No.S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

vs.

CLS TRANSPORTATION
LOS ANGELES, LLC, et al.,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Two,
Case No. B235158

From the Superior Court,
County of Los Angeles,
Judge Robert Hess
Case No. BC356521

ANSWER TO PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSON

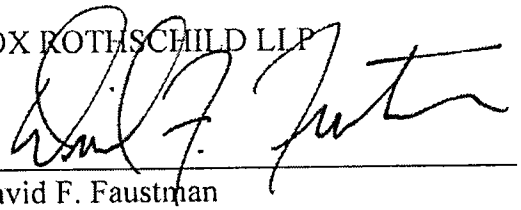
(Cal. Rules of Court, rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceedings that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

1. CLS WORLDWIDE SERVICES, LLC
2. EMPIRE INTERNATIONAL, LTD.
3. GTS HOLDINGS, INC.
4. Bison Capital Management, LLC
5. David Seelinger

Date: August 6, 2012

FOX ROTHSCHILD LLP



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I. INTRODUCTION AND SUMMARY OF ARGUMENT

If this Court is prepared to acknowledge that its decision in *Gentry v. Super. Ct.* has been overruled by the U.S. Supreme Court in *Conception v. AT&T Mobility*, granting review of this case is unnecessary. Under *Conception*, a "representative action" waiver is as enforceable as a class action waiver, and a PAGA claim is no exception. This Court has already held that PAGA is a "*procedural*" statute that conveys no "substantive rights." If this Court declines review, the opinion in *Iskanian* will stand, and the split decision in *Brown v. Ralphs* from the same District will soon be referred to as the "now disfavored" opinion. Additionally, there is no basis to question the factual finding of the trial court that CLS *did not* waive its right to seek arbitration. Finally, there is no basis to insist that California courts are bound by the controversial, politicized, and ever changing decisions of a federal agency. Respectfully, review should be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

CLS Transportation Los Angeles, LLC ("CLS") provides limousine and other transportation services. Petitioner was a chauffeur for CLS from March 8, 2004 through August 2, 2005. 1 Appellant's Appendix ("AA") 66-69.

On December 21, 2004, Petitioner voluntarily signed a "Proprietary Information and Arbitration Policy/Agreement" ("Arbitration Agreement") and agreed to arbitrate "any and all claims" arising out of his employment. 1 AA 66-69, 75-83. The Arbitration Agreement contained a class and representative action waiver. Notwithstanding, Petitioner filed a Class Action Complaint against CLS ("first Complaint") on August 4, 2006. 1 AA 7-20.

On February 9, 2007, CLS filed a motion to compel Petitioner to arbitrate his claims *on an individual basis*. 1 AA 32-84. The trial court

granted the motion, concluding that the Arbitration Agreement was "neither procedurally nor substantively unconscionable." 1 AA 300, 2 AA 301-09.

Petitioner appealed. 2 AA 310-311. While the appeal was pending, this Court decided *Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443, 450 ("*Gentry*"), which held that class action waivers in arbitration agreements were unenforceable based on *Discover Bank v. Super. Ct.* (2005) 36 Cal. 4th 148. In response, on May 27, 2008, the Appellate Court directed the trial court to "reconsider [its March 13, 2007 Order] in light of *Gentry*." 2 AA 324-29. As there was no way to prevail under the "*Gentry* test," CLS was forced to defend itself in litigation.

On November 21, 2007, Petitioner filed a second complaint pursuant to the Private Attorney General Act of 2004, Labor Code § 2698 ("PAGA") (Case No. BC381065) alleging violations of the California Labor Code ("PAGA Complaint"). 2 AA 330-53.

On August 28, 2008, the trial court consolidated Petitioner's first Complaint with his PAGA Complaint. On September 15, 2008, Petitioner filed a Consolidated First Amended Complaint. 2 AA 330-53. It is the operative pleading. 1 Respondent's Appendix ("RA") 27-32.

In *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __, 131 S. Ct. 1740 ("*Concepcion*"), the U.S. Supreme Court held that any state law prohibiting arbitration is preempted by the Federal Arbitration Act, 9 U.S.C. § 1 ("FAA"). The case explicitly overruled *Discover Bank*, which held that class action waivers are enforceable, and ruled that arbitration agreements must be enforced "according to their terms." *Concepcion,* 131 S. Ct. at 1745-46, 1753.

On May 16, 2011, CLS filed a Motion for Renewal of its Prior Motion for an Order Compelling Arbitration. 7 AA 1806-1941. On June 13, 2011, the Honorable Robert Hess granted CLS' motion, and expressly rejected Petitioner's argument that CLS had somehow waived its right to arbitrate. 7 AA 2062-63, 1 RA 33, 36-37. The trial court stated that "the

policy considerations that were articulated by the California Supreme Court in *Gentry* are now, as a result of the U.S. Supreme Court's Decision [in *Concepcion*], arguably invalid as a matter of federal constitution law." *Id.*

Petitioner appealed a second time. 7 AA 2064-2067. In response, the Court of Appeal published an opinion stating that "the trial court properly ordered this case to arbitration and dismissed class claims." Slip Opinion ("Slip Op.") 2. First, the Court of Appeal held that "*Concepcion* conclusively invalidates" *Gentry*; the *Gentry* test imposes class arbitration on those who contractually rejected it; and the vindication of statutory rights argument is "irrelevant" as it does not trump the Federal Arbitration Act ("FAA"). Slip Op. 8-10. Second, the Court held that *D.R. Horton* is not applicable because interpreting the FAA went beyond the NLRB's authority. Slip Op. 11-12. Third, the Court disagreed with *Brown v. Ralphs* (2011) 197 Cal. App. 4th 489 and determined that the public policy underlying PAGA does not "allow a court to disregard a binding arbitration agreement." Slip Op. 13-17. Fourth, the Court held that "substantial evidence supported a finding that CLS acted consistently with its right to arbitrate" because CLS moved to compel arbitration soon after the case was filed. Both parties agree that Petitioner would have satisfied the *Gentry* test so "CLS had no reasonable basis to believe that only Iskanian's individual claims would be arbitrated" and CLS filed its second motion to compel arbitration three weeks after *Concepcion* was issued. Slip Op. 19-20. Thus, the Court of Appeal held that there was no waiver. Slip Op. 20-21.

III. STANDARD OF REVIEW

The Supreme Court may order review of a Court of Appeal decision "when necessary to secure uniformity of decision or to settle an important question of law." Cal. Rules of Court 8.500(b). As discussed below, review is not necessary or appropriate.

IV. DISCUSSION

A. Respectfully, *Gentry* Has Been Overruled.

The majority of judges who have addressed the issue, including the three judge panel below, have held that *Concepcion* explicitly overruled *Discover Bank*, implicitly overruled *Gentry*, and that the class and representative action waiver is enforceable in the employment context. *See e.g. Quevedo v. Macy's, Inc.* (C.D. Cal. 2011) 798 F. Supp. 2d 1122, 1127, 1140 (***Concepcion* "undercut the reasoning" of *Discover Bank* and *Gentry***"); *Zarandi v. Alliance Data Sys. Corp.* (C.D. Cal. May 9, 2011) No. 10-CV-08309, 2011 WL 182728, *1-2 (***plaintiff's argument that class action waivers are unconscionable "is no longer viable after Concepcion***"); *Morse v. Servicemaster Global Holdings Inc.* (N.D. Cal. July 27, 2011) No. C10-00628, 2011 WL 3203919, *3-4 n.1 ("***Concepcion* rejected reasoning and precedent behind *Gentry***."); *Murphy v. DirecTV, Inc.* (C.D. Cal. Aug. 2, 2011) No. 08-CV-06465, 2011 WL 3319574, *4-5 ("**it is clear to the Court that *Concepcion* overrules *Gentry***"). The dissent in *Brown* questioned the viability of Gentry. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal. App. 4th 489, 505-09, J. Kriegler dissenting.

The Court should acquiesce in the judgment of these lower courts. Simply by denying review of this case, the issue will be settled.

B. The Court of Appeal's Ruling Does Not Conflict With Existing Law.

1. There Are No Substantive "Rights" Under PAGA.

The Labor Code Private Attorney General Act of 2004 ("PAGA"), Cal. Lab. Code §2698 *et. seq.*, prescribes a civil penalty for existing Labor Code sections for which no civil penalty has otherwise been established and allows aggrieved employees to bring a civil action to collect civil penalties for Labor Code violations previously only available in enforcement actions

initiated by the state's labor law enforcement agencies. *Caliber Bodyworks Inc. v. Super. Ct.*, (2005) 36 Cal. Rptr. 3d 31, 36-37.

An employee, however, does not have statutory right to automatically file a civil action seeking penalties under PAGA. "Only after" an aggrieved employee exhausts administrative procedures, may the employee seek penalties under PAGA. Cal. Lab. Code § 2699.3(a); *Caliber Bodyworks Inc.,* 36 Cal. Rptr. 3d at 384 (employee "must" first follow administrative procedures); *Baas v. Dollar Tree Stores, Inc.* (N.D. Cal. June 18, 2009) 2009 WL 1765759, at *5 (categorizing the timely exhaustion of administrative remedies as a "statutory condition precedent"); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) 2007 WL 1650942, at *4 (same).

PAGA also prohibits an employee action when the agency is already directly pursuing enforcement against the employer "on the same facts and theories" (Cal. Lab. Code § 2699(h)), or where after receiving notice from the employee, the Labor Workforce Development Agency ("LWDA") decides to investigate the employer and collect penalties itself (Cal. Lab. Code § 2699.3(a)(2)(A)). *See also Caliber Bodyworks Inc.,* 36 Cal. Rptr. 3d at 38 (the LWDA has the initial right to prosecute and collect civil penalties for alleged Labor Code violations).

Even if the agency authorizes the employee to proceed, the employee cannot bring a PAGA claim for *all* violations of the Labor Code. PAGA's application is limited to those provisions for which "no such penalty has been established" and cannot be maintained for violations expressly exempt from PAGA. *See* Cal. Lab. Code §§ 2699(f) & 2699(g)(2).

Further, an aggrieved employee is prohibited from seeking civil penalties under PAGA where an employer cures the violation and notifies the aggrieved employee of same. *See* Labor Code § 2699.3(c)(2)(A) ("no civil action ... may commence").

Thus, the notion that an employee has an automatic and unwaivable "statutory right" to pursue penalties under PAGA is refuted by the plain language of the statute.

Further, this Court has previously held that PAGA "**does not create property or any other substantive rights.**" *Amalgamated Transit Union Local 1756, AFL-CIO v. Super. Ct.* (2009) 46 Cal. 4th 993, 1003 (emphasis added). It is not the same as a claim for overtime, meal breaks, or minimum wage, and "is simply a **procedural statute.**" *Id.* (emphasis added). *Concepcion* sanctioned the waiver of a procedural right – the right to bring a class action lawsuit. *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, 1757. Thus, a representative action waiver is enforceable no less than a class waiver.

2. Iskanian Does Not Conflict With *Brown*, *Franco*, Or *Armendariz*.

The Court in *Franco* held that waivers of a representative action under PAGA are not enforceable. *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal. App. 4th 1277, 1303 (citing *Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443). The *Franco* court, however, relied on the now overruled *Gentry* case in reaching this conclusion. *See Quevado v. Macy's, Inc.* (C.D. Cal. 2011) 798 F. Supp. 2d 1122, 1142 (*Franco* "is no longer tenable in light of the Supreme Court's recent decision in *Concepcion*"). *Iskanian*, therefore, does not conflict with *Franco*.

Iskanian and *Brown* were both decided by division five of the Second District Court of Appeal. The purported "conflict" between *Iskanian* and *Brown*, is illusory and inconsequential. The *Iskanian* court was not required to follow *Brown*, a case where the majority relied on authorities that were overturned by *Concepcion.* The majority in *Brown* relied on *Franco*, which relied on *Gentry*. Since *Gentry* was overruled by *Concepcion* in April 2011, *Franco* (and now *Brown*) are disfavored authorities. The Court in *Brown* addressed facts distinguishable from the

facts in *Iskanian*. The *Brown* court addressed a PAGA waiver in a *mandatory* arbitration agreement. In contrast, the *Iskanian* court addressed a representative action waiver that was in a *voluntary* arbitration agreement. The *same court* that issues a decision may later choose to depart from that decision particularly when necessary to correct a court-created error. *Sierra Club v. San Joaquin Local Agency Formation Comm'n* (1999) 21 Cal. 4th 489, 503-05. But we believe that United States Supreme Court has spoken on the issue [in *Concepcion*], and we are required to follow its binding authority.")

The *Iskanian* court did something that the *Brown* court failed to do. It reconciled the U.S. Supreme Court's directives that the FAA displaces outright state law prohibition of "arbitration of a particular type of claim" and that a state is unable to require a procedure inconsistent with the FAA, "even if it is desirable for unrelated reasons." *Concepcion*, 131 S.Ct. at 1753. If this Court believes that *Iskanian* now conflicts with *Brown*, it is empowered to depublish *Brown*. This Court retains *sua sponte* authority to depublish *Brown* at any time. Cal. R. Ct. 8.1125(c)(2).

Petitioner's contention that *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, 961-63, does not support the *Iskanian* decision is also misplaced. In *Brown*, the court relied on the *Broughton/Cruz* rule to reach its decision that PAGA claims must proceed as representative actions because they are for the benefit of the "public." *Brown,* 197 Cal. App. 4th 500-01. The *Broughton/Cruz* rule exempted UCL and CLRA claims for public injunctive relief from arbitration. *Broughton v. Cigna Healthplans of Cal.* (1999) 21 Cal. 4th 1066, 1080 and *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal. 4th 303, 311-12. In *Kilgore*, the Ninth Circuit questioned the continuing vitality of the *Broughton/Cruz* rule and held that the rule was preempted by the FAA reasoning that "the very nature of federal preemption requires that state law bend to conflicting federal law – no matter the purpose of the state law." 673 F.3d at 961-63 (noting that a

state's sound public policy rationales is irrelevant to determining whether federal law preempts their legislation). The *Iskanian* court correctly acknowledged that the continuing existence of "*Broughton-Cruz* rule" was doubtful in light of *Concepcion*. Slip Op. 16-17.

Further, *Iskanian* is not inconsistent with *Mitsubishi* or *Gilmer*, which stand for the proposition that where a party agrees to arbitrate a statutory claim, that party does not waive the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum. *Mitsubishi*, 473 U.S. 614, 638 (1985); *Gilmer*, 500 U.S. at 27-28. Here, Petitioner did not waive his right to pursue statutory penalties for himself in arbitration under PAGA, but merely voluntarily agreed to waive his right to purse a representative action. The *Iskanian* court expressly noted that while the representative action waiver precludes Petitioner from pursuing a representative action under PAGA in arbitration, "we find he may pursue his individual PAGA claims in arbitration." (Slip Op. 17.)

Further, *Iskanian* does not conflict with the principles advanced by this Court in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83. *Armendariz* held only that "an arbitration agreement may not limit statutorily imposed **remedies.**" *Id.* at 103-04.

In stark contrast, the language in Respondent's arbitration agreement does not limit Petitioner's remedies for the alleged wage violations whatsoever. In addition, the representative action waiver does not preclude Petitioner from pursuing civil penalties on his own behalf under PAGA. There is no principled distinction between a "class action" and a "representative action."

3. There Is No Disorder By the Alleged Conflict Between *Iskanian* And *Reyes.*

The First Appellate District concluded that a PAGA claim could not be pursued on an individual basis because of the language of Labor Code section 2699(a), which states that an aggrieved employee may bring the

action "on behalf of himself or herself ***and*** other current or former employees." *Reyes v. Macy's Inc.* (2011) 202 Cal. App. 4th 1119, 1123-24. The Second Appellate District in *Iskanian* concluded otherwise. The *Iskanian* court directly addressed *Reyes*, but interpreted the use of the word "and" in the statute to mean that an employee may pursue a PAGA claim on behalf of others *only if* he pursues the claim on his own behalf. (Slip Op. 17, fn. 6.)

While the *Iskanian* and *Reyes* courts did not reach the same interpretation of PAGA's language, this variance can hardly be said to have caused significant confusion with "vexed courts, arbitrators and parties." In reaching its decision, the *Iskanian* court followed the Central District Court's decision in *Quevado v. Macy's, Inc.* (C.D. Cal. 2011) 798 F. Supp 2d 1122, 1142, which held that the plaintiff's "PAGA claim [was] arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees [was] enforceable." In any event this distinction is irrelevant to the issue of pre-emption.

Iskanian is also consistent with the interpretations of federal District Courts throughout the state of California. *See e.g., Grabowski v. Robinson* (S.D. Cal. 2011) 817 F. Supp. 2d 1159, 1181 ("Plaintiff's California [PAGA] claim is arbitrable, and the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable"); *see also Morvant v. P.F. Chang's China Bistro, Inc.* (N.D. Cal. May 7, 2012) 2012 WL 1604851, at *12 ("the Court must enforce the parties' Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general.")

4. ***Waffle House* Is Inapposite And Does Not Conflict With *Iskanian*.**

The "only issue" before the U.S. Supreme Court in *Waffle House*, was "whether the fact that [the employee] ha[d] signed a mandatory arbitration agreement limit[ed] the remedies available to the EEOC" where

the EEOC filed an enforcement action against the employer pursuant to the Americans with Disability Act ("ADA") in federal court. *EEOC v. Waffle House Inc.* (2002) 534 U.S. 279, 283, 297. The Court concluded that the arbitration agreement signed by the employee did not bar the EEOC from pursuing victim specific remedies such as back pay, reinstatement, compensatory damages, and punitive damages, in a judicial forum. *Id.* at 283-84. The court reasoned that the ADA and Title VII, the statutes enforced by the EEOC, did not authorize courts to balance the competing policies of the ADA and the FAA or to second-guess the agency's judgment concerning which of the remedies authorized by law that it shall seek in any given case. *Id.* at 297. The court rejected the notion that the EEOC stands in the shoes of the employee and therefore should be bound by the arbitration agreement. The court explained that it had previously recognized several situations in which the EEOC does not stand in the employee's shoes when it held that the EEOC does not have to comply with statutes of limitations or certain civil rules. Finally, the court explained that although the employee's actions are relevant to the EEOC's claim in the application of the principles of res judicata, mootness, and mitigation, that relevancy does not "render the EEOC a proxy for the employee." *Id.* at 298. *Waffle House* is thus inapplicable, and does not conflict with *Iskanian*. Defendant does not contend that Iskanian's waiver would preclude a state agency from enforcing provisions of the Labor Code. A representative action waiver in a voluntary arbitration agreement, such as the one at issue in this case, does not require the state to forfeit any rights, and does not conflict with *Waffle House*.

5. The Presumption Against Preemption Is Inapplicable Here; The FAA Preempts PAGA.

Under the Supremacy Clause of the Unites States Constitution, Congress has the power to pre-empt state law concerning matters that lie within the authority of Congress. *Farm Raised Salmon Cases* (2009) 42

Cal. 4th 1077, 1087. Absent a clear and manifest purpose of Congress to do so, there is no presumption against federal preemption when a state tries to directly regulate a matter traditionally within the power of Congress, rather that the state, and upon which Congress has acted." *People v. Union Pacific Railroad Co.* (2006) 141 Cal. App. 4th 1228, 1247.

The federal government has regulated arbitration for almost a century. The FAA was enacted in 1925, and has been held to have sweeping pre-emptive effect. *Perry v. Thomas* (1987) 482 U.S. 483, 493 (U.S. Supreme Court held that the FAA pre-empts California Labor Code.) The FAA preempts state law, and governs the enforcement of employment arbitration agreements. *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123.

C. CLS Did Not Waive Its Right To Arbitration; There Is No Conflict Of Law And Review Should Be Declined.

1. Waiver Is Highly Disfavored.

"[California] law, like the FAA, reflects a strong public policy favoring arbitration agreements." *Saint Agnes, Med. Ctr. v. PacificCare of Cal.* (2003) 31 Cal. 4th 1187, 1195 ("*Saint Agnes*"). Any doubts regarding waiver are to be resolved in favor of arbitration. *Moses H. Cone Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 25. Whether a party has waived arbitration is an issue of fact, which will **not** be disturbed by the appellate court if substantial evidence supports the trial court's decision. *Engalla v. Permanente Med. Grp., Inc.* (1997) 15 Cal. 4th 951, 983; *Saint Agnes,* 31 Cal. 4th at 1196. The trial court below held that there was no waiver.

Waiver only occurs where a party: (1) took steps inconsistent with an intent to arbitrate, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith. *Saint Agnes,* 31 Cal. 4th at 1196; *Keating v. Super. Ct.* (1982) 31 Cal. 3d 584, 605. "Mere delay...without some resultant prejudice to a party, cannot carry the day." *Keating,* 31 Cal. 3d at 605; *Christensen v. Dewer Dev.* (1983) 33 Cal. 3d 778, 782.

2. CLS Acted Consistently With Its Intent To Arbitrate *Gentry*, However, Paralyzed Its Ability To Do So.

CLS sought individual arbitration just eight weeks after Petitioner filed a lawsuit. 1 AA 48-65. When Petitioner refused to arbitrate, CLS filed its first motion to compel arbitration and the trial court granted it. 1 AA 32-84. Petitioner appealed. 1 AA 300, 2 AA 301-09. During the appeal, *Gentry* held that class action waivers were invalid if plaintiff met "the *Gentry* test." Both Petitioner and Respondent agree that Petitioner would have easily met this test. AB, p. 18-20. It is undisputed, therefore, that the trial court would **not** have ordered individual arbitration. AB, p. 2. At best, CLS would have been required to arbitrate on a classwide basis, a result expressly prohibited by the Arbitration Agreement, and one that CLS specifically wanted to avoid. Thus, any such effort would have been futile, and CLS was forced to litigate.

Thereafter, *Concepcion* overruled *Discover Bank*, and undermined the foundation of *Gentry*. *Concepcion* provided CLS with its first opportunity to compel arbitration. Three weeks later, CLS filed its second motion to compel arbitration which the trial court granted. 7 AA 1806-1941, 2062-63. Petitioner appealed again. In response, the Appellate Court summarily rejected Petitioner's waiver argument, recognized the trial court's factual finding, and stated that "CLS acted consistently with its right to arbitrate." Slip Op. 20-21.

3. CLS Again Sought To Compel Arbitration Immediately After *Concepcion*.

A party does not act inconsistently with the right to arbitrate by failing to seek to enforce an arbitration agreement that would be unenforceable under prior existing law. *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697 (No waiver where defendant filed a motion to compel arbitration after **three years** of litigation because

defendant's motion was prompted by a change in the law that gave it the right, for the first time, to obtain the relief requested); *see also Letizia v. Prudential Bache Secs., Inc.* (9th Cir. 1986) 802 F.2d 1185, 1187.

Since *Concepcion*, numerous cases, relying on *Fisher* and *Letizia*, have held that defendants did not waive arbitration despite months or years of litigation because the defendants reasonably believed that their class action waivers were unenforceable prior to *Concepcion*. *See, e.g., Quevedo v. Macy's Inc.* (C.D. Cal. 2011) 798 F.Supp.2d 1122, 1126-1131 (Even though defendant litigated for two years, pursued a motion to dismiss, opposed plaintiff's motion for class certification, and exchanged discovery with plaintiff, defendant did not waive its right to arbitrate because defendant reasonably believed that it had no legal right to individual arbitration post-*Gentry* and pre-*Concepcion*, and once that right was conferred by *Concepcion*, defendant promptly sought arbitration); *Grabowski,* 2011 WL 4353998 at *4-7 (No waiver where defendant litigated for eight months because it reasonably believed it could not compel individual arbitration pre-*Concepcion*, and then compelled arbitration promptly after *Concepcion*); *Plows v. Rockwell Collins, Inc.* (C.D. Cal. Aug. 9, 2011) 2011 WL 3501872, at *1-4 (After defendants had filed a notice of removal, motion to transfer, participated in a scheduling conference, conducted discovery, and litigated for 13 months, the Court that there was no waiver because "[d]efendant reasonably could have believed that [*Concepcion*] altered the legal landscape surrounding the arbitration clause in plaintiff's contract and that, prior to [*Concepcion*], the arbitration clause in plaintiff's employment agreement would have been deemed unenforceable" and defendant sought arbitration immediately after *Concepcion.*).

4. <u>"Litigation" Does Not Constitute Prejudice.</u>

"Mere delay" does not constitute prejudice or waiver. *Keating,* 31 Cal. 3d at 605; *Christenson*, 33 Cal. 3d at 782. Nor does the cost of

litigation. *Saint Agnes*, at 1203, *citing Groom v. Health Net* (2000) 82 Cal. App. 4th 1189, 1197 (mere expense of responding to motions is not the type of prejudice that bars a later motion to compel arbitration).

The only prejudice to be found in this case is to Plaintiffs' Counsel who have been denied access to the holy land of class action status and the gratuitous attorneys' fees they hoped to obtain. That kind of "prejudice" does not support an argument for waiver.

5. *Iskanian* Does Not Conflict With Petitioner's Proffered "Waiver" Cases Because *Concepcion* Conferred A New Right To Arbitrate; There Was No Bad Faith.

Petitioner attempts to create a conflict where none exists. He argues that the Court of Appeals in *Iskanian* erred by holding that there was no waiver because the delay, discovery, and litigation in *Iskanian* was far more extensive than the same factors in nine other cases, which held that there was a waiver. Petitioner's cases, however, are simply irrelevant.

First, in six of Petitioner's nine cases, the party seeking arbitration never provided notice of their intent to arbitrate, conducted extensive discovery which could not be used in arbitration, and failed to provide an explanation for the delay. More importantly, none of these cases had an intervening law which created a new right to compel arbitration. Indeed, the parties always had the right to compel arbitration, but simply failed to do so. *Guess?, Inc. v. Super. Ct.* (2000) 79 Cal. App. 4th 553, 557-58 (Defendant did not demonstrate any intent to arbitrate for four months, never explained why it delayed compelling arbitration, and there was no change in the law); *Davis v. Continental Airlines, Inc.* (1997) 59 Cal. App. 4th 205, 213 (Defendant obtained 1600 pages of documents, sought discovery even though plaintiff did not have the same right to discovery in arbitration, and there was no new right to arbitration); *Augusta v. Keen & Associates* (2011) 193 Cal. App. 4th 331, 338, 342 (defendant did not demand arbitration for over six months, did not offer an explanation for the

delay, conducted extensive discovery on the merits but refused to reciprocate discovery, and there was no new intervening change in the law); *Sobremonte v. Super. Ct.* (1998) 61 Cal. App. 4th 980, 993-95 (the bank filed multiple motions, refused to turn over documents, did not compel arbitration for 10 months, and there was no change in the law); *Burton v. Cruise* (2011) 190 Cal. App. 4th 939, 949 (plaintiff never demonstrated an intent to arbitrate, waited 11 months to compel arbitration, and there was no change in the law); *Adolph v. Coastal Auto Sales* (2010) 184 Cal. App. 4th 1443, 1451 (defendant delayed six months, filed a motion to compel after its demurrer was overruled to take advantage of plaintiff, and there was no change in the law).

Further, CLS did not gain anything from the "delay." It also had to expend time and money in litigation, which could have been prevented if Petitioner submitted to arbitration as CLS requested and he had agreed to in the Arbitration Agreement. Indeed, Petitioner complains that he was forced to conduct class discovery, yet it was his decision to file a class action. Petition, p. 23. *See, e.g., Quevado,* 789 F. Supp. 2d at *7 (plaintiff's investment of time and resources in the litigation did not amount to prejudice because the "wound [wa]s self-inflicted" when plaintiff chose the judicial forum in contravention of the arbitration agreement). Lastly, and more importantly, unlike these six cases, CLS suddenly obtained a new right to compel arbitration after *Concepcion* and immediately did so. It did not delay and there is no waiver.

Second, Petitioner's three remaining cases are also inapplicable. In *Hoover v. Am. Income Life Ins. Co.* (2012) 206 Cal. App. 4th 1193, 1198, 1206, there was no agreement to arbitrate the alleged claims, the Court did not consider *Concepcion*, and there was no new right to arbitrate. *Id.* Unlike *Hoover*, Petitioner agreed to arbitrate the claims alleged, the court relied upon *Concepcion*, and there was a change in the law which provided CLS with a new opportunity to compel arbitration. Similarly, in *Lewis v.*

Fletcher Jones Motor Cars, Inc. (2012) 205 Cal. App. 4th 436, 446-48, defendant argued that it did not waive its right to bring a motion to compel for five months because *Discovery Bank* "categorically precluded" arbitration until *Concepcion*. *Discover Bank*, however, was not applicable because the plaintiff in *Lewis* did not file a class action, so the class action waiver was not an issue, and there was no intervening change in the law. Here, however, it is undisputed that *Gentry* precluded arbitration and *Concepcion* was an intervening change in the law.

Lastly, in *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal. App. 4th 832, the court determined that the defendant waived its right to arbitrate because: (i) it never informed plaintiff of its intent to arbitrate and instead litigated for seven months; (ii) plaintiff was prejudiced because plaintiff engaged in "substantial" discovery on the class action allegations that, pursuant to *Concepcion*, would now be useless in arbitration; and (iii) the evidence revealed defendant intentionally delayed to seek arbitration in order to reduce the size of the putative class by settling with class members. *Id.* at 845-847. Moreover, the Court held that the defendant had engaged in **bad faith** by: (i) "informing plaintiff it could not respond to her discovery requests for various reasons"; (ii) "gleaning information about the putative class to try to commander [plaintiff's] litigation strategy"; and (iii) reviewing its records to determine which "class [] members should receive a settlement letter." *Id.* at 839.

Unlike *Roberts,* CLS put Petitioner on notice of its intent to arbitrate from 2006, did not obtain discovery that it could not use in arbitration, and did not delay arbitration for some ulterior means. Indeed, there is no evidence CLS engaged in bad faith, Petitioner has never alleged that CLS acted in bad faith, and neither the trial or Appellate Court determined that there was any bad faith. *Roberts*, therefore, is irrelevant.

Likewise, in *Kingsbury v. Greenfiber LLC* (C.D. Cal. June 29, 2012) 2012 WL2775022, *4-5, defendant claimed that it could not file a motion to

compel arbitration prior to *Concepcion* because of *Discover Bank*. Another court, however, had held that *Discover Bank* was inapplicable to the same arbitration agreement as the one in *Kingsbury*. *Id.* Defendant therefore was aware that *Discover Bank* did not apply to its arbitration agreement, and could not rely upon *Discover Bank* to justify any delay. Moreover, defendant did not seek arbitration until **4 months** after *Concepcion*. *Id.* at *6. Similarly, in *In Re Toyota* (2011) 828 F. Supp. 2d 1150, 1154, 1163, the court found waiver because defendant failed to compel arbitration until **6 months** after *Concepcion*. In stark contrast, it is undisputed that *Gentry* was an obstacle to individual arbitration and CLS filed a motion to compel individual arbitration within 19 days of *Concepcion*. *Kingsbury* and *In Re Toyota* therefore are inapplicable.

Finally, in *Walnut Producers of Cal. v. Diamond Foods, Inc.* (2010) 187 Cal. App. 4th 634, 649-50, the court failed to discuss the G*entry* test, and did not deal with a motion to compel arbitration, the seminal issues in this case. Lastly, in *Borrero v. Travelers Indemnity Co.* (2010) 2010 WL 4054114, at *2, the Court determined that the plaintiff **did not** meet the *Gentry* test and ordered the case to arbitration. This is clearly distinguishable as both parties here agree that Petitioner would have met the *Gentry* test and been forced into class wide arbitration.

Thus, Petitioner's cites are inapplicable and there is no conflict between *Iskanian* and California's waiver or futility law.

D. This Court Should Decline To Review The Lower Courts' Decisions To Disregard *D.R. Horton.*

1. State Courts Need Not Follow *D.R.Horton.*

The Court of Appeals was correct in disregarding *D.R. Horton, Inc.* (Jan. 6, 2012) 357 NLRB No. 184, 2012 WL 36274 ("*D.R. Horton*"). In that case, the National Labor Relations Board ("NLRB") exceeded its authority by interpreting the FAA and by ignoring the clear and unambiguous holdings of the U.S. Supreme Court in *Concepcion* and

CompuCredit Corp. v. Greenwood (2012) __ U.S.__ 132 S. Ct. 665, 668. The court then correctly cited *Ass'n of Civilian Technicians v. FLRA* (9th Cir. 2000) 200 F.3d 590, 592; *Hoffman Plastic Compounds Inc. v. NLRB* (2002) 535 U.S. 137, 144; and *NLRB v. Bildisco & Bildisco* (1984) 465 U.S. 513, 529, n.9, for the proposition that courts have no obligation to defer to the NLRB in instances where the board interprets a statute other than the National Labor Relations Act "NLRA" or in resolving a conflict between the NLRA and another statute---the FAA in the instant case. *Id.* at 962. The court therefore conducted its own review and declined to follow *Horton,* concluding that the U. S. Supreme Court in *Concepcion* made clear that arbitration agreements must be enforced according to their terms, providing no exception for employment-related disputes. *Id.* The court concluded in light of *Concepcion* and *CompuCredit* that the NLRB's holding in *Horton* that that the FAA must yield to the National Labor Relations Act ("NLRA") because class claims are "concerted activity" and protected under Section 7 of the NLRA fails because *Horton* failed to identify any "congressional command" in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms. *Id.* at 963. *See also, Nelsen v. Legacy Partners Residential, Inc* (July 18, 2012) ___ Cal.Rptr.3d___, 2012 WL 2913809, * 10-12, (not bound to follow *Horton* because the board's conclusion that class action litigation constituted protected activity was a novel interpretation of concerted activity, and that the policy favoring arbitration in the FAA must yield to the NLRA).

2. <u>Federal Law is Unsettled</u>

Horton is currently on appeal in the United States Court of Appeals for the Fifth Circuit. Hence, the *Horton* holding is not yet settled federal law, and the case does not provide an appropriate vehicle for this Court to grant review.

A majority of those courts that have considered the case, concluded that *Horton* does not render class and collective action waivers

unenforceable, the primary rationale being that *Concepcion* and *CompuCredit Corp. v. Greenwood* (2012) _U.S._, 132 S.Ct 665, require arbitration agreements, including those in the employment context, to be enforced according to their terms, and nothing in the subsequently enacted NLRA expressly overrode any provision in the FAA. *See e.g., Morvant v. P.F. Chang's China Bistro, Inc.* (N.D. Cal. 2012) __ F.Supp.2d __, 2012 WL 1604851, *12 (district court rejected board's holding in *Horton* "that agreements that require employees to submit to individual arbitration should not be enforced as against public policy" because the board's reasoning failed to "overcome the direct controlling authority [*Concepcion* and *CompuCredit*] holding arbitration agreements, including class action waivers contained therein, must be enforced according to their terms); *LaVoice v UBS Financial Services Inc.* (S.D.N.Y. 2012) 2012 WL 124590, * 6 (court declined to follow *Horton* noting that the court read *Concepcion* as "standing against any argument that an absolute right to collective action is consistent with the FAA's overarching purpose of ensuring the enforcement of arbitration agreements according to their terms to so as to facilitate streamlined proceedings [internal citations omitted]").

Given that *Horton* has yet to be enforced, given that the federal district courts in the various circuits are not in agreement on the validity of *Horton*, and given that this case or another case raising the same issue will almost certainly be appealed to the U.S. Supreme Court, this Court should not attempt to resolve this controversy.

3. The Court Should Decline Review Because Class And Representative Action Is Not Concerted Activity Protected Under The NLRA

The Court should also deny review in the instant case because contrary to Petitioner's assertions and the board's findings in *Horton,* common sense and the board's own precedent suggest that class and representative actions are the antithesis of "concerted activity" within the

meaning of the NLRA, such that an employee's Section 7 rights would be infringed upon by class and representative action waivers. This is because in a class or representative action the employee can simply file suit on the employee's own behalf and on behalf of all other putative class members, regardless whether the individual's fellow employees want to file suit. This stands in stark contrast to the board's explanation of concerted activity in *Myers Indus. & Prill* (1984) 268 NLRB 493 *(Myers I),* remanded, 755 F.2d 941 (D.C. 1985), reaffirmed, 281 NLRB 882 (1986) (*Myers II),* affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), where the board held in *Myers I* that "to find any employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not only by and on behalf of the employee himself" and in *Meyers II*, explained that the "definition [it adopted in *Meyers I*] expressly distinguishes between an employee's activities engaged in 'with or on the authority of other employees' (concerted) and an employee's activities engaged in 'solely by and on behalf of the employee himself' (not concerted)."

Additionally, as recently as October 2010, the board has concluded that bringing or choosing to participate in a class action for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. *See General Counsel's 10-06 Guidance Memorandum* issued July 16, 2010. Thus, even if class and representative action could be "concerted activity" under most circumstances, it is not here because there is no evidence that Petitioner at any relevant time or in any manner joined forces with employees, who unlike him, were still employed with CLS at the time he consulted with counsel and filed suit. Meyers II, 281 NLRB at 887 (the NLRB's definition in *Meyers I* "requires some linkage to group action" in order for conduct to be deemed "concerted" within the meaning of Section 7.) Further, there is no evidence that Plaintiff had the authority

of CLS employees to pursue the putative class action. On the contrary, about one-half of the putative class members expressly disavowed Plaintiff's claims upon learning of the case.. There is also no evidence that by his activities, Plaintiff intended to enlist the support of CLS employees in a common endeavor. In fact, in the course of the litigation, Petitioner admitted under oath that when he met with his attorneys for the first time, he sought to file a *religious discrimination* lawsuit on his *own behalf.* Accordingly, Petitioner's act of filing a class action for purely personal reasons is not protected by Section 7 rights and CLS' arbitration agreement prohibiting class actions does not violate Section 7. Therefore even if the filing of a class action could be "concerted activity", Petitioner did not engage in "concerted activity and therefore this Court should decline to grant review pursuant to *Horton* as the case is inapposite.

Further, Petitioner had no Section 7 rights to exercise at the time he filed suit because he was no longer an employee of CLS. The NLRA applies only to employees. *See Grabowski v. C.H. Robinson Co.* (S.D. Cal. 2011) 817 F.Supp.2d 1159 (filing of a class action complaint by an individual who was no longer an employee was not "concerted activity" under the NLRA). Therefore, CLS could not have violated his Section 7 rights by requiring arbitration on an individual basis.

Moreover, it should be noted that Section 7 encompasses not just the right to engage in Section 7 activity, but also includes the right to refrain from such activity. 29 U.S.C. § 157. Thus, Petitioner's decision to waive his right to engage in class, collective, or representative action by voluntarily signing the class action waiver and receiving consideration for that action should be equally protected by the NLRA.

4. Review Should Be Denied Because Petitioner's Arguments Concerning Horton Are Without Merit.

Petitioner errs in his assertion that the court of appeal was obligated to defer to the board in the instant case because the board interpreted not

just the National Labor Relations Act but also the FAA and the Norris-LaGuardia Act, statutes the board was not expressly charged with interpreting the FAA and for which the board was not owed deference. *See Southern S.S. Co. v NLRB* (1942) 316 U.S. 31, 47 ("the [b]oard has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives); *Association of Civilian Technicians v FLRA* (9th Cir 2000) 200 F.3d 590, 592 ("[C] ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute"); *Hoffman Plastic Compounds, Inc. v NLRB* (2002) 535 U.S. 137, 144("...we have never deferred to the [b]oard 's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA") Thus, the court had no obligation to defer to the board's decision.

The U.S. Supreme Court in C*ompuCredit*, held without any language limiting its holding's reach that the FAA established "a liberal federal policy favoring arbitration...," "...requiring courts to enforce agreements to arbitration according to their terms... even where the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command(internal citations omitted)." Id at 669 There is nothing in the NLRA demonstrating an intent by Congress to override the FAA. Thus, it is clear that the FAA overrides any alleged statutory right to collective litigation or arbitration as suggested in *Horton.*

Given Congress's clear intent to permit arbitration and given that the FAA is the earlier statute, it makes no sense that Congress failed to carve out an exception to FAA primacy in the NLRA if Congress truly intended to create a statutory right to pursue class and representative action either in litigation or arbitration. Otherwise employees would have an

unenforceable right, and this is something Congress could not have intended. Thus, it is clear there is no Section 7 right to pursue class or collective action, and absent that right Petitioner has no contractual defense to assert (i.e. void as against public policy).

Moreover, the instant case is distinguishable on its facts from *Horton* as the class and collective action waiver in the instant case was not mandatory, Petitioner voluntarily signed it and received consideration for his signature. Petitioner's citation to *Kaiser Steel and Corp. v Mullins* (1982) 455 U.S. 72 is not on point. In *Kaiser Steel*, the U.S. Supreme Court concluded that a court could not enforce a hot cargo agreement (agreement between a union and a neutral employer whereby the neutral agrees to cease handling the goods of another employer with which the union has a dispute) contained in a union's contract with the employer because such agreements explicitly violate Section 8(e) of the NLRA and are void and unenforceable per the express terms of the NLRA which provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, **and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.**

29 U.S.C. §158(e) (emphasis added).

Class or representative action waivers do not violate the NLRA *per se* as do hot cargo agreements such as the one in *Kaiser Steel* and nowhere in the NLRA's language did Congress state that class action waivers contained in arbitration agreements are unenforceable. Thus, Petitioner's assertion that class and

representative action waivers are akin to a *per se* illegal hot cargo agreement is without merit.

V. CONCLUSION

Based on the foregoing reasons, the Court should deny review of the *Iskanian* case.

Date: August 6, 2012

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d) of the California Rules of Court, the text of the Respondent's Answer to Petition for Review does not exceed 8,400 words. The text of the Respondent's Answer contains 7,380 words as determined by the word counting tool of Microsoft Word, the computer program used to prepare the brief.

Date: August 6, 2012 FOX ROTHSCHILD LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1800 Century Park East, Suite 300, Los Angeles, California 90067-3005.

On August 6, 2012, I served the following document described as:

ANSWER TO PETITION FOR REVIEW

On the interested parties in this action by sending the original or a ture copy thereof to the interested parties on the attached service list:

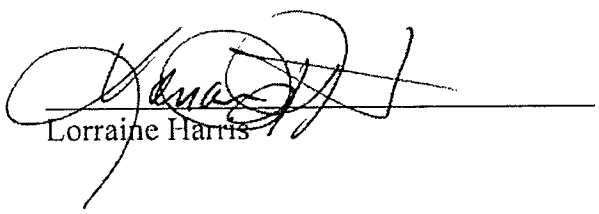
SEE ATTACHED SERVICE LIST

[X] **BY MAIL:** I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Fox Rothschild LLP practice for collecting and processing correspondence for mailing. On the same day that the document is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[X] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addresses named herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 6, 2012, at Los Angeles, California.



Lorraine Harris

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