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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOSEFINA GOMEZ, Plaintiff and Respondent, v. MARUKAI CORPORATION, Defendant and Appellant.	B236623 (Los Angeles County Super. Ct. No. BC434263)

APPEAL from an order of the Superior Court of Los Angeles County. Zaven V. Sinanian, Judge. Affirmed in part; reversed in part and remanded.

Lewis Brisbois Bisgaard & Smith, Jeffrey S. Ranen and Parisa Khademi for Defendant and Appellant.

Rastegar & Matern, Matthew J. Matern and Thomas S. Campbell for Plaintiff and Respondent.

Plaintiff and respondent Josefina Gomez brought this class action and representative action under the Labor Code Private Attorneys General Act of 2004 (the PAGA)[1] against her employer, defendant and appellant Marukai Corporation, for alleged violations of numerous Labor Code statutes regulating wages and working conditions. Defendant appeals from the trial court order denying its petition to compel arbitration. We affirm the trial court's finding that the provision in the arbitration agreement waiving plaintiff's right to pursue a PAGA action was severable, and that without the PAGA waiver, the arbitration agreement was enforceable. We reverse the trial court's finding that defendant waived the right to compel arbitration and remand with instructions to sever the PAGA claims and grant the petition to compel arbitration of plaintiff's remaining individual claims.

BACKGROUND

Josefina Gomez brought this action in March 2010 and amended the complaint on May 12, 2010, alleging numerous Labor Code violations related to wages, overtime pay, and rest and meal breaks. Her employer, Marukai Corporation, answered on August 9, 2010, and the court held a case management conference on October 1, 2010. The court set a hearing on class certification for March 3, 2011, but the parties stipulated twice to continue the hearing, and it was continued to September 13, 2011. Meanwhile, the parties engaged in some precertification discovery. Plaintiff propounded written discovery in October 2010. At some point, defendant propounded written discovery but the record does not disclose when that discovery was propounded. Sometime before the end of February 2011, defendant agreed to produce a class list although, as explained below, defendant never produced the list. (The trial court mistakenly recited in its statement of decision that it was after April 27, 2011, when defendant agreed to produce the class list.)

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[1] Labor Code sections 2698 through 2699.5 (the PAGA) allow actions to recover civil penalties for Labor Code violations brought by an aggrieved employee on her own behalf and on behalf of current or former employees.

The parties met and conferred over various discovery disputes, and defendant produced samples of timekeeping and payroll records on three dates between late February and early April 2011. In mid-May 2011, the parties agreed to the text of an opt-out notice and discussed its translation into Spanish and Japanese. In late July 2011, plaintiff took the depositions of two of defendant's managers. In early August 2011, defendant told plaintiff it would not produce putative class member information because it intended to move to compel arbitration of plaintiff's individual claims. At some point before this, plaintiff had hired an expert to analyze the timekeeping and payroll records, but the record does not reflect when plaintiff retained the expert or what work the expert may have done.

On August 16, 2011, defendant filed a petition to compel plaintiff to arbitrate her individual claims pursuant to an arbitration agreement she signed in 2007, about two years after she was hired. The arbitration agreement applied to all claims related to or arising out of plaintiff's employment, including statutory wage claims. It included an express waiver of the right to seek class-wide or representative relief in a private attorney general capacity, and stated that the arbitration provision was governed by the Federal Arbitration Act. (9 U.S.C. § 1 et seq. (FAA).) When plaintiff filed this action, the prevailing rule in California, as established in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*) and *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 (*Franco*), was that an arbitration agreement that waived both the right to bring a class action and the right to bring a representative private attorney general (PAGA) action "is tainted with illegality and is unenforceable." (*Franco*, at p. 1303.)

The United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740 (*Concepcion*), issued April 27, 2011, substantially altered the legal landscape concerning arbitration under the FAA. Defendant's petition to compel arbitration asserted the arbitration agreement was valid and enforceable, including the class action waiver, pursuant to the then-recent decision in *Concepcion*, which overruled the California Supreme Court's decision in

Discover Bank. In *Discover Bank*, the California Supreme Court held that arbitration provisions in certain consumer contracts of adhesion are unconscionable because they included a waiver of the consumer's right to class-wide arbitration. (*Discover Bank*, *supra*, 36 Cal.4th at p. 162.) *Concepcion* held that the FAA preempted the *Discover Bank* rule because the *Discover Bank* rule stood " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA].' " (*Concepcion*, *supra*, at p. 1753.) Thus, *Concepcion* established that a waiver of the right to seek class-wide relief did not make the parties' arbitration agreement unenforceable.

However, *Concepcion* did not address or consider whether the FAA preempted the *Franco* rule that a PAGA waiver is unconscionable. Because the complaint included PAGA claims, Marukai's petition also addressed the effect of the PAGA waiver based on the then even-*more*-recent July 12, 2011 decision in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 (*Brown*). *Brown* held that *Concepcion* did not address a statute such as PAGA and declined to depart from the California rule announced in *Franco* that a PAGA waiver is unconscionable. But *Brown* held the trial court had discretion to sever the PAGA waiver from the arbitration agreement and send the remaining claims to arbitration. (*Brown*, at pp. 503-504.) Thus, defendant contended that if the trial court followed *Franco*, it should sever the PAGA waiver in the arbitration agreement and send plaintiff's remaining individual claims to arbitration.

Plaintiff did not dispute that her claims fell within the scope of the arbitration agreement or that the FAA applied to the arbitration agreement. She opposed the petition on other grounds, including the one the trial court found dispositive—that defendant waived its right to arbitrate. Plaintiff argued that, even after *Concepcion* was decided, defendant continued to engage in discovery and conduct other procedural steps related to the class certification issue. Defendant's reply points and authorities argued that it would have been futile to bring its petition until after *Concepcion* and also *Brown* were decided, and that it "could not have known of its

right to arbitrate until at least the April 2011 *Concepcion* decision, if not the July 2011 *Brown* decision." According to defendant, the waiver argument "[did] not take into account the magnitude of [the *Concepcion*] ruling[, which was] a game changer."

As mentioned above, the *Concepcion* opinion did not address whether the FAA preempted the *Franco* rule that an arbitration agreement with a waiver of statutory private attorney general claims is unconcionable. The related question whether *Concepcion* impliedly overruled *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), with respect to class action waivers of statutory minimum wage and overtime claims, is presently pending decision by the California Supreme Court. (*Iskanian v. CLS Transportation of Los Angeles, LLC* (review granted, Sept. 19, 2012, S204032.) *Gentry* listed factors that determine whether a class action waiver in an employment contract is enforceable to resolve statutory wage and hour claims. The trial court addressed at some length the *Gentry* factors to determine whether the class action waiver should be enforced with regard to plaintiff's statutory wage claims. (*Gentry*, at pp. 453, 457.) The *Gentry* factors include: (1) the modest size of the potential for individual recovery; (2) the potential for retaliation against members of the class; (3) the fact that absent class members might be ill informed about their rights; and (4) other real world obstacles to vindicating class members' rights through individual arbitration. (*Id.* at p. 463.)

The trial court found that plaintiff did not produce sufficient evidence to establish the class action waiver was unconscionable under *Gentry*. With the exception of the PAGA claims, the trial court found that plaintiff was bound by the arbitration provision to arbitrate only her individual claims. However, finding that defendant waived its right to arbitration, the trial court denied the motion. Had defendant not waived its right to arbitrate, the trial court said, it would have severed the PAGA claims under *Brown* and let those proceed to trial.

DISCUSSION

" 'The party opposing arbitration has the burden of establishing that an arbitration provision is invalid[,]' " including by providing substantial evidence that the *Gentry* factors render unenforceable an arbitration agreement with a waiver of the right to bring statutory wage claims in a class action. (*Brown, supra*, 197 Cal.App.4th at 497, italics omitted.) We agree with the trial court that plaintiff did not produce any admissible evidence of any of the *Gentry* factors. The only "evidence" she offered discussing any of the *Gentry* factors was in the declaration of her counsel, Matthew J. Matern, which the trial court correctly found to be conclusory and speculative, with nothing more than generalized assertions about "low-wage workers." Where, as here, there was no evidence, much less substantial evidence, that the class action waiver was unenforceable under *Gentry*, plaintiff cannot demonstrate on appeal that the class action waiver rendered the arbitration agreement unenforceable. (*Brown*, at p. 497.)

Plaintiff has not preserved her right to appeal the trial court's finding that the arbitration agreement was neither procedurally nor substantively unconscionable under the more generalized standards of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, because she did not address the point in the trial court. The right to complain on appeal is waived if the issue was not raised in the trial court. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) Moreover, she has not supported her arguments on appeal with any citations to record evidence, thereby waiving the right to appellate review on that additional basis. Contentions on appeal that are not supported by references to the record will be deemed waived. The court is not required to make an independent search of the record and may disregard any claims when no reference is furnished. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

As for the PAGA waiver, the trial court found the dispute was arbitrable only after severing the PAGA claims for resolution in court. Plaintiff cannot seek appellate review of the trial court's finding that the PAGA waiver is severable from the arbitration agreement because she has not supported her arguments to the contrary with any applicable legal authorities or cogent discussion of the law. A brief must contain reasoned argument and legal authority to support its contentions or the court may treat the claim as waived. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary."].)

As for the issue at the heart of this dispute, whether defendant waived the right to compel arbitration by a delay in filing the petition to compel which caused plaintiff to suffer prejudice, a trial court's finding on waiver generally presents a question of fact which is binding on appeal if supported by substantial evidence. " 'When, however, 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.' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes Medical Center*).) In this case, the essential facts are not disputed. Whether we engage in de novo review or substantial evidence review, we find no support for the trial court's finding of waiver.

1. Principles Governing Waiver of Arbitration

Both the FAA and California state law reflect a strong policy favoring agreements to arbitrate and require close judicial scrutiny of waiver claims. (*St. Agnes Medical Center, supra,* 31 Cal.4th at p. 1195.) The party seeking to establish waiver bears a heavy burden of proof. We do not lightly infer waiver, and any doubts regarding waiver should be resolved in favor of arbitration. (*Ibid.*)

Both state and federal law also hold that no single test delineates the conduct that will constitute a waiver of arbitration, though " '[i]n determining waiver, a court can consider "(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." ' " (*St. Agnes Medical Center, supra*, 31 Cal.4th at pp. 1195-1196.)

2. Defendant Did Not Waive Its Right to Arbitrate

Plaintiff contends defendant waived its right to compel arbitration by acting inconsistently with the right to arbitrate, substantially invoking the litigation process, and prejudicing plaintiff. Defendant contends that it did not act inconsistently with the right to arbitrate because it could not enforce arbitration before *Concepcion* and *Brown*, since *Franco* established that the arbitration clause was unenforceable due to the class action and PAGA waivers. We agree, and we are not persuaded that defendant's limited participation in precertification discovery in this lawsuit was inconsistent with the right to arbitrate.

If defendant had brought its motion to compel arbitration before the opinions of the high court in *Concepcion* and of the California court in *Brown*, the trial court would have been bound to apply *Discover Bank* and *Franco* and deny any motion to compel arbitration. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . Decisions of every division of the District Courts of Appeal are binding upon all the . . . superior courts of this state . . . ."].) It was not until April 27, 2011, at the earliest, when *Concepcion* substantially changed the legal landscape and gave defendant strong support for the argument that the class arbitration waiver was enforceable. But, as the *Brown* court held, the high court in *Concepcion* did not

consider PAGA, or a statute like PAGA, which authorizes an individual employee to enforce state labor laws, "as the proxy or agent of the state's labor law enforcement agencies." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.)

Defendant's counsel testified that in late June or early July 2011, two months after *Concepcion*, his office reserved the first available hearing date for a motion to compel arbitration. But after the July 12, 2011 *Brown* case held a PAGA waiver, if severable, does not render an arbitration agreement unenforceable, defendant cancelled that hearing date so as to be able to address *Brown* in its motion and got the next available hearing date of September 9, 2011. Defendant notified plaintiff of its arbitration demand in early August 2011 and filed its motion to compel arbitration on August 16, 2011.

Defendant moved shortly after it reasonably determined that it would no longer be futile to move to compel arbitration. In other words, it acted consistently with a right to arbitrate, once that right was reasonably established. Although the safest and strongest course may have been for defendant to mention arbitration in a case management statement or answer, with the caveat that it was not moving to compel arbitration because it believed such a move was futile in light of *Discover Bank* and *Franco*, we do not think its failure to do so was an intentional waiver, under these circumstances. Although defendant could have moved to compel arbitration, as Ralph's Grocery Co. did in the *Brown* case, despite prevailing California law indicating that would have been futile, we decline to establish a rule that defendant should have done everything possible to compel arbitration, no matter how futile, expensive, or protracted the process.

The Ninth Circuit considered this issue in *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691 (*A.G. Becker*) and held that a party does not act inconsistently with a right to arbitrate when it would have been futile to move for arbitration under existing law. Similar to California law, in the Ninth Circuit, a party seeking to prove waiver must demonstrate an existing right to compel arbitration and acts inconsistent with that right. (*Id.* at p. 694.) The *A.G. Becker* defendant moved to

compel arbitration after failing to raise arbitration as an affirmative defense and litigating the case for three and a half years, during which time the parties filed pretrial motions and engaged in extensive discovery. (*Id.* at p. 693.) The defendant moved only after the United States Supreme Court rejected the "intertwining doctrine," which held that " 'when it is impractical if not impossible to separate out nonarbitrable from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over federal securities claims.' " (*Id.* at pp. 693, 695.) Prior to the high court's rejection of the intertwining doctrine, the Ninth Circuit had indicated its approval of the doctrine in a case filed two months before the plaintiffs filed suit against the defendant (*De Lancie v. Birr, Wilson & Co.* (9th Cir. 1981) 648 F.2d 1255, 1259, fn. 4). (*A.G. Becker*, at pp. 693, 695.) The court concluded that the defendant had "properly perceived that it was futile to file a motion to compel arbitration until" the Supreme Court had rejected the intertwining doctrine. (*Id.* at p. 695.) Therefore, the fact that the defendant did not file its motion to compel arbitration until then was not inconsistent with its agreement to arbitrate disputes. (*Id.* at p. 697.)

Considering the change in law *Concepcion* wrought, at least two federal district courts in California have concluded that class defendants did not act inconsistently with the right to arbitrate when they did not move to compel arbitration until after *Concepcion*. (See *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1131 [only after *Concepcion* "did it become clear that [the defendant] had the right to enforce its arbitration agreement as written and to defend against [the plaintiff's] claims in arbitration on an individual basis. . . . Because [the defendant] promptly moved to enforce its arbitration agreement as soon as it became clear that the agreement could be enforced as written, its earlier failure to seek to enforce its partially-unenforceable agreement did not reflect an intent to forego the right to seek arbitration"]; *In re Cal. Title Ins. Antitrust Litigation* (N.D.Cal., June 27, 2011, No. 08-01341 JSW) 2011 WL 2566449, *3 ["[P]rior to the ruling in *Concepcion*, in the absence of [a] class-wide arbitration provision, class arbitration

would not have been available. It therefore would indeed have been futile for Defendants in this matter to have moved to compel arbitration prior to the decision in *Concepcion*. Accordingly, the Court finds that Plaintiffs have failed to meet their burden to demonstrate that Defendants had an existing—and therefore waivable—right to compel arbitration."].)

The record provides no basis of support for the trial court's statement that it was "not persuaded by defendant's argument that the main reason why it did not move to compel arbitration was the fact that it did not have any legal authority to support such a motion until the United States Supreme Court decided the [*Concepcion*] case." There is no evidence in the record to refute defendant's argument in its reply brief in support of the petition to compel arbitration that it would have been futile to seek arbitration before *Concepcion* and *Brown* were decided. Plaintiff offered no evidence that directly or inferentially suggested defendant's explanation for the delay in seeking arbitration was pretext. Given that, even today, issues concerning FAA arbitration of California wage and hour claims await resolution by the California Supreme Court, we do not find defendant unreasonably delayed in seeking to compel arbitration.

3. Defendant Did Not Act Inconsistently with a Right to Arbitrate

With respect to the waiver factors in *St. Agnes Medical Center*, s*upra*, 31 Cal.4th at pp. 1195-1196, there is no dispute that defendant never demurred or moved to strike the complaint or moved for summary judgment, or filed a cross complaint, or any other motion, before filing its petition to compel arbitration. Defendant did not notice or take any depositions. Before filing its motion to compel arbitration, defendant offered to stipulate to a continuance of plaintiff's motion for class certification so it would not have to be filed until after the court ruled on the motion to compel arbitration. But plaintiff declined the offer. The parties had not attended a mediation or settlement conference. No judicial resources were wasted in law and motion or settlement efforts. In sum, defendant did not substantially invoke the litigation process or otherwise act inconsistently with the right to arbitrate.

The cases we have found holding that defendant waived the right to arbitration did not involve serious questions regarding the enforceability of the arbitration agreements under the prevailing law. (See, e.g., *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446 [six-month delay during which time the parties litigated multiple demurrers and motions to strike and engaged in discovery]; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451-1452 [six-month delay during which time defendant filed two demurrers, contested discovery requests, and engaged in efforts to schedule discovery]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557-558 (*Guess?*) [four-month delay during which time defendant moved for a stay, objected to written discovery, and participated in third-party depositions]; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 994 (*Sobremonte*) [10-month delay during which time defendant filed two demurrers, a cross-complaint, and motion to transfer case to municipal court, participated in five hearings, and engaged in extensive discovery].)

The defendants in the cases discussed above did not have a reasonable justification for their delay in seeking arbitration, and their unexcused delay suggested an attempt to game the system. (See, e.g., *Guess?*, *supra*, 79 Cal.App.4th at p. 558 ["Simply put, ' "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." ' "].) It was the combination of that unjustified delay and the use of the litigation process that prompted these courts to find waiver. By contrast, here, defendant had a reasonable justification for not moving immediately. Defendant had no choice but to engage in the litigation process when the governing California law held that the arbitration agreement was unenforceable. (See *Quevedo v. Macy's, Inc.*, *supra*, 798 F.Supp.2d at p. 1132 ["[The defendant] participated in the litigation and allowed 'important . . . steps' to take place only because it reasonably believed that it had no meaningful alternative given that its arbitration agreement was not enforceable as written. The Court accordingly concludes that this factor also does not support a finding of waiver."].)

4. Appellants Have Not Shown Prejudice

Mere participation in litigation and discovery without prejudice does not necessarily compel a finding of waiver. (*Sobremonte*, *supra*, 61 Cal.App.4th at p. 995.) With this in mind, we turn to whether defendant's delay prejudiced plaintiff. Under both California and federal law, the prejudice factor is critical in waiver determinations. (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1203.)

California's arbitration laws reflect a public policy in favor of arbitration as a speedy and inexpensive means of dispute resolution. (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1204.) "Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence [citation]." (*Ibid.*)

But "[b]ecause merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1203.)

Here, we have already determined that defendant did not "unduly" delay seeking arbitration, in light of the law holding that its arbitration clause was unenforceable. And there is certainly no evidence in the record that defendant waited until the "eve of trial" to seek arbitration; no trial date had been set. Plaintiff never argued that the length of the delay in seeking arbitration resulted in lost evidence. Rather, plaintiff argued, and the trial court found, defendant gained information about plaintiff's strategy that it could not have gained in arbitration, and plaintiff had already hired an expert to analyze the timekeeping and payroll records defendant had

produced in discovery before defendant notified plaintiff it was going to move to compel arbitration.

Neither plaintiff nor the court identified what information defendant supposedly gained about plaintiff's strategy that it could not have gained in arbitration. We can discern no evidence in the record to support the finding that defendant gained any strategic discovery advantage. The only information plaintiff argued that defendant obtained regarding her case strategy was in her motion for class certification. Defendant sought arbitration of plaintiff's individual claims, and dismissal of the class claims, so we are not persuaded that information disclosed in the class certification motion would have any strategic value to defendant in the arbitration of plaintiff's individual claims. Moreover, plaintiff could have protected the information from disclosure to defendant if she had accepted defendant's offer to stipulate to continue the date for filing and hearing the class certification motion until after the court ruled on the arbitration petition.

As for the claimed prejudice from plaintiff's retainer of an expert, the record does not disclose when plaintiff hired an expert. The only record evidence concerning plaintiff's expert is that counsel had "already hired an expert" before defendant notified plaintiff that defendant planned to petition the court to compel arbitration. There is nothing in the record disclosing when the expert was retained; if any retainer fee was paid and, if so, in what amount; or what work, if any, the expert did before defendant notified plaintiff that it would move to compel arbitration.

In short, plaintiff has not carried the heavy burden of proving waiver. The cases finding prejudice and waiver involved defendants that unduly delayed moving for arbitration without justification. Defendant had a reasonable justification for not moving immediately, and when that justification no longer existed, it moved reasonably promptly. Defendant cannot be said to have intentionally undermined the speedy and efficient nature of arbitration when it reasonably determined arbitration was unavailable, because the arbitration agreement was unenforceable under prevailing California law until shortly before defendant petitioned to compel

arbitration. Moreover, plaintiff has not shown prejudice, a critical factor weighing against waiver in this case.

DISPOSITION

The part of the court's order finding plaintiff's PAGA claims to be severable and finding her remaining individual claims to be arbitrable is affirmed. The court's finding that defendant waived arbitration is reversed. The case is remanded to the trial court with instructions to vacate its previous order and enter a new order severing the PAGA claims from arbitration and granting the petition to compel arbitration of plaintiff's remaining individual claims. Appellant shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

I CONCUR:

BIGELOW, P. J.

RUBIN, J. – DISSENTING

I dissent and would affirm the trial court's ruling.

Respectfully, I believe the majority opinion contains two errors in its conclusion that Marukai did not waive its right to arbitrate Gomez's claims. First, the majority misreads the applicable case law when it determines it would have been futile for Marukai to demand arbitration until after the decisions in *AT&T Mobility, LLC v. Concepcion* (2011) ___ U.S. ___, 131 S.Ct. 1740 (*Concepcion*) and *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 (*Brown*). Second, it does not properly evaluate the true state of the evidence in light of the correct standard of review. I will discuss each error in turn.

1. *A Pre-*Concepcion *Petition to Compel Arbitration Would Not Have Been Futile*

The majority's waiver analysis assumes that until *Concepcion* and *Brown* were decided, it would have been futile for Marukai to demand arbitration because existing law as expressed in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*) and *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 (*Franco*) would have barred it from doing so. According to the majority, these two decisions represented the "prevailing rule" that "an arbitration agreement that waived both the right to bring a class action and the right to bring a representative private attorney general (PAGA) action" was illegal and unenforceable. (Slip opn. at p. 3.) I respectfully disagree. I begin with a description of the relevant case law.

A. Discover Bank v. Superior Court

The *Discover Bank* court held that class action waivers in *consumer contracts of adhesion* were per se unconscionable under certain circumstances: where the

consumer plaintiffs alleged a scheme to defraud large numbers of consumers out of individually small sums of money. The court reasoned that in such cases, the small amounts of individual damage claims made individual arbitrations impractical to pursue. As a result, the class action waivers had the practical effect of exempting the defendant businesses from liability, thereby violating the public policy against exculpatory clauses. (*Discover Bank, supra,* 36 Cal.4th at pp. 160-162.)

B. Gentry v. Superior Court

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), the California Supreme Court held that arbitration provisions with class action waivers might be unconscionable and therefore unenforceable when applied to *statutory wage claims* because they could interfere with the ability of employees' to vindicate unwaivable statutory rights and to enforce the overtime laws, thereby violating public policy. (*Id.* at pp. 453, 457.) Its holding expanded on the logic of *Discover Bank* and its predicate concern that class action waivers might effectively act as exculpatory clauses because consumers would forego pursuing their small, individual claims. (*Gentry* at p. 457.) In the context of an employee's unwaivable statutory rights concerning compensation, class action waivers could have the same effect through a de facto waiver of those rights. (*Ibid.*)

The *Gentry* court laid out a four-part test for determining whether a class action waiver should be invalidated in such cases: (1) the modest size of the potential for individual recovery; (2) the potential for retaliation against members of the class; (3) the fact that absent class members might be ill informed about their rights; and (4) other real world obstacles to vindicating class members' rights through individual arbitration. (*Gentry, supra,* 42 Cal.4th at p. 463.)

The *Gentry* court could not "say categorically that all class arbitration waivers in overtime cases are unenforceable. . . . Not all overtime cases will necessarily lend themselves to class actions, nor will employees invariably request such class actions.

Nor in every case will class action or arbitration be demonstrably superior to individual actions." (*Gentry, supra,* 42 Cal.4th at p. 462.)

C. Franco v. Athens Disposal Co., Inc.

The plaintiff in *Franco* was a trash truck driver who sued his former employer for violating various Labor Code provisions relating to overtime pay and meal and rest periods. He also alleged a cause of action under the Private Attorney Generals Act (Lab. Code, §§ 2698-2699.5 (PAGA)), which authorizes an aggrieved employee to recover civil penalties on behalf of himself and other current or former employees for their employer's Labor Code violations. Franco's employment agreement included an arbitration provision that waived class arbitrations and also precluded him from acting in a private attorney general capacity. Based on those terms, the trial court granted the employer's petition to compel arbitration as to plaintiff's individual claims only.

The *Franco* court reversed, but needed to take two key steps before doing so. First, as to the Labor Code compensation and rest break claims, the court held that the plaintiff had satisfied *Gentry's* four-part test for invalidating a class arbitration waiver. If that were the only problem with the employer's arbitration agreement, the Court of Appeal said it would direct the trial court to strike the waiver and order the case to arbitration on a class-wide basis. (*Franco, supra,* 171 Cal.App.4th at p. 1299.) Next, the court went on to discuss the PAGA and the important policies that animated it. "Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary objective of a PAGA action, as it is in most class actions." Instead, the PAGA is the Legislature's attempt " 'to remedy the understaffing of California's labor law enforcement agencies by granting employees the authority to bring civil actions against their employers for Labor Code violations.' " (*Id.* at pp. 1300-1301.)

Therefore, the employer's efforts to "nullify the PAGA and preclude [the plaintiff] from seeking penalties on behalf of other current and former employees, that is, from performing the core function of a private attorney general . . . impedes *Gentry's* goal of 'comprehensive[ly] enforc[ing]' a statutory scheme through the imposition of ' "statutory sanctions" ' and 'fines.' [Citation.] Thus, the prohibition of private attorneys general is invalid." (*Franco, supra,* 171 Cal.App.4th at p. 1303.)

The PAGA waiver, combined with the class arbitration waivers that were invalid under *Gentry*, led the *Franco* court to "conclude that *the agreement as a whole* is tainted with illegality and is unenforceable." (*Franco, supra,* 171 Cal.App.4th at p. 1303, citing *Armendariz v. Foundation Health Psychare Servs.* (2000) 24 Cal.4th 83, 124-125 (*Armendariz*); italics added.)

D. AT&T Mobility v. Concepcion

The Federal Arbitration Act (9 U.S.C. § 1, et seq. (FAA) applies to contracts involving interstate commerce. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1351.) The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. (*Concepcion, supra,*131 S.Ct. at p. 1748.) *Discover Bank* was expressly overruled by *Concepcion, supra,* on the ground that it conflicted with the FAA. Even though *Discover Bank* involved the application of a standard contract defense that was ordinarily permitted under section 2 of the FAA, the *Concepcion* court concluded that, as applied, it had the effect of disfavoring arbitration and was therefore contrary to the FAA's animating philosophy of encouraging arbitration. (*Concepcion* at pp. 1746-1748.)

State courts may not rely on the uniqueness of an agreement to arbitrate as a basis for holding that the agreement is unconscionable because that would allow the courts to do what the state legislatures cannot. (*Concepcion, supra,* 131 S.Ct. at p. 1747.) Examples of such rulings, the *Concepcion* court said, would be cases finding a consumer arbitration agreement unconscionable because it did not provide for judicially monitored discovery, did not apply the rules of evidence, or did not

allow for a jury to decide the case. (*Ibid.*) Such holdings would "have a disproportionate impact on arbitration agreements" even though they seemingly fell under the savings clause of FAA section 2 due to their reliance on the generally applicable state law defense of unconscionability. (*Ibid.*)

The *Discover Bank* rule similarly interfered with arbitration, the *Concepcion* court held. While the rule did not require class wide arbitration, it allowed any party to a consumer contract to demand it after the fact. (*Concepcion, supra,* 131 S.Ct. at p. 1750.) Although parties to an arbitration agreement are free to provide for class wide proceedings, such proceedings are generally unsuited to arbitration because they make it more time consuming, expensive, and formal. Imposing them on the parties when not provided for by their arbitration agreement was therefore inconsistent with the FAA's policy of enforcing arbitration agreements according to their terms. (*Id.* at pp. 1750-1753.)

E. Brown v. Ralph's Grocery Co.

The plaintiff in *Brown, supra,* 197 Cal.App.4th 489, filed a class action lawsuit against her employer alleging causes of action for various Labor Code violations, along with a PAGA claim. The employer brought a petition to compel arbitration based on an arbitration provision in the employment agreement that barred both class wide arbitration and claims brought as a private attorney general. The trial court denied the petition after finding that the plaintiff had satisfied the *Gentry* factors for invalidating a class waiver and that the exclusion of private attorney general claims was also illegal under *Franco*.

The *Brown* court reversed. First, the *Brown* court held that the *Gentry* test was factual and that the plaintiff had failed to carry her burden of proof. As a result, the court did not need to reach the issue whether *Concepcion* applied to statutory violation claims under *Gentry*. (*Brown, supra,* 197 Cal.App.4th at pp. 496-498.)

The *Brown* court next concluded that *Concepcion* had not considered, and therefore did not govern, the validity of arbitration provisions that barred claims

brought under the PAGA, which was enacted by the Legislature as an enforcement mechanism of state law. (*Brown, supra,* 197 Cal.App.4th at pp. 501-503.) *Brown* noted the *Franco* court's holding that the entire arbitration provision in that case was invalid due to the combined effect of the PAGA bar and plaintiff's successful invocation of the *Gentry* test. (*Brown* at pp. 498-499.)

After concluding that the plaintiff in *Brown* had *not* satisfied the *Gentry* test, but that the PAGA waiver was unlawful, the court said, "[t]he issue remains whether the PAGA waiver should be severed from the arbitration agreement and whether the remainder of that agreement should be enforced according to its terms." (*Brown, supra,* 197 Cal.App.4th at p. 503.) Relying on both *Gentry, supra,* 42 Cal.4th at page 466, and *Armendariz, supra,* 24 Cal.4th at pages 121-122, the *Brown* court pointed out that when an arbitration agreement contains a single term that violates public policy, that term will generally be severed and the remainder enforced, with discretion as to whether and how to do so residing with the trial court. (*Brown,* at pp. 503-504.) Because the trial court in that case had not considered that issue, the matter was remanded so it could do so. (*Id.* at p. 504.)

2. *Under* Gentry *and* Franco*, a Petition to Compel Arbitration Would Not Have Been Futile*

The majority states that until *Brown* was decided in July 2011, a trial court hearing a petition to compel arbitration brought by Marukai would have been required to deny that petition under *Discover Bank* and *Franco*. (Slip opn. at p. 8.) As described above, it was *Gentry*, not *Discover Bank*, that concerned Labor Code violation claims. I therefore doubt whether *Concepcion* applies at all to *Gentry* or to this case. However, that issue is currently before our Supreme Court. (*Iskanian v. CLS Transportation Los Angeles, LLC.*, review granted Sept. 19, 2012, S204032.)

Assuming for argument's sake that *Gentry* was either implicitly overruled or in some way limited by *Concepcion*, the fact remains that *Gentry* did not outlaw all class arbitration waiver provisions in actions against employers for Labor Code

violations. Instead, employee plaintiffs had to satisfy *Gentry's* four-part test to invalidate the arbitration waiver. As the majority points out, the trial court in this case found that Gomez *did not* satisfy the *Gentry* test. Obviously, then, it would not have been futile for Marukai to petition to compel arbitration on the ground that the class action waiver in its arbitration provision was not unconscionable under *Gentry*. In fact, as the trial court's ruling makes clear, Marukai would have prevailed on that issue.

That leaves only Gomez's PAGA claim. The majority contends that under *Franco* it would have been futile to bring a petition to compel arbitration on that claim until *Brown* was decided in July 2011. *Brown* did not hold that *Franco* erred by holding that PAGA claims were not subject to *Concepcion* and that purported waivers of such claims were now enforceable. The *Brown* court agreed that PAGA claims were not subject to *Concepcion*, but held that the trial court was free to determine whether to sever that claim from the arbitration of the plaintiff's Labor Code violation claims, which were arbitrable. Therefore, to the extent Marukai and the majority rely on *Brown* for their futility argument, its only potential avenue of applicability must arise from the severability issue.

Franco did not hold that PAGA claims were not severable from others that would proceed to arbitration. Critical to the *Franco* ruling was the determination that the class arbitration waiver was unconscionable under *Gentry*. Had that been the only defect in the arbitration provision, the *Franco* court would have ordered that term stricken and directed that arbitration proceed as to other claims. That statement appears to reflect the long-standing rule that where an arbitration provision contains a single unenforceable term, that term will be severed and arbitration will proceed as to the remainder. (*Gentry, supra,* 42 Cal.4th at p. 466; *Armendariz, supra,* 24 Cal.4th at p. 99; *Brown, supra,* 197 Cal.App.4th at pp. 503-504.) However, because *both* the class arbitration waiver and the bar on PAGA claims tainted the entire agreement with illegality, the *Franco* court invalidated the entire provision. (*Franco, supra,* 171 Cal.App.4th at p. 1303.)

Brown, on the other hand, remanded the matter to the trial court to determine whether the PAGA claim should be severed after holding that the class arbitration waiver in that case was not unconscionable under *Gentry* and could therefore be enforced. (*Brown, supra,* 197 Cal.App.4th at pp. 498-499, 503-504.) Marukai did not need to wait for the decision in *Brown* to give it the right to seek severance of the PAGA claim. It has long been the case that an arbitration provision will still be enforced after severing out a single invalid term. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075; *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 101-102; *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 726-727.)

In short, an arbitration demand as to Gomez's Labor Code violation class claims was not futile because, as the majority acknowledges, Gomez likely could not have satisfied *Gentry's* four-part test. Marukai would have prevailed on that issue and Gomez would have been required to arbitrate those claims on an individual basis. Her PAGA claim would most likely have been severed, but that would not have rendered a petition to compel arbitration futile. Because Marukai has never addressed this issue, it has failed to explain why it delayed bringing a petition to compel arbitration soon after Gomez filed her complaint in March 2010, and I would therefore affirm the trial court's order on this basis.

3. *Substantial Evidence Supported the Trial Court's Waiver Findings*

The majority's waiver analysis is based on the assumption that it would have been futile to bring a petition to compel arbitration until after *Concepcion* and *Brown*. Although I disagree with that conclusion, for argument's sake I will analyze the facts concerning the waiver issue in that light.

A. *Principles Governing Waiver of Arbitration*

A party seeking to prove waiver of the right to arbitrate must show: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with

that existing right; and (3) prejudice to the party opposing arbitration. (*Hoover v. American Income Life Insurance Co.* (2012) 206 Cal.App.4th 1193, 1203 (*Hoover*).) However, waiver does not require a voluntary relinquishment of the right to arbitrate, and a party may waive the right without any intent to do so. (*Ibid.*) Although participation in the litigation of an arbitrable claim does not by itself waive a party's right to later seek arbitration, at some point continued litigation of the dispute justifies a finding of waiver. (*Id.* at p. 1204.) The relevant factors include whether: the actions of the party seeking arbitration are inconsistent with the right to arbitrate; the litigation machinery was substantially invoked and the parties' preparations for a lawsuit were well underway before the party seeking arbitration gave notice of that intent; the party seeking to arbitrate delayed a long time before trying to enforce the right to arbitrate; important intervening steps, such as taking advantage of judicial discovery procedures not available in arbitration, had taken place; and the delay affected, misled, or prejudiced the opposing party. (*Ibid.*)

There is no fixed stage in a lawsuit beyond which further litigation waives the right to arbitrate. Instead, the court views the litigation as a whole to determine whether the conduct of the party seeking arbitration was inconsistent with that right. (*Hoover, supra,* 206 Cal.App.4th at p. 1204.) "The presence or absence of prejudice from the litigation is a determinative issue. [Citation.] Because of the strong policy favoring arbitration, prejudice typically is found only where the petitioning party has unreasonably delayed seeking arbitration or substantially impaired an opponent's ability to use the benefits and efficiencies of arbitration. [Citations.] Prejudice is not found where the party opposing arbitration shows only that it incurred courts costs and legal expenses in responding to an opponent's pleadings and motions. [Citation.] Prejudice sufficient for waiver will be found where instead of seeking to compel arbitration, a party proceeds with extensive discovery that is unavailable in arbitration proceedings. [Citations]." (*Id.* at p. 1205.)

B. *Under the Applicable Standard of Review, We Defer to the Trial Court's Factual Findings*

The majority correctly states that given the strong policy favoring arbitration agreements, waiver claims deserve close judicial scrutiny. As a result, we do not lightly infer waiver, and any doubts should be resolved in favor of concluding that a waiver did not occur. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes Medical Center*).)[1] The majority is also correct when it states that the issue is of one of law for this court if the facts are undisputed and only one inference may be drawn. (*Id.* at p. 1196.)

However, whether a waiver occurred is generally a question of fact, and the trial court's finding of waiver is binding on us if it is supported by substantial evidence. (*St. Agnes Medical Center, supra,* 31 Cal.4th at p. 1196.) Where resolution of the matter turns on disputed facts, we imply all necessary findings supported by substantial evidence, and construe any reasonable inferences and resolve all ambiguities in the manner most favorable to the trial court's order. As a result, we can reverse only where the record before the trial court establishes a lack of waiver *as a matter of law*. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443 (*Lewis*).) In the next two subsections, I discuss why the evidence concerning Marukai's conduct was in dispute, compelling us to affirm the trial court's factual findings.

C. Evidence On Waiver Issue Presented to the Trial Court

Marukai's moving points and authorities were silent on the waiver issue. Relying on the declaration of her lawyer, along with certain supporting exhibits,

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1 Although the burden of proof for showing waiver of an arbitration provision is described by many decisions as a "heavy" one (see *St. Agnes Medical Center, supra,* 31 Cal.4th at p. 1195), the cases do not suggest that it imposes a burden of proof above that of preponderance of evidence. Instead, I believe it refers to the factors that must be found to exist before waiver may be found. This may be an issue for our Supreme Court to clarify.

Gomez's opposition points and authorities set forth a chain of events that she claimed showed Marukai had waived its contractual right to arbitrate.

First, Marukai knew it could demand arbitration because in 2010 it successfully petitioned the court to do so in Gomez's separate individual action against Marukai for sexual harassment. Second, the *Concepcion* decision was issued on April 27, 2011, after Marukai produced sample timecard and payroll records relevant to the issue of class certification in February and March of 2011. Next, on May 23, 2011, almost four weeks after the ruling in *Concepcion*, Marukai stipulated to continue Gomez's class certification motion from June 21 to September 13. In the stipulation filed with the trial court, Marukai represented that it was working with counsel for Gomez on giving notice to the putative class, including translations of the notice in English, Japanese, and Spanish.[2] Marukai also represented that it was conferring with Gomez to schedule the depositions of Marukai's human resources and payroll managers, that there were outstanding discovery issues that had to be resolved before Gomez filed her class certification motion, and that the continuance was necessary so the parties could complete discovery and see if an "informal resolution" of the matter was possible. After Gomez hired an expert to analyze timecard and payroll records produced by Marukai, Gomez went on to depose Marukai's human resources and payroll managers on class certification issues in July 2011, three months after *Concepcion* was decided. Finally, Marukai agreed to produce a list of putative class members after *Concepcion* was decided, but notified counsel for Gomez in an August 5, 2011, letter that based on the decision in *Concepcion*, it would not produce the list and would instead seek to arbitrate the dispute.

In its reply points and authorities, Marukai argued that it would have been futile to bring its petition until after *Concepcion* and *Brown* had been decided.

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[2] An e-mail exchange between counsel confirmed that those translations were underway.

Marukai contended it "could not have known of its right to arbitrate until at least the April 2011 *Concepcion* decision, if not the July 2011 *Brown* decision." Gomez's argument that Marukai unreasonably delayed bringing its petition to compel arbitration "did not take into account the magnitude of" the game-changing effect of *Concepcion*. Marukai also contended that in late June or early July of 2011 it requested an August 2011 hearing date on its petition to compel arbitration, then decided to cancel that hearing and set another for September 9, 2011, after the decision in *Brown* came down.

Marukai purported to support these *legal arguments* with the declaration of its lawyer, Jeffrey S. Ranen. However, his declaration made no mention of *Concepcion* or how that decision affected the timing of the petition to compel arbitration. His only statements concerning the timing issue asserted that in late June or early July of 2011, his office reserved the first available date of mid-August 2011 to hear a petition to compel arbitration. According to Ranen, after the decision in *Brown*, Marukai reviewed the "decision of whether and how to file [such a petition], and decided to cancel the mid August 2011 hearing date and reserved the current September 9, 2011 hearing date in order to address the *Brown* decision in the motion."[3]

Ranen's declaration said that Gomez twice asked to continue the class certification hearing and that he agreed to do so because it was "not my practice to create artificial barriers and deadlines." Although Marukai had propounded special and form interrogatories, and a request for production of documents to Gomez, it had not moved for summary judgment and the parties had not attended a mediation or a settlement conference. Marukai offered no other evidence on the waiver issue.

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[3] This lack of direct evidence that Marukai intentionally delayed asserting its right to arbitrate until after either *Concepcion* or *Brown* appears to have been the basis for the trial court's finding that it was "not persuaded" by Marukai's argument that the primary reason for its delay "was the fact that it did not have any legal authority to support such a motion until [*Concepcion* was decided]."

D. *The Trial Court's Waiver Finding Is Supported By the Record*

Gomez contends the trial court could have reasonably found that Marukai's delay and continued participation in class certification discovery for more than three months after *Concepcion* was decided shows conduct inconsistent with the right to arbitrate and, thus, warranted a finding of waiver. Distilled, Marukai counters that it would have been futile to seek arbitration before *Concepcion* was decided on April 27, 2011, and that it reserved a mid-August hearing date for a petition to compel arbitration sometime in late June or early July of 2011. Then, after *Brown* was decided on July 12, 2011, it needed to evaluate how that decision affected its planned petition, and therefore cancelled the mid-August hearing date and selected a September 9 hearing date instead.

Argument cannot take the place of evidence, however, (*Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 927), and there is no evidence to support Marukai's contentions. All Ranen's declaration states is that Marukai "reviewed its decision of whether and how to file a [petition to compel arbitration], and decided to cancel the mid August 2011 hearing date and reserved the current September 9, 2011 hearing date in order to address the Brown decision." He says nothing about why there was a delay from April 27, 2011, until late June or early July, at which point Marukai reserved its initial hearing date on a petition to compel arbitration, and therefore must have concluded that *Concepcion* gave it grounds to bring such a petition.

And while Marukai's evidence suggests that it concluded in late June or early July that *Concepcion* gave it grounds to bring a petition to compel arbitration, absent an evidentiary explanation, the trial court was free to conclude that Marukai learned of *Concepcion* and its effect on the arbitration provision much sooner, within a

reasonable time of the April 27 decision.[4] If so, Marukai offers neither explanation nor evidence for its late May decision to stipulate to a nearly three-month continuance of Gomez's class certification motion to permit further discovery on that issue despite its presumed knowledge of *Concepcion* and its "game-changing" effect, yet remain silent while it allowed Gomez to conduct that discovery. Instead, the only evidence concerning Marukai's first notification to Gomez comes in Ranen's August 5 letter, where he states that Marukai would renege on its promise to provide a list of putative class members because *Concepcion* made clear its right to demand arbitration.

Even if the evidence concerning Marukai's knowledge of *Concepcion* is accepted, there is no explanation for why it did not promptly notify Gomez, and instead continued to participate in class certification discovery once it had determined its significance in late June. And apart from Ranen's self-serving assertion that once *Brown* came down on July 12, Marukai needed to review the propriety of its planned petition to compel arbitration, the evidence does not explain why this was so, or why Marukai still delayed notifying Gomez while continuing to let Gomez conduct class certification discovery.

The majority skims over these evidentiary matters and makes no reasoned effort to distinguish between Marukai's trial court *arguments* and the scant evidence it produced to support them. However, the trial court was free to rely on these evidentiary omissions when evaluating the credibility of Ranen's declaration. (*Dillard v. McKnight* (1949) 34 Cal.2d 209, 223 [credibility of witness, including "omissions in his account of particular transactions, or of his own conduct," raise matters for the trier of fact]; *Burns v. Radoicich* (1947) 77 Cal.App.2d 697, 700-701 [even uncontradicted testimony may be disregarded by the trier of fact if it contains omissions concerning his conduct or is otherwise uncertain].)

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[4] It is not unreasonable for the trial court to have inferred that a law firm with both the resources and excellent reputation of Marukai's counsel learned of such a "game changing" ruling in short order after the decision came down.

With this rule in mind, I believe the trial court could properly conclude – based on the evidentiary gaps before it – that Marukai had failed to explain its delay in seeking arbitration. Due to these gaps, the evidence supports a finding that nearly one month after *Concepcion* was decided, Marukai stipulated to continue Gomez's class certification motion, representing to the court that the delay would allow the parties to work out discovery on that issue, along with issues related to notifying putative class members. Marukai remained silent while Gomez conducted that discovery, including the depositions of two Marukai employees approximately two weeks after the decision in *Brown*. Marukai never notified Gomez that it intended to assert its contractual right to arbitrate until August 5.

Absent an evidentiary explanation for Marukai's silence during this period, including why the *Brown* decision required a further delay and further silence, Marukai's conduct during this period is sufficiently inconsistent with its right to arbitrate to support the trial court's finding of waiver. (*Lewis, supra,* 205 Cal.App.4th at pp. 445-446 [party claiming right to arbitrate has responsibility to timely assert that right, and a party's unreasonable delay in demanding or seeking arbitration may, by itself, constitute a waiver of the right to arbitrate; four-month delay was sufficient to demonstrate waiver].) I certainly do not believe we can say that no waiver occurred as a matter of law.

4. *There Was Sufficient Evidence That the Delay Prejudiced Gomez*

The majority contends there was insufficient evidence that Marukai's delay in demanding arbitration prejudiced Gomez. I disagree.

Marukai propounded interrogatories and document production requests on Gomez, conduct that formed part of the trial court's finding that Gomez was prejudiced by Marukai's delay in seeking arbitration. Marukai contends this written discovery was minimal, and, because it was allowed by the applicable arbitration rules, did not give it access to discovery materials that it could not have otherwise obtained. Marukai has not described or provided a record of the discovery it

obtained, however. Furthermore, the arbitration rules do not automatically allow for written discovery. Instead, such discovery is at the discretion of the arbitrator. Because it is unclear whether that would have occurred, the trial court was free to find that Marukai in fact obtained through litigation discovery of matters it would not have been able to obtain through arbitration.

Furthermore, after *Concepcion*, Marukai remained silent and allowed Gomez to conduct discovery and investigation into class certification issues that Marukai believed were no longer applicable as *Conception* dictated that the case be arbitrated on Gomez's individual claims only. Gomez's investigation included hiring an expert to analyze payroll and time card records that Marukai produced and having the proposed class notification translated, while its discovery included deposing two Marukai employees on class certification issues. As a result, Gomez incurred the expense of class certification discovery when she might not have been required to do so at all pursuant to the arbitration provision.

This is not, as Marukai contends, a case where the party opposing arbitration simply incurred costs and legal fees to respond to pleadings and motions. Instead, Marukai's unreasonable delay in raising the arbitration issue caused Gomez to incur fees and costs for discovery and other matters related to the very issue at the heart of the delay – whether class wide claims were even allowed. As stated in *Hoover, supra*, 206 Cal.App.4th at page 1205, prejudice is found where the party seeking to arbitrate "has unreasonably delayed seeking arbitration *or* substantially impaired an opponent's ability to use the benefits and efficiencies of arbitration." (Italics added.) Here we have both. Marukai unreasonably delayed, propounded discovery when it was at best unclear it had the definitive right to do so under the applicable arbitration rules, and caused Gomez to conduct class certification discovery.

As the majority points out, Gomez did not produce records showing what expenses it occurred as a result of these actions, and it would certainly have been the better practice to do so. However, I believe the trial court, which had presided over this matter for some time, was in the best position to determine for itself the value of

the work performed. Given our duty to defer to the trial court's factual findings, I do not believe we can say as a matter of law that no prejudice occurred, and therefore we must affirm the trial court's finding on that issue.

RUBIN, J.