Filed 3/26/13 Fowler v. CarMax CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN WADE FOWLER et al., Plaintiffs and Appellants, v. CARMAX, INC. et al., Defendants and Respondents.	B238426 (Los Angeles County Super. Ct. No. BC388340)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Highberger, Judge. Reversed with directions.

Kingsley & Kingsley, Eric B. Kingsley, Darren M. Cohen; The Cooper Law Firm, Scott B. Cooper; The Carter Law Firm and Roger R. Carter, for Plaintiffs and Appellants.

Ogletree, Deakins, Nash, Smoak & Stewart, Jack F. Sholkoff and Christopher W. Decker, for Defendants and Respondents.

John Wade Fowler and Wahid Areso filed class complaints against CarMax,[1] alleging wage and hour violations. Fowler and Areso appeal from the trial court's order granting CarMax's motion to compel arbitration. We reverse and remand with directions.

BACKGROUND

As a condition of applying for employment with CarMax, Fowler and Areso were required to sign the CarMax dispute resolution agreement, which provided that any claims arising out of employment with CarMax be "settle[d] . . . exclusively by final and binding arbitration before a neutral Arbitrator," and any arbitration "will be conducted in accordance with the CarMax Dispute Resolution Rules and Procedures." Fowler signed the agreement on August 5, 2006, and Areso signed it on May 17, 2006; CarMax also signed the agreement. Fowler and Areso received a copy of the associated Dispute Resolution Rules and Procedures. We hereinafter refer to the agreement and the incorporated rules and procedures collectively as the arbitration agreement.

The arbitration agreement allowed each party up to 20 interrogatories or document requests, and allowed each party to take up to three depositions. The arbitrator had the discretion to permit additional discovery "[u]pon the request of any Party and a showing of substantial need . . . but only if the Arbitrator finds that such additional discovery is not overly burdensome, and will not unduly delay conclusion of the arbitration."

The arbitration agreement also prohibited class arbitration: "The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves an arbitration or lawsuit where representative members of a large group who claim to share a common interest seek collective relief)." The agreement also provided: "Carmax may alter or terminate the [arbitration agreement] on December 31 of any year upon giving thirty (30) calendar days written notice to Associates, provided that all claims

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[1] CarMax, Inc., CarMax Auto Superstores California, LLC, and CarMax Auto Superstores West Coast, Inc. CarMax, Inc. was dismissed without prejudice pursuant to a tolling agreement by stipulation and order filed June 24, 2008.

arising before alteration or termination shall be subject to the [arbitration agreement] in effect at the time the Arbitration Request Form is received by the Company." Notice of termination or alteration of the arbitration agreement "may be given by posting a written notice by December 1 of each year at all CarMax locations." The arbitration agreement and any award pursuant to it "shall be enforceable and subject to the Federal Arbitration Act, 9 U.S.[C.]§ 1, et seq. . . ."

In April 2008, Fowler, who was employed by CarMax as a sales consultant, filed a putative class action in superior court on behalf of a class of himself and other nonexempt CarMax employees, including a subclass of sales consultants. The complaint alleged that CarMax failed to provide meal and rest periods, failed to comply with wage statement requirements, failed to timely pay wages due at termination, and violated the unfair competition law. Areso's wife Leena, who also was employed by CarMax as a sales consultant, filed a putative class action against CarMax on behalf of all persons employed by CarMax as sales consultants in the four years prior to filing, and an amended complaint filed in July 2008 added Areso as a named plaintiff. Areso's first amended complaint alleged that CarMax failed to provide meal breaks and violated the unfair competition law.[2] The amended complaint also included a claim for civil penalties pursuant to the Private Attorneys General Act of 2004 (PAGA), Labor Code section 2698 et seq. Areso filed a notice of related cases, and the actions were assigned to the same courtroom.

Discovery ensued on both sides. On August 20, 2008, Fowler and Areso (hereinafter, collectively Plaintiffs) propounded special interrogatories and requests for production of documents to CarMax; Carmax responded in October 2008. Also in August 2008, CarMax propounded 34 requests for production of documents on Plaintiffs, who responded on September 24, 2008. On November 20, 2008, CarMax propounded special interrogatories on Plaintiffs, who responded in December 2008. On February 17,

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[2] The parties stipulated to the dismissal without prejudice of a cause of action for failure to reimburse for expenses.

2009, Plaintiffs served a second set of special interrogatories and requests for production of documents on CarMax, who responded in April 2009. Also in April 2009, CarMax served a second set of special interrogatories, and a second set of requests for production, on Plaintiffs. CarMax took the deposition of Leena Areso in September 2008, and took the deposition of Wahid Areso in October 2008. In January 2009, Plaintiffs took the deposition of CarMax's persons most knowledgeable.

CarMax filed two motions for summary adjudication in January 2009: one as to Leena and Wahid Areso's first cause of action for failure to pay overtime, and another as to Fowler's fourth cause of action for failure to provide itemized wage statements. The trial court granted both of CarMax's motions for summary adjudication on June 16, 2009. That same day, pursuant to a stipulation by the parties, the trial court stayed Plaintiffs' cases until the California Supreme Court entered a decision following its grant of review in *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25.[3] Leena Areso appealed the summary adjudication on her overtime claim, and dismissed her other claims; we affirmed the trial court's ruling. (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996.) The remaining issues in Plaintiffs' putative class actions are that CarMax failed to provide meal periods (Fowler and Areso) and rest periods (Fowler), and derivative claims.

While the stay was still in effect, on June 2, 2011, counsel for Carmax sent a letter to Plaintiff's counsel requesting that Plaintiffs submit their cases to arbitration and dismiss their class claims, in light of the United States Supreme Court's April 27, 2011 decision in *AT&T Mobility, LLC v. Concepcion* (2011) 563 U.S. ___ [179 L.Ed.2d 742, 131 S.Ct. 1740] (*Concepcion*). Counsel for Plaintiffs refused, responding that CarMax had taken steps inconsistent with the intent to invoke arbitration and had waived its right

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[3] On April 12, 2012, the California Supreme Court determined issues related to meal and rest periods not in issue on this appeal in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*).

to compel arbitration. Plaintiffs also argued that in any event, the agreement was substantively and procedurally unconscionable and therefore unenforceable.

CarMax then filed a motion on or about June 17, 2011 to vacate the stay and compel arbitration on an individual basis. Plaintiffs filed an opposition on July 1, 2011, arguing that CarMax had waived its right to compel arbitration, the agreement was procedurally and substantively unconscionable, *Concepcion* did not preempt the California Supreme Court decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), the Agreement violated the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.), and the Plaintiffs' claims under PAGA were not arbitrable. Plaintiffs requested that the court allow additional discovery before issuing a ruling to "develop a more extensive factual record on whether Defendants' class action ban would prevent Plaintiffs and the putative class members from vindicating their non-waivable statutory rights. Because Defendants had never raised this issue before the instant motion, there was no need to conduct discovery on the issue."

On July 19, 2011, the trial court held a hearing on CarMax's motion to compel arbitration, took the case under submission, and requested supplemental briefing from both parties. The court issued a proposed order granting the motion to compel on November 9, 2011. After further argument on November 17, 2011, the court issued an order granting CarMax's motion to compel on November 21, 2011. The trial court granted the motion "based primarily on the holding and reasoning of [*Concepcion*]," which the court believed "raise[d] serious questions as to the continued validity of case such as [*Gentry*]. . . ." The court found: CarMax had not waived its right to compel arbitration; *Gentry* was no longer applicable to determine whether the class action waiver was invalid; the arbitration agreement was not unconscionable merely because it was a contract of adhesion; the PAGA claim was arbitrable on an individual basis; and the NLRA did not preempt the agreement. The court concluded that Plaintiffs were required "to arbitrate their individual claims without inclusion of the class claims." The court stayed the case pending completion of the arbitration.

Plaintiffs filed a timely notice of appeal.

DISCUSSION

I. The trial court's order granting the motion to compel is appealable.

CarMax contends that the trial court's order compelling arbitration is not appealable and we should therefore dismiss the appeal. We disagree.

A trial court order compelling arbitration is ordinarily reviewable only after the arbitration is complete and a party appeals from the resulting judgment. (*Flores v. West Covina Auto Group* (2013) 212 Cal.App.4th 895, 905.) An exception is the death knell doctrine, which allows immediate appeal of such an order if it "effectively terminate[s] class claims while allowing individual claims to proceed." (*Ibid.*) As the California Supreme Court recently explained, an order "determining the plaintiff could not maintain his claims as a class action but could seek individual relief, was appealable . . . [b]ecause the order effectively rang the death knell for the class claims," and therefore was "in essence a final judgment on those claims." (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 757.) That is precisely what the trial court's order granting CarMax's motion to compel did, in finding the class action waiver was enforceable and requiring Plaintiffs to arbitrate their individual claims without inclusion of the class claims. *In re Baycol Cases I and II* make clear that Plaintiffs need not present evidence that they will not be able to pursue their *individual* claims as a result of the trial court's order. CarMax's reliance on dicta to the contrary in *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115[4] and *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094,

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[4] Despite what it termed Nelsen's "default" in failing to show that he could not pursue his individual claims, the court of appeal concluded it did not need to decide whether Nelsen's appeal was within the death knell doctrine, instead exercising its discretion to treat the appeal as a petition for a writ of mandate to "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." (*Nelsen v. Legacy Partners Residential, Inc.*, *supra*, 207 Cal.App.4th at p. 1123.) In this case, the trial court's minute order stated: "This matter is worthy of immediate appellate review via writ proceeding under the standards of C.C.P. section 166.1, and plaintiffs should so advise the Court of Appeal."

is therefore to no avail. As we stated recently, granting a motion to compel arbitration when the arbitration agreement includes a class action waiver "was the 'death knell' of class litigation through arbitration. . . . Consequently, [appellant] filed a proper appeal. [Citations.]" (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288 (*Franco*).)

II. CarMax did not waive the right to compel arbitration.

The trial court concluded that CarMax had not waived its right to compel arbitration, although before it moved to compel CarMax had filed two successful motions for summary adjudication and obtained "substantial discovery" from the Plaintiffs: "It is true that this all happened, but the key point is that it would have appeared pointless and probably even a risky strategy . . . for defendants and their counsel to challenge the controlling effect of *Discover Bank* [*v. Superior Court* (2005) 36 Cal.4th 148 (overruled in *Concepcion*, *supra*, 563 U.S. ___) (*Discover Bank*)] and *Gentry* . . . and similar California appellate authorities which appeared to prohibit state court enforcement of mandatory arbitration clauses to require individual arbitration only in the context of wage-and-hour class actions."[5] The trial court also stated, without further elaboration: "Further, and as a separate basis to find no waiver, plaintiffs have failed to make the required showing of resulting prejudice." On appeal, CarMax argues that when Plaintiffs filed their class actions complaints in 2008, the California Supreme Court had held that class action waivers were both procedurally and substantively unconscionable and thus unenforceable, first in the context of a consumer contract of adhesion (*Discover Bank*, at pp. 162–163), and then in the employment context (*Gentry*, *supra*, 42 Cal.4th at p. 463). CarMax contends that it would therefore have been futile to invoke the arbitration

[5] We held in *Franco* that *Gentry* applies to claims for meal and rest periods under the Labor Code, and that such claims rested on unwaivable statutory rights. (*Franco*, *supra*, 171 Cal.App.4th at pp. 1290, 1294.)

agreement, because under *Gentry* the arbitration agreement would have been unenforceable.[6]

Public policy strongly favors arbitration and "requires a close judicial scrutiny of waiver claims." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) "Although a court may deny a petition to compel arbitration on the ground of waiver [citation] waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Ibid.*) "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24–25 [103 S.Ct. 927, 74 L.Ed.2d 765].)

A written agreement to arbitrate an existing or future dispute can be waived if not properly asserted. (Code Civ. Proc., § 1281.2, subd. (a).) To determine whether a party has waived its right to arbitration, "relevant and properly considered" factors include: "'"(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the 'litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party."' [Citation.]" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

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[6] CarMax further contends that on April 27, 2011, when the Supreme Court decided *Concepcion*, *Gentry* was no longer good law, and CarMax soon thereafter moved to compel arbitration under the new state of affairs. As we explain below, we disagree that *Concepcion* overruled *Gentry*. Nevertheless, given that *Gentry* subjected class action waivers to close scrutiny when Plaintiffs filed their class actions, whether *Gentry* survived *Concepcion* does not control our waiver analysis.

When, as in this case, "'the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' [Citation.]" (*Ibid.*) The essential facts in this case are undisputed, and we therefore engage in de novo review.

Initially, we note that Plaintiffs filed their class complaints in April and May of 2008, and roughly a year later in June 2009, the parties stipulated to a stay of Plaintiffs' cases pending the California Supreme Court's 2012 decision in *Brinker, supra,* 53 Cal.4th 1004. That stay was still in effect when counsel for CarMax requested arbitration in June 2011. For the purpose of our waiver analysis, only slightly more than a year passed before CarMax indicated that it intended to move to compel for arbitration.

First, CarMax did not take any significant action inconsistent with the right to arbitrate. CarMax engaged in more discovery than provided for in the arbitration agreement, but as noted above, the agreement also allowed the parties to request additional discovery from the arbitrator. CarMax also successfully moved for summary adjudication on two causes of action, but as CarMax points out, the arbitration agreement provides that a party may "challenge[ ] the legal sufficiency of an asserted claim . . . in a pre-hearing brief," and the arbitrator had the power to strike a legally deficient claim prior to the arbitration hearing.

Second, the litigation machinery has been substantially invoked, with significant discovery and two summary adjudication motions, but as noted above, those actions were consistent with the terms of the arbitration agreement.

Third, CarMax did not delay for a long period before moving to compel arbitration and seeking a stay. During the year after the filing of the complaints and before the parties stipulated to a stay pending the decision in *Brinker, supra*, 53 Cal.4th 1004, *Gentry* made a motion to compel a highly risky proposition. When CarMax filed its motion to compel with the stay still in effect, it acted only slightly more than a month after *Concepcion* at least arguably overruled *Gentry*.

Fourth, CarMax did not file a counterclaim without seeking a stay.

Fifth, as we explained above, CarMax did not take any important intervening steps such as engaging in judicial discovery not available in arbitration. The arbitration agreement provided a mechanism for CarMax to request the somewhat more extensive discovery it propounded.

Sixth, Plaintiffs have made no showing of prejudice. Although Plaintiffs argue that the three years between the filing of their complaints and the motion to compel impaired their ability to enjoy the benefits or efficiencies of arbitration, as we pointed out above, fully two of those three years were subject to a stay agreed to by Plaintiffs pending the resolution of legal questions by the California Supreme Court in *Brinker*, *supra*, 53 Cal.4th 1004. The parties actively litigated the cases during the year preceding the stay, and Plaintiffs do not argue that any evidence was lost. (See *St. Agnes, supra*, 31 Cal.4th at p. 1204.)

Given the strong presumption against waiver, we agree with the trial court that no waiver occurred.

III. The arbitration agreement is not unconscionable.

Plaintiffs contend that even if CarMax did not waive the right to arbitrate, the arbitration agreement is unconscionable. We agree with the trial court that the arbitration agreement as a whole is not unconscionable.

An agreement to arbitrate is invalid if it is both procedurally and substantively unconscionable. (Code Civ. Proc., § 1281; Civ. Code, § 1670.5; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).)[7] The two types of unconscionability need not be present in the same degree, and "the more substantively oppressive the contract term, the less evidence of procedural

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[7] The trial court expressed doubt that *Armendariz, supra*, 24 Cal.4th 83, remained valid after *Concepcion*. Recently, however, the California Supreme Court found the FAA applied in a construction defect dispute and then analyzed whether the arbitration clause was unconscionable under *Armendariz*, without citation to *Concepcion*. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246–250.) We therefore employ *Armendariz* to examine whether the arbitration agreement as a whole is unconscionable.

unconscionability is required to come to the conclusion that the term is enforceable, and vice versa." (*Armendariz*, at p. 114.)

Procedural unconscionability arises in the making of the agreement, focusing on "the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795.) There is no question here that the arbitration agreement, presented to Plaintiffs for signature on a take-it-or-leave-it basis as a precondition to applying for employment with CarMax, was a standard contract of adhesion imposed and drafted by CarMax, the party with superior bargaining power. (*Armendariz, supra*, 24 Cal.4th at p. 113.) Plaintiffs do not argue, however, that they were surprised by hidden terms or somehow not informed of the terms of the agreement. There was therefore only some evidence of procedural unconscionability.

Substantive unconscionability focuses on "'"overly harsh"' or '"one-sided"' results." (*Armendariz, supra*, 24 Cal.4th at p. 114.) Plaintiffs argue that the provision allowing CarMax to alter or terminate the Arbitration Agreement on December 31 of any year by posting notice 30 days in advance at CarMax locations is unilateral and renders the agreement substantively unconscionable. Under California law, however, even a modification provision not providing for advance notice does not render an arbitration agreement illusory, because the agreement also contains an implied covenant of good faith and fair dealing. (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1463–1464.)

Although Plaintiffs do not raise this point, the arbitration agreement also provides: "[A]ll claims arising before alteration or termination shall be subject to the [agreement] in effect at the time the Arbitration Request Form is received by the Company." To the extent that this express statement would subject claims "arising" before a modification but not submitted to arbitration until after incorporation of that modification into the arbitration agreement, the covenant of good faith and fair dealing cannot vary the plain

language. (*Peleg v. Neiman Marcus Group, Inc.*, *supra*, 204 Cal.App.4th at p. 1465.)[8] Nevertheless, the arbitration agreement also provides that if any of the arbitration rules "is held to be in conflict with a mandatory provision of applicable law, the conflicting Rule or Procedure shall be modified automatically to comply with the mandatory provision" until the rules can be formally modified to comply with the law. The modification provision therefore does not constitute sufficient evidence of substantive unconscionability to counterbalance the relatively low level of procedural unconscionability.

IV. *Gentry* is still good law.

The trial court concluded that *Concepcion* rejected *Gentry* to the extent that it subjected a class action waiver in an arbitration agreement to special scrutiny as a precondition to determining whether to enforce the waiver.[9]

Discover Bank, *supra*, 36 Cal.4th 148, which the United States Supreme Court overruled in *Concepcion*, *supra*, 563 U.S. ___, involved a consumer contract of adhesion (a credit cardholder agreement). Our Supreme Court concluded that class action arbitration waivers found in such consumer contracts may be substantively unconscionable "'inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy.'" (*Discover Bank*, at p. 161.) The court explained that when a consumer contract of adhesion contains a class arbitration waiver, under circumstances where disputes likely involve small amounts of damages, and where

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[8] Plaintiffs cite *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, overruled on another point in *Concepcion*, which found unconscionable a unilateral modification clause in an arbitration agreement. That case, however, expressly did not hold that that clause by itself rendered the agreement unenforceable. (*Ingle*, at pp. 1179–1180, fn. 23.)

[9] The California Supreme Court has granted review in a case from Division Two of this district which held "the *Concepcion* decision conclusively invalidates the *Gentry* test." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, review granted Sept. 6, 2012, S204032.) The court also has granted review in *Franco v. Arakelian Enterprises, Inc.* (2012) 211 Cal.App.4th 314, review granted February 13, 2013, S207760, in which we reached the opposite result.

a litigant alleges that the party with the greater bargaining power engages in a scheme to deliberately cheat individual consumers out of small amounts of money, under California law such a waiver is invalid as unconscionable. (*Id.* at pp. 162–163.)

The California Supreme Court followed *Discover Bank* with *Gentry*, *supra*, 42 Cal.4th 443, in which the court held that a class action waiver in an arbitration agreement not in a consumer contract, but between an employee and his employer, would be invalid "under some circumstances [in which] 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*, at p. 457.) The court noted that individual awards in wage-and-hour cases tended to be modest, and employees and their attorneys must weigh that anticipated modest recovery (and the modest means of the plaintiffs) against the risk of not prevailing and incurring substantial attorney fees. Further, a current employee who sues his employer faces a greater risk of retaliation, individual employees may not sue because they are unaware that their legal rights may be violated, and even where some individual claims are larger, class actions may be necessary for the effective enforcement of statutory policies. (*Id.* at pp. 458–462.) Under those circumstances and any others imposing "real world obstacles to the vindication of class members' rights . . . through individual arbitration," (*id*. at p. 463) a class action waiver has an "exculpatory effect" and violates Civil Code section 1668. (*Gentry*, at pp. 457, 463.) After considering those factors, if the trial court concludes that a class action "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights . . . .'" (*Gentry*, *supra*, 42 Cal.4th at p. 463.) If no other provision in the arbitration agreement is unenforceable, the court should invalidate the

waiver and send the case to arbitration as a class action, or have the class action heard in court if the parties so stipulate. (*Id.* at p. 466.)

Gentry established that an arbitration agreement between an employer and an employee required a different analysis than *Discover Bank*'s rule of substantive unconscionability for consumer contracts of adhesion. The *Discover Bank* rule is "a legal determination subject to de novo review," while *Gentry* "is based on whether a class . . . action . . . is a significantly more effective practical means of vindicating unwaivable statutory rights, which is a discretionary determination subject to abuse of discretion review." (*Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 841.)

Presented with a class-action waiver in a consumer contract of adhesion, the court in *Concepcion* overruled what it called *Discover Bank*'s conclusion that "*most* collective-arbitration waivers in consumer contracts [are] unconscionable," noting "the times in which consumer contract were anything other than adhesive are long past." (*Concepcion*, *supra*, 131 S.Ct. at pp. 1746, 1750.) The court did not have before it, as we do in this case, an employment agreement, which the *Gentry* analysis examines not for unconscionability, but rather for whether, under the circumstances in the particular case, "a class . . . is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." (*Gentry*, *supra*, 42 Cal.4th at p. 463.) A class action waiver in such an agreement will be unenforceable if the trial court "finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of [wage and hour] laws for the employees alleged to be affected by the employer's violations." (*Ibid.*) The Supreme Court did not address a situation in which an employee's unwaivable statutory rights were involved, and therefore *Concepcion* does not preclude our application of a *Gentry* analysis.

The trial court in this case, however, did not address the *Gentry* factors. Because *Gentry* is still good law, the question on CarMax's motion to compel is whether the circumstances of Plaintiffs' class action establish that class litigation is likely to be

significantly more effective as a practical means of vindicating the rights of members of the putative class, whether in individual litigation or arbitration. (See *Gentry*, *supra*, 42 Cal.4th at p. 463.)

The *Gentry* analysis is fact intensive. In the opposition to CarMax's motion to compel, Plaintiffs requested additional discovery to establish a complete factual record as to the *Gentry* factors described above. The trial court held, however, that *Gentry* did not survive *Concepcion*, and so the court did not address the *Gentry* factors or Plaintiffs' discovery request. We therefore remand the matter for further proceedings, so that the trial court may determine what additional factual and legal inquiries are necessary to determine whether after applying *Gentry* the motion to compel should be granted or denied. (See *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 31.)[10]

V. The NLRA does not bar enforcement of the arbitration agreement.

The National Labor Relations Board (NLRB) concluded in *D.R. Horton, Inc.* (2012) 357 NLRB No. 184, that requiring an employee to waive class treatment of grievances violated an employee's rights under the NLRA. Under the FAA, however, a federal statute does not override an arbitration agreement unless congressional intent is clear from the statute's language or legislative history. (*CompuCredit Corp. v. Greenwood* (2012) 565 U.S. ___ [181 L.Ed.2d 586, 132 S.Ct. 665, 669].) The NLRA's provision that an employee may engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. § 157) does not show a clear congressional command to override the FAA, and *D.R. Horton, Inc.* did not identify any such command in the NLRA. (*Nelsen v. Legacy Partners Residential, Inc.*, *supra*, 207 Cal.App.4th at pp. 1133–1135.) We decline to follow the NLRB's decision.

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[10] If Fowler can demonstrate that CarMax has violated a substantive provision of the Labor Code, his PAGA claims will allow recovery of additional remedies. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 981, 987.)

DISPOSITION

The trial court's order granting CarMax's motion to compel arbitration is reversed. The matter is remanded for a determination whether the factors in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 exist so as to allow John Wade Fowler to proceed in court with the class action. Each side is to bear its costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.