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IN THE SUPREME COURT OF CALIFORNIA

LORENA NELSEN,
Plaintiff and Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO
Respondent.

LEGACY PARTNERS, INC.,
Defendant and Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A132927

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED FOR REVIEW

1. Are all orders compelling individual arbitration and dismissing class claims immediately appealable under the "death knell" doctrine? The Court of Appeal in *Franco v. Athens Disposal Co., Inc.*, (2009) 171 Cal.App.4th 1277, 1284 and *Iskanian v. CLS Transp. Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 955 (*Iskanian*) held they are. The Court of Appeal below, however, held that the "death knell" doctrine can only be invoked when the appellant affirmatively demonstrates that

"the trial court's order makes it impossible or impracticable" to proceed with the action at all. (See slip op. at p. 6.)

2. Who is responsible for deciding in the first instance whether the parties to an otherwise enforceable pre-dispute mandatory arbitration agreement intended to permit or prohibit classwide arbitration: the parties' arbitrator, or the trial court? The Court of Appeal below (see slip op. at pp. 11–15) and the Court of Appeal in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 517–519 (*Kinecta*) and *Truly Nolen of America v. Superior Court* (2012) ___ Cal.App.4th ___, ___ [2012 WL 3222211, *22] (*Truly Nolen*) held that this threshold clause construction issue may be decided by the court. A plurality of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 452–453 [123 S.Ct. 2402], the Court of Appeal in *Garcia v. DirectTV, Inc.* (2004) 115 Cal.App.4th 297, 298, and this court in *Discover Bank v. Superior Court* (2005) 26 Cal.4th 148, 170–171, abrogated on other grounds in *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740] (*Concepcion*), however, held that only the parties' chosen arbitrator has the authority interpret the parties arbitration agreement and determine whether there is an implicit agreement to arbitrate.

3. Where an employer's mandatory arbitration agreement does not expressly prohibit class arbitration, must an employee present evidence to the trial court sufficient to establish under *Gentry v. Superior Court*

(2007) 42 Cal.4th 443 (*Gentry*) that the arbitration agreement would preclude her from vindicating her fundamental statutory rights *if* it were construed to prohibit class arbitration, where no arbitrator or court has yet construed the agreement as prohibiting class arbitration? The Court of Appeal below held that Nelsen's failure to present such evidence in anticipation of such an interpretation constitutes waiver. (See slip op. at p. 17.)

4. Does the U.S. Supreme Court's decision in *Concepcion*, which held that the Federal Arbitration Act preempted California's *Discover Bank* rule, abrogate the principle established in *Gentry*, *supra*, 42 Cal.4th at pp. 453–466 that an employee must be allowed to pursue classwide arbitration when the employer's arbitration agreement impermissibly interferes with his or her unwaivable statutory right to receive minimum wage and overtime compensation. A majority of the Court of Appeal's decisions have held that *Gentry* survives *Concepcion* unless and until this or the U.S. Supreme Court expressly holds otherwise. (See, e.g., *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498; *Kinecta*, *supra*, 205 Cal.App.4th at p. 516; *Truly Nolen*, *supra*, 2012 WL 3222211 at p. *13.) A minority of courts, however, have either implied (see slip op. at p. 16) or expressly held (see *Iskanian*, *supra*, 206 Cal.App.4th at pp. 959–961) that *Concepcion* abrogates *Gentry*.

5. When an employee is required to sign an arbitration agreement as a condition of employment that contains an express or implied class arbitration waiver that violates the National Labor Relations Act, is the class arbitration wavier enforceable? The National Labor Relations Board in *In re D. R. Horton, Inc.* (Jan. 3, 2012) 357 NLRB No. 184 [2012 WL 36274, at *1] held that it is not. The Court of Appeal below (see slip op. at pp. 18–20), along with the Court of Appeal in *Iskanian*, *supra*, 206 Cal.App.4th at pp. 961–963 and *Truly Nolen*, *supra*, 2012 WL 3222211 at p. *21 held that it is.

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

The law is a mess. Since the U.S. Supreme Court's decision last year in *AT&T Mobility LLC Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740] (*Concepcion*), the validity of California's body of law surrounding the interpretation and enforcement of arbitration agreements containing either an express or implicit class arbitration waiver has suddenly had to be questioned. As a result, an increasing number of defendants are now attempting to use their mandatory arbitration agreements to shield themselves from ever having to face a class action. This is true even where, as here, the arbitration agreement is silent on the issue of class arbitration. Consequently, California courts are again faced with the question of who, the court or the arbitrator, has the authority to decide in the first instance whether an arbitration agreement that is silent as to class arbitration permits or prohibits such a procedure. In a direct conflict with this and the U.S. Supreme Court's precedent and guidance, every court this year to address this issue has held that a court may interpret an arbitration agreement and determine the scope of arbitration.

With more and more courts interpreting arbitration agreements and determining that they contain either express of implicit class arbitration waivers, the Court of Appeal has also had to determine whether such waivers are enforceable in mandatory employment arbitration agreement in

light of *Concepcion*. The Court of Appeal is split on this issue. A majority of the decisions hold that the principles established by this court in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 463 (*Gentry*) survive *Concepcion* unless and until this or the U.S. Supreme Court holds otherwise. A minority have either implied or expressly held that *Concepcion* abrogates *Gentry*. Similarly, the Court of Appeal has also had to determine whether a class arbitration waiver that violates the National Labor Relations Act is enforceable.[1]

Review should be granted so this court can resolve the conflicts in the Court of Appeal and determine the effect *Concepcion* had, if any, on California's arbitration law. Alternatively, this court should court should grant review in *Iskanian v. CLS Transportation of Los Angeles*, review pending, S204032, and either consolidate the two cases for review or grant review and hold based on the overlapping issues presented in the two cases.

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[1] California courts have also had to grapple with whether the principles established in *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 and *Cruz v. Pacifware Health Systems, Inc.* (2003) 30 Cal.4th 303 have been abrogated by *Concepcion*. This issue is currently pending before this court in *Sanchez v. Valencia Holding Co.*, review granted March 21, 2012, S199119.

STATEMENT OF THE CASE

On July 26, 2010, Plaintiff and Petitioner Lorena Nelsen ("Nelsen") brought this wage-and-hour class action against her employer, Defendant and Real Party in Interest Legacy Partners, Inc. ("LPI"), alleging that LPI misclassified her and similarly situated Property Managers and failed to pay them overtime pay premiums and other wages due. (See generally AA 3–26.) LPI moved to compel Nelsen's claims to individual arbitration based upon a mandatory arbitration agreement that Nelsen was required to sign as a condition of her employment with LPI. (See AA 31:1–32:21.)

LPI's arbitration agreement does not mention class arbitration. Nevertheless it broadly encompasses all potential disputes between the parties, subject to specifically designated exceptions. It provides, in pertinent part:

> I agree that any claim, dispute, or controversy (including, but not limited to, any and all claims of discrimination and harassment) which would otherwise require or resort to any court or other governmental dispute resolution forum between myself and [LPI] (or its owners, partners, directors, officers, managers, team members, agents, related companies, and parties affiliated with its team members benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, [LPI], whether based on tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (California Code of Civil Procedure Section 1280 et seq., including Section 1283.05 and all of the act's other mandatory and permissive rights to discovery) or state equivalent . . . .

(AA 40–41.)

On November 8, 2010, the trial court granted LPI's motion to compel individual arbitration, (see RT 3:9–21, 10:4–8), which was entered June 9, 2011, (see AA 95–96). Nelsen timely appealed, citing the "death knell" doctrine as the jurisdictional basis for her appeal. (See AA 98–99; see also Cal. Rules of Court, rule 8.104(a).)

On appeal, the Court of Appeal affirmed the trial court's order in its entirety. Nelsen subsequently filed a petition for rehearing, causing the court to make an inconsequential modification to its original opinion.

LEGAL ARGUMENT

I. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT OF WHETHER THE "DEATH KNELL" DOCTRINE APPLIES TO ALL ORDERS DISMISSING CLASS CLAIMS AND COMPELLING INDIVIDUAL ARBITRATION.

The "death knell" doctrine was adopted by this court in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 (*Daar*) as an exception to the final judgment rule. There, the court held that an order sustaining a demurrer to class action allegations and transferring the action from superior court to municipal court was an appealable order. (See *id.* at pp. 699–700.)

Two procedural circumstances were critical in *Daar*. (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 757 (*Baycol*).) First, the order in *Daar* " 'virtually demolished the action as a class action' and was in ' "legal effect" . . . tantamount to a dismissal of the action as to all members of the class other than plaintiff.' " (*Ibid.*, omission in original, quoting *Daar*, *supra*, 67 Cal.2d at p. 699.) And second, "the order appealed from was essentially a dismissal of everyone '*other* than plaintiff.' " (*Id.* at p. 758, italics in original, quoting *Daar*, at p. 699.) "Permitting an appeal was necessary because '[i]f the propriety of [a disposition terminating class claims] could not now be reviewed, it [could] never be reviewed,' and [this

court was] understandably reluctant to recognize a category of orders effectively immunized by circumstance from appellate review. This risk of immunity from review arose precisely, and only, because the individual claims lived while the class claims died." (*Ibid.*, first and second alterations in original, quoting *Daar*, at p. 699.) As the U.S. Supreme Court explained, " '[t]he 'death knell' doctrine *assumes* that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination.' " (*Ibid.*, italics added, quoting *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 469–479 [98 S.Ct. 2454] (*Coopers*).)

Thus, under the "death knell" doctrine, an order is immediately appealable when it "(1) amounts to a de facto final judgment for absent plaintiffs, under circumstances where (2) the persistence of viable but perhaps de minimis individual plaintiff claims creates a risk no *formal* final judgment will ever be entered." (*Baycol*, *supra*, 51 Cal.4th at p. 759, italics in original.)

Following the rational and holding in *Daar*, courts have consistently held "that an order, whatsoever form it may take, which has the effect of denying certification as a class action, is an appealable order." (*Morrissey v. City and County of San Francisco* (1997) 75 Cal.App.3d 903, 907 [citing cases]; see also *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462,

470 [confirming the "death knell" doctrine applies to orders denying certification as to the entire class]; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 [same].)

Until the Court of Appeal's opinion below, this included orders compelling individual arbitration and dismissing class claims. For example, in *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1284 the employee was required to sign an arbitration agreement as a condition of his employment that waived his right to proceed "as a representative or as a member of a class or in a private attorney general capacity." The defendant moved to compel individual arbitration, which the trial court granted. (*Id.* at p. 1287.) On appeal, the Second District Court of Appeal held that since the trial court had "found that the class arbitration waiver was enforceable and instructed Franco to arbitrate his claims individually" it "was the 'death knell' of class litigation through arbitration" and was therefore appealable. (*Id.* at p. 1288.)

The same thing occurred in *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 955–956, in which another division of the Second District Court of Appeal held that an order dismissing class claims and compelling individual arbitration "constitute[d] a 'death knell' for the class claims" and was therefore an immediately appealable order. (See also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1997) ¶ 2:39 ["And an order

enforcing an arbitration agreement requiring arbitration of claims individually and waiving class arbitrations is appealable as "the 'death knell' of class litigation through arbitration"]; *Barnes v. Bakersfield Dodge, Inc.* (May 22, 2012, No. F063370) 2012 WL 1859424, at *3 [applying the "death knell" doctrine to an order dismissing class claims and compelling individual arbitration]; *Collins v. Contemporary Services Corp.* (Aug. 18, 2011, No. B227951) 2011 WL 3630516, at *4 [same].)

The Court of Appeal below, however, departed from this well-established rule. Relying on *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, which dealt with an order *limiting* the scope of class arbitration, the court held for the first time that an appellant must "explain or demonstrate how [a] trial court's order makes it impossible or impracticable for [him or her] to proceed with the action at all" in order for it to be appealable. (Slip op. at p. 6.) This holding not only directly conflicts with *Franco* and *Iskanian*, but it is also contrary to this court's recognition that " '[t]he 'death knell' doctrine *assumes* that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination.' " (*Baycol*, *supra*, 51 Cal.4th at p. 758, italics added, quoting *Coopers*, *supra*, 437 U.S. at pp. 469–479.)

Immediate review is necessary to resolve this conflict because a plaintiff who fails to file a direct appeal from a "death knell" order forever loses the right to attack the order. (*Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 811 [citing cases].) Without guidance, plaintiffs will continue to appeal orders compelling individual arbitration and dismissing class claims in order to preserve their appellate rights, and will burdened with being forced to demonstrate that the dismissal of their class claims makes it unlikely that they will pursue their individual claim through arbitration to completion.

II. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT OF WHETHER COURTS CAN DETERMINE WHETHER AN ARBITRATION AGREEMENT PERMITS OR PROHIBITS CLASS ARBITRATION IN THE FIRST INSTANCE.

The Court of Appeal below held that a trial court can determine whether or not a valid arbitration agreement permits or prohibits class arbitration when "it is clear the agreement precludes class arbitration" and the trial court "do[es] not think any reasonable arbitrator applying California law could find otherwise." (Slip op. at p. 13.) Review should be granted because this holding worsens the already existing conflict in

California law regarding who is responsible—the court or the arbitrator—for determining in the first instances whether an arbitration agreement that is silent on class arbitration permits or prohibits such a procedure.

In *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 451–453 [123 S.Ct. 2402] (*Bazzle*), a four-Justice plurality of the U.S. Supreme Court held that only an arbitrator—not a trial court—can decide in the first instance whether an arbitration agreement can be construed as permitting or prohibiting class arbitration. That dispute, which concerned "what kind of arbitration proceeding the parties agreed to," was properly left to the parties' chosen arbitrator to decide. (*Id.* at p. 453.) Justice Stevens concurred, both in result and judgment, stating that he was doing so "to avoid [the] outcome" of "no controlling judgment of the Court." (*Id.* at p. 455 (conc. opn. of Stevens, J.); see also *ibid.* [agreeing that the plurality opinion expressed "a view of the case close to [his] own"].) By contrast, only three Justices concluded that the trial court was authorized to decide whether the parties intended to permit class arbitrations. (See *id.* at p. 458 (dis. opn. of Rehnquist, C.J.) [joined by O'Connor, J. and Kennedy, J.].) Thus, a majority of the Court was of the view that only an arbitrator can construe an arbitration clause to determine the parties' intended scope of arbitration. (See *Discover Bank v. Superior Court* (2005) 26 Cal.4th 148, 170–171, abrogated on other grounds in *Concepcion*, *supra*, 131 S.Ct. 1740.)

In light of *Bazzle*, the U.S. Supreme Court vacated and remanded an opinion by the Second District Court of Appeal, which held that clause construction determinations could be made by the trial court in the first instance, not the arbitrator. In *Garcia v. DIRECTV, Inc.* (2004) 115 Cal.App.4th 297, 298 (*Garcia*), the Court of Appeal reversed its prior holding, concluding: "The Supreme Court has spoken [in *Bazzel*], and the foundational issue—whether a particular arbitration agreement prohibits class arbitrations—must (in FAA cases) henceforth be decided by the arbitrators, not the courts."

For the next eight years, California courts consistently adhered to *Bazzle* and *Garcia*, and held that when a valid arbitration agreement is silent on the issue of classwide arbitration, it is for the arbitrator—not the court—to decide the issue of whether a valid arbitration agreement permits or prohibits class arbitration. (See, e.g., *Deluna v. La Sala Holding Co., Inc.* (May 19, 2004, No. B164161) 2004 WL 1112788, at *7; *Young v. Lowe's HIW, Inc.* (April 28, 2005, No. G033003) 2005 WL 995561, at *2; *Elias v. Superior Court* (March 16, 2005, No. B178379) 2005 WL 605716, at *6; c.f., *Yuen v. Superior Court* (2004) 121 Cal.App.4th 1133, 1137–1139 [holding that, under *Bazzle*, the arbitrator must decide whether the parties arbitration agreement permits consolidation of two arbitration proceedings].)

Even this court in *Discover Bank* noted that "the most that might be derived from *Bazzle*" is that "when the question of whether a class action arbitration is available depends on whether or not the arbitration agreement is silent on the matter or expressly forbids class action arbitration, then it is up to the arbitrator, not the court, to determine whether the arbitration agreement is in fact silent." (*Discover Bank*, *supra*, 26 Cal.4th at pp. 170–171; see also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1364–1366 [approving of *Bazzle* and remanding the case back to the parties' selected arbitrators for them to reconsider the availability of classwide arbitration].)

Things when awry, however, in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506 (*Kinecta*). There, the Second District Court of Appeal—without citing *Bazzle*, *Garcia* or *Discover Bank* and giving no indication that it was creating a conflict with those decisions—interpreted the parties' arbitration agreement and "conclude[d] that the parties did not agree to authorize class arbitration." (*Id.* at p. 357.) In part, the court's oversight was the fault of the parties, who characterized the who-should-decide-the-scope-of-arbitration issue as an "open question." The plaintiff, however, cited *Bazzle* and *Garcia* in her Petition for Rehearing, but the Court of Appeal denied her petition without modifying its published opinion or even acknowledging the conflict it had created.

Relying on this conflict, the Court of Appeal below held that it had the authority to interpret LPI's arbitration agreement and "conclude [that] the agreement does *not* permit class arbitrations." (Slip. op. at 15, italics in original.) Unlike *Kinecta*, however, the court below acknowledged *Bazzle* and *Garcia*, but refused to follow these decisions because "*Bazzle* was only a plurality decision" and therefore, according to the court, "is not binding." (*Id.* at p. 12, fn. 6.)

The split, however, didn't end there. Earlier this month, the Fourth District Court of Appeal in *Truly Nolen of America v. Superior Court* (2012) ___ Cal.App.4th ___, ___ [2012 WL 3222211, *21] (*Truly Nolen*) specifically remanded the case for the court—not the arbitrator—to interpret the parties' arbitration agreement and determine whether there was an implied agreement permitting class arbitration. Just like *Nelsen*, the court acknowledged that "there are conflicting authorities on the issue" and cited to *Garcia*. (*Id.* at p. *21, fn. 4.) But, just like *Nelsen*, the court justified its holding by noting that "*Bazzle* was a plurality" and therefore claimed that it was "not binding authority." (*Ibid.*)

Kinetca, *Nelsen*, and *Truly Nolen* don't just conflict with *Bazzle, Garcia* and *Discover Bank*. They also conflict with the overwhelming weight of federal authority. (See, e.g., *Soto-Fonelladas v. Ritz-Carlton San Juan Hotel Spa & Casino* (1st Cir. 2011) 640 F.3d 471, 476–477 [citing *Bazzle* for proposition that availability of class arbitration is a question of

contract interpretation for the arbitrator]; *Quilloin v. Tenet Health Systems Philadelphia, Inc.* (3d Cir. 2012) 673 F.3d 221, 232 (*Quilloin*) [same]; *Vilches v. The Travelers Co.* (3rd Cir. Feb. 9, 2011, No. 10–2888) 413 Fed. App'x. 487, 492 [same]; *Guida v. Home Savings of America, Inc.* (E.D.N.Y. 2011) 793 F.Supp.2d 611, 617–618 [and cases cited therein].)

Review should therefore be granted because the Court of Appeal's decision will only further engender the confusion among litigants and courts considering the meaning and enforceability of mandatory employment arbitration agreements that do not specifically address the issue of class arbitration. If *Kinetca, Nelsen,* and *Truly Nolen* are allowed to remain precedential, trial courts will routinely be asked to take it upon themselves the burdensome task of determining the availability of class arbitration, even when there is no genuine disagreement regarding the validity of an arbitration agreement or its application to the parties' dispute. And, despite the contrary holdings in *Bazzle*, *Garcia*, and *Discover Bank*, the contracting parties will be deprived of the benefit of their agreement to have arbitrators, rather than courts, construe their contracts in the first instance, and will be forced to trade the bargained-for speed and efficiency of arbitration for lengthy pre-arbitration trial proceedings, followed by appeals, before arbitration can even begin.

III. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER AN EMPLOYEE MUST PROVIDE EVIDENCE TO SATISFY THE *GENTRY* FACTORS BEFORE THERE HAS BEEN ANY DETERMINATION ON WHETHER THE EMPLOYER'S ARBITRATION AGREEMENT PERMITS OR PROHIBITS CLASS ARBITRATION.

Review should also be granted because the Court of Appeal's decision will force lower courts to oversee expensive and burdensome litigation regarding the application of *Gentry*, in which this court identified what an employee must prove to establish that an employer's *express* prohibition on class arbitration impairs the workforce's ability to vindicate statutory rights: "[W]hen it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested *notwithstanding an arbitration agreement that contains a class arbitration waiver*, the trial court must consider . . . : [1] the modest size of the potential individual recovery, [2] the potential for retaliation against members of the class, [3] the fact that absent members of the class may be ill informed about their rights, and [4] other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration." (*Gentry*, *supra*, 42 Cal.4th at p. 463, italics added.)

Consideration of the effects of a class action prohibition under *Gentry* necessarily presupposes an actual class action prohibition in the first place. Notwithstanding this prerequisite, the Court of Appeal's decision stressed Nelsen's supposed waiver of her right to prove these practical effects, without any prior determination that LPI's mandatory arbitration agreement actually prohibited class actions. (See slip op. at p. 17.) Because there had been no ruling that LPI's arbitration agreement prohibited class actions, there was no reason why Nelsen should have been required, upon pain of waiver, to prove that she could satisfy the *Gentry* factors if the agreement were later construed otherwise.

Sadly, this is not the first time the Court of Appeal held that an employee must present evidence to satisfy *Gentry before* an agreement that is silent on class arbitration has been construed as implicitly prohibiting the procedure. The Second District Court of Appeal in *Kinecta* also expected the employee to come forward with evidence satisfying the *Gentry* factors *before* there had been any determination on whether the agreement permitted or prohibited class arbitration. (See *Kinecta*, *supra*, 205 Cal.App.4th at p. 517.)

Under *Kinecta*'s and the Court of Appeal's holding, employees will be compelled to anticipate that *Gentry* evidence might be required to refute arguments regarding an employer's hidden intention to prohibit class arbitration, even where the arbitration agreement appears to permit class

arbitration. There is no justification, and no authority, for imposing such an unnecessary burden on employees and the trial courts. (*Quilloin*, *supra*, 673 F.3d at p. 232 (deeming it "hypothetical" to consider the implications of a class arbitration prohibition, if any, inferred from an arbitration agreement that does not expressly prohibit class arbitration, before the arbitrator construed the parties' agreement].)

IV. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT OF WHETHER *GENTRY* SURVIVES *CONCEPCION.*

Because the Court of Appeal held that an employee must provide evidence to satisfy the *Gentry* factors *before* any determination on whether the employer's arbitration agreement permits or prohibits class arbitration, the court was able to dodge the important question of "whether *Concepcion* abrogates the rule of *Gentry*." (Slip op. at p. 16.) However, the court in dicta suggested that it does. (*Ibid.*) The court recognized that "[o]ne appellate court [*Iskanian*] and a number of federal district courts have found *Concepcion* applies equally to *Gentry* and the FAA therefore precludes California courts from ordering classwide arbitration of wage and hour claims unless the parties have agreed to it." (*Ibid.* [citing cases].) The court did not, however, cite to *Brown v. Ralphs Grocery Co.* (2011) 197

Cal.App.4th 489 (*Brown*) or *Kinecta*, the two then-available Court of Appeal decisions holding that *Gentry* remains binding law in California.

Review should therefore be granted for this court to determine whether *Gentry* survives *Concepcion.* As explained below, there is now a deep and well-developed split in the Court of Appeal on this issue. A majority of courts (*Brown*, *Kinecta*, and *Truly Nolen*) have held that *Gentry* remains binding in California unless and until this or the U.S. Supreme Court expressly hold otherwise. A minority of courts have either implied (*Nelsen*) or expressly held (*Iskanian*) that *Concepcion* abrogates *Gentry.*

Brown was the first Court of Appeal decision to consider the issue. There, the Second District Court of Court of Appeal (Division 5) reasoned that *Gentry* survives *Concepcion.* It highlighted the differences between *Discover Bank* and *Gentry*, noting that " '*Discover Bank* is a case about unconscionability, [whereas] the rule set forth in *Gentry* is concerned with the effect of a class action waiver on unwaivable rights *regardless of unconscionability.*' " (*Brown*, *supra*, 197 Cal.App.4th at p. 498, italics in original, quoting *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 836 (*Arguelles-Romero*).) The court went on to state that *Concepcion* "specifically deals with the rule enunciated in *Discover Bank*," and declined to adopt a broad interpretation of the U.S. Supreme Court's holding. (*Id.* at p. 499.)

Importantly, *Brown* cited to *People v. Thomas* (1996) 49 Cal.App.4th 785, 791, which holds that California Supreme Court's interpretation of federal law is binding when there is "no contrary United States Supreme Court decision" directly on point. (*Brown*, *supra*, 197 Cal.App.4th at p. 498.) Similarly, Judge Kriegler in his concurring and dissenting opinion noted that, although *Concepcion* may have called *Gentry*'s survival into doubt, "*Gentry* remains the binding law of this state which we must follow." (*Id.* at p. 505 (conc. & dis. opn. of Krieger, J.), italics added, citing *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

In *Kinecta*, another division of the Second District Court of Appeal (Division 3) likewise noted that "*Gentry* appears to remain the binding law in California." (*Kinecta*, *supra*, 205 Cal.App.4th at p. 517.) Like *Brown*, the court pointed out that "*Gentry* decided a different issue from *Discover Bank*. In contrast to the unconscionability analysis in *Discover Bank*, the rule in *Gentry* concerns 'the effect of a class action waiver on unwaivable statutory rights *regardless of unconscionability*.' [Citation.] Specifically, *Gentry* addresses whether a class arbitration 'is a significantly more effective practical means of vindicating unwaivable statutory rights.' " (*Ibid.*, quoting *Arguelles*-Romero, *supra*, 184 Cal.App.4th at p.841.) The court reasoned that since "*Discover Bank* and *Gentry* established two different tests of whether to enforce a class arbitration waiver, which should

be considered separately," *Gentry* "has not been expressly abrogated or overruled," and therefore "remain[s] the binding law in California." (*Ibid.*)

Then came *Iskanian*. In direct conflict with both *Brown* and *Kinecta*, another division of the Second District Court of Appeal (Division 2) expressly held that the "*Concepcion* decision conclusively invalidates the *Gentry* test." (*Iskanian*, *supra*, 206 Cal.App.4th at p. 959.) The court gave three reasons for its holding. First, it claimed that *Concepcion* holds that under no circumstances may a party be compelled to class arbitration if the party did not agree to such a procedure. (See *id.* at pp. 959–960.) Second, despite the fact that *Gentry* and *Discover Bank* rest on entirely different rationales, the court held that *Gentry* is inconsistent with the FAA's implicit "objective of enforcing arbitration agreements according to their terms." (*Id.* at p. 960.) And third, *Gentry* was abrogated despite the fact that it is concerned with protecting employees' ability to vindicate their unwaivable statutory rights. (*Ibid.*)

To round things off, the Fourth District Court of Appeal in *Truly Nolen* recognized *Brown, Kinecta*, and *Iskanian* and reasoned that "[a]lthough *Concpecion*'s reasoning strongly suggest that *Gentry*'s holding is preempted by federal law, the United States Supreme Court did not directly rule on the class arbitration issue in the context of unwaivable statutory rights and the California Supreme Court has not yet revisited *Gentry*." (*Truly Nolen*, *supra*, 2012 WL 3222211 at *1; see also *id.* at pp.

*12–13.) It noted that "[o]n federal statutory issues, intermediate appellate courts in California are absolutely bound to follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently." (*Id.* at p. *13, italics in original, citing *People v. Superior Court* (1992) 8 Cal.App.4th 688, 702–703.) Thus, the court held that it "continue[s] to be bound by *Gentry* under California's stare decisis principles." (*Id.* at p. *1.)

With three cases upholding *Gentry* (*Brown*, *Kinetic*, and *Truly Nolen*) and two cases either suggesting (*Nelsen*) or expressly holding (*Iskanian*) that *Concepcion* abrogates *Gentry*, review by this court is vital. Without guidance, employees, employers, and trial courts will continue to argue over whether *Gentry* remains a valid and effective tool for employees to use to ensure that they are able to vindicate their unwaivable statutory right to minimum wage and overtime compensation.

V. REVIEW SHOULD BE GRANTED TO RESOLVE WHETHER AN EXPRESS OR IMPLICIT CLASS ARBITRATION WAIVER THAT VIOLATES THE NATIONAL LABOR RELATIONS ACT IS UNENFORCEABLE.

In *In re D. R. Horton, Inc.* (Jan. 3, 2012) 357 NLRB No. 184 [2012 WL 36274, at *1] (*Horton*) the National Labor Relations Board ("the Board") held that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") when it requires its employees, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial. (*Ibid.*) The Board found that such an agreement violates Section 7 of the NLRA, which gives employees the right to engage in concerted activities for mutual aid or protection, and that there was no conflict between federal labor law and policy, on the one hand, and the FAA and its policies, on the other. (*Ibid.*)

The Court of Appeal, however, declined to follow *Horton* and claimed that there were "a number of reasons" to justify its holding. (Slip. op. at p. 18.) The lower court's "reasoning," however, was fraught with

error,[2] and conflicts with over 70 years of administrative and judicial precedent. Review should therefore be granted to remedy the numerous conflicts the Court of Appeal's decision created with federal authority.

A. *Concepcion* Did Not Create Any Meaningful Conflict Between the NLRA and the FAA.

First, the Court of Appeal erred by relying on *Concepcion* to reject the application of the NLRA. (See slip. op. at p. 19.) In *Concepcion*, the question was whether the FAA preempted state laws of contract unconscionability to the extent those laws were applicable to invalidate class action prohibitions in FAA-covered consumer arbitration agreements. (See *Concepcion*, *supra*, 131 S.Ct. at pp. 1750–1751, 1753.) The 5-4 majority held that the FAA did have such a preemptive effect, concluding that the application of state unconscionability laws to require class arbitration in the face of a direct contractual prohibition would "stand as an obstacle to the accomplishment of the FAA's objectives"—specifically, the FAA's implicit goal of "ensur[ing] the enforcement of arbitration

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[2] While not critical to its decision, the Court of Appeal incorrectly held that an employee's job title alone can determine an employee's supervisory status for purposes of NLRA coverage. (Compare slip. op. at p. 20, with *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.* (1974) 416 U.S. 267, 290, fn. 19 [94 S.Ct. 1747] [recognizing that an employee's job duties, authority, and responsibility, rather than title, control the determination of supervisor status].)

agreements according to their terms so as to facilitate streamlined proceedings." (*Id.* at p. 1748.) At the same time, however, the Court explained that nothing in the language or purpose of the FAA was inconsistent with class arbitration per se, and it reiterated that consensual class arbitrations were still permitted under the FAA. (See *id.* at p. 1751.)

No preemption issue arises in this case, of course, because under the Supremacy Clause of the U.S. Constitution the preemption doctrine only applies where a conflict exists between federal law and inconsistent *state* law. Although the FAA may preempt state laws that are contrary to the FAA's language purposes, or objectives, it is well established that one federal statute—like the FAA—cannot preempt another federal statute—like the NLRA—even if an actual direct conflict exists between the two federal statutes. (See *Felt v. Atchison, Topeka, & Santa Fe. Ry. Co.* (9th Cir. 1995) 60 F.3d 1416, 1418–1419].)

Where a case involves rights and obligations under two federal statutes, and a question arises concerning a potential conflict between those two statutory schemes, the relevant inquiry is not one of "preemption," but of "implied repeal"—whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal, though, are highly disfavored and should never be presumed. (See *United States v. Borden Co.* (1939) 308 U.S. 188, 198 [60 S.Ct. 182] [intention to repeal must be

"clear and manifest" (internal quotation marks omitted).] Even when two federal statutes cover the same subject, "the rule is to give effect to both if possible." (*Ibid.*; accord, *Morton v. Mancari* (1974) 417 U.S. 535, 551 [94 S.Ct. 2474] (*Morton*).) In those rare cases in which two federal statutes are in "irreconcilable conflict," moreover, it is the *later*-enacted statute—in this case the 1935 NLRA—that must be found to have impliedly repealed any inconsistent provisions in the *earlier* statute—the 1925 FAA. (See *Posadas v. National City Bank of New York* (1936) 296 U.S. 497, 503 [56 S.Ct. 349].)

There are several reasons why no conflict actually exists between the FAA and the NLRA (which means there is no need to attempt to reconcile any differences or to determine whether Congress impliedly repealed the former through its enactment of the latter). First, there is no express conflict between the FAA and Section 7. The FAA does not mention class actions, let alone prohibit them, and both the U.S. Supreme Court and this court have long approved of classwide arbitrations. (See *Bazzle*, *supra*, 539 U.S. 444; *Keating v. Southland Corp.* (1984) 31 Cal.3d 584, 612, revd. on other grounds (1984) 465 U.S. 1.) Indeed, in *Concepcion* itself, the U.S. Supreme Court acknowledged that consensual class arbitrations are permitted under the FAA. (*Concepcion*, *supra*, 131 S.Ct. at p. 1751.)

Second, Section 2 of the FAA, commonly referred to as the FAA's savings clause, provides that any arbitration agreement may be held invalid

in whole or in part under any "grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Because any contract term that violates Section 7 of the NLRA is legally invalid and unenforceable as a matter of federal law, (see, *First Legal Support Services* (2004) 342 NLRB 350, 362), Section 2 of the FAA precludes the enforcement of such unlawful contract terms—even where, as here, the term has been inserted into a mandatory arbitration agreement covered by the FAA.

But even assuming there were some limited circumstances in which the explicit protections of Section 7 created a potential for conflict with the implicit objectives of the FAA, a court's obligation in construing and applying the NLRA would at most be to consider whether the language and purposes of the NLRA could fairly accommodate those other statutory objectives. (See *Mortin*, *supra*, 417 U.S. at p. 551.) Any such inquiry would have to take into account the relative strength of the potentially conflicting policies, as well as how explicitly they are stated and how directly they conflict. The NLRA's obligation to accommodate other statutory concerns should be at its weakest where, as here, the alleged conflict involves concerns that are central to the NLRA, yet only implicit or of limited scope under the other statutory scheme. (See *Sure-Tan, Inc. v. N.L.R.B.* (1984) 467 U.S. 883, 893–894 [104 S.Ct. 2803].)

Section 7 effectuates the declared policy of the United States to protect "the exercise by workers of full freedom of association [and] self-

organization . . . for the purpose of . . . mutual aid or protection." (29 U.S.C. § 151.) This policy reflects Congress's central goal of guaranteeing the right of employees, union and non-union alike, to engage in concerted activity for their and their co-workers' mutual aid and protection. (See *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 33 [47 S.Ct. 615] [right to engage in protected concerted activity is "fundamental"].)

By contrast, although the U.S. Supreme Court has found that Congress's unstated purpose in enacting the FAA includes encouraging the enforcement of consensual arbitration agreements and streamlining consensual dispute-resolution procedures, nothing the in FAA expressly guarantees or codifies those generalized principles, and certainly nothing in the FAA suggest that Congress ever intended to prevent workers from pursuing workplace claims in concert with their co-workers—which is the right Congress protected in both the 1932 Norris-LaGuardia Act and the 1935 NLRA.

For these reasons, *Concepcion* does not support the Court of Appeal's holding. There is no conflict between Section 7's explicit protection of an employee's right to engage in protected concerted activity and the unstated "goals" or "purposes" of the FAA. And, even if some potential for conflict did exist, the proper result would have been for the court to enforce the NLRA's core Section 7 right, thus protecting the

workers' ability to engage in concerted activity for their mutual aid and protection.

B. The Court of Appeal's Reliance on *CompuCredit* Was Misplaced Because the Statutory Right to Engage in Protected Concerted Activity Is a Core Substantive Right Under the NLRA.

Citing the U.S. Supreme Court's decision last term in *CompuCredit Corp. v. Greenwood* (2012) ___ U.S. ___ [132 S.Ct. 665] (*CompuCredit*), the Court of Appeal also held that the Board because " 'there is no language in the NLRA (or the related Norris-LaGuardia Act) demonstrating that Congress intended' " the NLRA's substantive statutory rights survive the FAA. (Slip Op. at pp. 19–20, quoting *Jasso v. Money Mart Exp., Inc.* (2012) ___ F.Supp.2d ___, ____ [2012 WL 1309171, at *8.].) This holding, however, misconstrues and misapplies *CompuCredit*, which was a straightforward application of the long established principle that courts evaluating the enforceability of an arbitration agreement under the FAA must determine whether the agreement includes terms that would prevent a party from vindicating substantive statutory rights—in this case, the "core . . . substantive" right under Sections 7 of the NLRA.

The narrow question of statutory construction before the U.S. Supreme Court in *CompuCredit* was whether Congress intended the Credit

Repair Organization Act ("CROA") (15 U.S.C. §1679) which provides consumers a non-waivable "right to sue" for violations of its provisions, to guarantee the right to sue *in court*, despite the parties' agreement to arbitrate. The Court held that in the absence of more specific language or evidence of congressional intent, CROA's language by itself was not sufficient to manifest Congress's intent to preclude consensual arbitration of disputes arising under the statute. By providing a non-waivable "right to sue," Congress merely intended to create a private right to pursue claims for statutory violations, without regard to forum. (See *CompuCredit*, *supra*, 132 S.Ct. at pp. 669–670.) Moreover, the Court concluded that if Congress had intended to preclude arbitration of statutory claims under CROA it could easily have done so—as it has done explicitly in several recent federal statutes. (See *id.* at p. 672.) As the Court explained, CROA's disclosure provision did *not* give consumers a substantive statutory right to bring an action in court. Instead, "[t]he *only* consumer right it creates is the right to receive the statement, which is meant to describe the consumer protections that the law elsewhere provides." (*Id.* at p. 670, italics added.)

The reasoning in *CompuCredit*, is fully consistent with the Board's approach in *Horton*, and with a host of U.S. Supreme Court cases stating that Congress has the power to override the FAA's implicit policies through substantive statutory enactments in other Acts. (See *CompuCredit*, *supra*, 131 S.Ct. at p. 668 [courts should defer to the federal policies underlying

the FAA "unless the FAA's mandate has been 'overridden by a contrary congressional command' " (internal citations omitted)]; see also *id.* at p. 672 [citing statutes where Congress expressed its intent to preserve a judicial forum for particular statutory disputes].)

The Supreme Court in *CompuCredit* could not have held that the FAA trumps all substantive rights created by other federal statutes, and it certainly did not do so. Any such holding would have been entirely inconsistent with the vast body of administrative law authorizing federal agencies to construe and apply the statutory language they are charged with implementing, and would be contrary to the numerous instances in which the Supreme Court itself has explicitly "held that proof of Congress' intent may also be discovered in the *history or purpose* of the statute in question." (*CompuCredit*, *supra*, 132 S.Ct. at p. 675 (conc. opn. of Sotomayor, J.), italics added; accord, *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26 (*Gilmer*); *Shearson/American Exp., Inc. v. McMahon* (1987) 482 U.S. 220, 227.)

The issue before the Court of Appeal was not, as in *CompuCredit*, whether Congress intended a particular federal statute (here the NLRA; there, CROA) to *preclude* arbitration of a particular dispute. Mandatory employment arbitration is certainly permitted under the federal labor statutes, and neither the Board nor Nelsen has ever contended otherwise. Here, the issue was whether particular language in the parties' arbitration

agreement—which the Court of Appeal construed as prohibiting class arbitration—deprives plaintiff of a substantive statutory right. And, the NLRB's decision in *Horton*, which rested on 70 years of unbroken case law, confirms that employer policies that prohibit class and collective adjudication of workplace disputes *does* violate substantive statutory rights. (*Horton*, *supra*, 2012 WL 36274 at pp. *7, 12, 14.)

CONCLUSION

For all the forgoing reasons, review should be granted to decide all five of the issues presented here.

August 25, 2012 **R. REX PARRIS LAW FIRM**

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this brief consists of 7,509 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: August 25, 2012

John M. Bickford, Esq.

Filed 7/18/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LORENA NELSEN,

Plaintiff and Appellant,

v.

LEGACY PARTNERS RESIDENTIAL, INC.,

Defendant and Respondent.

A132927

(San Francisco City & County Super. Ct. No. CGC-10-501912)

Lorena Nelsen filed a putative class action lawsuit against her former employer, Legacy Partners Residential, Inc. (LPI), alleging multiple violations of the California Labor Code. Based on an arbitration agreement she signed when LPI hired her, LPI moved to compel Nelsen to submit her individual claims to arbitration. Nelsen purports to appeal from the ensuing order granting LPI's motion. Although Nelsen fails to meet her burden to show the court's order is appealable, we exercise our discretion to treat the appeal as a petition for writ of mandate. We find (1) the arbitration agreement is not unconscionable; and (2) notwithstanding that the agreement precludes class arbitration by its own terms, Nelsen fails to show that compelling her to individual arbitration violates state or federal law or public policy. Accordingly, we deny Nelsen's petition and affirm the correctness of the trial court's order.

I. BACKGROUND

Nelsen was employed by LPI as a property manager in California from approximately July 2006 until June 2009. At the inception of her employment, Nelsen was provided with multiple employment forms to read and sign, including a 43-page "Team Member Handbook." The last two pages of the handbook contained a section

entitled, "TEAM MEMBER ACKNOWLEDGEMENT AND AGREEMENT" (Agreement), followed by signature lines for the "TEAM MEMBER" and a "LEGACY PARTNERS REPRESENTATIVE." The signature line was preceded by a sentence in bold print, stating, "My signature below attests to the fact that I have read, understand, and agree to be legally bound to all of the above terms." Nelsen and a representative of LPI both signed the Agreement in July 2006.

The first four paragraphs of the preprinted, form Agreement recited Nelsen's acknowledgments she (1) had received the handbook, (2) understood and agreed to all terms and conditions of employment outlined in the handbook, (3) agreed LPI could modify any of the policies or benefits set forth in the handbook at any time and for any reason, and (4) understood and agreed she was an "at will" employee. The fifth paragraph contained the following relevant arbitration language: "I agree that any claim, dispute, or controversy . . . which would otherwise require or resort [*sic*] to any court . . . between myself and Legacy Partners (or its owners, partners, directors, officers, managers, team members, agents, related companies, and parties affiliated with its team member benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Legacy Partners, . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act [9 U.S.C. § 1 et seq., (FAA)], in conformity with the procedures of the California Arbitration Act . . . ."[1] [2]

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[1] The arbitration clause further provided for (1) the arbitrator to be a retired superior court judge, subject to disqualification "on the same grounds as would apply to a judge of such court"; (2) all rules of pleading and evidence to be applicable, "including the right of demurrer . . . [,] summary judgment, judgment on the pleadings, and judgment under California Code of Civil Procedure Section 631"; (3) the arbitration award to include a "written reasoned opinion"; and (4) a right of appeal "at either party's written request" to a second arbitrator who would review the award "according to the law and procedures applicable to appellate review by the California Court of Appeal . . . of a civil judgment following court trials."

[2] There is no dispute the FAA governs the arbitration agreement. (See *Perry v. Thomas* (1987) 482 U.S. 483, 489 [FAA applies to all arbitration agreements in contracts

On July 26, 2010, Nelsen filed the present suit against LPI alleging causes of action arising under provisions of the California Labor Code for failure to (1) pay overtime, (2) provide meal periods, (3) provide rest breaks, (4) timely pay wages, (5) pay wages upon termination, (6) provide accurate itemized wage statements, (7) maintain payroll records, or (8) reimburse for necessary business expenses. The complaint also included a cause of action for violation of the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq., based on the aforementioned statutory wage claims, and seeking injunctive and other relief under that statute. The complaint was styled as a class action by Nelsen on behalf of all current and former California-based property managers who worked for LPI at any time from four years preceding the filing of the complaint until final judgment in the suit. In addition to consequential damages, restitution, and injunctive relief on behalf of the class, the complaint sought statutory penalties and attorney fees.

LPI sent Nelsen a letter advising her of the arbitration agreement and requesting she stipulate to the dismissal of her action and submit her individual claims to arbitration. After receiving no response from Nelsen, LPI moved two weeks later to compel Nelsen to arbitrate her claims. Nelsen opposed the motion on the grounds the arbitration agreement was unconscionable and violated California public policy favoring class actions and wage and hour lawsuits.

The trial court granted LPI's motion and entered an order requiring Nelsen to submit her individual claims to arbitration and staying the action in its entirety. Nelsen timely appealed from the order, citing *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 (*Franco*) in her notice of appeal as the basis for her right to appeal.

II. DISCUSSION

Nelsen contends (1) the order compelling arbitration is appealable, (2) the arbitration clause is unconscionable and unenforceable, (3) enforcement of the arbitration clause to preclude class arbitration would violate California and federal law and public policy in the employment field, and (4) her injunctive relief claim under the UCL is not subject to arbitration.

A. *Appealability*

Orders granting motions to compel arbitration are generally not immediately appealable. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648–649; *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998, 1004, fn. 8.) Such orders are normally subject to review only on appeal from the final judgment. (Code Civ. Proc., §§ 906, 1294.2; see *Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1088–1089.) Nelsen claims this case comes within an exception to the general rule recognized in *Franco* based on the so-called "death knell" doctrine. *Franco* permitted an immediate appeal from an order made in a putative class action requiring arbitration of individual claims and waiving class arbitration because such an order is effectively the "death knell" of the class litigation. (See *Franco, supra,* 171 Cal.App.4th at p. 1288.)

As an initial matter, LPI points out Nelsen failed to cite *Franco* or any other authority supporting the appealability of the trial court's order anywhere in her opening brief, in violation of California Rules of Court, rule 8.204(a)(2)(B). On that basis, LPI asks this court to (1) strike Nelsen's opening brief, and (2) find Nelsen waived any argument for appealability based on *Franco*. (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 557 [holding Court of Appeal has discretion to strike opening brief that fails to include an adequate statement of appealability]; *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 746 [contentions not raised in appellant's opening brief deemed waived].) We decline to grant either remedy in this case. Nelsen's citation to *Franco* in her notice of appeal put LPI on notice of her position regarding appealability and LPI took advantage of the opportunity in its respondent's brief to address that case and cite authority arguably contrary to it. LPI cannot reasonably claim prejudice from our consideration of Nelsen's argument based on *Franco*.

Franco involved a lawsuit filed by an employee against his employer seeking relief on behalf of himself and other employees for alleged state statutory wage and hour violations. (*Franco, supra,* 171 Cal.App.4th at p. 1282.) Franco's employer filed a petition to compel arbitration based on an arbitration agreement containing provisions waiving class arbitrations, and precluding Franco from bringing claims in arbitration on

behalf of other employees. (*Id.* at pp. 1283–1284.) The trial court granted the petition, directed Franco to submit his individual claims to arbitration, denied class arbitration, and ordered the civil action to be dismissed for all purposes except enforcement of the arbitration order or to confirm, modify or vacate any arbitration award. (*Id.* at pp. 1285, 1287.) The employer contended Franco's ensuing appeal from the order was improper. Without further elaboration, the Court of Appeal found the order was appealable: "The [trial court's] order found that the class arbitration waiver was enforceable and instructed Franco to arbitrate his claims individually. That was the 'death knell' of class litigation through arbitration." (*Id.* at p. 1288.)

The "death knell" doctrine was explained as follows in *General Motors Corp. v. Superior Court* (1988) 199 Cal.App.3d 247 at page 251: "Our Supreme Court . . . has held that where an order has the 'death knell' effect of making further proceedings in the action impractical, the order is appealable. In *Daar v. Yellow Cab Co.* [(1967)] 67 Cal.2d 695, the court held that an order sustaining a demurrer to class action allegations and transferring the action from superior court to municipal court was an appealable order. The court stated: '[H]ere the order under examination not only sustains the demurrer, but also directs the transfer of the cause from the superior court, where it was commenced as a class action, to the municipal court. We must assay the total substance of the order. It determines the legal insufficiency of the complaint as a class suit and preserves for the plaintiff alone his cause of action for damages. In "its legal effect" the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. It has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed.' "

Thus, "[t]he death knell doctrine [applies] *when it is unlikely the case will proceed as an individual action.*" (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098 (*Szetela*), italics added [finding an order sharply limiting the scope of class arbitration was not a "death knell" order].) Here, Nelsen fails to explain or demonstrate how the trial court's order makes it impossible or impracticable for her to proceed with the action

at all.[3] However, despite Nelsen's default, we need not decide whether her appeal comes within the death knell doctrine. As the Court of Appeal did in *Szetela*, we exercise our discretion to treat Nelsen's appeal as a petition for a writ of mandate. (*Szetela*, at p. 1098; *Olson v. Cory* (1983) 35 Cal.3d 390, 401.) This will ensure appellate review of the court's arbitration order in the event there is no future appellate proceeding in which the order will be reviewable.

B. *Unconscionability*

Section 2 of the FAA provides in relevant part as follows: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (9 U.S.C. § 2, italics added.) Section 2 is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24.) The italicized portion of section 2—known as its "savings clause"—provides an exception to the enforceability of arbitration agreements for " 'generally applicable contract defenses such as fraud, duress, or unconscionability.' " (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, ___ [131 S.Ct. 1740, 1746] (*Concepcion*).)

Invalidating an arbitration agreement for unconscionability under California law requires a two-part showing: "[T]he party opposing arbitration . . . ha[s] the burden of proving that the arbitration provision [is] unconscionable. [Citation.] . . . [¶] Unconscionability requires a showing of both procedural unconscionability and

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[3] As noted, Nelsen made no mention whatsoever of *Franco* or the death knell doctrine in her opening brief. In her reply brief she argues the court's order effectively ended the class litigation, but she makes no contention and cites to no evidence in the record showing it is impracticable for her to proceed with individual arbitration.

substantive unconscionability. [Citations.] Both components must be present, but not in the same degree; by the use of a sliding scale, a greater showing of procedural or substantive unconscionability will require less of a showing of the other to invalidate the claim." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795.) Where the relevant extrinsic evidence is undisputed, as it appears to be here, the appellate court reviews the arbitration contract de novo to determine whether it is legally enforceable. (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.)

Several factors support a finding LPI's arbitration agreement is procedurally unconscionable. It was part of a preprinted form agreement drafted by LPI that all of LPI's California property managers were required to sign on a take-it-or-leave-it basis. The arbitration clause was located on the last two pages of a 43-page handbook. While the top of page 42 contains a highlighted prominent title "TEAM MEMBER ACKNOWLEDGMENT AND AGREEMENT," the title makes no reference to arbitration and the arbitration language itself appears in a small font not set off in any way to stand out from the rest of the agreement or handbook. Moreover, unless Nelsen happened to be conversant with the rules of pleading in the Code of Civil Procedure, the law and procedure applicable to appellate review, and the rules for the disqualification of superior court judges, the terms and rules of the arbitration referenced in the clause would have been beyond her comprehension. (Cf. *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393 [employment arbitration provision was procedurally unconscionable because it was prepared by the employer, mandatory, and no copy of the applicable arbitration rules was provided].)

Substantive unconscionability depends on the terms of the arbitration clause itself. In this case, the issue of whether the clause in question is substantively unconscionable has already been addressed by the California Supreme Court in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*). (See also *Marshall v. Pontiac* (S.D.Cal. 2003) 287 F.Supp.2d 1229 [identical language, outcome controlled by *Little*].) The employment arbitration agreement in issue in *Little* was, for all practical purposes,

identical to Nelsen's.[4] There is just one substantive difference between the two arbitration agreements: the agreement in issue in *Little* provided that only awards exceeding $50,000 required the arbitrator's " 'written reasoned opinion' " or triggered the right to appeal to a second arbitrator. (*Id.* at p. 1070.) The Supreme Court found this one provision substantively unconscionable because, as a practical matter, the $50,000 appeal minimum operated in a lopsided way—it was much more likely to give the employer a right to appeal an unfavorable award than the employee. (*Id.* at pp. 1071–1074.) However, the Supreme Court did not toss out the arbitration provision as a whole on that

[4] The agreement read in relevant part as follows: " 'I agree that any claim, dispute, or controversy . . . which would otherwise require or allow resort to any court . . . between myself and the Company . . . arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (. . . including [Code of Civil Procedure] section 1283.05 and all of the act's other mandatory and permissive rights to discovery); provided, however, that: In addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis other than such controlling law, including but not limited to, notions of "just cause." As reasonably required to allow full use and benefit of this agreement's modifications to the act's procedures, the arbitration shall extend the times set by the act for the giving of notices and setting of hearings. Awards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial. I understand by agreeing to this binding arbitration provision, both I and the Company give up our rights to trial by jury.' " (*Little, supra*, 29 Cal.4th at pp. 1069–1070.)

basis. It ordered the $50,000 appeal threshold severed from the rest of the arbitration agreement, and found the rest of the arbitration agreement valid and enforceable. (*Id.* at pp. 1074–1076, 1085.) The provision severed by the court in *Little* does not appear in the arbitration agreement before this court.

Relying on *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 at page 113 (*Armendariz*), Nelsen claims the arbitration agreement is substantively unconscionable because it lacks bilaterality. Citing language identical to that found in Nelsen's arbitration agreement, the *Little* court rejected the same bilaterality argument Nelsen makes here: "[U]nlike the agreement in *Armendariz*, which explicitly limited the scope of the arbitration agreement to wrongful termination claims and therefore implicitly excluded the employer's claims against the employee [citation], the arbitration agreement in the present case contained no such limitation, instead applying to 'any claim, dispute, or controversy . . . between [the employee] and the Company.' " (*Little, supra,* 29 Cal.4th at p. 1075, fn. 1.) *Little* is controlling on that issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[5]

We therefore reject Nelsen's argument that her arbitration agreement with LPI is substantively unconscionable. Because she had the burden of demonstrating both procedural and substantive unconscionability (*Ajamian v. CantorCO2e, L.P., supra,* 203 Cal.App.4th at p. 795), we find the arbitration agreement was not unenforceable due to unconscionability.

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[5] Nelsen's arbitration agreement, like that in *Little*, is silent with respect to costs unique to the arbitration forum, such as arbitrator fees. (See *Little, supra,* 29 Cal.4th at pp. 1076–1085.) Because the employee's claim in *Little* involved nonwaivable statutory rights, the Supreme Court construed the arbitration agreement to require the employer to pay all types of costs unique to arbitration without regard to which party prevailed in the arbitration. (*Id.* at pp. 1076–1077, 1085, following *Armendariz, supra*, 24 Cal.4th at p. 113.) Since Nelsen's claims are also based on nonwaivable statutory rights, her arbitration agreement with LPI must be construed in the same fashion.

C. *Violation of California Public Policy*

1. *Overview of* Gentry

In her opposition to LPI's motion to compel arbitration in the trial court, Nelsen sought classwide arbitration of her claims in the alternative, if the arbitration clause as a whole was not found to be unconscionable. Relying on *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), Nelsen contends requiring individual arbitration of her wage and hour claims would violate California public policy even if the arbitration agreement is otherwise found to be valid and enforceable. As explained in *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 (*Arguelles-Romero*), "*Gentry* is concerned with the effect of a class action waiver on unwaivable statutory rights *regardless of unconscionability*." (*Id.* at p. 836.)

"*Gentry* involved a class of employees who alleged that their employer had improperly characterized them as exempt and therefore did not pay them overtime. [Citation.] The statutory right to recover overtime is unwaivable. [Citation.] The Supreme Court then concluded that, in wage and hour cases, a class action waiver would frequently have an exculpatory effect and would undermine the enforcement of the statutory right to overtime pay. [Citation.] The court identified several factors which, if present, could establish a situation in which a class action waiver would undermine the enforcement of the unwaivable statutory right. These factors included: (1) individual awards 'tend to be modest' [citation]; (2) an employee suing his or her current employer is at risk of retaliation [citation]; (3) some employees may not bring individual claims because they are unaware that their legal rights have been violated [citation]; and (4) even if some individual claims are sizeable enough to provide an incentive for individual action, it may be cost effective for an employer to pay those judgments and continue to not pay overtime—only a class action can compel the employer to properly comply with the overtime law [citation]." (*Arguelles-Romero, supra,* 184 Cal.App.4th at p. 840.)

Thus, *Gentry* holds that when a class action is requested in a wage and hour case notwithstanding an arbitration agreement expressly precluding class or representative actions, the court must decide whether individual arbitration is so impractical as a means

of vindicating employee rights that requiring it would undermine California's public policy promoting enforcement of its overtime laws. (*Arguelles-Romero, supra*, 184 Cal.App.4th at pp. 840–841.) If the court makes that determination, *Gentry* requires that it invalidate the class arbitration waiver and require class arbitration. (*Arguelles-Romero,* at pp. 840–841.) *Gentry* further held that refusing to enforce class arbitration waivers on such public policy grounds would not violate the FAA. (*Gentry, supra*, 42 Cal.4th at p. 465.)

As noted, *Gentry* applies when the arbitration agreement expressly waives class arbitration. Here, the agreement includes no express waiver of classwide arbitration, and the parties come to opposite conclusions about what inferences are to be drawn from that fact. LPI takes the position that silence cannot be construed as a waiver of class arbitration and, therefore, *Gentry* has no application. Nelsen on the other hand invites us to construe the arbitration agreement's silence as a de facto waiver of class arbitration. She correctly points out that LPI wants to have it both ways—class arbitration is precluded because the agreement does not expressly authorize it, yet *Gentry* is inapplicable because the agreement does not expressly waive such arbitration. In our view, *Gentry*'s application should not turn on whether an arbitration agreement bars class arbitration expressly or only impliedly. In either case, enforcement of the arbitration agreement according to its terms in a wage and hour case raises the identical policy issues. On the other hand, if the agreement *allows* class arbitration, Nelsen is entitled to such arbitration without regard to *Gentry*. We must therefore determine as a threshold matter whether the arbitration agreement in this case impliedly either precludes or allows class arbitration.

2. *Does the Agreement Permit Class Arbitration?*

The starting point for our analysis is the U.S. Supreme Court's holding in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.* (2010) ___ U.S. ___ [130 S.Ct. 1758] (*Stolt-Nielsen*). *Stolt-Nielsen* held "a party may not be compelled under the FAA to submit to class arbitration *unless there is a contractual basis* for concluding that the party *agreed* to do so." (130 S.Ct. at p. 1775, italics added.) The court did not specify what is

affirmatively required in order to show there is a "contractual basis" for finding an agreement to class arbitration. At the same time, it did not hold that the intent to agree to class arbitrations must be expressly stated in the arbitration agreement. The court stated: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here . . . the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." (*Id.* at p. 1776, fn. 10.) *Stolt-Nielsen* did hold that the agreement's "silence on the question of class arbitration" *cannot* be taken as dispositive evidence of an intent to *allow* class arbitration. (*Id.* at p. 1775.) Thus, "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator *may infer solely from the fact of the parties' agreement to arbitrate*." (*Ibid.*, italics added.) *Stolt-Nielsen* recognizes that "the interpretation of an arbitration agreement is generally a matter of state law." (*Id.* at p. 1773, citing *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 630–631 [129 S.Ct. 1896, 1901–1902, 173 L.Ed.2d 832].) The question of whether there is a contractual basis for concluding the parties intended to allow class arbitration must therefore be based on state law principles of contract interpretation to the extent they are consistent with the parameters of the FAA as described in *Stolt-Nielsen*. (See *Jock v. Sterling Jewelers* (2d Cir. 2011) 646 F.3d 113, 126.) Thus, whatever other state law principles apply, consent to class arbitration cannot be inferred solely from the agreement to arbitrate, and the decision cannot be based on the court's view of sound policy regarding class arbitration but must be discernible in the contract itself. (*Stolt-Nielsen,* at pp. 1767–1768.)

We recognize some federal courts have decided issues of class arbitration are generally for the arbitrator to decide, at least when the arbitration agreement does not provide otherwise. (See, e.g., *Guida v. Home Savings of America, Inc.* (E.D.N.Y. 2011) 793 F.Supp.2d 611, 617–618, and cases collected therein.)[6] Here, however, neither party

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[6] In reliance on *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444 (*Bazzle*), the Court of Appeal in *Garcia v. DIRECTV, Inc.* (2004) 115 Cal.App.4th 297 also held the arbitrator, not the court, must determine whether class arbitration was permitted by the arbitration agreement. As *Stolt-Nielsen* reminds us, however, *Bazzle*

has proposed we leave the question of class arbitration for the arbitrator. Both parties invite *this court* to decide the issue. LPI asks that we find the arbitration agreement does not reflect its consent to class arbitration, while Nelsen requests we either find the arbitration agreement unenforceable or interpret it to allow class arbitration. In any event, for the reasons we will discuss, we believe it is clear the agreement precludes class arbitration and do not think any reasonable arbitrator applying California law could find otherwise.

"The fundamental rule is that interpretation of . . . any contract . . . is governed by the mutual intent of the parties at the time they form the contract. [Citation.] The parties' intent is found, if possible, solely in the contract's written provisions. [Citation.] 'The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation.' [Citation.] If a layperson would give the contract language an unambiguous meaning, we apply that meaning." (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 196, disapproved on another point in *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1036, fn. 11.)

As an initial matter, the record does not disclose any admissible extrinsic evidence reflecting on the parties' intent with respect to class arbitration. Neither party has suggested there was any pre-agreement communication about whether the arbitration agreement covered class arbitration or any prelitigation conduct contradicting the positions the parties are taking on that subject now. We accordingly confine ourselves to construing the parties' intent based solely on the language of their arbitration agreement.

While the arbitration agreement in issue broadly encompasses any employment-related "claim, dispute, or controversy . . . which would otherwise require or [allow]

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was only a plurality decision on that point and is not binding. (*Stolt-Nielsen, supra,* 130 S.Ct. at p. 1772.) *Stolt-Nielsen* itself expressly declined to decide whether the court or the arbitrator must determine if there is a contractual basis for finding an intent to allow class arbitration. (*Ibid.*)

resort to any court," it contains one very significant limitation. The agreement only covers claims, disputes, and controversies "between myself and Legacy Partners," that is, between Nelsen and LPI. A class action by its very nature is not a dispute or controversy "between [Nelsen] and Legacy Partners." In this case (assuming a class was certified) it would be a dispute between LPI and numerous different individuals, one of whom is Nelsen. Although LPI agreed with Nelsen to arbitrate all kinds of disputes that might arise between *them*, this choice of contractual language, by its ordinary meaning, unambiguously negates any intention by LPI to arbitrate claims or disputes to which Nelsen was not a party.[7]

The Court of Appeal in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506 (*Kinecta*) was faced with a nearly identical question in a putative wage and hour class action brought by a credit union employee against her former employer. The employee arbitration agreement in that case covered " 'any claim, dispute, and/or controversy that either *I* may have against the Credit Union (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) or the Credit Union may have against *me*, arising from, related to, or having any relationship or connection whatsoever with *my* seeking employment with, employment by, or other association with the Credit Union . . . .' " (*Kinecta,* at p. 511, fn. 8, italics added.) The trial court had ordered the parties to class arbitration. (*Id.* at p. 509.) The Court of Appeal granted the employer's petition for writ of mandate overturning the trial court's order, holding the language of the arbitration agreement was inconsistent with an intent to allow class arbitration: "The arbitration provision identifies only two parties to the agreement, 'I, Kim Malone' and 'Kinecta Federal Credit Union and its wholly owned subsidiaries' (referred to . . . as 'the Credit Union'). It makes no

[7] The agreement encompasses employment-related disputes between Nelsen and LPI or its "owners, partners, directors, officers, managers, team members, agents, related companies, and parties affiliated with its team member benefit and health plans." The common thread in all such potential disputes is that they involve the adjudication of *Nelsen's* rights or obligations, not those of other employees or groups of employees.

reference to employee groups or to other employees of Kinecta, and instead refers exclusively to 'I,' 'me,' and 'my' (designating Malone)." (*Id.* at p. 577.) Applying *Stolt-Nielsen*, the court found there was no contractual basis for finding the agreement authorized class arbitration. (*Kinecta*, at p. 517.)

As in *Kinecta*, the arbitration contemplated by Nelsen's arbitration agreement in this case involves only disputes between two parties—Nelsen ("myself") and LPI. It does not encompass disputes between other employees or groups of employees and LPI. Other portions of the agreement reinforce the two-party intent of the agreement. The agreement provides for an appeal of the arbitrator's award "at *either party's* written request." (Italics added.) In bold letters, the agreement states, "I understand by agreeing to this binding arbitration provision, both *Legacy Partners and I* give up *our* rights to trial by jury." (Italics added.) All of the relevant contractual language thus contemplates a two-party arbitration. No language evinces an intent to allow class arbitration.[8]

We therefore conclude the agreement does *not* permit class arbitrations. We turn now to the question of whether the agreement is enforceable in that respect, notwithstanding *Gentry*.

3. *Enforceability under* Gentry

As the parties recognize, the continuing vitality of *Gentry* has been called into serious question by a recent decision of the United States Supreme Court holding that a state law rule requiring classwide arbitrations based on public policy grounds rather than the parties' arbitration agreement itself *does* violate the FAA. (See *Concepcion*, *supra*, 131 S.Ct. at pp. 1748–1753.) *Concepcion* expressly overruled *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), which had adopted a rule permitting the plaintiffs in certain consumer class action cases to demand classwide arbitration

[8] The agreement provides that all "rules of pleading" shall apply in the arbitration to the extent applicable to civil actions in California courts. The authorization for class actions, Code of Civil Procedure section 382, is not in the rules of pleading, which are found in part 2, title 6, chapter 1 of the Civil Procedure Code, section 420 et seq. (See *Kinecta, supra*, 205 Cal.App.4th at p. 519, fn. 3 [rejecting the argument that a similar reference to the rules of pleading evidenced an intent to allow class arbitrations].)

notwithstanding express class arbitration waivers in their arbitration agreements. (*Concepcion,* at pp. 1750–1751, 1753.) *Concepcion* held the so-called *Discover Bank* rule was preempted by the FAA because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Concepcion*, at pp. 1748, 1753.) Under the FAA, classwide arbitration cannot be imposed on a party who never agreed to it, as the *Discover Bank* rule requires. (*Concepcion*, at pp. 1750–1751.)

One California appellate court and a number of federal district courts have found *Concepcion* applies equally to *Gentry* and the FAA therefore precludes California courts from ordering classwide arbitration of wage and hour claims unless the parties have agreed to it. (See *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 959–961 (*Iskanian*); *Jasso v. Money Mart Exp., Inc.* (N.D.Cal. 2012) ___ F.Supp.2d ___ [2012 WL 1309171, *4–*7] (*Jasso*); *Sanders v. Swift Transp. Co. of Arizona, LLC* (N.D.Cal. 2012) ___ F.Supp.2d ___ [2012 WL 523527, *3]; *Lewis v. UBS Financial Services Inc.* (N.D.Cal. 2011) 818 F.Supp.2d 1161 [2011 WL 4727795, *4] (*Lewis*); *Murphy v. DIRECTV, Inc.* (C.D.Cal. 2011) 2011 WL 3319574, *4.) The reasoning of a Ninth Circuit decision in *Coneff v. AT & T Corp.* (9th Cir. 2012) 673 F.3d 1155—finding a Washington State rule deeming class arbitration waivers unconscionable was preempted by the FAA in light of *Concepcion*—would also seem to apply equally to *Gentry*, as the federal district court held in *Jasso*. (*Jasso,* at *7.)[9]

But we need not decide here whether *Concepcion* abrogates the rule in *Gentry*. By its own terms, *Gentry* creates no categorical rule applicable to the enforcement of class

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[9] The analysis in *Lewis* is representative: "Though acknowledging that *Concepcion* abrogated *Discover Bank*, Plaintiff nonetheless contends that *Gentry* remains viable because it addresses arbitration agreements contained in employment contracts, while *Concepcion* pertains to consumer contracts. *Concepcion* cannot be read so narrowly. . . . Like *Discover Bank*, *Gentry* advances a rule of enforceability that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation. As such, *Concepcion* effectively overrules *Gentry*." (*Lewis, supra*, 818 F.Supp.2d at p. 1167.)

arbitration waivers in all wage and hour cases. (*Gentry, supra*, 42 Cal.4th at p. 462.) As discussed earlier, before such waivers can be held unenforceable, *Gentry* requires a predicate showing that (1) potential individual recoveries are small; (2) there is a risk of employer retaliation; (3) absent class members are unaware of their rights; and (4) as a practical matter, only a class action can effectively compel employer overtime law compliance. (*Id.* at p. 463.) The trial court was in no position in this case to make a determination that *any* of the *Gentry* factors applied. Nelsen supported her opposition to LPI's motion to compel with a one and a half page declaration solely addressing facts relevant to procedural unconscionability. She submitted no evidence as to any of the factors discussed in *Gentry*. The record is thus wholly insufficient to apply *Gentry* even assuming for the sake of analysis *Gentry* has not been vitiated by *Concepcion*. (*Kinecta, supra*, 205 Cal.App.4th at p. 510.) Having relied on *Gentry* in her opposition to the motion to compel in the trial court, it was Nelsen's burden to come forward there with factual evidence supporting her position classwide arbitration was required. (*Kinecta*, at p. 510.) She is not entitled to a remand for the purpose of affording her a second opportunity to produce such evidence, as she now requests.

D. *Violation of Federal Law*

Finally, Nelsen cites a recent administrative decision of the National Labor Relations Board (the Board), *D.R. Horton, Inc.* (2012) 357 NLRB No. 184 (*Horton*).[10] In *Horton*, the Board determined it was a violation of the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.) to require employees as a condition of employment to waive the filing of class action or other joint or collective claims regarding wages, hours, or working conditions in any forum, arbitral or judicial.[11] (*Horton*, at p. 1.) According to the Board, such a requirement violates the substantive rights vested in employees by

[10] *Horton* was decided after Nelsen filed her opening brief. She cited it for the first time in her reply brief. At our request, LPI responded by letter brief to the new issues raised by Nelsen based on *Horton*.

[11] The decision was rendered by two members of the NLRB. The third member was recused (*Horton, supra,* 357 NLRB No. 184, at p. 1, fn. 1), and two of the five positions on the NLRB were vacant at the time.

section 7 of the NLRA to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.) Such mutual aid or protection, the Board asserted, had long been held—with judicial approval—to encompass "employees' ability to join together to pursue workplace grievances, including through litigation." (*Horton,* at p. 2.)

The Board further found in *Horton* that its interpretation of the NLRA to bar mandatory waivers of class arbitration over wages, hours, and working conditions did not conflict with the FAA or with the Supreme Court's decisions in *Concepcion* and *Stolt-Nielsen. Concepcion* involved a conflict between the FAA and *state law* which, under the supremacy clause, had to be resolved in favor of the FAA. (*Horton, supra*, 357 NLRB No. 184, at p. 12.) By contrast, the NLRA reflected federal substantive law, removing supremacy clause considerations from the equation. The Board reasoned that the strong federal policy embodied in the NLRA to protect the right of employees to engage in collective action trumped the FAA. (*Horton*, at pp. 8–12.) Further, the Board opined it was not in fact mandating class arbitration, contrary to *Concepcion* and *Stolt-Nielsen*, but holding employers may not, consistent with the NLRA, require individual arbitration without leaving a *judicial* forum open for class and collective claims. (*Horton*, at pp. 8–12.)

For a number of reasons, we decline to follow *Horton* here. Since we are not bound by the decisions of lower federal courts on questions of federal law, it follows we are also not bound by federal administrative interpretations. (See *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320–321, overruled in part by *Bates v. Dow Agrosciences L.L.C.* (2005) 544 U.S. 431; *Debtor Reorganizers, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 696.) Although we may nonetheless consider the *Horton* decision for whatever persuasive value it has, several factors counsel caution in doing so. Only two Board members subscribed to it, and the subscribing members therefore lacked the benefit of dialogue with a full board or dissenting colleagues. The subject matter of the decision—the interplay of class action litigation, the FAA, and section 7 of the NLRA—falls well outside the Board's core expertise in collective

bargaining and unfair labor practices. The Board's decision reflects a novel interpretation of section 7 and the FAA. It cites no prior legislative expression, or judicial or administrative precedent suggesting class action litigation constitutes a "concerted activit[y] for the purpose of . . . other mutual aid or protection" (29 U.S.C. § 157), or that the policy of the FAA favoring arbitration must yield to the NLRA in the manner it proposes. In fact, before *Horton* was decided, two federal district courts had specifically rejected arguments that class action waivers in the labor context violated section 7 of the NLRA. (*Grabowski v. C.H. Robinson* (S.D.Cal. 2011) 817 F.Supp.2d 1159, 1168–1169 [class action waiver]; *Slawienski v. Nephron Pharmaceutical Corp.* (N.D.Ga. 2010) 2010 WL 5186622, *2 [class arbitration waiver].)

At least two federal district court cases rejected *Horton* after it was decided. (See *Jasso*, *supra*, 2012 WL 1309171 at *7–*10 ["Because Congress did not expressly provide [in the NLRA] that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms"]; *LaVoice v. UBS Financial Services, Inc.* (S.D.N.Y. 2012) 2012 WL 124590, *6 [*Concepcion* precludes any argument, such as that made in *Horton*, that an absolute right to collective action can be reconciled with the FAA's " 'overarching purpose' of 'ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings' "].) Another district court found *Horton* inapposite where, as in this case, the plaintiff's putative class action complaint and opposition to arbitration made no allegation his claims alleging violations of California wage and hour laws were covered by the NLRA. (*Sanders v. Swift Transp. Co. of Arizona, LLC* (N.D.Cal. 2012) ___ F.Supp.2d ___ [2012 WL 523527, *4, fn. 1].)

As illustrated in the United States Supreme Court's decision in *CompuCredit Corporation v. Greenwood* (2012) ___ U.S. ___ [132 S.Ct. 665] (*CompuCredit*), a federal statute will not be found to override an arbitration agreement under the FAA unless such a congressional intent can be shown with clarity in the statute's language or legislative history. (*Id.* at pp. 672–673; see also *Jasso*, *supra*, 2012 WL 1309171 at *8.) As the district court found in *Jasso*, "there is no language in the NLRA (or in the related

Norris–LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." (*Jasso*, at *8.)

The Second District Court of Appeal in *Iskanian* has rejected *Horton* based on the *CompuCredit* analysis and because the decision goes well beyond the scope of the NLRB's administrative expertise by interpreting a statute—the FAA—that the agency is not charged with enforcing. (*Iskanian, supra*, 206 Cal.App.4th at pp. 382–383.)

Even if we ignored all of these authorities and found *Horton* persuasive, it would be inapplicable to this case in any event. Section 7 of the NLRA concerns the rights of covered "[e]mployees." (29 U.S.C. § 157.) Under the NLRA, "[t]he term 'employee' . . . shall *not* include . . . any individual employed as a supervisor . . . ." (29 U.S.C. § 152(3), italics added.) A "supervisor" includes anyone who exercises independent judgment in, inter alia, hiring, assigning, directing, rewarding, promoting, disciplining, or discharging other employees, or in making recommendations in those areas. (29 U.S.C. § 152(11).) There is no evidence in the record as to the nature of Nelsen's duties at LPI. Her title as "Property Manager" suggests she would not even be covered by the NLRA. Decisional law generally excludes "managerial employees" from the coverage of the NLRA. (See *NLRB v. Bell Aerospace Co.* (1974) 416 U.S. 267.) Thus, we have no basis to conclude the NLRA or *Horton* have any relevance to the arbitration agreement before this court.

E. *Injunctive Relief Claim*

In her complaint, Nelsen requested injunctive relief for LPI's alleged violations of the UCL. She contends this claim is non-arbitrable under the *Broughton-Cruz* doctrine.[12] LPI maintains (1) Nelsen waived her *Broughton-Cruz* argument by failing to raise it in

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[12] *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1082–1084 (*Broughton*) held claims for injunctive relief under the Consumers Legal Remedies Act (CLRA) designed to protect the public from deceptive business practices were not subject to arbitration. *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 (*Cruz*) extended *Broughton* to include claims to enjoin unfair competition under the UCL if relief is sought to prevent further harm to the public at large rather than merely to redress or prevent injury to a plaintiff. (*Cruz,* at pp. 315–316.)

the trial court; and (2) *Broughton-Cruz* has, in any event, been abrogated in the wake of *Concepcion*. We agree with LPI on both counts.

Nelsen asserts she is entitled to raise her *Broughton-Cruz* argument for the first time on appeal because it is based on "new authority," namely, the Supreme Court's opinion in *Concepcion* which, according to Nelsen "drastically changed the legal landscape in regards to arbitration." While it is true *Concepcion* did change the legal landscape regarding arbitration, nothing in *Concepcion*'s reasoning or analysis strengthens Nelsen's *Broughton-Cruz* argument. To the contrary, as discussed *post*, *Concepcion* may have destroyed the underpinnings of *Broughton-Cruz*. That doctrine predated the proceedings in the trial court, and nothing prevented Nelsen from raising it there. In our view, she has forfeited the issue. (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 [as a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal].) Since the application of *Broughton-Cruz* depends upon a disputed factual assertion—that the injunctive relief Nelsen seeks would more than incidentally benefit the public—the forfeiture rule must be stringently applied. (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.)

In any event, a recent decision of the Ninth Circuit Court of Appeals in *Kilgore v. KeyBank, Nat. Assn.* (9th Cir. 2012) 673 F.3d 947 (*Kilgore*) casts grave doubt on whether *Broughton-Cruz* survives in the wake of *Concepcion*. We agree with *Kilgore* that *Concepcion* adopts a sweeping rule of FAA preemption. Under *Concepcion*, the FAA preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally. Absolute prohibitions on the arbitration of particular kinds of claims such as that reflected in *Broughton-Cruz* are the clearest example of such policies: "Although the *Broughton-Cruz* rule may be based upon the sound public policy judgment of the California legislature, we are not free to ignore *Concepcion*'s holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a 'particular type of claim.' Therefore, we hold that 'the analysis is simple: The conflicting [*Broughton-Cruz*] rule is displaced by the FAA.' *Concepcion*, 131 S.Ct. 1747.

Concepcion allows for no other conclusion." (*Kilgore*, at p 963.) Since *Broughton-Cruz* prohibits outright the arbitration of claims for public injunctive relief, it is in conflict with the FAA. Nelsen's argument for exempting that claim from arbitration would have to be rejected on the merits if she had not forfeited it.

Hoover v. American Income Life Insurance Co. (2012) 206 Cal.App.4th 1193, cited by Nelsen following oral argument, does not convince us otherwise. *Hoover* does not mention *Kilgore* or analyze *Concepcion*'s potential relevance to the continued application of *Broughton-Cruz*. Moreover, the court in *Hoover* found the arbitration agreement in issue was not subject to the FAA and did not encompass state statutory claims. (*Hoover*, at pp. 1208–1209.) That is not our case.

Nelsen's injunctive relief claim must be arbitrated.

III. DISPOSITION

We deny Nelsen's petition for writ of mandate and affirm the correctness of the trial court's order compelling Nelsen to individual arbitration with LPI.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.

A132927

Trial Court: San Francisco City and County Superior Court

Trial Judge: Hon. Charlotte Walter Woolard

Counsel:

R. Rex Parris Law Firm, R. Rex Parris, Alexander R. Wheeler, Jason P. Fowler, Kitty Szeto, Douglas Han; Lawyers for Justice and Edwin Aiwazian for Plaintiff and Appellant.

Rutan & Tucker, Mark J. Payne and Brandon L. Sylvia for Defendant and Respondent.

Filed 8/14/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LORENA NELSEN,

Plaintiff and Appellant,

v.

LEGACY PARTNERS RESIDENTIAL, INC.,

Defendant and Respondent.

A132927

(San Francisco City & County Super. Ct. No. CGC-10-501912)

ORDER MODIFYING OPINION AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

It is ordered that the opinion filed herein on July 18, 2012, be modified as follows:

1. On page 19 of the opinion, delete the second full sentence on the page that begins, "It cites no prior legislative expression . . . . ," and replace it with the following sentence:

> It cites no clear precedent for its holdings that "an individual who files a class . . . action regarding wages, hours or working conditions" is per se "engaged in conduct protected by Section 7," or that the FAA's policy favoring arbitration must yield to the NLRA in the manner it proposes. (*Horton*, at p. 3.)

There is no change in the judgment.

Appellant's petition for rehearing is denied.

Dated:

AUG 14 2012

MARGULIES, J.

Margulies, Acting P.J.

PROOF OF SERVICE
1013A(3) CCP

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 43364 10th Street West, Lancaster, California 93534

On August 25, 2012, I served the foregoing document described as **PLAINTIFF AND PETITIONER LORENA NELSEN'S PETITION FOR REVIEW**

__X__ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

***** Please See Attached List *****

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__X__ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U. S. postal service on that same day with postage thereon fully prepaid at Lancaster, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Executed on August 25, 2012, at Lancaster, California.

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

Vicky L. James

Vicky L. James

ATTACHMENT TO PROOF OF SERVICE

NELSEN, LORENA, et al. v. LEGACY PARTNERS, INC., et al.
SAN FRANCISCO COUNTY CASE NO. CGC-10-501912

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