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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JENNIFER OUTLAND et al., Plaintiffs and Appellants, v. MACY'S DEPARTMENT STORES, INC., Defendant and Respondent.	A133589 (San Francisco City & County Super. Ct. No. CGC-09-486259)

Plaintiff filed a class action against her former employer, defendant Macy's Department Stores, Inc. (Macy's), challenging its classification of her employment and seeking compensation. Because plaintiff's employment agreement contained an arbitration provision precluding class relief, the trial court dismissed her class claims and ordered arbitration under the United States Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion* (2011) 131 S.Ct. 1740 (*Concepcion*), which holds that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) preempts California decisional law holding certain class action waivers unenforceable. We affirm.

I. BACKGROUND

In March 2009, plaintiff filed a class action on behalf of all California residents who had been employed as group sales managers for Macy's during the prior four years. The complaint alleged plaintiff had worked as a Macy's group sales manager for over 27 years before leaving in 2008. Although she typically worked 50 or more hours per week, she was never paid overtime and was not compensated when she missed meal and rest periods because her position was classified by Macy's as exempt from the applicable

wage orders. Plaintiff contended the position was, in fact, subject to these orders and sought, on behalf of the class, compensation for overtime and meal and rest breaks, penalties, and attorney fees.

In June 2011, following issuance of *Concepcion*, Macy's filed a motion to compel arbitration of plaintiff's individual claim and dismiss her class claims. The motion was based on a four-step employee dispute resolution program called "InSTORE," implemented by Macy's in 2003. The first three steps involved internal procedures; the fourth was binding arbitration. Participation in the fourth step was voluntary, although employees were required affirmatively to opt out of this step. Because plaintiff had not opted out, Macy's argued, she had effectively agreed to binding arbitration of any work-related disputes. Macy's also argued plaintiff was precluded from acting as a class representative, since the terms of the InSTORE program included a clause stating, "The Arbitrator shall not consolidate claims of different Associates into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves representative members of a large group, who claim to share a common interest seeking relief on behalf of the group)."

In opposing the motion, plaintiff did not dispute that she was bound by the terms of the InSTORE program as a result of her failure to opt out of the fourth step, nor did she dispute that the class action waiver clause, if enforced, precluded her from serving as class representative. Instead, she argued the court should hold the class action waiver unenforceable in the context of wage and hour litigation. The trial court rejected the argument and granted the motion to compel arbitration, finding plaintiff "entered into an enforceable arbitration agreement" with Macy's that precluded class relief. Plaintiff was granted three weeks to locate a class representative who had opted out of the fourth step of the InSTORE program.

II. DISCUSSION

Plaintiff contends *Concepcion* does not require dismissal of her class claims, relying on *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*) and the decision of the National Labor Relations Board (Board) in *D. R. Horton, Inc.* (Jan. 3, 2012)

357 NLRB No. 184 (*Horton*). Because there is no material dispute as to the factual circumstances underlying Macy's motion, we review the trial court's decision de novo. (*Omar v. Ralph's Grocery Co.* (2004) 118 Cal.App.4th 955, 959.)

The issues raised by plaintiff are now before the California Supreme Court by virtue of its grant of review in *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, review granted September 6, 2012, S204032 (*Iskanian*), and we explored them in *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115 (*Nelsen*). Our discussion will therefore be relatively brief.

A. Gentry

In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), the Supreme Court held that a waiver of class action arbitration is unenforceable under the unconscionability doctrine "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages," since "the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' " (*Id.* at pp. 162–163.) Essentially the same rationale was used in *Gentry* in holding a class action arbitration waiver unenforceable in an employment agreement, the court reasoning "such a provision would lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." (*Gentry, supra,* 42 Cal.4th at p. 457.) The *Gentry* court noted both *Discover Bank* and its decision were based on the "more general principle: that although '[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses' [citation], such a waiver can be exculpatory in practical terms because it can make it very difficult for those injured by unlawful conduct to pursue a legal remedy." (*Gentry,* at p. 457.)

In *Concepcion*, the United States Supreme Court effectively overruled *Discover Bank*, holding its ruling conflicted with section 2 of the FAA, which states: "A written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save

upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; *Concepcion*, *supra*, 131 S.Ct. at pp. 1745, 1750.) According to *Concepcion*, the ruling of *Discover Bank* 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.) The court rejected the argument that the use of the unconscionability doctrine in *Discover Bank* was a permissible basis for refusing enforcement of the class action waiver under the FAA because unconscionability is a "grounds . . . for the revocation of any contract." (9 U.S.C. § 2.) While recognizing the unconscionability doctrine's role in the common law, the court held its use in *Discover Bank* was not, in effect, content-neutral with respect to arbitration. Instead, the *Discover Bank* court had "applied [the doctrine] in a fashion that disfavors arbitration." (*Concepcion*, at p. 1747.)

Plaintiff notes that *Concepcion* was expressly directed only to the rule of *Discover Bank* and argues *Gentry* remains good law. We were also presented with this argument in *Nelsen*. Although we found it unnecessary to decide the issue, we noted several federal decisions had rejected plaintiff's argument.[1] (*Nelsen, supra*, 207 Cal.App.4th at pp. 1131–1132.) We also find it unpersuasive. While it is true *Concepcion* did not discuss *Gentry*, the court's rationale applies equally to that case. As noted above, both *Discover Bank* and *Gentry* are premised on the "more general principle" that class action waivers are, in certain cases, exculpatory in effect. (*Gentry, supra*, 42 Cal.4th at p. 457.)

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[1] See *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D.Cal. 2012) 2870 F.Supp.2d 831, 839–841; *Jasso v. Money Mart Exp., Inc.* (N.D.Cal. 2012) ___ F.Supp.2d ___ [2012 WL 1309171, pp. *4–*7] (*Jasso*); *Sanders v. Swift Transp. Co. of Arizona, LLC* (N.D.Cal. 2012) 843 F.Supp.2d 1033, 1037; *Lewis v. UBS Financial Services Inc.* (N.D.Cal. 2011) 818 F.Supp.2d 1161, 1167 (*Lewis*); *Murphy v. DIRECTV, Inc.* (C.D.Cal., Aug. 2, 2011, No. 2:07-cv-06465-JHN-VBKx) 2011 WL 3319574, p. *4. The reasoning of the Ninth Circuit 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*, ___ F.Supp.2d at p. ___ [2012 WL 523527 at p. *7].)

Concepcion held this unconscionability rationale to be insufficient to overcome the mandate of the FAA. The reasoning applies equally whether the contract imposing classwide arbitration is a consumer contract, as in *Discover Bank,* or an employment contract, as in *Gentry.*

The recent decision *Franco v. Arakelian Enterprises, Inc.* (2012) 211 Cal.App.4th 314 (*Franco*) does not require a different result. The *Franco* court, following an extended analysis, concluded *Concepcion* did not overrule *Gentry* because *Gentry* did not establish "a categorical rule that invalidates class action waivers—the type of rule that *Concepcion* condemned." (*Franco,* at p. 368.) However, we find it unnecessary to resolve the issue of *Franco*'s application here. To demonstrate a class action waiver unconscionable under the rationale of *Franco,* a party must show that the waiver effectively extinguishes their statutory remedy by providing evidence of the so-called "*Gentry* factors." (*Gentry, supra,* 42 Cal.4th at pp. 457–462; *Franco*, at pp. 331, 371–372.) These include " 'the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights . . . .' " (*Franco*, at pp. 355–356.) As plaintiff's counsel acknowledged at oral argument on this matter, plaintiff did not submit any evidence to the trial court concerning the *Gentry* factors. Accordingly, even if we accepted the rationale and holding of *Franco,* we would have no basis on this record for finding the class action waiver unconscionable. (See *Franco*, at pp. 371–372 [reviewing evidence submitted in that case regarding the *Gentry* factors].)

We also recognize the court in *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487 (*Truly Nolen*), while concluding *Concepcion* was inconsistent with *Gentry,* nonetheless elected to follow *Gentry* "until the California Supreme Court has the opportunity to review the decision in light of the recent United States Supreme Court decisions in *Concepcion* and *Stolt-Nielsen* [*S. A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. ___ [130 S.Ct. 1758] (*Stolt-Nielsen*)]." (*Truly Nolen,* at p. 507.)

Notwithstanding *Truly Nolen*, we conclude we must follow *Concepcion*.[2] Although the Supreme Court did not mention *Gentry* in *Concepcion*, the interpretation of the FAA preemption announced in *Concepcion* directly and conclusively undercuts *Gentry*'s rationale. We are bound by the United States Supreme Court's rulings with respect to federal questions, such as preemption. (*Elliot v. Albright* (1989) 209 Cal.App.3d 1028, 1034.)

B. Horton

Plaintiff also argues we should follow *Horton* and hold federal labor law trumps the FAA in the context of wage and hour litigation. We rejected that argument in *Nelsen*, as did the *Truly Nolen* court. (*Truly Nolen, supra*, 208 Cal.App.4th at pp. 514–515.) We quote and adopt our ruling from *Nelsen*: "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.[3] (*Horton*, [*supra,* 357 NLRB No. 184,] at p. 1.) According to the Board, such a requirement violates the substantive rights vested in employees by 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.)

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[2] Unlike other recent appellate decisions in this area, most notably *Iskanian*, the *Truly Nolen* decision appears not to have been the subject of a petition for review to the Supreme Court. There is no record of a petition for review or request for depublication on the Supreme Court's Web site. A petition for review has been filed in *Franco*, but as of this writing the Supreme Court has taken no action on the petition.

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

"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 LLC* (2005) 544 U.S. 431, 436-437; *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., Dec. 9, 2010, No. 1:10-CV-0460-JEC) 2010 WL 5186622, p. *2 [class arbitration waiver].)

"At least two federal district court cases rejected *Horton* after it was decided. (See *Jasso, supra*, ___ F.Supp.2d ___ at pp. ___–___ [2012 WL 1309171 at pp. *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., Jan. 13, 2012, No. 11 Civ. 2308(BSJ)(JLC)) 2012 WL 124590, p. *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, supra*, [843] F.Supp.2d at p. ___, fn. 1 [2012 WL 523527 at p. *4, fn. 1].)

"As illustrated in the United States Supreme Court's decision in *CompuCredit Corp. v. Greenwood* (2012) 565 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. (565 U.S. at pp. ___–___ [132 S.Ct. at pp. 672–673]; see *Jasso*, *supra*, ___ F.Supp.2d at p. ___ [2012 WL 1309171 at p. *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 p. ___ [2012 WL 1309171 at p. *8].)" (*Nelsen, supra*, 207 Cal.App.4th at pp. 1133–1135.)

III. DISPOSITION

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Banke, J.