No. 14-____

IN THE

Supreme Court of the United States

BRIDGESTONE RETAIL OPERATIONS, LLC,
FKA MORGAN TIRE & AUTO, LLC

Petitioner,

v.

MILTON BROWN, ET AL.,

Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

BETH HEIFETZ
Counsel of Record
ANTHONY J. DICK
SARAH A. HUNGER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.
20001-2113
(202) 879-3939
bheifetz@jonesday.com

Counsel for Petitioner

January 5, 2015

QUESTION PRESENTED

When parties agree to individually arbitrate claims arising in the course of their employment relationship, the Federal Arbitration Act generally requires the agreement to be enforced according to its terms, notwithstanding any state law or policy to the contrary. The question presented is:

Whether the California Supreme Court correctly held that the Federal Arbitration Act contains an implicit exception for claims brought by private parties when state law treats the claims as being brought "on behalf of the state."

LIST OF PARTIES

The parties in the court below were Respondents Milton Brown and Lee Moncada, who were the plaintiffs in the trial court, and Morgan Tire & Auto, LLC, which was the defendant in the trial court, and has since been acquired by Petitioner Bridgestone Retail Operations, LLC.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Bridgestone Retail Operations, LLC, discloses that it is a privately held limited liability company that has as its parent corporation Bridgestone Americas, Inc., which is in turn a wholly owned subsidiary of Bridgestone Corporation, a publicly held Japanese entity whose stock trades on the Tokyo Stock Exchange.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a writ of certiorari to review the order of the California Supreme Court, which refused to apply the Federal Arbitration Act to enforce plaintiffs' agreement to arbitrate.

OPINIONS BELOW

The unreported order of the California Supreme Court vacating and remanding this case is set forth at Pet. App. 1a–2a. The opinion of the Court of Appeal of California is reported at 216 Cal. App. 4th 1302 (2013), and is set forth at Pet. App. 5a–31a. The order of the California Superior Court granting Bridgestone's motion to compel individual arbitration is unreported, and is set forth at Pet. App. 32a–34a. The California Supreme Court's opinion in *Iskanian v. CLS Transportation of Los Angeles, LLC*, addressing the same issue presented here, is reported at 59 Cal. 4th 348 (2014), and is set forth at Pet. App. 46a–135a. A petition for certiorari in *Iskanian* currently is pending before this Court in No. 14-341.

JURISDICTION

The order of the California Supreme Court was entered on August 27, 2014. This Court has jurisdiction to review that order under 28 U.S.C. § 1257(a); *see Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984) (applying the principles of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), to find jurisdiction over an interlocutory order of the California Supreme Court that likewise refused to enforce an arbitration agreement under the Federal Arbitration Act). On November 10, 2014, this Court entered an order extending the time to file a petition for certiorari until January 8, 2015.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, 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.

The text of the California Labor Code Private Attorneys General Act of 2004 (PAGA), Cal. Lab. Code § 2698, *et seq.*, is set forth at Pet. App. 35a–45a.

INTRODUCTION

The Federal Arbitration Act (FAA) generally requires arbitration agreements to be enforced "according to their terms," notwithstanding any state law or policy to the contrary. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (citation omitted). In *Concepcion*, this Court ruled that the FAA required enforcement of a private agreement to arbitrate claims on an individual basis, and thus preempted California's policy favoring class proceedings. In the present case, Respondents are former Bridgestone employees who expressly agreed to arbitrate all employment-related claims on an individual basis, but now seek to bring claims against Bridgestone on a "representative" basis under

California's Private Attorneys General Act (PAGA), Cal. Lab. Code § 2698, *et seq.*, involving a broad class of current and former employees.

The court below held that, notwithstanding the FAA, plaintiffs' agreement to forgo representative-PAGA claims is unenforceable for reasons of California public policy. The court reached that conclusion by ignoring the preemption analysis set forth in *Concepcion*, and instead announcing that the FAA contains an implicit exception, never before recognized in this Court or any other court, for claims brought by private parties when state law treats the claims as being brought "on behalf of the state."

That novel implied exception to the FAA is a transparent attempt to circumvent this Court's decision in *Concepcion*, and has no basis in law or logic. Under its plain text, the only relevant criterion for determining whether the FAA applies to a claim is whether the "controversy" "aris[es] out of [a commercial] contract or transaction" between the parties. 9 U.S.C. § 2. That condition is plainly met when an employee brings a claim against his employer arising out of their employment relationship. For purposes of the FAA, it is entirely irrelevant whether state law considers the employee's claim to be brought "on behalf of the state."

Because the court deprived Bridgestone of its federal right to have its arbitration agreement enforced according to its terms, based on a novel rule of federal law that squarely conflicts with both the FAA's text and this Court's precedent, its decision warrants immediate review. This case presents an issue of exceptional importance not only because it is an attempted end-run around this Court's decision in

Concepcion, but also because it allows states to evade the FAA more broadly by rendering any claim non-arbitrable simply by deeming it to be brought "on behalf of the state." Given the clarity of the lower court's error, and the continuing pattern of state-court hostility to arbitration in defiance of this Court's authoritative interpretation of the FAA, this Court should consider summary reversal.

STATEMENT OF THE CASE

A. Legal Background

The FAA provides that an agreement "to settle by arbitration a controversy * * * arising out of [a commercial] contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA generally requires commercial arbitration agreements to be enforced "according to their terms." *Concepcion*, 131 S. Ct. at 1748 (citation omitted).

The above-quoted provision of the FAA includes a saving clause that allows states to invalidate the terms of an arbitration agreement on a "ground[] [that] exist[s] at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "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*, 131 S. Ct. at 1746 (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). If a state-law ground for invalidating an arbitration agreement does not fall within that category, the FAA expressly preempts it.

Moreover, even when a state-law ground *does* fall within the saving clause, it is still impliedly preempted if it otherwise conflicts with the FAA. Thus, states may not invalidate the terms of an arbitration agreement on any ground if doing so would "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Id.* at 1748. *See generally Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) ("[A] saving clause (like [an] express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.").

In *Concepcion*, this Court determined that where the parties have agreed to arbitrate claims on an *individual* basis, states may not require them to proceed on a *class* basis because doing so would "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." 131 S. Ct. at 1748. As the Court explained, the lack of appellate review in arbitration proceedings makes arbitration "poorly suited to the high[] stakes of class litigation," where "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Id.* at 1752. Without appellate review, "the risk of an error" becomes "unacceptable," and often means that arbitration is not a realistic option: Few if any defendants will choose to "bet the company with no effective means of review." *Id.* Thus, where the parties have agreed to arbitrate claims on an *individual* basis, forcing a defendant to arbitrate claims on a *class* basis is really no choice at all. Congress did not "intend[] to allow state courts to force such a decision." *Id.*

B. Factual Background

Plaintiffs Milton Brown and Lee Moncada are former employees of Petitioner Bridgestone Retail Operations, LLC ("Bridgestone").[1] Before beginning their employment, plaintiffs agreed to be bound by an Employee Dispute Resolution Plan ("EDR Plan"), which provides for any and all claims arising out of their employment relationship to be submitted to binding, individual arbitration. Pet. App. 136a–194a.

The EDR Plan provides that it governs all "Disputes," defined to mean any "legal claim * * * which relates to, arises from, concerns, or involves in any way":

> 1. This EDR Plan;
>
> 2. The employment of an Employee, including the application for and the initiation, terms, conditions, or termination of such employment;
>
> 3. Any other matter arising from or concerning the employment between the Employee and the Company including, by way of example and without limitation: * * * Compensation, bonus, and wage and hour claims under federal, state or local statutes, ordinances, regulations, orders or common law, including the Fair Labor Standards Act.

Pet. App. 160a.

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[1] Plaintiffs were employees of the company Morgan Tire & Auto, LLC, which was the original defendant in this case and has since been acquired by Bridgestone. For the sake of simplicity, this petition refers to the defendant company at all times as Bridgestone.

The EDR Plan also provides that it "is the exclusive, final and binding method by which Disputes can be resolved. The *only* method by which a Party can seek relief in a court of law is in accordance with the provisions of the [FAA]. Except as provided herein, the Parties shall have no right to litigate a Dispute in any other forum." Pet. App. 162a.

The EDR Plan contains an express promise to forgo class or representative actions and instead to arbitrate all claims on an individual basis. The relevant language states:

> Parties to the EDR Plan waive any right they may otherwise have to pursue, file, participate in, or be represented in Disputes brought in any court on a class basis or as a collective action or representative action. This waiver applies to any Disputes that are covered by the EDR Plan to the full extent such waiver is permitted by law. All Disputes subject to the EDR Plan must be mediated and arbitrated as individual claims. The Plan specifically prohibits the mediation or arbitration of any Dispute on a class basis or as a collective action or representative action.

Pet. App. 164a-165a.

Despite their promise to arbitrate claims on an individual basis and to forgo class or representative actions, Pet. App. 191a-194a, plaintiffs now seek to disregard that agreement and bring representative claims against Bridgestone for alleged Labor Code violations involving a broad class of current and former employees.

In their complaint, plaintiffs listed seven "causes of action" alleging separate wage-and-hour violations against Bridgestone under the California Labor Code. Pet. App. 209a–221a. The alleged violations included failure to pay overtime, failure to provide mandatory meal and rest periods, failure to abide by minimum-wage requirements, failure to provide timely pay upon discharge, failure to issue paychecks in the state-mandated timeframe, and failure to provide itemized wage statements. For each alleged violation, plaintiffs sought individual remedies to redress their alleged personal injuries.[2] In addition, plaintiffs also invoked the California Private Attorneys General Act of 2004 (PAGA) to collect civil penalties for the same Labor Code violations involving all current and former employees.[3]

PAGA allows an "aggrieved employee" to bring a representative claim against his employer "for a violation of" the California Labor Code, seeking to collect monetary penalties for violations "on behalf of

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[2] *See* Pet. App. 211a (Count I, ¶54) (seeking to recover "unpaid overtime compensation"); Pet. App. 214a (Count II, ¶66) (seeking to recover "one additional hour of pay" for "each work day that [a] meal period was not provided"); Pet. App. 215a (Count III, ¶76) (seeking to recover "one additional hour of pay" for "each work day that [a] rest period was not provided"); Pet. App. 216a (Count IV, ¶82) (seeking to recover "the unpaid balance of their minimum wage compensation"); Pet. App. 219a (Count V, ¶91) (seeking to recover "penalty wages for each day they were not paid" after being discharged, due to failure to pay full wages owed upon discharged); Pet. App. 220a (Count VI, ¶98) (seeking "all remedies available" for failure to pay wages on time); Pet. App. 220a-221a (Count VII, ¶¶101-05) (seeking "actual damages caused by" Bridgestone's failure to furnish a timely and "accurate itemized wage statement in writing").

[3] *See* Pet. App. 211a-221a (¶¶55, 67, 77, 85, 92, 99, 107).

himself or herself and other current or former employees." Pet. App. 35a. The penalty is $100 per employee per pay period for the first violation, and $200 for each subsequent violation per employee per pay period. Pet. App. 36a. The statute provides that 75 percent of any civil penalties recovered by the plaintiff under PAGA must be distributed to the California Labor and Workforce Development Agency, and the remaining 25 percent must be distributed among all "aggrieved employees." Pet. App. 37a-38a. A prevailing employee is also "entitled to an award of reasonable attorney's fees and costs." Pet. App. 37a.

The ability of employees to collect civil penalties under PAGA for Labor Code violations committed by their employer is *in addition to* the ordinary remedies available to them individually under California law. PAGA expressly does not "limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." Pet. App. 37a. Thus, for example, if an employer violates the Labor Code by failing to pay overtime wages, then an affected employee may bring an individual action under Cal. Labor Code § 1194 seeking to recover the unpaid balance of wages (plus interest, costs, and attorneys' fees), and *also* may bring PAGA claims to collect additional "civil penalties" for the same violations involving all "current or former employees," Pet. App. 35a. That is what plaintiffs did in this case: their complaint seeks individual recovery for all Labor Code violations affecting them personally, and then invokes PAGA to collect monetary penalties for the same violations involving all current and former employees.

C. The Proceedings Below

Plaintiffs brought their claims in the California Superior Court of Santa Clara County. Bridgestone filed a motion to compel individual arbitration based on the agreements signed by plaintiffs, which the court granted on June 21, 2011. Pet. App. 32a–34a. Plaintiffs appealed.

On June 4, 2013, the Court of Appeal reversed. Although the court recognized that plaintiffs' PAGA claims fell within the scope of their arbitration agreement, which waived any right to bring "representative" claims, the court held the waiver invalid for reasons of state public policy—namely, the state's policy interest in employees' serving as "private attorneys general," assisting the state in enforcing the California Labor Code by bringing representative claims against their employers seeking to impose class-wide liability. Pet. App. 25a. The court further held that "the FAA d[oes] not require enforcement of an arbitration agreement that prevent[s] an employee from acting as a private attorney general under the PAGA," because enforcing such an agreement would bar plaintiffs from vindicating their statutory rights under PAGA. Pet. App. 21a. The court recognized that "PAGA does not give an employee any substantive rights," Pet. App. 26a, and that an employee who waives his right to bring PAGA claims thus "retains his or her individual claim for damages or restitution separate from the right to pursue civil penalties under the PAGA" on behalf of his fellow employees. Pet. App. 29a. Nonetheless, the court held that the right to bring PAGA claims is "a statutory right intended for a predominantly public purpose"—namely, to

advance the state's policy interest in enforcing the Labor Code—and that the FAA must give way to that right. Pet. App. 24a.

On July 11, 2013, Bridgestone filed a petition for review in the California Supreme Court. On September 11, 2013, the court granted review and ordered that the case be held pending its consideration on the merits of *Iskanian v. CLS Transportation of Los Angeles*. Pet. App. 3a.[4]

Iskanian involved the same issue present here: The plaintiff there sought to bring PAGA claims involving a broad class of fellow employees, despite having signed an individual arbitration agreement promising not to bring representative claims. The question presented was whether the FAA required enforcement of his representative-PAGA waiver.

On June 23, 2014, the California Supreme Court issued its decision in *Iskanian*, holding in an opinion by Justice Goodwin Liu that the FAA does not require enforcement of an individual arbitration agreement that includes a representative-PAGA waiver. Pet. App. 46a–135a. The court acknowledged that if the FAA applied to PAGA claims, it would require enforcement of an agreement to arbitrate such claims on an individual basis. That conclusion is mandated by the preemption analysis of *Concepcion*. After all, using a "representative" action to seek damages "on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature," and "[u]nder *Concepcion*, such an action

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[4] A petition for certiorari in *Iskanian* is now pending before this Court in No. 14-341.

could not be maintained in the face of a class waiver." Pet. App. 100a.

But despite that frank admission, the court concluded that California may refuse to enforce representative-PAGA waivers without the need for any preemption analysis at all, on the ground that PAGA claims fall entirely outside the scope of the FAA. The court held that, as a matter of federal law, the FAA contains an implicit exception for claims brought by private parties when state law treats the claims as being brought "on behalf of the state"—which the court found to be true of PAGA claims.[5] The court justified this exception based on the supposedly limited purpose of the FAA to require arbitration only for "disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency." Pet. App. 95a.

Justice Chin wrote a separate concurrence in which he rejected the majority's reasoning. As he explained, the majority's sweeping holding means that "the state may, without constraint by the FAA, simply ban arbitration of PAGA claims and declare agreements to arbitrate such claims unenforceable," a result which has no basis in the text of the FAA and "no case law support." Pet. App. 115a (Chin, J., concurring). The novel exception created by *Iskanian* thus opens up a gaping loophole in the basic principle that, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the * * *

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[5] The court construed PAGA claims to be brought "on behalf of the state" even though that is directly contrary to PAGA's statutory text, which authorizes claims to be brought "on behalf of [the plaintiff] and other current or former employees." Pet. App. 35a.

conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).[6]

Because *Iskanian* squarely controls the FAA issue here concerning the enforceability of Bridgestone's individual arbitration agreements, the California Supreme Court issued an order vacating and remanding this case to apply *Iskanian*. Pet. App. 1a. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The California Supreme Court's creation of a novel, implicit exception to the FAA is directly contrary to the FAA's text and this Court's precedents. The FAA requires the enforcement of a provision in a "commercial" contract "to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2. This Court has made clear that the FAA applies to all claims arising out of an employment relationship, including state statutory claims. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). And here it is indisputable that plaintiffs' PAGA claims alleging violations of the California Labor Code arise out of their employment

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[6] Nevertheless, Justice Chin explained that he would hold the arbitration agreement unenforceable for a different reason. Namely, it prohibited the plaintiff from "asserting his statutory right under PAGA" to bring representative claims "in any forum," and thus violated the so-called "effective vindication" doctrine. Pet. App. 114a (Chin, J., concurring). He did not explain how that conclusion can be squared with this Court's teaching that the FAA requires "effective vindication" only of *federal* claims protecting *substantive* rights, and does not apply to *state* statutory claims or purely *procedural* rights, such as the right to proceed on a "representative" basis under PAGA. *See infra* Part I.C.

relationship with Bridgestone. Accordingly, the FAA applies regardless of whether plaintiffs' ability to bring PAGA claims may serve important state policy goals.

The only way the California Supreme Court could reach a contrary result was by holding that the FAA contains an unwritten exception for claims brought by private parties when state law treats the claims as being brought "on behalf of the state." That newly invented exception has no basis in federal law. Under the FAA's text and controlling precedent, it makes no difference whether California, for its own policy reasons, considers PAGA plaintiffs' claims to be brought "on behalf of the state." The lower court's contrary decision cannot be squared with the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding *any* state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added).

Allowing the decision below to stand would give states a roadmap to circumvent this Court's decision in *Concepcion*, which held that states cannot prohibit the enforcement of arbitration agreements that require claims to be adjudicated on an individual basis. Under the reasoning of the California Supreme Court, states could give plaintiffs a non-waivable right to pursue any claim on a representative basis simply by deeming the claim to be brought "on behalf of the state." Even worse, the decision below would eviscerate the FAA more broadly because any claim that a state deems to be brought "on behalf of the state" would become entirely exempt from the FAA, which would have repercussions far beyond the

limited context of class and representative actions. In light of the California Supreme Court's clear error and the continuing pattern of judicial hostility to arbitration, summary reversal would be appropriate to enforce this Court's authority to interpret the FAA. At the very least, this case should be granted and scheduled for argument on a consolidated basis with the petition currently pending before the Court in *Iskanian*, No. 14-341.

I. THE CALIFORNIA SUPREME COURT ERRED BY INVENTING A NOVEL EXCEPTION TO THE FAA

A. The FAA Applies To Statutory Claims Arising Out Of An Employment Relationship

In determining whether the FAA applies to a particular claim, the FAA itself expressly provides that the only relevant question is whether the "controversy" "aris[es] out of [the commercial] contract or transaction" between the parties. 9 U.S.C. § 2. This Court's precedent makes clear that the FAA applies to state statutory claims "arising from [an] employment relationship." *Circuit City Stores,* 532 U.S. at 123. Indeed, in *Perry v. Thomas*, 482 U.S. 483, 489-92 (1987), this Court held that the FAA applies to wage-and-hour claims under the California Labor Code, which is the same body of substantive law at issue here.

"[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the Act in controversies based on statutes." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226-27, 240 (1987) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473

U.S. 614, 626-27 (1985) (internal quotation marks omitted)). Accordingly, this Court has applied the FAA "without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration." *Mitsubishi Motors*, 473 U.S. at 627 (citing *Southland Corp.*, 465 U.S. at 15).

The broad scope of the FAA is well illustrated by this Court's recent unanimous decision in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam), where the plaintiffs alleged that a medical facility had injured patients in its care. The lower court attempted to narrow the FAA by creating a novel exception in the statute for claims that "collaterally derive from" the contract between the parties. *Id.* at 1203-04. This Court summarily reversed.

B. The FAA Does Not Exempt Claims Treated By State Law As Being Brought "On Behalf Of The State"

Just like any other claim asserting violations of the California Labor Code, PAGA claims arise out of the employment relationship. State law makes clear that a person may not bring a PAGA action unless he or she is "an aggrieved employee," Pet. App. 35a, defined as one "who was employed by" the alleged Labor Code violator and "against whom" at least one of the alleged violations "was committed," Pet. App. 35a. Accordingly, as the *Iskanian* majority recognized, only "employees who ha[ve] been aggrieved by the employer" may bring PAGA actions. Pet. App. 100a. And as Justice Chin emphasized in his concurrence—without dispute from the majority—it is necessarily true that when an employee brings a PAGA claim, the "dispute arises,

first and fundamentally, out of [the employment] relationship." Pet. App. 115a (Chin, J., concurring). Therefore, because PAGA claims "aris[e] out of [the commercial] contract or transaction" between employer and employee, 9 U.S.C. § 2, the FAA applies.

The California Supreme Court offered various reasons in support of its conclusion that the FAA nevertheless contains an exception for PAGA claims, but none of these reasons has any merit. *First*, the court held that a PAGA claim "lies" entirely "outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship," but is instead "a dispute between an employer and the *state*." Pet. App. 98a. Under the FAA, however, it is entirely irrelevant whether state law treats a suit brought by a private employee as a dispute "between an employer and an employee" or "between an employer and the state." The sole relevant criterion is whether the plaintiff's claim "aris[es] out of [the] contract [or] transaction" between the parties who have agreed to arbitrate. 9 U.S.C. § 2. That condition is met where, as here, an employee brings statutory claims arising from his or her employment relationship. *See Circuit City Stores,* 532 U.S. at 123. The parties' arbitration agreement is thus enforceable under the FAA. There is "nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Southland Corp.*, 465 U.S. at 10-11. Just as the statute "includes no exception for personal-injury or wrongful-death claims," *Marmet*, 132 S. Ct. at 1203, neither does it include any exception for claims considered by state law to be brought "on behalf of the state."

By relying on the notion that "the state is the real party in interest," Pet. App. 98a–99a, the court below flatly ignored the teaching of this Court's recent decision in *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014). At issue in *Hood* was whether the Class Action Fairness Act (CAFA), 28 U.S.C. § 1453, applied to an action brought by a State seeking restitution for injuries suffered by a large group of its citizens. The CAFA statute authorized removal to federal court in "mass action" cases, involving "monetary relief claims of 100 or more persons." *Id.* at 739 (citation omitted). The defendant sought to remove the State's lawsuit, arguing that even though the State was the only named "person" who was a plaintiff, the suit nonetheless qualified as a "mass action" because the State's many citizens were the "real parties in interest." *Id.* at 741.

This Court unanimously rejected that argument because the "real party in interest" was irrelevant under the statutory text. As the Court explained, "the question in this case is not simply whether there exists some background principle of analyzing the real parties in interest to a suit; the question is whether Congress intended that courts engage in that analysis when deciding whether a suit is a mass action." *Id.* at 745. The same is true here: The question is not whether the named plaintiffs in a PAGA suit are bringing their claims on their own behalf or rather "on behalf of the state," such that the state is the "real party in interest." The question instead is whether Congress indicated that this distinction makes any difference under the FAA. The answer is no, because the text of the FAA displays no regard for whether state law treats a private party's claim as being brought on behalf of the state. If the

parties have agreed to submit their claims to arbitration, and the claims "aris[e] out of" their contractual relationship, 9 U.S.C. § 2, then it is simply irrelevant whom the claims are brought "on behalf of."

Second, in an attempt to find some support in precedent, the California Supreme Court relied on *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), which held that private arbitration agreements do not prevent the state itself from bringing an action to enforce federal law. Pet. App. 97a-98a. In *Waffle House*, the EEOC brought an enforcement action, and the defendant employer argued that the EEOC was bound by a *private* arbitration agreement that the company had signed with its employees. This Court rejected that argument, holding that the EEOC could not be compelled to arbitrate because it was not "a party to" the arbitration agreement and had never "agreed to arbitrate its claims." 534 U.S. at 294.

Waffle House stands only for the proposition that the FAA does not "place[] any restriction on a *nonparty*'s choice of a judicial forum," *id.* at 289 (emphasis added), and does not bind a "nonparty" to the arbitration agreement, *id.* at 294. That principle has no purchase here, where the plaintiffs *are* parties to an agreement to arbitrate their claims on an individual basis. Enforcing that agreement would leave the state free to bring its own broad-based enforcement action, and would bind only the private parties who have agreed to be bound. If anything *Waffle House* strengthens the case for enforcement in this situation by stressing that the FAA's entire point is to "ensure[] the enforceability of private agreements to arbitrate." *Id.* at 289.

Third, turning to policy considerations, the California Supreme Court claimed that the FAA does not apply to PAGA claims because they are "fundamentally a law enforcement action designed to protect the public and not to benefit private parties." Pet. App. 98a. The court found it significant that "the [PAGA] plaintiff represents the same legal right and interest as state labor law enforcement agencies," that 75 percent of the penalties recovered under PAGA must be distributed to the State, and that "an aggrieved employee's action * * * functions as a substitute for an action brought by the government itself." Pet. App. 98a-99a. But once again, such state policy considerations are entirely irrelevant under the FAA because they have nothing to do with whether the employees' PAGA claims "aris[e] out of" their commercial "contract or transaction" with their employer, which is all that matters for FAA purposes. 9 U.S.C. § 2.

In *Gilmer v. Interstate/Jonhson Lane Corp.*, this Court specifically rejected the notion that statutory claims fall outside the scope of the FAA when the underlying statute is "designed not only to address individual grievances, but also to further important social policies." 500 U.S. 20, 27 (1991). Although the plaintiff's claim served the EEOC's interest there in enforcing federal law, this Court affirmed that "mere involvement of an agency in the enforcement of a statute is not sufficient to preclude arbitration." *Id.* at 28-29. *See also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258-59 (2009) (same); *see also Preston*, 552 U.S. at 358 (noting that *Gilmer* "considered and rejected a similar argument, namely, that arbitration of age discrimination claims would undermine the role of the Equal Employment Opportunity

Commission (EEOC) in enforcing federal law"). As *Concepcion* reaffirmed, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. Thus, as Justice Chin recognized, the FAA "place[s] a limit on the ability of a state, for policy reasons, to 'enhance' its public enforcement capabilities by authorizing employees who have contractually agreed to arbitrate their statutory PAGA claims to ignore that agreement and pursue those claims in court." Pet. App. 118a (Chin, J., concurring).

The state's policy interests are particularly irrelevant here. Allowing individual arbitration of PAGA claims would hardly hamstring California's ability to enforce its employment laws. As was true in *Gilmer*, the State's "role in enforcing [the statute]" here "is not dependent on the filing of a [PAGA claim]; the [State] may receive information concerning alleged violations * * * from any source, and it has independent authority to" investigate and bring enforcement actions. 500 U.S. at 28. Indeed, as the California Supreme Court admitted in *Iskanian*, PAGA leaves employees completely "free to forgo the option of pursuing a PAGA action" altogether. Pet. App. 99a. It is thus difficult to maintain that allowing employees to choose to arbitrate their claims on an individual basis somehow critically undermines the State's interest in law enforcement. If employees can forgo representative-PAGA claims altogether, there is no reason they cannot waive them as a matter of contract.[7]

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[7] As a practical matter, PAGA claims rarely if ever result in the collection of large penalties for the State's coffers, but are

In sum, none of the reasons adduced in *Iskanian* support its sweeping and unprecedented holding. Indeed, since *Iskanian* was decided, federal district courts have overwhelmingly rejected its reasoning, and have held instead that the FAA requires enforcement of representative-PAGA waivers. *See Lucero v. Sears Holdings Mgmt. Corp.*, No. 14-cv-1620 AJB (WVG), 2014 WL 6984220, at *6 (S.D. Cal. Dec. 2, 2014); *Mill v. Kmart Corp.*, No. 14-cv-02749-KAW, 2014 WL 6706017, at *7 (N.D. Cal. Nov. 26,

(continued…)

almost always used to pressure defendants into agreeing to large "in terrorem" settlements for the benefit of private plaintiffs and their counsel. *Concepcion*, 131 S. Ct. at 1752 (citation omitted). PAGA claims are typically settled alongside ordinary individual claims, and parties are careful to attribute the vast majority of the settlement payment to the non-PAGA claims, thus avoiding distributing 75 percent of the total to the State. *See, e.g.*, *Franco v. Ruiz Food Prods., Inc.* No. 1:10-cv-2354, 2012 WL 5941801 (E.D. Cal. Nov. 27, 2012) ($10,000 allocated to PAGA claim out of $2.5 million settlement); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-cv-324, 2012 WL 5364575 (E.D. Cal. Oct. 31, 2012) ($10,000 allocated to PAGA claim out of $3.7 million settlement); *McKenzie v. Fed. Express Corp.*, No. 10-2420, 2012 WL 2930201 (C.D. Cal. July 2, 2012) ($82,500 allocated to PAGA claim out of $8.25 million settlement); *Jack v. Hartford Fire Ins. Co.*, No. 3:09-cv-1683-MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) ($3,000 allocated to PAGA claim out of $1.2 million settlement); *Chu v. Wells Fargo Inv., LLC*, Nos. C 05-4526 & C 06-7924, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) ($10,000 allocated to PAGA claim out of $6.9 million settlement); *Louie v. Kaiser Found. Health Plan, Inc.*, No. 08-cv-0795 IEG RBB, 2008 WL 4473183, at *2-3 (S.D. Cal. Oct. 6, 2008) ($33,333.33 allocated to PAGA claim out of $5.4 million settlement); *see also Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 589 (2010) (upholding multi-million-dollar settlement agreement that allocated zero dollars to the PAGA claim).

2014); *Martinez v. Leslie's Poolmart, Inc.*, No. 8:14-cv-01481-CAS (CWX), 2014 WL 5604974, at *5 (C.D. Cal. Nov. 3, 2014); *Ortiz v. Hobby Lobby Stores, Inc.*, No. 2:13-CV-01619, 2014 WL 4961126, at *9 (E.D. Cal. Oct. 1, 2014); *Langston v. 20/20 Cos.*, No. EDCV 14-1360 JGB SPX, 2014 WL 5335734, at *7 (C.D. Cal. Oct. 17, 2014); *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW SSX, 2014 WL 5088240, at *12 (C.D. Cal. Oct. 7, 2014); *Fardig v. Hobby Lobby Stores Inc.*, No. SACV 14-00561 JVS, 2014 WL 4782618, at *4 (C.D. Cal. Aug. 11, 2014).

Before *Iskanian*, multiple federal district courts reached the same conclusion. *See, e.g.*, *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845-46 (N.D. Cal. 2012); *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298, 1304-05 (N.D. Cal. 2013); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1140-42 (C.D. Cal. 2011); *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011).[8] These cases underscore the weakness of *Iskanian*'s rationale.

C. Plaintiffs Cannot Avoid Enforcement Of Their Agreement On The Ground That It Would Bar Them From Vindicating Their Statutory Rights

Justice Chin's concurrence suggested that due to the "effective vindication" doctrine, the FAA does not require enforcement of arbitration agreements that contain representative-PAGA waivers, which preclude plaintiffs from bringing representative-

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[8] *See generally* Law.com, "The California Divide: Federal Courts Refuse to Follow State Supreme Court's *Iskanian* Decision," *available at* http://www.law.com/sites/jdsupra/2014/10/24/the-california-divide-federal-courts-refuse-to-follow-state-supreme-courts-iskanian-decision/ (last visited Dec. 21, 2014).

PAGA claims "in any forum." Pet. App. 113a-114a (Chin, J., concurring). That is wrong for two reasons. First, the "effective vindication" doctrine applies only to ensure the vindication of *federal* rights, and does not require the FAA to give way for the sake of *state* statutory claims. And second, in any event, enforcing the representative-PAGA waiver at issue here would leave plaintiffs perfectly free to vindicate their own personal substantive rights through individual claims under the California Labor Code.

1. The "Effective Vindication" Doctrine Does Not Apply To State-Law Claims

The "effective vindication" doctrine "originated as dictum" and has never been applied by this Court to invalidate an arbitration agreement. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). To the extent the doctrine has any validity, it applies only to rights established in *federal* statutes, not in state statutes. As a matter of federal law under the FAA, a party that has "made the bargain to arbitrate * * * 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*, 473 U.S. at 628 (emphasis added). The FAA thus "requires courts to enforce agreements to arbitrate according to their terms * * * unless [that] mandate has been overridden by a contrary *congressional* command." *CompuCredit Corp. v. Greenwood* 132 S. Ct. 665, 669 (2012) (emphasis added) (internal quotation marks omitted).

As this Court recently explained, the "effective vindication" doctrine is based on the principle that "competing *federal* policies" should be harmonized

wherever possible, such that the FAA should not be read to cut off "*federal* statutory rights" that Congress has specifically granted. *Italian Colors*, 133 S. Ct. at 2310 (emphases added). But where employees agree to waive *state-law* claims, the FAA requires enforcement of that agreement as a matter of federal law, which no state policy can trump. Even the dissent in *Italian Color*s recognized that a claim based on state law "could not possibly implicate the effective-vindication rule," which "comes into play only when the FAA is alleged to conflict with another *federal* law," because the FAA has "no earthly interest (quite the contrary) in vindicating [state] law." *Id.* at 2320 (Kagan, J., dissenting).

Numerous other courts have likewise recognized that the effective-vindication doctrine applies only when *federal* statutory rights are at stake. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) ("*Mitsubishi*, *Gilmer*, [*Randolph*], and similar decisions are limited to federal statutory rights."); *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1185 (Fla. 2013) (vindication-of-rights defense is limited to "claims brought under *federal* statutes"); *see also Homa v. Am. Express Co.*, 494 F. App'x 191, 196 n.2 (3d Cir. 2012), cert. denied, 133 S. Ct. 2885; *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006) (the Supreme Court's vindication-of-rights cases "simply do not apply" when a plaintiff "seek[s] to enforce * * * rights provided by state law"); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir. 2004) (rejecting application of effective-vindication doctrine to claims not arising under federal statutes); *Brown v. Wheat First Secs., Inc.*, 257 F.3d 821, 826 (D.C. Cir. 2001) (effective-vindication doctrine addresses only

"whether dispute resolution under the FAA was consistent with the federal right-creating statute in question"); *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W.3d 892, 908 (Tenn. Ct. App. 2006) (doctrine does not apply where "no federally protected interest is at stake").

In accordance with all of these cases, the "effective vindication" doctrine simply does not apply in the context of rights granted under state law. If a party agrees to waive his state statutory rights, then that agreement is fully enforceable under the FAA and the Supremacy Clause as a matter of federal law.

2. Plaintiffs' Arbitration Agreement Allows Them To Vindicate Their Personal Substantive Rights

Even if the "effective vindication" doctrine required the FAA to accommodate state statutory rights, the doctrine would not apply here in any event because plaintiffs' representative-PAGA waiver leaves them perfectly free to vindicate *their own* substantive rights through individual claims under the California Labor Code. As this Court explained in *Italian Colors*, a party can effectively vindicate his rights as long as he is able to press his own *personal* rights in arbitration without impediment. *See* 133 S. Ct. at 2311. A party who waives his right to bring representative-PAGA claims does not forfeit any of his own substantive rights, but only forgoes the procedural right to serve as a private attorney general on behalf of the State or his fellow employees.

As the California Supreme Court has recognized, PAGA "does not create property rights or any other substantive rights. Nor does it impose any legal obligations." *Amalgamated Transit Union, Local 1756*

v. Superior Court, 46 Cal. 4th 993, 1003 (2009). Instead, PAGA is "simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies." *Ibid.*

The civil penalties available under PAGA are *in addition to*, not instead of, the ordinary remedies available under state law that allow employees to vindicate their own personal substantive rights under the California Labor Code. This point is underscored by the fact that plaintiffs here brought individual claims seeking individual remedies for all of the Labor Code violations they allege, and they are seeking to collect PAGA penalties *on top of* those individual remedies. *See supra* pp. 8-9 & n.2. The individual remedies suffice to vindicate plaintiffs' *personal* rights under the Labor Code, quite apart from the civil penalties they seek to collect "on behalf of the state" to vindicate the state's rights through the procedural device of PAGA.

For that reason, even though plaintiffs have waived their procedural right under PAGA to act as "private attorneys general" and to bring representative claims against their employer on behalf of the state, plaintiffs are free to vindicate their own *personal* substantive rights through ordinary wage-and-hour claims or other individual claims under state law, just as they were able to do before PAGA was enacted in 2004. "[T]he individual suit that was considered adequate to assure 'effective vindication' of [employees' rights] before adoption of [PAGA] procedures did not suddenly become

'ineffective vindication' upon [PAGA's] adoption." *Italian Colors*, 133 S. Ct. at 2311.

It cannot be suggested that PAGA gives individuals a non-waivable "personal" right to bring "representative" claims on behalf of the state and/or their fellow employees. If that were possible, of course, then vindicating such a right might require the availability of representative actions. But that is not possible, because otherwise states could easily circumvent *Concepcion* and *Italian Colors* by giving individuals a non-waivable "personal" right to bring class-action claims. That cannot be. Just as the FAA requires the enforcement of class waivers, so too it requires the enforcement of "representative" PAGA waivers, regardless of whether state law gives plaintiffs a right to bring such claims.

II. THIS IS A CASE OF EXCEPTIONAL IMPORTANCE

This case presents an issue of exceptional importance because the decision below continues the pattern of "judicial hostility towards arbitration" that many lower courts have carried out in defiance of this Court's authoritative interpretation of the FAA. *Concepcion*, 131 S. Ct. at 1747. The California Supreme Court has created a novel rule of federal law without any basis in text or precedent that is transparently designed to circumvent this Court's decision in *Concepcion*, and has the broader effect of subverting the FAA's federal policy favoring the enforcement of private arbitration agreements according to their terms. Indeed, the novel exception to the FAA created by the lower court goes far beyond subverting this Court's decision in *Concepcion*: By declaring that the FAA does not apply *at all* to any

claims that state law considers to be "brought on behalf of the state," the California Supreme Court has opened a gaping loophole that would allow California and other states to declare entire categories of claims non-arbitrable.

Under the *Iskanian* rule, state courts have license to abrogate this Court's FAA precedents simply by labeling state-law claims to be brought "on behalf of the state." For example, in *Southland Corp.*, 465 U.S. at 4, if California had deemed the state Franchise Investment Law claims at issue there to be "brought on behalf of the state," then the arbitration agreement at issue would no longer be enforceable. In *Perry v. Thomas*, 482 U.S. at 486, if California had deemed the State to be the "real party in interest" for the wage-collection claims at issue, then the plaintiffs would no longer be bound by their agreement to arbitrate. And in *Concepcion*, 131 S. Ct. at 1748, where the plaintiffs were seeking to impose massive class-wide liability on the defendant in contravention of their express contractual promise to arbitrate on an individual basis, the case would have come out differently if only they were seeking to impose that liability "on behalf of the state." Indeed, that scenario precisely describes the present case, where California's highest court has held that a single employee may disregard his individual arbitration agreement and bring claims against his employer for Labor Code violations involving *all* of his fellow employees, past and present, because of the State's policy interest in enforcing its laws.

This Court has recognized the exceptional importance of enforcing its FAA precedents by summarily reversing a steady stream of state-court

decisions attempting to narrow the FAA in recent years. *See, e.g.*, *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 504 (2012) (per curiam); *Marmet*, 132 S. Ct. at 1204; *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24, 26 (2011) (per curiam) (unanimously holding that state courts "have a prominent role to play as enforcers of agreements to arbitrate," and may not "fail[] to give effect to the plain meaning of the Act" (internal quotation marks omitted)).

As the Court explained in *Nitro-Lift*, "State courts rather than federal courts are most frequently called upon to apply the [FAA], including [its] national policy favoring arbitration," and it is therefore "a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." 133 S. Ct. at 501 (summarily reversing a decision by the Oklahoma Supreme Court that "ignored a basic tenet of the [FAA's] substantive arbitration law"). State courts "must abide by the FAA * * * and by the opinions of this Court interpreting that law." *Id.* at 503. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Ibid.* (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)). State courts cannot be allowed to defy this Court's precedents in order to find arbitration agreements unenforceable, because "the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" *Id.* (quoting *Concepcion*, 131 S. Ct. at 1747).

California in particular has demonstrated judicial hostility to arbitration, which has required this Court to reverse several California court decisions refusing

to enforce arbitration agreements under the FAA in recent decades. *See, e.g., Southland Corp.*, 465 U.S. 1; *Perry*, 482 U.S. 483; *Preston*, 552 U.S. 346; *Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."); *see also id.* at 1747 (noting that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts" (citing Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39, 54, 66 (2006))).

Against this backdrop of hostility to arbitration, summary reversal would be appropriate to enforce this Court's authority to interpret the FAA. The lower court's error is clear, the issue is cleanly presented, and oral argument is unnecessary to further elucidate the legal arguments. At the very least, however, given the importance of the issue and the damage done to the FAA by the lower court's decision, this Court should grant full review. Although this case presents the same question as the petition currently pending before this Court in the *Iskanian* petition, No. 14-341, the parties in the two cases have framed the issues differently, and as a result the Court's review would be enhanced by granting and consolidating the two cases.

CONCLUSION

For these reasons, the petition for certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

BETH HEIFETZ
Counsel of Record
ANTHONY J. DICK
SARAH A. HUNGER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.
20001-2113
(202) 879-3939
bheifetz@jonesday.com

Counsel for Petitioner

January 5, 2015

APPENDIX

APPENDIX A

Court of Appeal, Sixth Appellate District - No. H037271

S211962

IN THE SUPREME COURT OF CALIFORNIA
En Banc

MILTON BROWN et al., Petitioners,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;

MORGAN TIRE & AUTO, LLC et al., Real Party in Interest.

The above-entitled matter is transferred to the Court of Appeal, Sixth District, with directions to vacate its decision and reconsider the cause in light of *Iskanian v. CLS Transportation of Los Angeles* (2014) 59 Cal.4th 348, 391-392. (Cal. Rules of Court, rule 8.528(d).)

Cantil-Sakauye
Chief Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

_____
Associate Justice

APPENDIX B

Court of Appeal, Sixth Appellate District - No. H037271

S211962

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MILTON BROWN et al., Petitioners,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;

MORGAN TIRE & AUTO, LLC et al., Real Party in Interest.

The petition for review is granted.

Further action in this matter is deferred pending consideration and disposition of a related issue in *Iskanian* v. *CLS Transportation of Los Angeles,* S204032 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

Cantil-Sakauye
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

APPENDIX C

Court of Appeal of California, Sixth District.

MILTON BROWN et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;
MORGAN TIRE & AUTO, LLC, et al., Real Parties in Interest.

No. H037271.
June 4, 2013. REVIEW GRANTED September 11, 2013.

Appeal from the Superior Court of Santa Clara County, No. 110-CV178451, Peter Kirwan, Judge.

Initiative Legal Group, Capstone Law, Melissa Grant, Glenn A. Danas and Katherine W. Kehr for Petitioners.

No appearance for Respondent.

Klatte, Budensiek & Young-Agriesti, E.W. Klatte III, Summer Young Agriesti; Heikaus Weaver and Christopher Michael Heikaus Weaver for Real Parties in Interest.

OPINION

PREMO, J. —

The question presented in this case is whether the Federal Arbitration Act (FAA) (9 U.S.C. § 1-16) permits arbitration agreements to override the statutory right to bring representative claims under

the Labor Code Private Attorneys General Act of 2004 (PAGA) [i] (Lab. Code, § 2698 et seq.). [ii] We conclude that the FAA does not demand enforcement of such an agreement. A plaintiff suing for PAGA civil penalties is suing as a proxy for the state. A PAGA claim is necessarily a representative action intended to advance a predominately public purpose. When applied to the PAGA, a private agreement purporting to waive the right to take representative action is unenforceable because it wholly precludes the exercise of this unwaivable statutory right. *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [179 L.Ed.2d 742, 131 S.Ct. 1740] (*Concepcion*) does not require otherwise.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Milton Brown and Lee Moncada were employed by defendant Morgan Tire & Auto, LLC, doing business as Wheel Works. Both plaintiffs were nonexempt hourly employees. Brown was a general automotive service technician who had worked for defendant just under two years. Moncada was employed as a head mechanic for nine months.

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

civil penalties on behalf of themselves and all other aggrieved employees as allowed by the PAGA.

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

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

At the time plaintiffs filed this case, California law made arbitration agreements containing class action waivers [iii] unenforceable in virtually all consumer cases. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162-163 [30 Cal.Rptr.3d 76, 113 P.3d

1100] (*Discover Bank*).) *Gentry v. Superior Court* (2007) 42 Cal.4th 443 [64 Cal.Rptr.3d 773, 165 P.3d 556] (*Gentry*) made class action waivers unenforceable in wage and hour cases if the trial court found that a class action would be more effective in vindicating the employees' statutory rights. On April 27, 2011, the United States Supreme Court filed *Concepcion*, *supra*, 563 U.S. ___ [131 S.Ct. 1740], overruling *Discover Bank*. Although *Concepcion* did not mention *Gentry*, defendant promptly filed a motion to compel arbitration, arguing that *Concepcion* impliedly overruled *Gentry* as well as *Discover Bank*. Plaintiffs opposed the motion, arguing that defendant had waived its right to arbitrate and, in any event, *Concepcion* did not affect the *Gentry* rule. The superior court concluded that *Gentry* was no longer good law, found that defendant had not waived its right to arbitrate, and granted the "motion to compel individual arbitration." Plaintiffs filed a notice of appeal from that order.

(1) Ordinarily, an order compelling arbitration is not appealable and may be reviewed only after the parties complete arbitration and appeal from the judgment. (*Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1089 [122 Cal.Rptr.2d 131].) Writ relief is available in exceptional circumstances. (*United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1581 [283 Cal.Rptr. 8].) Since plaintiffs' arguments involve a rapidly developing area of the law, we notified the parties that we would consider the notice of appeal as a petition for writ of mandate. The matter proceeded as such and we issued an order to show cause. We

now conclude that plaintiffs are entitled to some of the relief they requested.

II. LEGAL FRAMEWORK

In its most generic form an arbitration agreement merely requires the parties to resolve their disputes by way of arbitration, a process that is intended to be simpler, less formal, and more expeditious than the process of resolving disputes in court. (*See Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628 [87 L.Ed.2d 444, 105 S.Ct. 3346] (*Mitsubishi*).) As arbitration agreements have evolved, they have added features to further simplify the process. One such feature is the class action waiver, which typically binds the parties to arbitrate their disputes on an individual basis, prohibiting collective or representative actions.

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

terms. . . ." (*Ibid.*) The parties agree that the FAA applies in this case.

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

Until 2011, *Discover Bank*, *supra*, 36 Cal.4th at pages 162 through 163, made class action waivers unenforceable if the arbitration agreement of which it is a part is a "consumer contract of adhesion," disputes between the parties will likely "involve small amounts of damages," and "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. . . ." And *Gentry*, *supra*, 42 Cal.4th at page 463, had held that in the case of alleged systematic, classwide Labor Code violations, a class action waiver may be unenforceable given the existence of specified factors and a trial court's conclusion that class arbitration "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration" and that "disallowance of the class action will likely lead to a less comprehensive enforcement

of overtime laws for the employees alleged to be affected by the employer's violations. . . ." (*Ibid.*)

(3) This state of the law changed in April 2011, when the United States Supreme Court filed *Concepcion*, *supra*, 563 U.S. ___, ___ [131 S.Ct. 1740, 1753], explicitly overruling *Discover Bank*. *Concepcion* held that the *Discover Bank* rule was preempted by the FAA because *Discover Bank* stood as an obstacle to the overall purpose of the FAA. (563 U.S. ___, ___ [131 S.Ct. at pp. 1748, 1751].) Notwithstanding the FAA's savings clause, courts may not invalidate an arbitration agreement based upon generally applicable contract principles, such as unconscionability, if those principles are applied in a fashion that disfavors arbitration. (563 U.S. at p. ___ [131 S.Ct. at p. ___ 1747].) *Concepcion* reasoned that, despite the *Discover Bank* requirements that the case involve a contract of adhesion, modest individual damages, and allegations of cheating, the rule would apply to virtually all consumer arbitration agreements. Thus, *Discover Bank* effectively inserted, retroactively, the requirement that all consumer arbitration agreements permit classwide arbitration. (*Id.* at p. ___ [131 S.Ct. at p. ___ 1744].) Classwide arbitration is fundamentally different than individual arbitration because it sacrifices the informality of the arbitration process, requires extensive procedural formality to protect absent class members, and greatly increases the risk to defendants by magnifying the potential liability in proceedings that are largely insulated from judicial review. (*Id.* at p. ___ [131 S.Ct. at p. ___ 1751].) Thus, requiring the parties to include classwide arbitration in all consumer arbitration agreements discourages, rather than encourages, arbitration as a

dispute resolution tool and, unless the parties had agreed to it, classwide arbitration directly conflicts with the requirement that arbitration agreements be enforced as written. Accordingly, the *Discover Bank* rule is preempted by the FAA. (563 U.S. at p. ___ [131 S.Ct. at p. 1751].) *Concepcion* did not mention *Gentry*.

III. THE QUESTIONS PRESENTED

Since *Concepcion* was decided there has developed a difference of opinion among our Courts of Appeal as to the effect of that case upon the enforceability of class action waivers in the employment context. (*See*, *e.g.*, *Iskanian v. CIS Transportation of Los Angeles LLC*, *supra*, review granted Sept. 19, 2012, *S204032* [*Concepcion* requires enforcement of class action waiver when applied to a PAGA claim]; *Franco v. Arakelian Enterprises, Inc.*, review granted Feb. 13, 2013, *S207760* [*Concepcion* does not require enforcement of a class action waiver that prohibits recovery under the PAGA].) Our Supreme Court has granted review in several cases to resolve some of these differences. The lead case before the Supreme Court is *Iskanian*, which the Supreme Court's Web site notes as presenting the following issues: "(1) Did [*Concepcion*] impliedly overrule [*Gentry*] with respect to contractual class action waivers in the context of non-waivable labor law rights? (2) Does the high court's decision permit arbitration agreements to override the statutory right to bring representative claims under the [PAGA]? (3) Did defendant waive its right to compel arbitration?"[iv]

In the present case, plaintiffs do not argue that *Gentry* applies to invalidate the class action waiver here. Accordingly, we express no opinion on that

issue. Plaintiffs do ask us to weigh in on the other two issues before the Supreme Court:

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

Second, does *Concepcion*, *supra*, 563 U.S. ___ [131 S.Ct. 1740] permit arbitration agreements to override the statutory right to bring representative claims under the PAGA?

Plaintiffs' third issue is not, as of this writing, before the Supreme Court. That is: Is the class action waiver preempted by the collective action requirement of the National Labor Relations Act (NLRA) (29 U.S.C. § 157)?

Discussion

1. Did Defendant Waive Its Contractual Right to Individual Arbitration?

i. Standard and Scope of Review

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.'" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 [8 Cal.Rptr.3d 517, 82 P.3d 727] (*St. Agnes*).) Because the facts in the present case are undisputed, we apply the independent standard of review.

(4) "Both state and federal law emphasize that no single test delineates the nature of the conduct that

will constitute a waiver of arbitration." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) *St. Agnes* used, as a guide, a six-point test used by most of the federal circuits to determine whether a party has waived the contractual right to arbitrate. That test requires a court to consider "'(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [*e.g.*, taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.'" (*Sobremonte v. Superior Court* [(1998)] 61 Cal.App.4th [980,] 992 [72 Cal.Rptr.2d 43], quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir. 1988) 849 F.2d 464, 467-468.)" (*Id.* at p. 1196.)

Defendant argues that since application of the FAA involves federal law, the three-factor test used by *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 694 is the applicable test. Since *Fisher* was decided, however, the Ninth Circuit has ruled that the determination of whether a party has waived the contractual right to arbitrate is a question of state law. (*Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1125-1126.) Accordingly, we apply the *St. Agnes* analysis.

ii. Acts Inconsistent with Right to Compel Arbitration

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

Plaintiffs argue that this case is like *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832 [133 Cal.Rptr.3d 350] (*Roberts*) or *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436 [140 Cal.Rptr.3d 206 (*Lewis*), in which the appellate courts rejected the defendants' argument that they delayed compelling arbitration because of a concern about enforceability that was cleared up by *Concepcion*. Neither case is on point. *Roberts* rejected the argument because *Concepcion* was decided more than a year *after* the defendant filed its motion to compel arbitration. (*Roberts*, *supra*, at p.

846, fn. 10.) That is, there had not yet been any change in the law when the defendant filed its tardy motion to compel arbitration.

In *Lewis*, the defendant had delayed filing a motion to compel arbitration until after *Concepcion* was filed. According to the defendant, that was because it believed the *Discover Bank* rule made the arbitration agreement unenforceable. But as the appellate court pointed out, the plaintiff had not filed a class action. In other words, *Discover Bank* was inapplicable to the action even before *Concepcion* overturned it. (*Lewis*, *supra*, 205 Cal.App.4th at p. 4.48.)

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

arbitration waiver." (*Gentry*, *supra*, 42 Cal.4th at p. 463.) Given the breadth of the *Gentry* rule and the nature of the claims raised here, it was reasonable for defendant to believe, prior to *Concepcion*, that a motion to compel individual arbitration was likely to fail. *Quevedo v. Macy's, Inc.* (C.D.Cal.2011) 798 F.Supp.2d 1122, 1129 (*Quevedo*) is precisely on point.

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

iii. Participation in Litigation/Prejudice to Plaintiffs

(6) Factors two through five of the St. Agnes test are related to the extent of the party's participation in

the judicial litigation. As to the sixth factor, prejudice, our courts "will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1203.) We assess prejudice in light of California's strong public policy favoring arbitration. (*Id.* at p. 1204, citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183, 832 P.2d 899].) "Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*St. Agnes*, *supra*, at p. 1204.) Prejudice may be found where the petitioning party used the judicial process to gain information it could not have gained in arbitration, waited until the eve of trial to seek arbitration, or delayed so long that evidence was lost. (*Ibid.*)

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

the litigation in order to take advantage of the judicial process prior to demanding arbitration.

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

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

2. The NLRA Does Not Make the Class Action Waiver Unenforceable

(7) On the merits, we first consider plaintiffs' argument that the FAA does not require enforcement of the class action waiver because that would impermissibly interfere with their rights to collective action granted by the NLRA. The NLRA makes it an unfair labor practice for an employer to interfere with an employee's right "to engage in . . . conceited activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157, 158.) Plaintiffs urge us to adopt the position taken by the National Labor Relations Board (NLRB) in *D. R. Horton* (2012) 357 NLRB No. 184 [*2012 NLRB LEXIS 11*], which held that a mandatory arbitration agreement prohibiting resolution of any employment-related disputes on a class or representative basis was a violation of the NLRA.

(8) D. R. Horton is not binding precedent. Although the NLRB's construction of the NLRA is entitled to great deference, the same deference is not accorded to the NLRB's interpretation of either the FAA or Supreme Court precedent. (*Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050, 1053.) The question is one of statutory interpretation; we apply the de novo standard of review. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [7 Cal.Rptr.2d 531, 828 P.2d 672].)

(9) Under the FAA, courts must enforce agreements to arbitrate according to their terms "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" (*CompuCredit Corp. v. Greenwood* (2012) 565 U.S. ___, [181 L.Ed.2d 586, 132 S.Ct. 665, 669], quoting *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 226 [96 L.Ed.2d 185, 107 S.Ct. 2332].)

(10) We find no congressional command in the NLRA that would preclude application of the FAA. Two California appellate courts have reached the same result. (*Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 514-515 [145 Cal.Rptr.3d 432]; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1132-1135 [144 Cal.Rptr.3d 198].) Federal district courts in the Ninth Circuit are in accord. (*See Morvant v. P.F. Chang's China Bistro, Inc.* (N.D.Cal. 2012) 870 F.Supp.2d 831, 845; *Jasso v. Money Mart Express, Inc.* (N.D.Cal. 2012) 879 F.Supp.2d 1038, 1047 ["[T]here is no language in the NLRA (or in the related Norris — LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA."].)

We join our state and federal colleagues in rejecting the argument.

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

i. Introduction

We now turn to plaintiffs' argument that the class action waiver is unenforceable as applied to the PAGA claim. Plaintiffs urge us to follow *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 503 [128 Cal.Rptr.3d 854] (*Brown*), which held that the FAA did not require enforcement of an arbitration agreement that prevented an employee from acting as a private attorney general under the PAGA. Defendant argues that *Brown* was wrongly decided and the reasoning of *Concepcion*, *supra*, 563 U.S. ___ [131 S.Ct. 1740] makes the instant agreement enforceable even to the extent it prevents plaintiffs from pursuing a representative PAGA action. Because there are no undisputed facts, the question is one of law calling for our de novo review. (*Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 833 [44 Cal.Rptr.3d 817].)

ii. Analysis

(11) The PAGA provides that any section of the Labor Code calling for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency (LWDA) "may, as an alternative, be recovered through a civil action brought by an aggrieved employee. . . ." (§ 2699, subd. (a).) For those Labor Code sections without a specified civil penalty, the PAGA establishes a default penalty and allows an aggrieved employee to bring a civil action to enforce

that penalty as well. (§ 2699, subds. (f), (g)(1).) In either case, the statute describes the private action as one brought by an aggrieved employee "on behalf of himself or herself and other current or former employees. . . ." (*Id.*, subds. (a), (g)(1).) As our Supreme Court has explained, an employee plaintiff suing under the PAGA "does so as the proxy or agent of the state's labor law enforcement agencies. The act's declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 [95 Cal.Rptr.3d 588, 209 P.3d 923 (*Arias*).) Indeed, the individual employee suing for PAGA penalties recovers only a fraction of the penalty assessed. Seventy-five percent of the penalty goes to the LWDA and 25 percent to the "aggrieved employees." (§ 2699, subd. (i).)

As we explained above, *Concepcion* clarified that, although the FAA savings clause allows arbitration agreements to be invalidated for the same reasons any other contract may be invalidated, general contract principles cannot be used in a way that disfavors arbitration. (*Concepcion*, *supra*, 563 U.S. at pp. ___, ___ [131 S.Ct. at pp. 1747, 1750].) *Concepcion* overturned the *Discover Bank* rule because *Discover Bank* effectively required all consumer arbitration agreements to include the option of class arbitration and, since class arbitration is much less desirable from a defendant's point of view, the rule discouraged arbitration agreements altogether. Thus, *Discover Bank* stood as an obstacle to the purposes of the FAA, which was to enforce arbitration agreements according to their terms and promote arbitration as a means for resolving disputes.

(563 U.S. at pp. ___-___[131 S.Ct. at pp. 1748-1749].) *Concepcion* did not consider employment contracts nor did the case address the validity of an arbitration agreement and class action waiver covering statutory rights.

(12) It is true that, in applying the FAA, the United States Supreme Court has uniformly held that statutory rights may be enforced in an arbitral forum as well as in a judicial forum. But the high court has just as consistently noted that a contract provision calling for arbitration of statutory rights is enforceable because arbitration is an acceptable method for vindicating the rights at issue. For example, in *Mitsubishi*, *supra*, 473 U.S. 614, the United States Supreme Court concluded that antitrust claims are arbitrable. (*Id.* at p. 624.) "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. . . . 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." (*Id.* at p. 628.)

Mitsubishi disapproved *American Safety Equipment Corp. v. J.P. Maguire & Co.* (2nd Cir.1968) 391 F.2d 821, 826-827, which held that, since Congress had designed the antitrust laws to promote the national interest, it must have intended such claims to be resolved in the courts. *Mitsubishi* concluded that the public benefit of the antitrust laws did not require adjudication in the courts since an antitrust cause of action was more compensatory than punitive. Although the law provides for treble damages, treble

damages are designed to compensate the injured plaintiff; they constitute a *private* remedy. (*Mitsubishi*, *supra*, 473 U.S. at pp. 635-636.)

Mitsubishi made it clear that some circumstances would make an arbitration agreement unenforceable. Noting that the contract before it contained both a choice-of-forum clause and a choice-of-law clause, the court 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." (*Mitsubishi*, *supra*, 473 U.S. at p. 637, fn. 19.) "[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; *see Shearson/American Express Inc. v. McMahon*, *supra*, 482 U.S. 220, 242 [holding that claims based on the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961-1968) are subject to arbitration: "[T]here is no inherent conflict between arbitration and the purposes underlying [the treble damages provision]."].)

(13) In sum, any statute providing a private remedy that may be effectively adjudicated in the arbitral forum must be arbitrated if that is what the parties have agreed to do. But neither *Mitsubishi* nor *Concepcion*, nor any other United States Supreme Court case of which we are aware, has held that the FAA requires enforcement of a private agreement that wholly prevents the exercise of a statutory right intended for a predominantly public purpose. *Brown*,

supra, 197 Cal.App.4th at page 503, upon which plaintiffs rely, distinguished *Concepcion* and other United States Supreme Court precedent, noting that none of the high court's cases address a statute like the PAGA.

In *Brown*, *supra*, 197 Cal.App.4th 489, the arbitration agreement prohibited the employee from suing as a private attorney general. *Brown* found the waiver unenforceable, holding, "If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorneys general actions to enforce state labor laws would, in large part, be nullified." (*Id.* at p. 502.) In the present case, the EDRP does not explicitly prohibit private attorney general actions but it does prohibit representative actions. Accordingly, it effectively prohibits the employee from prosecuting any PAGA claim at all.

(14) The PAGA is not the kind of law that serves both a remedial and deterrent purpose; the principal purpose of the PAGA is the public purpose of deterrence. It is beyond question that when the LWDA is acting upon alleged violations it is acting on behalf of the public. When the individual employee has brought the suit, he or she is likewise acting on behalf of the public. As our Supreme Court has stated: "[A]n aggrieved employee's action under the [PAGA] functions as a *substitute* for an action brought by the government itself. . . ." (*Arias*, *supra*, 46 Cal.4th at p. 986, italics added.) The PAGA "authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (Lab. Code, § 2699, subds. (a), (g)), and an action to recover civil penalties 'is fundamentally a

law enforcement action designed to protect the public and not to benefit private parties' (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17 [141 Cal.Rptr. 20, 569 P.2d 125])." (*Arias*, at p. 986.)

(15) The obvious public purpose of the law suggests that it is necessarily a representative action. Law enforcement does not take place on an individual basis. The PAGA does not give an employee any substantive rights. The PAGA merely allows the employee to act on behalf of the state when the employer violates other sections of the Labor Code. Assuming, without deciding, that a PAGA claim may be effectively prosecuted in the arbitral forum, it must proceed as a representative action, if at all, because the representative aspect is intrinsic to the claim. A PAGA action could hardly serve as a substitute for LWDA proceedings if the action were prosecuted by aggrieved employees one at a time. On this point we part company with *Quevedo*, *supra*, 798 F.Supp.2d at page 1141, in which the federal district court held that a class action waiver had to be enforced as applied to the PAGA claim, which meant that the plaintiff could pursue only an individual PAGA claim in the arbitration. Our conclusion, in line with *Brown*, *supra*, 197 Cal.App.4th at page 503, is that there are no separate individual claims in a PAGA action; the individual must bring a PAGA claim as a representative action on behalf of himself or herself and other aggrieved employees. (*See Urbino v. Orkin Services of California, Inc.* (C.D.Cal. 2011) 882 F.Supp.2d 1152, 1167.)

We recognize that *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20 [114 L.Ed.2d 26, 111 S.Ct. 1647] (*Gilmer*), held that an arbitration agreement in

a case under the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. § 621-634) was enforceable even though it precluded classwide adjudication of alleged violations. The court noted, "[I]t should be remembered that arbitration agreements will not preclude the *EEOC* [Equal Employment Opportunity Commission] from bringing actions seeking class-wide and equitable relief." (*Gilmer*, *supra*, at p. 32.) In the case of the PAGA, however, when the employee brings a PAGA claim it does so *in place of* the LWDA. Indeed, the employee can file a PAGA claim only if the LWDA has chosen not to pursue the action itself. (§ 2699.3.) Consequently, precluding the employee's action effectively extinguishes the claim and insulates the employer from liability for the penalties called for by the PAGA.

Citing *Marmet Health Care Center v. Brown* (2012) 565 U.S. ___ [182 L.Ed.2d 42, 132 S.Ct. 1201] (*Marmet*), defendant maintains that public policy is not a basis for refusing to enforce an arbitration agreement according to its terms. In *Marmet*, the West Virginia Supreme Court had held that the FAA did not preempt a categorical rule against predispute arbitration agreements applicable to personal injury claims against nursing homes. (*Marmet*, at p. ___ [132 S.Ct. at p. 1204].) The Supreme Court reversed. Quoting *Concepcion*, *supra*, 563 U.S. at page ___ [131 S.Ct. at page 1747], the Supreme Court explained, "As this Court reaffirmed last Term, '[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.' . . . 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*, *supra*, at pp. 1203-1204.) The present case is different.

(16) *Marmet* involved a state law that categorically prohibited individuals from agreeing to arbitrate routine common law claims for personal injury to themselves. Such claims are private claims that individuals may agree to have adjudicated by arbitration and, if they do, the FAA requires that the courts enforce their agreement. A PAGA claim is a statutory claim that provides a public remedy. It is true that plaintiffs agreed not to take any representative action with regard to their employment-related claims against defendant. But their agreement is unenforceable as applied to the PAGA. As our Supreme Court has counseled, arbitration 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.' [Citation.] 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 v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100 [99 Cal.Rptr.2d 745, 6 P.3d 669].) Waiver of the right to pursue a representative PAGA action (in court or in arbitration) is unenforceable under these general contract principles because it amounts to the waiver of a right established for a public reason and effectively exempts the employer from responsibility for its violation of the law.

(17) Furthermore, nothing in the PAGA "limit[s] an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." (§ 2699, subd. (g)(1).) Thus, the employee retains his or her individual claim for damages or restitution separate from the right to pursue civil penalties under the PAGA. To be sure, the PAGA provides only a remedy; it confers no substantive rights of its own. Since imposition of the PAGA's purely punitive civil penalties may easily be excluded from the scope of an arbitration agreement, we cannot predict that requiring representative adjudication of a PAGA claim will necessarily discourage arbitration of disputes concerning the substantive Labor Code violations. (*Concepcion*, *supra*, 563 U.S. at p. ___ [131 S.Ct. at p. 1751].) (18) Thus, our conclusion that a class action waiver is unenforceable when applied to the PAGA is not a categorical rule prohibiting arbitration of a certain type of claim.

(19) Finally, our conclusion does not require invalidating the EDRP as a whole. "[C]ourts may enforce contracts that illegally contravene public rights, so long as the objectionable provisions can be severed." (*Abramson v. Juniper Networks, Inc.* (2004)

115 Cal.App.4th 638, 658 [9 Cal.Rptr.3d 422].) (20) As applied to the PAGA claim, the EDRP's class action waiver amounts to the waiver of a right established for a public purpose and effectively exempts defendant from responsibility for its own alleged violation of the law. Accordingly, it is void to the extent it prevents plaintiffs from pursuing PAGA's civil penalties. Plaintiffs have offered no viable challenge to the remainder of the EDRP. It follows that respondent court erred in compelling individual arbitration of plaintiffs' PAGA claim.

There is no basis for requiring arbitration of the claim on a representative basis because defendant has not agreed to arbitrate any representative actions. (*See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, ___ [176 L.Ed.2d 605, 130 S.Ct. 1758, 1775] ["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"].) It follows that the PAGA claim must be excluded from the order compelling arbitration and stayed pending resolution of the arbitration.

IV. DISPOSITION

Let a writ of mandate issue directing respondent superior court to vacate its order granting defendant's motion to compel individual arbitration and stay this action. The court shall enter a new order (1) granting defendant's motion to compel arbitration with respect to all of plaintiffs' claims except the claim for civil penalties under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.), and (2) staying the action as to all of plaintiffs' claims, including the claim under the

Private Attorneys General Act, pending resolution of the arbitration. Each party to bear its own costs.

Rushing, P. J., and Elia, J., concurred.

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[i] The same question is presently pending before the California Supreme Court. (*See Iskanian v. CLS Transportation of Los Angeles LLC*, review granted Sept. 19, 2012, *S204032*.)

[ii] Further unspecified section references are to the Labor Code.

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

[iv] (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfmdist=0&doc_*id*=2019694&docjno=*S204032*> [as of June 4, 2013].)

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

MILTON BROWN and LEE MONCADA, individually, and on behalf of other members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"), Plaintiffs, vs. MORGAN TIRE & AUTO, LLC dba WHEEL WORKS, a Florida limited liability company, BRIDGESTONE RETAIL OPERATIONS, LLC, a Delaware limited liability company, BRIDGESTONE AMERICAS, INC., a Nevada corporation, DOES 1 through 10,	Case No. 110CV178451 Assigned to the Hon. Peter Kirwan Dept. 8 **ORDER GRANTING DEFENDANT MORGAN TIRE & AUTO, LLC DBA WHEEL WORKS' MOTION FOR AN ORDER COMPELLING PLAINTIFFS MILTON BROWN AND LEE MONCADA TO INDIVIDUAL ARBITRATION** **HEARING** Date: June 21, 2011 Time: 9:00 a.m. Dept: 8 Date Action Filed: August 31, 2010 Trial Date: Not Set

inclusive,

Defendants.

The Motions of Defendant Morgan Tire & Auto, LLC, dba Wheel Works ("Defendant") for (1) an order compelling Plaintiffs Milton Brown and Lee Moncada to binding arbitration; and (2) an immediate stay, came on regularly for hearing on June 21, 2011 at 9:00 a.m. in Department 8 of the above-entitled Court, before the Honorable Peter Kirwan. Initiative Law Group appeared on behalf of Plaintiffs Milton Brown and Lee Moncada ("Plaintiffs"). E.W. Klatte, III, of Rutan & Tucker LLP, appeared on behalf of Defendant.

Having considered the motion and supporting papers, Plaintiffs' opposition brief and supporting papers, Defendant's reply brief, Plaintiffs' notice of new authority, oral argument of the parties, and the record in this case, and good cause appearing therefore, IT IS HEREBY ORDERED as follows:

1. Defendant's Motion to Compel Arbitration is GRANTED; Although the parties participated in litigation for approximately six months, merely participating in litigation, by itself, does not result in a waiver of arbitration rights. Moreover, courts will typically not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses. *Saint Agnes Medical Center v. Pacificare 31 Cal. 4th 1187*. The party seeking to establish a waiver bears a heavy burden of proof. (*1189). The Court finds that in the instant case, plaintiffs have not meet the requisite burden.

2. Defendant's Motion for Immediate Stay is GRANTED.

IT IS SO ORDERED:

Dated: June 21, 2011

/s/ Peter H. Kirwan
Hon. Peter Kirwan
Judge of the Superior Court

APPENDIX E

LABOR CODE
SECTION 2698-2699.5

2698. This part shall be known and may be cited as the Labor Code Private Attorneys General Act of 2004.

2699. (a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice

required by this part, and any aggrieved employee is made whole.

(e) (1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of

its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g) (1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of

labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l) The superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.

2699.3. (a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

(B) If the agency intends to investigate the alleged violation, it shall notify the employer and the aggrieved employee or representative by certified mail of its decision within 33 calendar days of the postmark date of the notice received pursuant to paragraph (1). Within 120 calendar days of that decision, the agency may investigate the alleged violation and issue any appropriate citation. If the agency determines that no citation will be issued, it shall notify the employer and aggrieved employee of that decision within five business days thereof by certified mail. Upon receipt of that notice or if no citation is issued by the agency within the 158-day

period prescribed by subparagraph (A) and this subparagraph or if the agency fails to provide timely or any notification, the aggrieved employee may commence a civil action pursuant to Section 2699.

(C) Notwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part.

(b) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give notice by certified mail to the Division of Occupational Safety and Health and the employer, with a copy to the Labor and Workforce Development Agency, of the specific provisions of Division 5 (commencing with Section 6300) alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The division shall inspect or investigate the alleged violation pursuant to the procedures specified in Division 5 (commencing with Section 6300).

(i) If the division issues a citation, the employee may not commence an action pursuant to Section 2699. The division shall notify the aggrieved employee and employer in writing within 14 calendar days of certifying that the employer has corrected the violation.

(ii) If by the end of the period for inspection or investigation provided for in Section 6317, the division fails to issue a citation and the aggrieved employee disputes that decision, the employee may challenge that decision in the superior court. In such an action, the superior court shall follow precedents of the Occupational Safety and Health Appeals Board. If the court finds that the division should have issued a citation and orders the division to issue a citation, then the aggrieved employee may not commence a civil action pursuant to Section 2699.

(iii) A complaint in superior court alleging a violation of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall include therewith a copy of the notice of violation provided to the division and employer pursuant to paragraph (1).

(iv) The superior court shall not dismiss the action for nonmaterial differences in facts or theories between those contained in the notice of violation provided to the division and employer pursuant to paragraph (1) and the complaint filed with the court.

(B) If the division fails to inspect or investigate the alleged violation as provided by Section 6309, the provisions of subdivision (c) shall apply to the determination of the alleged violation.

(3) (A) Nothing in this subdivision shall be construed to alter the authority of the division to permit long-term abatement periods or to enter into memoranda of understanding or joint agreements with employers in the case of long-term abatement issues.

(B) Nothing in this subdivision shall be construed to authorize an employee to file a notice or to

commence a civil action pursuant to Section 2699 during the period that an employer has voluntarily entered into consultation with the division to ameliorate a condition in that particular worksite.

(C) An employer who has been provided notice pursuant to this section may not then enter into consultation with the division in order to avoid an action under this section.

(4) The superior court shall review and approve any proposed settlement of alleged violations of the provisions of Division 5 (commencing with Section 6300) to ensure that the settlement provisions are at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation. The provisions of the settlement relating to health and safety laws shall be submitted to the division at the same time that they are submitted to the court. This requirement shall be construed to authorize and permit the division to comment on those settlement provisions, and the court shall grant the division's commentary the appropriate weight.

(c) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision other than those listed in Section 2699.5 or Division 5 (commencing with Section 6300) shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The employer may cure the alleged violation within 33 calendar days of the postmark date of the notice. The employer shall give written notice by certified mail within that period of time to the aggrieved employee or representative and the agency if the alleged violation is cured, including a description of actions taken, and no civil action pursuant to Section 2699 may commence. If the alleged violation is not cured within the 33-day period, the employee may commence a civil action pursuant to Section 2699.

(B) No employer may avail himself or herself of the notice and cure provisions of this subdivision more than three times in a 12-month period for the same violation or violations contained in the notice, regardless of the location of the worksite.

(3) If the aggrieved employee disputes that the alleged violation has been cured, the aggrieved employee or representative shall provide written notice by certified mail, including specified grounds to support that dispute, to the employer and the agency. Within 17 calendar days of the postmark date of that notice, the agency shall review the actions taken by the employer to cure the alleged violation, and provide written notice of its decision by certified mail to the aggrieved employee and the employer. The agency may grant the employer three additional business days to cure the alleged violation. If the agency determines that the alleged violation has not been cured or if the agency fails to provide timely or any notification, the employee may proceed with the civil action pursuant to Section 2699. If the agency determines that the alleged violation has been

cured, but the employee still disagrees, the employee may appeal that determination to the superior court.

(d) The periods specified in this section are not counted as part of the time limited for the commencement of the civil action to recover penalties under this part.

2699.5. The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, paragraphs (1), (2), and (3) of subdivision (a) of, and subdivision (e) of, Section 1701.4, subdivision (a) of Section 1701.5, Sections 1701.8, 1701.10, 1701.12, 1735, 1771, 1774, 1776,

1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3095, 6310, 6311, and 6399.7.

APPENDIX F

59 Cal.4th 348

Supreme Court of California

Arshavir ISKANIAN, Plaintiff and Appellant,
v.

CLS TRANSPORTATION LOS ANGELES,

LLC, Defendant and Respondent.

No. S204032. | June 23, 2014.

Synopsis

Background: Employee brought putative class action against employer for wage and hour violations. The Superior Court, Los Angeles County, No. BC356521, Robert L. Hess, J., granted employer's motion to compel arbitration and dismissed class claims. Employee appealed. The Court of Appeal issued writ of mandate, 2008 WL 2171792. The Superior Court again granted employer's motion to compel arbitration and dismissed class claims. Employee appealed. The Court of Appeal affirmed. Employee petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Liu, J., held that:

[1] Federal Arbitration Act (FAA) preempts California law holding class action waivers as to employees' unwaivable rights to be contrary to public policy;

[2] class action waiver did not violate National Labor Relations Act (NLRA);

[3] employer did not waive right to compel arbitration;

[4] waiver of employees' right to representative action under Private Attorney General Act (PAGA) violated public policy;

[5] FAA does not preempt state law as to unenforceability of waivers of PAGA; and

[6] PAGA does not violate the principle of separation of powers under the California Constitution.

Reversed and remanded.

Opinion, 142 Cal.Rptr.3d 372, superseded.

Chin, J., filed concurring opinion, in which Baxter, J., joined. Werdegar, J., filed concurring and dissenting opinion.

Opinion

LIU, J.

In this case, we again address whether the Federal Arbitration Act (FAA) preempts a state law rule that restricts enforcement of terms in arbitration agreements. Here, an employee seeks to bring a class action lawsuit on behalf of himself and similarly situated employees for his employer's alleged failure to compensate its employees for, among other things, overtime and meal and rest periods. The employee had entered into an arbitration agreement that waived the right to class proceedings. The question is whether a state's refusal to enforce such a waiver on grounds of public policy or unconscionability is preempted by the FAA. We conclude that it is and that our holding to the contrary in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 64 Cal.Rptr.3d 773, 165 P.3d 556 (*Gentry*) has been abrogated by recent United States Supreme Court precedent. We further reject the arguments that the class action waiver at issue here is unlawful under the National Labor Relations Act and that the employer in this case waived its right to arbitrate by withdrawing its motion to compel arbitration after *Gentry*.

The employee also sought to bring a representative action under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab.Code, § 2698 et seq.). This statute authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state. As explained below, we conclude that an arbitration agreement requiring an employee as a condition of employment to give up the

right to bring representative PAGA actions in any forum is contrary to public policy. In addition, we conclude that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.

Finally, we hold that the PAGA does not violate the principle of separation of powers under the California Constitution.

I.

Plaintiff Arshavir Iskanian worked as a driver for defendant CLS Transportation Los Angeles, LLC (CLS) from March 2004 to August 2005. In December 2004, Iskanian signed a "Proprietary Information and Arbitration Policy/Agreement" providing that "any and all claims" arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator. The arbitration agreement provided for reasonable discovery, a written award, and judicial review of the award; costs unique to arbitration, such as the arbitrator's fee, would be paid by CLS. The arbitration agreement also contained a class and representative action waiver that said: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims

against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person."

On August 4, 2006, Iskanian filed a class action complaint against CLS, alleging that it failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, or pay final wages in a timely manner. In its answer to the complaint, CLS asserted among other defenses that all of plaintiff's claims were subject to binding arbitration. CLS moved to compel arbitration, and in March 2007, the trial court granted CLS's motion. Shortly after the trial court's order but before the Court of Appeal's decision in this matter, we decided in *Gentry* that class action waivers in employment arbitration agreements are invalid under certain circumstances. (*Gentry, supra*, 42 Cal.4th at pp. 463–464, 64 Cal.Rptr.3d 773, 165 P.3d 556.) The Court of Appeal issued a writ of mandate directing the superior court to reconsider its ruling in light of *Gentry*.

On remand, CLS voluntarily withdrew its motion to compel arbitration, and the parties proceeded to litigate the case. On September 15, 2008, Iskanian filed a consolidated first amended complaint, alleging seven causes of action for Labor Code violations and an unfair competition law (UCL) claim (Bus. & Prof.Code, § 17200 et seq.). Iskanian brought his claims as an individual and putative class representative seeking damages, and also in a

representative capacity under the PAGA seeking civil penalties for Labor Code violations. After conducting discovery, Iskanian moved to certify the class, and CLS opposed the motion. On October 29, 2009, the trial court granted Iskanian's motion.

On April 27, 2011, the United States Supreme Court issued *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. 131 S.Ct. 1740, 179 L.Ed.2d 742 (*Concepcion*). *Concepcion* invalidated our decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (*Discover Bank*), which had restricted consumer class action waivers in arbitration agreements. Soon after, in May 2011, CLS renewed its motion to compel arbitration and dismiss the class claims, arguing that *Concepcion* also invalidated *Gentry*. Iskanian opposed the motion, arguing among other things that *Gentry* was still good law and, in any event, that CLS had waived its right to seek arbitration by withdrawing the original motion to compel arbitration. The trial court ruled in favor of CLS, ordering the case into individual arbitration and dismissing the class claims with prejudice.

The Court of Appeal affirmed, concluding that *Concepcion* invalidated *Gentry*. The court also declined to follow a National Labor Relations Board ruling that class action waivers in adhesive employment contracts violate the National Labor Relations Act. With respect to the PAGA claim, the court understood Iskanian to be arguing that the PAGA does not allow representative claims to be arbitrated, and it concluded that the FAA precludes

states from withdrawing claims from arbitration and that PAGA claims must be argued individually, not in a representative action, according to the terms of the arbitration agreement. Finally, the court upheld the trial court's finding that CLS had not waived its right to compel arbitration. We granted review.

II.

We first address the validity of the class action waiver at issue here and the viability of *Gentry* in light of *Concepcion*.

In *Discover Bank*, we held that when a class arbitration 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 ... 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.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Discover Bank, supra*, 36 Cal.4th at pp. 162–163, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

The high court in *Concepcion* invalidated *Discover Bank* and held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Concepcion, supra*, 563

U.S. at p. ——, 131 S.Ct. at p. 1748.) According to Concepcion, classwide 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." (*Id.* at p. ——, 131 S.Ct. at p. 1751.) Class arbitration also "greatly increases risks to defendants" and "is poorly suited to the higher stakes of class litigation" because of the lack of judicial review, "thus rendering arbitration unattractive" to defendants. (*Id.* at p. —— & fn. 8, 131 S.Ct. at p. 1752 & fn. 8.) The court concluded that " [b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' [citation], California's *Discover Bank* rule is preempted by the FAA." (*Id.* at p. ——, 131 S.Ct. at p. 1753.)

In *Gentry*, we considered a class action waiver and an arbitration agreement in an employment contract. The complaint in *Gentry* alleged that the defendant employer had systematically failed to pay overtime wages to a class of employees. Whereas *Discover Bank* concerned the application of the doctrine of unconscionability, *Gentry* focused on whether the class action waiver would "undermine the vindication of the employees' unwaivable statutory rights" to overtime pay. (*Gentry, supra*, 42 Cal.4th at p. 450, 64 Cal.Rptr.3d 773, 165 P.3d 556.) We concluded that a class action waiver may be unenforceable in some circumstances: "[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' right to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, 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 in an arbitration forum.' " (*Id.* at pp. 463–464, 64 Cal.Rptr.3d 773, 165 P.3d 556.)

Iskanian contends that *Gentry* survives *Concepcion*. In his briefing, he argues: "The Missouri Supreme Court has interpreted *Concepcion* as holding that *Discover Bank* was preempted because 'it required class arbitration even if class arbitration disadvantaged consumers and was unnecessary for the consumer to obtain a remedy.' (*Brewer v. Missouri Title Loans* (Mo.2012) 364 S.W.3d 486, 489, 494.) Similarly, a recent analysis of *Concepcion* concludes that '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.' (Gilles & Friedman,

After Class: *Aggregate Litigation in the Wake of AT & T Mobility v. Concepcion* (2012) 79 U. Chi. L.Rev. 623, 651.)"

[1] Iskanian also contends: "*Gentry*, by contrast, 'is not a categorical rule against class action waivers.' [Citation.] *Gentry* explicitly disclaimed any categorical rule.... Unlike *Discover Bank*, which held consumer class-action bans 'generally unconscionable' ([*Gentry, supra*, 42 Cal.4th] at p. 453 [64 Cal.Rptr.3d 773, 165 P.3d 556]), *Gentry* held only that when a statutory right is unwaivable because of its 'public importance,' *id.* at p. 456 [64 Cal.Rptr.3d 773, 165 P.3d 556], banning class actions would in 'some circumstances' '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 [64 Cal.Rptr.3d 773, 165 P.3d 556].)" According to Iskanian, "[t]he Courts of Appeal have interpreted *Gentry* to require an evidentiary showing in which a plaintiff bears the burden of demonstrating, based on the Gentry factors, that enforcing a class-action ban would result in a waiver of substantive rights."

Contrary to these contentions, however, the fact that *Gentry's* rule against class waiver is stated more narrowly than *Discover Bank* 's rule does not save it from FAA preemption under *Concepcion*. The high court in *Concepcion* made clear that even if a state law rule against consumer class waivers were limited to "class proceedings [that] are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," it would still be preempted because

states cannot require a procedure that interferes with fundamental attributes of arbitration "even if it is desirable for unrelated reasons." (*Concepcion, supra*, 563 U.S. at p. ——, 131 S.Ct. at p. 1753; see *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ——, —— & fn. 5, 133 S.Ct. 2304, 2312 & fn. 5, 186 L.Ed.2d 417 (*Italian Colors*).) It is thus incorrect to say that the infirmity of *Discover Bank* was that it did not require a case-specific showing that the class waiver was exculpatory. *Concepcion* holds that even if a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA. Under the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers.

In his briefing and at oral argument, Iskanian further argued that the *Gentry* rule or a modified *Gentry* rule—whereby a class waiver would be invalid if it meant a de facto waiver of rights and if the arbitration agreement failed to provide suitable alternative means for vindicating employee rights—survives *Concepcion* under our reasoning in *Sonic–Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 163 Cal.Rptr.3d 269, 311 P.3d 184 (*Sonic II*). But the *Gentry* rule, whether modified or not, is not analogous to the unconscionability rule set forth in *Sonic II*.

As noted, *Gentry* held that the validity of a class waiver turns on whether "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and [whether] the

disallowance of the class action will likely lead to a less comprehensive enforcement of [labor or employment] laws for the employees alleged to be affected by the employer's violations." (*Gentry, supra*, 42 Cal.4th at p. 463, 64 Cal.Rptr.3d 773, 165 P.3d 556.) In other words, if individual arbitration or litigation cannot be designed to approximate the advantages of a class proceeding, then a class waiver is invalid. But *Concepcion* held that because class proceedings interfere with fundamental attributes of arbitration, a class waiver is not invalid even if an individual proceeding would be an ineffective means to prosecute certain claims. (See *Concepcion, supra*, 563 U.S. at p. ——, 131 S.Ct. at p. 1753.)

The Berman waiver addressed in *Sonic II* is different from a class waiver. As *Sonic II* explained, a Berman waiver implicates a host of statutory protections designed to benefit employees with wage claims against their employers. (*Sonic II, supra*, 57 Cal.4th at pp. 1127–1130, 163 Cal.Rptr.3d 269, 311 P.3d 184.) One of those protections is a special administrative hearing (a Berman hearing) that we had held unwaivable in *Sonic–Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 121 Cal.Rptr.3d 58, 247 P.3d 130 (*Sonic I*). In *Sonic II*, we overruled *Sonic I* in light of *Concepcion*, reasoning that " [b]ecause a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration—namely, its objective ' "to achieve 'streamlined proceedings and expeditious results' " ' " and "is thus preempted by the FAA." (*Sonic II, supra*, 57 Cal.4th at p. 1141, 163

Cal.Rptr.3d 269, 311 P.3d 184.) Under the logic of *Sonic II*, which mirrors the logic applied to the *Gentry* rule above, it is clear that because a Berman hearing interferes with fundamental attributes of arbitration, a Berman waiver is not invalid even if the unavailability of a Berman hearing would leave employees with ineffective means to pursue wage claims against their employers.

But *Sonic II* went on to explain that "[t]he fact that the FAA preempts *Sonic I*'s rule requiring arbitration of wage disputes to be preceded by a Berman hearing does not mean that a court applying unconscionability analysis may not consider the value of benefits provided by the Berman statutes, *which go well beyond the hearing itself.*" (*Sonic II, supra*, 57 Cal.4th at p. 1149, 163 Cal.Rptr.3d 269, 311 P.3d 184, italics added.) The Berman statutes, we observed, provide for fee shifting, mandatory undertaking, and several other protections to assist wage claimants should the wage dispute proceed to litigation. (*Id.* at p. 1146, 163 Cal.Rptr.3d 269, 311 P.3d 184.) "Many of the Berman protections are situated no differently than state laws concerning attorney fee shifting, assistance of counsel, or other rights designed to benefit one or both parties in civil litigation." (*Id.* at p. 1150, 163 Cal.Rptr.3d 269, 311 P.3d 184; see, e.g., Lab.Code, § 1194, subd. (a) [one-way fee shifting for plaintiffs asserting minimum wage and overtime claims].) The value of these protections does not derive from the fact that they exist in the context of a pre-arbitration administrative hearing. Instead, as *Sonic II* made clear, the value of these protections may be realized in "potentially many ways" through arbitration

designed in a manner "consistent with its fundamental attributes." (*Sonic II*, at p. 1149, 163 Cal.Rptr.3d 269, 311 P.3d 184; see *ibid*. ["Our rule contemplates that arbitration, no less than an administrative hearing, can be designed to achieved speedy, informal, and affordable resolution of wage claims...."].)

Sonic II thus established an unconscionability rule that considers whether arbitration is an effective dispute resolution mechanism for wage claimants without regard to any advantage inherent to a procedural device (a Berman hearing) that interferes with fundamental attributes of arbitration. By contrast, the *Gentry* rule considers whether individual arbitration is an effective dispute resolution mechanism for employees *by direct comparison* to the advantages of a procedural device (a class action) that interferes with fundamental attributes of arbitration. *Gentry*, unlike *Sonic II*, cannot be squared with *Concepcion*.

In practice, *Gentry*'s rule prohibiting class waivers if "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration" (*Gentry, supra*, 42 Cal.4th at p. 463, 64 Cal.Rptr.3d 773, 165 P.3d 556) regularly resulted in invalidation of class waivers, at least prior to *Concepcion*. (See, e.g., *Loco Olvera v. El Pollo, Inc.* (2009) 173 Cal.App.4th 447, 457, 93 Cal.Rptr.3d 65; *Sanchez v. Western Pizza Enterprises, Inc*. (2009) 172 Cal.App.4th 154, 170–171, 90 Cal.Rptr.3d 818; *Franco v. Athens Disposal Co*. (2009) 171 Cal.App.4th

1277, 1298–1299, 90 Cal.Rptr.3d 539; *Murphy v. Check N' Go of California, Inc.* (2007) 156 Cal.App.4th 138, 148–149, 67 Cal.Rptr.3d 120; *Jackson v. S.A.W. Entertainment Ltd.* (N.D.Cal.2009) 629 F.Supp.2d 1018, 1027–1028.) These results are unsurprising since it is unlikely that an individual action could be designed to approximate the inherent leverage that a class proceeding provides to employees with claims against a defendant employer. (See *Concepcion, supra*, 563 U.S. at p. ——, 131 S.Ct. at p. 1752.) By contrast, *Sonic II* addressed individual wage claims, not class actions, and there is no reason to think that the value of Berman protections distinct from a Berman hearing itself cannot be achieved by designing an arbitration process that is accessible, affordable, and consistent with fundamental attributes of arbitration. (See *Sonic II, supra*, 57 Cal.4th at p. 1147, 163 Cal.Rptr.3d 269, 311 P.3d 184 ["There are potentially many ways to structure arbitration, without replicating the Berman protections, so that it facilitates accessible, affordable resolution of wage disputes. We see no reason to believe that the specific elements of the Berman statutes are the only way to achieve this goal or that employees will be unable to pursue their claims effectively without initial resort to an administrative hearing as opposed to an adequate arbitral forum."].)

In sum, *Sonic II* recognized that the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration. But *Concepcion* held that the FAA does prevent states from mandating or promoting procedures incompatible with arbitration. The *Gentry* rule runs afoul of this latter principle.

We thus conclude in light of *Concepcion* that the FAA preempts the *Gentry* rule.

III.

Iskanian contends that even if the FAA preempts *Gentry*, the class action waiver in this case is invalid under the National Labor Relations Act (NLRA). Iskanian adopts the position of the National Labor Relations Board (Board) in *D.R. Horton Inc. & Cuda* (2012) 357 NLRB No. 184 [2012 WL 36274] (*Horton I*) that the NLRA generally prohibits contracts that compel employees to waive their right to participate in class proceedings to resolve wage claims. The Fifth Circuit recently refused to enforce that portion of the NLRB's opinion. (*D.R. Horton, Inc. v. NLRB* (5th Cir.2013) 737 F.3d 344 *(Horton II*).) We consider below the Board's position and the Fifth Circuit's reasons for rejecting it.

A.

In *Horton I,* the employee, Michael Cuda, a superintendent at Horton, claimed he had been misclassified as exempt from statutory overtime protections under the Fair Labor Standards Act (FLSA). He sought to initiate a nationwide class arbitration of similarly situated superintendents working for Horton. Horton asserted that the mutual arbitration agreement (MAA) barred arbitration of collective claims. Cuda then filed an unfair labor practice charge, and the Board's general counsel issued a complaint. The complaint alleged that Horton violated section 8(a)(1) of the NLRA by

maintaining the MAA provision that said the arbitrator " 'may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.' " (*Horton I, supra*, 357 NLRB No. 184, p. 1.) The complaint further alleged that Horton violated NLRA section 8(a)(1) and (4) by maintaining arbitration agreements that required employees, as a condition of employment, " 'to submit all employment related disputes and claims to arbitration ..., thus interfering with employee access to the [Board].' " (*Horton I,* at p. 2.) An administrative law judge agreed that the latter but not the former is an unfair labor practice.

On appeal, the Board concluded that (1) the joining together of employees to bring a class proceeding to address wage violations is a form of concerted activity under section 7 of the NLRA (29 U.S.C. § 157); (2) an agreement compelling an employee to waive the right to engage in that activity as a condition of employment is an unfair labor practice under section 8 of the NLRA (*id.*, § 158); and (3) this rule is not precluded by the FAA because it is consistent with the FAA's savings clause (9 U.S.C. § 2) and because the later enacted NLRA prevails over the earlier enacted FAA to the extent there is a conflict.

The Board began its analysis with section 7 of the NLRA, which states that "[e]mployees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage*

in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection,* and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (29 U.S.C. § 157, italics added.)

The Board commented: "It is well settled that 'mutual aid or protection' includes employees' efforts to 'improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 [98 S.Ct. 2505, 57 L.Ed.2d 428] (1978). The Supreme Court specifically stated in *Eastex* that Section 7 'protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.' *Id.* at 565–566 [98 S.Ct. 2505]. The same is equally true of resort to arbitration. [¶] The Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation." (*Horton I, supra*, 357 NLRB No. 184, p. 2 [2012 WL 36274 at p. *2].)

The Board then turned to section 8(a)(1) of the NLRA, which says it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" section 7. (29 U.S.C. § 158(a)(1).) The Board found, based on the previous discussion, "that the MAA

expressly restricts protected activity." (*Horton I, supra*, 357 NLRB No. 184, p. 4 [2012 WL 36274 at p. *5].) "That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights—including, notably, agreements that employees will pursue claims against their employer only individually." (*Ibid.*)

The Board buttressed this conclusion by reviewing a statute that preceded the NLRA, the Norris LaGuardia Act, which among other things limited the power of federal courts to issue injunctions enforcing "yellow dog" contracts prohibiting employees from joining labor unions. (*Horton I, supra*, 357 NLRB No. 184, p. 5 [2012 WL 36274 at p. *7].) The types of activity, "whether undertaken 'singly or in concert,' " that may not be limited by restraining orders or injunctions include " 'aiding any person participating or interested in any labor dispute who ... is prosecuting, any action or suit in any court of the United States or of any State.' 29 U.S.C. § 104(d) (emphasis added)." (*Id.* at pp. 5–6 [2012 WL 36274 at p. *7], fn. omitted.) " 'The law has long been clear that all variations of the venerable "yellow dog contract" are invalid as a matter of law.' *Barrow Utilities & Electric*, 308 NLRB 4, 11, fn. 5 (1992)." (Id. at p. 6 [2012 WL 36274 at p. *8].)

The Board concluded its analysis by finding no

conflict between the NLRA and the FAA. Relying on the FAA's savings clause (see 9 U.S.C. § 2 [arbitration agreements are to be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract"]), the Board explained that "[t]he purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts. The Supreme Court ...has made clear that '[w]herever private contracts conflict with [the] functions' of the National Labor Relations Act, 'they obviously must yield or the Act would be reduced to a futility.' *J.I. Case Co.* [(1944)] 321 U.S. [332,] 337 [64 S.Ct. 576, 88 L.Ed. 762]. To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law. The MAA would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the Respondent solely on an individual basis." (*Horton I*, supra, 357 NLRB No. 184, p. 9 [2012 WL 36274 at p. *11].)

The Board also invoked the principle that arbitration agreements may not require a party to " 'forgo the substantive rights afforded by the statute.' " (*Horton I, supra*, 357 NLRB No. 184, p. 9, quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (*Gilmer*).) The Board clarified that "[t]he question presented in this case is not whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. [Citation.] Rather, the issue here is whether the MAA's categorical prohibition of

joint, class, or collective federal, state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA." (*Horton, supra*, 357 NLRB No. 184, p. 9, fn. omitted [2012 WL 36274 at p. *11].)

The Board recognized a tension between its ruling and *Concepcion*'s statements that the "overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" and that the "switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality." (*Concepcion, supra*, 563 U.S. at pp. ——,——, 131 S.Ct. at pp. 1748, 1751.) But in the Board's view, "the weight of this countervailing consideration was considerably greater in the context of [*Concepcion*] than it is here for several reasons. [*Concepcion*] involved the claim that a class-action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable. Here, in contrast, only agreements between employers and their own employees are at stake. As the Court pointed out in [*Concepcion*], such contracts of adhesion in the retail and services industries might cover 'tens of thousands of potential claimants.' *id.* at 1752. the average number of employees employed by a single employer, in contrast, is 20, and most class- wide employment litigation, like the case at issue here, involves only a specific subset of an employer's employees. A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in [*Concepcion*]—speed, cost, informality, and risk—

when the class is so limited in size. 131 S.Ct. at 1751–1752. Moreover, the holding in this case covers only one type of contract, that between an employer and its covered employees, in contrast to the broad rule adopted by the California Supreme Court at issue in [*Concepcion*]. Accordingly, any intrusion on the policies underlying the FAA is similarly limited." (*Horton I, supra*, 357 NLRB No. 184, pp. 11–12, fn. omitted [2012 WL 36274 at p. *15, fn. omitted].)

"Finally," the Board said, "even if there were a conflict between the NLRA and the FAA, there are strong indications that the FAA would have to yield under the terms of the Norris–LaGuardia Act. As explained above, under the Norris–LaGuardia Act, a private agreement that seeks to prohibit a 'lawful means [of] aiding any person participating or interested in' a lawsuit arising out of a labor dispute (as broadly defined) is unenforceable, as contrary to the public policy protecting employees' 'concerted activities for ... mutual aid or protection.' To the extent that the FAA requires giving effect to such an agreement, it would conflict with the Norris–LaGuardia Act. The Norris–LaGuardia Act, in turn—passed 7 years *after* the FAA,—repealed '[a]ll acts and parts of acts in conflict' with the later statute (Section 15)." (*Horton I, supra*, 357 NLRB No. 184, p. 12, fn. omitted [2012 WL 36274 at p. *16, fn. omitted].)

B.

In *Horton II*, the Fifth Circuit disagreed with the Board's ruling that the class action waiver in the MAA was an unfair labor practice. The court

recognized precedent holding that " 'the filing of a civil action by employees is protected activity ... [and] by joining together to file the lawsuit [the employees] engaged in concerted activity.' *127 Rest. Corp., 331 NLRB* 269, 275–76 (2000). '[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is "concerted activity" under Section 7' of the NLRA. *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir.2011)." (*Horton II, supra*, 737 F.3d at p. 356.) However, the Fifth Circuit reasoned, "The [FAA] has equal importance in our review. Caselaw under the FAA points us in a different direction than the course taken by the Board." (*Id.* at p. 357.)

Relying on *Concepcion,* the Fifth Circuit rejected the argument that the Board's rule fell within the savings clause of the FAA. A rule that is neutral on its face but is "applied in a fashion that disfavors arbitration" is not a ground that exists "for the revocation of any contract" within the meaning of the savings clause. (*Concepcion, supra*, 563 U.S. at p. ——–, 131 S.Ct. at p. 1747.) The Fifth Circuit concluded that the Board's rule, like the rule in *Discover Bank*, was not arbitration neutral. Rather, by substituting class proceedings for individual arbitration, the rule would significantly undermine arbitration's fundamental attributes by requiring procedural formality and complexity, and by creating greater risks to defendants. (*Horton II, supra*, 737 F.3d at p. 359, citing *Concepcion, supra*, 563 U.S. at pp. ——–, ——–, 131 S.Ct. at pp. 1750–1752.)

The court then considered whether "the FAA's

mandate has been 'overridden by a contrary congressional command.' " (*CompuCredit v. Greenwood* (2012) 565 U.S. ——, ——, 132 S.Ct. 665, 669, 181 L.Ed.2d 586; see *Italian Colors, supra*, 570 U.S. at p. ——, 133 S.Ct. at p. 2309.) "If such a command exists, it 'will be discoverable in the text,' the statute's 'legislative history,' or 'an "inherent conflict" between arbitration and the [statute's] underlying purposes.' ... '[T]he relevant inquiry [remains] whether Congress ... precluded "arbitration or other nonjudicial resolution" of claims.' " (*Horton II, supra*, 737 F.3d at p. 360, quoting *Gilmer, supra*, 500 U.S. at pp. 26, 28, 111 S.Ct. 1647.) The court found that neither the NLRA's language nor its legislative history showed any indication of prohibiting a class action waiver in an arbitration agreement. (*Horton II*, at pp. 360–361.)

Next, the Fifth Circuit considered whether there is "an inherent conflict" between the FAA and the NLRA. (*Horton II, supra*, 737 F.3d at p. 361.) It noted that NLRA policy itself "favors arbitration" and permits unions to waive the right of employees to litigate statutory employment claims in favor of arbitration. (*Ibid.*) The court also noted that "the right to proceed collectively cannot protect vindication of employees' statutory rights under the ADEA or FLSA because a substantive right to proceed collectively has been foreclosed by prior decisions." (*Ibid.*, citing *Gilmer, supra*, 500 U.S. at p. 32, 111 S.Ct. 1647 and *Carter v. Countrywide Credit Industries, Inc.* (5th Cir.2004) 362 F.3d 294, 298.) "The right to collective action also cannot be successfully defended on the policy ground that it provides employees with greater bargaining power.

'Mere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.' *Gilmer*, 500 U.S. at 33, 111 S.Ct. 1647. The end result is that the Board's decision creates either a right that is hollow or one premised on an already-rejected justification." (*Horton II*, at p. 361.)

Further, the court observed that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice. [Citation.] We find limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted." (*Horton II*, supra, 737 F.3d at p. 362, fn. omitted.) For the reasons above, the court held that the NLRA does not foreclose enforcement of a class action waiver in an arbitration agreement. (*Horton II*, at p. 363.)

C.

[2] We agree with the Fifth Circuit that, in light of *Concepcion*, the Board's rule is not covered by the FAA's savings clause. Concepcion makes clear that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice. (*Concepcion, supra*, 563 U.S. at pp. ——, ——, 131 S.Ct. at pp. 1750–1752.) Thus, if the Board's rule is not precluded by the FAA, it must be because the NLRA conflicts with and takes

precedence over the FAA with respect to the enforceability of class action waivers in employment arbitration agreements. As the Fifth Circuit explained, neither the NLRA's text nor its legislative history contains a congressional command prohibiting such waivers. (*Horton II*, supra, 737 F.3d at pp. 360–361.)

[3] We also agree that there is no inherent conflict between the FAA and the NLRA as that term is understood by the United States Supreme Court. It is significant that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." (*Horton II*, supra, 737 F.3d at p. 362.) To be sure, "the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it' " (*NLRB v. City Disposal Systems Inc.* (1984) 465 U.S. 822, 829, 104 S.Ct. 1505, 79 L.Ed.2d 839), and the forms of concerted activity protected by the NLRA are not necessarily limited to those that existed when the NLRA was enacted in 1935 or reenacted in 1947. However, in *Italian Colors*, where the high court held that federal antitrust laws do not preclude enforcement of a class action waiver in an arbitration agreement, the high court found it significant that "[t]he Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23...." (*Italian Colors, supra*, 570 U.S. at p. ——, 133 S.Ct. at p. 2309.) Here as well, like the Fifth Circuit, "[w]e find limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the

NLRA was (re)enacted." (*Horton II*, at p. 362, fn. omitted.)

Furthermore, as the high court stated in *Italian Colors*: "In *Gilmer, supra*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions. We said that statutory permission did ' "not mean that individual attempts at conciliation were intended to be barred." ' " (*Italian Colors, supra*, 570 U.S. at p. ——, 133 S.Ct. at p. 2311.) Thus, the high court has held that the explicit authorization of class actions in the Age Discrimination in Employment Act (see 29 U.S.C. § 626(b), referencing, for purposes of enforcement 29 U.S.C. § 216 [providing for employee class actions as a remedy for Fair Labor Standard Act violations]) does not bar enforcement of a class waiver in an arbitration agreement. This holding reinforces our doubt that the NLRA's general protection of concerted activity, which makes no reference to class actions, may be construed as an implied bar to a class action waiver.

We do not find persuasive the Board's attempt to distinguish its rule from *Discover Bank* on the basis that employment arbitration class actions tend to be smaller than consumer class actions and thus "far less cumbersome and more akin to an individual arbitration proceeding." (*Horton I, supra*, 357 NLRB No. 184, p. 12 [2012 WL 36274 at p. *15].) Nothing in *Concepcion* suggests that its rule upholding class action waivers, which relied significantly on the

incompatibility between the formality of class proceedings and the informality of arbitration (*Concepcion, supra*, 563 U.S. at p. ——, 131 S.Ct. at p. 1751), depends on the size of the class involved. Nor does the limitation of a class action waiver to disputes between employers and employees mitigate the conflict between the Board's rule and the FAA under the reasoning of *Concepcion*.

We thus conclude, in light of the FAA's " 'liberal federal policy favoring arbitration' " (*Concepcion, supra*, 563 U.S. at p.——, 131 S.Ct. at p. 1745), that sections 7 and 8 the NLRA do not represent "a contrary congressional command" overriding the FAA's mandate. (*CompuCredit v. Greenwood, supra*, 565 U.S. at p. ——, 132 S.Ct. at p. 669.) This conclusion is consistent with the judgment of all the federal circuit courts and most of the federal district courts that have considered the issue. (See *Sutherland v. Ernst* & *Young, LLP* (2d Cir.2013) 726 F.3d 290, 297 fn. 8; *Owen v. Bristol Care, Inc.* (8th Cir.2013) 702 F.3d 1050, 1053–1055; *Delock v. Securitas Sec. Servs. USA, Inc*. (E.D.Ark.2012) 883 F.Supp.2d 784, 789–790; *Morvant v. P.F. Chang's China Bistro, Inc*. (N.D.Cal.2012) 870 F.Supp.2d 831, 844– 845; *Jasso v. Money Mart Express, Inc.* (N.D.Cal.2012) 879 F.Supp.2d 1038, 1048–1049; but see *Herrington v. Waterstone Mortg. Corp.* (W.D.Wis. Mar. 16, 2012) No. 11–cv–779–bbc [2012 WL 1242318, at p. *5] [defendant advances no persuasive argument that the Board interpreted the NLRA incorrectly].)

Our conclusion does not mean that the NLRA

imposes no limits on the enforceability of arbitration agreements. Notably, while upholding the class waiver in *Horton II*, the Fifth Circuit affirmed the Board's determination that the arbitration agreement at issue violated section 8(a) (1) and (4) of the NLRA insofar as it contained language that would lead employees to reasonably believe they were prohibited from filing unfair labor practice charges with the Board. (*Horton II, supra*, 737 F.3d at pp. 363–364.) Moreover, the arbitration agreement in the present case, apart from the class waiver, still permits a broad range of collective activity to vindicate wage claims. CLS points out that the agreement here is less restrictive than the one considered in *Horton*: The arbitration agreement does not prohibit employees from filing joint claims in arbitration, does not preclude the arbitrator from consolidating the claims of multiple employees, and does not prohibit the arbitrator from awarding relief to a group of employees. The agreement does not restrict the capacity of employees to "discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims." (*Horton I, supra*, 357 NLRB No. 184, p. 6 [2012 WL 36274 at p. *8]; cf. *Italian Colors, supra*, 570 U.S. at p. ——, fn. 4, 133 S.Ct. at p. 2311, fn. 4 [making clear that its holding applies only to class action waivers and not to provisions barring " other forms of cost sharing"].) We have no occasion to decide whether an arbitration agreement that more broadly restricts collective activity would run afoul of section 7.

IV.

[4] Code of Civil Procedure section 1281.2 provides that one ground for denying a petition to compel arbitration is that "[t]he right to compel arbitration has been waived by the petitioner." Iskanian contends that CLS waived its right to arbitration by failing to diligently pursue arbitration. We disagree.

[5] "As our decisions explain, the term 'waiver' has a number of meanings in statute and case law. [Citation.] While 'waiver' generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. [Citations.] In the arbitration context, '[t]he term "waiver" has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.' [Citation.]" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4, 8 Cal.Rptr.3d 517, 82 P.3d 727 (*St. Agnes Medical Center*).)

[6] "California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the 'bad faith' or 'willful misconduct' of a party

may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.]" (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425–426, 158 Cal.Rptr. 828, 600 P.2d 1060.) The fact that the party petitioning for arbitration has participated in litigation, short of a determination on the merits, does not by itself constitute a waiver. (*St. Agnes Medical Center, supra,* 31 Cal.4th at p. 1203, 8 Cal.Rptr.3d 517, 82 P.3d 727.)

We have said the following factors are relevant to the waiver inquiry: " ' "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' " (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1196, 8 Cal.Rptr.3d 517, 82 P.3d 727.)

[7] [8] In light of the policy in favor of arbitration, "waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1195, 8 Cal.Rptr.3d 517, 82 P.3d 727.)

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citation.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' " (*Id.* at p. 1196, 8 Cal.Rptr.3d 517, 82 P.3d 727.)

In the present case, CLS initially filed a timely petition to compel arbitration in response to Iskanian's complaint, which included class action claims. After the trial court granted the petition, this court issued *Gentry*, which restricted the enforceability of class waivers, and the Court of Appeal remanded the matter to the trial court to determine whether *Gentry* affected the ruling. Rather than further litigate the petition to compel arbitration, CLS withdrew the petition and proceeded to litigate the claim and resist Iskanian's move to certify a class. The parties engaged in discovery, both as to the merits and on the class certification issue. In October of 2009, the trial court granted Iskanian's motion to certify the class. In May of 2011, shortly after the Supreme Court filed *Concepcion*, which cast *Gentry* into doubt, CLS renewed its petition to compel arbitration. The trial court granted the petition.

CLS contends that it has never acted inconsistently with its right to arbitrate. It initially petitioned to compel arbitration and then abandoned arbitration only when *Gentry* made clear that further petition would be futile. It moved to compel arbitration again

as soon as a change in the law made clear the motion had a chance of succeeding. In response, Iskanian contends that California law does not recognize futility as a legitimate ground for delaying the assertion of the right to arbitration and that even if there were such an exception, it should not apply here because even after *Gentry*, CLS's petition to compel arbitration had some chance of success.

[9] [10] This court has not explicitly recognized futility as a ground for delaying a petition to compel arbitration. (Compare *Fisher v. A.G. Becker Paribas Inc.* (9th Cir.1986) 791 F.2d 691, 697 [delay in asserting arbitration rights excusable when prevailing "intertwining doctrine" made such an assertion futile until Supreme Court rejected the doctrine].) But futility as grounds for delaying arbitration is implicit in the general waiver principles we have endorsed. A factor relevant to the waiver inquiry is whether the party asserting arbitration has acted inconsistently with the right to arbitrate (see *St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1196, 8 Cal.Rptr.3d 517, 82 P.3d 727) or whether a delay was "unreasonable" (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446, 140 Cal.Rptr.3d 206 (*Fletcher Jones*)). The fact that a party initially successfully moved to compel arbitration and abandoned that motion only after a change in the law made the motion highly unlikely to succeed weighs in favor of finding that the party has not waived its right to arbitrate.

Iskanian points out that *Gentry* did not purport to

invalidate all class waivers in wage and hour cases, but only in those instances when a class action or arbitration "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, 64 Cal.Rptr.3d 773, 165 P.3d 556.) In this case, however, neither party has ever disputed that the class action waiver at issue would not have survived *Gentry*. This case is therefore distinguishable from cases finding unexcused delay where the party asserting arbitration had some real chance of succeeding in compelling individual arbitration under extant law applicable to class waivers. (See *Fletcher Jones, supra*, 205 Cal.App.4th at p. 448, 140 Cal.Rptr.3d 206 [*Discover Bank* 's holding that consumer class action waivers are prohibited in the case of small damages claims did not preclude class waiver where plaintiff sought $19,000 in damages].)

[11] Iskanian contends that because he spent three years attempting to obtain class certification, including considerable effort and expense on discovery, waiver should be found on the ground that the delay in the start of arbitration prejudiced him. We have said that "prejudice ... is critical in waiver determinations." (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1203, 8 Cal.Rptr.3d 517, 82 P.3d 727.) But "[b]ecause merely participating in litigation, by itself, does not result in ... waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*Ibid.*) "Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or

substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence [citation]." (*Id.* at p. 1204, 8 Cal.Rptr.3d 517, 82 P.3d 727.)

Some courts have interpreted *St. Agnes Medical Center* to allow consideration of the expenditure of time and money in determining prejudice where the delay is unreasonable. In *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 118 Cal.Rptr.3d 613, for example, the court reasoned that "a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes.' [Citation.] Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel." (*Id.* at p. 948, 118 Cal.Rptr.3d 613.) Other courts have likewise found that unjustified delay, combined with substantial expenditure of time and money, deprived the parties of the benefits of arbitration and was sufficiently prejudicial to support a finding of waiver to arbitrate. (See, e.g., *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1205, 142 Cal.Rptr.3d 312; *Roberts v. El Cajon*

Motors, Inc. (2011) 200 Cal.App.4th 832, 845–846, 133 Cal.Rptr.3d 350; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451, 110 Cal.Rptr.3d 104; *Guess? Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558, 94 Cal.Rptr.2d 201; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 996, 72 Cal.Rptr.2d 43; but see *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1197, 98 Cal.Rptr.2d 836 [excluding time and expense from the calculus of prejudice].)

[12] These cases, however, do not support Iskanian's position. In each of them, substantial expense and delay were caused by the *unreasonable or unjustified* conduct of the party seeking arbitration. In this case, the delay was reasonable in light of the state of the law at the time and Iskanian's own opposition to arbitration. Where, as here, a party promptly initiates arbitration and then abandons arbitration because it is resisted by the opposing party and foreclosed by existing law, the mere fact that the parties then proceed to engage in various forms of pretrial litigation does not compel the conclusion that the party has waived its right to arbitrate when a later change in the law permits arbitration.

Moreover, the case before us is not one where "the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration" or "where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence." (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1204, 8 Cal.Rptr.3d 517, 82

P.3d 727.) No such prejudice has been shown here. As CLS points out, without contradiction by Iskanian, the discovery it obtained while the case was in court consisted of Iskanian's deposition and 77 pages of documents pertaining to his individual wage claim. Because the arbitration agreement itself provides for "reasonable discovery," there is no indication that CLS obtained any material information through pretrial discovery that it could not have obtained through arbitral discovery.

In sum, Iskanian does not demonstrate that CLS's delay in pursuing arbitration was unreasonable or that pretrial proceedings have resulted in cognizable prejudice. We conclude that CLS has not waived its right to arbitrate.

V.

As noted, the arbitration agreement requires the waiver not only of class actions but of "representative actions." There is no dispute that the contract's term "representative actions" covers representative actions brought under the Private Attorneys General Act. (Lab.Code, § 2968 et seq.; all subsequent undesignated statutory references are to this code.) We must decide whether such waivers are permissible under state law and, if not, whether the FAA preempts a state law rule prohibiting such waivers.

A.

Before enactment of the PAGA in 2004, several statutes provided civil penalties for violations of the Labor Code. The Labor Commissioner could bring an action to obtain such penalties, with the money going into the general fund or into a fund created by the Labor and Workforce Development Agency (Agency) for educating employers. (See § 210 [civil penalties for violating various statutes related to the timing and manner in which wages are to be paid]; § 225.5 [civil penalties for violating various statutes related to withholding wages due]; Stats.1983, ch. 1096.) Some Labor Code violations were criminal misdemeanors. (See §§ 215, 216, 218.)

The PAGA addressed two problems. First, the bill sponsors observed that "many Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, Labor Code violations rarely result in criminal investigations and prosecutions." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (Reg.Sess. 2003–2004) as amended Apr. 22, 2003, p. 5.) The solution was to enact civil penalties for Labor Code violations "significant enough to deter violations." (*Ibid.*) For Labor Code violations for which no penalty is provided, the PAGA provides that the penalties are generally $100 for each aggrieved employee per pay period for the initial violation and

$200 per pay period for each subsequent violation. (§ 2699, subd. (f)(2).)

The second problem was that even when statutes specified civil penalties, there was a shortage of government resources to pursue enforcement. The legislative history discussed this problem at length. Evidence gathered by the Assembly Committee on Labor and Employment indicated that the Department of Industrial Relations (DIR) "was failing to effectively enforce labor law violations. Estimates of the size of California's 'underground economy'—businesses operating outside the state's tax and licensing requirements— ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. [¶] Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California." (Assembly Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg.Sess. 2003– 2004) as amended July 2, 2003, p. 4.)

We summarized the Legislature's response to this problem in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980–981, 95 Cal.Rptr.3d 588, 209 P.3d 923 (*Arias*): "In September 2003, the Legislature enacted

the Labor Code Private Attorneys General Act of 2004 [citations]. The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts. (Stats.2003, ch. 906, § 1.)

"Under this legislation, an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (Lab.Code, § 2699, subd. (a).) Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.' (*Id.*, § 2699, subd. (i).)

"Before bringing a civil action for statutory penalties, an employee must comply with Labor Code section 2699.3. (Lab.Code, § 2699, subd. (a).) That statute requires the employee to give written notice of the alleged Labor Code violation to both the employer and the Labor and Workforce Development Agency, and the notice must describe facts and theories supporting the violation. (Id., § 2699.3, subd. (a).) If the agency notifies the employee and the employer that it does not intend to investigate ..., or if the

agency fails to respond within 33 days, the employee may then bring a civil action against the employer. (*Id.*, § 2699.3, subd. (a) (2)(A).) If the agency decides to investigate, it then has 120 days to do so. If the agency decides not to issue a citation, or does not issue a citation within 158 days after the postmark date of the employee's notice, the employee may commence a civil action. (Id., § 2699.3, subd. (a)(2)(B).)" (*Arias, supra*, 46 Cal.4th at pp. 980–981, 95 Cal.Rptr.3d 588, 209 P.3d 923, fn. omitted.)

In *Arias*, the defendants argued that if the PAGA were not "construed as requiring representative actions under the act to be brought as class actions," then a defendant could be subjected to lawsuits by multiple plaintiffs raising a common claim, none of whom would be bound by a prior judgment in the defendant's favor because they were not parties to a prior lawsuit. (*Arias, supra*, 46 Cal.4th at p. 985, 95 Cal.Rptr.3d 588, 209 P.3d 923.) We rejected this due process concern on the ground that "the judgment in [a PAGA representative] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." (*Ibid.*) We reached this conclusion by elucidating the legal characteristics of a PAGA representative action: "An employee plaintiff suing ... under the [PAGA] does so as the proxy or agent of the state's labor law enforcement agencies.... In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. [Citations.].... Because

collateral estoppel applies not only against a party to the prior action in which the issue was determined, but also against those for whom the party acted as an agent or proxy [citations], a judgment in an employee's action under the act binds not only that employee but also the state labor law enforcement agencies.

"Because an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (Lab.Code, § 2699, subds.(a), (g)), and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17 [141 Cal.Rptr. 20, 569 P.2d 125]). When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. (Rest.2d Judgments, § 41, subd. (1)(d), com. d, p. 397.) Accordingly, with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act, and therefore defendants' due process concerns are to that extent unfounded."

(*Arias, supra*, 46 Cal.4th at p. 986, 95 Cal.Rptr.3d 588, 209 P.3d 923.)

[13] The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities. Case law has clarified the distinction "between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the [PAGA] became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid. [Citation.] Examples of the latter are section 225.5, which provides, in addition to any other penalty that may be assessed, an employer that unlawfully withholds wages in violation of certain specified provisions of the Labor Code is subject to a civil penalty in an enforcement action initiated by the Labor Commissioner in the sum of $100 per employee for the initial violation and $200 per employee for subsequent or willful violations, and section 256, which authorizes the Labor Commissioner to 'impose a civil penalty in an amount not exceeding 30 days [sic] pay as waiting time under the terms of Section 203.' " (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377–378, 36 Cal.Rptr.3d 31, fns. omitted; see *Murphy v. Kenneth Cole*

Productions, Inc. (2007) 40 Cal.4th 1094, 1114, 56 Cal.Rptr.3d 880, 155 P.3d 284 [distinguishing premium pay under section 226.7 from a civil penalty in determining the applicable statute of limitations].)

[14] [15] [16] A PAGA representative action responsibility for his own fraud, or willful injury to the person is therefore a type of qui tam action. "Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty." (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 671, 126 Cal.Rptr. 415 (*Sanders*).) The PAGA conforms to these traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation. The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit. (See *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399, 60 Cal.Rptr.2d 569.)

Although the PAGA was enacted relatively recently, the use of qui tam actions is venerable, dating back to colonial times, and several such statutes were enacted by the First Congress. (See *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 776–777, 120 S.Ct. 1858, 146 L.Ed.2d 836.) The Federal False Claims Act, allowing individuals to share the recovery achieved by the reporting of false claims, originated during the Civil War. (See *United States ex rel. Marcus v. Hess* (1943)

317 U.S. 537, 539–540, 63 S.Ct. 379, 87 L.Ed. 443; 31 U.S.C § 3730.) The qui tam plaintiff under the Federal False Claims Act has standing in federal court under article III of the United States Constitution, even though the plaintiff has suffered no injury in fact, because that statute "can reasonably be regarded as effecting a partial assignment of the Government's damages claim." (*Stevens*, at p. 773, 120 S.Ct. 1858.) California has more recently authorized qui tam actions for the recovery of false claims against the state treasury. (Gov.Code, § 12652, subd. (c), added by Stats.1987, ch. 1420, § 1, p. 5239.) In addition, there are earlier examples of qui tam actions under California law. (See, e.g., *Sanders, supra*, 53 Cal.App.3d at p. 671, 126 Cal.Rptr. 415 [noting qui tam provision in Political Reform Act of 1974].)

B.

[17] With this background, we first examine whether an employee's right to bring a PAGA action is waivable. The unwaivability of certain statutory rights "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 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.' (*In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1065 [64 Cal.Rptr.2d 522].) 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 v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*).)

[18] These statutes compel the conclusion that an employee's right to bring a PAGA action is unwaivable. Section 2699, subdivision (a) states: "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ... for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." As noted, the Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the Labor and Workforce Development Agency by empowering employees to enforce the Labor Code as representatives of the Agency. Thus, an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code. Because such an agreement has as its "object, ... indirectly, to exempt [the employer] from responsibility for [its] own ... violation of law," it is against public policy and may not be enforced. (Civ.Code, § 1668.).

Such an agreement also violates Civil Code section 3513 's injunction that "a law established for a public

reason cannot be contravened by a private agreement." The PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations. Of course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations. (See *Armendariz, supra*, 24 Cal.4th at p. 103, fn. 8, 99 Cal.Rptr.2d 745, 6 P.3d 669 [waivers freely made after a dispute has arisen are not necessarily contrary to public policy].) But it is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises.

CLS argues that the arbitration agreement at issue here prohibits only representative claims, not individual PAGA claims for Labor Code violations that an employee suffered. Iskanian contends that the PAGA, which authorizes an aggrieved employee to file a claim "on behalf of himself or herself *and* other current or former employees" (§ 2699, subd. (a), italics added), does not permit an employee to file an individual claim. (Compare *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123–1124, 135 Cal.Rptr.3d 832 [agreeing with Iskanian's position] with *Quevedo v. Macy's, Inc.* (C.D.Cal.2011) 798 F.Supp.2d 1122, 1141–1142 [an employee may bring an individual PAGA action and waive the right to bring it on behalf of other employees].) But whether or not an individual claim is permissible under the PAGA, a prohibition of representative claims frustrates the PAGA's objectives. As one Court of

Appeal has observed: "[A]ssuming it is authorized, a single- claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if an individual claim has collateral estoppel effects. (*Arias, supra*, 46 Cal.4th at pp. 985–987 [95 Cal.Rptr.3d 588, 209 P.3d 923].) Other employees would still have to assert their claims in individual proceedings." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502, 128 Cal.Rptr.3d 854, fn. omitted.)

We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law.

C.

[19] [20] Notwithstanding the analysis above, a state law rule, however laudable, may not be enforced if it is preempted by the FAA. As *Concepcion* made clear, a state law rule may be preempted when it "stands as an obstacle to the accomplishment of the FAA's objectives." (*Concepcion, supra*, 563 U.S. at p. ——, 131 S.Ct. at p. 1748.) We conclude that the rule against PAGA waivers does not frustrate the FAA's objectives because, as explained below, the FAA aims to ensure an efficient forum for the resolution of

private disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency.

The FAA's focus on private disputes finds expression in the statute's text: "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, italics added.) Although the italicized language may be read to indicate that the FAA applies only to disputes about contractual rights, not statutory rights (see Friedman, *The Lost Controversy Limitation of the Federal Arbitration Act* (2012) 46 U.Rich. L.Rev. 1005, 1037–1045), the high court has found the FAA applicable to statutory claims between parties to an arbitration agreement (see, e.g., *Mitsubishi Motors v. Soler Chrysler–Plymouth* (1985) 473 U.S. 614, 635–637, 105 S.Ct. 3346, 87 L.Ed.2d 444). Even so, however, the statutory phrase "a controversy thereafter arising out of such contract or transaction" is most naturally read to mean a dispute about the respective rights and obligations of parties in a contractual relationship.

The FAA's focus on private disputes is further revealed in its legislative history, which shows that the FAA's primary object was the settlement of ordinary commercial disputes. (See J. Hearings on Sen. Bill No. 1005 and H.Res. No. 646 before the

Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 15 (1924) at p. 29 [testimony of FAA drafter Julius Henry Cohen that the act will merely make enforceable the customs of trade associations to arbitrate disputes]; id. at p. 7 [testimony of Charles Bernheimer, Chairman of Com. on Arbitration, N.Y. State Chamber of Commerce, that FAA is designed to resolve "ordinary everyday trade disputes" between merchants].) There is no indication that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals. Furthermore, although qui tam citizen actions on behalf of the government were well established at the time the FAA was enacted (see *ante*, 173 Cal.Rptr.3d at p. 311, 327 P.3d at p. 148), there is no mention of such actions in the legislative history and no indication that the FAA was concerned with limiting their scope. (Compare *Concepcion, supra*, 563 U.S. at pp. ——, ——, 131 S.Ct. at pp. 1751–1752 [noting that class arbitration was not envisioned by the Congress that enacted the FAA].)

Consistent with this understanding, the United States Supreme Court's FAA jurisprudence—with one exception discussed below—consists entirely of disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency. (See, e.g., *Italian Colors, supra*, 570 U.S. at p. ——, 133 S.Ct. at p. 2308 [class action by merchants for excessive credit card fees charged in violation of antitrust laws]; *Marmet Health Care Center, Inc. v. Brown* (2012) 565 U.S. ——, ——, 132 S.Ct. 1201, 1202–1203, 182 L.Ed.2d 42 [wrongful death action]; *Concepcion, supra*, 563 U.S. at p. ——, 131 S.Ct. at p.

1744 [class action suit for damages over fraudulent practices]; *Rent–A–Center West, Inc. v. Jackson* (2010) 561 U.S. 63, 64–65, 130 S.Ct. 2772, 2775, 177 L.Ed.2d 403 [employment discrimination suit]; *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 667, 130 S.Ct. 1758, 176 L.Ed.2d 605 [antitrust dispute involving price fixing and supracompetitive pricing]; *Preston v. Ferrer* (2008) 552 U.S. 346, 350, 128 S.Ct. 978, 169 L.Ed.2d 917 [action by attorney to recover fees from former client]; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 [class action by borrowers against lender for alleged usurious loans]; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 449, 123 S.Ct. 2402, 156 L.Ed.2d 414 [class action damages suit by borrowers against lender for violations of South Carolina law]; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 683, 116 S.Ct. 1652, 134 L.Ed.2d 902 [contract and fraud claims related to franchise agreement]; *Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 478– 479, 109 S.Ct. 1917, 104 L.Ed.2d 526 [various statutory causes of actions by investors against broker over investments "turned sour"]; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 470–471, 109 S.Ct. 1248, 103 L.Ed.2d 488 [action for fraud and breach of contract]; *Perry v. Thomas* (1987) 482 U.S. 483, 484–485, 107 S.Ct. 2520, 96 L.Ed.2d 426 [suit for breach of contract, conversion, and breach of fiduciary duty arising from employment relationship]; *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 222–223, 107 S.Ct. 2332, 96 L.Ed.2d 185 [suit against brokerage firm by clients alleging various statutory causes of action];

Mitsubishi Motors v. Soler Chrysler–Plymouth (1985) 473 U.S. 614, 619–620, 105 S.Ct. 3346, 87 L.Ed.2d 444 [contract, defamation, and antitrust dispute between automobile companies]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 4, 104 S.Ct. 852, 79 L.Ed.2d 1 [class action suit for fraud, breach of contract, breach of fiduciary duty, and violation of state disclosure requirements related to franchise agreement]; *Gilmer v. Interstate/ Johnson Lane Corp.* (1991) 500 U.S. 20, 23–24, 111 S.Ct. 1647, 114 L.Ed.2d 26 [employment age discrimination suit]; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983) 460 U.S. 1, 6–7, 103 S.Ct. 927, 74 L.Ed.2d 765 [contract dispute].)

The one case in which the high court has considered the enforcement of an arbitration agreement against the government does not support CLS's contention that the FAA preempts a PAGA action. In *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (*Waffle House*), the high court held that an employment arbitration agreement governed by the FAA does not prevent the Equal Employment Opportunity Commission (EEOC) from suing an employer on behalf of an employee bound by that agreement for victim-specific relief, such as reinstatement and back pay. The court based its conclusion primarily on the fact that the EEOC was not a party to the arbitration agreement. (*Id.* at pp. 288–289, 122 S.Ct. 754.) *Waffle House* further noted that the EEOC was not a proxy for the individual employee, that the EEOC could prosecute the action without the employee's consent, and that the employee did not exercise control over the litigation. (*Id.* at p. 291, 122 S.Ct. 754.) Whereas *Waffle House*

involved a suit by the government seeking to obtain victim-specific relief on behalf of an employee bound by the arbitration agreement, this case involves an employee bound by an arbitration agreement bringing suit on behalf of the government to obtain remedies other than victim-specific relief, i.e., civil penalties paid largely into the state treasury. Nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of qui tam action on behalf of the state for such remedies.

Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code. Through his PAGA claim, Iskanian is seeking to recover civil penalties, 75 percent of which will go to the state's coffers. We emphasized in *Arias* that "an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' "; that "[i]n a lawsuit brought under the [PAGA], the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies"; and that "an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself." (*Arias, supra*, 46 Cal.4th at p. 986, 95 Cal.Rptr.3d 588, 209 P.3d 923.) The fact that any judgment in a PAGA action is binding on the government confirms that the state is the real party

in interest. (*Ibid.*) It is true that "a person may not bring a PAGA action unless he or she is 'an aggrieved employee' (§ 2699, subd. (a))" (conc. opn., *post*, 173 Cal.Rptr.3d at p. 323,327 P.3d at p. 157), but that does not change the character of the litigant or the dispute. As Justice Chin correctly observes, "*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state." (*Id.* at p. 322, 327 P.3d at p. 157.)

Of course, any employee is free to forgo the option of pursuing a PAGA action. But it is against public policy for an employment agreement to deprive employees of this option altogether, before any dispute arises. (*Ante*, 173 Cal.Rptr.3d at pp. 312–313, 327 P.3d at pp. 148–149.) The question is whether this public policy contravenes the FAA. Nothing in the text or legislative history of the FAA nor in the Supreme Court's construction of the statute suggests that the FAA was intended to limit the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions. Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, they directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws. In crafting the PAGA, the Legislature could have chosen to deputize citizens who were not employees of the defendant employer to prosecute qui tam actions. The Legislature instead chose to limit

qui tam plaintiffs to willing employees who had been aggrieved by the employer in order to avoid "private plaintiff abuse." (Sen. Judiciary Comm., Analysis of Sen. Bill No. 796 (Reg.Sess. 2003–2004) as amended Apr. 22, 2003, p. 7.) This arrangement likewise does not interfere with the FAA's policy goal.

Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature. Under *Concepcion*, such an action could not be maintained in the face of a class waiver. Here, importantly, a PAGA litigant's status as "the proxy or agent" of the state (*Arias, supra*, 46 Cal.4th at p. 986, 95 Cal.Rptr.3d 588, 209 P.3d 923) is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies. Our FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgmentis binding on the state and any monetary penalties largely go to state coffers.

[21] [22] Further, the high court has emphasized that " 'courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress.'

(*Arizona v. United States* (2012) 567 U.S. ——, ——, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351; see *Chamber of Commerce v. Whiting* (2011) 563 U.S. ——, ——, 131 S.Ct. 1968, 1985, 179 L.Ed.2d 1031 ['Our precedents "establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." [Citation.]'].)" (*Sonic II, supra*, 57 Cal.4th at p. 1154, 163 Cal.Rptr.3d 269, 311 P.3d 184.) There is no question that the enactment and enforcement of laws concerning wages, hours, and other terms of employment is within the state's historic police power. (See *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756, 105 S.Ct. 2380, 85 L.Ed.2d 728 [" 'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.' "]; *Kerr's Catering Service v. Dept. of Industrial Relations* (1962) 57 Cal.2d 319, 326– 327, 19 Cal.Rptr. 492, 369 P.2d 20.) Moreover, how a state government chooses to structure *its own* law enforcement authority lies at the heart of state sovereignty. (See *Printz v. United States* (1997) 521 U.S. 898, 928, 117 S.Ct. 2365, 138 L.Ed.2d 914 ["It is an essential attribute of the State's retained sovereignty that they remain independent and autonomous within their proper sphere of authority."].) We can discern in the FAA no purpose, much less a clear and manifest purpose, to curtail the ability of states to supplement their enforcement capability by authorizing willing employees to seek civil penalties for Labor Code violations traditionally prosecuted by the state.

In sum, the FAA aims to promote arbitration of claims belonging to the private parties to an

arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances. We conclude that California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the Labor and Workforce Development Agency's interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution.

D.

[23] CLS contends that the PAGA violates the principle of separation of powers under the California Constitution. Iskanian says this issue was not raised in CLS's answer to the petition for review and is not properly before us. Because the constitutionality of the PAGA is directly pertinent to the issue of whether a PAGA waiver is contrary to state public policy, and because the parties have had a reasonable opportunity to brief this issue, we will decide the merits of this question. (See Cal. Rules of Court, rule 8.516(b)(1), (2).)

The basis of CLS's argument is found in *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 112 Cal.Rptr.3d 697, 235 P.3d 21 (*County of Santa Clara*). There we reconsidered our earlier holding in *People ex rel. Clancy v. Superior Court* (1985) 39

Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*), which appeared to categorically bar public entities from hiring private counsel on a contingent fee basis to prosecute public nuisances. In the context of a disputed injunction to close an adult bookstore, this court reasoned that private counsel acting as a public prosecutor must be "absolutely neutral" and must engage in a "delicate weighing of values" that would be upset if the prosecutor had a financial interest in the prosecution. (*Id.* at pp. 748–749, 218 Cal.Rptr. 24, 705 P.2d 347.)

In *County of Santa Clara*, we clarified that *Clancy* 's "absolute prohibition on contingent-fee arrangements" applies only to cases involving a constitutional "liberty interest" or "the right of an existing business to continue operation," and not to all public nuisance cases. (*County of Santa Clara, supra*, 50 Cal.4th at p. 56, 112 Cal.Rptr.3d 697, 235 P.3d 21.) We recognized, as we did in *Clancy*, that contingent fee representation was appropriate in "ordinary civil cases" in which a government entity's own economic interests were at stake. (*County of Santa Clara*, at p. 50, 112 Cal.Rptr.3d 697, 235 P.3d 21; see *Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Whereas the suit in *Clancy* was akin to a criminal prosecution, with possible criminal penalties and severe civil penalties, we said the public nuisance suit at issue in *County of Santa Clara*, which involved abatement of lead paint, fell somewhere in between an ordinary civil case and a criminal prosecution. (*County of Santa Clara*, at p. 55, 112 Cal.Rptr.3d 697, 235 P.3d 21.) We held that for such cases, the interest in prosecutorial neutrality is sufficiently protected when private counsel, although

having a pecuniary interest in litigation, is "subject to the supervision and control of government attorneys" so that "the discretionary decisions vital to an impartial prosecution are made by neutral attorneys." (*Id.* at p. 59, 112 Cal.Rptr.3d 697, 235 P.3d 21.)

[24] CLS contends that the PAGA runs afoul of our holding in *County of Santa Clara* by authorizing financially interested private citizens to prosecute claims on the state's behalf without governmental supervision. CLS further contends that because *County of Santa Clara* dealt with regulation of the legal profession, which is the province of this court, the PAGA violates the principle of separation of powers under the California Constitution. (See Cal. Const., art. III, § 3; *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 731–732, 147 Cal.Rptr. 631, 581 P.2d 636.) We disagree.

[25] "[T]he separation of powers doctrine does not create an absolute or rigid division of functions." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068, 17 Cal.Rptr.3d 225, 95 P.3d 459.) Rather, "[t]he substantial interrelatedness of the three branches' actions is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. Such interrelationship, of course, lies at the heart of the

constitutional theory of 'checks and balances' that the separation of powers doctrine is intended to serve." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52–53, 51 Cal.Rptr.2d 837, 913 P.2d 1046.)

[26] In considering CLS's challenge, we note that it would apply not only to the PAGA but to all qui tam actions, including the California False Claims Act, which authorizes the prosecution of claims on behalf of government entities without government supervision. (See Gov.Code, § 12652, subd. (c).) No court has applied the rule in *Clancy* or *County of Santa Clara* to such actions, and our case law contains no indication that the enactment of qui tam statutes is anything but a legitimate exercise of legislative authority. The Legislature is charged with allocating scarce budgetary resources (see *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1010– 1011, 116 Cal.Rptr.3d 480, 239 P.3d 1186), which includes the provision of resources to the state executive branch for prosecution and law enforcement. Qui tam actions enhance the state's ability to use such scarce resources by enlisting willing citizens in the task of civil enforcement. Indeed, the choice often confronting the Legislature is not between prosecution by a financially interested private citizen and prosecution by a neutral prosecutor, but between a private citizen suit and no suit at all. As noted, the lack of government resources to enforce the Labor Code led to a legislative choice to deputize and incentivize employees uniquely positioned to detect and prosecute such violations through the PAGA.

This legislative choice does not conflict with *County of Santa Clara*. Our holding in that case applies to circumstances in which a government entity retains a private law firm or attorney as outside counsel. A "fundamental" reason to worry about neutrality in that context is that such an attorney, like an attorney directly employed by the government, "has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly." (*Clancy, supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347.) By contrast, a litigant who brings a qui tam action on behalf of the government generally does not have access to such power. The qui tam litigant has only his or her own resources and may incur significant cost if unsuccessful. The PAGA, by deputizing employee plaintiffs to enforce the Labor Code on behalf of the Labor and Workforce Development Agency, does not present the same risks of abuse as when a city or county hires outside counsel to do its bidding.

Moreover, our rule in *County of Santa Clara* involves minimal if any interference with legislative or executive functions of state or local government. The rule simply requires government entities to supervise the attorneys they choose to hire to pursue public nuisance actions. By contrast, a rule disallowing qui tam actions would significantly interfere with a legitimate exercise of legislative authority aimed at accomplishing the important public purpose of augmenting scarce government resources for civil prosecutions.

Because of these differences, *Clancy* and *County of Santa Clara* do not apply beyond the context of attorneys hired by government entities as independent contractors. There is no conflict between the rule in those cases and the PAGA. Accordingly, we reject CLS's argument that the PAGA violates the separation of powers principle under the California Constitution.

VI.

Having concluded that CLS cannot compel the waiver of Iskanian's representative PAGA claim but that the agreement is otherwise enforceable according to its terms, we next consider how the parties will proceed. Although the arbitration agreement can be read as requiring arbitration of individual claims but not of representative PAGA claims, neither party contemplated such a bifurcation. Iskanian has sought to litigate all claims in court, while CLS has sought to arbitrate the individual claims while barring the PAGA representative claim altogether. In light of the principles above, neither party can get all that it wants. Iskanian must proceed with bilateral arbitration on his individual damages claims, and CLS must answer the representative PAGA claims in some forum. The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration.

This raises a number of questions: (1) Will the parties agree on a single forum for resolving the PAGA claim

and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed pursuant to Code of Civil Procedure section 1281.2? (See *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 388–391, 25 Cal.Rptr.3d 540, 107 P.3d 217 [California Arbitration Act rather than FAA procedures apply to arbitrations brought in California courts].) The parties have not addressed these questions and may do so on remand. The parties may also address CLS's contention that the PAGA claims are time-barred, as well as Iskanian's response that CLS has forfeited this contention and cannot raise it on appeal.

CONCLUSION

Because the Court of Appeal held that the entire arbitration agreement, including the PAGA waiver, should be enforced, we reverse the judgment and remand the cause for proceedings consistent with this opinion.

WE CONCUR: CANTIL–SAKAUYE, C.J., CORRIGAN, J., and KENNARD, J. *

Concurring Opinion by CHIN, J.

I agree that the rule of *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 64 Cal.Rptr.3d 773, 165 P.3d 556 (*Gentry*), which was announced by a bare four-to-three majority of this court, is inconsistent with and invalid under the decisions of the United States

Supreme Court interpreting the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). I also agree that the class action waiver in this case is not unlawful under the National Labor Relations Act, that defendant CLS Transportation Los Angeles, LLC, did not waive its right to arbitrate, that the arbitration agreement is invalid insofar as it purports to preclude plaintiff Arshavir Iskanian from bringing in any forum a representative action under the Private Attorneys General Act of 2004 (PAGA) (Lab.Code, § 2698 et seq.), and that this conclusion is not inconsistent with the FAA. However, as explained below, I do not endorse all of the majority's reasoning and discussion, including its endorsement of dicta in *Sonic–Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 163 Cal.Rptr.3d 269, 311 P.3d 184 (*Sonic II*). I therefore concur in the judgment.

I. BOTH *GENTRY'S* RULE AND *SONIC II'S* DICTA ARE INVALID UNDER THE FAA.

As noted above, I agree with the majority that *Gentry* 's rule may not stand under the United States Supreme Court's construction of the FAA. Indeed, for that very reason, I joined Justice Baxter's well-reasoned dissent in *Gentry*, which explained that neither the FAA nor California law permits courts to "elevate a mere judicial affinity for class actions as a beneficial device for implementing the wage laws above the policy expressed by both Congress and our own Legislature that voluntary individual agreements to arbitrate ... should be enforced according to their terms." (*Gentry, supra*, 42 Cal.4th

at p. 477, 64 Cal.Rptr.3d 773, 165 P.3d 556 (dis. opn. of Baxter, J.).)

I do not agree, however, that the approach to unconscionability a majority of this court described in dicta in *Sonic II* may "be squared" with the high court's FAA decisions. (Maj. opn., ante, 173 Cal.Rptr.3d at p. 298, 327 P.3d at p. 137.) That approach, as my dissent in *Sonic II* explained, is preempted by the FAA as the high court construed that act in *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. ——, 131 S.Ct. 1740, 179 L.Ed.2d 742 (*Concepcion*), *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ——, 133 S.Ct. 2304, 186 L.Ed.2d 417 (*Italian Colors*), and several other decisions. (*Sonic II, supra*, 57 Cal.4th at pp. 1184–1192, 163 Cal.Rptr.3d 269, 311 P.3d 184 (dis. opn. of Chin, J.).) Nothing has occurred since we issued *Sonic II* to change my view.

Indeed, the majority's discussion in this case further reveals the invalidity under federal law of *Sonic II* 's dicta. According to the majority, under that dicta, whether the arbitration procedure to which the parties have agreed is unconscionable turns not on whether it permits recovery, but on whether it is, in a court's view, less "effective ... for wage claimants" than a "dispute resolution mechanism" that includes the procedures and protections "the Berman statutes" prescribe. (Maj. opn., *ante*, 173 Cal.Rptr.3d at pp. 298–299, 327 P.3d at pp. 136– 137.) However, the high court has established that the FAA does not permit courts to invalidate arbitration agreements based on the view that the procedures they set forth

would " 'weaken[ ] the protections afforded in the substantive law to would-be complainants.' [Citation.]" (*Green Tree Financial Corp.–Ala. v. Randolph* (2000) 531 U.S. 79, 89– 90, 121 S.Ct. 513, 148 L.Ed.2d 373.) Consistent with this principle, in *Italian Colors*, the court recently held that an arbitration agreement may be not invalidated based on proof that its waiver of a *congressionally approved* mechanism— the class action—would make pursuing a federal antitrust claim prohibitively expensive. (*Italian Colors, supra,* 570 U.S. at pp. ——— – ———, 133 S.Ct. at pp. 2310–2312.) A fortiori, an arbitration agreement may not be invalidated based on a court's subjective view that the agreement's waiver of the Berman procedures and protections would render arbitration less "effective ... for wage claimants" than a "dispute resolution mechanism" that includes those procedures and protections. According to the high court, the FAA is "a congressional declaration of 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.* (1983) 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765, italics added.) To quote Justice Baxter's dissent in *Gentry*, it does not permit courts to "elevate a mere judicial affinity for" the Berman dispute resolution mechanism "as a beneficial device for implementing the wage laws above the policy expressed by ... Congress ... that voluntary individual agreements to arbitrate ... should be enforced according to their terms." (*Gentry, supra*, 42 Cal.4th at p. 477, 64 Cal.Rptr.3d 773, 165 P.3d 556 (dis. opn. of Baxter, J.).) I therefore do not join the majority opinion insofar as it suggests that the approach to

unconscionability described in *Sonic II*'s dicta is valid under the FAA.

II. THE PAGA WAIVER IS UNENFORCEABLE.

Under PAGA, an "aggrieved employee"—i.e., "any person who was employed by" someone alleged to have violated the Labor Code "and against whom one or more of the alleged violations was committed"—may bring a civil action against the alleged violator to recover civil penalties for Labor Code violations both as to himself or herself and as to "other current or former employees." (Lab.Code, § 2699, subds.(a), (c).) [1] As we have explained, an aggrieved employee's PAGA action " 'is fundamentally a law enforcement action' " that "substitute[s] for an action brought by the government itself." *(Arias v. Superior Court* (2009) 46 Cal.4th 969, 986, 95 Cal.Rptr.3d 588, 209 P.3d 923.) The employee-plaintiff "acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies" and seeking statutory civil penalties "that otherwise would be sought by" those agencies. (*Amalgamated Transit Union, Local 1756, AFL–CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003, 95 Cal.Rptr.3d 605, 209 P.3d 937.) By statute, 75 percent of the penalties "recovered by aggrieved employees" under PAGA goes to the Labor and Workforce Development Agency, and only 25 percent goes to "the aggrieved employees." (§ 2699, subd. (i).) Accordingly, *every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the

action—or as to other employees as well, is a representative action on behalf of the state.

As relevant, the arbitration agreement here provides: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and *representative* action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or *representative* action claims against the other in *arbitration or otherwise*; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." (Italics added.) Because, as explained above, *all* PAGA claims are representative actions, these provisions purport to preclude Iskanian from bringing a PAGA action *in any forum*. To this extent, the arbitration provision is, for reasons the majority states, invalid under California law. (Maj. opn., *ante*, 173 Cal.Rptr.3d at pp. 312–313, 327 P.3d at pp. 148 149.)

I agree with the majority that this conclusion is not inconsistent with the FAA, but my reasoning differs from the majority's. Although the FAA generally requires enforcement of arbitration agreements according to their terms, the high court has recognized an exception to this requirement for "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." (*Italian Colors, supra,* 570 U.S. at p. ——, 133 S.Ct. at p. 2310; see *Mitsubishi Motors v. Soler Chrysler–Plymouth* (1985)

473 U.S. 614, 637, 105 S.Ct. 3346, 87 L.Ed.2d 444 ["so 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"].) Accordingly, the conclusion that the arbitration agreement here is invalid insofar as it forbids Iskanian from asserting his statutory right under PAGA in any forum does not run afoul of the FAA.

The majority takes a different route in finding no preemption. It first correctly observes that the FAA applies by its terms only to provisions in contracts " 'to settle by arbitration a controversy thereafter arising out of such contract.' " (Maj. opn., *ante*, 173 Cal.Rptr.3d at p. 313, 327 P.3d at p. 150, quoting 9 U.S.C. § 2.) Based on this language, the majority then declares that a PAGA claim "lies" completely "outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." (Maj. opn., *ante*, at p. 315, 327 P.3d at p. 151.) It is, instead, merely "a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code." (Maj. opn., *ante*, at p. 315, 327 P.3d at p. 151.)

For several reasons, I question the majority's analysis. First, I disagree that a PAGA claim is not "a dispute between an employer and an employee arising out of their contractual relationship." (Maj. opn., *ante*, 173 Cal.Rptr.3d at p. 315, 327 P.3d at p.

151.) As noted above, a person may not bring a PAGA action unless he or she is "an aggrieved employee" (§ 2699, subd. (a)), i.e., a person "who was employed by" the alleged Labor Code violator and "against whom" at least one of the alleged violations "was committed" (§ 2699, subd. (c)). In other words, as the majority explains, by statute, only "employees who ha[ve] been aggrieved by the employer" may bring PAGA actions. (Maj. opn., *ante*, at p. 316, 327 P.3d at p. 152.) Thus, although the scope of a PAGA action may extend beyond the contractual relationship between the plaintiff—employee and the employer—because the plaintiff may recover civil penalties for violations as to other employees—the dispute arises, first and fundamentally, out of that relationship.

Second, to find no FAA preemption in this case, we need not adopt a novel theory, devoid of case law support, that renders the FAA completely inapplicable to PAGA claims. Under the majority's view that PAGA claims "lie[ ] outside the FAA's coverage" because they are not disputes between employers and employees "arising out of their contractual relationship" (maj. opn., *ante*, 173 Cal.Rptr.3d at p. 315, 327 P.3d at p. 151), the state may, without constraint by the FAA, simply ban arbitration of PAGA claims and declare agreements to arbitrate such claims unenforceable. I do not subscribe to that view, for which the majority offers no case law support. By contrast, as explained above, there *is* case law support—from the high court itself—for the conclusion that the arbitration agreement here is unenforceable because it purports to preclude Iskanian from bringing a PAGA action *in any forum*. We should limit ourselves to an analysis

firmly grounded in high court precedent, rather than needlessly adopt a novel theory that renders the FAA completely inapplicable.

Third, contrary to the majority's assertion, *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (*Waffle House*), to the extent it is relevant, actually *does* "suggest[ ] that the FAA preempts" the majority's rule. The question there was whether, under the FAA, an agreement between an employer and an employee to arbitrate employment-related disputes precluded the Equal Employment Opportunity Commission (EEOC), which was not "a party to" the arbitration agreement and had never "agreed to arbitrate its claims," from pursuing victim-specific relief in a judicial enforcement action. (*Waffle House, supra,* at p. 294, 122 S.Ct. 754.) The court said "no," explaining that nothing in the FAA "place[s] any restriction on a nonparty's choice of a judicial forum" (*Waffle House, supra*, at p. 289, 122 S.Ct. 754) or requires a "nonparty" to arbitrate claims it has not agreed to arbitrate (*id.* at p. 294, 122 S.Ct. 754). Because Iskanian is a party to the arbitration agreement in this case, this holding is inapposite. What is apposite in *Waffle House* is the court's statement that the FAA "ensures the enforceability of private agreements to arbitrate." (*Waffle House, supra,* 534 U.S. at p. 289, 122 S.Ct. 754.) This statement, which simply reiterates what the court has said "on numerous occasions" (*Stolt–Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 682, 130 S.Ct. 1758, 176 L.Ed.2d 605), casts considerable doubt on the majority's view that the FAA permits either California or its courts to declare

private agreements to arbitrate PAGA claims categorically unenforceable.

Finally, under other high court precedent, there is good reason to doubt the majority's suggestion that the FAA places no limit on "the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions." (Maj. opn., *ante*, 173 Cal.Rptr.3d at p. 316, 327 P.3d at p. 152.) When the high court recently held in *Concepcion* that the FAA prohibits courts from conditioning enforcement of arbitration agreements on the availability of classwide arbitration procedures, even if such procedures "are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," it explained: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Concepcion, supra,* 563 U.S. at p. ——, 131 S.Ct. at p. 1753.) In earlier decisions, the high court broadly explained that the FAA "is a congressional declaration of 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, 103 S.Ct. 927, italics added), which "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1). Thus, "if contracting parties agree to include" certain claims "within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms *even if a rule of state law would otherwise exclude*

such claims from arbitration." (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76, italics added.) In other words, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Concepcion, supra*, 563 U.S. at p. ——, 131 S.Ct. at p. 1747.) These binding pronouncements indicate that the FAA may, in fact, place a limit on the ability of a state, for policy reasons, to "enhance" its public enforcement capabilities by authorizing employees who have contractually agreed to arbitrate their statutory PAGA claims to ignore that agreement and pursue those claims in court as the state's "representatives." (Maj. opn., *ante*, at p. 316, 327 P.3d at p. 152.)

However, as explained above, requiring an arbitration provision to preserve *some* forum for bringing PAGA actions does not exceed that limit. I therefore concur in the judgment.

I CONCUR: BAXTER, J.

Concurring and Dissenting Opinion by WERDEGAR, J.

I join the court's conclusions as to Arshavir Iskanian's Private Attorneys General Act claims, which are not foreclosed by his employment contract or the Federal Arbitration Act (FAA). I disagree with the separate holding that the mandatory class action and class arbitration waivers in Iskanian's employment contract are lawful. Eight decades ago, Congress made clear that employees have a right to

engage in collective action and that contractual clauses purporting to strip them of those rights as a condition of employment are illegal. What was true then is true today. I would reverse the Court of Appeal's decision in its entirety.

I.

Employment contracts prohibiting collective action, first known as " 'ironclads,' " date to the 19th century. (Ernst, *The Yellow-dog Contract and Liberal Reform, 1917–1932* (1989) 30 Lab. Hist. 251, 252 (*The Yellow-dog Contract*).) Confronted with collective efforts by workers to agitate for better terms and conditions of employment, employers responded by conditioning employment on the promise not to join together with fellow workers in a union. (*Lincoln Union v. Northwestern Co.* (1949) 335 U.S. 525, 534, 69 S.Ct. 251, 93 L.Ed. 212; Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction* (1993) 11 Hofstra Lab. L.J. 97, 100.) This practice was "so obnoxious to workers that they gave these required agreements the name of 'yellow dog contracts.' " (*Lincoln Union*, at p. 534, 69 S.Ct. 251.)

"Recognizing that such agreements in large part represent the superior economic position of the employer by virtue of which the theoretical freedom of an employee to refuse assent was illusory, and that such agreements therefore emptied of meaning the 'right of collective bargaining,' " state legislatures and Congress sought to stem the practice, enacting statutes that prohibited conditioning employment on

a compulsory contractual promise not to unionize. (Frankfurter & Greene, The Labor Injunction (1930) p. 146.) These efforts were initially unsuccessful; first state courts, and then the *Lochner*-era [2] Supreme Court, struck down the bans as an infringement on liberty of contract. (*Coppage v. Kansas* (1915) 236 U.S. 1, 9–14, 35 S.Ct. 240, 59 L.Ed. 441; *Adair v. United States* (1908) 208 U.S. 161, 172–176, 28 S.Ct. 277, 52 L.Ed. 436; Frankfurter & Greene, at pp. 146–148; Ernst, *The Yellow-dog Contract, supra*, 30 Lab. Hist. at p. 252.) When the Supreme Court gave a clear imprimatur to yellow-dog contracts in *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260, upholding an injunction against collective organizing efforts on the ground that the contracts granted employers a property right secure from union interference, the use of contractual bans on collective action blossomed. (Frankfurter & Greene, at pp. 148–149; Ernst, at pp. 253–256.) Through the use of such terms, "[a]ny employer willing to compel employee acquiescence could effectively foreclose all union organizational efforts directed at his business." (Winter, Jr., *Labor Injunctions and Judge-made Labor Law: The Contemporary Role of Norris–LaGuardia* (1960) 70 Yale L.J. 70, 72, fn. 14.)

In the 1930's, Congress tried again to outlaw contractual bans on collective action. A bill drafted by then-Professor Felix Frankfurter and others [3] was swiftly and overwhelmingly approved in both houses and enacted as the Norris–LaGuardia Act of 1932. (Bremner, *The Background of the Norris–La Guardia* Act (1947) 9 The Historian 171, 174–175.) Section 2 of the act declared as the public policy of the United

States employees' right to engage in collective activity, free from employer restraint or coercion: "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, ... *it is necessary that he have full freedom of association,* self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that *he shall be free from the interference, restraint, or coercion of employers of labor,* or their agents, in the designation of such representatives or in self-organization or *in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...."* (29 U.S.C. § 102, italics added.) Congress recognized the inability of a "single laborer, standing alone, confronted with such far- reaching, overwhelming concentration of employer power" to "negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor," the necessary corrective to be "[t]he right of wage earners to organize and to act jointly in questions affecting wages [and the] conditions of labor," and, as the solution, "specific legislative action" to preserve workers' "freedom in association to influence the fixing of wages and working conditions." (Sen. Rep. No. 163, 72d Cong., 1st Sess., p. 9 (1932); see generally *id.*, at pp. 9–14.) Arguing for passage, the act's cosponsor, Senator George Norris, explained the measure was needed to end a regime in which "the

laboring man.... must singly present any grievance he has." (Remarks of Sen. Norris, Debate on Sen. No. 935, 72d Cong., 1st Sess., 75 Cong. Rec. 4504 (1932).)

To that end, section 3 of the Norris–LaGuardia Act was "designed to outlaw the so-called yellow-dog contract." (H.R. Rep. No. 669, 72d Cong., 1st Sess., p. 6 (1932); accord, Sen. Rep. No. 163, *supra*, at pp. 15–16.) "[T]he vice of such contracts, which are becoming alarmingly widespread," was that they rendered collective action and unions effectively impossible; "[i]ndeed, that is undoubtedly their purpose, and the purpose of the organizations of employers opposing" the Norris–LaGuardia Act. (H.R. Rep. No. 669, at p. 7.) If such contracts, requiring a waiver of workers' rights of free association, were given enforcement in the courts, "collective action would be impossible so far as the employee is concerned by virtue of the necessity of signing the character of contract condemned, which prevents a man from joining with his fellows for collective action; and the statement ... that 'it has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work' would become an empty statement of historical fact." (*Ibid.*, quoting *Texas & N.O.R. Co. v. Ry. Clerks* (1930) 281 U.S. 548, 570, 50 S.Ct. 427, 74 L.Ed. 1034.) Accordingly, the Norris–LaGuardia Act declared yellow dog contracts "to be contrary to the public policy of the United States" and unenforceable in any court of the United States. (29 U.S.C. § 103.)

Three years later, Congress expanded on these proscriptions in the National Labor Relations Act (commonly known as the Wagner Act after its author, Sen. Robert F. Wagner). (Pub.L. No. 74–198 (July 5, 1935) 49 Stat. 449, codified as amended at 29 U.S.C. §§ 151–169.) The public policy underlying the act was the same as that motivating the Norris–LaGuardia Act: "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (29 U.S.C. § 151.) To ensure that end, the Wagner Act granted employees, inter alia, "the right ... to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection...." (29 U.S.C. § 157 (also known as section 7).) [4] Employers were forbidden "to interfere with, restrain, or coerce employees in the exercise of" their right to engage in concerted, collective activity. (29 U.S.C. § 158(a)(1).) Inter alia, these provisions were a "logical and imperative extension of that section of the Norris–La Guardia Act which makes the yellow-dog contract unenforceable in the Federal courts." (Nat. Labor Relations Act of 1935, Hearings before House Com. on Labor on H.R. No. 6288, 74th Cong., 1st Sess., at p. 14 (1935), statement of Sen. Wagner; accord, remarks of Sen. Wagner, Debate on Sen. No. 1958, 74th Cong., 1st Sess., 79 Cong. Rec. 7570 (daily ed. May 15, 1935); see H.R. Rep. No. 1147, 74th Cong., 1st Sess., supra, at p. 19.) [5] Recognizing as clear "the legality of collective action on the part of employees in order to safeguard their proper interests," the post-*Lochner* Supreme Court now

upheld against constitutional challenge Congress's "safeguard" of this right. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33–34, 57 S.Ct. 615, 81 L.Ed. 893.)

In the years since the Wagner Act's passage, the Supreme Court, Courts of Appeals, and National Labor Relations Board have conclusively established that the right to engage in collective action includes the pursuit of actions in court. (*Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565–566, 98 S.Ct. 2505, 57 L.Ed.2d 428 [the Wagner Act's " 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"]; *Brady v. National Football League* (8th Cir.2011) 644 F.3d 661, 673 ["a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7" of the Wagner Act]; *Mojave Electric Cooperative* (1998) 327 NLRB 13, 18, enforced by *Mohave Elec. Co–op., Inc. v. N.L.R.B.* (D.C.Cir.2000) 206 F.3d 1183, 1188–1189 [same]; *Altex Ready Mixed Concrete Corp.* (1976) 223 NLRB 696, 699–700, enforced by *Altex Ready Mixed Concrete Corp. v. N.L.R.B.* (5th Cir.) 542 F.2d 295, 297 [same]; *Leviton Manufacturing Company, Inc. v. N.L.R.B.* (1st Cir.1973) 486 F.2d 686, 689 [same].) This right extends to the filing of wage and hour class actions (*United Parcel Service, Inc.* (1980) 252 NLRB 1015, 1018, enforced by *N.L.R.B. v. United Parcel Service, Inc.* (6th Cir.1982) 677 F.2d 421), including wage class actions filed by former employees like Iskanian (see *Harco Trucking, LLC* (2005) 344 NLRB 478, 482). The Wagner Act thus prohibits, as an

unfair labor practice, employer interference with the ability of current or former employees to join collectively in litigation.

II.

Today's class waivers are the descendants of last century's yellow dog contracts. (See D.R. *Horton & Cuda* (Jan. 3, 2012) 357 NLRB No. 184, p. 6.) CLS Transportation's adhesive form contract includes a clause prohibiting Iskanian, like all its employees, from pursuing class or representative suits or class arbitrations. [6] Thus, Iskanian may not file collectively with fellow employees a suit or an arbitration claim challenging any of CLS's employment practices or policies. Patently, the effect of the clause is to prevent employees from making common cause to enforce rights to better wages and working conditions. In this, the clause is indistinguishable from the yellow dog contracts prohibited by the Norris–LaGuardia and Wagner Acts. Indeed, the whole point of protecting a right to collective action is to allow employees to do precisely what CLS Transportation's clause forbids—band together as a group to peaceably assert rights against their employer.

That the class waiver is without effect necessarily follows. An employer may not by contract require an employee to renounce rights guaranteed by the Wagner Act (*Nat. Licorice Co. v. Labor Board* (1940) 309 U.S. 350, 359–361, 60 S.Ct. 569, 84 L.Ed. 799; see id. at p. 364, 60 S.Ct. 569 ["employers cannot set at naught the National Labor Relations Act by

inducing their workmen to agree not to demand performance of the duties which it imposes"]), and this includes a contract clause requiring an employee to resolve disputes in individual, binding arbitration. Such a clause "is the very antithesis of collective bargaining [and] ... impose[s] a restraint upon collective action." (*National Labor Relations Board v. Stone* (7th Cir.1942) 125 F.2d 752, 756; see *Barrow Utilities & Electric* (1992) 308 NLRB 4, 11, fn. 5 ["The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid...."].) The restriction in Iskanian's contract thus directly contravenes federal statutory labor law and is invalid on its face. A contract clause that violates the Wagner Act is unenforceable. (*Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83–86, 102 S.Ct. 851, 70 L.Ed.2d 833; *J.I. Case Co. v. Labor Board* (1944) 321 U.S. 332, 337, 64 S.Ct. 576, 88 L.Ed. 762 [private contracts that conflict with the Wagner Act "obviously must yield or the Act would be reduced to a futility"].) Iskanian may not be prevented, on the basis of his contract, from proceeding with a putative class action.

III.

Notwithstanding this authority, CLS Transportation invokes the FAA as grounds for upholding the class waiver.

In the early part of the 20th century, merchants faced judicial hostility to predispute arbitration agreements they entered with their fellow merchants; routinely, the courts declined to enforce such

agreements, relying on the common law rule that specific enforcement of agreements to arbitrate was unavailable. (H.R. Rep. No. 96, 68th Cong., 1st Sess., pp. 1–2 (1924); Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-making* (2012) 44 Loy. U. Chi. L.J. 391, 395.) In 1925, Congress enacted the FAA in response. Its purpose was to have arbitration agreements "placed upon the same footing as other contracts." (H.R. Rep. No. 96, at p. 1)

Section 2 of the FAA, its "primary substantive provision" (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765), makes this point explicit: An arbitration agreement "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, italics added). Here, we deal with a provision—the waiver of the statutorily protected right to engage in collective action—that would be unenforceable in any contract, whether as part of an arbitration clause or otherwise. The FAA codifies a nondiscrimination principle; "[a]s the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." (*Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 404, fn. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270.) That purpose is not upset by precluding, in arbitration clauses and employment contracts alike, mandatory class waivers forfeiting the right to engage in collective action, a right foreshadowed by section 3 of the Norris–LaGuardia Act and guaranteed by section 7 of the Wagner Act. Accordingly, there is no conflict between

the FAA and the Norris–LaGuardia and Wagner Acts, nor is there anything in the FAA that would permit disregard of the substantive rights guaranteed by those later enactments.

Were one to perceive a conflict, the express text of the Norris– LaGuardia Act would resolve it. The 1932 act supersedes prior law, including any contrary provisions in the 1925 FAA: "All acts and parts of acts in conflict with the provisions of this chapter are repealed." (29 U.S.C. § 115.) The effect of this provision, in combination with section 3 (29 U.S.C. § 103) banning yellow dog contracts and the FAA's section 2 (9 U.S.C. § 2), subjecting arbitration agreements to the same limits as other contracts, is to render equally unenforceable contractual obligations to forswear collective action in regular employment agreements and in employment arbitration agreements.

Brief reflection on the purposes underlying the Norris–LaGuardia Act and Wagner Act demonstrates why this must be so. A strike for better wages and working conditions is core protected activity. (*Labor Board v. Erie Resistor Corp.* (1963) 373 U.S. 221, 233–235, 83 S.Ct. 1139, 10 L.Ed.2d 308; *Automobile Workers v. O'Brien* (1950) 339 U.S. 454, 456–457, 70 S.Ct. 781, 94 L.Ed. 978.) So too is a walkout. (*Labor Bd. v. Washington Aluminum Co.* (1962) 370 U.S. 9, 14–17, 82 S.Ct. 1099, 8 L.Ed.2d 298; *N.L.R.B. v. McEver Engineering, Inc.* (5th Cir.1986) 784 F.2d 634, 639; *Vic Tanny Intern., Inc. v. N.L.R.B.* (6th Cir. 1980) 622 F.2d 237, 240–241.) But the expressly declared fundamental purpose of the Wagner Act is to

minimize industrial strife. (29 U.S.C. § 151["[P]rotection by law of the right of employees to organize and bargain" is necessary to "promote[ ] the flow of commerce by removing certain recognized sources of industrial strife and unrest"]; see *Brooks v. Labor Board* (1954) 348 U.S. 96, 103, 75 S.Ct. 176, 99 L.Ed. 125 ["The underlying purpose of [the Wagner Act] is industrial peace."]; Atleson, Values and Assumptions in American Labor Law (1983) p. 40 ["The most common argument in favor of the Wagner Act was that it would reduce industrial strife."].) The Wagner Act "seeks, to borrow a phrase of the United States Supreme Court, 'to make the appropriate collective action (of employees) an instrument of peace rather than of strife.' " (H.R. Rep. No. 1147, 74th Cong., 1st Sess., *supra,* at p. 9.) If a class waiver provision in an arbitration agreement were deemed enforceable, Iskanian and other employees would be protected if they elected to protest through strikes or walkouts but precluded from resolving grievances through peaceable collective action—a result precisely opposite to the reduction in industrial strife at the heart of the Wagner Act's goals. Congress would not have favored less peaceable means over more peaceable ones.

Alternatively, if the device of inserting a collective action ban in an arbitration clause were enough to insulate the ban from the Norris–LaGuardia and Wagner Acts' proscriptions, employers could include in every adhesive employment contract a requirement that *all* disputes and controversies, not just wage and hour claims, be resolved through arbitration and thus effectively ban the full range of collective activities Congress intended those acts to

protect. Such a purported harmonizing of the various acts would gut the labor laws; the right to " 'collective action would be a mockery.' " (H.R. Rep. No. 669, 72d Cong., 1st Sess., *supra*, at p. 7.) When Congress invalidated yellow dog contracts and protected the right to engage in collective action, it could not have believed it was conveying rights enforceable only at the grace of employers, who could at their election erase them by the simple expedient of a compelled waiver inserted in an arbitration agreement.

CLS Transportation argues *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. 321, 131 S.Ct. 1740, 179 L.Ed.2d 742 and *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. ——, 132 S.Ct. 665, 181 L.Ed.2d 586 save its class waiver. Neither does.

Concepcion considered whether as a matter of obstacle preemption the FAA foreclosed a state-law unconscionability rule applicable to class waivers in consumer contracts. (*AT & T Mobility LLC v. Concepcion, supra,* 563 U.S. at p. ——, 131 S.Ct. at p. 1746.) It did not speak to the considerations entailed in reconciling the FAA with other coequal federal statutes. Nor did it address any of the particulars of Congress's subsequent labor legislation codifying employees' substantive rights to engage in collective action, rights not shared by consumers.

CompuCredit Corp. v. Greenwood, supra, 565 U.S. —— —, 132 S.Ct. 665 is similarly of no assistance. There, the Supreme Court reaffirmed that to determine whether the FAA's presumption in favor of enforcing arbitration clauses applies to a given claim, one must

ask whether the presumption has been " 'overridden by a contrary congressional command' " in other federal law. (*Id.* at p. ——, 132 S.Ct. at p. 669.) The claims at issue there arose under a federal law that guaranteed consumers notice of a " ' "right to sue." ' " (*Ibid.*, quoting 15 U.S.C. § 1679c(a).) Had Congress intended to preclude arbitration as a suitable forum under the applicable act, "it would have done so in a manner less obtuse" than one offhand reference to a right to sue. (*CompuCredit,* at p. ——, 132 S.Ct. at p. 672.) In contrast, the Norris–LaGuardia Act and Wagner Act present no similar difficulties for discerning a contrary congressional command. Such a command may be evident from "the text of the [other statute], its legislative history, or an 'inherent conflict' between arbitration and the [other statute's] underlying purposes." (*Gilmer v. Interstate/ Johnson Lane Corp.* (1991) 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26.) Each such source supplies support here: the conclusion that class waivers are foreclosed arises not from inferences gleaned from a lone phrase, as in *CompuCredit*, but from the explicit text, legislative history and core purpose of the acts, all establishing the right to collective action and the illegality of compelled contractual waivers of that right. (See *ante*, pts. I. & II.)

Refusing to enforce a National Labor Relations Board order finding a class waiver violative of the Wagner Act, a divided Fifth Circuit reached a contrary conclusion. (*D.R. Horton, Inc. v. N.L.R.B.* (5th Cir.2013) 737 F.3d 344 (*Horton II*), declining to enforce *D.R. Horton & Cuda, supra*, 357 NLRB No. 184.) The majority's analysis assumed a congressional command superseding the FAA could

come only from "the general thrust of the [Wagner Act]—how it operates, its goal of equalizing bargaining power" (*Horton II*, at p. 360) and the "congressional intent to 'level the playing field' between workers and employers" (*id.* at p. 361), sources the majority found insufficient. One need not look to such generalized and abstract indications. As discussed, the FAA subordinates arbitration agreements to generally applicable bars against contract enforcement (9 U.S.C. § 2), and the Wagner Act by its text bars employers from contractually conditioning employment on waiver of the right to engage in collective action (29 U.S.C. §§ 157, 158(a)(1); see *Nat. Licorice Co. v. Labor Board, supra,* 309 U.S. at pp. 359–361, 60 S.Ct. 569).

Horton II also took comfort in the fact rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.), governing class actions, was not adopted until 1966. (*Horton II, supra*, 737 F.3d at p. 362.) But that the most prevalent current form of collective litigation is recent does not mean the Wagner Act at its inception did not shield from waiver the right to collective litigation in whatever manner available. Collective actions via the common law doctrine of virtual representation, based on equity principles, are of much older vintage than rule 23. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 988–989, 95 Cal.Rptr.3d 588, 209 P.3d 923 (conc. opn. of Werdegar, J.).) "The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat

broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.' " (*Eastex, Inc. v. NLRB, supra*, 437 U.S. at p. 565, 98 S.Ct. 2505.) The broad language of the Wagner Act shields concerted activity for mutual aid or protection by whatever means pursued, including through peaceable collective suits.

In the end, CLS Transportation's argument rests on the notion that the FAA should be interpreted to operate as a super-statute, limiting the application of both past and future enactments in every particular. "[M]en may construe things after their fashion/Clean from the purpose of the things themselves." (Shakespeare, Julius Caesar, act I, scene 3, lines 34–35.) So it is with this view of the FAA. The text and legislative history of the Norris–LaGuardia and Wagner Acts, passed by legislators far closer in time to the FAA than our current vantage point, show no such deference. The right of collective action they codify need not yield.

I respectfully dissent.

Parallel Citations

59 Cal.4th 348, 327 P.3d 129, 199 L.R.R.M. (BNA) 3772, 164 Lab.Cas. P 61,492, 22 Wage & Hour Cas.2d (BNA) 1511, 2014 Daily Journal D.A.R. 8037

Endnotes

* Retired Associate Justice of the Supreme Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 All further unlabeled statutory references are to the Labor Code.

1 *Lochner v. New York* (1905) 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937.

2 See Frankfurter & Greene, The Labor Injunction, supra, page 226 and footnote 61; id. at pages 279–288 (draft bill); Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act* (1989) 89 Colum. L.Rev. 789, 846–849.

3 Congress took to heart, as it had in the Norris–LaGuardia Act, Chief Justice Taft's admonition that because a "single employee was helpless in dealing with an employer," collective action "was essential to give laborers [the] opportunity to deal on equality with their employer." (*Amer. Foundries v. Tri–City Council* (1921) 257 U.S. 184, 209, 42 S.Ct. 72, 66 L.Ed. 189, quoted in H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 10 (1935) and H.R. Rep. No. 669, 72d Cong., 1st Sess., *supra*, at p. 7.)

4 Senator Wagner's "intent was the intent of Congress, for unlike most other major legislation, this statute was the product of a single legislator. Although Wagner received assistance from various sources, he fully controlled the bill's contents from introduction to final passage." (Morris, *Collective Rights as Human Rights: Fulfilling Senator Wagner's Promise of Democracy in the Workplace—The Blue Eagle Can Fly Again* (2005) 39 U.S.F. L.Rev. 701, 709.)

5 The clause provides: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." ("Proprietary Information and Arbitration Policy/ Agreement," ¶ 16(b) (Iskanian's contract).)

APPENDIX G

MORGAN TIRE & AUTO, INC.
EMPLOYEE DISPUTE RESOLUTION PLAN
(Effective September 10, 2003)

THE EMPLOYEE DISPUTE RESOLUTION PLAN IS THE EXCLUSIVE MEANS OF RESOLVING EMPLOYMENT-RELATED DISPUTES. ALL PERSONS WHO APPLY FOR EMPLOYMENT, ACCEPT EMPLOYMENT, CONTINUE WORKING FOR, OR ACCEPT ANY PROMOTIONS, PAY INCREASES, BONUSES, OR ANY OTHER

BENEFITS OF EMPLOYMENT FROM MORGAN TIRE AND AUTO, INC. AGREE TO RESOLVE ALL SUCH DISPUTES THROUGH THE MEDIATION AND BINDING ARBITRATION PROCESS DESCRIBED HEREIN INSTEAD OF THROUGH THE COURT SYSTEM.

NEW EMPLOYEE ACKNOWLEDGEMENT AND AGREEMENT

I understand and agree that any employment-related legal dispute I may have with Morgan Tire & Auto, Inc. (the "Company") including, but not limited to, any dispute concerning my application for employment, my employment if I am hired, and the termination of my employment if I am hired, must be resolved exclusively through the Company's Employee Dispute Resolution Plan. I therefore understand and agree that I must submit all disputes covered by the EDR Plan to mediation and, if necessary, to final and binding arbitration under the terms of the EDR Plan, I understand and agree that disputes covered by the EDR Plan include, but are not limited to, claims under federal, state or local civil rights statutes, laws, regulations or ordinances and federal, state, or local common law contract and tort claims.

I hereby waive any right that I may have to resolve disputes covered by the EDR Plan through any other means, except as set, forth in the EDR Plan, including a court case and/or a jury trial.

I acknowledge that I have had an opportunity to review the booklet containing the EDR Plan, a copy of which I received before signing this Acknowledgement and Agreement. The EDR Plan fully defines the disputes that are covered, describes the procedures for mediation and arbitration, and sets forth the remedies I may obtain.

I understand and acknowledge that my agreement to be bound by the EDR Plan is made in exchange for the Company employing me and the Company's

promise to mediate or arbitrate disputes covered by the EDR Plan, as fully described in the EDR Plan.

I understand and acknowledge that I will not be allowed to begin working until I have signed and dated this Acknowledgement and Agreement and that the Company is reasonably relying upon all of my representations and statements related to the EDR Plan in making its decision to employ me, and, but for those representations and statements, the Company would not choose to do so. I also understand that my employment with the Company will be at-will and that this Acknowledgment and Agreement does not affect my at-will employment status.

Employee Signature	Date
Print Name	Social Security Number

CURRENT EMPLOYEE ACKNOWLEDGEMENT

I hereby acknowledge my receipt of the Morgan Tire & Auto, Inc. Employee Dispute Resolution Plan. I also acknowledge that I have had an opportunity to review the EDR Plan. I further acknowledge that the EDR Plan fully defines the disputes that are covered, describes the procedures for mediation and arbitration, and sets forth the remedies I may obtain.

Employee Signature	Date
Print Name	Social Security Number

SUMMARY EXPLANATION OF THE

MORGAN TIRE & AUTO, INC.

EMPLOYEE DISPUTE RESOLUTION PLAN

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Summary Explanation of the Morgan Tire & Auto, Inc. Employee Dispute Resolution Plan
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Morgan Tire & Auto, Inc. Employee Dispute Resolution Plan

Sample Requests for Mediation and Arbitration

BACKGROUND

The Old "Lose-Lose" Approach

People are different. At Morgan Tire & Auto, Inc. (the "Company"), we have thousands of employees who work together daily. The differences among the people in our workforce strengthen us as a Company. Each person brings a different perspective which is valuable to the Company's human profile.

Sometimes, our differences result in misunderstandings or disputes. Unresolved disputes lower the morale of individual employees and weaken the Company. Such disputes can also be time-consuming and costly, particularly when they result in lawsuits.

Many employees who have brought lawsuits have been disappointed with the results. After long delays, years of worry and interrupted careers, much of what they recover, if anything, has gone to their attorneys. The Company has not fared any better with this type of litigation. In these cases, which have involved relatively few employees, the Company has paid out much more in legal fees than in judgments or settlements. This time and money could have been put to better use by both parties.

The Progressive "Win-Win" Approach

The Company is one of many businesses that have been using a more effective method for resolving workplace disputes - one that benefits everyone.

This approach is called the "Morgan Tire & Auto, Inc. Employee Dispute Resolution Plan" ("the EDR Plan"). Resolution of disputes occurs much more promptly and entails minimal expense. Instead of juries, courts or administrative bodies, the EDR Plan uses

mediation and arbitration, provided through the American Arbitration Association ("AAA") to resolve workplace disputes that have not been resolved internally. The AAA is a public service organization that offers a wide range of dispute resolution services to private individuals, businesses, associations and all levels of government. It handles approximately 60,000 cases each year and has access to over 50,000 neutral experts who hear and decide cases.

Mediation and arbitration are designed to:

- Provide a quick and fair resolution of your legal dispute.
- Protect your work relationships instead of disrupting them.
- Prevent excessive spending on attorney's fees.

Mediation and arbitration under the EDR Plan are external means of resolving disputes. Naturally, the goal of both you and the Company should be to resolve any disputes internally. If you have a dispute, you should first talk to your manager or supervisor. If, for any reason, you are unable or unwilling to talk to your manager or supervisor, you should bring the dispute to the attention of another member of management or your Human Resources ("HR") representative who is trained to deal with employment-related problems. If you are uncomfortable or dissatisfied with this approach to resolving a problem, you may also call the Company's Compliance Hotline at 1-800-750-4975. These calls will be routed to the appropriate person.

If you cannot resolve a dispute covered by the EDR Plan through any of the foregoing internal means, you may utilize the external processes of mediation and arbitration provided by the EDR Plan.

MEDIATION

The first step under the EDR Plan is mediation. For many people, just presenting their case to someone outside the Company who has no involvement with their problems is all that is needed to break a stalemate.

What is Mediation

Mediation is often the most straightforward and cost-effective method of resolving disputes. It involves a meeting in which a neutral person, called a mediator, helps you and the Company work together to come to an agreement. The most important thing that mediation does is open up lines of communication so that people can consider different options.

Mediation is a non-binding process. That means that no one is required to agree. The mediator will make suggestions along the way, but you and the Company are ultimately responsible for resolving your dispute. All mediations under the EDR Plan will use an AAA mediator as the neutral third-party. Each mediator will have received special training and will be experienced in resolving disputes through mediation.

Requesting Mediation

To initiate mediation proceedings, you must file a written Request for Mediation with the AAA. **The Request for Mediation must be filed within ninety (90) days of the event giving rise to the dispute or before the expiration of the applicable statute of limitations, whichever is longer.** A Request for Mediation can be obtained from the AAA by writing them at 13455, Noel Road, Suite 1750, Dallas, TX 75240, or by telephoning them at 800-426-8792. (A sample copy is also included at the end of this booklet.) The written

Request for Mediation must be accompanied by a $100 processing fee. The Company will participate with you in the mediation process and will pay all additional administrative costs, including the costs of the mediator. If you choose to be represented by an attorney, you will be responsible for your own attorney's fees.

Typical Mediation Steps

When you submit a Request for Mediation, the AAA will assign a professional mediator who will meet with you and a Company representative to help work out your differences. If you are represented by an attorney, your attorney can also participate in the mediation. The mediator may first meet privately with you and then with a Company representative to try to develop a better understanding of the problem and help the parties solve it.

Key Advantages of Mediation

Because mediation has proven highly successful, it is generally the outside resolution method of choice, Mediation has many advantages. For example, it:

- Allows you to explain your opinion, belief, or feeling.
- Gives you a neutral person's perspective.
- Helps to reduce feelings of hostility.
- Helps to separate emotional issues from factual issues.
- Promotes discussion of creative solutions.
- Helps people work through their problems.

Sometimes, the simple process of being required to sit down and discuss a dispute allows the parties to find a solution to it.

If the dispute cannot be resolved by mediation, you may wish to take your dispute to arbitration for a final and binding decision. The arbitration process is described below.

ARBITRATION

If the dispute is covered by the EDR Plan and is not resolved by mediation, you may request arbitration; you cannot utilize the arbitration process unless you have first gone through the mediation process outlined above. All arbitrators used to decide a claim under the EDR Plan will be provided through the AAA. Arbitrators will have received special training and will be experienced in resolving disputes through arbitration.

What is Arbitration

Arbitration is a process in which a dispute is presented to a neutral third-party, the arbitrator, for a final and binding decision. The arbitrator makes this decision after both sides present their evidence and arguments at a hearing. There is no jury. The arbitrator has the same authority to award relief as a court of law or an administrative agency.

The AAA administers the arbitration proceedings, which are held privately. The AAA handles thousands of such cases each year. Though arbitration is less formal than a court trial, it is an orderly proceeding, governed by rules of procedure and legal standards of conduct.

Requesting Arbitration

To initiate arbitration proceedings you must file a written Request for Arbitration with the AAA. **The Request for Arbitration must be filed within 30 days from the date that the mediation process has been**

concluded, as defined in the EDR Plan. A Request for Arbitration can be obtained from the AAA by writing them at 13455 Noel Road, Suite 1750, Dallas, TX 75240, or by telephoning them at 800-426-8792. (A sample copy is also included at the end of this booklet.) The Company will participate with you in the arbitration process and will pay the administrative costs, including the costs of the arbitrator. If you choose to be represented by an attorney, you will be responsible for your own attorneys' fees.

The Role of Attorneys

The Company has access to legal advice through its Law Department and outside attorneys. You may consult with an attorney or any other adviser of your choice at any time, although you are not required to hire an attorney in order to participate in arbitration.

Typical Arbitration Steps

In summary, the arbitration process generally includes the following steps:

1. A party files a written Request for Arbitration with the AAA after having gone through mediation.
2. Any other parties involved are notified.
3. The AAA selects an arbitrator, with input from the parties.
4. The AAA arranges a hearing date at a convenient location.
5. Before the hearing, documents and other information may be exchanged.
6. At the hearing, testimony is given and witnesses are questioned and cross-examined.

7. The arbitrator issues a final and binding award.

Arbitration Makes Sense

Arbitration makes sense for a number of reasons:

- Quick Resolution: You can expect a quick resolution of your dispute. A decision will usually be made within weeks or months. In contrast, many court cases take years to conclude.
- Independent Decision Maker: Everyone benefits from the objectivity and experience of an outside, neutral arbitrator.
- What You Can Achieve: Under the terms of the EDR Plan, an arbitrator can award you any relief that would be available from a court of law or an administrative agency.
- Preserve Work Relationships: A quick and impartial resolution through arbitration may interfere less with your job than engaging in years of costly, frustrating and time-consuming litigation.

CONCLUSION

Legislatures and courts have encouraged the use of alternative forms of dispute resolution such as mediation and arbitration to settle disputes quickly, fairly and effectively. They recognize that the conventional court system is often slow, cumbersome and expensive.

The EDR Plan promotes fair treatment of employees. It makes it easier and faster to resolve employment-related disputes. It also saves all of us from the financial and emotional expense of a long court battle, which can weaken working relationships and careers.

We all have an interest in quick resolution of disputes at a reasonable cost.

The foregoing information and the Common Questions and Answers that follow provide a Summary Explanation of the EDR Plan. Complete details of the EDR Plan are contained in the text of the plan itself, entitled "Morgan Tire & Auto, Inc. Employee Dispute Resolution Plan," which is included in this booklet. If there are any contradictions or discrepancies between the Summary Explanation and the EDR Plan, the provisions of the EDR Plan will govern.

COMMON QUESTIONS AND ANSWERS

1. Can I use the EDR Plan to solve any problems that occur at work?

   Answer: As it is currently designed, the outside resolution processes offered by the AAA (mediation and arbitration) can be used to resolve only "Disputes" as defined in the EDR Plan.

2. What "Disputes" are covered by the EDR Plan?

   Answer: Disputes are legal claims recognized under federal, state or local law involving your application for employment with the Company, your employment with the Company, or the termination of your employment with the Company. These include such things as: discrimination based on age, sex, race, color, national origin, disability, or religion; sexual or other harassment; unlawful retaliation; workers' compensation retaliation; defamation; infliction of emotional distress; breach of contract; and other matters involving the

terms and conditions of your employment or your application for or termination of employment.

For a more detailed description of disputes covered by the EDR Plan, please see Section 2.D. of the EDR Plan itself, which is included in this booklet.

3. Are both employees and the Company required to pursue their legal claims under the EDR Plan?

Answer: Yes. Under the EDR Plan, both employees and the Company give up their right to a court case or jury trial as a means of resolving disputes covered by the EDR Plan.

4. What is the difference between mediation and arbitration?

Answer: Mediation is a process in which the parties involved in a dispute try to settle it with the aid of a neutral third party, the mediator, who is skilled in this process. The mediator helps to open up lines of communication but does not make a final decision in favor of one of the parties. In arbitration, a dispute is submitted to an outside neutral third party who makes a final and binding decision after hearing evidence and arguments.

5. Do I have to go through mediation before proceeding to arbitration?

Answer: Yes.

6. How does arbitration differ from a court trial?

Answer: With arbitration, the decision is final and binding. Except under rare circumstances, it will not be reversed by subsequent proceedings. In conventional court proceedings, on the other hand, either party may appeal a decision, often with lengthy delays. The AAA arbitrators have many years of experience in the judicial process and some are retired judges. However, an arbitration proceeding is usually much more informal than a case heard in court. The proceeding is held in private offices instead of in a public courthouse. The biggest difference, however, lies in the reasonable cost of arbitration. Because arbitration is faster and less formal, it generally ends up costing everyone involved much less to resolve the case.

7. What happens if I file a lawsuit against the Company that involves a dispute covered by the EDR Plan?

   Answer: The Company will ask the court to dismiss the case and require the parties to proceed under the EDR Plan.

8. Is there any limit on the amount of monetary damages that can be awarded through arbitration?

   Answer: The EDR Plan does not impose a specific maximum award. An arbitrator has the same authority as a court or an administrative agency to award damages, but may only award damages to the extent allowed by the applicable law.

9. What can I do to seek relief if I believe my legal rights have been violated?

Answer: You have several options:

(a) You can talk to your manager or supervisor or to any other appropriate management employee. This "open door" policy has been the Company's practice for many years.

(b) You can talk to your Human Resources representative.

(c) If you feel uncomfortable with option (a) or (b), you can call the Company's toll-free number, 1-800-750-4975, to discuss your problem.

(d) If you cannot resolve your dispute in any of these ways, you may request mediation through the AAA. If the matter is not resolved in mediation and you proceed to arbitration, the arbitrator will determine if a legal right has been violated and the amount of damages, if any, that should be awarded. You can obtain a Request for Mediation form or a Request for Arbitration form by writing to the AAA, 13455 Noel Road, Suite 1750, Dallas, TX 75240, or by telephoning them at 800-426-8792. (Sample copies are also included in this booklet.)

10. Can I be represented by an attorney in either the mediation or the arbitration?

Answer: Yes. It is your choice. You may hire an attorney to represent you in either the mediation or the arbitration or both. However,

you are not obligated to do so in order to participate.

11. What happens if I am terminated or laid off by the Company? Does the EDR Plan still apply to me?

Answer: Yes. If you are terminated or laid off, you must still resolve all disputes covered by the EDR Plan through the EDR Plan. All options of the EDR Plan would be available to you.

12. Does the EDR Plan cover disputes about on-the job injuries or claims for unemployment benefits?

Answer: Claims for workers' compensation or unemployment compensation benefits will be handled as they traditionally have been handled, and not through the EDR Plan. However, an allegation that you have been retaliated against because you filed a workers' compensation claim would be covered by the EDR Plan.

13. Does the EDR Plan cover disputes arising under employee benefit plans or pension plans?

Answer: You are not required to pursue under the EDR Plan disputes relating to benefits arising under any employee welfare benefit plan or pension plan sponsored, established or maintained by the Company. However, such disputes may be pursued under the Plan if you and the Company voluntarily agree to do so in writing. You must exhaust all internal administrative procedures and appeals under

the applicable employee welfare benefit plan or pension plan before you initiate a proceeding under the EDR Plan.

14. How are class actions, collective actions, and representative actions affected by the EDR Plan?

Answer: In the absence of the EDR Plan, you and the Company may otherwise have had a right or opportunity to pursue, participate in, or be represented in litigation filed in court as class actions, collective actions, or representative actions. But under the EDR Plan, both employees and the Company give up their right to pursue, participate in, or be represented in class actions, collective actions, or representative actions in any forum.

15. Are the Company's employees all over the world covered under the EDR Plan?

Answer: No. Currently, the EDR Plan applies only to United States employees, meaning those employees who work in the United States or are under the jurisdiction of its court system. In addition, persons who are hired into a unit of employees covered by a collective bargaining agreement in effect between the Company and a union are not covered by the EDR Plan.

16. Under the EDR Plan, can I still file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or a state or local civil rights agency or commission?

Answer: It is the Company's hope that the EDR Plan will be so effective that you will not

need to or want to go anywhere else. You may, however, file a charge with the EEOC or another state or local civil rights agency or commission. However, if you file a lawsuit against the Company, or if you attempt to pursue relief in your own name in a state or local administrative agency proceeding, the Company will take steps to have your claims dismissed and decided under the EDR Plan.

17. What happens if my manager or supervisor starts to make things difficult for me after I contact the AAA?

Answer: The Company wants you to take full advantage of the EDR Plan. The Company absolutely forbids retaliation against you for using it. If you feel that someone is retaliating against you, you should immediately contact your Human Resources representative, who will help you handle this problem or refer you to someone who can. Please remember that the Company wants to assure that your right to use the EDR Plan is safeguarded.

MORGAN TIRE & AUTO, INC.

EMPLOYEE DISPUTE RESOLUTION PLAN

MORGAN TIRE & AUTO, INC.
EMPLOYEE DISPUTE RESOLUTION PLAN

Application for employment, initial employment, continued employment, or acceptance of any promotions, pay increases, bonuses, or any other benefits of employment on or after the effective date of the Morgan Tire & Auto, Inc., Employee Dispute Resolution Plan constitutes consent and agreement by both the Employee and the Company to be bound by the following terms.

1. **Purpose and Construction**

   The Morgan Tire & Auto, Inc. Employee Dispute Resolution Plan ("the EDR Plan") is intended to facilitate the prompt, fair, and inexpensive resolution of legal disputes between the Company and its present and former Employees, and applicants for employment. The EDR Plan is intended to create an exclusive mechanism for the final resolution of all disputes falling within its terms. It is not intended to abridge or enlarge substantive legal rights except as expressly set forth herein. **The EDR Plan does not modify the "at-will" employment relationship between the Company and its Employees.** The EDR Plan should be interpreted in accordance with these purposes and objectives.

2. **Definitions**

   A. "AAA" means the American Arbitration Association, the entity selected to administer the mediation and/or arbitration of disputes between an Employee and the Company pursuant to the EDR Plan, or its successor.

B. The "Act" means the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

C. "Company" means Morgan Tire & Auto, Inc. ("MTA") including, but not limited to all entities having or having had any ownership interest in MTA, or in which MTA has or has had any ownership interest, and without limitation, all parent, subsidiary, sister, related or affiliate companies, or divisions of MTA, and any and all partners, members, shareholders or owners thereof, together with the officers, managers, supervisors, employees and agents, whether in their official, corporate or individual capacities, of each and all of the foregoing entities, and their respective heirs, executors, personal representatives, administrators, predecessors, successors and assigns. In the event an Employee and the Company agree, pursuant to Section 4.D. below, to pursue under the EDR Plan disputes relating to benefits arising under an employee welfare benefit plan or pension plan, the "Company" shall also include every plan of benefits, whether or not tax-exempt, sponsored, established or maintained by the Company, and the fiduciaries, agents and Employees of all such entities, as well as the successors and assigns of all persons and entities.

D. "Dispute" means a legal claim between persons bound by the EDR Plan which relates to, arises from, concerns, or involves in any way:

1. This EDR Plan;

2. The employment of an Employee, including the application for and the initiation, terms, conditions, or termination of such employment;

3. Any other matter arising from or concerning the employment relationship between the Employee and the Company including, by way of example and without limitation:

- Claims of discrimination or harassment on any basis, including race, color, national origin, ethnicity, religion, sex, age, handicap, disability or any other protected category or characteristic, arising under any federal, state or local constitution, statute, ordinance, regulation, order, or common law, including Title VII of the Civil Rights Act of 1964, as amended, Section 1981, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Americans with

Disabilities Act, and the Equal Pay Act;

- Compensation, bonus, and wage and hour claims under federal, state or local statutes, ordinances, regulations, orders or common law, including the Fair Labor Standards Act;
- Retaliation claims for whistle blowing or other legally protected activity, including workers' compensation retaliation;
- Claims relating to involuntary terminations, such as layoffs and discharges, including constructive discharges;
- Claims for breach of contract (expressed or implied) and/or promissory estoppel;
- Tort claims such as defamation, intentional or negligent infliction of emotional distress, assault, battery, conversion, invasion of privacy and other personal injury claims;
- Claims for alleged violations of public policy; and
- Claims for breach of fiduciary duty or breach of the duty of loyalty.

E. "EDR Plan" means The Morgan Tire & Auto, Inc. Employee Dispute Resolution Plan, as amended from time to time.

F. "Employee" means any applicant for employment, current employee or former employee of the Company residing in the United States, or otherwise subject to the applicable laws of the United States or any state, municipality, or Other political subdivision; provided, however, that this EDR Plan shall not apply to any employee's Dispute which arose while such employee was employed in a unit of employees represented by a labor organization, or to the Company with respect to such employees, except to the extent that this Plan is or may become a part of an applicable collective bargaining agreement.

G. "Party" or "Parties" means the Company and those Employees and persons defined in Section 4.A. of the EDR Plan.

H. "Sponsor" means Morgan Tire & Auto, Inc.,

3. **Exclusive Remedy**

The EDR Plan is the exclusive, final and binding means by which Disputes can be resolved. The *only* method by which a Party can seek relief in a court of law is in accordance with the provisions of the Act. Except as provided herein, the Parties shall have no right to litigate a Dispute in any other forum. Consequently, the Institution of a proceeding under this Plan shall be a condition precedent to the initiation of any legal action by an Employee against the Company and any

such legal action shall be limited to those actions available under the Act.

4. **Application and Coverage**

A. The EDR Plan applies to and binds the Company, each Employee who is in the employment of the Company on or after the effective date of the EDR Plan, any applicant for employment who applied on or after the effective date of the EDR Plan, and the heirs, beneficiaries, successors, and assigns of any such persons. All such persons shall be deemed Parties to the EDR Plan. Provided, however, that the EDR Plan shall not apply to any Employee's Dispute which arose while such Employee was employed in a unit of Employees represented by a labor organization, or to the Company with respect to such Employees, except to the extent that the EDR Plan is or may become a part of an applicable collective bargaining agreement.

B. Except as provided for herein, the EDR Plan applies to any Dispute between persons bound by the EDR Plan.

C. Notwithstanding anything to the contrary in the EDR Plan, the EDR Plan does not apply to (i) Employees' claims for workers' compensation benefits or claims for unemployment compensation benefits, or (ii) claims with respect to allegations of trade secret violations and breach of non-competition provisions

and agreements. Furthermore, nothing herein is intended or will operate to affect the exclusive remedies provided under applicable workers' compensation statutes.

D. Notwithstanding anything to the contrary in the EDR Plan, Employees are not required to pursue under the EDR Plan Disputes which relate to, arise from, concern or involve employee benefits arising under any employee welfare benefit plan or pension plan sponsored, established or maintained by the Company. Such Disputes may be pursued under the EDR Plan if the Employee and the Company voluntarily agree to do so in writing. If the Employee and the Company so agree, then all provisions of the EDR Plan shall apply. The EDR Plan does not alter the terms, requirements or benefits, including any claims or internal appeals procedures, of any employee welfare benefit plan or pension plan sponsored, established or maintained by the Company.

E. Parties to the EDR Plan waive any right they may otherwise have to pursue, file, participate in, or be represented in Disputes brought in any court on a class basis or as a collective action or representative action. This waiver applies to any Disputes that are covered

by the EDR Plan to the full extent such waiver is permitted by law.

F. All Disputes subject to the EDR Plan must be mediated and arbitrated as individual claims. The Plan specifically prohibits the mediation or arbitration of any Dispute on a class basis or as a collective action or representative action, and the arbitrator shall have no authority or jurisdiction to enter an award or otherwise provide relief on a class, collective or representative basis. The Parties to the EDR Plan, therefore, do not waive and specifically retain a right to appeal in a court of competent jurisdiction any determination or award of an arbitrator made in contravention of this section, including without limitation, a determination (i) that a claim may proceed as a class, collective, or representative action; or (ii) that awards relief on a class, collective, or representative basis. In such appeal, the standard of review to be applied to the arbitrator's decision shall be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.

5. **Mediation**

A. Before proceeding to binding arbitration, the Parties must first submit the Dispute to mediation, as set forth below.

B. A Party must initiate proceedings by filing with the AAA a written Request

for Mediation and by tendering the administrative fee required under Section 31 below. The Request for Mediation must be filed within ninety (90) days of the event giving rise to the Dispute or before the expiration of the applicable statute of limitations, whichever is longer. Failure of a Party to timely initiate mediation shall bar the Party from any relief or other proceedings under the EDR Plan or otherwise, and any such Dispute shall be deemed to have been finally and completely resolved.

C. At the time that the Request for Mediation is filed with the AAA, the initiating Party shall also serve a copy of it on the Company at the address shown on the Request for Mediation or on the Employee at his/her address of record with the Company, as the case may be. At a minimum, the Request for Mediation shall describe the nature of the Dispute, the monetary amount involved, if any, and the remedy sought.

D. The AAA shall review the Request for Mediation and appoint a mediator who will schedule a mediation conference between the Parties. The AAA shall use its best efforts to appoint a mediator within thirty (30) days of the date it receives the Request for Mediation.

E. No later than one week before the mediation conference, or on such other

date as requested by the mediator or agreed to by the mediator and the Parties, the Parties shall submit to the mediator concise written summaries of their positions together with any supporting documents. These position statements may include proposed solutions to the matters in controversy.

F. The entire mediation process will be confidential. No record of the mediation conference will be made, except that the terms of any settlement reached during a conference shall be memorialized in writing. All statements, promises, offers, and opinions made during the mediation conference, whether oral or in writing, will be confidential and will not be subject to discovery or admissible for any purpose in arbitration or in any other legal proceedings involving the Parties, other than an action to enforce a settlement agreement. Evidence otherwise admissible or subject to discovery, however, will not be excluded from discovery or be deemed inadmissible in evidence simply as a result of its having been referenced or used in the mediation process.

G. Upon the occurrence of any of the following events, the mediation process shall be deemed to have been concluded: (i) the Dispute is resolved, or (ii) the mediator or either of the Parties determines that all settlement

possibilities have been exhausted and there is no possibility of resolution at that time, and the Parties and the AAA are so notified in writing.

6. Initiation of the Binding Arbitration Process

A. A party must initiate any arbitration proceeding under the EDR Plan within thirty (30) days from the date that the mediation process has been concluded, as defined in Section 5.G.

B. A Party must initiate arbitration proceedings by filing with the AAA a written Request for Arbitration.

C. At the time that the Request for Arbitration is filed, the initiating Party shall also serve a copy of it on the Company at the address shown on the Request for Arbitration, or on the Employee at his/her address of record with the Company, as the case may be. At a minimum, the Request for Arbitration shall include the following information:

1. A description of the Dispute in sufficient detail to advise the other Party of the nature of the Dispute;

2. The date when the Dispute first arose;

3. The names and work locations of any persons with knowledge of the Dispute; and

4. The relief or remedy requested.

D. Parties on whom notice is served shall answer in writing within thirty (30) days of receiving the Request for Arbitration.

E. The Answer to the Request for Arbitration shall include the following information:

1. A response, by admission or denial, to each allegation set forth in the Request for Arbitration;

2. All affirmative defenses to the Dispute; and

3. All Disputes in the nature of counterclaims that can be asserted against the other Party to the proceedings.

F. The party to whom a counterclaim is directed shall file a written response to its allegations within thirty (30) days of receiving the counterclaim.

7. **Appointment of the Arbitrator**

Immediately after receipt of the Request for Arbitration, the AAA shall implement the procedure for the selection of an arbitrator as set forth in its National Rules for the Resolution of Employment Disputes.

8. **Date, Time and Place of Hearings**

A. The arbitrator shall determine the location of the arbitration hearing.

B. The arbitrator shall set the date and time of the arbitration hearing. The date of the hearing shall be no later than 180 days after the date of the filing

of the Request for Arbitration, unless the Parties agree otherwise or the arbitrator determines that the hearing should be scheduled at a later date.

C. Notice of any arbitration bearing shall be given at least twenty-one (21) days in advance, unless the arbitrator determines, upon a showing of good cause, that a shorter time is necessary.

9. **Conferences**

The arbitrator may schedule and hold conferences for the discussion and determination of the any pre-hearing matter or any matter which will expedite the hearing, including:

A. Clarification of issues;
B. Determination of preliminary issues, including summary determination of dispositive legal issues;
C. Discovery;
D. The time and location of hearings or conferences;
E. Interim legal or equitable relief authorized by applicable law;
F. Pre- or post-hearing memoranda;
G. Stipulations; or
H. Any other matter of substance or procedure.

10. **Mode of Conferences and Hearings**

In the discretion of the arbitrator or by agreement of the Parties, conferences and hearings may be conducted by telephone or by written submission, as well as in person.

11. **Procedure**

A. The arbitrator shall be the sole judge of the relevance, materiality and admissibility of evidence offered at the arbitration hearing.

B. The arbitrator shall determine the number of days required for the arbitration hearing.

C. In the absence of contrary legal authority, the Party who submitted the Request for Arbitration shall have the burden of proof on each element of the Dispute to the same extent as if the matter were pending in a United States District Court sitting at the place of the hearing. The answering Party shall have the burden of proving affirmative defenses and the elements of any counterclaims asserted to the same extent as if the matter were pending in a United States District Court sitting at the place of the hearing.

D. The Party with the burden of proof shall present its case-in-chief first. At the conclusion of that Party's case-in-chief, the other Party may submit a motion for a directed finding. If such a motion is denied, or if it is not dispositive of the entire Dispute, the other Party may present its case-in-chief. Parties may call witnesses on rebuttal following the completion of the other Party's case-in-chief.

E. The arbitrator may subpoena witnesses or documents at the request of a Party or on the arbitrator's own initiative.

F. The arbitrator may consider the evidence of witnesses by affidavit or deposition, but shall give evidence so presented only such weight as the arbitrator deems appropriate after consideration of any objection made to its admission.

G. The AAA's Expedited Procedures shall not apply to the EDR Plan unless the arbitrator and all Parties agree otherwise.

12. **Pre-Hearing Discovery and Motions**

A. On a schedule to be determined by the arbitrator, the Parties shall exchange the names and addresses of all witnesses, including experts, they intend to call, and shall produce all documents they intend to offer, at the arbitration hearing. The subject matter of each witness' expected testimony shall also be provided at the time the witness is identified.

B. The arbitrator shall have discretion to determine the form, amount and frequency of discovery, subject to the following conditions:

1. The deposition of the Party who submitted the Request for Arbitration shall be allowed as a matter of right. One deposition of the answering Party also shall be allowed as a matter of right. Additional depositions may be taken if the Parties so agree or if the arbitrator determines, upon a

showing of good cause, that additional depositions are necessary.

2. Each Party may propound one set of no more than thirty (30) interrogatories, including subparts. Additional interrogatories may be propounded if the Parties so agree or if the arbitrator determines, upon a showing of good cause, that additional interrogatories are necessary.

C. Discovery, including document requests and requests for admissions, as well as the depositions and interrogatories permitted under Section 12.B. above, shall be conducted/propounded in accordance with the Federal Rules of Civil Procedure (excluding Rule 26(a)), subject to any restrictions imposed by the arbitrator or the EDR Plan.

D. All discovery must be completed no later than ninety (90) days after the filing of the answer, unless the Parties agree otherwise or the arbitrator determines that discovery should continue beyond this date.

E. Either Party may file a motion for summary judgment. The arbitrator shall determine a briefing schedule, allowing for an opening brief, opposition brief and reply brief. Summary judgment motions must be filed, briefed and decided by the arbitrator no later

than sixty (60) days after the close of discovery.

13. **Representation**
Any Party to either a mediation or an arbitration may be represented by an attorney.

14. **Attendance at Hearings**
The arbitrator shall maintain the privacy of the hearings to the extent permitted by law. The arbitrator shall order witnesses to be sequestered at the request of any Party. However, the following persons are exempt from any order of sequestration and may attend every stage of proceedings, regardless of their status as potential witnesses: the Party who submitted the Request for Arbitration, the answering Party, and the attorneys for any Party.

15. **Postponement**
The arbitrator, for good cause shown by a Party, or on agreement of the Parties, may postpone any hearing or conference. The pendency of court proceedings related to the same matter shall not automatically be considered good cause for postponement.

16. **Oaths**
Before proceeding with the first hearing, the arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator shall require witnesses to testify under oath. Oaths shall be administered by the arbitrator or the court reporter, if one is present.

17. **Stenographic Record**
A record of the arbitration hearing may be made by audio or video taping or by

stenographic transcription. The Party requesting the record shall assume all related costs. The other Party may order a copy of the record at its own expense. The Parties may also agree to split the costs of the record. Any record shall be made available to the arbitrator.

18. **Arbitration in the Absence of a Party**
The arbitrator may proceed in the absence of the Parties or their representatives who, after due notice, fail to be present or fail to obtain a postponement. An award shall not be made solely on the default of a Party. Rather, the arbitrator shall require any Party who is present to submit such evidence as the arbitrator may require for the making of an award.

19. **Post-Hearing Submissions**
All documentary or tangible evidence to be considered by the arbitrator shall be submitted at the arbitration hearing. The arbitrator shall permit the filing of post-hearing briefs at the request of any Party and shall determine the procedure and timing of such filings.

20. **Closing the Hearing**
When the arbitrator is satisfied that the record is complete, including the submission of any post-hearing briefs, the arbitrator shall declare the hearing closed.

21. **Waiver of Procedures**
Any Party who fails to object promptly in writing upon learning that any provision or requirement of the EDR Plan has not been complied with, shall be deemed to have waived the right to object.

22. **Service of Notices and Papers**

Any papers, notices, or process necessary or proper for the initiation or continuation of any proceeding under the EDR Plan (including the award of the arbitrator, for any court action in connection therewith, or for the entry of judgment on an award made under these procedures) shall be served on any Party by mail addressed to the Party or his/her representative at his/her last known address, or by personal service. The AAA, the Parties, and the arbitrator may also use facsimile transmission or other forms of electronic communication to give any notices or to effect service as required by these procedures, as allowed by the AAA and/or the arbitrator.

23. **Communications with the AAA**

Any Party may file a Request for Mediation or a Request for Arbitration, or otherwise communicate with the AAA, by contacting:

American Arbitration Association
13455 Noel Road
Suite 1750
Dallas, TX 75240
Telephone: 800-420-8792

24. **Communication with the Arbitrator**

There shall be no communication between the Parties and the arbitrator other than at any hearings or conferences. Any other oral or written communications from the Parties to the arbitrator shall be directed to the AAA (and copied to the other Parties) for transmission to the arbitrator, unless the Parties and the arbitrator agree otherwise.

25. **Time of Award**
Unless otherwise agreed by the Parties or specified by applicable law, the award shall be promptly made by the arbitrator no later than thirty (30) days from the date of the closing of the hearing or the final submission of post-hearing briefs, whichever is later.

26. **Form of Award**.
The award shall be in writing and signed and dated by the arbitrator. The award shall contain findings of fact and conclusions of law, the rationale for any grant of monetary damages or other relief, and a brief discussion of applicable legal authorities considered in connection with the award. The arbitrator shall give signed copies of the award to all Parties.

27. **Modification of Award**
On order of a court of competent jurisdiction, or on agreement of the Parties, the arbitrator shall modify any award. The arbitrator may modify an award on the motion of a Party if the arbitrator finds that the award as rendered is ambiguous or defective in form, or if the award requires an illegal or impossible act. Except as provided in accordance with applicable law, these are the only circumstances under which an arbitrator may withdraw or modify an award.

28. **Damages and Relief**
Upon a finding that a Party has sustained its burden of proof on any Dispute, the arbitrator may award such monetary or injunctive relief as may be just and reasonable under

applicable law. In awarding relief, however, the arbitrator shall abide by the EDR Plan and shall further adhere to the following conditions:

A. The arbitrator may only award such monetary or other damages as are available under applicable law, and only to the extent such damages would be available if the matter were pending in a United States District Court sitting at the place of the arbitration hearing.

B. All Parties have a duty to mitigate their damages by all reasonable means. The arbitrator shall take a Party's failure to mitigate into account in granting any relief or remedies.

C. The arbitrator may award any Party its reasonable attorneys' fees and costs only in accordance with applicable law.

29. **Scope of Arbitrator's Authority**

The arbitrator's authority shall be limited to the resolution of Disputes between the Parties as defined in the EDR Plan. As such, the arbitrator shall be bound by and shall apply applicable substantive law as set forth in the EDR Plan. The arbitrator shall not have the authority to either abridge or enlarge substantive rights available under applicable law. The arbitrator may also grant emergency or temporary relief which is or would be authorized by applicable law.

30. **Judicial Proceedings and Exclusion of Liability**

A. Neither the AAA nor any arbitrator is a necessary Party in any judicial

proceeding relating to proceedings under the EDR Plan.

B. Neither the AAA nor any arbitrator shall be liable to any Party for any act or omission in connection with any proceeding within the scope of the EDR Plan.

C. Any court with jurisdiction over the Parties may compel a Party to proceed under the EDR Plan at any place and may enforce any award made.

D. Parties to the EDR Plan shall be deemed to have consented that judgment upon the award of the arbitrator may be entered and enforced in any federal or state court having jurisdiction over the Parties.

E. Initiation of, participation in, or removal of a legal proceeding shall not constitute a waiver of the right to proceed under the EDR Plan.

31. **Fees and Expenses**

A. The expenses of witnesses shall be borne by the Party calling such witnesses, except as otherwise provided by applicable law or in the award of the arbitrator.

B. All attorneys' fees shall be borne by the Party incurring them, except as otherwise provided by applicable law or by the EDR Plan.

C. If proceedings are initiated by an Employee, the Employee shall be responsible for the payment of a $100 administrative fee payable to the AAA.

The Company shall be responsible for any other AAA administrative fees and the fees and expenses of the mediator and/or arbitrator.

D. If proceedings are initiated by the Company, the Company shall be responsible for all AAA administrative fees and the fees and expenses of the mediator and/or arbitrator.

E. Each Party shall bear its own costs of discovery during the proceeding.

32. **Amendment and Termination**

The EDR Plan may be amended or terminated at any time. However, no amendment or termination shall apply to a Dispute of which Sponsor had actual notice, through the filing with the AAA of a Request for Mediation or a Request for Arbitration, on the date of amendment or termination. No amendment or termination shall be effective unless approved in writing by a Vice-President or higher official of the Company and until sixty (60) days after written notice of such amendment or termination is sent to the AAA and Employees as defined in Section 2.F. above.

33. **Applicable Law**

A. These proceedings and any judicial review of awards under these rules shall be governed by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*

B. Except where otherwise expressly provided in the EDR Plan, the arbitrator shall apply the substantive law, including the applicable choice-of-law rules, which would be applied by a

United States District Court sitting at the place of the arbitration hearing.

C. The Act shall apply to this EDR Plan and any proceedings under the EDR Plan, including any actions to compel, enforce, vacate or confirm proceedings, awards, orders of an arbitrator, or settlements under the EDR Plan.

D. Other than as expressly provided herein, the substantive legal rights, remedies and defenses of all Parities are preserved. In the case of arbitration, the arbitrator shall have the authority to determine and implement the applicable law and to order any and all relief, legal or equitable, which a Party could obtain from a United States District Court sitting at the place of the arbitration hearing on the basis of the Dispute alleged.

E. Other than as expressly provided herein, the EDR Plan shall not be construed to grant additional substantive legal or contractual rights, remedies or defenses which would not be available if the action were pending in a United States District Court sitting at the place of the arbitration hearing in the absence of the EDR Plan.

34. **Administrative Proceedings**

A. Employees may file administrative charges with the Equal Employment Opportunity Commission or state or local civil rights agencies and commissions. However, Employees may

not pursue relief in their own name in any federal, state or local administrative agency proceeding. In all other respects, the EDR Plan shall apply to Disputes sought to be brought before any local, state or federal administrative body unless prohibited by the laws applicable to the interpretation or enforcement of the EDR Plan.

B. Participation in any administrative proceeding by the Company shall not affect the applicability of the EDR Plan to any such Dispute, and the Company shall not be deemed to have waived its right to later compel mediation and arbitration of such a Dispute pursuant to the EDR Plan.

35. Severability

The terms of the EDR Plan are severable. The invalidity or unenforceability of any provision herein shall not affect the application of any other provision. Where possible, consistent with the purposes of the EDR Plan, any otherwise invalid provision of the EDR Plan may be reformed and, as reformed, enforced. In the event that a court of competent jurisdiction determines that any provision of the EDR Plan is unenforceable or should be reformed, the Dispute shall then be resolved by the arbitrator under the EDR Plan consistent with such court's determination. Notwithstanding the foregoing, in the event a court of competent jurisdiction determines that the Parties' waiver of their right to file, participate in, or be represented in class

actions, collective actions or representative actions brought in court (as set forth in Section 4.E. above) is unenforceable, then that waiver shall be severed, and the Parties may pursue, participate in, or be represented in class actions, collective actions, or representative actions in court as though such waiver did not exist and notwithstanding that the claims, if brought on an individual basis, would otherwise be subject to the EDR Plan. Under no circumstances may the EDR Plan be construed or reformed to permit class actions, collective actions, or representative actions to proceed under the EDR Plan.

SAMPLE REQUEST FOR MEDIATION

AND

SAMPLE REQUEST FOR ARBITRATION

AMERICAN ARBITRATION ASSOCIATION

REQUEST FOR MEDIATION

PLEASE NOTE: YOU MUST FILE THIS REQUEST FOR MEDIATION WITHIN NINETY (90) DAYS OF THE EVENT THAT GAVE RISE TO THE DISPUTE OR BEFORE THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS, WHICHEVER IS LONGER.

I am submitting the following Dispute for MEDIATION under the Morgan Tire & Auto, Inc. ("MTA") Employee Dispute Resolution Plan:

My name (please print): _____

My current or last MTA work address: _____
City, state and zip code: _____
Work telephone no: _____

My home address: _____
City, state, and zip code: _____
Home telephone no.: _____

Description of my legal claim (attach additional pages if necessary):

_____
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(COMPLETE AND SIGN REVERSE SIDE ALSO)

AMERICAN ARBITRATION ASSOCIATION

REQUEST FOR ARBITRATION

PLEASE NOTE: YOU MUST FILE THIS REQUEST FOR ARBITRATION WITHIN THIRTY (30) DAYS OF THE DATE ON WHICH MEDIATION OF YOUR DISPUTE WAS CONCLUDED.

I am submitting the following Dispute for ARBITRATION under the Morgan Tire & Auto, Inc. ("MTA") Employee Dispute Resolution Plan:

DATE MEDIATION OF THIS DISPUTE WAS COMPLETED: _____

My name (please print): _____

My current or last MTA work address: _____

City, state and zip code: _____

Work telephone no: _____

My home address: _____

City, state, and zip code: _____

Home telephone no.: _____

Description of my legal claim (attach additional pages if necessary):

_____

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_____

(COMPLETE AND SIGN REVERSE SIDE ALSO)

The incident(s) I am complaining about occurred on the following dates(s):

_____

I request the following remedies (include any specific monetary amounts):

_____

_____

_____

_____

_____

_____

Names and work locations of other persons with knowledge of my claim:

_____

_____

_____

To initiate Arbitration proceedings, submit this Request to:

The American Arbitration Association
13455 Noel Road
Suite 1750
Dallas, TX 75240
Telephone: 800-426-8792

A copy of this Request for Arbitration must also be mailed to:

BFS Retail & Commercial
Operations, LLC
Law Department
ATTN: EDR Plan Representative
333 E. Lake Street
Bloomingdale, IL 60108

Signature: _____ Date: _____

APPENDIX H

NEW EMPLOYEE
ACKNOWLEDGEMENT AND AGREEMENT

I understand and agree that any employment-related legal dispute I may have with Morgan Tire & Auto, Inc. (the "Company") including, but not limited to, any dispute concerning my application for employment, my employment if I am hired, and the termination of my employment if I am hired, must be resolved exclusively through the Company's Employee Dispute Resolution Plan. I therefore understand and agree that I must submit all disputes covered by the EDR Plan to mediation and, if necessary, to final and binding arbitration under the terms of the EDR Plan. I understand and agree that disputes covered by the EDR Plan include, but are not limited to, claims under federal, state or local civil rights statutes, laws, regulations or ordinances and federal, state, or local common law contract and tort claims.

I hereby waive any right that I may have to resolve disputes covered by the EDR Plan through any other means, except as set forth in the EDR Plan, including a court case and/or a jury trial.

I acknowledge that I have had an opportunity to review the booklet containing the EDR Plan, a copy of which I received before signing this Acknowledgement and Agreement. The EDR Plan fully defines the disputes that are covered, describes

the procedures for mediation and arbitration, and sets forth the remedies I may obtain.

I understand and acknowledge that my agreement to be bound by the EDR Plan is made in exchange for the Company employing me and the Company's promise to mediate or arbitrate disputes covered by the EDR Plan, as fully described in the EDR Plan.

I understand and acknowledge that I will not be allowed to begin working until I have signed and dated this Acknowledgement and Agreement and that the Company is reasonably relying upon all of my representations and statements related to the EDR Plan in making its decision to employ me, and, but for those representations and statements, the Company would not choose to do so. I also understand that my employment with the Company will be at-will and that this Acknowledgement and Agreement does not affect my at-will employment status.

/s/ Milton P. Brown	24 Sept. 08
Employee Signature	Date
Milton P. Brown	[REDACTED]
Print Name	Social Security Number

APPENDIX I

NEW EMPLOYEE
ACKNOWLEDGEMENT AND AGREEMENT

I understand and agree that any employment-related legal dispute I may have with Morgan Tire & Auto, Inc. (the "Company") including, but not limited to, any dispute concerning my application for employment, my employment if I am hired, and the termination of my employment if I am hired, must be resolved exclusively through the Company's Employee Dispute Resolution Plan. I therefore understand and agree that I must submit all disputes covered by the EDR Plan to mediation and, if necessary, to final and binding arbitration under the terms of the EDR Plan. I understand and agree that disputes covered by the EDR Plan include, but are not limited to, claims under federal, state or local civil rights statutes, laws, regulations or ordinances and federal, state, or local common law contract and tort claims.

I hereby waive any right that I may have to resolve disputes covered by the EDR Plan through any other means, except as set forth in the EDR Plan, including a court case and/or a jury trial.

I acknowledge that I have had an opportunity to review the booklet containing the EDR Plan, a copy of which I received before signing this Acknowledgement and Agreement. The EDR Plan fully defines the disputes that are covered, describes

the procedures for mediation and arbitration, and sets forth the remedies I may obtain.

I understand and acknowledge that my agreement to be bound by the EDR Plan is made in exchange for the Company employing me and the Company's promise to mediate or arbitrate disputes covered by the EDR Plan, as fully described in the EDR Plan.

I understand and acknowledge that I will not be allowed to begin working until I have signed and dated this Acknowledgement and Agreement and that the Company is reasonably relying upon all of my representations and statements related to the EDR Plan in making its decision to employ me, and, but for those representations and statements, the Company would not choose to do so. I also understand that my employment with the Company will be at-will and that this Acknowledgement and Agreement does not affect my at-will employment status.

/s/ Jose Lee Moncada	8-15-09
Employee Signature	Date
Jose Lee Moncada	[REDACTED]
Print Name	Social Security Number

APPENDIX J

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

MILTON BROWN AND LEE MONCADA, individually, and on behalf of other members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"),

Plaintiffs,

vs.

MORGAN TIRE & AUTO, LLC dba WHEEL WORKS, a Florida limited liability company, BRIDGESTONE RETAIL OPERATIONS, LLC, a Delaware limited liability company, BRIDGESTONE AMERICAS, INC., a Nevada corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No.: 110CV178451

[Assigned to the Hon. Kevin J. Murphy, Dept. 22]

CLASS ACTION & ENFORCEMENT UNDER THE PRIVATE ATTORNEYS GENERAL ACT, CALIFORNIA LABOR CODE §§ 2698 ET SEQ.

FIRST AMENDED CLASS ACTION COMPLAINT

(1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime);

(2) Violation of California Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums);

(3) Violation of California Labor Code § 226.7 (Unpaid Rest Period Premiums);
(4) Violation of California Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages);
(5) Violation of California Labor Code §§ 201 and 202 (Wages Not Timely Paid Upon Termination);
(6) Violation of California Labor Code § 204 (Wages Not Timely Paid During Employment);
(7) Violation of California Labor Code § 226(a) (Non-Compliant Wage Statements);
(8) Violation of California Business & Professions Code §§ 17200 et seq.

Jury Trial Demanded

Plaintiffs, MILTON BROWN and LEE MONCADA (herein "Plaintiffs"), individually and on behalf of all other members of the public similarly situated, alleges as follows:

JURISDICTION AND VENUE

1. This class action is brought pursuant to California Code of Civil Procedure section 382. The monetary damages and restitution sought by Plaintiffs exceed the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. The amount in controversy for each class representative, including claims for compensatory damages and pro rata share of attorneys' fees, is less than seventy-five thousand dollars ($75,000). However, Plaintiffs allege, on information and belief, that the aggregate amount in controversy for the proposed class action, including monetary damages, restitution and attorneys fees requested by Plaintiffs, is less than five million dollars ($5,000,000), exclusive of interests and costs.

2. This Court has jurisdiction over this action pursuant to the California Constitution, Article VI, section 10, which grants the Superior Court "original jurisdiction in all causes except those given by statute to other courts." The statutes under which this action is brought do not specify any other basis for jurisdiction.

3. This Court has jurisdiction over all Defendants because, upon information and belief, each party is either a citizen of California, has sufficient minimum contacts in California, or otherwise intentionally avails itself of the California market so as to render the exercise of jurisdiction over it by the California

courts consistent with traditional notions of fair play and substantial justice.

4. Venue is proper in this Court because, upon information and belief, one or more of the named Defendants reside, transact business, or have offices in this county and the acts and omissions alleged herein took place in this county.

5. California Labor Code sections 2699 *et seq.*, the "Labor Code Private Attorneys Generals Act" ("PAGA"), authorizes aggrieved employees to sue directly for various civil penalties under the California Labor Code.

6. On July 28, 2010, Plaintiffs provided timely written notice by certified mail to the California Labor and Workforce Development Agency ("LWDA") and to Defendants, pursuant to California Labor Code section 2699.3(a).

THE PARTIES

7. Plaintiff MILTON BROWN is a resident of Santa Clara County, California.

8. Plaintiff LEE MONCADA is a resident of Santa Clara County, California.

9. Defendant MORGAN TIRE & AUTO, LLC dba "WHEEL WORKS," was and is, upon information and belief, a Florida limited liability company doing business in California, and at all times hereinafter mentioned, an employer whose employees are engaged throughout this county, the State of California, or the various states of the United States of America.

10. Defendant BRIDGESTONE RETAIL OPERATIONS, LLC, was and is, upon information and belief, a Delaware limited liability company

doing business in California, and at all times hereinafter mentioned, an employer whose employees are engaged throughout this county, the State of California, or the various states of the United States of America.

11. Defendant BRIDGESTONE AMERICAS, INC., was and is, upon information and belief, a Nevada corporation doing business in California, and at all times hereinafter mentioned, an employer whose employees are engaged throughout this county, the State of California, or the various states of the United States of America.

12. Plaintiffs are unaware of the true names or capacities of Defendants sued herein under the fictitious names DOES 1 through 10, but prays for leave to amend and serve such fictitiously named Defendants pursuant to California Code of Civil Procedure section 474 once their names and capacities become known.

13. Plaintiffs are informed and believe, and thereon allege, that DOES 1 through 10 are the partners, agents, owners, shareholders, managers or employees of MORGAN TIRE & AUTO, LLC dba "WHEEL WORKS," BRIDGESTONE RETAIL OPERATIONS, LLC, and/or BRIDGESTONE AMERICAS, INC., were acting on behalf of MORGAN TIRE & AUTO, LLC dba "WHEEL WORKS," BRIDGESTONE RETAIL OPERATIONS, LLC, and/or BRIDGESTONE AMERICAS, INC., at all relevant times.

14. Plaintiffs are informed and believe, and thereon allege, that each and all of the acts and omissions alleged herein was performed by, or is attributable to MORGAN TIRE & AUTO, LLC dba

"WHEEL WORKS," BRIDGESTONE RETAIL OPERATIONS, LLC, BRIDGESTONE AMERICAS, INC., and DOES 1 through 10 (collectively, "Defendants"), each acting as the agent for the other, with legal authority to act on the other's behalf. Defendant BRIDGESTONE AMERICAS, INC. controls defendant BRIDGESTONE RETAIL OPERATIONS, LLC, which controls MORGAN TIRE & AUTO, LLC dba "WHEEL WORKS." The acts of any and all Defendants were in accordance with, and represent, the official policy of Defendants.

15. At all relevant times herein mentioned, Defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, Defendants, and each of them, aided and abetted the acts and omissions of each and all the other Defendants in proximately causing the damages herein alleged.

16. Plaintiffs are informed and believe, and thereon allege, that each of said Defendants is in some manner intentionally, negligently, or otherwise responsible for the acts, omissions, occurrences, and transactions alleged herein.

CLASS ACTION ALLEGATIONS

17. Plaintiffs bring this action on their own behalf, as well as on behalf of each and all other persons similarly situated, and thus, seek class certification under California Code of Civil Procedure section 382.

18. All claims alleged herein arise under California law for which Plaintiffs seek relief authorized by California law.

19. Plaintiffs' proposed subclasses consist of and are defined as:

(a) *Unpaid Wages Subclass*:

All non-exempt or hourly paid employees who worked for Defendants in California within four years prior to the filing of this complaint until the date of certification.

(b) *Non-Compliant Wage Statement Subclass*:

All non-exempt or hourly paid employees of Defendants who worked in California and received a wage statement within one year prior to the filing of this complaint until the date of certification.

20. Plaintiffs reserve the right to establish additional subclasses as appropriate.

21. There is a well-defined community of interest in the litigation and the class is readily ascertainable:

(a) *Numerosity*: The members of the class (and each subclass, if any) are so numerous that joinder of all members would be unfeasible and impractical. The membership of the entire class is unknown to Plaintiffs at this time, however, the class is estimated to be greater than one-hundred (100) individuals and the identity of such membership is readily ascertainable by inspection of Defendants' employment records.

(b) *Typicality*: Plaintiffs are qualified to, and will, fairly and adequately protect the interests of each class member with whom they have a well-defined community of interest, and Plaintiffs' claims (or defenses, if any) are typical of all class members' as demonstrated herein.

(c) *Adequacy*: Plaintiffs are qualified to, and will, fairly and adequately, protect the interests of each class member with whom they have a well-defined community of interest and typicality of

claims, as demonstrated herein. Plaintiffs acknowledge that they have an obligation to make known to the Court any relationship, conflicts or differences with any class member. Plaintiffs' attorneys, the proposed class counsel, are versed in the rules governing class action discovery, certification, and settlement. Plaintiffs have incurred, and throughout the duration of this action, will continue to incur costs and attorneys' fees that have been, are, and will be necessarily expended for the prosecution of this action for the substantial benefit of each class member.

(d) *Superiority*: The nature of this action makes the use of class action adjudication superior to other methods. A class action will achieve economies of time, effort and expense as compared with separate lawsuits, and will avoid inconsistent outcomes because the same issues can be adjudicated in the same manner and at the same time for the entire class.

(e) *Public Policy Considerations*: Employers in the State of California violate employment and labor laws every day. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former employees are fearful of bringing actions because they believe their former employers might damage their future endeavors through negative references and/or other means. Class actions provide the class members who are not named in the complaint with a type of anonymity that allows for the vindication of their rights at the same time as their privacy is protected.

22. There are common questions of law and fact as to the class (and each subclass, if any) that

predominate over questions affecting only individual members, including but not limited to:

(a) Whether Defendants' failure to pay wages, without abatement or reduction, in accordance with the California Labor Code, was willful;

(b) Whether Defendants required Plaintiffs and class members to work over eight (8) hours per day, and/or over forty (4) hours per week and failed to pay legally required overtime compensation to Plaintiffs and class members;

(c) Whether Defendants deprived Plaintiffs and class members of meal periods or required Plaintiffs and class members to work during meal periods without compensation;

(d) Whether Defendants deprived Plaintiffs and class members of rest periods or required Plaintiffs and class members to work during rest periods without compensation;

(e) Whether Defendants failed to pay minimum wages to Plaintiffs and class members;

(f) Whether Defendants complied with wage reporting as required by the California Labor Code; including but not limited to section 226;

(g) Whether Defendants failed to timely pay all wages earned by Plaintiffs and class members during their employment;

(h) Whether Defendants failed to timely pay all wages due to Plaintiffs and class members upon their discharge or resignation;

(i) Whether Defendants' conduct was willful or reckless;

(j) Whether Defendants engaged in unfair business practices in violation of California Business & Professions Code sections 17200 *et seq.*; and

(k) The appropriate amount of damages, restitution, or monetary penalties resulting from Defendants' violations of California law.

GENERAL ALLEGATIONS

23. At all relevant times set forth, Defendants employed Plaintiffs and other persons in non-exempt job positions at store locations in California.

24. Defendants employed Plaintiff Milton Brown as a "General Service employee" or "General Tech," a non-exempt or hourly paid position, from about August 2008 until July 15, 2010. Plaintiff was employed at Defendants' San Jose location, in Santa Clara County, California, from about February 2010 until July 15, 2010. Defendants previously employed Plaintiff Brown at their Mountain View location, located in Santa Clara County, California, from about August 2008 until February 2010. His job duties include running diagnostic tests on vehicles and performing vehicle service and maintenance, such as engine or suspension repairs.

25. Defendants employed Plaintiff Lee Moncada as a "Head Mechanic," a non-exempt or hourly paid position, at Defendants' Mountain View location, located in Santa Clara County, California business location, from May 2009 until February 27, 2010. His job duties included supervising junior mechanics, running diagnostic tests on vehicles and repairing brake, suspension and electrical problems.

26. Defendants continue to employ individuals in non-exempt job positions at store locations in California.

27. Plaintiffs are informed and believe, and thereon allege, that employees were not paid for all hours worked, because all hours worked were not

recorded. For example, Plaintiff Moncada was regularly required to work off-the-clock for up to an hour after his shift was complete.

28. Plaintiffs are informed and believe, and thereon allege, that at all times herein mentioned, Defendants were advised by skilled lawyers and other professionals, employees and advisors knowledgeable about California labor and wage law, employment and personnel practices, and about the requirements of California law.

29. Plaintiffs are informed and believe, and thereon allege that Defendants knew or should have known that Plaintiffs and class members were entitled to receive certain wages for overtime compensation and that they were not receiving certain wages for overtime compensation. Plaintiff Moncada, for example, was not paid overtime for any of the time he worked off-the-clock.

30. Plaintiffs are informed and believe, and thereon allege that Defendants knew or should have known that Plaintiffs and class members were entitled to receive all meal periods or payment of one additional hour of pay at Plaintiffs' and class members' regular rate of pay when they did not receive a timely uninterrupted meal period. Plaintiff Brown alleges that he frequently does not receive his required meal periods within the first 5 hours and has to wait until business slows down before he may take his first meal period. In addition, Plaintiffs would often clock out but continue working during their meal periods.

31. Plaintiffs are informed and believe, and thereon allege that Defendants knew or should have known that Plaintiffs and class members were

entitled to receive all rest periods or payment of one additional hour of pay at Plaintiffs' and class members' regular rate of pay when a rest period was missed. Plaintiffs further allege that they did not received all rest breaks.

32. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or should have known that Plaintiffs and class members were entitled to receive at least minimum wages for compensation, and that they did not receive at least minimum wages for compensation for work done off-the-clock.

33. Plaintiffs are informed and believe, and thereon allege, that Defendant knew or should have known that Plaintiffs and class members were entitled to receive complete and accurate wage statements in accordance with California law, and that they did not receive complete and accurate wage statements in accordance with California law.

34. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or should have known that Plaintiff Moncada and class members were entitled to receive all the wages owed to them, including overtime pay and missed meal and rest period premiums, upon discharge. Plaintiff Brown did not receive his final pay check upon his discharge on July 15, 2010. Instead, he received it two (2) days later, on July 17, 2010. Plaintiff Moncada did not receive his final pay check upon his discharge on February 27, 2010. Instead, he received it about one month after he was discharged.

35. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or should have known that Plaintiffs and class members were

entitled to timely payment of wages during employment. Plaintiffs and class members did not receive payment of all wages, including overtime pay and missed meal and rest period premiums, within the time periods permissible under California Labor Code section 204.

36. Plaintiffs are informed and believe, and thereon allege, that at all times herein mentioned, Defendants knew or should have known that they had a duty to compensate Plaintiffs and class members, and that Defendants had the financial ability to pay such compensation but willfully, knowingly and intentionally failed to do so, and falsely represented to Plaintiffs and class members that they were properly denied wages, all in order to increase Defendants' profits.

37. California Labor Code section 218 states that nothing in Article 1 of the Labor Code shall limit the right of any wage claimant to "sue directly . . . for any wages or penalty due to him [or her] under this article."

38. At all times herein set forth, PAGA was applicable to Plaintiffs' employment by Defendants.

39. At all times herein set forth, PAGA provides that any provision of law under the California Labor Code that provides for a civil penalty to be assessed and collected by the LWDA for violations of the California Labor Code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of herself and other current or former employees pursuant to procedures outlined in California Labor Code section 2699.3.

40. Pursuant to PAGA, a civil action under PAGA may be brought by an "aggrieved employee," who is

any person that was employed by the alleged violator and against whom one or more of the alleged violations was committed.

41. Plaintiffs were employed by Defendants and the alleged violations were committed against them during their time of employment and they are, therefore, aggrieved employees. Plaintiffs and other employees are "aggrieved employees" as defined by California Labor Code section 2699(c) in that they are all current or former employees of Defendants, and one or more of the alleged violations were committed against them.

42. Pursuant to California Labor Code sections 2699.3 and 2699.5, aggrieved employees, including Plaintiffs, may pursue a civil action arising under PAGA after the following requirements have been met:

(a) The aggrieved employees shall give written notice by certified mail (hereinafter "Employee's Notice") to the LWDA and the employer of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

(b) The LWDA shall provide notice (hereinafter "LWDA Notice") to the employer and the aggrieved employee by certified mail that it does not intend to investigate the alleged violation within thirty (30) calendar days of the postmark date of the Employee's Notice. Upon receipt of the LWDA Notice, or if the LWDA Notice is not provided within thirty-three (33) calendar days of the postmark date of the Employee's Notice, the aggrieved employee may commence a civil action pursuant to California Labor Code section 2699 to recover civil penalties in

addition to any other penalties to which the employee may be entitled.

43. On July 28, 2010, Plaintiffs provided written notice by certified mail to the LWDA and to Defendants MORGAN TIRE & AUTO, LLC dba "WHEEL WORKS," BRIDGESTONE RETAIL OPERATIONS, LLC, and BRIDGESTONE AMERICAS, INC., of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

44. More than 33 days have passed since Plaintiffs sent their Employee's Notice to the LWDA, and the LWDA has made no response. Thus, Plaintiffs have satisfied the administrative prerequisites under California Labor Code section 2699.3(a) to recover civil penalties against Defendants MORGAN TIRE & AUTO, LLC dba "WHEEL WORKS," BRIDGESTONE RETAIL OPERATIONS, LLC, and BRIDGESTONE AMERICAS, INC., in addition to other remedies, for violations of California Labor Code sections 201, 202, 204, 226(a), 226.7, 510, 512(a), 1194, 1197, 1197.1 and 1198.

FIRST CAUSE OF ACTION

Violation of California Labor Code §§ 510 and 1198 (Against All Defendants)

45. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 44.

46. California Labor Code section 1198 and the applicable Industrial Welfare Commission ("IWC") Wage Order provide that it is unlawful to employ persons without compensating them at a rate of pay either time-and-one-half or two-times that person's

regular rate of pay, depending on the number of hours worked by the person on a daily or weekly basis.

47. Specifically, the applicable IWC Wage Order provides that Defendants are and were required to pay Plaintiffs and class members employed by Defendants, and working more than eight (8) hours in a day or more than forty (40) hours in a workweek, at the rate of time-and-one-half for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek.

48. The applicable IWC Wage Order further provides that Defendants are and were required to pay Plaintiffs and class members employed by Defendants, and working more than twelve (12) hours in a day, overtime compensation at a rate of two times their regular rate of pay.

49. California Labor Code section 510 codifies the right to overtime compensation at one-and-one-half times the regular hourly rate for hours worked in excess of eight (8) hours in a day or forty (40) hours in a week or for the first eight (8) hours worked on the seventh day of work, and to overtime compensation at twice the regular hourly rate for hours worked in excess of twelve (12) hours in a day or in excess of eight (8) hours in a day on the seventh day of work.

50. During the relevant time period, Plaintiffs and class members consistently worked in excess of eight (8) hours in a day and/or in excess of forty (40) hours in a week.

51. During the relevant time period, Plaintiffs and class members worked off-the-clock, and were not paid for all the off-the-clock hours they worked in

excess of eight (8) hours in a day and/or in excess of forty (40) hours in a week. This includes time spent working off-the-clock. For example, Plaintiff Moncada was regularly required to work off-the-clock for up to an hour after his shift was complete.

52. During the relevant time period, Defendants willfully failed to pay all overtime wages owed to Plaintiffs and class members. Defendants did not pay Plaintiffs and class members overtime wages for work that was done off-the-clock in excess of eight (8) hours a day or forty (40) hours in a week.

53. Defendants' failure to pay Plaintiffs and class members the unpaid balance of overtime compensation, as required by California laws, violates the provisions of California Labor Code sections 510 and 1198, and is therefore unlawful.

54. Pursuant to California Labor Code section 1194, Plaintiffs and class members are entitled to recover their unpaid overtime compensation, as well as interest, costs, and attorneys' fees.

55. Pursuant to California Labor Code section 2699(f) and (g), Plaintiffs and other aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees, for violations of California Labor Code sections 510 and 1198.

SECOND CAUSE OF ACTION

Violation of California Labor Code §§ 226.7 and 512(a)

(Against All Defendants)

56. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 55.

57. At all relevant times, the applicable IWC Wage Order and California Labor Code sections 226.7 and 512(a) were applicable to Plaintiffs' and class members' employment by Defendants.

58. At all relevant times, California Labor Code section 226.7 provides that no employer shall require an employee to work during any meal period mandated by an applicable order of the California IWC.

59. At all relevant times, the applicable IWC Wage Order and California Labor Code section 512(a) provide that an employer may not require, cause or permit an employee to work for a period of more than five (5) hours per day without providing the employee with an uninterrupted meal period of not less than thirty (30) minutes, except that if the total work period per day of the employee is not more than six (6) hours, the meal period may be waived by mutual consent of both the employer and the employee.

60. At all relevant times, the applicable IWC Wage Order and California Labor Code section 512(a) further provide that an employer may not require, cause or permit an employee to work for a period of more than ten (10) hours per day without providing the employee with a second uninterrupted meal period of not less than thirty (30) minutes, except that if the total hours worked is not more than twelve

(12) hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

61. During the relevant time period, Plaintiffs and class members who were scheduled to work for a period of time no longer than six (6) hours, and who did not waive their legally mandated meal periods by mutual consent, were required to work for periods longer than five (5) hours without an uninterrupted meal period of not less than thirty (30) minutes.

62. During the relevant time period, Plaintiffs and class members who were scheduled to work for a period of time in excess of six (6) hours were required to work for periods longer than five (5) hours without an uninterrupted meal period of not less than thirty (30) minutes.

63. During the relevant time period, Defendants willfully required Plaintiffs and class members to take meal breaks late. Often Plaintiffs and class members would not be allowed to take meal breaks until after five (5) hours into their shifts. Plaintiffs would also often clock out for their meal periods but continue to work.

64. During the relevant time period, Defendants failed to pay Plaintiffs and class members the full meal period premium due pursuant to California Labor Code section 226.7.

65. Defendants' conduct violates the applicable IWC Wage Orders and California Labor Code sections 226.7 and 512(a).

66. Pursuant to the applicable IWC Wage Order and California Labor Code section 226.7(b), Plaintiffs and class members are entitled to recover from

Defendants one additional hour of pay at the employees' regular hourly rate of compensation for each work day that the meal period was not provided.

67. Pursuant to California Labor Code section 2699(f) and (g), Plaintiffs and other aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees, for violations of California Labor Code sections 226.7 and 512(a).

THIRD CAUSE OF ACTION

Violation of California Labor Code § 226.7

(Against All Defendants)

68. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 67.

69. At all relevant times herein set forth, the applicable IWC Wage Order and California Labor Code section 226.7 were applicable to Plaintiffs' and class members' employment by Defendants.

70. At all relevant times, California Labor Code section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the California IWC.

71. At all relevant times, the applicable IWC Wage Order provides that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period" and that the "rest period time shall be

based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof" unless the total daily work time is less than three and one-half (3½) hours.

72. During the relevant time period, Defendants required Plaintiffs and class members to work four (4) or more hours without authorizing or permitting a ten (10) minute rest period per each four (4) hour period worked.

73. During the relevant time period, Defendants willfully required Plaintiffs and class members to work during rest periods and failed to compensate Plaintiffs and class members for work performed during rest periods.

74. During the relevant time period, Defendants failed to pay Plaintiffs and class members the full rest period premium due pursuant to California Labor Code section 226.7.

75. Defendants' conduct violates the applicable IWC Wage Orders and California Labor Code section 226.7.

76. Pursuant to the applicable IWC Wage Order and California Labor Code section 226.7(b), Plaintiffs and class members are entitled to recover from Defendants one additional hour of pay at the employee's regular hourly rate of compensation for each work day that the rest period was not provided.

77. Pursuant to California Labor Code section 2699(f) and (g), Plaintiffs and other aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each

aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees, for violations of California Labor Code section 226.7.

FOURTH CAUSE OF ACTION

Violation of California Labor Code §§ 1194, 1197, 1197.1

(Against All Defendants)

78. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 77.

79. At all relevant times, California Labor Code sections 1194, 1197 and 1197.1 provide that the minimum wage for employees fixed by the Industrial Welfare Commission is the minimum wage to be paid to employees, and the payment of a lesser wage than the minimum so fixed is unlawful.

80. During the relevant time period, Plaintiffs and class members worked off-the-clock and were not paid for all the off-the-clock hours they worked. This included work that was regularly required to be done before clocking in and after clocking out and while clocked out during meal breaks.

81. During the relevant time period, Defendants regularly failed to pay minimum wage to Plaintiffs and class members as required, pursuant to California Labor Code sections 1194, 1197 and 1197.1.

82. Defendants' failure to pay Plaintiffs and class members the minimum wage as required violates California Labor Code sections 1194, 1197 and 1197.1. Pursuant to those sections Plaintiffs and class members are entitled to recover the unpaid balance of their minimum wage compensation as well as interest, costs and attorney's fees, and liquidated

damages in an amount equal to the wages unlawfully unpaid and interest thereon.

83. Pursuant to California Labor Code section 1197.1, Plaintiffs and class members are entitled to recover a penalty of $100.00 for the initial failure to timely pay each employee minimum wages, and $250.00 for each subsequent failure to pay each employee minimum wages.

84. Pursuant to California Labor Code section 1194.2, Plaintiffs and class members are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

85. Pursuant to California Labor Code section 2699(f) and (g), Plaintiffs and other aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees, for violations of California Labor Code sections 1194, 1197 and 1197.1.

FIFTH CAUSE OF ACTION

Violation of California Labor Code §§ 201 and 202

(Against All Defendants)

86. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 85.

87. At all times herein set forth, California Labor Code sections 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that if an employee

voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

88. During the relevant time period, Defendants willfully failed to pay Plaintiff Moncada and class members who are no longer employed by Defendants their wages, including overtime and minimum wages and missed meal and rest periods premiums, earned and unpaid, either at the time of discharge, or within seventy-two (72) hours of their leaving Defendants' employ.

89. Defendants' failure to pay Plaintiffs and those class members who are no longer employed by Defendants their wages earned and unpaid at the time of discharge, or within seventy-two (72) hours of their leaving Defendants' employ, is in violation of California Labor Code sections 201 and 202. Plaintiff Brown did not receive his final pay check upon his discharge on July 15, 2010. Instead, he received it two (2) days later, on July 17, 2010. Plaintiff Moncada did not receive his final pay check upon his discharge on February 27, 2010. Instead, he received it about one month later.

90. California Labor Code section 203 provides that if an employer willfully fails to pay wages owed, in accordance with sections 201 and 202, then the wages of the employee shall continue as a penalty from the due date, and at the same rate until paid or until an action is commenced; but the wages shall not continue for more than thirty (30) days.

91. Plaintiff Moncada and class members are entitled to recover from Defendants the statutory penalty wages for each day they were not paid, up to a thirty (30) day maximum pursuant to California Labor Code section 203.

92. Pursuant to California Labor Code section 2699(a), Plaintiff Moncada and other aggrieved employees are entitled to recover civil penalties plus costs and attorneys' fees for violations of California Labor Code sections 201 and 202.

SIXTH CAUSE OF ACTION

Violation of California Labor Code § 204

(Against All Defendants)

93. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 92.

94. At all times herein set forth, California Labor Code section 204 provides that all wages earned by any person in any employment between the 1st and the 15th days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 16th and the 26th day of the month during which the labor was performed.

95. At all times herein set forth, California Labor Code section 204 provides that all wages earned by any person in any employment between the 16th and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 1st and the 10th day of the following month.

96. At all times herein set forth, California Labor Code section 204 provides that all wages earned for

labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

97. During the relevant time period, Defendants willfully failed to pay Plaintiffs and class members all wages due to them, within any time period permissible by California Labor Code section 204.

98. Plaintiffs and class members are entitled to recover all remedies available for violations of California Labor Code section 204.

99. Pursuant to California Labor Code section 2699(a), Plaintiffs and other aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees, for violations of California Labor Code section 204.

SEVENTH CAUSE OF ACTION

Violation of California Labor Code § 226(a)

(Against All Defendants)

100. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 99.

101. At all material times set forth herein, California Labor Code section 226(a) provides that every employer shall furnish each of his or her employees an accurate itemized wage statement in writing showing nine pieces of information, including the total hours worked, among other things.

102. Defendants have intentionally and willfully failed to provide employees with complete and accurate wage statements. The deficiencies include, among other things, the failure to include the inclusive dates for the periods worked by Plaintiffs and class members, the total number of hours worked by Plaintiffs and class members and all applicable hourly rates.

103. As a result of Defendants' violation of California Labor Code section 226(a), Plaintiffs and class members have suffered injury and damage to their statutorily protected rights.

104. Specifically, Plaintiffs and class members have been injured by Defendants' intentional violation of California Labor Code section 226(a) because they were denied both their legal right to receive, and their protected interest in receiving, accurate, itemized wage statements under California Labor Code section 226(a).

105. Plaintiffs and class members are entitled to recover from Defendants the greater of their actual damages caused by Defendants' failure to comply with California Labor Code section 226(a), or an aggregate penalty not exceeding four thousand dollars ($4,000) per employee.

106. Plaintiffs and class members are also entitled to injunctive relief to ensure compliance with this section, pursuant to California Labor Code section 226(g).

107. Pursuant to California Labor Code section 2699(a), Plaintiffs and other aggrieved employees are entitled to recover civil penalties plus costs and attorneys' fees for violations of California Labor Code section 226(a).

EIGHTH CAUSE OF ACTION

Violation of California Business & Professions Code §§ 17200 *et seq.*

(Against All Defendants)

108. Plaintiffs incorporate by reference and re-allege as if fully stated herein the material allegations set out in paragraphs 1 through 107.

109. Defendants' conduct, as alleged herein, has been, and continues to be, unfair, unlawful, and harmful to Plaintiffs, other class members, and to the general public. Plaintiffs seek to enforce important rights affecting the public interest within the meaning of Code of Civil Procedure section 1021.5.

110. Defendants' activities, as alleged herein, are violations of California law, and constitute unlawful business acts and practices in violation of California Business & Professions Code sections 17200 *et seq.*

111. A violation of California Business & Professions Code sections 17200 *et seq.* may be predicated on the violation of any state or federal law. In this instant case, Defendants' policies and practices of requiring non-exempt or hourly paid employees, including Plaintiffs and class members, to work overtime without paying them proper compensation violates California Labor Code sections 510 and 1198. In addition, Defendants' policies and practices of requiring non-exempt or hourly paid employees, including Plaintiffs and class members, to work through their meal and rest periods without paying them proper compensation violate California Labor Code sections 226.7 and 512(a). Defendants' policies and practices of not paying at least minimum wages violate California Labor Code sections 1194,

1197 and 1197.1. Defendants' policies and practices of failing to timely pay wages to Plaintiffs and class members violate California Labor Code section 201, 202 and 204. Moreover, Defendants' policies and practices of failing to provide accurate wage statements violate California Labor Code section 226(a).

112. Plaintiffs and putative class members have been personally injured by Defendants' unlawful business acts and practices as alleged herein, including but not necessarily limited to the loss of money and/or property.

113. Pursuant to California Business & Professions Code sections 17200 *et seq.*, Plaintiffs and putative class members are entitled to restitution of the wages withheld and retained by Defendants during a period that commences four years prior to the filing of this complaint; a permanent injunction requiring Defendants to pay all outstanding wages due to Plaintiffs and class members; an award of attorneys' fees pursuant to California Code of Civil Procedure section 1021.5 and other applicable laws; and an award of costs.

REQUEST FOR JURY TRIAL

Plaintiffs request a trial by jury.

PRAYER FOR RELIEF

Plaintiffs, and on behalf of all others similarly situated, pray for relief and judgment against Defendants, jointly and severally, as follows:

1. For damages, restitution and penalties in excess of twenty-five thousand dollars ($25,000).

Class Certification

2. That this action be certified as a class action;

3. That Plaintiffs be appointed as the representatives of the Class; and

4. That counsel for Plaintiffs be appointed as Class Counsel.

As to the First Cause of Action

5. That the Court declare, adjudge and decree that Defendant violated California Labor Code sections 510 and 1198 and applicable IWC Wage Orders by willfully failing to pay all overtime wages due to Plaintiffs and class members;

6. For general unpaid wages at overtime wage rates and such general and special damages as may be appropriate;

7. For pre-judgment interest on any unpaid overtime compensation commencing from the date such amounts were due;

8. For reasonable attorneys' fees and for costs of suit incurred herein pursuant to California Labor Code section 1194(a);

9. For civil penalties pursuant to California Labor Code section 2699(f) and (g) in the amount of $100 for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code sections 510 and 1198; and

10. For such other and further relief as the Court may deem equitable and appropriate.

As to the Second Cause of Action

11. That the Court declare, adjudge and decree that Defendants violated California Labor Code sections 226.7 and 512 and applicable IWC Wage Orders by willfully failing to provide all meal periods to Plaintiffs and class members;

12. That the Court make an award to the Plaintiffs and class members of one (l) hour of pay at each employee's regular rate of compensation for each workday that a meal period was not provided;

13. For all actual, consequential, and incidental losses and damages, according to proof;

14. For premiums pursuant to California Labor Code section 226.7(b);

15. For pre-judgment interest on any unpaid wages from the date such amounts were due;

16. For civil penalties pursuant to California Labor Code section 2699(f) and (g) in the amount of $100 for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code sections 226.7 and 512(a); and

17. For such other and further relief as the Court may deem equitable and appropriate.

As to the Third Cause of Action

18. That the Court declare, adjudge and decree that Defendants violated California Labor Code section 226.7 and applicable IWC Wage Orders by willfully failing to provide all rest periods to Plaintiffs and class members;

19. That the Court make an award to the Plaintiffs and class members of one (l) hour of pay at each employee's regular rate of compensation for each workday that a rest period was not provided;

20. For all actual, consequential, and incidental losses and damages, according to proof;

21. For premiums pursuant to California Labor Code section 226.7(b);

22. For pre-judgment interest on any unpaid wages from the date such amounts were due;

23. For civil penalties pursuant to California Labor Code section 2699(f) and (g) in the amount of $100 for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code section 226.7; and

24. For such other and further relief as the Court may deem equitable and appropriate.

As to the Fourth Cause of Action

25. That the Court declare, adjudge and decree that Defendants violated California Labor Code sections 1194, 1197 and 1197.1 by willfully failing to pay minimum wages to Plaintiffs and class members;

26. For general unpaid wages and such general and special damages as may be appropriate;

27. For statutory wage penalties pursuant to California Labor Code section 1197.1 for Plaintiffs and class members in the amount as may be established according to proof at trial;

28. For pre-judgment interest on any unpaid compensation from the date such amounts were due;

29. For reasonable attorneys' fees and for costs of suit incurred herein pursuant to California Labor Code section 1194(a);

30. For liquidated damages pursuant to California Labor Code section 1194.2;

31. For civil penalties pursuant to California Labor Code section 2699(f) and (g) in the amount of $100 for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code section 1194, 1197 and 1197.1; and

32. For such other and further relief as the Court may deem equitable and appropriate.

As to the Fifth Cause of Action

33. That the Court declare, adjudge and decree that Defendants violated California Labor Code sections 201, 202 and 203 by willfully failing to pay all compensation owed at the time of termination of the employment of Plaintiffs and other class members no longer employed by Defendants;

34. For all actual, consequential and incidental losses and damages, according to proof;

35. For statutory wage penalties pursuant to California Labor Code section 203 for Plaintiffs and all other class members who have left Defendants' employ;

36. For pre-judgment interest on any unpaid wages from the date such amounts were due;

37. For civil penalties pursuant to California Labor Code section 2699(a), plus costs and attorneys'

fees for violation of California Labor Code section 201, 202, and 203; and

38. For such other and further relief as the Court may deem equitable and appropriate.

As to the Sixth Cause of Action

39. That the Court declare, adjudge and decree that Defendants violated California Labor Code section 204 by willfully failing to pay all compensation owed at the time required by California Labor Code section 204, to Plaintiffs and class members;

40. For all actual, consequential and incidental losses and damages, according to proof;

41. For pre-judgment interest on any untimely paid compensation, from the date such amounts were due;

42. For civil penalties pursuant to California Labor Code section 2699(a) in the amount of $100 for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code section 204; and

43. For such other and further relief as the Court may deem equitable and appropriate.

As to the Seventh Cause of Action

44. That the Court declare, adjudge and decree that Defendants violated the record keeping provisions of California Labor Code section 226(a) and applicable IWC Wage Orders as to Plaintiffs and class members, and willfully failed to provide accurate itemized wage statements thereto;

45. For all actual, consequential and incidental losses and damages, according to proof;

46. For statutory penalties pursuant to California Labor Code section 226(e);

47. For injunctive relief to ensure compliance with this section, pursuant to California Labor Code section 226(g);

48. For civil penalties pursuant to California Labor Code section 2699(a) plus costs and attorneys' fees for violation of California Labor Code section 226(a); and

49. For such other and further relief as the Court may deem equitable and appropriate.

As to the Eighth Cause of Action

50. That the Court declare, adjudge and decree that Defendants violated California Business and Professions Code sections 17200 *et seq.* by failing to provide Plaintiffs and class members all overtime compensation due to them, by failing to provide all meal and rest periods to Plaintiffs and class members, failing to pay at least minimum wages to Plaintiffs and class members, by failing to pay Plaintiffs' and class members' wages timely as required by California Labor Code section 201, 202, and 204 and by failing to provide accurate wage statements to Plaintiffs and class members.

51. For restitution of unpaid wages to Plaintiffs and all class members and prejudgment interest from the day such amounts were due and payable;

52. For the appointment of a receiver to receive, manage and distribute any and all funds disgorged from Defendants and determined to have been wrongfully acquired by Defendants as a result of

violations of California Business & Professions Code sections 17200 *et seq.*;

53. For reasonable attorneys' fees and costs of suit incurred herein pursuant to California Code of Civil Procedure section 1021.5;

54. For injunctive relief to ensure compliance with this section, pursuant to California Business & Professions Code sections 17200 *et seq.*; and

55. For such other and further relief as the Court may deem equitable and appropriate.

Dated: August 31, 2010 Respectfully submitted,

Initiative Legal Group APC

By:/s/ Gene Williams
Gene Williams
Mark P. Pifko
Jamie R. Greene

Attorneys for Plaintiffs Milton Brown and Lee Moncada