Filed 12/4/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EDIXON FRANCO, Plaintiff and Respondent, v. ARAKELIAN ENTERPRISES, INC., Defendant and Appellant.	B232583 (Los Angeles County Super. Ct. No. BC369201) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on November 26, 2012, be modified as follows:

On page 7, in footnote 1, change "$2,250" to "2,500." The corrected footnote will read:

> **1** Franco cannot bring his action in small claims court. His potential recovery of approximately $10,250 — $7,750 in damages for rest and meal period violations and $2,500 in PAGA penalties — exceeds the $10,000 cap in small claims court. (See Code Civ. Proc., § 116.221.)

There is no change in the judgment.

MALLANO, P. J. CHANEY, J. JOHNSON, J.

Filed 11/26/12 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EDIXON FRANCO, Plaintiff and Respondent, v. ARAKELIAN ENTERPRISES, INC., Defendant and Appellant.	B232583 (Los Angeles County Super. Ct. No. BC369201)

APPEAL from an order of the Superior Court of Los Angeles County, John Kronstadt, Judge. Affirmed.

Hill, Farrer & Burrill, Kyle D. Brown, James A. Bowles and E. Sean McLoughlin for Defendant and Appellant.

Rastegar & Matern, Matthew J. Matern and Thomas S. Campbell for Plaintiff and Respondent.

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), our Supreme Court held that, in arbitration agreements governing employment, class action waivers may be unenforceable in "*some circumstances* [because they] . . . would lead to a de facto waiver [of employees' statutory rights] and would impermissibly interfere with employees' ability to vindicate [those] rights" (*id.* at p. 457, italics added).

More specifically, *Gentry* addressed the enforceability of class action waivers in the context of a claim for overtime compensation. The court grounded its decision on the conclusion that an employee's right to overtime compensation is an unwaivable statutory right. (*Gentry*, *supra*, 42 Cal.4th at pp. 455–457.) In determining the validity of class action waivers, the court stated: (1) "individual awards in wage-and-hour cases tend to be modest" (*id.* at p. 457); (2) "a current employee who individually sues his or her employer is at greater risk of retaliation" (*id.* at p. 459); (3) "some individual employees may not sue because they are unaware that their legal rights have been violated" (*id.* at p. 461); (4) "'class actions may be needed to assure the effective enforcement of statutory policies'" (*id.* p. 462); and (5) there may be "real world obstacles to the vindication of class members' rights to overtime through individual arbitration" (*id*. at p. 463).

Gentry concluded that, when an employee alleges that an employer has *systematically* denied proper overtime pay to a class of employees, and a trial court *finds*, based on the foregoing factors, that a class action "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, *and finds* that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable [statutory] rights . . . .'" (*Gentry*, *supra*, 42 Cal.4th at p. 463, italics added.)

In *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 (*Franco I*), we concluded that *Gentry* invalidated a class action waiver where an employee alleged that his employer had violated the laws regarding employees' rights to rest and meal periods — statutory rights that are also unwaivable. (*Franco I*, at pp. 1290–1294, citing Lab. Code,

§§ 512, 226.7; undesignated section references are to that code.) We further concluded that, with respect to a claim under the Labor Code Private Attorneys General Act of 2004 (PAGA) (§§ 2698–2699.5), *Gentry* invalidated an arbitration clause prohibiting an employee from acting as a private attorney general (see *Franco I*, at pp. 1299–1302).

After we decided *Franco I*, the employer filed a second petition to compel arbitration, arguing that a change in the law rendered the class action waiver enforceable. The trial court denied the petition. That ruling is now before us. The question on appeal is whether *Gentry* was overruled by *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. ___ [130 S.Ct. 1758] (*Stolt-Nielsen*) and *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*Concepcion*). We conclude that *Gentry* remains good law because, as required by *Concepcion*, it does not establish a categorical rule against class action waivers but, instead, sets forth several factors to be applied on a case-by-case basis to determine whether a class action waiver precludes employees from vindicating their statutory rights. And, as required by *Stolt-Nielsen*, when a class action waiver is unenforceable under *Gentry*, the plaintiff's claims must be adjudicated in court, where the plaintiff may file a putative class action. Accordingly, we affirm.

I

BACKGROUND

The facts in this appeal are taken from our prior opinion and the record in *Franco I* and the exhibits filed in connection with the second petition to compel arbitration.

On April 9, 2007, plaintiff Edixon Franco filed a class action complaint against "Athens Disposal Company, Inc., dba Athens Services" (Athens [Services]). The complaint alleged as follows.

"Franco [was] employed by Athens [Services] as a nonexempt, hourly employee . . . . He brought this suit individually and on behalf of other similarly situated current and former employees. The potential class is significant in size such that individual joinder would be impractical. Athens [Services] engaged in a systematic course of illegal payroll

practices and policies in violation of the Labor Code . . . . Athens [Services] subjected all of its hourly employees to the identical violations.

"The first cause of action alleges that Athens [Services] violated Labor Code sections 510 and 1194 by failing to pay overtime. . . . In the second cause of action, Franco alleges that Athens [Services] violated section 226.7 and the applicable Industrial Welfare Commission wage order, No. 9-2001 (Wage Order) . . . , codified at California Code of Regulations, title 8, section 11090. More specifically, Athens [Services] allegedly failed to provide meal periods and to pay an additional hour of compensation per workday to employees who missed a meal period. The third cause of action alleges a separate violation of section 226.7 and the Wage Order by failing to provide rest periods and to pay an additional hour of compensation per workday to employees who missed a rest period. In the fourth cause of action, the complaint asserts violations of sections 226, 1174, and 1174.5, as well as the Wage Order, by failing to provide necessary payroll information to employees and failing to maintain records on each employee showing all hours worked and all meal periods taken. The fifth cause of action seeks civil penalties authorized by the PAGA for violating the Labor Code as to Franco and other current and former employees; Franco alleges he exhausted the requisite administrative remedies under the act. (See §§ 2699.3, 2699.5.)" (*Franco I, supra*, 171 Cal.App.4th at p. 1283.)

On June 22, 2007, Athens Services, represented by Hill, Farrer & Burrill (the Hill firm), "filed a petition to compel arbitration and to dismiss or stay the civil action. The petition stated that Athens [Services] was in the business of trash removal, hauling, disposal, and recycling and was engaged in interstate commerce within the meaning of the Federal Arbitration Act . . . (9 U.S.C. §§ 1–16). Athens [Services] alleged that arbitration was required under the [August 2005] arbitration agreement signed by Franco — written in Spanish — which was attached as an exhibit." (*Franco I, supra*, 171 Cal.App.4th at pp. 1283–1284.)

Franco was employed by Athens Services from May 20, 2005, to May 12, 2006. In August 2005, he signed an "Employee Agreement to Arbitrate" that stated:
"I acknowledge that I have received and reviewed a copy of the Athens Services' Mutual

Arbitration Policy ('MAP'), and I understand that it is a condition of my employment. I agree that it is my obligation to make use of the MAP and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Athens Services . . . or its parent, subsidiary, sister or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents ('the Company') and that . . . both the Company and I agree to forego any right . . . to bring claims on a representative or class basis. I also agree that such arbitration . . . will be conducted under the Federal Arbitration Act and the applicable procedure rules of the American Arbitration Association ('AAA'). [¶] . . . [T]he Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and the Company further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expenses for the arbitrator and the administrative costs of the AAA will be an amount equal to the local civil court filing fee and the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. If any provision of the MAP is found unenforceable, that provision may be severed without affecting this agreement to arbitrate. . . ."

The "Mutual Arbitration Policy" (MAP) read: "Athens Services ('the Company') has adopted and implemented a *new* arbitration policy, requiring mandatory, binding arbitration of disputes, for all employees, regardless of length of service. . . . [The MAP] will govern all existing or future disputes between you and the Company that are related in any way to your employment. [¶] . . . [¶] The MAP . . . covers all disputes relating to or arising out of an employee's employment with the Company or the termination of that employment. . . . [¶] . . . Likewise, the Company agrees to be bound by the MAP. This mutual obligation to arbitrate claims means that both you and the Company are bound to use the MAP as the only means of resolving any employment-related disputes. . . . [B]oth you and the Company forego and waive any right to join or *consolidate claims* in arbitration with others or to make claims in arbitration *as a representative or as a member of a class* or in a *private attorney general capacity* . . . . No remedies that otherwise would be available to you individually or to the Company in a court of law, however, will be

forfeited by virtue of this agreement to use and be bound by the MAP. [¶] . . . [¶] The Company and you will share the cost of the AAA's filing fee and the arbitrator's fees and costs, but your share of such fees and costs shall not exceed an amount equal to your local court civil filing fee. . . . You and the Company will be responsible for the fees and costs of your own respective legal counsel, if any . . . ." (Italics added.) The MAP permitted the company and its employees to sue in small claims court subject to that court's jurisdictional monetary limit.

The MAP was described as a "new" arbitration policy because, at the time of hire on May 20, 2005, Franco was given the "Athens Services Employee Guide," which required arbitration in simple, concise terms: "Any claim or controversy that arises out of or relates to the interpretation, application or enforcement of this agreement or any other matter concerning or relating to the employment relationship between the Employer and Employee shall be submitted to final and binding arbitration in accordance with the Labor Arbitration Rules of the American Arbitration Association." The arbitration provision in the employee guide did not prohibit an employee from consolidating claims, pursuing a class action or other representative action, being a class representative or a member of a class, or acting as a private attorney general. The arbitration provision was silent as to those issues. Franco signed an acknowledgment form, indicating he had been given a copy of the employee guide and that a company representative had explained its contents to him in detail. Both the employee guide and the acknowledgment form were in Spanish.

In support of the petition to compel arbitration, the president of "Athens Disposal Company, doing business as Athens Services," submitted a declaration stating that the company had complied with the Labor Code and the applicable wage order. The payroll manager submitted a declaration, stating: "I have been employed by Athens Services for 8 years . . . . [¶] . . . [¶] . . . I am familiar with Edixon Franco's personnel file. He was employed by Athens [Services] as a waste hauling driver. In that position, Edixon Franco held a commercial driver's license and operated one of the company's waste hauling vehicles (i.e. a trash truck), which is a three axle commercial vehicle weighing more than 10,000 pounds. As a driver operating such a vehicle, Edixon Franco, like all of [Athens

Services's] waste hauling drivers, was exempt from California's overtime wage laws and regulations . . . ."

In opposition to the petition, Franco "submitted evidence showing that, based on his hourly wage, his estimated damages for the alleged denial of meal and rest periods totaled $7,750; he would also be entitled to approximately $2,500 in civil penalties [under the PAGA]. . . . Franco filed a declaration in which he stated that, during his employment with Athens [Services] (1) he did not know he was entitled to an hour's pay if Athens [Services] did not give him a meal or rest period; (2) he was not aware of all of his rights under the Labor Code or other labor law; (3) in his experience, employees who complained about working conditions were 'looked down on' by management and 'often los[t] their jobs or [were] treated in ways that force[d] them to quit'; and (4) he 'did not feel secure enough to complain about anything [he] may have felt was wrong . . . . [He] felt that if [he] complained about anything [he] would be fired.'" (*Franco I*, *supra*, 171 Cal.App.4th at p. 1285.)[1]

Franco filed declarations from three attorneys who discussed the necessity of bringing his wage and hour claims as a class action, whether in court or arbitration. One declaration, from Attorney Matthew J. Matern, read: "Based on my experience and knowledge of Labor Code cases, it would be extremely difficult for the class member employees to obtain representation for their cases because of the relatively small amounts [of] damages each employee suffers if they are required *to litigate each of their cases separately*. That is assuming . . . each class member knew [his or her] rights under the Labor Code were being violated, each had the ability to find an attorney to separately litigate [his or her] individual case in arbitration and had no fear of being fired for doing

---

[1] Franco cannot bring his action in small claims court. His potential recovery of approximately $10,250 — $7,750 in damages for rest and meal period violations and $2,250 in PAGA penalties — exceeds the $10,000 cap in small claims court. (See Code Civ. Proc., § 116.221.)

so. Typically, these employees come into my office with no knowledge of the Labor Code. Moreover, they rarely have worked for the employers for a substantial period of time, in some cases only a year or two, as is the case for the Plaintiffs in this case. In fact, we have potential clients come into our office who worked for an employer less than a year and most assuredly many members of a class will have shorter times of employment with the employer, with correspondingly lower damages.

". . . Without the ability to litigate these cases as a class proceeding, my firm could not represent the individual class members especially if we had [to] arbitrate each one separately because of the low damages present in many of these cases, including this one. Moreover, if the entire class were to come into my office, we could not . . . litigate each case separately, *either in court or in arbitration*.

". . . As to the argument that attorneys fees are available in these types of cases, because of the small amount of damages for each individual, the small amount of attorney's fees that would be considered 'reasonable' in relation to any individual's claim would not be sufficient to permit me to invest my time. Moreover, paying the claims of each individual employee who happens to walk into my or another attorney's office *will not deter the employer from continuing to deny rest and meal periods* or force the employer to pay its employees the wages due. Rather, *preventing class proceedings* from occurring will only allow this and other employers to pay the claims of a few employees, if any, and *continue violating the Labor Code unabated*.

". . . The penalties sought under the PAGA are not damages and are apportioned seventy-five percent to the State of California and twenty-five percent to the individual class members, not the Named Plaintiff. Based on the hourly wages paid to Plaintiff Franco, we estimate *damages* for him for denial of rest and meal breaks to be approximately $7,750.00. We estimate that *penalties* in this case for the individual named plaintiffs [under the PAGA] could reach approximately $10,000.00 for Plaintiff for [rest and meal period] violations . . . , with [Franco] retaining about approximately $2,500.00." (Italics added.)

Another attorney, Victor L. George, declared: "In February of this year[, 2007,] I was named a 'Top 100 Southern California Attorney' in 'Southern California Super Lawyers.' I have been listed as a 'Super Lawyer' each of the four (4) years the magazine has been in existence (2004, 2005, 2006, 2007). According to the publishers of Law Politics magazine, Super Lawyers are the top 5% of attorneys in their practice field. [¶] . . . [¶]

"All my cases are Plaintiff's cases. All have substantial risks. I advance all costs and all of our firm's time. I am extremely selective about picking my cases; [trying] to help those that are (a) the most clearly in need and (b) that might have a chance to prevail. Even so, I recognize that often any financial remuneration will not be forthcoming until years and years after I initially begin to pursue a case. I litigate Labor Code cases similar to this case on a class basis and would not take a case from any of the absent class members if I had *to litigate it on an individual basis* because of the moderate damages and because *these cases are labor intensive*. Additionally, it makes no sense to bring these cases individually because *the employer can simply pay the small damages and not be forced to correct its unlawful behavior*.

". . . Based on my experience and knowledge of wage and hour cases, it would be extremely difficult for an employee to obtain representation for their Labor Code cases if they needed to either *arbitrate or litigate in court individually*. Many cases such as this one have damages significantly lower than your typical harassment or discrimination case. . . . These [Labor Code] cases involve many hours of attorney work and despite the possibility of obtaining attorneys fees upon a successful arbitration, the chances that an arbitrator will award the attorney the full amount of hours worked are not great.

". . . In my experience, the employees that come into my office have little knowledge of their rights under California law and rarely do they come in while still working for the employer who wronged them. Many times the employees who come into my office have worked for the employer for less than one year.

". . . Many of the cases that involve short term employees *could not be litigated at all in superior court* because of the low amount of damages. If one of the purported class

members in this case came into my office after working for only a few months and not receiving any breaks, I would have to decline. *Without the ability to litigate these cases as a class proceeding, my firm could not represent the individual class members*, especially if we had [to] arbitrate each one separately because of the low damages present in many of these cases." (Italics added.)

Franco argued that, under *Gentry*, *supra*, 42 Cal.4th 443, the MAP's class action waiver and the prohibition on acting as a private attorney general were invalid. Athens Services countered that *Gentry* was "*not . . . a blanket rule* invalidating all class action waivers in employment arbitration agreements." Rather, *Gentry* applied only in cases where a class action waiver constituted a "disadvantage [to] employees in vindicating their rights." (*Id.* at p. 464, italics added.) According to Athens Services, Franco had not made such a showing or satisfied the *Gentry* factors. Athens Services also asserted that Franco's overtime claim was meritless because he was exempt from the state's overtime compensation laws.

The trial court, Judge Elizabeth A. Grimes presiding, granted the petition to compel arbitration, reasoning that although *Gentry* applied to overtime claims, Franco's claim for overtime compensation lacked merit. The court also stated that, assuming *Gentry* applied to Franco's nonovertime claims, classwide arbitration would not be significantly more effective than individual arbitrations because of the preponderance of individualized issues, the need for specific inquiries into the merits of each employee's claims, and the varying extent of liability. The court opined that "[Athens Services's] arbitration program would not disadvantage any employee who pursued claims through individual arbitration." (*Franco I*, *supra*, 171 Cal.App.4th at p. 1287.)

On appeal, we concluded that, in ruling on the petition, the trial court had erred in considering the merits of Franco's overtime claim and treating the claim as if it had been dismissed. (See *Franco I*, *supra*, 171 Cal.App.4th at pp. 1287, 1288–1290.) As to Franco's claims alleging rest and meal period violations, we held that the pertinent laws (§§ 512, 226.7) conferred unwaivable statutory rights on employees and that Franco had satisfied the *Gentry* factors. (See *Franco I*, at pp. 1290–1299.) We reached the same

conclusion as to Franco's claim for civil penalties under the PAGA. (See *id.* at pp. 1299–1302.) We stated that Athens Services's evidence concerning whether it had complied with the Labor Code was premature: "[T]his type of evidence goes to the merits of Franco's claims and is not to be considered on a petition to compel arbitration . . . ." (*Id.* at p. 1298.) We ultimately decided that, under *Gentry*, the class action waiver was unenforceable. (See *id.* at pp. 1297–1299.) We also concluded that the MAP's prohibition on acting as a private attorney general was unenforceable as to Franco's claim under the PAGA, which authorizes "an aggrieved employee [to recover civil penalties] on behalf of himself or herself and other current or former employees." (§ 2699, subd. (a); see *Franco I*, at pp. 1299–1300, 1303.)[2]

Finally, we determined that a class proceeding was likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration: "We conclude the record does not support the trial court's determination that the employees' claims would be so individualized as to render class . . . treatment significantly less effective than individual arbitrations. At this early stage in the litigation, we know that Athens [Services] uses a computer and an electronic

---

[2] In *Franco I*, we stated that the MAP did not preclude Franco from seeking civil penalties under the PAGA on *his individual claims*. (See *Franco I*, *supra*, 171 Cal.App.4th at p. 1300.) In light of *Arias v. Superior Court* (2009) 46 Cal.4th 969, which was decided after *Franco I*, we now conclude otherwise. The MAP authorized an arbitrator, in hearing an individual claim, to award *remedies* that would be available on an individual claim brought in court — for example, backpay, an injunction, noneconomic damages, and punitive damages. But the MAP flatly prohibited an employee from acting as a private attorney general. Based on the PAGA's purpose and legislative history (see *Arias*, at pp. 980–981, 986), we now hold that an employee who brings a PAGA claim and seeks civil penalties *solely on an individual basis* is acting as a private attorney general. Before the PAGA was enacted, an employee could not recover civil penalties for Labor Code violations; the Labor Commissioner had sole authority to do so. (See *Arias*, at pp. 980, 986; *Franco I*, at pp. 1300–1301.) Thus, the MAP created an absolute bar to a recovery under the PAGA regardless of whether an aggrieved employee sought civil penalties on behalf of himself or herself or on behalf of other employees as well.

timecard system to keep track of its employees' work hours. By law, an employer must maintain time records showing an employee's (1) 'total daily hours worked' and (2) meal periods, unless 'operations cease' during meals. . . . Further, Athens [Services] allegedly engaged in a *systematic* course of illegal payroll *practices and policies* in violation of the Labor Code and subjected *all* of its hourly employees to the same unlawful conduct. As a result, common questions of law and fact predominate over individualized issues." (*Franco I, supra*, 171 Cal.App.4th at pp. 1298–1299.)

Accordingly, we found the MAP unenforceable, explaining: "'If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. . . . [¶] . . . [M]ultiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.'" (*Franco I, supra*, 171 Cal.App.4th at p. 1299.) "Because the [MAP] contains a class arbitration waiver and also precludes Franco from seeking civil penalties . . . , contrary to the PAGA, we conclude that the agreement as a whole is tainted with illegality and is unenforceable. . . . Athens [Services's] petition to compel arbitration should therefore be denied, and this case should proceed in a court of law." (*Id.* at p. 1302, citation omitted.) We reversed the trial court.

Athens Services filed a petition for review in the California Supreme Court, which declined to hear the case (June 17, 2009, S172223). Athens Services then filed a petition for a writ of certiorari in the United States Supreme Court, which denied the petition on January 11, 2010 (*Athens Disposal Co., Inc. v. Franco* (2010) ___ U.S. ___ [130 S.Ct. 1050]). The case returned to the trial court.

On January 22, 2010, the trial court, Judge John A. Kronstadt presiding, conducted a status conference. Counsel for Athens Services — the Hill firm — stated that Franco had sued the wrong corporation: Athens Disposal Company, Inc., doing business as Athens Services, was not his employer; Arakelian Enterprises, Inc. (Arakelian), doing business as Athens Services, was his actual employer. In subsequent responses to special interrogatories, the Hill firm indicated that Athens Disposal Company, Inc., had never

employed Franco, nor had it employed anyone during the relevant time period. On March 25, 2010, Franco amended the complaint, adding Arakelian as a Doe defendant.

On May 17, 2010, Arakelian filed a petition to compel arbitration, relying — as had the first petition — on the MAP, adopted in August 2005. In its memorandum of points and authorities, the Hill firm argued that our decision in *Franco I* had been overruled by *Stolt-Nielsen*, *supra*, 130 S.Ct. 1758, making the MAP enforceable. In the alternative, the Hill firm asserted that if *Stolt-Nielsen* had not overruled *Franco I* , the trial court should compel arbitration based on the arbitration provision in the Athens Services Employee Guide, which Franco acknowledged receiving when he was hired on May 20, 2005.

In opposition to the petition, Franco relied on his opposition to the first petition to compel arbitration. He filed supplemental papers contending that (1) under the law of the case doctrine, Arakelian was bound by *Franco I* because it was in privity with Athens Disposal Company, Inc., (2) *Stolt-Nielsen* did not constitute a change in the law, and (3) if the MAP was unenforceable, the arbitration provision in the employee guide did not provide a basis for arbitration because it had been superseded by the MAP, and there was no legal grounds for reviving it.

With respect to Arakelian's late appearance in the case, Franco pointed out that on May 24, 2005 — around two years *before* he filed suit — the Hill firm appeared on behalf of "Arakelian Enterprises, Inc., dba Athens Services" in a different employment case (*Flores v. Arakelian Enterprises, Inc.* (Super. Ct. L.A. County, 2005, No. BC333940)). In *Flores*, the Hill firm successfully petitioned the superior court to compel arbitration. Arakelian prevailed on the merits. On July 22, 2010, judgment was entered in *Flores*, confirming the arbitration award in favor of Arakelian. Thus, the entire time the Hill firm was representing "Athens Disposal Company, Inc., dba Athens Services" *in this case*, the firm knew from its work in *Flores* that Arakelian, not Athens Disposal Company, Inc., was the corporation doing business as Athens Services. Yet the firm did not disclose that Arakelian was Franco's employer until after (1) we reversed the order granting the first petition to compel arbitration and (2) Athens Services had exhausted all appeals.

On September 13, 2010, the trial court heard Arakelian's petition to compel arbitration. By minute order of the same date, the trial court denied the petition. On April 11, 2011, the trial court issued a more comprehensive order denying the petition on two grounds: (1) the law of the case doctrine and (2) Arakelian's failure to identify itself as Franco's true employer until after the Hill firm had filed the first petition to compel arbitration and exhausted the appeals process.

On April 21, 2011, Arakelian filed a notice of appeal. Six days later, on April 27, 2011, the United States Supreme Court issued its decision in *Concepcion*, *supra*, 131 S.Ct. 1740.

II

DISCUSSION

The material facts are not in dispute. The question on appeal — whether *Gentry*, *supra*, 42 Cal.4th 443, has been overruled — presents an issue of law we review de novo. (See *Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 940; *W.M. Barr & Co., Inc. v. South Coast Air Quality Management Dist.* (2012) 207 Cal.App.4th 406, 423.)

Arakelian argues that *Gentry* was overruled by *Stolt-Nielsen*, *supra*, 130 S.Ct. 1758, and *Concepcion*, *supra*, 131 S.Ct. 1740. We disagree. *Gentry* held that, based on certain factors, a class action waiver may be unenforceable if it prevents employees from vindicating unwaivable statutory rights. *Stolt-Nielsen*, on the other hand, held that if an arbitration agreement does not expressly or implicitly authorize a class action, a plaintiff cannot pursue claims on a class basis in an arbitral forum. (See *Stolt-Nielsen*, at pp. 1775–1776; *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 512.) *Concepcion* held that California's *Discover Bank* rule (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*)) did not provide a basis for revoking an arbitration agreement because it constituted a categorical rule against class action waivers in consumer contracts, thereby disfavoring arbitration. (See *Concepcion*, at pp. 1747, 1750.) *Concepcion* did not address or question prior Supreme Court cases recognizing that an arbitration agreement may be unenforceable if it prevents a plaintiff from vindicating his or her statutory rights.

A. Issues Not Raised in *Franco I*

In *Franco I*, the Hill firm represented a corporation named Athens Disposal Company, Inc., doing business as Athens Services. After we reversed the trial court's order compelling arbitration and held that Franco was entitled to a court trial, the Hill firm unsuccessfully sought review in the California Supreme Court and the United States Supreme Court.

Approximately 11 days after the United States Supreme Court denied certiorari, the Hill firm announced at a status conference in the trial court that Franco had sued the wrong corporation. According to the Hill firm, Franco should have filed suit against Arakelian. In its opening brief on *this* appeal, the Hill firm maintains that Athens Disposal Company, Inc., was "an inactive corporate entity." Yet in *Franco I*, the Hill firm submitted a declaration *from the president of* "*Athens Disposal Company*" in support of Athens Services's petition to compel arbitration.

After the Hill firm announced that Franco had sued the wrong corporation, he added Arakelian as a Doe defendant. The Hill firm then filed a second petition to compel arbitration based on the same arbitration agreement — the MAP — we held unenforceable in *Franco I*. Simply put, the Hill firm attempted to enforce the same arbitration agreement again.

"'The law of the case doctrine states that when, in deciding an appeal, an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal."'" (*ABF Capital Corp. v. Grove Properties Co*. (2005) 126 Cal.App.4th 204, 212.) "'Absent an applicable exception, the doctrine "requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong." . . . As its name suggests, the doctrine applies only to an appellate court's decision on a question of law; it does not apply to questions of fact.'" (*Gunn v. Mariners Church, Inc*. (2008) 167 Cal.App.4th 206, 213.)

In denying the second petition to compel arbitration, the trial court stated that it would not consider any new legal arguments that could have been made in *Franco I.* For instance, the trial court did not resolve Arakelian's contention that, if the MAP was still unenforceable under *Franco I*, it should enforce the predecessor arbitration provision in the employee guide. In addition, the second petition was supported by preprinted statements signed by a number of Athens Services's employees, declaring that the company had complied with the rest and meal period laws. But as stated in *Franco I*, that type of evidence goes directly to the merits of Franco's claims and is not pertinent in ruling on a petition to compel arbitration. (*Franco I*, *supra*, 171 Cal.App.4th at p. 1298; see *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023–1025.)

We agree with the trial court that, under the law of the case doctrine, legal arguments that could have been raised in *Franco I* will not be considered in this appeal. Athens Services, represented by the Hill firm on both petitions to compel arbitration, should have presented all colorable legal arguments in *Franco I.* (See *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 310.) Nevertheless, the law of the case doctrine does not apply where there has been an intervening change in the law. (See *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 727–728; *People v. Stanley* (1995) 10 Cal.4th 764, 786–787.) We therefore turn to Arakelian's principal issue on appeal: whether *Gentry* has been overruled by *Stolt-Nielsen* and *Concepcion*.[3]

---

[3] We invited the parties to submit letter briefs addressing whether Franco was entitled to a judicial forum under the National Labor Relations Act (29 U.S.C. §§ 151–168). (See *D.R. Horton, Inc.* (2012) 357 NLRB No. 184 [2012 WL 36274, 2012 NLRB Lexis 11].) Because Franco did not submit a letter brief, we decline to reach the issue. (See *Sullivan v. Centinela Valley Union High School Dist*. (2011) 194 Cal.App.4th 69, 72, fn. 3; *Berger v. California Ins. Guarantee Assn*. (2005) 128 Cal.App.4th 989, 1007.)

B. Arbitration of Statutory Claims

The Federal Arbitration Act (FAA) was enacted in 1925 and codified in 1947 as chapter 1, title 9 of the United States Code (9 U.S.C. §§ 1–16). (See *Dumitru v. Princess Cruise Lines, Ltd.* (S.D.N.Y. 2010) 732 F.Supp.2d 328, 336.)

At first, the arbitration of statutory claims under the FAA received a judicial cold shoulder. In *Wilko v. Swan* (1953) 346 U.S. 427 [74 S.Ct. 182] (*Wilko*), the Supreme Court held that claims under the Securities Act of 1933 (15 U.S.C. §§ 77a–77aa) were not subject to arbitration. As the court explained: "When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.

"Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact,' . . . cannot be examined. Power to vacate an award is limited. . . . The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law. . . . [T]he protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness . . . ." (*Wilko*, *supra*, 346 U.S. at pp. 435–437, fns. omitted.)

In *Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506 [94 S.Ct. 2449] (*Scherk*), the court distinguished *Wilko* and concluded that a dispute under the Securities Exchange Act

of 1934 (15 U.S.C. §§ 78a–78u) is subject to arbitration where the parties' agreement implicates international concerns: "Accepting the premise . . . that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934, [Alberto-Culver Company's] reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets. [¶] . . .

"Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.

"Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated

and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." (*Scherk, supra*, 417 U.S. at pp. 515–516, fn. omitted.)

Moses H. Cone Hospital v. Mercury Constr. Corp. (1983) 460 U.S. 1 [103 S.Ct. 927] addressed the interplay between state and federal courts in applying the FAA. There, a hospital entered into an agreement with a construction contractor and agreed to resolve disputes through binding arbitration. When a dispute arose, the hospital filed suit in state court. The contractor filed an action in federal district court, seeking an order compelling arbitration. The federal district court issued a stay of its proceedings pending resolution of the state court case. The court of appeals reversed and instructed the district court to enter an order compelling arbitration.

The Supreme Court held that the district court had erred: "The basic issue presented in [the contractor's] federal suit was the arbitrability of the dispute between [it] and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. [Title 9, section 2 of the United States Code] is the primary substantive provision of the [FAA], declaring that a written agreement to arbitrate 'in any maritime transaction or a contract evidencing a transaction involving commerce . . . 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. Section 2 is a congressional declaration of *a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary*. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." (*Moses H. Cone Hospital v. Mercury Constr. Corp., supra*, 460 U.S. at p. 24, fn. omitted, italics added.) The court also commented, "Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court." (*Id.* at p. 26, fn. 34.)

In *Southland Corp. v. Keating* (1984) 465 U.S. 1 [104 S.Ct. 852], the court recognized that if a state law treats an arbitration agreement differently than contracts in

general, it is preempted by the FAA. At issue was a dispute under California's Franchise Investment Law (Corp. Code, §§ 31000–31516). One provision of the law stated: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." (Corp. Code, § 31512.) The California Supreme Court had interpreted that provision to require a judicial resolution of a dispute arising under the Franchise Investment Law. (See *Southland Corp.*, at p. 10.)

The United States Supreme Court held that the state law was preempted, explaining: "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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 (1976).

"Congress has . . . mandated the enforcement of arbitration agreements.

"We discern only two limitations on the enforceability of arbitration provisions governed by the [FAA]: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." (*Southland Corp. v. Keating*, *supra*, 465 U.S. at pp. 10–11, fn. omitted.)

The court continued: "'[T]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted

with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . . .' . . .

". . . '[T]he purpose of the [FAA] was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by *federal judges*, or . . . by *state courts or legislatures*.'" (*Southland Corp. v. Keating*, *supra*, 465 U.S. at p. 13, citation omitted, italics added.) Thus, the FAA was intended to overcome hostility to arbitration by both state and federal judges.

In *Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213 [105 S.Ct. 1238], the court addressed the situation where a plaintiff's claims consist of arbitrable and nonarbitrable claims. The court rejected the proposition that a court should stay arbitration while the nonarbitrable claims are adjudicated in another forum even though bifurcated proceedings might interfere with the FAA's goal of "speedy and efficient decisionmaking." (*Id.* at p. 219; see *id.* at pp. 216–217.)

As the court stated: "The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the *overriding goal* of the Arbitration Act was *to promote the expeditious resolution of claims*. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement — upon the motion of one of the parties — of privately negotiated arbitration agreements. . . . [*T*]*he Act makes clear that its purpose was to place an arbitration agreement 'upon the same footing as other contracts*, where it belongs,' . . . and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate. This is not to say that Congress was blind to the potential benefit of the legislation *for expedited resolution of disputes*." (*Dean Witter Reynolds Inc. v. Byrd*, *supra*, 470 U.S. at pp. 219–220, citation & fn. omitted, italics added.) "We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act — enforcement of private agreements *and* encouragement of efficient and speedy dispute resolution — *must be resolved in favor of the latter* in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to *enforce private agreements into which parties had entered*, and

that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation . . . ." (*Id.* at p. 221, italics added.)

In *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614 [105 S.Ct. 3346] (*Mitsubishi Motors*), the plaintiff, a car manufacturer, filed a breach of contract action against one of its dealerships and sought to compel arbitration of the dispute pursuant to an arbitration provision in the parties' contract. The dealer filed a counterclaim against the manufacturer, alleging a violation of the Sherman Act (15 U.S.C. §§ 1–7), the Clayton Act (15 U.S.C. §§ 12–27, 44), and other statutes. (See *Mitsubishi Motors*, at pp. 618–620, 635.) The Supreme Court granted certiorari to decide whether an antitrust claim is subject to arbitration when the parties' contract arises from an international transaction. (*Mitsubishi Motors*, at p. 624.)

In concluding that the antitrust claim should be arbitrated, the court stated: "By agreeing to arbitrate a statutory claim, a party *does not forgo the substantive rights afforded by the statute*; *it only submits to their resolution in an arbitral, rather than a judicial, forum*. It trades the procedures and opportunity for review of the courtroom for *the simplicity, informality, and expedition of arbitration*. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." (*Mitsubishi Motors*, *supra*, 473 U.S. at p. 628, citation omitted, italics added.)

In *Mitsubishi Motors*, the court disagreed with the assertion that an award of treble damages under the Clayton Act (15 U.S.C. § 15) served a *public* purpose and therefore precluded arbitration. Instead, the court concluded that treble damages constituted a *private* remedy intended to compensate a plaintiff: "The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators. . . .

"The importance of the *private* damages remedy, however, does not compel the conclusion that it may not be sought outside an American court. Notwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable *an injured competitor to gain compensation for that injury*.

"'[The provision authorizing an award of treble damages] is in essence a remedial provision. It provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. . . . It nevertheless is true that the treble-damages provision, which makes awards available *only to injured parties*, and measures the awards *by a multiple of the injury actually proved*, is designed primarily as a *remedy*.' . . .

". . . [T]he treble-damages provision 'was conceived of primarily as a remedy for "[t]he people of the United States *as individuals.*"'" (*Mitsubishi Motors*, *supra*, 473 U.S. at pp. 635–636, citations omitted, italics added.)

Last, in *Mitsubishi Motors*, the court noted that the parties' contract contained a choice-of-forum clause, requiring that arbitration be conducted in Japan, as well as a choice-of-law clause, mandating the application of the laws of the Swiss Confederation. (473 U.S. at p. 637, fn. 19.) The court then commented, "[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as *a prospective waiver of a party's right to pursue statutory remedies* for antitrust violations, we would have little hesitation *in condemning the agreement as against public policy*." (*Ibid.*, italics added.) "[S]o long as the prospective litigant *effectively may vindicate its statutory cause of action in the arbitral forum*, the statute will continue to serve both its remedial and deterrent function." (*Id.* at p. 637, italics added.)

In *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220 [107 S.Ct. 2332] (*McMahon*), the court held that claims based on the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a–78u) and the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961–1968) are subject to arbitration. Addressing the claim under the Securities Exchange Act of 1934, the court noted that in *Scherk*, *supra*, 417 U.S. at

pages 515–518, it had required that claims under the act be arbitrated where the arbitration agreement arose in an international context. (See *McMahon*, at pp. 229, 232–233.) In *McMahon*, the court held that securities claims involving domestic agreements are subject to arbitration because, in enacting the Securities Exchange Act of 1934, Congress did not exempt such claims from the FAA. (See *McMahon*, at pp. 227–238.) The court also noted that an administrative agency, the Securities and Exchange Commission, "has sufficient statutory authority to ensure that *arbitration is adequate to vindicate Exchange Act rights*." (*Id.* at p. 238, italics added.)

As to the RICO claim, the plaintiffs in *McMahon* argued that the availability of treble damages (see 18 U.S.C. § 1964(c)) served a *public* purpose, making the claim nonarbitrable. The Supreme Court rejected that argument, as it had with respect to an award of treble damages in antitrust cases. (See *Mitsubishi Motors*, *supra*, 473 U.S. at pp. 635–636.) The court concluded that an award of treble damages is a remedy intended to compensate a plaintiff, not a benefit conferred on the public. (See *McMahon*, *supra*, 482 U.S. at pp. 240–241.) In short, "The private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute. [¶] . . . [The plaintiffs] may *effectively vindicate their RICO claim in an arbitral forum*, and therefore there is no inherent conflict between arbitration and the purposes underlying [the provision authorizing an award of treble damages]." (*McMahon*, at p. 242, italics added.)

Given the foregoing case law, it was inevitable that the decision in *Wilko*, *supra*, 346 U.S. 427 — which exempted claims under the Securities Act of 1933 (15 U.S.C. §§ 77a–77aa) from arbitration — would soon meet its demise. In *Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477 [109 S.Ct. 1917], the court overruled *Wilko*, saying it reflected "'the old judicial hostility to arbitration'" (*Rodriguez de Quijas*, at p. 480).

Finally, in the seminal case of *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20 [111 S.Ct. 1647] (*Gilmer*), the Supreme Court held that an employee's claim

under the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. §§ 621–634) is subject to arbitration. There, the plaintiff asserted that "the ADEA is designed not only to address individual grievances, but also to further important social policies." (*Gilmer*, at p. 27.) In response, the court stated: "We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but . . . claims under those statutes are appropriate for arbitration. '[S]o long as the prospective litigant *effectively may vindicate* [*his or her*] *statutory cause of action in the arbitral forum*, the statute will continue to serve both its remedial and deterrent function.' . . .

"We also are unpersuaded by the argument that arbitration will undermine the role of the [Equal Employment Opportunity Commission (EEOC)] in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. . . . [The plaintiff] filed a charge with the EEOC in this case. In any event, *the EEOC's role in combating age discrimination is not dependent on the filing of a charge*; the agency may receive information concerning alleged violations of the ADEA 'from any source,' and *it has independent authority to investigate age discrimination*." (*Gilmer, supra*, 500 U.S. at pp. 27–28, citation omitted, italics added.)

The court continued: "It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and *class actions*. As the court below noted, however, arbitrators do have the power to fashion equitable relief. . . . [T]he NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to 'damages and/or other relief.' . . . The NYSE rules also provide for *collective proceedings*. . . . But 'even if the arbitration could not go forward as a class action or class relief could not be granted by the

arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' . . . Finally, it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions *seeking class-wide* and equitable *relief*." (*Gilmer, supra,* 500 U.S. at p. 32, citations omitted, some italics added; see *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 [122 S.Ct. 754] [arbitration agreement between employer and employee did not preclude EEOC from seeking victim-specific relief for employee].)

In sum, the United States Supreme Court has recognized that: (1) the FAA embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (*Moses H. Cone Hospital v. Mercury Constr. Corp.*, *supra*, 460 U.S. at p. 24); (2) a state law is preempted if it singles out an arbitration agreement for different treatment than contracts in general (*Southland Corp. v. Keating*, *supra*, 465 U.S. at pp. 10–11, 13); (3) the FAA was enacted "to place an arbitration agreement 'upon the same footing as other contracts . . .' . . . and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" (*Dean Witter Reynolds Inc. v. Byrd*, *supra*, 470 U.S. at pp. 219–220); (4) the FAA was also intended to enforce private agreements to arbitrate and encourage the efficient and speedy resolution of disputes (*id.* at p. 221); and (5) the FAA was necessary to overcome "'the old judicial hostility to arbitration'" (*Rodriguez de Quijas v. Shearson/Am. Exp., supra,* 490 U.S. at p. 480).

At the same time, the high court has stated that: (1) "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function" (*Mitsubishi Motors*, *supra*, 473 U.S. at p. 637); (2) if an arbitration agreement operates "as a prospective waiver of a party's right to pursue statutory remedies," it will be "condemn[ed] . . . as against public policy" (*id*. at p. 637, fn. 19); (3) "[b]y agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he or she] only submits to their resolution in an arbitral, rather than a judicial, forum" (*id.* at p. 628); (4) an award of treble damages is a private, not a public, remedy,

and a cause of action that permits the recovery of treble damages is therefore subject to arbitration (see *id*. at pp. 635–636; *McMahon*, *supra*, 482 U.S. at pp. 240–241); (5) the arbitration of claims on an individual — as opposed to a class — basis may be required if the arbitration agreement or rules permit an employee to bring "collective proceedings" or if an administrative agency may seek "class-wide . . . relief" (*Gilmer*, *supra*, 500 U.S. at p. 32; see also *McMahon*, *supra*, 482 U.S. at p. 238); and (6) "[arbitration] clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract'" (*Southland Corp. v. Keating*, *supra*, 465 U.S. at p. 11). The court also suggested by implication that if a cause of action authorizes a *public* remedy, arbitration may not be mandatory. (See *Mitsubishi Motors*, *supra*, 473 U.S. at pp. 635–636 [because award of treble damages is a private, not public, remedy, antitrust claim is subject to mandatory arbitration]; *McMahon*, *supra*, 482 U.S. at pp. 240–241 [same as to RICO claim].)

C. Vindication of Statutory Rights

In *Cole v. Burns Intern. Security Services* (D.C.Cir. 1997) 105 F.3d 1465 (*Cole*), an employee filed suit against his former employer, alleging race discrimination, harassment based on race, and retaliation in violation of title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. §§ 2000e to 2000e-4). The employee asserted that the parties' arbitration agreement was unconscionable because it lacked certain procedural protections. The court initially stated: "The starting point of our analysis is the Supreme Court's decision in *Gilmer*[, *supra*, 500 U.S. 20]. In that case, the Court held that an employee's agreement to arbitrate employment-related disputes may require him to arbitrate statutory claims under the ADEA because '[b]y agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum.' . . . [T]he Court emphasized that 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.' . . . [¶] . . . [¶] Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes." (*Cole*, at pp. 1481–1482.)

The court of appeals rejected the employee's argument that the arbitration agreement was unconscionable, explaining: "We believe that all of the factors addressed in *Gilmer* are satisfied here. In particular, we note that the arbitration arrangement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs *or* any arbitrators' fees or expenses as a condition of access to the arbitration forum. Thus, an employee who is made to use arbitration as a condition of employment 'effectively may vindicate [his or her] statutory cause of action in the arbitral forum.' . . . '[D]espite the strong FAA policy of ordering arbitration hearings and implementing arbitration awards, minimal standards of procedural fairness must be satisfied before a civil action may be stayed and arbitration ordered. . . . [A] federal court, before enforcing an employer's demand for arbitration under an employment contract, . . . must . . . scrutinize the agreed-upon or contemplated arbitration system.'" (*Cole*, *supra*, 105 F.3d at pp. 1482–1483, citations omitted.)

Three years later, in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), our Supreme Court relied extensively on *Gilmer* and *Cole* in holding that claims under the Fair Employment and Housing Act (FEHA) (Gov. Code, §§ 12900–12996) involve unwaivable statutory rights and, therefore, the arbitration of FEHA claims requires an "adequate" arbitral forum — one in which an employee may fully vindicate those rights. (See *Armendariz*, at pp. 90–91, 99–102.) As the court put it: "[A]rbitration agreements that encompass *unwaivable* statutory rights must be subject to particular scrutiny. This unwaivability derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' 'Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced.' . . . Second, Civil Code section 3513

states, 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.'" (*Armendariz*, at p. 100, citation omitted, original italics.)

Although the arbitration agreement in *Armendariz* was governed by the California Arbitration Act (Code Civ. Proc., §§ 1280–1294.2), not the FAA (see *Armendariz, supra*, 24 Cal.4th at pp. 91–92), the court concluded that its analysis applied to both acts (see *id.* at pp. 96–99). In describing the "minimum requirements for the lawful arbitration of [unwaivable statutory] rights pursuant to a mandatory employment arbitration agreement" (*id*. at p. 102), the court first noted that, in a prior case, it had held that a neutral arbitrator was "essential to ensuring the integrity of the arbitration process." (*Id.* at p. 103, citing *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 825.) The court went on to hold: (1) an arbitration agreement cannot limit statutorily available remedies (*Armendariz*, at pp. 103–104); (2) "[t]he denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights" (*id.* at p. 104); (3) "an arbitrator in an FEHA case must issue a written arbitration decision . . . [containing] essential findings and conclusions on which the award is based" (*id.* at p. 107); and (4) in arbitrating FEHA claims, "the arbitration agreement . . . cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court" (*id.* at pp. 110–111). An agreement that mandates the arbitration of FEHA claims "impliedly obliges the employer to pay all types of costs that are unique to arbitration." (*Id.* at p. 113.)[4]

In *Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79 [121 S.Ct. 513] (*Randolph*), decided after *Armendariz*, the plaintiff purchased a mobile home and

---

[4] After determining the procedural rights applicable to the arbitration of FEHA claims, the Supreme Court in *Armendariz* discussed the doctrine of unconscionability as applied to the arbitration agreement before it. (See *Armendariz, supra,* 24 Cal.4th at pp. 113–121.) That discussion is not pertinent to the question before us.

financed the purchase through defendants. The finance agreement required the arbitration of disputes between the parties and stated it was governed by the FAA. The plaintiff filed suit against the defendants in federal court, alleging violations of the Truth in Lending Act (15 U.S.C. §§ 1601–1667f) and the Equal Credit Opportunity Act (15 U.S.C. §§ 1691–1691f). The defendants moved to compel arbitration. The plaintiff opposed the motion on the ground that the agreement was silent as to the payment of filing fees, arbitrator's costs, and arbitration expenses. The district court granted the motion, and the court of appeals reversed.

The Supreme Court held that the arbitration agreement was enforceable: "[W]e are mindful of the FAA's purpose 'to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.' . . .

"In light of that purpose, we have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims. . . . We have likewise rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' . . . These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because '"*so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum*,"' the statute serves its functions." (*Randolph*, *supra*, 531 U.S. at pp. 89–90, citations omitted, italics added.)

The court concluded: "It may well be that *the existence of large arbitration costs could preclude a litigant such as* [*the plaintiff*] *from effectively vindicating her federal statutory rights in the arbitral forum.* But the record does not show that [she] will bear such costs if she goes to arbitration. . . . [I]t contains hardly any information on the matter. . . . '[W]e lack . . . information about how claimants fare under [the defendants'] arbitration clause.' . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk'

that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

"To invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.' . . . It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. . . . We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. . . . Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. [The plaintiff] did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point." (*Randolph*, *supra*, 531 U.S. at pp. 90–92, citations omitted, italics added.)

In *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, the court of appeals applied *Randolph* to federal *and* state antitrust claims, specifically, the Clayton Act (15 U.S.C. §§ 12–27, 44) and the Massachusetts Antitrust Act (Mass. Gen. Laws, ch. 93, §§ 1–14a). (See *Kristian*, at pp. 29, 43.) Although both acts authorized an award of attorney fees and costs to the prevailing party (15 U.S.C. § 15(a); Mass. Gen. Laws, ch. 93, § 12), the arbitration agreements precluded such an award.

In concluding that the agreements' prohibition on an award of attorney fees and costs was unenforceable, the court of appeals stated: "The [Supreme] Court's assumption [in *Randolph*] that a showing of prohibitive arbitration costs is a valid challenge to enforcement of an arbitration agreement makes practical sense. If, because of a consumer agreement[,] . . . a plaintiff's only apparent dispute resolution forum is binding, mandatory arbitration, and the plaintiff cannot afford to arbitrate because of an inability to recover attorney's fees and costs, the plaintiff is essentially deprived of any dispute resolution forum whatsoever. [¶] . . .

"Here, Plaintiffs have a much stronger position than the plaintiff in *Randolph*. The clause in *Randolph* was silent on the question of costs and fees. By contrast, the . . . arbitration agreements explicitly state that a plaintiff bears all of his or her own costs, including the cost of experts and attorneys. The conflict between the arbitration agreements and the statutes could not be clearer. More importantly, again in contrast to the plaintiff in *Randolph*, Plaintiffs make a strong showing that costs and attorney's fees will be prohibitively expensive. In the district court, Plaintiffs submitted extensive declarations from a former Massachusetts Superior Court justice, an attorney who specializes in antitrust law and class actions, and an economist. These declarations establish that the pursuit of Plaintiffs' antitrust claims will require a huge outlay of financial resources. *Without the possibility of recovering costs and attorney's fees, an individual plaintiff would undoubtedly have an impossible time securing legal representation . . . .*" (*Kristian v. Comcast Corp*., *supra*, 446 F.3d at pp. 51–52, italics added.) As stated by the court of appeals, "our conclusion on Plaintiff's *vindication of statutory rights claim*" (*id.* at p. 53, italics added) compels the affirmance of the district court's decision to sever the clause prohibiting the recovery of costs and attorney fees (*ibid.*).

In *Booker v. Robert Half International, Inc.* (D.C.Cir. 2005) 413 F.3d 77, an employee was required by contract to arbitrate any dispute arising out of or relating to employment. An employee filed suit under the District of Columbia Human Rights Act (D.C.Code, §§ 2-1401.01 to 2-1431.08), alleging he had been discharged based on race. Although the act authorized an award of punitive damages to a prevailing employee (see D.C.Code, § 2-1403.16(b); *Arthur Young & Co. v. Sutherland* (D.C.Ct.App. 1993) 631 A.2d 354, 370–372), the arbitration agreement contained a provision barring such an award (*Booker*, at p. 79). The district court severed that provision and granted the motion to compel arbitration. The employee appealed.

Relying in part on *Randolph, supra*, 531 U.S. 79, the court of appeals said: "We take from these recent cases two basic propositions: *first*, that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the

effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and *second*, that this burden cannot be carried by 'mere speculation' about how an arbitrator 'might' interpret or apply the agreement." (*Booker v. Robert Half International, Inc., supra,* 413 F.3d at p. 81.) The court of appeals affirmed the district court's decision, severing the punitive damages provision and granting the motion absent the severed clause. (*Id.* at pp. 85–86.)

In *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, our Supreme Court addressed the continuing validity of *Armendariz, supra,* 24 Cal.4th 83, in light of two post-*Cole* decisions. First, in *Brown v. Wheat First Securities, Inc.* (D.C.Cir. 2001) 257 F.3d 821, the same circuit court that decided *Cole, supra,* 105 F.3d 1465, held that *Cole*'s requirements for arbitrating claims under Title VII were limited to *federal* statutory rights. (See *Brown*, at pp. 823, 826.) In *Armendariz*, our Supreme Court had relied on *Cole* in establishing minimum requirements for arbitrating claims under the FEHA. (See *Armendariz*, *supra*, 24 Cal.4th at pp. 101–113.) In *Little*, the Supreme Court declined to follow *Brown*, saying: "The *Brown* court's apparent position that only *federal* statutory rights may be subject to *Cole*'s requirements, because any attempt to place conditions on arbitration based on *state law* would be preempted by the [FAA], is incorrect. The FAA provides that arbitration agreements are '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.) Thus, '"[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2] [of the FAA]."' . . . But under section 2 of the FAA, a state court may refuse to enforce an arbitration agreement based on 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' . . . One such long-standing ground for refusing to enforce a contractual term is that it would force a party to forgo unwaivable public rights . . . .

". . . [W]hile we recognize that a party compelled to arbitrate such rights does not waive them, but merely '"submits to their resolution in an arbitral, rather than a judicial, forum"' . . . , arbitration cannot be misused to accomplish a de facto waiver of these rights. Accordingly, although the *Armendariz* requirements specifically concern arbitration

agreements, they do not do so out of a generalized mistrust of arbitration per se . . . , but from a recognition that *some* arbitration agreements and proceedings may harbor terms, conditions and practices that *undermine the vindication of unwaivable rights*. The *Armendariz* requirements are therefore applications of *general state law contract principles regarding the unwaivability of public rights* to the unique context of arbitration, and accordingly are not preempted by the FAA." (*Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at pp. 1078–1079, citations omitted, some italics added.)

In *Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th 1064, our Supreme Court also addressed whether *Armendariz* was preempted by the FAA as construed in *Randolph*, *supra*, 531 U.S. 79. There, the United States Supreme Court stated that if "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." (*Randolph*, *supra*, 531 U.S. at p. 92.) In *Armendariz*, our Supreme Court held that where an employee is required to arbitrate an FEHA claim, he or she is not obligated to pay any type of cost unique to arbitration regardless of whether the cost would be prohibitively expensive. (*Armendariz*, *supra*, 24 Cal.4th at pp. 110–111, 113.) In *Little*, our Supreme Court concluded that *Armendariz* was not preempted by *Randolph*, explaining: "Although [*Randolph*] was not an employment case, most courts interpreting it have done so in the employment context. These courts have arrived at divergent meanings of the 'prohibitively expensive' standard [established in *Randolph*]. Some courts have interpreted that term narrowly and maintain that it does not affect the validity of the categorical position set forth in *Cole*, *supra*, 105 F.3d 1465, that the employer should pay the costs of a mandatory employment arbitration of statutory claims. [Citations.] Other courts have held that [*Randolph*] represents a departure from *Cole*'s categorical position, and requires a case-by-case analysis based on such factors as the employee's ability to pay the arbitration fees and the differential between projected arbitration and litigation fees. [Citations.] Still other courts have held the information presented by the employee before arbitration was too speculative to warrant invalidation of the arbitration agreement, while

retaining jurisdiction to reconsider the cost issue after arbitration. [Citations.]" (*Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at pp. 1083–1084.)

Our Supreme Court continued: "*Armendariz* and [*Randolph*] agree on two fundamental tenets. First, silence about costs in an arbitration agreement is not grounds for denying a motion to compel arbitration. Second, arbitration costs can present significant barriers to the vindication of statutory rights. Nonetheless, there may be a significant difference between the two cases. Although [*Randolph*] did not elaborate on the kinds of cost-sharing arrangements that would be unenforceable, dicta in that case, and several federal cases . . . , suggest that federal law requires only that employers not impose 'prohibitively expensive' arbitration costs on the employee . . . , and that determination of whether such costs have been imposed are to be made on a case-by-case basis. *Armendariz*, on the other hand, categorically imposes costs unique to arbitration on employers when *unwaivable rights* pursuant to a mandatory employment arbitration agreement are at stake. Assuming that [*Randolph*] and *Armendariz* pose solutions to the problem of arbitration costs that are in some respects different, we do not agree . . . that the FAA requires states to comply with federal arbitration cost-sharing standards.

". . . *Armendariz*'s cost-shifting requirement is not preempted by the FAA. It is not a barrier to the enforcement of arbitration agreements, nor does it improperly disfavor arbitration in comparison to other contract clauses. Rather, it is derived from state contract law principles regarding *the unwaivability of certain public rights* in the context of a contract of adhesion. We do not discern from the United States Supreme Court's jurisprudence on FAA preemption a requirement that state law conform precisely with federal law as to the manner in which such public rights are protected." (*Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at p. 1084, citations omitted, italics added.)

1. *Discover Bank*

In *Discover Bank*, *supra*, 36 Cal.4th 148, overruled in *Concepcion*, *supra*, 563 U.S. ___ [131 S.Ct. 1740], our Supreme Court determined whether a class arbitration waiver in a consumer contract was unenforceable under the doctrine of unconscionability. In that case, the plaintiff, a credit cardholder, sued the card issuer, Discover Bank, alleging a

claim for breach of contract and a claim for violation of the Delaware Consumer Fraud Act (Del.Code Ann., tit. 6, §§ 2511–2527). (*Discover Bank*, at p. 154.) Discover Bank moved to compel arbitration pursuant to an arbitration provision in the cardholder agreement, which also contained a class action waiver. The trial court initially rejected the plaintiff's attack on the class action waiver and ordered his claims to be arbitrated on an individual basis. Upon reconsideration, however, the trial court struck the class action waiver and granted the motion to compel, leaving open the possibility that the plaintiff might succeed in certifying a class in the arbitration proceeding. Discover Bank filed a petition for a writ of mandate in the Court of Appeal, which granted the petition on the ground that any California law invalidating a class action waiver was preempted by the FAA.

The Supreme Court granted review. In reversing the Court of Appeal, the court explained that "class action waivers found in [consumer] contracts may . . . be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code section 1668: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.'" (*Discover Bank*, *supra*, 36 Cal.4th at p. 161, italics omitted.)

The court then set forth the traditional principles of unconscionability: "'[T]he doctrine has "'both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results." . . . The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, "'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" . . . [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.'" (*Discover Bank*, *supra*, 36 Cal.4th at p. 160.)

Ultimately, the court distilled a specific rule of unconscionability for class arbitration waivers in consumer contracts: "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'" (*Discover Bank, supra,* 36 Cal.4th at pp. 162–163, quoting Civ. Code, § 1668.)

2. *Gentry*

Two years later, our Supreme Court decided *Gentry, supra,* 42 Cal.4th 443. In *Gentry,* an employee filed a putative class action against his employer, alleging a violation of California's overtime compensation statutes (§§ 510, 1194). More specifically, the plaintiff alleged that his employer, Circuit City, had "'illegally misclassified' [customer service managers] as 'exempt managerial/executive employees' not entitled to overtime pay, when in fact, they were '"non-exempt" non-managerial employees' entitled to be compensated for hours worked in excess of eight hours per day and 40 hours per week." (*Gentry,* at p. 451.) Circuit City moved to compel arbitration pursuant to its "Associate Issue Resolution Package" and "Dispute Resolution Rules and Procedures," which required the arbitration of employment-related disputes. The arbitration agreement also contained a class action waiver. The plaintiff opposed arbitration and argued the class action waiver was unenforceable. The trial court found the class action waiver was valid and granted the motion, ordering the plaintiff to arbitrate his claims on an individual basis. The Court of Appeal denied the plaintiff's petition for a writ of mandate, concluding the class action waiver was enforceable.

The Supreme Court granted review "to clarify our holding in *Discover Bank*." (*Gentry, supra,* 42 Cal.4th at p. 452.) The court began by stating that *Discover Bank* was based on the doctrine of unconscionability. (*Gentry, supra,* 42 Cal.App.4th at pp. 453–

455.) The court pointed out that "we had no occasion in *Discover Bank* to consider whether a class action or class arbitration waiver *would undermine the plaintiff's statutory rights*." (*Id.* at p. 455, italics added.) After concluding that the right to overtime compensation was an unwaivable statutory right (*id.* at pp. 455–456), the court noted that its decision in *Armendariz, supra*, 24 Cal.4th 83, was based on unwaivable statutory rights under the FEHA (see *id.* at p. 456–457). The court stated: "We have not yet considered whether a class arbitration waiver would lead to a de facto waiver of statutory rights, or whether the ability to maintain a class action or arbitration is 'necessary to enable an employee to *vindicate . . . unwaivable rights in an arbitration forum*.' . . . We conclude that *under some circumstances* such a provision would lead to a de facto waiver and would impermissibly interfere with employees' ability to *vindicate unwaivable rights* and to *enforce the overtime laws*." (*Id.* at p. 457, italics added.)

In describing when a class action waiver might constitute a de facto waiver of statutory rights, the court stated: "First, individual awards in wage-and-hour cases tend to be modest. In addition to the fact that litigation over [the] minimum wage by definition involves the lowest-wage workers, overtime litigation also usually involves workers at the lower end of the pay scale, since professional, executive, and administrative employees are generally exempt from overtime statutes and regulations. . . . According to the . . . report [of the Department of Labor Standards Enforcement, obtained] in response to Gentry's California Public Records Act request, the average award from its wage adjudication unit for 2000–2005 was $6,038." (*Gentry, supra*, 42 Cal.4th at pp. 457–458, citations omitted.)

Next, the court explained: "It is true that section 1194 permits employees to recover reasonable attorney fees if they prevail in an overtime litigation suit. . . . Even assuming that such attorney fees were equally available in arbitration, employees and their attorneys must weigh the typically modest recovery, and the typically modest means of the employees bringing overtime lawsuits, with the risk of not prevailing and being saddled with the substantial costs of paying their own attorneys. Moreover, the award of 'reasonable' fees and costs is at the discretion of the trial court. Assuming that the

arbitrator had similar discretion, there is still a risk that even a prevailing plaintiff/employee may be undercompensated for such expenses. Given these risks and economic realities, *class actions play an important function in enforcing overtime laws* by permitting employees who are subject to the same unlawful payment practices a *relatively inexpensive way* to resolve their disputes." (*Gentry, supra,* 42 Cal.4th at pp. 458–459, italics added.)

The court continued: "A second factor in favor of class actions for these cases . . . is that a current employee who individually sues his or her employer is at greater risk of retaliation. We have recognized that retaining one's employment while bringing formal legal action against one's employer is not 'a viable option for many employees.' . . . The difficulty of suing a current employer is likely greater for employees further down on the corporate hierarchy. As one court observed: '"Although there is only plaintiff's suggestion of intimidation in this instance, the nature of the economic dependency involved in the employment relationship is inherently inhibiting."' . . .

". . . [F]ederal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation, even when it was otherwise questionable that the numerosity requirements of rule 23 (Fed. Rules Civ.Proc., rule 23, 28 U.S.C.) were satisfied." (*Gentry*, *supra*, 42 Cal.4th at pp. 459–460, citation omitted.)

As a third factor to be considered, the court said: "[S]ome individual employees may not sue because they are unaware that their legal rights have been violated. . . . [I]t may often be the case that the illegal employer conduct escapes the attention of employees. Some workers, particularly immigrants with limited English language skills, may be unfamiliar with the overtime laws. . . . Even English speaking or better educated employees may not be aware of the nuances of overtime laws with their sometimes complex classifications of exempt and nonexempt employees. . . . [¶] . . . [A] federal district court recently concluded that an arbitration agreement with a class arbitration waiver was inconsistent with the minimum wage and overtime provisions of the federal Fair Labor Standards Act (FLSA). 'In this case, the imposition of a waiver of class actions

may effectively prevent . . . employees from seeking redress of FLSA violations. The class action [waiver] thereby circumscribes the legal options of these employees, *who may be unable to incur the expense of individually pursuing their claims*." (*Gentry*, *supra*, 42 Cal.4th at pp. 461–462, citation omitted, italics added.)

Fourth, "'class actions may be needed to assure *the effective enforcement of statutory policies* even though some claims are large enough to provide an incentive for individual action. While employees may succeed under favorable circumstances in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, *a class action may still be justified if these alternatives offer no more than the prospect of "random and fragmentary enforcement" of the employer's legal obligation to pay overtime*.' . . . 'By preventing "a failure of justice in our judicial system" . . . , *the class action* not only benefits the individual litigant but serves the public interest in *the enforcement of legal rights and statutory sanctions*.'" (*Gentry*, *supra*, 42 Cal.4th at p. 462, citations omitted, italics added.)

If an employee's wage and hour claim involves the foregoing factors, including any "real world obstacles to the vindication of class members' rights to overtime through individual arbitration" (*Gentry*, *supra*, 42 Cal.4th at p. 463), then a class action waiver in an arbitration agreement has an "exculpatory effect" (*id.* at p. 457). And an exculpatory agreement violates Civil Code section 1668, which states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Yet, under *Gentry*, the foregoing factors are not sufficient to invalidate a class action waiver.

After discussing those factors, the court concluded: "[W]hen it is alleged that an employer has *systematically* denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, *the trial court must consider the factors discussed above*: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights,

and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration. *If it concludes, based on these factors, that a class . . . is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations,* it must invalidate the class arbitration waiver to ensure that these employees can '*vindicate* [*their*] *unwaivable rights . . . .*'" (*Gentry*, *supra*, 42 Cal.4th at p. 463, italics added.)

Under *Gentry*, if a class action waiver is invalid, and no other provision in the arbitration agreement is unenforceable, the court should (1) invalidate the waiver and send the case to arbitration, where it may be heard as a class action, or (2) have the case heard in court but only if the parties so stipulate. (*Gentry*, *supra*, 42 Cal.4th at p. 466; see *id.* at p. 463; see also *Franco I*, *supra*, 171 Cal.App.4th at pp. 1299–1300, 1303 [finding two provisions of arbitration agreement invalid and declaring arbitration agreement unenforceable, permitting case to proceed in court]; see fn. 2, *ante*.)

At this point in our discussion, we think it beneficial to point out some post-*Gentry* considerations that affect an employee's ability to vindicate his or her unwaivable statutory rights through arbitration. First, *Gentry* involved a claim for overtime compensation. An employee who prevails on a claim alleging the failure to pay overtime compensation or the minimum wage is entitled to an award of attorney fees. (See § 1194, subd. (a); *Gentry*, *supra*, 42 Cal.4th at p. 458.) Similarly, an employee is entitled to attorney fees if he or she prevails on a claim "for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." (§ 218.5.) In *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, the Supreme Court held that the Labor Code (§§ 218.5, 1194) does not permit an award of attorney fees to an employee who prevails on a claim alleging a violation of the rest period statute (§ 226.7). (See *Kirby*, at pp. 1250–1253, 1255–1259.) The analysis in *Kirby* seems equally applicable to a claim alleging a failure to provide a meal period (§§ 226.7, 512). For an employee like Franco — whose overtime claim may be meritless and whose principal claims are based

on the rest and meal period statutes (see *Franco I, supra*, 171 Cal.App.4th at pp. 1283, 1286) — the unavailability of attorney fees would make it significantly less likely that an attorney would pursue his rest and meal period claims on an individual basis. In cases alleging rest and meal period claims, *Kirby* increases the need for class relief if employees are to vindicate their unwaivable statutory rights.

Next, as to the second factor in *Gentry* — the risk of retaliation faced by a current employee who files an individual wage and hour claim — *Gentry* cited statistics compiled by the Department of Labor Standards Enforcement (DLSE): The number of retaliation complaints filed with the DLSE ranged annually from 446 (53 percent of all complaints) in 2000 to 808 retaliation complaints (66 percent of all complaints) in 2003. (See *Gentry, supra*, 42 Cal.4th at p. 460.)[5] Our examination of post-2003 DLSE reports shows that there were 646 retaliation complaints (61 percent of all complaints) in 2004; 537 (56 percent) in 2005; 626 (60 percent) in 2006; 738 (62 percent) in 2007; 720 (64 percent) in 2008; 695 (64 percent) in 2009; 658 (66 percent) in 2010; and 800 (60 percent) in 2011. (See State of Cal., Dept. of Industrial Relations, DLSE, Discrimination Complaint Report 2004 & Retaliation Complaint Reports 2005–2011 <http://www.dir.ca.gov/dlse/DLSEreports.htm> [as of Nov. 26, 2012].) Although the absolute number of retaliation complaints has varied over the years, that type of complaint has constituted over half of the DLSE's caseload and has been, by far, the largest category of complaints.

Consequently, it remains true "that these statistics are supportive of [the] position that retaliation against employees for asserting statutory rights under the Labor Code is widespread. Given that retaliation would cause immediate disruption of the employee's life and economic injury, and given that the outcome of the complaint process is uncertain,

---

[5] It appears that *Gentry* mistakenly stated that 808 retaliation complaints were made in *2004*. The correct year was 2003. (See State of Cal., Dept. of Industrial Relations, DLSE, Discrimination Complaint Report 2003 <http://www.dir.ca.gov/dlse/DLSEreports.htm> [as of Nov. 26, 2012].)

we do not believe the existence of an antiretaliation statute and an administrative complaint process undermines [the] point that fear of retaliation will often deter employees from *individually suing* their employers." (*Gentry, supra*, 42 Cal.4th p. 461, italics added.)

As an illustration of *Gentry*'s third factor — "some individual employees may not sue because they are unaware that their legal rights have been violated" (*Gentry, supra*, 42 Cal.4th at p. 461) — we note that, while the legal community awaited the Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th 1004, no one could describe with assurance the scope of an employer's duty to provide rest and meal periods. *Brinker* devoted several pages to explaining "the amount of rest time that must be authorized, and the timing of any rest periods." (*Id.* at p. 1028; see *id*. at pp. 1028–1032.) The court also addressed the propriety of a class action as to rest period claims. (*Id.* at pp. 1032–1034.) On the subject of meal periods, the court held that an "employer satisfies [its] obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and *does not impede or discourage them from doing so*. . . . [¶] . . . [T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed. *Bona fide relief from duty* and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay . . . ." (*Id*. at pp. 1040–1041, italics added.) The court also discussed the timing of meal periods (*id.* at p. 1041–1049), and the propriety of pursuing meal period claims as a class action (*id.* at pp. 1049–1052).

Finally, in *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, the Court of Appeal explained the doctrinal distinctions between *Discover Bank* and *Gentry*. As the court stated: "*Discover Bank* involved allegations of an unconscionable class action waiver. . . . [¶] The Supreme Court first concluded that 'when a consumer is given an amendment to its cardholder agreement in the form of a "bill stuffer" that he would be deemed to accept if he did not close his account, an element of procedural

unconscionability is present.' . . . The court then turned to the issue of substantive unconscionability, and concluded that class action waivers 'may . . . be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy.'" (*Arguelles-Romero*, at p. 837, citation omitted.)

"In contrast, what we will call 'the rule of *Gentry*' is not a rule of unconscionability. . . .

"The seeds for the rule of *Gentry* were planted not in *Discover Bank*, but in *Armendariz*, *supra*, 24 Cal.4th 83. *Armendariz* considered whether a plaintiff could be compelled to arbitrate discrimination claims brought under the Fair Employment and Housing Act (FEHA). The Supreme Court began with the premise that FEHA rights are unwaivable. . . . The court agreed that, as a general matter, assuming the arbitral forum is adequate, an agreement to arbitrate a nonwaivable statutory claim does not waive the claim, it simply submits its resolution to another forum. . . . However, if the arbitral forum is *not* adequate, an agreement to arbitrate a nonwaivable statutory claim may, in fact, improperly compel the claimant to forfeit his or her statutory rights. . . . The *Armendariz* court then considered the minimum requirements that any arbitral forum would have to meet so that forcing a party to pursue nonwaivable statutory claims in that forum would still enable the party to vindicate his or her rights. . . .

"The question that arose in *Gentry* was whether the right to a *class arbitration* should also be included among the *Armendariz* protections as a necessary minimum requirement for the arbitration of a nonwaivable statutory right. The Supreme Court concluded that it should, 'at least in some cases.'" (*Arguelles-Romero v. Superior Court*, *supra*, 184 Cal.App.4th at pp. 839–840, citations & fn. omitted.) "While *Discover Bank* and *Gentry* were applications of the same general principle, it is also apparent that they involved different legal theories. *Discover Bank* is based on unconscionability, which is a legal determination subject to de novo review, while *Gentry* is based on whether a class . . . action[] is a significantly more effective practical means of vindicating unwaivable statutory rights, which is a discretionary determination subject to abuse of discretion review." (*Id.* at p. 841; see *Franco I*, *supra*, 171 Cal.App.4th at pp. 1293–1294 [*Discover*

Bank based on doctrine of unconscionability while *Gentry* based on waiver of statutory rights].)

D. Class Arbitration under the FAA

For our purposes, two decisions of the United States Supreme Court are pertinent in determining whether *Gentry* remains good law.

1. *Stolt-Nielsen*

In *Stolt-Nielsen*, *supra*, 130 S.Ct. 1758, a dispute arose between a shipping company and one of its customers. The customer filed a putative class action in federal district court, alleging an antitrust claim. The parties had agreed to arbitrate their disputes. After filing suit in federal district court, the customer served the shipping company with a demand for class arbitration. (*Id.* at pp. 1764–1765.) The parties entered into a supplemental agreement providing that (1) a panel of three arbitrators would decide if the case could be maintained as a class arbitration, and (2) the arbitration clause was silent on that point. (*Id.* at pp. 1765–1766.) The arbitrators concluded the arbitration clause permitted class arbitration and issued an award resolving only that question. (*Id.* at p. 1766.) The panel stayed its decision to allow the parties to seek judicial review. (*Ibid.*)

The district court vacated the award, concluding that the arbitrators should have based their decision on custom and usage in the maritime industry. The court of appeals reversed the district court on the ground that maritime law did not *prohibit* class arbitration. (*Stolt-Nielsen*, *supra*, 130 S.Ct. at pp. 1766–1767.)

The Supreme Court granted certiorari and reversed the court of appeals. In holding that the arbitrators had "'exceeded [their] powers'" (*Stolt-Nielsen*, *supra*, 130 S.Ct. at p. 1767), the court stated: "Rather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation." (*Id.* at pp. 1768–1769.) "[W]e have said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.' . . . [¶] Whether enforcing

an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.' . . . In this endeavor, 'as with any other contract, the parties' intentions control.' . . . This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. . . . [¶] Underscoring the consensual nature of private dispute resolution, we have held that parties are '"generally free to structure their arbitration agreements as they see fit."'" (*Id.* at pp. 1773–1774, citations omitted.) "[I]t follows that 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." (*Id.* at p. 1775, original italics.)

In the court's view: "An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. . . .

"Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. . . . The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation . . . even though the scope of judicial review is much more limited . . . . We think 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." (*Stolt-Nielsen*, *supra*, 130 S.Ct. at pp. 1775–1776, citations omitted.)

Thus, *Stolt-Nielsen* held that class arbitration is not permitted unless the parties have expressly or implicitly agreed to it. *Gentry*, on the other hand, concerned the enforceability of class action waivers that prevent the vindication of unwaivable statutory rights and that constitute exculpatory clauses. Nevertheless, *Gentry* concluded that, if a class action waiver is unenforceable, the court should invalidate the waiver and send the case to arbitration, where the plaintiff may attempt to certify a class. (See *Gentry*, *supra*, 42 Cal.4th at pp. 463, 466.) But under *Stolt-Nielsen*, class arbitration is not permitted unless the parties agree to that procedure. (See *Stolt-Nielsen*, *supra*, 130 S.Ct. at pp. 1775–1776; *Truly Nolen of America v. Superior Court*, *supra*, 208 Cal.App.4th at p. 512.) Plainly, in a case where *Gentry* applies — to invalidate a class action waiver — the parties have *not* agreed in any fashion to allow class arbitration. Consequently, under *Stolt-Nielsen*, the remedy under *Gentry* should be the denial of the motion or petition to compel arbitration, permitting the case to be heard in court, where the plaintiff may seek to certify a class. (See *Sutherland v. Ernst & Young, LLP* (S.D.N.Y. 2011) 768 F.Supp.2d 547, 554.)

2. *Concepcion*

In February 2002, Vincent and Liza Concepcion purchased cellular telephones and service from AT&T. The telephones were advertised as free, but the Concepcions were charged $30.22 in sales tax based on the telephones' retail value. The Concepcions filed suit in the United States District Court for the Southern District of California. "The [case] was later consolidated with a putative class action, alleging . . . that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free." (*Concepcion*, *supra*, 131 S.Ct. at p. 1744.)

The purchase agreement between the Concepcions and AT&T contained a provision requiring the arbitration of all disputes and prohibiting class or representative proceedings. The agreement further provided that "customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web

site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement . . . denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees." (*Concepcion, supra*, 131 S.Ct. at p. 1744.)

AT&T moved to compel arbitration. The district court denied the motion. "It described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was 'quick, easy to use' and likely to 'promp[t] full or . . . even excess payment to the customer *without* the need to arbitrate or litigate' . . . and that consumers who were members of a class would likely be *worse off*." (*Concepcion*, *supra*, 131 S.Ct. at p. 1745, 2d italics added.) Nevertheless, the district court found the class arbitration waiver unenforceable under *Discover Bank*, *supra*, 36 Cal.4th 148. The Ninth Circuit affirmed for the same reason.

The Supreme Court granted certiorari to decide the following "Question Presented": "Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures — here, class-wide arbitration — when those procedures *are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims*." (U.S. Supreme Ct., Dock., *AT&T Mobility LLC v. Concepcion*, Question Presented <http://www.supremecourt.gov/qp/09-00893qp.pdf> [as of Nov. 26, 2012], italics added.)

In reversing the Ninth Circuit and overruling *Discover Bank*, the Supreme Court began by quoting section 2 of the FAA — the act's "'primary substantive provision.'" (*Concepcion*, *supra*, 131 S.Ct. at p. 1745.) That section states: "'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." (*Concepcion*, at p. 1745, italics added.) As the Supreme Court acknowledged: "The final phrase of § 2 . . . 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*, at p. 1746.)

The court then observed that *Discover Bank* "classif[ies] *most* collective-arbitration waivers in consumer contracts as unconscionable." (*Concepcion*, *supra*, 131 S.Ct. at p. 1746, italics added.) The court continued: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. . . . But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." (*Id.* at p. 1747.) "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Id.* at p. 1748.) "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. . . . [¶] The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' . . . This purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements 'valid, irrevocable, and enforceable' as written (subject, of course, to the saving clause)." (*Concepcion*, at p. 1748.) "'A prime objective

of an agreement to arbitrate is to achieve "streamlined proceedings and expeditious results."'" (*Id.* at p. 1749.)

In overruling *Discover Bank*, the court explained: "California's *Discover Bank* rule . . . interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The rule is limited to adhesion contracts, . . . but the times in which consumer contracts were anything other than adhesive are long past. . . . The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. . . . The former requirement, however, is toothless and malleable . . . , and the latter has no limiting effect, as all that is required is an allegation." (*Concepcion*, *supra*, 131 S.Ct. at p. 1750, citations & fn. omitted.)

The court went on to describe the differences between bilateral and class arbitrations. "First, the switch from bilateral to 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." (*Concepcion*, *supra*, 131 S.Ct. at p. 1751.) "Second, class arbitration *requires* procedural formality. The . . . rules [of the American Arbitration Association] governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation." (*Ibid.*) "Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. . . . [¶] Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award 'was procured by corruption, fraud, or

undue means'; 'there was evident partiality or corruption in the arbitrators'; 'the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced'; or if the 'arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made.'" (*Concepcion*, at p. 1752.)

In its concluding remarks, the court stated: "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. . . . But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. . . . [T]he arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole . . . . [T]he District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action . . . . [¶] Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' . . . California's *Discover Bank* rule is preempted by the FAA." (*Concepcion*, *supra*, 131 S.Ct. at p. 1753, citations omitted.)

a. Categorical Rules Against Class Action Waivers

As we read *Concepcion*, the FAA preempted the *Discover Bank* rule because it operated as a categorical prohibition on class action waivers in consumer contracts. According to the Supreme Court, *Discover Bank* would invalidate "most" of those waivers (see *Concepcion*, *supra*, 131 S.Ct. at p. 1746) and "allows any party to a consumer contract to demand [classwide arbitration] *ex post*" (*id.* at p. 1750).

"[T]he Supreme Court [in *Concepcion*] concluded that the triggering conditions of California's *Discover Bank* rule imposed no effective limit on its application. . . . The

Court . . . implied that although the *Discover Bank* rule was cast as an application of unconscionability doctrine, in effect, it set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases, upon the mere *ex post* demand by any consumer." (*Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205, 1211.) "The lack of any requirement of showing actual unconscionability meant that *Discover Bank* created an essentially categorical requirement of class arbitration . . . ." (*Brewer v. Missouri Title Loans* (Mo. 2012) 364 S.W.3d 486, 489.) "[T]he critical flaw leading to the preemption of the *Discover Bank* rule was that it required class arbitration even if class arbitration disadvantaged consumers and was unnecessary for the consumer to obtain a remedy." (*Id.* at p. 494.)

Based on our reading of *Concepcion*, we reject "the conclusion that the [FAA] requires state courts to replace the essentially categorical *Discover Bank* rule requiring class arbitration with another categorical rule requiring individual arbitration in every case . . . ." (*Brewer v. Missouri Title Loans, supra*, 364 S.W.3d at p. 491.)

This interpretation is supported by the post-*Concepcion* decision in *Marmet Health Care Center v. Brown* (2012) ___ U.S. ___ [132 S.Ct. 1201]. There, the Supreme Court held that the FAA preempted a West Virginia rule prohibiting arbitration agreements from encompassing claims against a nursing home for negligence resulting in personal injury or death. (See *id.* at p. 1203.) Relying on *Concepcion*, the high court stated: "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a *categorical rule* prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." (*Marmet Health Care Center*, at pp. 1203–1204, italics added; see also *Perry v. Thomas* (1987) 482 U.S. 483 [107 S.Ct. 2520] [FAA preempts California statute (§ 229) permitting civil action for collection of wages despite parties' agreement to arbitrate wage disputes]; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681 [116 S.Ct. 1652 [FAA preempts Montana statute that requires a contract subject to arbitration to contain notice of arbitration on first page]; *Preston v. Ferrer* (2008) 552 U.S. 346 [128 S.Ct. 978]

[when parties agree to arbitrate all disputes, FAA preempts state statutes vesting administrative forum with primary jurisdiction over dispute].)

Concepcion recognized that "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Concepcion*, 131 S.Ct. at p. 1748.) But *Concepcion* did not hold that every ground for revoking an arbitration agreement under the savings clause in section 2 of the FAA (9 U.S.C. § 2) is preempted just because it interferes with the purposes of the act. That interpretation would render the savings clause meaningless. Every ground for revocation under section 2 — such as fraud, duress, or unconscionability — renders an arbitration agreement partially or totally unenforceable according to its terms. And in *Concepcion*, the Supreme Court acknowledged that the "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" (*Concepcion*, at p. 1746; accord, *id.* at p. 1748 [principal purpose of the FAA — to enforce arbitration agreements according to their terms — is subject to savings clause].)

As explained by commentators: "The savings clause of the FAA provides that arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.' *Concepcion* then adds the proviso that, even if a defense is generally applicable to litigation and arbitration alike . . . , it loses the protection of the FAA [savings] clause if it 'stands as an obstacle' to the intent of Congress — which means, at the very least, if it renders arbitration, as traditionally defined, unavailable in some category of cases." (Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion (2012) 79 U.Chi. L.Rev. 623, 647–648, fn. omitted.)

"*Concepcion* is, at base, about obstacle preemption. In evaluating a case-by-case defense under which plaintiffs must show that the imposition of the class waiver confers de facto immunity, the critical issue following *Concepcion* is whether the defense will be deemed to 'stand[] as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress,' as expressed in the FAA. This inquiry turns on just what 'stands as an obstacle' means.

"So what was it about the *Discover Bank* unconscionability defense that made it an impermissible 'obstacle,' so as to trigger preemption under the FAA notwithstanding its nondiscriminatory general applicability within the meaning of the savings clause? This much we know: it was not because the successful invocation of that defense in any given case would render an arbitration clause unenforceable as written. Any such objection would be circular: it would mean the defense is an impermissible obstacle because it is a defense. Whenever any common law contract defense is successfully invoked under the FAA [savings] clause — including fraudulent inducement, duress, or anything else — the arbitration clause may not be enforced as written, or sometimes at all. So unless we are to rescind the savings clause, we must look elsewhere for the meaning of 'obstacle.' In our view, the unconscionability defense in *Concepcion* 'stood as an obstacle,' for preemption purposes, because it was a categorical rule that applied to all consumer cases. The sin of the *Discover Bank* rule was that it did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis. . . .

"In essence the standard boils down to this. To support the rejection of an arbitration provision under the savings clause, a defense of exculpatory contract must: (1) be recognized as a ground for the revocation of contracts as a matter of state law; (2) apply to 'any contract,' in or out of arbitration; and (3) be supported by a showing that the invocation of the arbitration clause *in a specific case* would be exculpatory or would confer de facto immunity upon the defendant." (Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, *supra*, 79 U.Chi. L.Rev. at pp. 650–651, fns. omitted, italics added.) "[If] a state law exists that automatically holds all class action waivers as unconscionable, then the state law is preempted by the FAA, which was the issue and holding in *Concepcion*." (Note, *There Is Still Hope For The Little Guy: Unconscionability Is Still A Defense Against Arbitration Clauses Despite* AT&T v. Concepcion (2012) 33 Whittier L.Rev. 651, 663.)

As we have previously discussed, *Gentry* is not a categorical rule against class action waivers. (See pt. II.C.2, *ante*.) Rather, it is a multifactor test applied on a case-by-case basis that turns on whether, after an analysis of several factors, the court finds that "a class . . . is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of [wage and hour] laws for the employees alleged to be affected by the employer's violations . . . ." (*Gentry*, *supra*, 42 Cal.4th at p. 463; see *id.* at pp. 457–462.) Indeed, in petitioning the trial court to compel arbitration the first time, Athens Services conceded that *Gentry* was "*not* a *blanket rule* invalidating class action waivers in all employment arbitration agreements." (Italics added.)

As *Gentry* itself recognized: "We cannot say categorically that all class arbitration waivers in overtime cases are unenforceable. As [the employer-defendant] points out, some 40 published cases over the last 70 years in California have involved individual employees prosecuting overtime violations without the assistance of class litigation or arbitration. [Citations.] Not all overtime cases will necessarily lend themselves to class actions, nor will employees invariably request such class actions. Nor in every case will class action or arbitration be demonstrably superior to individual actions." (*Gentry*, *supra*, 42 Cal.4th at p. 462.)

Consistent with the multifactor nature of the test in *Gentry*, our Supreme Court "remand[ed] th[at] case to the Court of Appeal with directions to remand to the trial court to determine . . . whether, in this particular case, class [proceedings] would be a significantly more effective means than individual arbitration actions of vindicating the right to overtime pay of the group of employees whose rights to such pay have been allegedly violated by Circuit City. If the trial court invalidates the waiver on public policy grounds, then the parties may . . . [initiate] class [proceedings] . . . ." (*Gentry*, *supra*, 42 Cal.4th at p. 466.)

Accordingly, *Gentry* is not preempted by the FAA because it is not a categorical rule that invalidates class action waivers — the type of rule that *Concepcion* condemned.

b. Vindication of Statutory Rights Post-*Concepcion*

As noted, the "Question Presented" in *Concepcion* did not expressly address whether an arbitration agreement is enforceable if it fails to ensure that the parties can vindicate their claims. (See pt. II.D.2, *ante*.) Nor did the opinion in *Concepcion* mention the line of Supreme Court cases stating that an arbitration agreement is unenforceable if it prevents a claimant from vindicating his or her statutory claims. In the 19 months since *Concepcion* was decided, courts have reached different conclusions as to whether *Gentry* has been overruled. (See *Reyes v. Liberman Broadcasting, Inc*. (2012) 208 Cal.App.4th 1537, 1546–1549, discussing cases.)

To our knowledge, only one published decision has referenced the "Question Presented" in *Concepcion*, and it held that a class action waiver was unenforceable because the waiver prevented the plaintiff from vindicating her statutory right to overtime compensation. In *Sutherland v. Ernst & Young, LLP*, *supra*, 768 F.Supp.2d 547, and *Sutherland v. Ernst & Young, LLP* (S.D.N.Y. 2012) 847 F.Supp.2d 528, an employee filed a putative class action alleging her employer had violated the Fair Labor Standards Act of 1938 (29 U.S.C. §§ 201–219) by not paying overtime compensation. Although the parties were subject to an arbitration agreement containing a class action waiver, the district court invalidated the waiver on the ground that the plaintiff could not afford to pursue her claim on an individual basis.

As the district court explained in its first decision: "Sutherland's uncontested submission estimates that her attorney's fees during arbitration will exceed $160,000, and that costs will exceed $6,000. . . . Sutherland will utilize expert assistance in support of her claims. . . . Her expert, a professor of accountancy, has submitted an affidavit stating that his fees may exceed $33,500, and that he requires a retainer payment of $25,000. . . . In sum, Sutherland would be required to spend approximately $200,000 in order to recover double her overtime loss of approximately $1,867.02." (*Sutherland v. Ernst & Young, LLP*, *supra*, 768 F.Supp.2d at pp. 551–552, citations & fn. omitted.)

The district court found that "[e]ven if Sutherland were willing to incur approximately $200,000 to recover a few thousand dollars, she would be unable to retain

an attorney to prosecute her individual claim. This is due largely to the [Arbitration] Agreement's obstacles to reimbursement of fees and expenses. *Whether* attorney's fees and expenses incurred during arbitration are compensable is subject to the discretion of the arbitrators. . . . The *amount* of such reimbursement is also left to the arbitrators' discretion. [¶] In light of the foregoing, Sutherland cannot reasonably be expected to retain an attorney to pursue her individual claim." (*Sutherland v. Ernst & Young, LLP*, *supra*, 768 F.Supp.2d at p. 553.) "Sutherland's only option in pursuing her individual claim is thus to retain an attorney on a contingent fee basis. But just as no rational person would expend hundreds of thousands of dollars to recover a few thousand dollars in damages, 'no attorney (regardless of competence) would ever take such a case on a contingent fee basis.' . . . [¶] If Sutherland could aggregate her claim with the claims of others similarly situated, however, she would have no difficulty in obtaining legal representation. . . . This is because class proceedings 'achieve economies of time, effort, and expense. . . .'" (*Id.* at pp. 553–554, citations & fn. omitted.)

In the district court's second decision, the court concluded that preemption under *Concepcion* occurs when a plaintiff lacks the *incentive* to pursue a claim, but, in the case before it, the plaintiff lacked the *means* to bring a claim: "The facts in Sutherland's case differ from *Concepcion* with respect to the plaintiff's ability to vindicate her statutory rights. The Court in *Concepcion* emphasized in detail the provisions in that arbitration agreement that benefitted plaintiffs and that ensured that the Concepcions would be able to find redress for their claims. . . . [T]he question presented to the Court in *Concepcion* was whether the FAA 'preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures — here, class-wide arbitration — *when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.*' . . . In contrast to the facts in *Concepcion*, Sutherland has demonstrated that she would not be able to obtain representation or vindicate her rights on an individual basis." (*Sutherland v. Ernst & Young, LLP*, *supra*, 847 F.Supp.2d at pp. 535–536, italics added in *Sutherland*.)

In distinguishing *Concepcion*, the district court continued: "There is a difference . . . between claims that might slip through the cracks because plaintiffs choose not to prosecute them individually, and claims for which a plaintiff seeks redress but is precluded from vindicating her rights. This difference is the difference between the situation faced by the Concepcions and that faced by Sutherland. The terms of the arbitration agreement at issue in *Concepcion* ensured that the Concepcions could bring their claim in arbitration on an individual basis, either representing themselves or with counsel. The fact that a plaintiff in the same situation as the Concepcions might choose not to make a claim for such a small overcharge is not the Court's concern, even if a class-action lawyer might be eager to bring the case on behalf of all similarly situated plaintiffs, but for the class-action waiver. By contrast, the terms of the arbitration agreement and the cost of discovery in Sutherland's case preclude her from redressing alleged FLSA violations. [¶] Sutherland's case is similar instead to situations discussed by the Supreme Court in which it has stated that it may not enforce contractual agreements that would operate 'as a prospective waiver of a party's right to pursue statutory remedies.'" (*Sutherland v. Ernst & Young, LLP*, *supra*, 847 F.Supp.2d at p. 537, citing *Mitsubishi Motors*, *supra*, 473 U.S. at p. 637, fn. 19.)

As the Ninth Circuit recently observed in upholding a class action waiver: "'[T]he *Concepcion* Court examined this very arbitration agreement' and concluded '"that aggrieved customers who filed claims would be essentially guaranteed to be made whole."' . . .

"The dissent in *Concepcion* focused on a related but different concern — even if the arbitration agreements guaranteed (via fee-shifting provisions) that complaining customers would be made whole with respect to damages and counsel fees, most customers would not bother filing claims because the amounts are too small to be worth the trouble. . . . That is, the concern is not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so. That concern is, of course, a primary policy rationale for class actions . . . . But as the Supreme Court stated in *Concepcion*, such unrelated policy concerns, however

worthwhile, cannot undermine the FAA." (*Coneff v. AT&T Corp*. (9th Cir. 2012) 673 F.3d 1155, 1159, citations & fn. omitted, original italics.) Put another way, preemption under *Concepcion* occurs if the arbitration process would make a prevailing claimant whole, but the amount in dispute is so small that a claimant does not think it worth the effort to pursue relief; preemption does not occur under *Concepcion* if a claimant lacks the means to pursue a claim in arbitration because the cost of pursuing relief on an individual basis — whether in arbitration or court — exceeds the potential recovery.

So it is here. Franco lacks the *means*, not the *incentive*, to pursue his rest and meal period claims on an individual basis in arbitration. The attorney declarations submitted by Franco in opposing the petition to compel arbitration stated that, based on his estimated recovery of around $10,250 in damages and PAGA penalties, it would be highly unlikely that an attorney would represent him on *an individual basis in either arbitration or court*. Thus, it does not matter that Athens Services would pay the arbitrator's fee and any other expenses unique to arbitration; Franco's case is not viable in *either* forum unless it can be brought as a class action.

As one attorney explained: "I advance all costs and all of our firm's time. . . . Even so, I recognize that often any financial remuneration will not be forthcoming until years and years after I initially begin to pursue a case. I litigate Labor Code cases similar to this case on a class basis and would not take a case from any of the absent class members if I had *to litigate it on an individual basis* because of the *moderate damages and because these cases are labor intensive*. Additionally, it makes no sense to bring these cases individually because the employer can simply pay the small damages and *not be forced to correct its unlawful behavior*. [¶] . . . [I]t would be extremely difficult for an employee to obtain representation for their Labor Code cases if they needed to either *arbitrate or litigate in court individually*. Many cases such as this one have damages significantly lower than your typical harassment or discrimination case. . . . These [Labor Code] cases involve many hours of attorney work and despite the possibility of obtaining attorneys fees upon a successful arbitration, the chances that an arbitrator will award the attorney the full amount of hours worked are not great." (Italics added.)

As noted, after we decided *Franco I* — long after the attorney declarations were submitted — the California Supreme Court held that attorney fees are not recoverable by an employee who prevails on a rest period claim. (See *Kirby v. Immoos Fire Protection, Inc.*, *supra*, 53 Cal.4th at pp. 1250–1253, 1255–1259.) The court's analysis also appears to apply to employees who prevail on a meal period claim.

As stated by another attorney in support of Franco's opposition: "Without the ability to litigate these [Labor Code] cases as a class proceeding, my firm could not represent the individual class members especially if we had [to] arbitrate each one separately because of the low damages present in many of these cases, including this one. Moreover, if the entire class were to come into my office, we could not . . . *litigate each case separately, either in court or in arbitration*.

". . . [P]aying the claims of each *individual employee* who happens to walk into my or another attorney's office *will not deter the employer from continuing to deny rest and meal periods* or force the employer to pay its employees the wages due. Rather, *preventing class proceedings* from occurring will only allow this and other employers to pay the claims of a few employees, if any, and *continue violating the Labor Code unabated*." (Italics added.)

We conclude that, as established by the attorney declarations, Franco cannot pursue relief for violations of his unwaivable statutory rights to rest and meal periods unless his case can be brought as a class action. This is the type of case where the plaintiff lacks the *means* to vindicate his unwaivable statutory rights absent a class action. (See *Coneff v. AT&T Corp.*, *supra*, 673 F.3d at p. 1159 [applying *Concepcion* and distinguishing between plaintiffs who lack *incentive* to pursue claim and those who lack *means* to pursue claim].) "In contrast to the facts in *Concepcion*, [Franco] has demonstrated that [he] would not be able to obtain representation or vindicate [his] rights on an individual basis." (*Sutherland v. Ernst & Young, LLP*, *supra*, 847 F.Supp.2d at p. 536.) "Without the possibility of recovering costs and attorney's fees, an individual plaintiff would undoubtedly have an impossible time securing legal representation . . . given the minor amount an individual plaintiff would likely recover relative to the cost of prosecution." (*Kristian v. Comcast*

Corp., *supra*, 446 F.3d at p. 52.) Where, as here, an arbitration agreement operates "as a prospective waiver of a party's right to pursue statutory remedies," it will be "condemn[ed] . . . as against public policy." (*Mitsubishi Motors*, *supra*, 473 U.S. at p. 637, fn. 19.) If a "prospective litigant [cannot] effectively . . . vindicate [his or her] statutory cause of action in the arbitral forum, the [FAA] will [not] serve . . . its remedial and deterrent function." (*Id.* at p. 637.)

We therefore conclude that *Gentry* survives *Stolt-Nielsen* and *Concepcion*. Consistent with *Stolt-Nielsen*, when a class action waiver is unenforceable under *Gentry*, the case must be adjudicated in court, where the plaintiff may seek to certify a class. As required by *Concepcion*, *Gentry* is not a categorical rule against class action waivers but is a multifactor test that rests in part on whether a class action "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." (*Gentry*, *supra*, 42 Cal.4th at p. 463.) And consistent with *Mitsubishi Motors*, *Gilmer*, and *Randolph*, *Gentry* recognizes that arbitration is not a proper forum if it prevents a claimant from effectively pursuing his or her unwaivable statutory rights.

We realize that some federal courts have limited the vindication of statutory rights analysis to claims based on federal law; other federal courts disagree. (See, e.g., *Coneff v. AT&T Corp.*, *supra*, 673 F.3d at p. 1158, fn. 2, citing conflicting decisions.) But as the United States Supreme Court emphasized in a post-*Concepcion* decision: "[The FAA] requires courts to enforce agreements to arbitrate according to their terms. . . . That is the case *even when* the claims at issue are *federal* statutory claims . . . ." (*CompuCredit Corp. v. Greenwood* (2012) ___ U.S. ___ [132 S.Ct. 665, 669].) And in *Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th 1064, our Supreme Court rejected the argument that, under the FAA, the vindication of statutory rights is limited to federal claims (*id.* at pp. 1078–1079). Further, nothing in the language or legislative history of the FAA suggests that, in deciding whether to compel arbitration, a court should consider the vindication of *federal* statutory rights but not the vindication of *state* statutory rights. (See *Southland Corp. v. Keating*, *supra*, 465 U.S. at pp. 11–16 [discussing FAA's legislative history]; Horton,

Arbitration as Delegation (2011) 86 N.Y.U. L.Rev. 437, 444–449 [same].) On the contrary, the act was intended to overcome judicial hostility to arbitration by both state and federal judges. (See *Southland Corp. v. Keating*, *supra*, 465 U.S. at p. 13.)[6]

Even assuming, however, that the vindication of statutory rights language in *Mitsubishi Motors*, *Gilmer*, and *Randolph* is limited to federal law claims,[7] *Gentry* is distinguishable from those cases and from *Concepcion* because it does not invalidate a class action waiver unless (1) a class action "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)] *the disallowance of the class action will likely lead to a* ***less comprehensive enforcement*** *of* [*wage and hour laws*] for the employees alleged to be affected by the employer's violations." (*Gentry*, *supra*, 42 Cal.4th at p. 463, italics & boldface added.) In short, *Gentry* is based on the twin purposes of (1) ensuring that an employee has the means to pursue a violation of wage and hour laws, and (2) preventing an employer from using a class action waiver to escape liability for wage

---

[6] Putting aside the vindication of statutory rights, the language and legislative history of the FAA have led a minority of Supreme Court justices and some commentators to conclude that the FAA does not apply in state courts. (See *Southland Corp. v. Keating*, *supra*, 465 U.S. at pp. 21–36 (dis. opn. of O'Connor, J.); *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 284–285 [115 S.Ct. 834] (dis. opn. of Scalia, J.); *id.* at pp. 285–287 (dis. opn. of Thomas, J.); Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress* (2006) 34 Fla. St.U. L.Rev. 99; Dunham, Southland Corp. v. Keating *Revisited: Twenty-five Years in Which Direction?* (2010) 4 Charleston L.Rev. 331.)

[7] In *In re American Exp. Merchants' Litigation* (2d Cir. 2012) 667 F.3d 204, 219, certiorari granted *sub nomine American Express Co. v. Italian Colors Restaurant*, Nov. 9, 2012, No. 12-133 [2012 WL 3096737], the Supreme Court will decide "[w]hether the Federal Arbitration Act permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." (U.S. Supreme Ct., Dock., *American Express Company v. Italian Colors Restaurant*, Question Presented <http://www.supremecourt.gov/qp/12-00133qp.pdf> [as of Nov. 26, 2012].)

and hour violations. Without such protection, an employer could use a class action waiver to create an unlawful exculpatory contract (see Civ. Code, § 1668) and undermine the enforcement of the Labor Code. We are not aware of any decision that holds or suggests that a multifactor test like *Gentry* is preempted by the FAA. *Concepcion* did not sanction arbitration agreements that deprive an employee of the means to seek relief for wage and hour violations, nor did it exempt all exculpatory contracts from the scope of the FAA's savings clause (9 U.S.C. § 2).

The United States Supreme Court has recognized the necessity of a class action in cases where, as here, the potential recovery exceeds the cost of litigating a plaintiff's claims on an individual basis. As the court stated in one case: "A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit *proceed as a class action or not at all*." (*Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 161 [94 S.Ct. 2140], italics added.)

We also note this is not a case where the arbitration agreement or rules permit "collective proceedings" or where an administrative agency can be expected to seek classwide relief. (Cf. *Gilmer*, *supra*, 500 U.S. at p. 32.) Although the Labor Commissioner has the statutory authority to "prosecute [an] action for the collection of wages and other moneys payable to employees" (§ 98.3, subd. (b)), the Legislature enacted the PAGA precisely because the Labor Commissioner lacks the resources to prosecute Labor Code violations adequately. "'The [PAGA] attempted to remedy the understaffing of California's labor law enforcement agencies by granting employees the authority to bring civil actions against their employers for Labor Code violations. Fearing the state's budget crisis [in 2003] would continue to prevent adequate Labor Code enforcement, the Act's sponsors intended to guarantee "maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices." Thus, under the Act, employees supplement the [Labor Commissioner] as Labor Code enforcers by

"deputizing" employees in the role of private attorney generals.'" (*Franco I*, *supra*, 171 Cal.App.4th at pp. 1301–1302.)

Which brings us to the subject of *Concepcion*'s effect, if any, on PAGA claims. We have already concluded that Athens Services's arbitration agreement — the MAP — contains two unenforceable clauses: the class action waiver and the prohibition on acting as an attorney general. (See *Franco I*, *supra*, 171 Cal.App.4th at pp. 1297–1300, 1303; fn. 2, *ante*.) Those clauses operate independently of each other: One restricts Franco's pursuit of his rest and meal period claims while the other prohibits his recovery under the PAGA. Together, they render the MAP tainted with illegality, making it unenforceable and permitting Franco to adjudicate his claims in a judicial forum. (See *Franco I*, at p. 1303; fn. 2, *ante*.) *Concepcion* does not preclude a court from declaring an arbitration agreement unenforceable if the agreement is permeated by an unlawful purpose.

In addition, we observe that the PAGA authorizes an aggrieved employee to recover civil penalties — a remedy — only if he or she proves that an employer has violated a substantive provision of the Labor Code, such as the statutes governing rest and meal periods (§§ 226.7, 512). (See *Arias v. Superior Court*, *supra*, 46 Cal.4th at pp. 981, 987; §§ 2699, subd. (a), 2699.3, 2699.5.) In a case where *Gentry* invalidates a class action waiver, requiring that substantive claims be heard in court, *Gentry* also mandates that the additional remedies available under the PAGA be determined in court. As stated, where *Gentry*'s multifactor test is satisfied, an arbitration forum is not appropriate for vindicating an employee's unwaivable statutory rights. Those rights include not only the substantive Labor Code provisions but also the available remedies, including those under the PAGA. We need not go so far as to say that all PAGA claims are exempt from arbitration. Rather, when substantive Labor Code claims must be adjudicated in court under *Gentry*, the PAGA remedies "tag along" under the same unwaivable statutory rights analysis that applies to the substantive claims.

We therefore conclude the trial court properly denied Arakelian's petition to compel arbitration.

III

DISPOSITION

The order is affirmed.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.