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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DESERT REGIONAL MEDICAL CENTER, INC., Plaintiff and Appellant, v. JAMES FERNANDEZ, Defendant and Respondent.	E076011 (Super. Ct. No. PSC1905534) OPINION
DESERT REGIONAL MEDICAL CENTER, INC., Plaintiff and Appellant, v. MARY RAFFERTY, Defendant and Respondent.	E076012 (Super. Ct. No. PSC1905546)
DESERT REGIONAL MEDICAL CENTER, INC., Plaintiff and Appellant, v. ELIZABETH SHEPHERD, Defendant and Respondent.	E076024 (Super. Ct. No. PSC195551)

APPEAL from the Superior Court of Riverside County. David M. Chapman, Judge. Affirmed.

Hill, Farrer & Burrill, Michael S. Turner and E. Sean McLoughlin, for Plaintiff and Appellant.

Department of Industrial Relations Division of Labor Standards Enforcement, Max Norris and Jessica L. Fry, for Defendants and Respondents.

I.

INTRODUCTION

Plaintiff Desert Regional Medical Center, Inc. (DRMC) appeals a trial court order entered on August 28, 2020, denying DRMC's petitions to compel arbitration of employee rest break and meal period claims brought by DRMC nurses James Fernandez, Mary Rafferty, and Elizabeth Shepherd (Respondents) against DRMC. DRMC contends the trial court erred by denying its petitions to compel arbitration and failing to stay Respondents' individual claims pending completion of arbitration in a separate proceeding initiated by Respondents' union (the California Nurses Association (Union)) on behalf of all nurses employed by DRMC in California. DRMC argues the trial court erred in denying DRMC's petitions to compel arbitration based on waiver. DRMC asserts that the issue of waiver must be determined by the arbitrator, not the trial court, and even if the court had jurisdiction to decide waiver, there was insufficient evidence to support a finding of waiver. DRMC further contends Respondents are estopped from arguing waiver. Finally, DRMC argues the trial court abused its discretion by denying

DRMC's motion for reconsideration of the August 28, 2020 order denying DRMC's petition to compel arbitration.

We reject DRMC's contentions and affirm the order denying DRMC's petitions to compel arbitration and request for a stay.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The material facts are undisputed.

Respondents are registered nurses (RNs) employed by DRMC. DRMC is a California corporation, which owns and operates Desert Regional Medical Center, California, an acute care hospital owned and operated by a subsidiary corporation of Tenet Healthcare Corporation (Tenet). DRMC provides healthcare services and is engaged in interstate commerce within the meaning of the Federal Arbitration ACT (FAA). At all times relevant to this proceeding, Respondents have been employed pursuant to a collective bargaining agreement (CBA) negotiated between DRMC and the Union.

A. *CBA Terms*

Article 11 of the CBA includes provisions governing RNs' hours of work, overtime, scheduling, wages, premiums, and other compensation. The CBA provisions guarantee that DRMC will comply with applicable California and federal wage and hour requirements, and with Industrial Welfare Commission Wage Order (Wage Order)

requirements regarding meal and rest periods. The CBA specifically addresses rest breaks, meal periods, and payment of missed break premiums.

Article 9 of the CBA sets forth mandatory grievance and arbitration procedures, which must be followed when processing disputes involving interpretation or application of the CBA. The CBA grievance process allows the Union to resolve informally RNs' disputes directly with DRMC. Under Article 9, the Union may submit to arbitration any unresolved grievance. Under federal labor law, mandatory grievance and arbitration provisions in a CBA are to be given broad effect.

The CBA further states in Article 9E that individual RNs and DRMC may voluntarily agree to arbitrate "any dispute not otherwise arbitrable under the [CBA]" under the Tenet Fair Treatment Process (FTP), which provides dispute resolution procedures for employment related disputes.

Respondents voluntarily signed a DRMC employment document, entitled "Acknowledgement," referred to herein as an Employment Arbitration Agreement. Under the agreement, Respondents agreed to submit any and all *non-CBA covered claims or disputes* to final and binding arbitration before the American Arbitration Association (AAA).

B. *Summary of Procedural Background*

The facts and procedural background summarized below show the chronological overlapping of the Union group grievance proceedings brought by the Union under the CBA on behalf of all of DRMC's RNs, and Respondents' individual claims decided by

the state Labor Commissioner. DRMC appealed the Labor Commissioner's order in state court and petitioned to compel arbitration of Respondents' individual claims.

1. Union Group Grievance

In March 2015, the Union filed with DRMC, on behalf of DRMC's RNs, a meal and rest break grievance. The Union group grievance alleges that DRMC was committing ongoing violations of the CBA and California state law by (1) altering employee timesheets without their consent; (2) refusing to provide employees with their time sheets when requested; (3) refusing to comply with the Union's request for time sheets from all employees; (4) not paying employees for missed meals in accordance with Wage Order requirements; and (5) not paying employees for their missed breaks in accordance with Wage Order requirements. The Union group grievance requested DRMC to immediately supply the Union with RN timesheets going back three years; to immediately cease and desist the practice of altering timesheets; and to pay employees for all missed meals and breaks.

In May 2015, the Union sent DRMC a letter requesting arbitration of the unresolved meal and rest period grievance under the CBA.

In May 2016, the Union filed another grievance on behalf of DRMC RNs, alleging DRMC was committing ongoing violations of the CBA by not implementing a rest break schedule and a working document for recording employee rest breaks. The Union group grievance requested DRMC to immediately pay its RNs for missed rest break penalties

and to fully comply with the CBA and state law by providing three rest breaks per 12 hour shift.

2. Respondents' Individual Claims

In July and September 2016, Respondents and three other DRMC RNs each filed their own claims with the Labor Commissioner, alleging violations of Labor Code sections 203, 226.7, and 517, and Wage Order 5; and requesting payment of (1) unpaid rest period premium wages; (2) unpaid meal period premium wages; and (3) waiting time penalties under Labor Code section 203.[1]

3. Union Group Grievance

The Union's grievances filed in March 2015 and May 2016 (group grievance), on behalf of all of DRMC's RNs were not informally resolved. Therefore, the Union referred the group grievance to arbitration under the CBA. In June 2018, the Union sent DRMC a letter noting that the unpaid meal and break group grievance remained outstanding.

4. Respondents' Individual Claims Before the Labor Commissioner

In February 2019, DRMC filed with the Labor Commissioner a brief arguing that the Labor Commissioner lacked jurisdiction to hear and decide Respondents' individual claims because they had to be resolved in another forum. DRMC asserted that the CBA

[1] The Labor Commissioner's July 19, 2019 decision appears to incorrectly state that Respondents' initial claims were filed with the Labor Commissioner in July and September *2015*, rather than in July and September *2016*, as stated in Respondent Fernandez's complaint filed with the Labor Commissioner and as stated in the December 4, 2019, federal district court order remanding the matter back to the state court.

required compliance with grievance procedures and arbitration, and Respondents' Employment Arbitration Agreements also required arbitration of Respondents' individual claims. DRMC argued that, at a minimum, the Labor Commissioner was required to defer hearing Respondents' claims until after Respondents' individual claims were arbitrated.

In February and March 2019, the Labor Commissioner heard under Labor Code section 98, Respondents' individual claims.[2] During the hearing, which lasted several days, the hearing officer heard testimony and the parties presented documentary evidence and arguments. The hearing officer overruled DRMC's objection to jurisdiction by the Labor Commissioner.

On July 19, 2019, the Labor Commissioner issued an administrative order, decision, or award of the labor commissioner (Order), which provided a detailed analysis of the Labor Commissioner's findings, analysis, and calculations. The Order stated that DRMC owed Respondents unpaid wages and interest, and ordered DRMC to pay Shepherd $64,794.62; Rafferty $57,589.92; and Fernandez $66,492.41 for unpaid wages and interest.

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[2] As the court explained in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*), such a hearing is commonly referred to as a Berman hearing, in which "'the employee may seek *administrative* relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8. [This] option was added by legislation enacted in 1976 (Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371) and is commonly known as the "Berman" hearing procedure after the name of its sponsor.' [Citation.]" (*Sonic I*, *supra*, at pp. 671-672; see also *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1127-1128 (*Sonic II*).)

5. Respondents' Individual Claims in Trial Court

On August 7, 2019, DRMC filed in the Riverside County Superior Court a notice of filing a de novo appeal of the Labor Commissioner's order awarding Respondents unpaid wages. DRMC stated in the notice that it was appealing the Order on the grounds the CBA and Wage Order required resolution of Respondents' individual claims through CBA's grievance and arbitration process. Instead of complying with those grievance and arbitration requirements, Respondents submitted individual wage claims to the Labor Commissioner. DRMC's notice of appeal of the Order further asserted that under federal arbitration law, the CBA grievance and arbitration procedures take precedent and must be exhausted before any other action is taken. DRMC argued that, therefore, the Labor Commissioner lacked jurisdiction over the Respondents' individual claims.

On August 23 and 28, 2019, DRMC filed notices of removal of DRMC's action appealing the Labor Commissioner's Order, to the federal district court on the ground the federal court had federal question jurisdiction under the federal Labor Management Relations Act (29 U.S.C. § 185).

On September 23, 2019, Respondents filed a motion to remand DRMC's case appealing the Order back to the state court.

6. Union Group Grievance

In October 2019, the Union sent DRMC a letter requesting a meeting to discuss the unresolved Union group grievance and a referral to arbitration.

7. Respondents' Individual Claims

On December 4, 2019, the federal district court granted Respondents' motion to remand back to the state court DRMC's action appealing the Labor Commissioner's Order. The federal court granted remand on the ground that "'[t]he right to remove a state court case to federal court is clearly limited to defendants.'" (*Am. Int'l Underwriters (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1260 (9th Cir. 1988 (citing 28 U.S.C. § 1441).) The federal court explained that DRMC was not a defendant and therefore "forfeited its right to a federal forum when it initially filed this action in state court."

Upon remand, DRMC filed notices of related cases and requested transfer of DRMC's action appealing the Order, to a different courtroom or courthouse. On March 12, 2020, the trial court denied DRMC's request on the ground DRMC brought its motions in the wrong courtroom.

8. DRMC's Petition to Compel Arbitration of Respondents' Individual Claims

On July 22, 2020, DRMC filed petitions to compel arbitration of Respondents' individual claims (Petition).[3] DRMC alleged in the Petition that under the FAA, DRMC is entitled to arbitrate Respondents' individual claims in accordance with the terms of the applicable agreements to arbitrate. In addition, DRMC is entitled to an order staying the judicial action until arbitration has been completed.

[3] DRMC's petitions and amended petitions to compel arbitration are referred to herein in the singular as the Petition or amended Petition to compel arbitration, because the allegations are essentially the same in each of the Respondent's Petitions.

On July 30, 2020, DRMC again filed a motion to deem DRMC's cases appealing the Order related and reassigned.

9. The Union Group Grievance

The Tenet Health labor relations manager confirmed by letter dated August 12, 2020, sent to the Union and arbitrator Michael Prihar, that the Union and Tenet, on behalf of DRMC, had agreed to arbitrate the Union group grievance regarding "Missed Meals-Time Sheets," and appoint Michael Prihar as arbitrator. Efforts to schedule the arbitration hearing were underway.[4]

10. Respondents' Individual Claims

On August 17, 2020, Respondents filed opposition to DRMC's Petition to compel arbitration and stay the action.

On August 17, 2020, DRMC's counsel's legal assistant sent Respondents' counsel an email stating that the August 28, 2020, hearing of DRMC's Petition to compel

[4] According to DRMC's appellant's reply brief (pp. 7-8) and motion to take additional evidence, filed in this court on January 7, 2022 (Exh. A, pp. 34-35), arbitration of the Union group grievance was held on August 23 and October 8, 2021, after DRMC filed its notice of appeal in this action. DRMC's motion for this court to take additional evidence is denied on the ground the additional evidenced is irrelevant. It consists of (1) the reporter's transcripts of the arbitration hearing on August 23 and October 8, 2021, and (2) exhibits entered into evidence during the arbitration. The proposed additional evidence was not before the trial court when it denied DRMC's Petition to compel arbitration on August 28, 2020, or presented during any subsequent petitions or motions to compel arbitration, or motions for reconsideration because the Union group grievance arbitration had not yet occurred. In addition, the requested additional evidence is from a different matter and different forum than the instant case.

arbitration was continued to September 18, 2020. The email further stated DRMC would serve an amended Petition and notice of the hearing in due course.

On August 24, 2020, the trial court denied DRMC's motion to deem the individual RN wage claim cases related, and to reassign the cases to a different courtroom.

On August 27, 2020, the trial court posted on the internet a tentative ruling on DRMC's original Petition to compel arbitration of Respondents' individual claims and stay the action. According to the court's tentative ruling notice and California Rules of Court, rule 3.1308(a)(1), tentative rulings for a law and motion matter were posted online by 3:00 p.m. on the court day immediately before the hearing. Oral argument must be requested by no later than 4:30 p.m. the court day before the hearing. If not requested by 4:30 p.m., the tentative ruling will become the final ruling, effective the date of the hearing.

The August 27, 2020, the tentative ruling on DRMC's Petition to compel arbitration stated that DRMC's Petition was denied on the grounds "[DRMC's] actions are inconsistent with the right to arbitration, the litigation machinery has been substantially invoked, [DRMC] delayed in obtaining a stay, important intervening steps have been taken, and the delay has affected/prejudiced [Respondents]." The tentative ruling was lengthy and provided detailed analysis of the issues raised in the Petition. It further stated that the court denied the Petition based on DRMC's waiver of the right to arbitrate and because DRMC did not attach a copy of the FTP or quote the FTP arbitration terms.

On August 27, 2020, the same day the trial court posted its tentative decision on DRMC's Petition to compel arbitration, DRMC filed a first amended Petition to compel arbitration. The allegations in the first amended Petition were the same as those in the original Petition, with the exception that DRMC's first amended Petition added the dates that Respondents signed their Employment Arbitration Agreements.

On August 28, 2020, the trial court ruled on DRMC's original Petition to compel arbitration. No appearance was made by either party. Therefore, the August 27, 2020 tentative ruling became the ruling of the court.

On September 4, 8, and 9, 2020, DRMC filed a second amended Petition to compel arbitration and stay the action.[5] DRMC's second amended Petition added a paragraph summarizing the FTP, which consists of arbitration procedures that DRMC and Respondents agreed to follow. DRMC also attached a copy of the FTP procedures.

DRMC filed a notice of hearing of the second amended Petition to compel arbitration and stay further judicial proceedings until completion of arbitration or, alternatively, to dismiss the action pending completion of the arbitration proceedings. DRMC also requested reconsideration of the August 28, 2020 order under Civil Procedure Code section 1008,[6] to allow for consideration of the second amended Petition.

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[5] DRMC filed a second amended Petition as to each of the individual Respondent's claims. As with the Petition and first amended Petition, we refer to the second amended Petitions as a single document because the allegations are essentially the same in each of the second amended Petitions.

[6] Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

DRMC explained in its notice of hearing that DRMC did not check to see if there was a tentative ruling on August 27, 2020 or appear on August 28, 2020 for the hearing on the original Petition because DRMC believed the August 28, 2020 hearing on the original Petition had been continued. Therefore, DRMC and its counsel were unaware the court issued a tentative ruling on August 27, 2020, or heard the Petition on August 28, 2020, until DRMC received a mailed copy of the August 28, 2020 minute order.

On September 11, 2020, DRMC filed an objection to the August 28, 2020 order, and requested it be vacated or the court alternatively reconsider the ruling under section 1008. DRMC explained why it believed the trial court had continued the August 28, 2020 Petition hearing, and that DRMC had no reason to believe that the court would issue a tentative ruling the day before and enter it as the order.

On September 16, 2020, Respondents filed opposition to DRMC's first amended Petition to compel arbitration. In a supporting declaration, Respondents' attorney stated that on August 27, 2020, at 7:19 p.m., DRMC email-served him with its first amended Petition to compel arbitration and stay the action. The following day, DRMC was served with the August 28, 2020 notice of ruling. Respondents opposed DRMC's request to vacate the August 28, 2020 ruling.

On September 22, 2020, DRMC filed a reply to Respondents' opposition to DRMC's second amended Petition to compel arbitration and stay action. DRMC alternatively requested reconsideration of the August 28, 2020 order.

On September 25, 2020, the trial court heard DRMC's objections to the August 28, 2020 order. The court's September 25, 2020 minute order and ruling entered on September 29, 2020, (1) overruled DRMC's objections to the August 28, 2020 order; (2) directed DRMC to refile as two separate motions its September 4, 2020 request for reconsideration and amended Petition to compel arbitration; and (3) vacated the September 29, 2020 hearing on DRMC's second amended Petition.

On September 28, 2020, DRMC filed a separate motion for reconsideration of the August 28, 2020 order denying DRMC's Petition to compel arbitration. On October 8, 2020, DRMC filed a motion to compel arbitration and for a stay.[7] Respondents opposed DRMC's motion to compel arbitration and motion for reconsideration.

On October 19, 2020, DRMC filed an objection to the September 25, 2020 minute order vacating the September 29, 2020 hearing on DRMC's second amended Petition to compel arbitration without hearing the matter, when neither party requested the hearing vacated.

On October 22, 2020, the trial court heard and denied DRMC's motion for reconsideration. The trial court adopted its detailed tentative ruling as the order of the court. The court stated in its ruling that the motion for reconsideration was untimely and

[7] This was DRMC's fourth attempt to request the trial court to compel arbitration of Respondents' individual claims. DRMC filed its original Petition on July 22, 2020, a first amended Petition on August 27, 2020, a second amended Petition on September 4, 2020, and then the "motion" to compel arbitration on October 8, 2020.

DRMC had not presented new or different facts, circumstances or law to support reconsideration. The court also denied DRMC's evidentiary objections as immaterial.

On October 27, 2020, DRMC filed notices of appeal of the August 28, 2020 order.

On November 3, 2020, the trial court heard and denied DRMC's motion to compel arbitration of Respondents' individual claims and stay the action. The court concluded the motion was moot because the court had previously ruled on DRMC's Petition to compel arbitration, which the court denied on August 28, 2020, finding in part that DRMC had waived any right to arbitration of Respondents' individual claims. The trial court had also previously denied DRMC's motion for reconsideration of the August 28, 2020 order. The court noted that although DRMC referred to its other previous requests to compel arbitration as petitions, they were actually all motions because they were filed after DRMC filed in the same case DRMC's appeal of the Labor Commissioner's Order.

On November 4, 2020, DRMC filed a notice of automatic stay pending appeal of the August 28, 2020 order denying DRMC's Petition to compel arbitration of Respondents' individual claims and to stay the action.

III.

DISCUSSION

DRMC contends the trial court erred in entering its order on August 28, 2020, denying DRMC's Petition to compel arbitration. DRMC also argues the trial court erred in denying DRMC's motion for reconsideration. We disagree as to both contentions.

A. *Right to Arbitration*

DRMC argues that under the CBA, Employment Arbitration Agreement, and FTP, Respondents were required to arbitrate their individual claims against DRMC.

1. Law Applicable to Compelling Arbitration

The FAA makes enforceable a written arbitration provision in a contract evidencing a transaction affecting interstate commerce. (*Circuit City v. Adams* (2001) 532 U.S. 105, 111-124; 9 U.S.C. § 2.) It is undisputed that DRMC is involved in interstate commerce. (*Circuit City v. Adams*, *supra*, at pp. 111-124.) The FAA also makes enforceable an obligation included in an employment collective bargaining agreement to arbitrate state statutory claims. (*14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 252, 256-258.) The FAA authorizes any party aggrieved by the failure or refusal of another to arbitrate under an enforceable arbitration agreement to petition the court for an order to compel arbitration in accordance with the terms of the arbitration agreement. (9 U.S.C. § 4.)

Section 1281.2 of the California Arbitration Act requires the trial court to grant a petition to compel arbitration unless it finds (1) no written agreement to arbitrate exists, (2) the right to compel arbitration has been waived, (3) grounds exist for rescission of the agreement, or (4) litigation is pending that may render the arbitration unnecessary or create conflicting rulings on common issues.

However, "[a]s a general rule, state statutory wage and hour claims are not subject to arbitration, whether the arbitration clause is contained in the CBA or an individual

agreement. The CBA cannot waive the right to sue under applicable federal or state statutes because these statutory rights 'devolve on petitioners as individual workers, not as members of a collective organization.'" (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1206 (*Hoover*).)

2. Respondents' Written Agreements to Arbitrate

DRMC argues that under the CBA, Respondents were required to arbitrate their individual claims, and any claims not subject to CBA arbitration must be arbitrated under Respondents' Employment Arbitration Agreement and FTP.

a. *CBA Arbitration Terms*

The CBA between DRMC and the Union representing DRMC's RNs, including Respondents, contains provisions governing DRMC's RNs' hours of work, overtime, scheduling, wages, premiums, and other compensation. The CBA provisions guarantee that DRMC will comply with applicable California and federal wage and hour requirements, and with Industrial Welfare Commission Wage Order requirements regarding meal and rest periods.

Article 9 of the CBA provides mandatory grievance and arbitration procedures for addressing grievances. A grievance is defined in the CBA as "a dispute as to the interpretation, meaning or application of a specific provision of this [CBA] Agreement." The CBA grievance process requires RNs and the Union initially to attempt to resolve informally RN disputes directly with DRMC. If unsuccessful, the Union may submit to arbitration any unresolved grievance. Under Article 9C, 2 of the CBA, "The arbitrator's

decision shall be rendered in writing and shall be final and binding on the parties and on all affected bargaining unit Registered Nurses."

The CBA states in Article 9E that individual RNs and DRMC may voluntarily agree to arbitrate "any dispute not otherwise arbitrable under the [CBA]," under the FTP. Respondents voluntarily agreed to arbitrate employment-related disputes by signing an Employment Arbitration Agreement, agreeing to submit any and all *non-CBA covered claims or disputes* with DRMC to final and binding arbitration in accordance with the FTP.

b. *DRMC Employment Arbitration Agreement*

The Employment Arbitration Agreement states that, "[e]xcept to the extent that any applicable [CBA] provided otherwise, I hereby voluntarily agree to use [DRMC's] Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tenet or its . . . affiliated companies and entities, . . . I also agree that such arbitration will be conducted . . . under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ('AAA')."

c. *The FTP*

The FTP agreement states that "Tenet has established the Fair Treatment Process ('FTP'), to provide for review of employment-related disputes between [DRMC] and its

employees, culminating in final and binding arbitration of such disputes if they cannot be resolved through the optional internal step." As to applicability and coverage, the FTP agreement to arbitrate "covers all disputes relating to or arising out of an employee's employment with [DRMC] or the termination of employment. *The only disputes or claims not covered by the FTP are those listed in the Exclusions section below*. . . . This is a mutual agreement to arbitrate claims which means that both the employee and [DRMC] *are bound to use the FTP process as the only means of resolving employment-related disputes*, and thereby *agree to forego any right they each may have had to a jury trial on issues covered by the FTP*." (Italics added.)

The first step of the three-step FTP process is optional and consists of submitting a written claim on a "Dispute Resolution Form" to DRMC's Human Resources department. If the employee is dissatisfied with DRMC's response to the claim, then the dispute must be submitted to final and binding arbitration. The required FTP arbitration process is stated in detail. The FTP explicitly states that "[c]ertain issues may not be submitted for review (or exclusive review) under the FTP. . . . [*A*]*ny non-waivable statutory claims, which may include* claims within the jurisdiction of the National Labor Relations Board, *wage claims within the jurisdiction of a local or state labor commissioner . . . are not subject to exclusive review under the FTP*. This means that *employees may file such non-waivable statutory claims with the appropriate agency* that has jurisdiction over them if they wish, regardless of whether they decide to use the FTP to resolve them. However, *if such agency completes its processing of an employee's claim and the employee decides to*

pursue further remedies on such claims in a civil action against [DRMC], the employee must use the FTP (although Step 1 may be skipped). In addition, *the FTP does not apply to employees covered by a collective bargaining agreement, unless otherwise agreed to by such employees*." (Italics added.)

The parties dispute whether Respondents' individual claims must be arbitrated under the CBA. Even if not subject to mandatory arbitration under the CBA, any claims not covered by the CBA are subject to the Employment Arbitration Agreement and FTP, agreed to by Respondents. However, the FTP expressly states that "*wage claims within the jurisdiction of a local or state labor commissioner . . . are not subject to exclusive review under the FTP*." Respondents therefore could "*file such non-waivable statutory claims with the appropriate agency*." Respondents did so.

DRMC argues that after the Labor Commissioner resolved Respondents' individual claims and DRMC appealed the decision in the superior court, DRMC had a right to arbitrate the matter. While the instant appeal was pending, the United States Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1924, 2022 WL 2135491 (*Viking*), considered whether the employer, Viking River Cruises, Inc. (Viking), had a right to compel arbitration of an employee's "individual" claim under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.) . In addressing the issue, the court in *Viking* held that the FAA preempts California law stated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, which prohibits splitting PAGA claims into arbitrable "individual" claims, which are based on a

labor violation personally experienced by an employee plaintiff,[8] and nonarbitrable "representative" claims, which are brought by the plaintiff employee on behalf of California's Labor and Workforce Development Agency (LWDA) and other employees who also experienced labor violations. (*Viking*, *supra*, at p. 1924.) The Court in *Viking* also concluded that the FAA, however, does *not* preempt the additional *Iskanian* rule prohibiting wholesale waivers of the right to assert representative claims under PAGA. (*Viking*, *supra*, at pp. 1924-1925.)

The Supreme Court explained in *Viking* that the FAA only "preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (*Viking*, *supra*, 142 S.Ct., at p. 1924.) The arbitration agreement between Viking and the plaintiff employee purported to waive "representative" PAGA claims. Under *Iskanian*, this provision was invalid as a wholesale waiver of PAGA claims. That aspect of *Iskanian* was not preempted by the FAA. (*Viking*, *supra*, at pp. 1924-1925.) The court in *Viking* thus concluded that Viking had a right to arbitrate the employee's individual claim, but did not have a right to arbitrate the representative PAGA claim. (*Ibid.*)

In *Sonic I*, the California Supreme Court held that "it is contrary to public policy and unconscionable for an employer to require an employee, as a condition of employment, to waive the right to a Berman hearing, a dispute resolution forum

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[8] In the context of this discussion of *Viking*, use of the term, "individual" claim refers only to the plaintiff employee's personal claim and does not encompass the "representative" claims also included in the PAGA claim.

established by the Legislature to assist employees in recovering wages owed." (*Sonic II*, *supra*, at p. 1124.) The court in *Sonic I* further held that its rule prohibiting waiver of a Berman hearing is not preempted by the FAA. (*Sonic II*, *supra*, at p. 1124.)

Upon granting certiorari, the United States Supreme Court in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 565 U.S. 973, ordered the *Sonic I* judgment vacated and the case remanded to the Supreme Court of California for further consideration in light of *AT & T Mobility LLC v. Concepcion* (2011)563 U.S. 333. In *Concepcion*, the United States Supreme Court held that the FAA preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. (*Id*. at p. 352.)

In *Sonic II*, the California Supreme Court held that waiver of a Berman hearing in an arbitration agreement, imposed on an employee as a condition of employment, is no longer prohibited. (*Sonic II*, *supra*, 57 Cal.4th at p. 1124 ["we now hold, contrary to [*Sonic I*, *supra*, 51 Cal.4th at pp. 671-72], that the FAA preempts our state-law rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment."].)

Although waiver of a Berman hearing may be permissible under *Sonic II* as a result of FAA preemption, in the instant case, the Employment Arbitration Agreement and FTP do not require the employee to waive a Berman hearing and do not require mandatory arbitration afterwards if requested by the employer. The FTP only requires the employee to arbitrate under the FTP after a Berman hearing if the *employee* decides to pursue further remedies in a civil action against the employer. Furthermore, regardless

of whether Desert Regional had a right to arbitrate respondents' individual claims, Desert Regional waived any such right, as discussed below.

3. Failure to Provide or Quote the FTP Arbitration Provisions

DRMC argues Respondents were required to arbitrate their individual claims under either or both the CBA and Employment Arbitration Agreement, which incorporates the FTP. Regardless of whether any or all of Respondents' individual claims are subject to arbitration under the CBA or the Employment Arbitration Agreement, the trial court properly denied DRMC's Petition to compel arbitration on August 28, 2020, because DRMC failed to attach to its Petition a copy of the FTP or quote in the Petition the relevant language regarding arbitration. It was not until DRMC filed a second amended Petition to compel arbitration in September 2020, that DRMC attached the FTP to the second amended Petition.

Under California Rules of Court, rule 3.1330, a party petitioning to compel arbitration must state "the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim *or* a copy must be physically or electronically attached to the petition and incorporated by reference." "[U]nder this rule, unless there is a dispute over authenticity, it is sufficient for a party moving to compel arbitration to recite the terms of the governing provision. [Citation.]" (*Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 793., italics added.) Rule 3.1330 "does not require the petitioner to introduce the agreement into evidence or provide the court with anything more than a copy or recitation of its terms." (*Condee v. Longwood*

Management Corp. (2001) 88 Cal.App.4th 215, 219; see also, *Sprunk v. Prisma LLC*, *supra*, 14 Cal.App.5th at p. 793.) DRMC's Petition did not comply with this requirement.

By failing to attach a copy of the FTP to DRMC's Petition to compel arbitration or quote the FTP's relevant arbitration provisions, DRMC did not establish it had a contractual right to arbitrate Respondents' individual claims.

B. *Waiver of the Right to Compel Arbitration*

In addition to DRMC's failure to attach the FTP to the Petition to compel arbitration, there is substantial evidence DRMC waived its right, if any, to arbitrate Respondents' individual claims. There is no dispute that Respondents and DRMC, and their authorized agents, signed the CBA and agreed to the terms of the Employment Arbitration Agreement and incorporated FTP. There is also no dispute that DRMC and Respondents agreed to these agreements' arbitration provisions. The principal question here is whether DRMC waived its contractual right, if any, to arbitrate Respondents' individual claims. We conclude that, even assuming DRMC met its burden of establishing there was an applicable written contract requiring arbitration of Respondents' individual claims, DRMC waived any such right by delaying filing the Petition to compel arbitration until July 20, 2020.

1. Court Jurisdiction to Determine Issue of Waiver

DRMC argues that under *Howsam v. Dean Witter Reynolds, Inc*. (2002) 537 U.S. 79, 83-85 (*Howsam*), *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp* (1983) 460 U.S. 1, 24-25 (*Moses*), and *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 964 (*Omar*), the issue of waiver of the right to compel arbitration should have been decided by the arbitrator, not the court. We disagree.

DRMC asserts that under federal law, waiver is presumptively for the arbitrator to decide and federal law applies. (See *Howsam*, *supra*, 537 U.S. at pp. 83-85; *Moses H.*, *supra*, 460 U.S. at pp. 24-25; *Omar*, *supra*, 118 Cal.App.4th at p. 964.) Although the United States Supreme Court has "long recognized and enforced a 'liberal federal policy favoring arbitration agreements' [citation], it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability,*' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' [Citations.]" (*Howsam*, *supra*, 537 U.S. at p. 83.) "Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." (*Id.* at p. 84.)

"At the same time the Court has found the phrase 'question of arbitrability' *not* applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter." (*Howsam*, *supra*, 537 U.S. at p. 84.) For instance, in federal court "the presumption is that *the arbitrator should decide*

'*allegations of waiver*, delay, or a like defense to arbitrability.'" (*Ibid.*, italics added; see also *Moses*, *supra*, at pp. 24-25.) Thus, in federal court, in the absence of an agreement to the contrary, "'issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, *estoppel*, and other conditions precedent to an obligation to arbitrate have been met, *are for the arbitrators to decide*.'" (*Howsam*, *supra*, at p. 85, italics added.)

The court in *Omar*, *supra*, 118 Cal.App.4th 955, 965, held that under federal law the issue of waiver of arbitration is for the arbitrator to decide. However, the court in *Omar* explained that "whether waiver claims are determined by the court or the arbitrator depends on whether the arbitration agreement is governed by federal or state law. The authors state that *under California law the court determines waiver, while under federal law the arbitrator must decide whether the delay in demanding arbitration was unreasonable and prejudicial* and, where the delay is unrelated to the litigation process, 'it is improper for the judge to decide this issue.'" (*Id.* at p. 963, italics added; see also Code of Civ. Proc., § 1281.2.)

Omar concluded that because all of the waiver allegations concerned *Nonlitigation* conduct, such as a failure to agree to pay the costs of arbitration, the issues involved "contract interpretation and arbitration procedures, which are more properly subjects of determination by an arbitrator than the court." (*Id.* at p. 964.) Unlike in *Omar*, Respondents' allegations in the present case raise the issue of waiver in context of

DRMC's *litigation* conduct. *Omar* thus does not apply here, and it was proper for the trial court to decide the issue of waiver.

"Because arbitration is an alternative to litigation, a party who actively participates in a lawsuit and thereby resorts to the courts to resolve the dispute may be found, through such inconsistent behavior, to have relinquished its right to arbitrate. [Citing federal authorities.] [¶] Because such a waiver is based upon conduct related to the judicial process, the existence of waiver is a question for the courts to decide." (*Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 234.)

In addition, although in the instant case, the CBA, Employment Arbitration Agreement, and FTP provide that arbitrations shall be governed by the Federal Arbitration Act (FAA) and American Arbitration Association (AAA) procedural rules, California law nevertheless applies to the determination of whether the court or arbitrator has jurisdiction over the issue of waiver. This is because Respondents' individual claims allege state statutory labor code violations and are not brought by the Union under the CBA. In addition, DRMC is seeking to enforce an employment contract arbitration provision which is subject to state law and which does not expressly provide that federal law shall apply to the determination of waiver or that the arbitrator shall decide the issue. (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 686-687 "[[T]he text of [FAA] § 2 declares that state law may be applied "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.""].)

In California, section 1281.2 provides in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, *the court shall order* the petitioner and the respondent *to arbitrate the controversy* if it determines that an agreement to arbitrate the controversy exists, *unless it determines that*: [¶] (a) *The right to compel arbitration has been waived by the petitioner*." (Italics added.) The trial court therefore had jurisdiction under state law to determine whether DRMC waived its right to arbitrate Respondents' individual claims.Thus, regardless of whether state or federal law applies in determining whether waiver is an issue for the court or arbitrator, the result is the same in this case: The trial court had jurisdiction to decide the issue of waiver.

2. Waiver Standard of Review and Burden of Proof

The determination of waiver is generally a question of fact, and "the trial court's finding, if supported by sufficient evidence, is binding on the appellate court." (*St. Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*).) "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." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319; *St. Agnes*, *supra*, at p. 1196.)

Here, the essential facts are not disputed but more than one inference can be made from the facts. Therefore, we apply the substantial evidence standard of review of the

trial court's finding of waiver. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) Under that standard, the trial court's finding of waiver is binding on this court if supported by substantial evidence. (*Sprunk v. Prisma LLC*, *supra*, 14 Cal.App.5th at p. 795.)

Under the FAA, "a party who resists arbitration on the ground of waiver bears a heavy burden [citations], and any doubts regarding a waiver allegation should be resolved in favor of arbitration [citation]." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) Our state waiver rules are in accord. (*Ibid.*) "Although a court may deny a petition to compel arbitration on the ground of waiver (§ 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof. [Citations.]" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.)

3. Waiver Findings

The term "waiver" has a number of meanings under statutory and case law. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195, fn. 4.) "While 'waiver' generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. [Citations.] In the arbitration context, '[t]he term "waiver" has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.' [Citation.]" (*Ibid.*) Under federal law, the federal principle of "default" is analogous to waiver. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.)

There is no single test under state or federal law that delineates the nature of the conduct that will constitute a waiver of arbitration. (*St. Agnes*, *supra*, 31 Cal.4th at p.

1196.) """In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.]""" (*Ibid.*)

In assessing waiver of a contractual right to arbitration, the court may consider the following factors when determining waiver: """(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*, *supra*, 31 Cal.4th at p. 1196, quoting *Sobremonte v. Superior Court*, *supra*, 61 Cal.App.4th at p. 992; *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 31.)

California courts thus have found a waiver of the right to arbitration in a variety of contexts, """ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to

instances in which the petitioning party has unreasonably delayed in undertaking the procedure."'" (*Fleming Distribution Co. v. Younan* (2020) 49 Cal.App.5th 73, 80 (*Fleming*).) "[A] party that wishes to pursue arbitration must take '"active and decided steps to secure that right"' because an arbitration agreement '"is not . . . self-executing."' [Citation.] 'Mere announcement of the right to compel arbitration is not enough. To properly invoke the right to arbitrate, a party must (1) timely raise the defense and take affirmative steps to implement the process, and (2) participate in conduct consistent with the intent to arbitrate the dispute. Both of these actions must be taken to secure for the participants the benefits of arbitration.'" (*Id.* at pp. 80-81.)

As noted in *Fleming*, *supra*, 49 Cal.App.5th at page 80, "Although participating in the litigation of an arbitrable claim does not by itself waive a party's right to later seek to arbitrate the matter, at some point continued litigation of the dispute justifies a finding of waiver. (*Hoover*, *supra*, 206 Cal.App.4th at p. 1204 [courts look at the party's actions, as a whole, in determining whether its conduct is inconsistent with an intent to arbitrate]; see also e.g., *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446 [four months passed after the filing of an action before the party 'expressed a desire to arbitrate']; []*Platt Pacific, Inc. v. Andelson*[, *supra*,] 6 Cal.4th [at p.] 314 [party may waive the right without the intent to do so by, for example, making an untimely demand to arbitrate]; *Zamora v. Lehman* [(2010)] 186 Cal.App.4th [1,] 12, 18.)"

Here, substantial evidence supports a finding of waiver. DRMC did not timely raise its right to arbitrate Respondents' individual claims or take affirmative steps to

implement the process. DRMC delayed filing its Petition to compel arbitration for four years, which included three years from when Respondents submitted their individual claims against DRMC with the Labor Commissioner (July and September 2016) until the Labor Commissioner decided the claims in July 2019. DRMC then delayed an additional year until DRMC finally filed in July 2020, a Petition to compel arbitration of Respondents' individual claims. During the three-year period after Respondents filed their individual claims with the Labor Commissioner, DRMC failed to expeditiously file a Petition to compel arbitration and request a stay. Instead, DRMC actively participated in the Labor Commissioner proceedings. DRMC filed objections to the Labor Commissioner's jurisdiction over the claims, argued that Respondents' individual claims had to be arbitrated under the CBA and Employment Arbitration Agreement, and participated in a five-day Labor Commissioner hearing (Berman hearing) in February and March 2019, during which DRMC and Respondents presented documentary evidence and arguments.

Even if, as DRMC argues, the court can only consider DRMC's one-year delay after the Labor Commissioner issued its decision in July 2019, such delay supports a finding of waiver. DRMC's actions during that one-year period, from July 2019 until July 2020, were inconsistent with an intent to arbitrate. Rather than filing a Petition to compel arbitration right after receiving the unfavorable Labor Commissioner's decision, on August 7, 2020, DRMC proceeded to contest the award by filing in the trial court a de novo appeal of the Labor Commissioner's decision. We recognize that such act alone

was not sufficient to waive arbitration. (*Hoover*, *supra*, 206 Cal.App.4th at p. 1204.) However, DRMC took additional actions which supported the trial court's finding that DRMC's actions, as a whole, were inconsistent with an intent to arbitrate. In August 2019, DRMC attempted to remove to federal court its state court action appealing the Labor Commissioner's decision without success; filed motions of related cases and requested reassignment and transfer of DRMC's case appealing the Labor Commissioner decision to a different courtroom or courthouse, which the trial court denied in March 2020; objected in May 2020, to Respondents' written discovery; and requested discovery sanctions, which the trial court denied on March 12, 2020. DRMC finally, on July 22, 2020, filed its Petition to compel arbitration.

DRMC attributes the delay, in part, to the impact of the pandemic on the courts but has not provided any evidence that this prevented DRMC from filing a petition to compel arbitration or for how long. Respondents note in their appellate respondents brief that "remote motion practice resumed in the Palm Springs Courthouse in June 2020," and Respondents filed a motion to compel discovery responses on June 25, 2020. Even if the courts were not hearing motions for a couple of months during the pandemic, this did not prevent DRMC from at least filing and serving its Petition to compel arbitration and requesting a stay. DRMC also has not provided any valid justification for failing to file its Petition to compel arbitration during the period from July 2019, after the Labor Commissioner's order, until the pandemic began in March 2020.

Fleming, *supra*, 49 Cal.App.5th 73, is analogous to the instant case. In June 2017, the *Fleming* plaintiff employee, Alfons Younan, filed with the Labor Commissioner, a labor claim seeking unpaid wages against his employer, Fleming Distribution Company. The employer sent the Labor Commissioner a letter requesting dismissal of the claim because the parties signed an arbitration agreement agreeing to resolve any and all claims related to employment by binding arbitration. The employer threatened to file a motion to compel arbitration if the claim was not dismissed. Even though the claim was not dismissed, the employer did not file a motion to compel arbitration. In July 2018, the employer filed an answer with the Labor Commissioner, asserting the defense that arbitration was the proper forum and requesting dismissal of the claim. (*Fleming*, *supra*, at p. 77.)

In August 2018, the *Fleming* employer filed a motion with the Labor Commissioner to dismiss the claim on the ground the employee's employment agreement included a provision agreeing to arbitration of his claim. Again, the employer stated that if the claim was not dismissed, the employer would file a motion to compel arbitration. The Labor Commissioner denied the employer's motion to dismiss the claim on the ground the employer had failed to obtain a stay from the superior court. The Labor Commissioner heard the employee's wage claim in December 2018, and issued an order favorable to the employee. Thereafter, the employer filed in the superior court a notice of appeal of the Labor Commissioner's order. A trial was scheduled for March 2019.

In February 2019, the *Fleming* employer filed a petition to compel arbitration, stay proceedings, vacate the Labor Commissioner's order, and dismiss the action. (*Fleming*, *supra*, 49 Cal.App.5th at p. 78.) The *Fleming* employer argued in its petition to compel arbitration that the matter should be arbitrated because the arbitration agreement was governed by the FAA, which preempts California Labor Code section 229. That statute allows employees to pursue their wage claims in court even if they agreed to arbitrate such claims. The employer also argued it did not waive its right to arbitration because it consistently requested the matter dismissed and arbitrated. (*Fleming*, *supra*, at p. 78.)

The trial court in *Fleming* denied the employer's petition to compel arbitration. The trial court "found Fleming waived its right to arbitration by taking steps inconsistent with an intent to invoke arbitration, including delaying its request to the superior court until after a full hearing took place and the Labor Commissioner issued its order." (*Fleming*, *supra*, 49 Cal.App.5th at p. 79.) In reaching its holding, the court in *Fleming* noted that, when the Labor Commissioner in *Fleming* accepted the employee's complaint and scheduled a hearing on the merits, the employer again stated that it was going to move to compel arbitration if the claim was not dismissed, yet did not do so. The employer also failed to request a continuance or otherwise act in furtherance of asserting that the matter had to be arbitrated. Instead, the employer fully participated in the Labor Commissioner hearing by presenting documentary evidence, witness testimony, and argument, thereby learning the employee's trial strategies at the hearing.

The *Fleming* court concluded that under these circumstances and in light of the employer's "repeated choice not to move to compel arbitration in the trial court, coupled with its full participation in the Labor Commissioner proceedings, the trial court correctly determined Fleming did not 'properly invoke the right to arbitrate' by 'tak[ing] affirmative steps to implement the process' and 'participate in conduct consistent with the intent to arbitrate the dispute.' [Citation.]" (*Fleming*, *supra*, 49 Cal.App.5th at p. 82.)

The *Fleming* court added that, "[e]ven after the Labor Commissioner issued its order, Fleming appealed from the order but did not exercise its right to immediately seek to compel arbitration and stay the superior court proceedings. Further, the trial court's register of actions indicates the parties engaged in discovery after the filing of the notice of appeal; there are multiple entries relating to Younan's request for 'compliance with . . . [his] request for production of documents' and other discovery, as well as a lengthy court order granting Younan's discovery requests." (*Fleming*, *supra*, 49 Cal.App.5th at p. 83.) It was not until *20 months after the employee filed his Labor Commissioner complaint* and *2 months after the Labor Commissioner issued its decision* that the employer finally filed a superior court petition to compel arbitration. The *Fleming* court therefore concluded that the trial court properly found this delay was not reasonable and therefore supported a finding of waiver. (*Fleming*, *supra*, at p. 83.)

In the instant case, DRMC's delay filing its Petition to compel arbitration was even longer than the delay in *Fleming*. Respondents filed their individual claims in July and September 2016, and the Labor Commissioner issued its award in July 2019. DRMC

did not file its Petition to compel arbitration and request for a stay until July 2020. DRMC thus delayed filing its Petition 48 months after Respondents filed their individual claims with the Labor Commissioner, and 12 months after the Labor Commissioner issued its award. As in *Fleming*, this delay was not reasonable or consistent with the intent to arbitrate the dispute. Also, during the delay, DRMC participated in Labor Commissioner proceedings, appealed the Labor Commissioner's decision in state court, participated in discovery proceedings, unsuccessfully attempted to remove its state court case to the federal court, and filed unsuccessful motions to have the case related to other cases and transferred to a different courtroom.

We recognize that the instant case is distinguishable from *Fleming* in that *Fleming* did not involve a simultaneous Union grievance subject to arbitration under a CBA. *Fleming* nevertheless supports the determination that, under the circumstances in the instant case, DRMC's delay waived any right it may have had to arbitrate the individual claims.In *Fleming*, the employer argued there was no waiver because, despite its delay in filing its petition to compel arbitration, the employee failed to show he was prejudiced by the delay. The employer asserted that a finding of prejudice required that the employer's delay filing the petition to compel arbitration and request a stay must have caused the employee "to incur extensive costs and legal expenses and/or an unfair disadvantage that would materially prejudice his position in any future arbitration." (*Fleming*, *supra*, 49 Cal.App.5th at p. 83.) Even in the absence of such circumstances, the *Fleming* court disagreed "there was 'no evidence' of prejudice to support a waiver." (*Ibid.*) The

Fleming court concluded there was sufficient evidence of prejudice because "prejudice can be found 'where the petitioning party has unreasonably delayed seeking arbitration or substantially impaired an opponent's ability to use the benefits and efficiencies of arbitration.' [Citation.]" (*Fleming*, *supra*, at p. 83, quoting *Hoover*, *supra*, 206 Cal.App.4th at p. 1205; see also *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 216 ["a defendant should timely seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court have wasted valuable resources on ordinary litigation."].)

The *Fleming* court explained that, although the employee did not have an attorney during the Labor Commissioner proceedings and therefore did not suffer monetary loss in the form of attorney fees and costs, he was represented in the superior court action and engaged in discovery. The employee also suffered the prejudice of waiting several years to collect wages that at least one tribunal determined he was owed, when the matter could have been arbitrated earlier, assuming arbitration was proper. "As noted, the benefit of arbitration is that it is a relatively efficient and cost-effective way of resolving disputes." (*Fleming*, *supra*, 49 Cal.App.5th at p. 83.) By the time the employer filed its petition to compel arbitration, "all benefits of a speedy resolution [the employee] could have obtained through arbitration have been lost. (*Sobremonte v. Superior Court*, *supra*, 61 Cal.App.4th at p. 996 ['any benefits they may have achieved from arbitration have been lost']; *St. Agnes*, *supra*, 31 Cal.4th at p. 1204 [prejudice is found where 'the petitioning party's conduct has substantially undermined [the] important public policy [in favor of

arbitration] or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration'].) We conclude [the employee] suffered cognizable prejudice." (*Fleming*, *supra*, at pp. 83-84.)

As in *Fleming*, Respondents suffered cognizable prejudice of waiting years to collect wages that the Labor Commissioner determined were owed, when the matter could have been arbitrated earlier. In addition, attorney fees and costs likely were incurred by or on behalf of Respondents as a result of DRMC's state court litigation after completion of the Labor Commissioner proceedings.

DRMC argues there was no prejudice because, unlike in *Fleming*, DRMC could not compel arbitration until the Labor Commissioner proceedings were completed in July 2019. But even assuming this is true, DRMC unreasonably delayed filing its Petition to compel arbitration for a year after completion of the Labor Commissioner proceedings.

Fleming notes that, "although prejudice has been held to be 'critical' in determining waiver, we also note the Supreme Court has cautioned courts to examine each case in context: 'no single test delineates the nature of the conduct that will constitute a waiver of arbitration.' (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) Moreover, a party's unreasonable delay has also been considered a significant and determinative issue." (*Fleming*, *supra*, 49 Cal.App.5th at p. 84.) The *Fleming* court further noted that the California Supreme Court in *Wagner Construction Co. v. Pacific Mechanical Corp.*, *supra*, 41 Cal.4th 19, "observed that a party's unreasonable delay in demanding or seeking arbitration, in and of itself, may constitute a waiver of a right to arbitrate. '[A]

party may [not] postpone arbitration indefinitely by delaying the demand. . . . [¶] When no time limit for demanding arbitration is specified, a party must still demand arbitration within a reasonable time. [Citation.] . . . "[W]hat constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case."'" (*Fleming*, *supra*, at p. 84; see also *Hoover*, *supra*, 206 Cal.App.4th at p. 1205.)

After *Fleming* was decided, the United States Supreme Court recently held in *Morgan v. Sundance, Inc.* (2022) 142 S. Ct. 1708 (*Morgan*), that under federal law a showing of prejudice is not required to establish waiver of the right to arbitrate. After *Fleming* was decided, the United States Supreme Court recently held in *Morgan*, that under federal law, a showing of prejudice is not required to establish waiver of the right to arbitrate.

In *Morgan*, Robyn Morgan sued her former employer, Sundance, Inc., for committing federal labor law violations. As part of her job application, Morgan agreed to "'use confidential binding arbitration, instead of going to court.'" (*Morgan*, *supra*, 142 S. Ct. at p. 1711.) Sundance did not initially move to compel arbitration or stay the case. Over a period of 8 months, Sundance filed a motion to dismiss, filed an answer, and engaged in mediation, before moving to compel arbitration.

The district court denied Sundance's motion to compel arbitration based on waiver. The Eighth Circuit disagreed on the ground Morgan suffered no prejudice. Morgan sought review from the U.S. Supreme Court, which agreed to hear the case to

resolve a split in the federal courts of appeals as to whether prejudice is required to show a waiver of the right to arbitration under the FAA. The U.S. Supreme Court in *Morgan* agreed that prejudice was not required to show a waiver based on section 6 of the FAA (9 USCA § 6), which provides that any application to the court "shall be made and heard in the manner provided by law for the making and hearing of motions," except as otherwise therein expressly provided. (9 U.S.C. § 6; *Morgan*, *supra*, 142 S. Ct. at 1714.)

The court in *Morgan* explained that the phrase "any application" in section 6 of the FAA includes applications to stay a court case and compel arbitration under sections 3 and 4 of the FAA and noted that "a federal court assessing waiver does not generally ask about prejudice." (*Morgan*, *supra*, 142 S. Ct. at p. 1713.) The *Morgan* Court thus concluded that the Eighth Circuit erred in imposing an arbitration-specific requirement of prejudice. It noted that the courts that required prejudice did so based on the federal policy favoring arbitration. The *Morgan* court found that that policy "does not authorize federal courts to invent special, arbitration-preferring procedural rules" such as the judicially imposed rule requiring a finding of prejudice when ruling on waiver.
This is because, "[t]o decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party." (*Id.* at p. 1713.) The usual federal rule of waiver therefore does not include a prejudice requirement. (*Id.* at p. 1714.)This case is distinguishable from *Morgan* in that the instant case concerns state statutory rights and law, rather than rights asserted under federal law.

Even assuming that under state law in the instant case a showing of prejudice is required, DRMC's delay petitioning to compel arbitration was prejudicial under *Fleming*. It significantly diminished the benefits of arbitration by postponing Respondents' recovery, wasting Respondents' and others' time participating in litigating the labor dispute in a separate forum before arbitrating the case, and providing DRMC with the unfair advantage of participating in a trial run of litigating the case before the Labor Commissioner. Thus, regardless of whether state law or federal law applies, the trial court's findings of waiver and prejudice are well supported by the record.

We thus conclude the trial court properly determined that DRMC waived its right to arbitration based on DRMC's delay in petitioning to compel arbitration. DRMC's conduct was inconsistent with an intent to arbitrate Respondents' individual claims, DRMC invoked the litigation machinery, including filing a de novo appeal of the Labor Commissioner's decision in state court, and DRMC delayed petitioning to compel arbitration for a substantial period of time. The trial court further reasonably found prejudice caused by the delay. The trial court therefore did not err in ruling that DRMC waived any right DRMC may have had to arbitrate Respondents' individual claims.

4. Estoppel

DRMC argues the Union's delay in initiating arbitration of the 2015 Union group grievance until August 2020, estopped Respondents from arguing DRMC waived its right to arbitrate. DRMC asserts that Respondents are estopped from blaming DRMC for the delay petitioning to compel arbitration or for any related prejudice, because the Union

agreed to arbitrate the Union group grievance, and any delay between May 2015 and August 2020, was voluntarily caused either by Respondents, their Union, or the Labor Commissioner. We disagree.

First, the Union group grievance and related proceedings are separate and independent proceedings from Respondents' individual claims brought by each respondent, and not by the Union. Second, Respondents' individual claims were filed and decided in a different forum than the Union group grievance. Respondents submitted their claims to the Labor Commissioner for resolution. The Union submitted its group grievance to arbitration under the CBA. Third, although the Union was a party, acting on behalf of Respondents as well as other RNs when pursuing the Union group grievance, the Union was not a party to Respondents' individual claims. Fourth, Respondents were not responsible for the Union's delay initiating arbitration of the Union group grievance or for the Union agreeing to arbitrate the Union group grievance. Therefore, Respondents are not estopped from arguing DRMC waived arbitration of Respondents' individual claims.

C. *Motion for Reconsideration*

DRMC contends the trial court abused its discretion by denying DRMC's requests for reconsideration of the August 28, 2020, order denying DRMC's Petition to compel arbitration. We disagree.

1. Reconsideration Background

By letter dated August 12, 2020, sent to the Union and arbitrator Michael Prihar, the Tenet Health manager of labor relations confirmed that Tenet, on behalf of DRMC, and the Union had agreed to arbitrate a Union group grievance regarding "Missed Meals-Time Sheets." The letter also confirmed that Michael Prihar had been selected to arbitrate the Union group grievance and efforts to schedule the arbitration hearing were underway.

On August 17, 2020, a legal assistant for DRMC's counsel sent Respondents' counsel an email stating that the August 28, 2020, hearing of DRMC's Petition to compel arbitration was continued to September 18, 2020. The email further stated DRMC would serve an amended Petition and notice of the hearing in due course.

On August 27, 2020, DRMC filed a first amended Petition to compel arbitration of Respondents' individual claims. The next day, on August 28, 2020, the trial court denied DRMC's original Petition.

DRMC first requested reconsideration of the August 28, 2020, order in notices filed on September 4, 8, and 9, 2020, of the hearings of Respondents' second amended Petitions. The hearings were set for September 29 and 30, 2020, and October 1, 2020. In each of the three notices, DRMC stated it was requesting that the court (1) order Respondents to submit their individual claims to binding arbitration and (2) stay further judicial proceedings pending completion of such arbitration, or alternatively dismiss the action pending completion of the arbitration.

The Notices further stated that "Alternatively, DRMC moves for reconsideration of any previously issued tentative ruling or minute order denying any previously filed Petition. This alternative motion is made under Civil Procedure Code section 1008 (a-c) on the grounds that new and different grounds exist and any prior order should be revoked to permit consideration of the . . . [second] Amended Petition and such new or different facts. While DRMC originally filed a Petition that was set for hearing August 28, 2020, it reasonably believed that hearing to have been cancelled, vacated or continued by its filing of an Amended Petition that was set for hearing September 18, 2020. The first amended Petition with the September 18 hearing date was filed by the Court on August 27, 2020, and DRMC's counsel already had communicated the new hearing date to [Respondents'] counsel and informally, to the Court's staff. Accordingly DRMC and its counsel were unaware of any tentative ruling being issued in advance of or any hearing being held on the originally noticed date, until receiving a mail served copy of the August 28, 2020, minute order."

The notices also stated that new facts were dispositive of the issues of estoppel and the Union's agreement to submit the individual nurses' claims to the grievance arbitration process mandated by Article 9 of the CBA. The new facts included the August 12, 2020, agreement between the Union and DRMC to appoint arbitrator Michael Prihar to adjudicate the March 16, 2015, Union group grievance on behalf of all DRMC RNs.

On September 11, 2020, DRMC also filed an objection to the August 28, 2020 order and requested the court to vacate or reconsider the order. DRMC's objection

entitled, "Objection to August 28, 2020 minute order adopting tentative ruling for cancelled hearing; request to vacate minute order" (Objection), consisted of a three-page document stating DRMC's reasons for objecting to the August 28, 2020 minute order. DRMC stated it did not have notice of the tentative ruling on August 27, 2020; DRMC did not attend any hearing on August 28, 2020, because the hearing was cancelled before the tentative was issued on August 27, 2020; and the original petition and August 28, 2020, hearing date were substituted with the first amended Petition, filed on August 27, 2020, and hearing date of September 18, 2020.

DRMC further stated in the Objection document that on August 7, 2020, DRMC reserved the new hearing date for the first amended Petition. On August 10, 2020, DRMC paid the fee for continuing the Petition to September 18, 2020. On August 17, 2020, DRMC notified Respondents by email of the new hearing date. On August 27, 2020, DRMC filed its first amended Petition and the court confirmed the hearing date of September 18, 2022. DRMC's attorney's office "informally contacted the Court's clerk about taking the August 28 hearing off calendar because of the reservation of a different and later hearing date and the filing of an amended petition for that later hearing date and was told that the filing of the Amended Petition with the new hearing date and reservation number would accomplish this." Under these circumstances, DRMC's counsel assumed that the hearing on August 28, 2020, was taken off calendar and there was no tentative ruling on the original Petition.

DRMC requested in its statement of Objection that the court vacate, *nunc pro tunc*, the August 28, 2020, minute order and attached the August 27, 2020 tentative ruling. Alternatively, DRMC requested the court to reconsider the ruling under section 1008 and the court's inherent power, and permit DRMC to be heard on the merits of the second amended petition set to be heard on September 29, 2020.

During a hearing on September 25, 2020, the trial court overruled DRMC's Objection and denied DRMC's motion for reconsideration on the ground DRMC did not file a separate, proper motion for reconsideration. The court also vacated the future hearings on the second amended Petition to compel arbitration, pending the court's consideration of a properly filed and noticed motion for reconsideration by DRMC.

On September 28, 2020, DRMC filed a separate motion for reconsideration of the August 28, 2020, order.

On October 8, 2020, DRMC filed a "motion" to compel arbitration of Respondents' individual claims and stay the action.

On October 22, 2020, the court denied DRMC's September 28, 2020, motion for reconsideration on the grounds it was untimely and did not provide new facts or law. The court also denied DRMC's evidentiary objections as immaterial.

On November 3, 2020, the court denied DRMC's "motion" to compel arbitration of Respondents' individual claims and stay the action on the grounds the matter was moot because the court had already ruled on DRMC's Petition to compel arbitration and motion for reconsideration of the August 28, 2020, ruling.

2. Analysis

DRMC argues that its attempt to cancel the August 28, 2020 court hearing and withdraw the original Petition to compel arbitration by filing a first amended Petition on August 27, 2020, should have been considered by the trial court when it entered the August 28, 2020, order. DRMC asserts that had the court done so, it would not have ruled on the Petition on August 28, 2020. DRMC contends that under such circumstances reconsideration should have been granted. We disagree.

Section 1008, subdivision (g) limits a party's right to seek reconsideration after a motion is denied. (*Novak v. Fay* (2015) 236 Cal.App.4th 329, 335.) Section 1008, subdivision (a) requires a motion for reconsideration to be filed within 10 days of service of "notice of entry" of the order sought to be reconsidered. (*Novak v. Fay*, *supra*, 236 at p. 335.) Subdivision (a) also requires that "[t]he party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

DRMC's initial requests for reconsideration in the notice of DRMC'S second amended Petition to compel arbitration and Objection did not constitute properly noticed and filed motions for reconsideration. DRMC merely mentioned it was requesting reconsideration under section 1008. There were no supporting points and authorities or citations to evidence or case law, other than mentioning section 1008 in the notices and Objection.

While the court suggested DRMC properly file and notice a separate motion for reconsideration, by the time this was done, the motion was untimely under section 1008. In addition, there were no new facts, circumstances, or law. The FTP, which DRMC failed to attach to the Petition and first amended Petition to compel arbitration, existed before the court entered its August 28, 2020, order. In addition, DRMC's purported new facts, consisting of the Union and DRMC agreeing to arbitrate the Union group grievance and selection of an arbitrator, also existed before August 28, 2020. Furthermore, the arbitration of the Union group grievance did not concern Respondents' individual claims and was being resolved in a different forum.

There also was no prejudicial error because it is unlikely that the outcome would have been any different had the court considered the alleged new facts or DRMC's first amended Petition when it ruled on the original Petition on August 28, 2020, because the first amended Petition did not add any new material facts. The allegations in the first amended Petition were the same as those in the original Petition, with the exception that DRMC's first amended Petition added the dates that Respondents signed their Employment Arbitration Agreements. It was not until DRMC filed its second amended Petitions to compel arbitration on September 4, 8, and 9, 2020, that DRMC added a paragraph summarizing DRMC's FTP and attached a copy of the FTP. By that time, the trial court had already properly ruled on DRMC's Petition to compel arbitration on August 28, 2020, and DRMC had failed to file a timely proper motion for reconsideration supported by new law or facts.

On September 28, 2020, DRMC finally filed a proper, separate motion for reconsideration of the August 28, 2020, order but by that time, the motion was too late. The motion was filed a month after the August 28, 2020, order. The trial court therefore properly denied the motion for reconsideration on October 22, 2020, on the grounds the motion for reconsideration was untimely and DRMC had not presented new or different facts, circumstances or law to support reconsideration.

Furthermore, even if the trial court erred in denying DRMC's motion for reconsideration of the August 28, 2020, order, there was no prejudicial error because it is not reasonably likely that the outcome would have been any different had the court reconsidered its August 28, 2020, ruling denying the Petition to compel arbitration. Error alone "does not warrant reversal. 'The burden is on the appellant, not alone to show error, but to show injury from the error.' [Citation.] Nowhere have appellants demonstrated any possibility that, had the court reached the merits of their reconsideration motion, it would have granted the motion. Indeed, the converse seems true." (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.)

Even if the trial court had granted DRMC's motion for reconsideration and reconsidered its August 28, 2020, ruling it is unlikely DRMC would have prevailed on its Petition to compel arbitration or its subsequently filed amended Petitions. Thus, any error by the trial court in denying DRMC's motion for reconsideration was not prejudicial and does not warrant reversal. (*Robbins v. Los Angeles Unified School Dist.*, supra, 3 Cal.App.4th at p. 318.)

IV.

DISPOSITION

The trial court's August 28, 2020, order is affirmed. The trial court's orders denying reconsideration of the August 28, 2020, order are also affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.