless and until the United States Supreme Court declares it to be an incorrect statement of federal law and thus we apply it here.

In the course of their employment, plaintiffs signed an agreement to be bound by defendant's employee dispute resolution plan (EDRP). The EDRP provides that all employment related disputes will be submitted to mediation and arbitration "rather than to the courts or to governmental agencies." The EDRP further specifies: "Parties to the [EDRP] waive any right they may otherwise have to pursue, file, participate in, or be represented in Disputes brought in any court on a class basis or as a collective action or representative action. This waiver applies to any Disputes that are covered by the [EDRP] to the full extent such waiver is permitted by law. All Disputes subject to the [EDRP] must be mediated and arbitrated as individual claims. The [EDRP] specifically prohibits the mediation or arbitration of any Dispute on a class basis or as a collective action or representative action."

Notwithstanding the EDRP, defendant did not raise arbitration as an affirmative defense in its answer. Defendant participated in discovery and negotiated the terms of a stipulated protective order relating to the class members. Defendant took the deposition of plaintiff Brown. Defendant also agreed to produce the names and contact information of all putative class members and agreed to participate in private mediation on a classwide basis.

At the time plaintiffs filed this case, California law made arbitration agreements containing class action waivers<sup>3</sup> unenforceable in virtually all consumer cases. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162-163 (*Discover Bank*)). *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*) made class action waivers unenforceable in wage and hour cases if the trial court found that a class action would be more effective in vindicating the employees' statutory rights. On April 27, 2011, the United States

---

<sup>3</sup> We use the phrase, "class action waiver" as meaning the relinquishment of a right to proceed, either in a judicial or arbitral forum, as the representative of, or as a member of, a class of persons. Where it is necessary to make a distinction between judicial class actions and class arbitration, we shall do so explicitly.

Supreme Court filed *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. \_\_\_ [179 L. Ed. 2d 742, 131 S.Ct. 1740] (*Concepcion*), overruling *Discover Bank*. Although *Concepcion* did not mention *Gentry*, defendant promptly filed a motion to compel arbitration, arguing that *Concepcion* impliedly overruled *Gentry* as well as *Discover Bank*. Plaintiffs opposed the motion, arguing that defendant had waived its right to arbitrate and, in any event, *Concepcion* did not affect the *Gentry* rule. The superior court concluded that *Gentry* was no longer good law, found that defendant had not waived its right to arbitrate, and granted the “motion to compel individual arbitration.” Plaintiffs filed a notice of appeal from that order.

Ordinarily, an order compelling arbitration is not appealable and may be reviewed only after the parties complete arbitration and appeal from the judgment. (*Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1089.) Writ relief is available in exceptional circumstances. (*United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1581.) Since plaintiffs’ arguments involve a rapidly developing area of the law, we notified the parties that we would consider the notice of appeal as a petition for writ of mandate. The matter proceeded as such and we issued an order to show cause. We now conclude that plaintiffs are entitled to some of the relief they requested.

## **II. DISCUSSION**

### ***A. Legal Framework***

In its most generic form, an arbitration agreement merely requires the parties to resolve their disputes by way of arbitration, a process that is intended to be simpler, less formal, and more expeditious than the process of resolving disputes in court. (See *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628.) As arbitration agreements have evolved, they have added features to further simplify the process. One

such feature is the class action waiver, which typically binds the parties to arbitrate their disputes on an individual basis, prohibiting collective or representative actions.

Congress enacted the FAA to overcome widespread judicial antipathy to arbitration agreements. (*Concepcion, supra*, 563 U.S. \_\_\_ at p. \_\_\_ [131 S.Ct. at p. 1745].) Under the FAA, arbitration agreements must be enforced according to their terms. Specifically, the FAA provides: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (9 U.S.C. § 2.) The FAA reflects both a policy favoring arbitration and fundamental principles of contract. (*Concepcion, supra*, at p. \_\_\_ [at p. 1745].) “[C]ourts must place arbitration agreements on an equal footing with other contracts, [citation], and enforce them according to their terms. . . .” (*Ibid.*) The parties agree that the FAA applies in this case.

The final phrase of 9 United States Code section 2, the so-called “savings clause,” permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” “This saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1746].)

Until 2011, *Discover Bank* made class action waivers unenforceable if they appeared in arbitration agreements that were “consumer contract[s] of adhesion” (*Discover Bank, supra*, 36 Cal.4th at p. 162), disputes between the parties were likely to “involve small amounts of damages,” (*ibid.*) and “it [was] alleged that the party with the superior bargaining power ha[d] carried out a scheme to deliberately cheat large numbers

of consumers out of individually small sums of money.” (*Id.* at pp. 162-163.) And *Gentry, supra*, 42 Cal.4th at page 463, had held that--in the case of alleged systematic, classwide Labor Code violations--a class action waiver may be unenforceable where certain specified factors exist and a trial court concludes that (1) class arbitration “is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration” and (2) “disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer’s violations . . . .” (*Ibid.*)

In April 2011, the United States Supreme Court held in *Concepcion* that the *Discover Bank* rule was preempted by the FAA because *Discover Bank* stood as an obstacle to the overall purpose of the FAA. (*Concepcion, supra*, 563 U.S. at pp. \_\_\_ [131 S.Ct. at pp. 1748, 1751].) Notwithstanding the FAA’s savings clause, courts may not invalidate an arbitration agreement based upon generally applicable contract principles, such as unconscionability, if those principles are applied in a fashion that disfavors arbitration. (*Id.* at p. \_\_\_ [131 S.Ct. at p. 1747].) *Concepcion* reasoned that, despite the *Discover Bank* requirements that the case involve a contract of adhesion, modest individual damages, and allegations of cheating, the rule would apply to virtually all consumer arbitration agreements. Thus, *Discover Bank* effectively inserted, retroactively, the requirement that all consumer arbitration agreements permit classwide arbitration. (*Id.* at p. \_\_\_ [131 S.Ct. at p. 1744].) Classwide arbitration is fundamentally different than individual arbitration because it sacrifices the informality of the arbitration process, requires extensive procedural formality to protect absent class members, and greatly increases the risk to defendants by magnifying the potential liability in proceedings that are largely insulated from judicial review. (*Id.* at p. \_\_\_ [131 S.Ct. at p. 1751].) Thus, requiring the parties to include classwide arbitration in all consumer arbitration agreements discourages, rather than encourages, arbitration as a dispute

resolution tool and, unless the parties had agreed to it, classwide arbitration directly conflicts with the requirement that arbitration agreements be enforced as written. Accordingly, the *Discover Bank* rule is preempted by the FAA. (*Ibid.*)

*Concepcion* did not mention *Gentry*. However, our Supreme Court held in *Iskanian*, that, in light of *Concepcion*, “the FAA preempts the *Gentry* rule” prohibiting class waivers if a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration. (*Iskanian, supra*, 59 Cal.4th at p. 366.)

### ***B. Questions Presented***

Plaintiffs raise three issues on appeal:

First, did the defendant waive its right to compel arbitration by failing to move to compel arbitration until after *Concepcion* was decided?

Second, is the class action waiver preempted by the collective-action requirement of the National Labor Relations Act (NLRA) (29 U.S.C. § 157)?

Third, does *Concepcion* permit arbitration agreements to override the statutory right to bring representative claims under the PAGA?

### ***C. Defendant Did Not Waive or Abandon its Right to Enforce the EDRP***

#### ***1. Standard and Scope of Review***

“Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration.” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) *St. Agnes* used, as a guide, a six-point test used by most of the federal circuits to determine whether a party has waived the contractual right to arbitrate. That test requires a court to 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.” ’ ” (Id. at p. 1196.) The *Iskanian* court reaffirmed the validity of *St. Agnes*. (*Iskanian, supra*, 59 Cal.4th at pp. 374-378 [applying *St. Agnes* in concluding that defendant did not waive its right to arbitration].) Accordingly, we apply the *St. Agnes* analysis.

## 2. Acts Inconsistent with Right to Compel Arbitration

The EDRP purports to require plaintiffs to individually arbitrate their wage and hour claims. Nevertheless, defendant actively litigated this case for 10 months before mentioning arbitration. Indeed, defendant engaged in discovery and even agreed to produce the names and contact information for members of the putative class and to participate in classwide mediation. Plaintiffs maintain these are acts inconsistent with the right to compel arbitration. Defendant responds that until *Concepcion* was decided, the courts of this state had held that class action waivers like the one contained in the EDRP were unenforceable. Because the EDRP gave the right to individual arbitration only as “permitted by law,” defendant reasonably believed it had no right to individual arbitration and any motion to enforce such a right would have been futile. *Concepcion* represented a change in the law that gave defendant an argument that the EDRP was enforceable according to its terms.

Plaintiffs argue that this case is like *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832 (*Roberts*) or *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436 (*Lewis*), in which the appellate courts rejected the defendants’ argument that they delayed compelling arbitration because of a concern about enforceability that

was cleared up by *Concepcion*. Neither case is on point. *Roberts* rejected the argument because *Concepcion* was decided more than a year *after* the defendant filed its motion to compel arbitration. (*Roberts, supra*, at p. 846, fn. 10.) That is, there had not yet been any change in the law when the defendant filed its tardy motion to compel arbitration.

In *Lewis*, the defendant had delayed filing a motion to compel arbitration until after *Concepcion* was filed. According to the defendant, that was because it believed the *Discover Bank* rule made the arbitration agreement unenforceable. But as the appellate court pointed out, the plaintiff had not filed a class action. In other words, *Discover Bank* was inapplicable to the action even before *Concepcion* overturned it. (*Lewis, supra*, 205 Cal.App.4th at p. 448.)

Plaintiffs also argue that defendant cannot claim a motion to compel individual arbitration would necessarily have been futile prior to *Concepcion*. But, in *Iskanian*, our Supreme Court recognized that futility is grounds for delaying arbitration. (*Iskanian, supra*, 59 Cal.4th at p. 376.)

Plaintiffs point out that, because *Gentry* is not a categorical prohibition of class action waivers, there was some chance that defendant could have convinced a court to enforce the EDRP as written even before *Concepcion* was filed. Under *Gentry*, in deciding whether to enforce a class arbitration waiver, a trial court must consider whether the potential for individual recovery would be modest, the possibility class members might suffer retaliation, the possibility that absent class members would be ill informed about their rights, and other real world obstacles to vindicating the employees' rights in individual arbitration. If, based upon these factors, the trial court concludes that class arbitration is likely to be "significantly more effective" than individual actions in vindicating the employees' rights and that disallowing a class action would "likely lead to a less comprehensive enforcement of overtime laws" the court "must invalidate the class arbitration waiver." (*Gentry, supra*, 42 Cal.4th at p. 463.) Given the breadth of the

*Gentry* rule and the nature of the claims raised here, it was reasonable for defendant to believe, prior to *Concepcion*, that a motion to compel individual arbitration was likely to fail. *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1129 (*Quevedo*), is precisely on point.

*Quevedo* was filed in March 2009 as a class action wage and hour case against the defendant, Macy's Inc. The Macy's employment agreement contained an arbitration clause and a class action waiver. However, "[i]n light of *Gentry*, Macy's reasonably concluded that it could not enforce the class action waiver in its arbitration agreement" and did not move to compel arbitration until after *Concepcion* was decided. (*Quevedo, supra*, 798 F.Supp.2d at p. 1130.) Macy's could have insisted upon arbitration but under *Gentry*, class arbitration was all but inevitable. "A right to defend against *an individual's* claims in arbitration meaningfully differs from a right to defend against *class and collective* claims in arbitration . . . . If Macy's waived any right, it was the right to defend against *Quevedo's* class and collective claims in arbitration." (*Ibid.*, italics added, citing *Concepcion, supra*, 563 U.S. at pp. \_\_\_ [131 S.Ct. at pp. 1751, 1743].) Accordingly, the court held that Macy's conduct was not inconsistent with a right to individual arbitration. (*Quevedo, supra*, at p. 1131.) The present case is factually indistinct from *Quevedo*. We find that court's reasoning to be sound and apply it to the present matter to conclude that defendant's delay in compelling arbitration "was reasonable in light of the state of the law at the time." (*Iskanian, supra*, 59 Cal.4th at p. 377.)

### 3. *Participation in Litigation/Prejudice to Plaintiffs*

Factors two through five of the *St. Agnes* test are related to the extent of the party's participation in the judicial litigation. As to the sixth factor, prejudice, our courts "will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) We assess prejudice in light of California's strong public policy favoring arbitration. (*Id.* at p. 1204,

citing, *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) “Prejudice typically is found only where the petitioning party’s conduct has substantially undermined this important public policy or substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration.” (*St. Agnes, supra*, at p. 1204.) Prejudice may be found where the petitioning party used the judicial process to gain information it could not have gained in arbitration, waited until the eve of trial to seek arbitration, or delayed so long that evidence was lost. (*Ibid.*)

In this case, defendant participated in the class litigation to the extent necessary to defend the suit. In light of *Gentry, supra*, 42 Cal.4th 443, it was reasonable for defendant to believe that it did not have the right to enforce the individual arbitration described in the EDRP and, therefore, it would have been unreasonable to expect it to refrain from participating in the judicial process altogether. Once the law changed, defendant did not delay in seeking to compel arbitration. Defendant’s motion to compel arbitration was filed on May 17, 2011, only 20 days after *Concepcion* was filed, and roughly 10 months after the court litigation had commenced. The rapidity with which defendant sought to enforce the arbitration agreement following the *Concepcion* decision indicates that defendant was not involved in the litigation in order to take advantage of the judicial process prior to demanding arbitration.

Plaintiffs argue that defendant propounded more discovery than may have been allowed by an arbitrator but plaintiffs have not shown how that additional discovery yielded information that defendant could not have obtained in the course of an arbitration. Plaintiffs do not allege that any evidence has been lost by the 10-month delay. Nor is there any claim that defendant’s actions have impaired plaintiffs’ ability to have their individual disputes resolved fairly through arbitration. That is, plaintiffs have not demonstrated prejudice.

We conclude that defendant did not waive or abandon its right to enforce the EDRP.

***D. The NLRA Does Not Make the Class Action Waiver Unenforceable***

Plaintiffs contend that enforcement of the class action waiver would impermissibly interfere with their rights to collective action granted by the NLRA. The NLRA makes it an unfair labor practice for an employer to interfere with an employee’s right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” (29 U.S.C. §§ 157, 158.) Plaintiffs urge us to adopt the position taken by the National Labor Relations Board (NLRB) in *D.R. Horton, Inc.* (2012) 357 NLRB No. 184 [2012 NLRB Lexis 11], which held that a mandatory arbitration agreement prohibiting resolution of any employment-related disputes on a class or representative basis was a violation of the NLRA.

The *Iskanian* court rejected an identical argument, concluding that the FAA preempts the NLRB’s rule prohibiting waivers of class action wage and hour claims. (*Iskanian, supra*, 59 Cal.4th at pp. 372-373.) Following *Iskanian*, we conclude the NLRA does not foreclose enforcement of the EDRP’s class action waiver.

***E. The Class Action Waiver Is Unenforceable as Applied to the PAGA Claim***

We now turn to plaintiffs’ argument that the class action waiver is unenforceable as applied to the PAGA claim. *Iskanian* is dispositive.

As our Supreme Court explained there, an employment agreement that compels the waiver of representative claims under the PAGA “serves to disable one of the primary mechanisms for enforcing the Labor Code” and “violates Civil Code section 3513’s injunction that ‘a law established for a public reason cannot be contravened by a private agreement.’ ” (*Iskanian, supra*, 59 Cal.4th at p. 383.) Accordingly, such an agreement “is contrary to public policy and unenforceable as a matter of state law.” (*Id.* at p. 384.)

Further, the rule against PAGA waivers is not preempted by the FAA, as “a PAGA claim lies outside the FAA’s coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents--either the [Labor and Workforce Development Agency] or aggrieved employees--that the employer has violated the Labor Code.” (*Iskanian, supra*, 59 Cal.4th at pp. 386-387.)

For these reasons, the respondent court erred in compelling individual arbitration of plaintiffs’ PAGA claim. Plaintiffs have offered no viable challenge to the remainder of the EDRP. “Having concluded that [defendant] cannot compel the waiver of [plaintiffs’] representative PAGA claim but that the agreement is otherwise enforceable according to its terms, we next consider how the parties will proceed.” (*Iskanian, supra*, 59 Cal.4th at p. 391.) As in *Iskanian*, plaintiffs here “sought to litigate all claims in court, while [defendant] . . . sought to arbitrate the individual claims while barring the PAGA representative claim altogether. In light of the principles above, neither party can get all that it wants.” (*Ibid.*) On remand, the parties may address (1) whether they would prefer to resolve the representative PAGA claim through arbitration; (2) if not, whether it is appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation; and (3) if such bifurcation occurs, whether the arbitration should be stayed pursuant to Code of Civil Procedure section 1281.2. (*Iskanian, supra*, at pp. 391-392.)

### **III. DISPOSITION**

Let a writ of mandate issue directing respondent superior court to vacate its order granting defendant’s motion to compel individual arbitration and stay this action. The court shall enter a new order after determining (1) whether the parties would prefer to resolve the representative PAGA claim through arbitration; (2) if not, whether it is appropriate to bifurcate the claims, with individual claims going to arbitration and the

representative PAGA claim to litigation; and (3) if such bifurcation occurs, whether the arbitration should be stayed pursuant to Code of Civil Procedure section 1281.2. Each party shall bear its own costs.

---

Premo, J.

WE CONCUR:

---

Rushing, P.J.

---

Elia, J.