No. S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN, an individual,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION OF LOS ANGELES,
Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO
CASE B235158

FROM THE SUPERIOR COURT,
COUNTY OF LOS ANGELES,
CASE NO. BC356521, ASSIGNED FOR ALL PURPOSES
TO JUDGE ROBERT HESS, DEPARTMENT 24

APPELLANT'S REPLY BRIEF ON THE MERITS

CAPSTONE LAW APC
GLENN A. DANAS (SBN 270317)
RYAN H. WU (SBN 222323)
1840 CENTURY PARK EAST, STE. 450
LOS ANGELES, CA 90067
TELEPHONE: (310) 556-4811
FACSIMILE: (310) 943-0396
GLENN.DANAS@CAPSTONELAWYERS.COM
RYAN.WU@CAPSTONELAWYERS.COM

PUBLIC CITIZEN LITIGATION GROUP
SCOTT L. NELSON (SBN 413548 (DC))
(COUNSEL *PRO HAC VICE*)
1600 20TH STREET, NW
WASHINGTON, DC 20009
TELEPHONE: (202) 588-1000
FACSIMILE: (202) 588-7795
SNELSON@CITIZEN.ORG

Attorneys for Plaintiff and Appellant
ARSHAVIR ISKANIAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

FEDERAL STATUTES

SECONDARY AUTHORITIES

ARGUMENT

I. THE CLASS-ACTION BAN IS UNENFORCEABLE

CLS agrees that the Federal Arbitration Act (FAA) requires enforcement only of agreements to arbitrate claims, not agreements that waive or prevent assertion of substantive claims. (CLS at 10 ["acknowledg[ing] that an arbitration agreement cannot waive substantive rights"].) That acknowledgment effectively concedes that the underpinning of *Gentry v. Superior Court* (2007) 42 Cal.4th 443 remains sound, contrary to CLS's repeated insistence that *AT&T Mobility v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740] overruled *Gentry*.

A. *Gentry* Rests Firmly on the FAA's Non-Waiver Principle

Although it acknowledges that an arbitration agreement cannot waive substantive rights, CLS repeatedly states that the class action is merely a "procedural mechanism," and "participation in class ... actions is not a substantive right." (CLS at 12, 10.) CLS misunderstands Mr. Iskanian's argument, which is not that participation in class actions is itself a substantive right, but that the availability of class actions is sometimes essential to the vindication of substantive rights. Thus, as *Gentry* held, "under some circumstances such a provision [banning class actions] would lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." (42 Cal.4th at 457.)

Gentry's holding that contractual restrictions on arbitration *procedures* can in some circumstances effect the waiver of substantive rights is fully consistent with decisions of the United States Supreme Court. In *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, the Court recognized that a showing that arbitration procedures are so onerous as to prevent effective vindication of substantive rights would render an arbitration agreement unenforceable. (See id. at pp. 90, 92;

accord *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1084.) *Green Tree* reflects a broader principle that the Court has repeatedly stated: the FAA requires arbitration only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum ...." (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 637; see also *Preston v. Ferrer* (2008) 522 U.S. 346, 359 ["here, Ferrer relinquishes no substantive rights the TAA or other California law may accord him."].)

CLS suggests this principle applies only to "federal claims" (CLS at 10), but that suggestion is inconsistent with its own recognition that "an arbitration agreement cannot waive substantive rights" *at all.* (Ibid.) CLS's argument confuses the question of whether the FAA allows waiver of substantive rights with the distinct question of whether mandatory arbitration of a particular type of claim can be forbidden. The language CLS cites from *Mitsubishi*, *Green Tree*, *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665 and *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20 addresses the latter issue, and reflects the obvious point that only Congress can override a federal statute. But the non-waiver principle is not based on the idea that substantive rights *displace* the FAA; it rests on the recognition that the FAA *itself* does not provide for waiver of substantive rights. Thus, as demonstrated in our opening brief (at 11-15), neither the FAA nor decisions of the U.S. Supreme Court and this Court supports the distinction between state and federal rights that CLS suggests.

As CLS observes, an arbitration agreement may not be displaced by mere "speculation" that it "might not be effective." (CLS at 11.) But *Gentry* demands more than speculation: It requires a case-specific factual showing that disallowing class proceedings would pose such "significant obstacles to the vindication of employees' statutory rights" (42 Cal.4th at 463 fn. 7) as to effect a "de facto waiver" of unwaivable rights. (Id. at

457.) *Gentry* does not hold that class actions must be permitted whenever they may be more effective than individual actions; *Gentry* requires that the difference in efficacy be so significant that statutory rights cannot effectively be vindicated without class proceedings. (Id. at 462-63.)

Nor does *Gentry* improperly hold that "arbitration must never prevent a plaintiff from vindicating a claim." (CLS at 11.) That an individual plaintiff may sometimes face obstacles (whether in arbitration or litigation) does not necessarily mean that the forum is inadequate. *Gentry* holds, however, that a class-action prohibition is unenforceable when it places such "formidable practical obstacles in the way of employees' prosecution of ... claims" that it *systematically* inhibits vindication of rights. (42 Cal.4th at 464.) That holding is fully consistent with the FAA.

B. *Concepcion* Did Not Overrule *Gentry*

Nothing in *Concepcion* addresses, let alone disavows, the U.S. Supreme Court's many previous statements that arbitration agreements must permit effective vindication of substantive rights. *Concepcion* does not even mention *Gentry*, although the case was cited repeatedly in the briefing, including an extensive discussion in an amicus curiae brief submitted by employment-law organizations.[1] That *Concepcion* neither rejects the vindication-of-rights analysis nor mentions *Gentry* belies CLS's argument that *Concepcion* overruled *Gentry*. CLS's head-count of lower court judges who have concluded otherwise (CLS at 16-17) cannot turn *Concepcion* into something that it is not.

Furthermore, *Concepcion*'s rejection of *Discover Bank* does not suggest that *Gentry*, too, must fall. *Gentry* is not simply a rote application

---

[1] Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, *et al.*, No. 09-893, at 28-30, available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_893_RespondentAmCuLawyersCommitteeforCivilRightsUnderLaw.authcheckdam.pdf.

of *Discover Bank*. This Court noted in *Gentry* that *Discover Bank* did not rest on a finding that a class-action ban would effectively waive unwaivable statutory rights. (See 42 Cal.4th at 455.) By contrast, *Gentry* is entirely premised on that theory. (See id. at 455-67.). Thus, it does not matter for purposes of *Gentry*'s vindication-of-rights analysis whether the agreement allowed an employee to opt out or was otherwise free from procedural unconscionability. (Ibid.)[2]

Moreover, the *Gentry* rule is markedly different from that of *Discover Bank*. Whereas the *Discover Bank* rule effectively invalidated class-action bans in small-dollar consumer transactions even where (as in *Concepcion*) a consumer's rights could be effectively vindicated in individual arbitration (see *Concepcion*, 131 S.Ct. at 1753), *Gentry* explicitly requires a case-specific showing that a class action ban would frustrate vindication of rights. (42 Cal.4th at 466.) Thus, the question *Concepcion* resolved—whether the FAA preempts a state-law rule requiring the availability of class procedures "when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims"[3]—does not control *Gentry*'s fate. Nowhere in its brief does CLS address the inapplicability of the question resolved in *Concepcion* to the validity of *Gentry*.

CLS asserts, however, that *Gentry* violates *Concepcion*'s dictum that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (131 S.Ct. at 1753.) That observation responded to the dissent's assertion that class actions are

---

[2] Similarly, here, CLS's (inaccurate) characterizations of the agreement as part of a voluntary settlement agreement that was not binding on all employees (CLS at 4) are irrelevant. In any event, the agreement was not "voluntary," as it expressly applies to every CLS employee. (See 7AA 1853 [under "Company Policy"].)

[3] http://www.supremecourt.gov/qp/09-00893qp.pdf.

desirable to prevent some "small-dollar claims" from "slip[ping] through the cracks." (Ibid.) *Concepcion* no doubt forbids a state from requiring class proceedings merely because, though not *necessary* to vindicate substantive rights, they are beneficial for reasons of efficiency or maximization of enforcement. But *Concepcion* did not purport to address a doctrine applicable where class proceedings are necessary to avoid de facto waiver of substantive rights—indeed, it immediately went on to emphasize that the claims at issue could be fully vindicated in individual arbitration. (Ibid.) Moreover, where a particular procedure is necessary to avoid waiver of substantive rights, requiring such a procedure is not "inconsistent with the FAA," ibid., because, as demonstrated in our opening brief (at 8-15) and conceded by CLS (CLS at 10), the FAA itself does not allow arbitration agreements to waive substantive rights.[4]

CLS's assertion that *Gentry*'s rule improperly "derives its meaning from the fact that an agreement to arbitrate is at issue" (CLS at 13) is equally untenable. *Gentry* does not "prohibit[] outright the arbitration of a particular type of claim." (CLS at 14 [quoting *Concepcion*, 131 S.Ct. at 1747].) Nor does it discriminate against arbitration. It applies to class-action bans inside and outside of arbitration. (*Gentry*, 42 Cal.4th at 465.) More importantly, it reflects the arbitration-neutral principle that contractual waivers of statutory rights that exist to benefit the public are impermissible. (Ibid.) Because that principle *mirrors* the FAA's own non-

[4] If *Concepcion* had actually decided whether class-action bans that prevent vindication of substantive rights are enforceable, the Court's decision to receive full briefing and argument in *American Express Co. v. Italian Colors Restaurant* (2012) 133 S.Ct. 594 (order granting certiorari) would be inexplicable. The Court has regularly issued summary reversals when a lower court's refusal to enforce an arbitration agreement was directly foreclosed by precedent. (See, e.g., *Nitro-Lift Technologies, L.L.C. v. Howard* (2012) 133 S.Ct. 500; *Marmet Health Care Center, Inc. v. Brown* (2012) 132 S.Ct. 1201; *KPMG LLP v. Cocchi* (2011) 132 S.Ct. 23.)

waiver principle, it does not discriminate against arbitration in violation of federal law.

C. The Arbitration Agreement Here Violates *Gentry*

CLS chose not to defend the validity of its class-action waiver after *Gentry* was decided, leaving uncontested Mr. Iskanian's position that CLS's ban prevented effective vindication of his substantive statutory rights. When CLS changed its mind following *Concepcion*, Mr. Iskanian submitted evidence that the class-action ban would prevent vindication of substantive rights (7AA 1963-82). On appeal, CLS conceded that Mr. Iskanian's showing satisfied *Gentry*, a concession it reiterates here.[5] (CLS at 6.)

However, CLS now also argues inconsistently that the agreement does *not* prevent vindication of employees' rights because, it asserts, approximately 60 class members, after the trial court compelled arbitration, opted for individual arbitration rather than joining the rest of the class to try to maintain a class action. (CLS at 12.) However, the citation CLS offers fails to demonstrate that those class members, in choosing what they saw as the lesser evil in light of the lower courts' decisions, can effectively vindicate their rights through non-class arbitration.[6] But even if these facts

---

[5] Since one of the *Gentry* factors is employees' fear of retaliation for filing individual suits, CLS effectively concedes that it is "likely to retaliate against current employees for exercising their rights." (*Ontiveros v. Zamora* (E.D.Cal. Feb. 14, 2013) 2013 U.S.Dist. Lexis 20408, *25-26.)

[6] CLS's efforts to prevent any substantive progress in the arbitrations tend to confirm its own concession that individual arbitration is, in *Gentry*'s terms, significantly less effective than class proceedings in permitting vindication of substantive rights. CLS has fought the individual claimants for nearly two years on almost every aspect of the arbitrations, including payment of filing fees, appointment of arbitrators, and CLS's (unsuccessful) attempts to have the trial court order consolidation. Not a single claimant has received a hearing on the merits. (Motion for Judicial Notice, Exhibits 1-8 [evidencing the extensive motion practice in which

suggest that arbitration might be an adequate means of pursuing the substantive rights at issue, that would not be a reason to overrule *Gentry*; at most, it would indicate that, had CLS chosen to do so, it might have contested *Gentry*'s application. CLS has long since waived its right to do that, having conceded the adequacy of Mr. Iskanian's *Gentry* showing.

II. THE BAN ON PAGA REPRESENTATIVE CLAIMS IS UNENFORCEABLE

CLS's arbitration agreement forbids all representative actions. CLS does not dispute that a Private Attorney General Act (PAGA) action is by nature representative: The PAGA plaintiff asserts claims as a representative of the State of California and seeks a recovery that will benefit the State, himself, and other employees. CLS offers no authority holding that the FAA requires, or even permits, enforcement of an arbitration agreement that altogether bars assertion of such a claim.

A. CLS's Meritless Claim That PAGA Is Unconstitutional Is Not Properly Presented

CLS attempts to avoid the issue by asserting that PAGA is unconstitutional. That issue is not before the Court. Under California Rule of Court 8.500(a)(2), a respondent who seeks to supplement the questions presented in a petition for review must set forth its additional questions in its answer. Because CLS's answer did not mention any claim that PAGA is unconstitutional, the issue is outside the scope of this Court's grant of review. (See *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d

---

these 60 former class members had to engage *just to access* the arbitral forum to which they had been compelled].)

That some class members had counsel to represent them in arbitration was entirely attributable to Mr. Iskanian's efforts in certifying the class. But for the class proceedings, which existed only because of *Gentry*, those class members would not have been advised of their rights and would not have had a relationship with counsel who were in a position to represent them in arbitration once the trial court decertified the class and compelled individual arbitration.

84, 98-99.) Moreover, the issue was not decided in the Court of Appeal, rendering review in this Court especially inappropriate. (See *Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n* (1999) 21 Cal.4th 352, 379, 381.)

No important reason for review exists here. The issue CLS attempts to introduce has never been addressed by any appellate court in the nine years since PAGA's enactment, and the few trial-level courts that have considered CLS's theory have dismissed it as insubstantial: "[C]onstitutional challenges to PAGA have been uniformly rejected." (*Tseng v. Nordstrom, Inc.* (C.D.Cal. July 23, 2012) 2012 WL 3019949, at *5.)[7]

The precedents CLS cites—*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 and *Clancy v. Superior Court* (1985) 39 Cal.3d 740—do not involve constitutional separation-of-powers claims, but principles of legal ethics governing attorneys who directly represent government entities and thus wield government power and resources, concerns inapplicable under PAGA. (See *Willner*, 2012 WL 1570789, at *6.) Neither decision involved a statute expressly authorizing a private remedy to supplement government enforcement. (Ibid.) And nothing in PAGA deprives courts of power to regulate attorney conduct or infringes the executive's authority to oversee uniform enforcement of state law. (See id. at *7.)

In *Arias v. Superior Court* (2009) 46 Cal.4th 969, this Court emphasized that PAGA representative actions brought by private litigants serve important public purposes by enhancing enforcement of California's labor laws. The Court should lend no credence to CLS's belated assertion

---

[7] See also *Kilby v. CVS Pharmacy Inc.* (S.D.Cal. May 31, 2012) 2012 WL 1969284, *2 fn.2; *Willner v. Manpower Inc.* (N.D.Cal. May 3, 2012) 2012 WL 1570789, *3-7; *Echavez v. Abercrombie & Fitch Co.* (C.D.Cal. May 12, 2012) 2012 WL 2861348, *5-7; *Brown v. American Airlines, Inc.* (C.D.Cal. 2011) 285 F.R.D. 546, 554-55.

that the private actions that serve those significant interests render the statute unconstitutional.

B. CLS's Statute of Limitations Argument Is Not Properly Presented

CLS also seeks to avoid the issue on which this Court granted review by asserting that Mr. Iskanian's PAGA claims are time-barred—another issue neither addressed below nor included in either the petition for review or the answer. (See Rule 8.500(a)(2).) Limitations issues were not even properly before the Court of Appeal because CLS did not raise them in its Renewed Motion to Compel Arbitration. Thus, the defense was not implicated by the order on appeal. And CLS neither moved to dismiss the PAGA claims on limitations grounds, nor cross-appealed the trial court's failure to dismiss them sua sponte on that basis. (See *Doers v. Golden Gate Bridge, Highway & Transp. Dist.* (1979) 23 Cal.3d 180, 184-185 fn. 1 [issue waived when not brought to trial court's attention]; *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439 [respondent may not seek relief altering judgment below without a cross-appeal].) Like its constitutional claims, CLS's limitations arguments are not before the Court.

As made clear by CLS's extensive reliance on federal district court decisions, this Court would have to resolve many issues that have not been aired in California's appellate courts and are only cursorily briefed by CLS to reach CLS's statute-of-limitations defense. These issues include (1) whether the one-year limitations period of Cal. Code. Civ. Proc. § 340, subd. (a) or the longer periods applicable to particular wage-and-hour claims apply to PAGA claims;[8] (2) whether, even assuming the one-year statute applies, a PAGA claim relates back to the filing of an earlier complaint, and whether the timing of notice to the state affects the relation-

[8] Cf. *Pineda v. Bank of Am., N.A.*, (2010) 50 Cal.4th 1389 (holding § 340 inapplicable to claims for statutory penalties where substantive statute provided a longer period).

back doctrine;[9] and (3) whether, if the PAGA penalty claims of an individual are time-barred, he may still represent the state in seeking penalties on behalf of other employees whose individual penalty claims are not time-barred, where the plaintiff is aggrieved by, and has live damages claims based on, the same misconduct.

CLS's argument also assumes, incorrectly, that all Mr. Iskanian's claims for unpaid wages necessarily accrued the moment his employment with CLS ended, and that there is no basis for equitable tolling (issues on which facts were not developed below because CLS did not move for dismissal on limitations grounds). And CLS fails to mention PAGA's provisions that the time required to satisfy statutory notice requirements is "not counted as part of the time limited for the commencement of the civil action to recover penalties under this part," Cal. Lab. Code § 2699.3(d), and that "[n]otwithstanding 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." (Id. § 2699.3(a)(2)(C).)[10]

This Court should therefore not add CLS's limitations issues to the questions to be decided.

---

[9] In *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, the Court of Appeal held that a PAGA claim related back to the filing of a complaint with claims arising out of the same facts. CLS, relying on *Wilson v. Department of Public Works* (1969) 271 Cal.App.2d 665, argues that relation-back is unavailable because of failure of the "condition precedent" of notice to the state. But in *Wilson*, the plaintiff had no remedy because he had not satisfied the preconditions for asserting *any* claim against the state; thus, there was nothing to which his new claims could relate back. By contrast, here there is no dispute that Mr. Iskanian satisfied the preconditions for bringing a PAGA suit pursuant to § 2699.3.

[10] Because the 60 days for amendment is "specified in this section" for purposes of § 2699.3(d), it also should not count in calculating limitations periods.

C. Prospective Waivers of PAGA Claims Are Unenforceable

CLS contends that its prohibition against PAGA actions is enforceable under the FAA. However, CLS does not contest that the FAA's enforcement of arbitration agreements does not extend to agreements that prospectively waive the right to bring particular claims or seek specific types of relief. Rather, CLS argues that this principle does not apply to PAGA claims.

Relying on *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal.4th 993, CLS argues that PAGA does not create "substantive rights." (CLS at 22.) However, *Amalgamated Transit* decided only whether PAGA is "substantive" in the sense that it creates an individually assignable property interest. Because the PAGA right of action was created to "protect the public," this Court declined to recognize that it created an alienable property right. (Id. at 1003.)

That PAGA is not "substantive" in that sense, however, does not mean the label "substantive" is inapplicable for purposes of all other legal doctrines. Thus, a number of federal courts have held that PAGA's provisions creating representative claims for civil penalties are substantive under the *Erie* doctrine and must be applied in federal court, unlike mere procedural state rules. As one court put it, "PAGA transcends the definition of what is simply procedural." (*Moua v. Int'l Bus. Mach. Corp.* (N.D.Cal. Jan.31, 2012) 2012 WL 370570, *3; see also *Willner*, 2012 WL 1570789, *7-9; *Cardenas v. McLane Foodservice, Inc.* (C.D.Cal. Jan.31, 2011) 2011 WL 379413, *2; *Mendez v. Tween Brands, Inc.* (E.D.Cal. July 1, 2010) 2010 WL 2650571, *3.) These courts have properly recognized that PAGA is "substantive" under *Erie* because it gives plaintiffs a "right to recover" in specified circumstances. (*Guaranty Trust Co. v. York* (1945) 326 U.S. 99, 109.)

By purporting to strip plaintiffs of their ability to recover under

circumstances in which PAGA would provide them with a claim for statutory penalties, the arbitration agreement here exceeds the FAA's bounds. The U.S. Supreme Court has repeatedly recognized that the FAA does not require enforcement of an agreement that would function as "a prospective waiver of a party's right to pursue statutory remedies." (*Mitsubishi*, 473 U.S. at 637 fn. 19.) CLS cites no authority holding that the application of that principle turns on whether the law creating a statutory claim is labeled "substantive" or "procedural" for some other purpose.

CLS also fails to recognize that *Amalgamated Transit*'s reason for holding PAGA claims not *assignable* contradicts CLS's view that they are *waivable*. This Court's recognition that PAGA claims are created "to protect the public, not to benefit private parties" (46 Cal.4th at 1003) precisely mirrors the Court's description of a claim that cannot be prospectively waived by private agreement—a claim that "inures to the benefit of the public at large rather than to a particular employer or employee." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100 [citation omitted].) It would make little sense to hold that a plaintiff may not *assign* the right to bring a PAGA claim, but may prospectively *waive* it.

CLS seeks to minimize the impact of its ban on PAGA representative actions by asserting that PAGA allows claims to be brought by an individual solely on his own behalf. But even if an "individual" PAGA claim were theoretically permissible *under the statute*, CLS's *arbitration agreement* would not allow such a claim: It purports to forbid *any* representative claim. As *Amalgamated Transit Union* makes clear, all PAGA claims are representative claims, as the PAGA claimant is a "proxy or agent ... representing the same legal right and interest" as the State. (46 Cal.4th at 1003.) CLS has no answer to this point.

Moreover, CLS's assertion that PAGA permits "individual" claims rests not on the *statutory language*—which authorizes an employee to bring an action on behalf of himself "and other current or former employees" (Cal. Lab. Code § 2699(a))—but on a tidbit of legislative history that does not specifically address the point as well as the use of a different conjunction in the statute's caption. Neither suffices to contradict the statute's own language.

Most importantly, even if both the agreement and the statute permitted an "individual" PAGA action, the agreement would still prohibit a substantial portion of the recovery PAGA authorizes: penalties inuring to the State and other aggrieved employees. As *Arias* and *Amalgamated Transit* explain, PAGA's principal achievement was the creation of these remedies to benefit the public and spur enforcement of California's labor laws. Precluding them would severely truncate the "public rights" that California law renders unwaivable. (*Little*, 29 Cal.4th at 1079.) California law does not permit waiver of *some* unwaivable rights just because others are not waived, nor does the FAA require enforcement of an agreement that waives *some* statutory remedies just because others are retained.

D. Enforcing the Waiver of PAGA Claims Would Improperly Bind the State

CLS's attempted reliance on *Amalgamated Transit* underscores a critical point that CLS's brief ignores: PAGA claims are claims of the State, and the PAGA representative action reflects the State's judgment of the most effective means of asserting its claims and achieving its law enforcement goals. (46 Cal.4th at 1003; accord *Arias*, 46 Cal.4th at 980, 986.) Enforcing an arbitration agreement prohibiting PAGA claims would preclude the State from using its chosen means of enforcing its laws. CLS does not contest that, under the FAA, an arbitration agreement cannot bind a government entity that is not a party to it. (*EEOC v. Waffle House, Inc.*

(2002) 534 U.S. 279, 294.) As our opening brief explained (at 31-32), enforcing a waiver of the remedies available in a PAGA representative action would improperly "turn[] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies." (*Waffle House*, 534 U.S. at 295.) CLS has no response.

III. THE PROHIBITION OF CLASS AND REPRESENTATIVE ACTIONS IS UNENFORCEABLE BECAUSE IT VIOLATES FEDERAL LABOR LAW

CLS acknowledges that the National Labor Relations Board held in *D.R. Horton, Inc.* (2012) 357 NLRB No. 184, 2012 WL 36274 that federal labor law prohibits enforcement of agreements that "interfere with, restrain, or coerce" employees in the exercise of their statutory right to pursue collective legal action, and that "[t]he right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." (*D.R. Horton*, 2012 WL 36274 at *12). CLS asserts that *D.R. Horton* is wrongly decided and factually distinguishable. Neither assertion withstands analysis. (See generally Sullivan & Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution* (2013) 64 Alab.L.Rev. No. 5.)[11] The NLRB's analysis in *D.R. Horton* proceeded in

[11] Although *D.R. Horton* is now before the Fifth Circuit, that court's eventual ruling may not resolve this dispute. Whichever party loses may seek U.S. Supreme Court review. If the employer prevails, the Board will also have the option of continuing to apply its *D.R. Horton* analysis to other cases. Adverse appellate decisions bind the Board only as to the parties to a proceeding; the Board takes "the position that it is not obliged to follow decisions of a particular court of appeals in subsequent proceedings not involving the same parties." (Letter of NLRB Acting Solicitor in *Industrial Turnaround Corp. v. NLRB* (4th Cir. 1997, Nos. 96-1783, 96-1926) 115 F.3d 248; see S. Estreicher, R. Revesz, *Nonacquiescence by Federal Administrative Agencies* (1989) 98 Yale L.J. 681.) Further, the Fifth Circuit may not reach the merits in *D.R. Horton*, given the employer's belated alternative argument that under *Noel Canning v. NLRB* (D.C. Cir.

two parts: It first considered whether a prohibition on collective legal action violates employees' rights to engage in "concerted activity" under the NLRA and the Norris-La Guardia Act (NLGA), and then addressed whether the FAA allows an employer to salvage an otherwise unlawful class-action prohibition by including it in an arbitration agreement. Although the two issues are analytically distinct, CLS blends them together.

A. The NLRB's threshold ruling—that an employer's prohibition of employee class actions violates both the NLRA and NLGA—is supported by more than seven decades of Board law and court decisions. (See Opening Brief at 33-34.) CLS disagrees with the Board's conclusion that employee class actions constitute "concerted" activity under NLRA §7 and that an employer's prohibition of class actions "interferes with, restrains, or coerces" that right in violation of NLRA §8(a)(1), but its arguments do not come close to overcoming the great deference to which the NLRB's exercise of its congressionally delegated authority to construe its own statute (and, in particular, the scope of protected activity under NLRA §7) is entitled. (See *NLRB v. City Disposal Sys. Inc.* (1984) 465 U.S. 822, 829-30.)

CLS contends that under *its* reading of the NLRA, "there is no

---

2013) 705 F.3d 490, the Board had no jurisdiction because one of its members was an intra-session recess appointee. That argument, which CLS raises in passing here (CLS at 28) is wrong for the reasons stated in *Evans v. Stephens* (11th Cir. 2004) (en banc) 387 F.3d 1220, 1226, *United States v. Woodley* (9th Cir. 1985) (en banc) 751 F.2d 1008, 1012-13, and for the additional historical reasons set forth in the Board's February 28, 2013, Supplemental Letter Brief to the Third Circuit in *NLRB v. New Vista Nursing & Rehabilitation* (3rd Cir. Nos. 11-3440, 12-1027, 12-1936). Even if the D.C. Circuit's construction of the Appointments Clause were correct, under the long-established "de facto officer" doctrine an agency's rulings cannot be overturned based on an after-the-fact challenge to the validity of an agency official's initial appointment. (See, e.g., *Ryder v. United States* (1995) 515 U.S. 177.)

'unambiguous' Section 7 right to pursue class or collective action[s]," because it is possible that no co-workers will agree to participate in any given class action. (CLS at 29-30.) However, the Board has repeatedly found that class actions are, by their very nature, concerted activity under §7; and the federal courts have uniformly deferred to that construction. (See *D.R. Horton*, 2012 WL 36274 at pp. *2-4 [citing cases].)[12] CLS cannot identify a single appellate case in which an employee who filed or joined a class action was held *not* to be engaged in protected concerted activity. The collective benefits achievable through such concerted activity are precisely why workplace claims challenging classwide practices and policies are often prosecuted as class actions. (See *Meyer Industries, Inc.* (1986) 281 NLRB 882 (*Meyer Industries II*), *aff'd sub nom. Prill v. NLRB* (D.C. Cir. 1987) 835 F.2d 1481 ("definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action").[13]

CLS contends that there is "no evidence that [Iskanian] joined forces with employees who, unlike him, were still employed [by CLS when] he consulted with counsel and filed suit." (CLS at 30.) Even if true, however, that is irrelevant, because the governing §7 standard is whether the

---

[12] *See also Brady v. National Football League* (8th Cir. 2011) 644 F.3d 661, 673; *Mohave Elec. Coop., Inc. v. NLRB* (D.C. Cir. 2000) 206 F.3d 1183, 1188-89; *NLRB v. United Parcel Service, Inc.* (6th Cir. 1982) 677 F.2d 421, *enf'g* (1980) 252 NLRB 1015, 1018, 1022 fn. 26; *NLRB v. Trinity Trucking & Materials Corp.* (7th Cir. 1977) (Mem. Disp.) 567 F.2d 391; *Saigon Gourmet Restaurant, Inc.* (2009) 353 NLRB No. 110; *Harco Trucking, LLC* (2005) 344 NLRB No. 56.

[13] While CLS is correct that employees also have a §7 right to "refrain" from concerted activity (CLS at 30) they can always choose not to participate in a class action or other concerted legal action. That ability fully protects their right to "refrain." An agreement precluding collective litigation does not enhance the protection of the right to *refrain* from concerted action, but directly infringes the right to *participate* in such action.

employee's actions can reasonably be construed as having been *intended* to benefit one or more co-workers. (See id.; see also *D.R. Horton*, 2012 WL 36274, at *4.) CLS's statement, however, is not true. Several of Mr. Iskanian's co-workers submitted declarations supporting his motion for class certification, indicating their willingness to "join forces" with him, *see* 2AA 511-22; and he testified in deposition about his discussions with co-workers about improving workplace conditions, *see* 6AA 1708-12. Most importantly, the trial court certified the requested class, concluding that Mr. Iskanian was an adequate class representative and allowing the case to proceed as a class action for a year-and-a-half.[14] Thus, as a legal matter, Mr. Iskanian was acting in concert with the class members he represented.

CLS also cites the *pre-D.R. Horton* opinion in *Grabowski v. C.H. Robinson* (S.D.Cal. 2011) 817 F.Supp.2d 1159 for the proposition that "former" employees have no § 7 rights. (See CLS at 30.) That proposition is also incorrect, as demonstrated by *D.R. Horton* itself, which was brought by an employee who first sought to vindicate his statutory rights two years *after* termination (to challenge a workplace policy that was in effect while he was employed). (See 2012 WL 36274 at *1; see also *Brown v. Citicorp Credit Services, Inc.* (D.Idaho Feb. 21, 2013) 2013 WL 645942 [following *D.R. Horton* in case involving motion to compel former employee to individual arbitration].) CLS also misstates the ruling in *Grabowski*, which did not hold that former employees have no §7 rights, but followed another district court's mistaken conclusion that §7 "deal[s] solely with an employee's right to participate in union organizing activities." (See 817

[14] CLS erroneously asserts that "one-half of the putative class members expressly disavowed Appellant's claims upon learning of the case." CLS at 30 (citing 7AA 2005-2041). CLS's record citations identify only six individuals who chose to pursue individual claims before the Labor Commissioner, while the certified class included 188 employees, of whom only 6 opted out.

F.Supp.2d at 1169 [citation omitted].)

CLS's assertion that *D.R. Horton* is inapplicable because the arbitration agreement here supposedly allows some forms of concerted action is equally off the mark. (CLS at 27-28.) CLS cites no authority for the novel proposition, which *D.R. Horton* expressly rejected, that an employer may deny employees the ability to engage in one form of concerted action merely because it allows others.

B. Turning to *D.R. Horton*'s conclusion that no conflict exists between the right to engage in concerted activity and the implied policies of the FAA, CLS cites several cases for the unremarkable proposition that the Board cannot adopt *discretionary remedies* for NLRA violations that directly interfere with protected rights under other statutes. (CLS at 29.) Those cases are not inconsistent with *D.R. Horton*, where the Board found *no* statutory conflict between the NLRA/NLGA and the FAA, and concluded that if there were such a conflict it should be resolved in favor of the NLRA's "core, substantive" §7 right.[15]

The Board was correct in concluding that the FAA and federal labor law do not conflict. First, CLS identifies no express conflict between the FAA and NLRA §7 (or the parallel provisions of the NLGA). Multi-claimant arbitrations have been commonplace for decades;[16] and the U.S. Supreme Court has long recognized that classwide claims *can* be

---

[15] In the few cases where the Supreme Court has required the Board to tailor the NLRA's statutory remedies to accommodate requirements of another statute, it has required accommodation because the Board's proposed remedy would have directly violated an explicit—and in some instances, criminal—statutory provision. (See, e.g., *Sure-Tan v. NLRB* (1984) 467 U.S. 883, 902; *Southern Steamship Co. v. NLRB* (1942) 316 U.S. 31, 43; *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, 147-50.)

[16] See, e.g., *Donahue v. Susquehanna Collieries Co.* (3d Cir. 1943) 138 F.2d 3 [staying court proceedings pending arbitration of FLSA collective action].

arbitrated.[17]

Second, FAA § 2 expressly provides that arbitration agreements shall *not* be enforceable if they would be invalid under any "grounds as exist at law or in equity for the revocation of any contract." (See 2012 WL 36274 at *11-*12 [citing 9 U.S.C. §2].) CLS does not dispute that contract terms that violate the NLRA and/or NLGA are generally unenforceable. Consequently, under FAA § 2, inserting such terms into a mandatory arbitration agreement does not make them valid.

CLS's class-action prohibition would violate the NLRA and NLGA if implemented as a stand-alone contract term, separate and apart from any arbitration agreement. (See, e.g., *Grant v. Convergys Corp.* (E.D.Mo. March 1, 2013) 2013 WL 781898 (invalidating freestanding class-action prohibition in employment application under NLRA §7).) That CLS inserted this unlawful prohibition into an arbitration agreement makes no difference. The FAA does not permit unlawful terms to be given greater force and effect when incorporated into an arbitration agreement than when they stand alone. Indeed, "immuniz[ing] an arbitration agreement from judicial challenge" on grounds applicable to other agreements would "elevate it over other forms of contract" in violation of the FAA. (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404 fn.12.)

Even if some conflict existed between the NLRA/NLGA and the FAA, *D.R. Horton* would appropriately reconcile the statutes given the fundamental nature of §7 rights. (See 2012 WL 36274 at *10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974) [when two federal statutes "are capable of co-existence," both should be given effect "absent a clearly expressed congressional intention to the contrary."]; see also Sullivan &

---

[17] See, e.g., *Keating v. Superior Court* (1982) 31 Cal.3d 584, 612, rev'd on other grounds (1984) 465 U.S. 1; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444; *Concepcion* 131 S.Ct. at pp. 1750-51.

Glynn, supra, at 26-30 & fn. 175-200.) The *implied* pro-arbitration policy of the FAA, *Concepcion*, 131 S.Ct. at 1740, is subject to many limitations, including those set forth in FAA §2. *D.R. Horton* thus properly balances any tension between federal labor law and arbitration policy by invalidating the employer's sweeping prohibition against concerted legal activity while still permitting it to require arbitration of workplace disputes. (See 2012 WL 36274 at *10.) Preserving employees' right to engage in collective legal activity in no way *precludes* arbitration, and nothing in *D.R. Horton* would prevent CLS from: 1) limiting arbitration to individual claims only (while allowing concerted actions in another forum); or 2) requiring arbitration of all workplace claims (including class and representative claims).

CLS's argument that *D.R. Horton* is nonetheless contrary to *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665 ignores Mr. Iskanian's discussion of that case. (See Opening Brief at 37-38.) *CompuCredit* held that Congress had not clearly established a statutory right to proceed in court rather than arbitration for a particular type of consumer credit claim. By contrast, *D.R. Horton* concluded that an employer's prohibition of *concerted* legal activity *does* violate its employees' substantive statutory rights. Because Congress specifically delegated authority to the Board to determine what constitutes interference with concerted activity under the NLRA by "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms" (*Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483, 500-01 [citation omitted]), the requirements of *CompuCredit* have been fully satisfied.

Finally, CLS attempts to distinguish *D.R. Horton* by asserting that, in this case, Mr. Iskanian "voluntarily" consented to the class-action prohibition because he "signed the Arbitration Agreement as part of a

settlement with Respondent, during which he received $1,350.00, and which other employees refused to sign without consequence." (CLS at 27.) In fact, the settlement agreement and the arbitration agreement were separate documents, neither of which referred to the other. (Compare 7AA 1844-45 to 7AA 1846-54.) The settlement agreement covered past claims litigated in a preceding case, while the arbitration agreement applied only prospectively. In any event, under the NLRA §8(a)(1) standard, the question is not whether an employer's arbitration clause was "voluntary" or "involuntary" but whether it prohibits, restrains or coerces employees from engaging in protected activity, which the agreement here does. Thus, under any conceivable application of §8(a)(1) to the facts of this case, CLS should be precluded from enforcing its class-action prohibition.[18]

IV. CLS WAIVED ITS RIGHT TO ARBITRATE

Although CLS contends that substantial evidence supports the lower court's anomalous non-waiver decision (CLS at 31), when "the facts are undisputed and only one inference may be drawn, the issue is one of law" and is reviewed de novo. (*St. Agnes Medical Center v. PacifiCare of Calif.* (2003) 31 Cal.4th 1187, 1196 [citation omitted].) Here, the Court of Appeal's application of erroneous legal propositions to undisputed facts is reversible error.[19]

---

[18] Nowhere is this point better illustrated than in the cases cited in *D.R. Horton*, 2012 WL 36274 at *6-*7 (citing *National Licorice Co. v. NLRB* (1940) 309 U.S. 350, 360 [individual employment contract violates §8(a)(1) because it would discourage employees from presenting grievances to employer except on individual basis]; *NLRB v. J.H. Stone & Sons* (7th Cir. 1942) 125 F.2d 752, 756 [individual employment contract requiring employees to resolve employment disputes individually violates NLRA, even if "entered into without coercion" and even though some employees declined to sign those contracts, because it was a "restraint upon collective action"]).

[19] The trial court did not make findings on waiver or expressly rule on the issue. (See 7AA 2062-63, RT June 13, 2011.)

A. CLS's Excuses for Acting Inconsistently With the Intent to Arbitrate Lack Merit

CLS took action unequivocally "inconsistent with an intent to arbitrate." (*St. Agnes*, 31 Cal.4th at 1195.) In 2008, the Court of Appeal vacated an order compelling arbitration and remanded for further factual development in light of *Gentry*. Before the parties conducted further *Gentry* discovery, CLS abruptly withdrew its petition to compel and proceeded to litigate for the next three years without mentioning any desire to return to arbitration.

Unable to dispute this record, CLS insists that it always intended to arbitrate but discarded its arbitration petition because "Appellant and Respondent agreed that Appellant would have met [the *Gentry*] test." (CLS at 32.) This justification is irrelevant, disingenuous, and ultimately invalid.

A party that asserts and then relinquishes a right to arbitrate before later attempting to revive it is no different from one that belatedly seeks arbitration without having ever attempted to do so. In both cases, the party has pursued litigation in court while keeping the "get-out-of-litigation" card in its back pocket, to be played at a more opportune time. CLS is just like any party that invokes arbitration as an affirmative defense in its answer but continues to litigate. Invoking arbitration in an answer is "insufficient to preclude waiver," (*Davis v. Continential Airlines, Inc.* (1997) 59 Cal.App.4th 205, 217), and CLS's discarded petition is no more effective.

The parties' respective estimations of the strength of Mr. Iskanian's evidence are irrelevant to the waiver analysis. Mr. Iskanian always bore the burden of making a "factual showing" to the court that enforcement of the class-action waiver would be exculpatory. (*Gentry*, 42 Cal.4th at 466.) That burden is not easily met. (See, e.g., *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1131; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497 [finding that plaintiffs failed

to meet their burden under *Gentry*].) In light of Mr. Iskanian's burden, CLS was not "forced to litigate." (CLS at 32.) .

CLS's assertion that it consistently "conceded" that the *Gentry* factors would be met is also factually untrue. In the *trial court* CLS argued that Mr. Iskanian's rights *could* still be fully vindicated individually, citing several class members who had filed individual claims with the Labor Commissioner. (See 7AA 1999-2000, 2004-2041.) Even now, CLS argues that *Gentry* is inapplicable because the class members' statutory claims can be vindicated through individual arbitration. (See CLS at 12.) CLS cannot have it both ways; its arguments in the trial court show that it did not initially "concede" that Mr. Iskanian satisfied the *Gentry* factors. CLS could have made the same arguments immediately after the remand instead of waiting three years.

CLS's actions exemplify "conduct inconsistent with the intent to arbitrate." If CLS truly intended to arbitrate, it could have moved to stay the action pending a decision in *Concepcion*, in which certiorari was granted on May 24, 2010. (*AT&T Mobility v. Concepcion* (2010) 130 S.Ct. 3322 [order granting writ of certiorari].) CLS also could have moved to compel arbitration while *Concepcion* was pending, like the defendants did in *Nelsen* and *Brown*. Instead, during this period, CLS actively pursued litigation on the merits without mentioning arbitration. Thus, contrary to CLS's protestations (CLS at 34), it engaged in exactly the kind of "wait and see" gamesmanship that constitutes waiver. (See *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices and Prod. Liability Litig.* (C.D.Cal. 2011) 828 F.Supp.2d 1150, 1163.)

B. CLS's Delay Is Not Excused by "Futility"

CLS does not dispute that the Ninth Circuit's futility defense is inconsistent with California waiver law. Yet CLS continues to assert this defense, relying almost exclusively on federal district court decisions. (See

CLS at 32-33.)[20] Even assuming a futility defense exists, it has no application here.

The Ninth Circuit itself, in a case postdating CLS's district court authority, held that a defendant waived arbitration because, even under *Discover Bank*, a motion to compel arbitration "was not inevitably futile." (*Gutierrez v. Wells Fargo Bank* (9th Cir. Dec. 26, 2012) 704 F.3d 712, 721.) Subsequently, a federal district court invoked *Gutierrez* to reject application of the futility defense to *Gentry*. (See *Ontiveros*, 2013 U.S.Dist. Lexis 20408, at *25-26 ["*Gutierrez* [citations] undermines defendant's claim that it was precluded by *Gentry* from exercising its right to arbitrate this dispute"].) *Ontiveros* specifically cited *Borrero v. Traveler's Indem. Co.* (E.D.Cal. Oct. 15, 2010) 2010 U.S.Dist. Lexis 114004 to demonstrate that *Gentry* did not categorically foreclose arbitration pre-*Concepcion*. (Ibid.)

CLS downplays *Borrero* by asserting that the parties here agreed the *Gentry* test would be met. (CLS at 34.) Again, CLS did not "concede" that the *Gentry* factors were satisfied until this case reached the Court of Appeal—and CLS's strategic decision to concede the *Gentry* factors on appeal does not retroactively transform the position it took in the trial court. And the critical point is that *Gentry*, *Borrero*, and the first appeal here all demonstrate that *Gentry* did not necessarily preclude enforcement of class action waivers. Futility applies (if at all) only when a decision creates a "new right" to arbitrate, not when arbitration is potentially available but the

[20] The only state case CLS cites, *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, is readily distinguishable. In 2006, the *Phillips* trial court denied the defendant's petition to compel arbitration based on *Discover Bank*. After *Concepcion* directly overruled *Discover Bank*, the defendant renewed its petition, which was granted under the "change in law" provision of Calif. Code Civ. Proc. § 1008(b). Here, the trial court did not deny a prior petition, and the governing law was not directly overruled by *Concepcion*.

defendant makes a strategic choice because it believes a court is *unlikely* to compel it. (See *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 447.)[21] Even if *Concepcion* abrogated *Gentry*, it spawned no "new right to arbitrate." (Ibid.)

C. CLS's Three Years of Class and Merits Litigation Prejudiced Mr. Iskanian

CLS's active litigation included merits and class discovery (2AA 419-20; 2AA 435-510; 7AA 1788-1805), unsuccessfully opposing Mr. Iskanian's motion for class certification (2AA 383 through 7AA 1805), and moving for summary judgment (RT June 13, 2011 [at 25:18-22]). A mere three months before trial (7AA 1987), CLS moved to compel individual arbitration of a certified class action.

Although CLS shifted the litigation machinery into high gear, it contends that Mr. Iskanian suffered no prejudice. But CLS cannot identify a single case finding no prejudice when arbitration was invoked on the eve of trial after years of litigation. Nor is prejudice found only when a party acquires evidence in litigation that would be unavailable in arbitration. (CLS at 38.) Rather, this Court has held that waiver may be found "where a party unduly delayed and waited until the eve of trial to seek arbitration." (*St. Agnes*, 31 Cal.4th at 1203-04.)

California courts have found waiver under far less prejudicial circumstances. (See Petition for Review at 22 [chart illustrating that waiver was found in nine published cases where defendants litigated for substantially shorter periods than here, without filing dispositive motions or contesting motions for class certification].) CLS offers only immaterial

---

[21] CLS might have decided not to pursue arbitration for any number of strategic, cost, or other reasons. For this reason, the defendant's subjective beliefs are irrelevant to a futility calculus; what matters is whether success on such a motion was possible. (*Roberts* v. *El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 846 fn.10.)

factual distinctions of these cases without demonstrating that the plaintiffs suffered greater prejudice than what Mr. Iskanian suffered. (See CLS at 36-37.)

CLS also does not meaningfully address the prejudice suffered by Mr. Iskanian as class representative. He engaged in class discovery, successfully moved for class certification, and aided in other class-action work. CLS does not deny that all of this effort would be "useless in [individual] arbitration." (*Roberts*, 200 Cal.App.4th at 846.)

CLS's principal rejoinder is that, unlike the *Roberts* plaintiff, Mr. Iskanian was put on "notice" that CLS intended to arbitrate. (CLS at 36.) But Mr. Iskanian received no more notice than that offered by an answer asserting arbitration as one of a laundry list of affirmative defenses. CLS's abandonment of arbitration superseded any prior intent it may have signaled. Otherwise, *Roberts* is only "easily distinguishable" in that the plaintiff there, in the early stages of class discovery, suffered far less prejudice than Mr. Iskanian, who, with class counsel, had certified the class, administered class notices, and was actively preparing for trial.

CLS's argument that no prejudice can be found because the expenses are incurred by class counsel, rather than by Mr. Iskanian himself, CLS at 39, also lacks merit.[22] (See, e.g., *Edwards v. First Am. Corp.* (C.D.Cal. Nov. 30, 2012) 2012 U.S.Dist. Lexis 174957, *34 [finding prejudice where delay "resulted in the expenditure of enormous costs by [the plaintiff] and class counsel in litigating this matter at every level ... over the past five years."] CLS's related argument that the fees incurred

[22] If prejudice could only be found where a party incurred fees out-of-pocket, as CLS alleges, it would put low-wage employees on an inferior footing for waiver purposes, and undermine California's policy of encouraging enforcement of wage laws through fee-shifting by increasing the risk for contingency fee attorneys. (*Sav-On Drug Stores v. Super. Ct.* (2004) 34 Cal.4th 319, 340.)

were "self-inflicted" is also entirely circular—and wrong. In fact, those fees were incurred in reasonable reliance on CLS's pursuit of litigation in court. (See *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784 [finding prejudice where attorneys' fees were incurred in reliance on a party's continued pursuit of litigation]; *Ontiveros*, 2013 U.S.Dist. Lexis 20408, at *30 fn. 5 [expressly rejecting defendants' argument that the harm from incurring fees were "self-inflicted"].)

CLS may not "pursu[e] a strategy of courtroom litigation only to turn towards the arbitral forum at the last minute." (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 949.) With this certified class action poised for trial, "[i]t is simply too late for [the defendant] to now tell Plaintiffs that it is putting an end to litigation in... court, switching to another forum, and starting the case all over again in arbitration after being unable to dismiss Plaintiffs' claims." (*In re Toyota Motors*, 828 F.Supp.2d at 1165.)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: April 10, 2013

Respectfully submitted,

Capstone Law APC

By: _____

Glenn A. Danas
Ryan H. Wu

Public Citizen Litigation Group
Scott L. Nelson

Attorneys for Plaintiff-Appellant
ARSHAVIR ISKANIAN

CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.204(c)(1) and 8.490, the enclosed Appellant's Reply Brief on the Merits was produced using 13-point Times New Roman type style and contains 8,375 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: April 10, 2013

Respectfully submitted,

Capstone Law APC

By: _____

Glenn A. Danas
Ryan H. Wu

Public Citizen Litigation Group
Scott L. Nelson

Attorneys for Plaintiff-Petitioner
ARSHAVIR ISKANIAN