NORTHERN DISTRICT PRACTICE PROGRAM: FALL CIVIL SYMPOSIUM 2022

THE SUPREME COURT'S SHAPING OF OUR CONSTITUTIONAL RIGHTS: PAST, PRESENT & FUTURE

EMPLOYMENT ARBITRATION AFTER *VIKING RIVER CRUISES, INC. V. MORIANA*

Hon. William H. Orrick III, U.S. District Judge

Paul W. Cane, Jr., Paul Hastings LLP

Michael Rubin, Altshuler Berzon LLP

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2022 WL 4652719
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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Court of Appeal, Second District, Division 2, California.

JEAN HENSLEY, Plaintiff and Respondent,
v.
MEDELY, INC., Defendant and Appellant.

B311571
|
Filed 9/30/2022

APPEAL from an order of the Superior Court of Los Angeles County, Yolanda Orozco, Judge. Reversed with directions. (Los Angeles County Super. Ct. No. 19STCV10238)

Attorneys and Law Firms

K&L Gates, Eugene Ryu and Penny Chen for Defendant and Appellant.

Aegis Law Firm, Samuel A. Wong, Kashif Haque, Jessica L. Campbell and Fawn F. Bekam for Plaintiff and Respondent.

Opinion

LUI, P. J.

Appellant **Medely**, Inc. operates an online platform to help healthcare workers seeking jobs connect with medical facilities needing workers. Respondent Jean Hensley found jobs through **Medely's** platform. Despite agreeing to arbitrate disputes under the Federal Arbitration Act (FAA) (9 U.S.C.S. § 1 et seq.), Hensley sued **Medely** on behalf of herself and others under the Private Attorneys General Act of 2004 (PAGA) for alleged Labor Code violations. (Lab. Code, § 2698 et seq.) [1]

The Supreme Court recently held that an employer is entitled under the FAA to compel arbitration of an employee's individual claims, separate and apart from PAGA claims alleged on behalf of others. (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [142 S.Ct. 1906, 213 L.Ed.2d 179] (*Viking*).) Following *Viking,* we reverse the order denying **Medely's** motion to compel arbitration and direct the court to enter a new order requiring Hensley to arbitrate her individual claims.

FACTS AND PROCEDURAL HISTORY

Hensley's Lawsuit

Hensley used **Medely's** online platform to find nursing work at healthcare facilities. **Medely** classified her as an independent contractor. Hensley filed suit in 2019 "on behalf of herself and all other aggrieved employees employed by [**Medely**] through[out] California." She seeks civil penalties under PAGA for willful employment misclassification and failure to pay overtime wages, provide meal periods or rest breaks, provide accurate itemized wage statements, maintain accurate records, timely pay wages or reimburse business expenses.

Medely's Motion to Compel Arbitration

Medely, a software company, has an online platform that healthcare professionals use to find short term jobs at medical facilities. To access the platform, professionals create accounts and agree to the terms of a service agreement (Agreement). Each time users book jobs, they must reconfirm their acceptance of the Agreement. **Medely's** chief executive Waleed Nasr declares that that Hensley created an account in July 2017 and booked six jobs using **Medely's** platform. Each time, Hensley logged onto her account and reconfirmed her consent to the Agreement.

The Agreement's introduction reads: "[D]isputes between us to be submitted to binding and final arbitration. (1) You will only be permitted to pursue claims and seek relief against us on an individual basis, not as a plaintiff or class member in any class or representative action or proceeding; and (2) you are waiving your right to seek relief in a court of law and to have a jury trial on your claims." Section 17, the Agreement's arbitration clause, states that it is governed by the FAA.

The Agreement denies any employment relationship with professionals or medical facilities or "a partnership or agency relationship between the Medical Facility and **Medely**.... **Medely** does not, in any way, supervise, direct or control the Professional's work or services performed in any manner. **Medely** does not set the Professional's work hours and location of work, nor is **Medely** involved in determining the type or manner of compensation." Professionals "acknowledge and agree that there is no employment, part-time employment, consulting, contractor, partnership, or joint venture relationship whatsoever between you and us. **Medely** is not an employment service or agency and does not secure employment for you."

Medely asked the court to compel arbitration of Hensley's lawsuit or, under a delegation clause, the issue of whether she was misclassified as an independent contractor. In opposition, Hensley asserted that she did not agree to arbitrate; that predispute waivers of PAGA claims are invalid; and **Medely** waived the right to arbitrate.

The Court's Rulings

The court initially granted **Medely's** motion to compel arbitration. It found that **Medely** proved the existence of an arbitration agreement: Hensley clicked on a button to manifest assent to the Agreement, first to create her account then each time she booked jobs. The court found that the Agreement delegates authority to the arbitrator to resolve whether Hensley was properly classified as an independent contractor.

Over a month later, Hensley petitioned for reconsideration. **Medely** opposed the motion, arguing that it was untimely and the new case law Hensley cited did not change existing law on PAGA.

On reconsideration, the court denied the motion to compel arbitration. It acknowledged that **Medely** proved the existence of an arbitration agreement and Hensley agreed to it multiple times. However, because there is no agreement to arbitrate between **Medely** and the state of California, Hensley is "deputized" to represent the state in the PAGA action.

DISCUSSION

1. Appeal and Review

Appeal lies from denial of a motion to compel arbitration. (Code Civ. Proc., § 1294, subd. (a).) We independently construe the Agreement on de novo review. (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 707; *Eminence Healthcare, Inc. v. Centuri Health Ventures, LLC* (2022) 74 Cal.App.5th 869, 875.)

2. Ruling on Reconsideration

Medely argues that the trial court erred by reconsidering its decision to correct a "potential misinterpretation of the law" caused by Hensley's failure "to raise all arguments and authority." The court did not rely on Code of Civil Procedure section 1008 because reconsideration was not sought within the 10-day statutory time frame. Instead, it exercised its inherent authority to "correct its own errors," citing *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107 [on its own motion, court may reconsider prior interim orders to correct errors]. The court was entitled to use its core power in this manner. (*Id.* at p. 1104.)

There is no basis for reversal owing to a procedural defect. (Cal. Const., art. VI, § 13 [judgment cannot be set aside for procedural error unless it resulted in a miscarriage of justice].) **Medely** was not deprived of notice or an opportunity to be heard before the court ruled. In any event, we independently review the ruling with full briefing by the parties, curing any procedural error below. (*Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 683.)

3. PAGA Civil Actions

PAGA allows "an aggrieved employee on behalf of himself or herself and other current or former employees" to seek civil penalties for labor violations, after exhausting administrative procedures. (§§ 2699, subd. (a), 2699.3, 2699.5.) " '[A]ggrieved employee' means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).) The employee acts on behalf of the state to redress Labor Code violations. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.)

4. The *Viking* Case

When the trial court ruled, governing law barred splitting a PAGA action into arbitrable "individual" claims and non-arbitrable "representative" claims. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 383 (*Iskanian*); *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88 ["courts have rejected efforts to split PAGA claims into individual and representative components"].) This aspect of *Iskanian* was recently overruled in *Viking, supra,* 142 S.Ct. 1906.

The Supreme Court held that California "cannot condition the enforceability of an agreement to arbitrate on the availability of a procedural mechanism that would permit a party to expand the scope of the anticipated arbitration by introducing claims that the parties did not jointly agree to arbitrate." (*Viking, supra,* 142 S.Ct. at p. 1923.) "A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration. Such a rule would permit parties to superadd new claims to the proceeding, regardless of whether the agreement between them committed those claims to arbitration." (*Id.* at p. 1924.)

The FAA preempts *Iskanian* to the extent "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.) "*Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than 'forgo[ing] the procedural rigor and appellate review of the courts to realize the benefits of private dispute resolution.' " (*Id.* at p. 1912.) Thus, under the FAA plaintiffs can, in fact, be compelled to arbitrate their individual PAGA claims.

5. The Agreement Requires Individual Arbitration

The FAA governs the Agreement's arbitration clause. Parties may "*expressly* designate" the FAA in their agreement. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394.) Thus, the FAA controls our interpretation of the Agreement. (*Prima Donna Development Corp. v. Wells Fargo Bank, N.A.* (2019) 42 Cal.App.5th 22, 35 (*Prima Donna*); *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1121–1122.)

In plain language, the Agreement requires arbitration of individual claims. Users of **Medely's** platform must submit to arbitration "on an individual basis." Section 17.1 reads: "[Y]ou are agreeing in advance that you will not participate in or seek to recover monetary or other relief in any lawsuit filed against **Medely** alleging class, collective, and/or representative claims.... Instead, by agreeing to arbitration, you may bring your claims against **Medely** in an individual arbitration proceeding." Section 17.5 repeats that "all claims and disputes within the scope of this arbitration agreement must be arbitrated on an individual basis and not on a class basis, only individual relief is available, and claims of more than one user cannot be arbitrated or consolidated with those of any other user."

Medely is "entitled to enforce the agreement insofar as it mandated arbitration of [Hensley's] individual PAGA claim[s]." (*Viking, supra,* 142 S.Ct. at p. 1925.) The arbitrator will necessarily decide if Hensley is an "aggrieved employee" (§ 2699, subd. (c)) or bar her from asserting PAGA if it finds that she is not an employee. (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. ___, ___ [139 S.Ct. 524, 529, 202 L.Ed.2d 480] [contract may delegate to an arbitrator the gateway issue of arbitrability]; *Trinity v. Life Ins. Co. of North America* (2022) 78 Cal.App.5th 1111, 1122.).)

6. Severability Clause

The FAA does not preempt *Iskanian*'s rule prohibiting the "wholesale waiver of PAGA claims." (*Viking, supra,* 142 S.Ct. at p. 1924.) The Agreement does not explicitly state that users waive PAGA claims. And even if the Agreement's ban on representative claims is construed as an impermissible waiver of PAGA claims, its section 17.6 allows any invalid or unenforceable parts to "be severed and the remainder of the Arbitration Agreement shall continue in full force and effect."

When a severability clause removes parts of an agreement that are invalid in some respect, any part of the agreement that remains valid must still be enforced in arbitration. "Based on this [severability] clause, [**Medely**] was entitled to enforce the agreement insofar as it mandated arbitration of [Hensley]'s individual PAGA claim[s]." (*Viking, supra,* 142 S.Ct. at p. 1925.)

7. Hensley Forfeited Her Unconscionability Claims

After Hensley filed a respondent's brief, the Supreme Court decided *Viking*. We asked Hensley's counsel "to file an

informal letter brief discussing the *Viking River* decision and appellant's arguments regarding that decision." Ignoring the limited scope of her task, Hensley's counsel devoted nearly the entire brief to the issue of unconscionability. Counsel concedes she is raising unconscionability "for the first time." We did not authorize counsel to raise a new issue in the letter brief.

Hensley forfeited the issue of unconscionability. (*Prima Donna, supra,* 42 Cal.App.5th at p. 42 [plaintiff forfeited unconscionability as a defense to an arbitration agreement by failing to raise the issue in the trial court].) It is far too late to assert unconscionability just before oral argument.

DISPOSITION

The order denying appellant **Medely's** motion to compel arbitration is reversed. The trial court is directed to issue an order compelling respondent Hensley to arbitrate her individual claims against **Medely** and to stay her non-individual PAGA claims pending completion of the arbitration.

The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED.

We concur:

CHAVEZ, J.

HOFFSTADT, J.

All Citations

Not Reported in Cal.Rptr., 2022 WL 4652719

Footnotes

1 Undesignated statutory references are to the Labor Code.

TAB 2

Radcliff v. San Diego Gas & Elec. Co.

United States District Court for the Southern District of California

September 12, 2022, Decided; September 12, 2022, Filed

Case No.: 20-cv-1555-H-MSB

Reporter
2022 U.S. Dist. LEXIS 165054 *

DAVID RADCLIFF, individually and on behalf of others similarly situated and aggrieved, Plaintiff, v. SAN DIEGO GAS & ELECTRIC COMPANY, a California corporation; SEMPRA ENERGY, a California corporation; and DOES 1 through 50, inclusive, Defendants.

Core Terms

arbitration, compel arbitration, wage-and-hour, subject to arbitration

Counsel: [*1] For David Radcliff, invidually and on behalf of others similarly situated and aggrieved, Plaintiff: Sara Bradshaw Tosdal, LEAD ATTORNEY, Matern Law Group, PC, Oakland, CA.

For San Diego Gas & Electric Company, a California corporation, Sempra Energy, a California corporation, Defendants: Daniel J. McQueen, LEAD ATTORNEY, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; David Alvarez, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton, Los Angeles, CA.

Judges: MARILYN L. HUFF, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: MARILYN L. HUFF

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND MOTION TO STRIKE

[Doc. No. 49.]

On February 27, 2020, Plaintiff David Radcliff filed a proposed class action complaint against Defendants San Diego Gas & Electric Company and Sempra Energy alleging various wage-and-hour violations. (Doc. No. 1-2, Compl.) On September 25, 2020, Defendants moved to compel arbitration of Plaintiff's wage-and-hour claims. (Doc. No. 7.) The Court granted this motion. (Doc. No. 20, the "2020 Order.") As a result, the only claims still before the Court are Plaintiff's claims for penalties under the California Private Attorneys General Act ("***PAGA***"). (Id.)

On January 13, 2022, the parties **[*2]** jointly moved to stay the Court's consideration of the ***PAGA*** claims pending a forthcoming decision by the United States Supreme Court in ***Viking River*** *Cruises, Inc. v. Moriana, 142 S.Ct. 1906 (2022)* ("Moriana"). (Doc. No. 46.) The Court granted the parties' motion for a stay. (Doc. No. 47.) The Supreme Court issued its decision in *Moriana* on June 15, 2022.

On August 16, 2022, Defendants moved to compel arbitration of Plaintiff's individual ***PAGA*** claim and to strike Plaintiff's representative ***PAGA*** claim.[1] (Doc. No. 49.) The Court held a case status hearing on August 22, 2022. (Doc. No. 50.) Plaintiff subsequently filed his opposition to the motion on August 30, 2022. (Doc. No. 51.) Defendants filed their reply in support of their motion on September 7, 2022. (Doc. No. 53.) The Court held a hearing on the motion on September 12, 2022. Sara B. Tosdal appeared for the Plaintiff, and Richard Azada appeared for the Defendants. For the foregoing reasons, the Court grants Defendants' motion.

MOTION TO COMPEL ARBITRATION

In the 2020 Order, this Court compelled Plaintiff to submit his wage-and-hour claims to arbitration. (2020 Order at 7, 12.) Plaintiff acknowledges that his ***PAGA*** claims are predicated on these same wage-and-hour claims. (See Doc. No. 51 at 3.) **[*3]** However, Plaintiff insists that his ***PAGA*** claims are not subject to arbitration because these predicate claims were not subject to arbitration in the first instance. (Id. at 3, 6-8.) In essence, Plaintiff seeks reconsideration of the 2020 Order. For support, Plaintiff rehashes many of the arguments from his opposition to Defendants' initial motion to compel. (See Doc. No. 53 at 1-3.) The Court is unpersuaded by Plaintiff's argument. The Court continues to view the wage-and-hour claims as properly subject to the parties' arbitration agreement for the reasons set forth in the 2020 Order. (See 2020 Order at 3-12.) Since these predicate claims are subject to arbitration, Plaintiff's individual ***PAGA*** claim will also be subject to arbitration.

During the Court's consideration of the prior motion to compel arbitration, Defendants conceded that Plaintiff's ***PAGA*** claims were not subject to arbitration. (2020 Order at 3.) At the time, the California Supreme Court's opinion in *Iskanian v. CLS Transp. Los Angeles, LLC, 327 P.3d 129 (Cal. 2014)*, set forth the controlling law on that issue. Recently, the Supreme Court has held that the Federal Arbitration Act ("FAA") preempts the rule of California law established by Iskanian. See *Moriana, 142 S.Ct. at 1913*.

The background of this case is nearly identical to *Moriana*. In both cases, **[*4]** an employee filed a complaint alleging ***PAGA*** claims and various predicate wage-and-hour violations. *Id. at 1916*. The defendant in *Moriana*, ***Viking River*** Cruises ("Viking"), moved to compel arbitration of the plaintiff's individual ***PAGA*** claim and to dismiss her representative ***PAGA*** claim. Id. The trial court denied the motion to compel, and the California Court of Appeal affirmed the denial on the basis of the California Supreme Court's opinion in Iskanian. Id. The Supreme Court overruled these decisions and concluded that the FAA preempted the rule in *Iskanian* that precluded the division of ***PAGA*** actions into individual and non-individual claims through an arbitration agreement. *Id. at 1924*. Thus, Viking "was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual ***PAGA*** claim." *Id. at 1925*. Likewise, Defendants in this case are entitled to arbitrate Plaintiff's individual ***PAGA*** claim because it is subject to the parties' valid, enforceable arbitration agreement as set forth in the Court's 2020 Order. Accordingly, the Court grants Defendants' motion to compel arbitration of Plaintiff's individual ***PAGA*** claim.

MOTION TO STRIKE

Plaintiff alleges both individual and representative ***PAGA*** claims in Count XI **[*5]** of his Complaint. (Doc. No. 1-2, Compl. ¶¶ 68-71.) The Court now turns to the representative ***PAGA*** claim. Defendants move to strike the representative ***PAGA*** claim from Count XI for lack of statutory standing.[2] (Doc. No. 49 at 9-10.) Plaintiff contends that he has statutory standing to pursue a

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[1] In *Moriana*, the Supreme Court noted that the terms "individual" and "representative" have multiple meanings in the context of a ***PAGA*** claim. *142 S.Ct. at 1916*. For the purposes of this order, the Court uses the term "individual" ***PAGA*** claims to mean claims that are premised on California Labor Code violations "actually sustained by the plaintiff" and "representative" ***PAGA*** claims to mean those claims "arising out of events involving other employees." Id.

[2] Plaintiff does not assert that his representative ***PAGA*** claim should be arbitrated. Rather, he only seeks to maintain his representative ***PAGA*** claim before this Court. Notably, the Supreme Court remarked in *Moriana* that the ***PAGA*** claim joinder rule may not require parties to arbitrate matters outside of those agreed upon. *Moriana, 142 S. Ct. at 1923-24*. Thus, the Defendants are not required to arbitrate the representative ***PAGA*** claim unless they agreed to do so. See id. Defendants argue that they did not agree to arbitrate the representative claim.

representative ***PAGA*** claim before this Court even if he is compelled to arbitrate his individual ***PAGA*** claim. (Doc. No. 51 at 10-15.)

Defendants' motion to strike is effectively a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)* for lack of statutory standing. *Vaughn v. Bay Envtl. Mgmt., Inc., 567 F.3d 1021, 1022-24 (9th Cir. 2009)*. But, given that Defendants filed an answer in this case (Doc. No. 2), the Court considers the proper legal standards to be those that govern a motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*. *Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1192 (9th Cir. 1989)*. A Rule 12(c) motion will only be granted "when, viewing the facts as presented in the pleadings in the light most favorable to the plaintiff, and accepting those facts as true, the moving party is entitled to judgment as a matter of law." *Gutierrez v. Chung, 2013 WL 655141, *3 (E.D. Cal. Feb. 21, 2013)*. The standard governing a motion under Rule 12(c) is essentially the same as that governing a Rule 12(b)(6) motion. *Dworkin, 867 F.2d at 1192*. When a Rule 12(c) motion is used to raise the defense of failure to state a claim, the motion is subject to the same **[*6]** test as a motion under Rule 12(b)(6).

In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)*. The plaintiff must allege "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*.

There are no relevant factual disputes between the parties on this issue. The parties simply disagree as to whether Plaintiff can maintain statutory standing to bring a representative ***PAGA*** claim once his individual ***PAGA*** claim is compelled to arbitration. The Court begins with a brief review of Moriana's holding on this issue. ***PAGA*** contains "what is effectively a rule of claim joinder [and] [a]n employee with statutory standing may seek any civil penalties the state can, including penalties for violations involving employees other than the ***PAGA*** litigant herself." *Moriana, 142 S.Ct. at 1915* (internal quotation omitted). However, "[u]nder ***PAGA***'s standing requirement, **[*7]** a plaintiff can maintain non-individual ***PAGA*** claims in an action only by virtue of also maintaining an individual claim in that action." *Id. at 1925* (citing *Cal. Labor Code §§ 2699(a)*, (c)). "When an employee's own dispute is pared away from a ***PAGA*** action, the employee is no different from a member of the general public, and ***PAGA*** does not allow such persons to maintain suit." Id. (citing *Kim v. Reins Int'l Cal., Inc., 459 P.3d 1123, 1133 (Cal. 2020)*). In sum, the Supreme Court concluded that once a plaintiff's individual ***PAGA*** claims were compelled to arbitration, that plaintiff "lack[ed] statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." Id.

Defendants contend that Moriana's holding resolves the statutory standing issue.[3] In contrast, Plaintiff argues that the Supreme Court erred in its interpretation of ***PAGA***'s statutory standing. (Doc. No. 51 at 11-12.) Plaintiff primarily takes issue with the Supreme Court's interpretation of the California Supreme Court's opinion in Kim. (Id.) Plaintiff asserts that Justice Sotomayor invited California courts to correct this error in her concurrence. *Moriana, 142 S.Ct. at 1925-26* (Sotomayor, J., concurring) ("Of course, if this Court's understanding of state law is wrong, California courts, **[*8]** in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under ***PAGA*** within state and federal constitutional limits."). Notwithstanding Justice Sotomayor's concurrence, a majority of Justices—including Justice Sotomayor—held that a plaintiff lacks statutory standing to bring a representative ***PAGA*** claim without a related individual ***PAGA*** claim in that same proceeding. See *Moriana, 142 S.Ct. at 1925-26*. Moreover, the Supreme Court explicitly considered *Kim* when reaching this holding. See *Moriana, 142 S.Ct. at 1925-26*.

The Court is disinclined to substitute its own interpretation of California state law in place of an interpretation set forth so recently by the Supreme Court. See *Kona Enterprises, Inc. v. Est. of Bishop, 229 F.3d 877, 884 n.7 (9th Cir. 2000)* (explaining

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Plaintiff does not contest this assertion. Moreover, the Court concluded in its 2020 Order that the arbitration agreement only provides for arbitration of Plaintiff's individual claims. (See 2020 Order at 12-13.)

[3] Defendants also argue that Plaintiff's statutory standing is a question s of federal law. (Doc. No. 53 at 3-4.) But Defendants are conflating statutory standing—in this case, set forth by California state law—and Article III standing. See *Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174-75 (9th Cir. 2004)* (discussing Article III standing and statutory standing). Statutory standing, not Article III standing, is at issue in this case, and because ***PAGA*** is a state law claim, state law is controlling of statutory standing to bring the claim.

that courts within the Ninth Circuit are bound by interpretations of state law by the Ninth Circuit in the absence of any subsequent indication from the state courts that the interpretation is incorrect); *Owen ex. rel. Owen v. United States, 713 F.2d 1461, 1464 (9th Cir. 1983)* (same); see also *F.D.I.C. v. McSweeney, 976 F.2d 532, 535 (9th Cir. 1992)* ("As a three-judge panel, we are bound by our prior decisions interpreting state as well as federal law in the absence of intervening controlling authority."). Moreover, like the Supreme Court, this Court sees no **[*9]** "mechanism [provided by ***PAGA***] to enable a court to adjudicate non-individual ***PAGA*** claims once an individual claim has been committed to a separate proceeding." *Moriana, 142 S.Ct. at 1925*. Accordingly, the Court strikes Plaintiff's representative ***PAGA*** claim from Count XI because Plaintiff now lacks statutory standing to bring the claim before this Court.

REQUEST TO STAY

Plaintiff argues that if this Court finds in favor the Defendants on the statutory standing issue, then the Court should stay this case until the California Supreme Court issues its opinion in the appeal of *Adolph v. Uber Techs., Inc., No. G059860, 2022 WL 1073583 (Cal. Ct. App. Apr. 11, 2022)*.[4] "The district court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones, 520 U.S. 681, 706 (1997)*. Plaintiff, as the proponent, bears the burden of establishing the need of the stay. *Id. at 708*. "The Court considers the following factors when ruling on a request to stay proceedings: (1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice, measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." Richards v. Pac. Gas & Elec. Co., 2017 WL 1370684, at *1 (C.D. Cal. Apr. 10, 2017) (citation omitted). **[*10]** The Court should "balance the length of any stay against the strength of the justification given for it." Id. (citation omitted).

Plaintiff requests that the Court stays this case until after the California Supreme Court issues its order in Adolph. (Doc. No. 51 at 15-17.) Plaintiff contends that the California Supreme Court will correct the Supreme Court's error on the question of statutory standing. (Id.) Two factors weigh heavily against a stay. First, the Supreme Court directly addressed the statutory standing issue in *Moriana*. Although the California Supreme Court may also address this question, this Court is already presented with persuasive authority on the statutory standing issue. Second, this Court has no assurances of when the California Supreme Court will decide *Adolph*. The opening merits brief in the appeal is due on September 19, 2022 (Doc. No. 51 at 16), but neither the parties nor the Court know when this case will be resolved. The Court declines to issue an indefinite stay of months, or possibly years, on the possibility that the California Supreme Court's interpretation of statutory standing will differ from the interpretation articulated in Moriana. See *Dependable Highway Exp., Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007)* ("Generally, stays **[*11]** should not be indefinite in nature.").

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion. The Court strikes Plaintiff's representative ***PAGA*** claim from Count XI of his complaint and compels the remaining individual ***PAGA*** claim in Count XI to be arbitrated. As the ***PAGA*** claims were the only remaining claims before the Court, the Court dismisses the case.

IT IS SO ORDERED.

DATED: September 12, 2022

/s/ Marilyn L. Huff

MARILYN L. HUFF, Senior District Judge

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[4] Plaintiff requests that this Court take judicial notice of related trial court opinions. (Doc. No. 51-4.) A court may take judicial notice of a fact that is "not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. This includes court records. See *U.S. v. Raygoza-Garcia, 902 F.3d 994, 1001 (9th Cir. 2018)*. Accordingly, the Court takes judicial notice of the opinions submitted by the Plaintiff. (Doc. Nos. 51-5 - 51-9.)

UNITED STATES DISTRICT COURT

End of Document

TAB 3

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

DOUGLASS OLMSTED, on behalf of all aggrieved employees of DEFENDANT in the State of California,

Plaintiff,

vs.

MERCURY INSURANCE SERVICES, LLC; and DOES 1 through 50, Inclusive,

Defendant.

Case No. 21CV376878

Hon. Christopher G. Rudy
Dept. 7

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL INDIVIDUAL ARBITRATION AND TO DISMISS REPRESENTATIVE PAGA ACTION BY DEFENDANT MERCURY INSURANCE SERVICES, LLC; DECLARATIONS OF AMY LINDBERG AND STEPHEN L. BERRY IN SUPPORT THEREOF

Date: TBD by Court
Time: 9:00 a.m.
Dept.: 7

Complaint Filed: January 29, 2021
Trial Date: None

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Statutes

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On May 10, 2022, this court stayed all proceedings in this action pending the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*. On June 15, 2022, the Supreme Court issued an 8-1 decision in that case, holding that individual claims filed under the California private attorneys general act ("PAGA") can be compelled to arbitration, and once compelled, the non-individual PAGA claims brought on behalf of other individuals cannot be maintained and must be dismissed. In so doing, the Supreme Court held that the federal arbitration act ("FAA") preempts the California Supreme Court's ruling in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), insofar as *Iskanian* precludes the arbitration of an individual employee's PAGA claims.

Like all applicants for employment with defendant Mercury Insurance Services, LLC ("Mercury") who receive an employment offer, plaintiff Douglass Olmsted ("Olmsted") was informed that one of the conditions of his employment offer was his acceptance of a mutual agreement to arbitrate all claims and controversies that may arise between them. Olmsted chose to accept employment with Mercury, and voluntarily signed an arbitration agreement, in which he expressly promised to arbitrate any individual claim he may have against Mercury. Nevertheless, in derogation of his promise, Olmsted filed the instant lawsuit against Mercury.

Olmsted's lawsuit arises out of his employment with Mercury. Specifically, Olmsted seeks civil penalties for alleged Labor Code violations for alleged unreimbursed business expenses that he incurred as a result of his employment with Mercury. He also seeks civil penalties for all similarly alleged "aggrieved employees" of Mercury, pursuant to PAGA. However, under *Viking River Cruises*, and pursuant to his agreement to arbitrate, Olmsted cannot pursue those "representative" claims.

The agreement to arbitrate between Olmsted and Mercury is valid and binding,[1] it is neither "procedurally" nor "substantively" unconscionable, and it covers all of Olmsted's

[1] Indeed, were there any doubt about the enforceability of Olmsted's arbitration agreement, it is completely removed by the fact that he has utilized that agreement to pursue non-PAGA claims in a pending separate action.

individual claims asserted in this action. Pursuant to *Viking River Cruises*, and Olmsted's contractual promise, this Court should compel arbitration of Olmsted's individual PAGA claims against Mercury. Further, as Olmsted lacks statutory standing to continue to maintain his non-individual claims in court while pursuing his individual claims in arbitration, those non-individual claims in which he purports to represent other current and former employees of Mercury should be dismissed.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2021, Olmsted sued Mercury, alleging a single cause of action for civil penalties under PAGA. Olmsted's lawsuit is premised upon a singular theory that Mercury "had a pattern and practice of failing to reimburse Plaintiff and other aggrieved employees for all expenses that were necessarily incurred in the discharge of their job duties." Complaint, ¶ 27. Specifically, Olmsted has alleged that "Plaintiff and other aggrieved employees were assigned by [Mercury] to work from home," and "[a]s a result of working from home, Plaintiff and other aggrieved employees were necessarily required to use their home internet, electricity, and other utilities in the discharge of their duties," and "Plaintiff and other aggrieved employees incurred [such] various expenses as a result of working from home for which they were not reimbursed." Complaint, ¶ 28-29.

In August 2017, Olmsted applied for and received an offer of employment with Mercury. *See* Declaration of Amy Lindberg, attached hereto as Exhibit "A," ¶ 2. At the time of his hire, Olmsted and Mercury entered a "Mutual Dispute Resolution Agreement" (the "Agreement"), requiring each of them to arbitrate all claims that they may have against each other. *Id*. and Exhibit "1," thereto.

As to Olmsted, the Agreement requires him to submit to arbitration "all claims or controversies . . . past, present or future, whether or not arising out of [his] employment (or its termination)." *Id*., Exhibit 1, at p.1. The Agreement specifically designates "Arbitrable claims" as "claims for wages, bonuses, or other compensation due . . . and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, except claims for workers' compensation or unemployment compensation benefits." *Id*.

The Agreement also includes a class and representative action waiver in a paragraph entitled "Individual Dispute Resolution," which provides:

> To the maximum extent permitted by law, I hereby waive any right to bring on behalf of persons other than myself, or to otherwise participate with other persons in, any class, collective, or representative action (including but not limited to any representative action under the California Private Attorneys General Act ("PAGA"), or other federal, state or local statute or ordinance of similar effect). I understand, however, that to the maximum extent permitted by law I retain the right to bring claims in arbitration, including PAGA claims, for myself as an individual (and only for myself).

Id., at p. 2.

Mercury did not initially move to strike Olmsted's PAGA representative allegations and claim, and to compel his individual claims to arbitration because of the California Supreme Court's decision in *Iskanian*, which held that pre-dispute agreements to waive the right to bring "representative" PAGA claims were invalid as a matter of public policy. *See* Declaration of Stephen L. Berry, attached hereto as Exhibit "B," ¶ 3.

On February 22, 2022, Olmsted initiated an arbitration proceeding in accordance with the Agreement, asserting eight causes of action against Mercury for discrimination, retaliation and wrongful termination. Berry Decl., ¶ 4 and Exhibit "2," thereto. Following the U.S. Supreme Court's decision in *Viking River Cruises*, Olmsted was requested to dismiss this action and pursue his individual PAGA claim in arbitration pursuant to the Agreement. He refused. Berry Decl., ¶ 5 and Exhibit "3," thereto.

III. THIS COURT SHOULD COMPEL ARBITRATION OF OLMSTED'S INDIVIDUAL PAGA CLAIM

A binding arbitration agreement covers the claims asserted here. This Court should compel arbitration of Olmsted's individual PAGA claims against Mercury, and dismiss the representative action that he erroneously has attempted to assert on behalf of other employees.

A. *Viking River Cruises* Holds That Courts Can Compel An Employee's Individual PAGA Claims To Arbitration.

Congress enacted the FAA **"**to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.**"** *Moses H. Cone Mem'l*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). "The FAA reflects both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *Kramer v. Toyota Motor Corp*., 705 F.3d 1122, 1126 (9th Cir. 2013) (citations omitted). Although the FAA's "saving clause" permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2), these generally applicable contract defenses do not include "defenses that apply only to arbitration" or "that target arbitration . . . by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (internal quotations omitted).

The U.S. Supreme Court has repeatedly rejected efforts -- including California's -- to circumvent Congress' clear instruction expressed in the FAA that courts should "enforce arbitration agreements according to their terms -- including terms providing for individualized [as opposed to class, collective, or representative] proceedings." *Epic*, 138 S. Ct. at 1619. In 2011, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), where it addressed a California rule that prohibited as unconscionable most class action waivers in consumer contracts. 536 U.S. at 338. The Court observed that the state rule interfered with "fundamental attributes" of arbitration by permitting any party to demand class-wide proceedings despite the traditionally individualized and informal nature of arbitration. *Id*. at 344, 347-48. Thus, the Court held that California's rule stood "as an obstacle to the accomplishment of the FAA's objectives" and was preempted by the FAA. *Id*. at 343.

Despite the U.S. Supreme Court's unequivocal directive that courts should enforce the plain terms of arbitration agreements, the California Supreme Court in *Iskanian* held that a pre-dispute agreement in which an employee agrees to arbitrate all claims individually and to forgo the right to pursue a representative PAGA action is unenforceable. *See Iskanian*, 59 Cal. 4th at 384. *Viking River Cruises* is the most recent example of the U.S. Supreme Court rebuffing California's hostility to arbitration agreements.

In *Viking River Cruises*, the plaintiff accepted an agreement to arbitrate any dispute arising out of her employment with Viking. *Id*. at *5. The agreement contained a waiver

providing that "in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action." *Id*. In addition, the agreement included "a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court," but that "if any 'portion' of the waiver remained valid, it would be 'enforced in arbitration.'" *Id*.

Despite the agreement, the plaintiff sued Viking under PAGA on behalf of herself and other employees for alleged wage and hour violations of the Labor Code. *Id*. Viking moved to compel the plaintiff's "individual" PAGA claim. *Id*. The trial court denied the motion based on the *Iskanian* rule, and the California Court of Appeal affirmed. *Id*. The California Supreme Court denied review, and the U.S. Supreme Court granted certiorari

The ability under PAGA to join *other* employees' claims in a single representative proceeding was critical to the Court's decision. *Id*. at *10. The Court held that a conflict exists between the FAA and the *Iskanian* rule prohibiting parties from contracting around this claim joinder. *Id*. As the Court explained, "[i]f the parties agree to arbitrate 'individual' PAGA claims based on personally sustained violations, *Iskanian* allows the aggrieved employee to abrogate that agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties." *Id*. at *11. "As a result, *Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than forgoing the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution." *Id*. (internal quotation omitted). Therefore, "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Id*.

Having concluded that *Iskanian* was preempted, the Court held that Viking was "entitled to compel arbitration of the plaintiff's individual claim." *Id*. It further explained that because PAGA's standing provision requires that the named plaintiff be an "aggrieved employee" herself, the plaintiff could not continue to litigate her non-individual claims in court, and so after compelling her individual claims to arbitration, "the correct course is to dismiss her remaining claims." *Id*.

B. The Agreement Covers Olmsted's Individual Claims.

This Court should order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 650 (1986) (citation omitted). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999) (internal quotation marks omitted).

Here there is no doubt. The Agreement applies to "all claims or controversies . . . past, present or future, whether or not arising out of [his] employment (or its termination)." Lindberg Decl., Exhibit 1, at p. 1. The covered claims include "claims for violation of any state, or other governmental law, statute, regulation, or ordinance, except claims for workers' compensation or unemployment compensation benefits." *Id*.

Further, the Agreement anticipated *individual* arbitration: Olmsted expressly agreed that, "[t]o the maximum extent permitted by law, [he] . . . waive[d] any right to bring on behalf of persons other than [him]self, or to otherwise participate with other persons in, any class, collective, or representative action (including but not limited to any representative action under [PAGA])." Under settled law, "'a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.'" *Viking River Cruises*, 2022 WL 2135491, at *7 (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019) (emphasis in original). Now, based on *Viking River Cruises*, the same rule applies to preclude PAGA representative actions.

C. The Agreement Is Valid.

By utilizing the Agreement to pursue his non-PAGA claims, Olmsted has waived any argument he may have that the Agreement is invalid. In any event, as shown below, there is no basis for any challenge to the enforceability of the Agreement.[2]

[2] Arbitration agreements are presumed to be valid; the party seeking to avoid arbitration bears the burden of demonstrating otherwise. *Espejo v. S. Cal. Permanente Med. Grp.*, 246 Cal. App. 4th 1047, 1060 (2016) (moving party meets their "*initial* burden to show an agreement to arbitrate" exists "by attaching a copy of the arbitration agreement purportedly bearing the opposing party's signature" to a declaration); *Condee v. Longwood Mgmt. Corp.*, 88 Cal. App. 4th 215, 219 (2001)

1. The Agreement is an enforceable contract under ordinary contract formation principles.

When determining whether a valid contract to arbitrate exists, courts apply ordinary state-law principles that govern contract formation. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 62-63 (2015) (reversing a California state court that had failed to do so). Under California law, a contract requires (1) the parties' consent, and (2) consideration. Cal. Civ. Code § 1550; *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999). Both of these prerequisites are met here.

First, Mercury and Olmsted consented to be bound by the Agreement. "The manifestation of mutual consent is generally achieved through the process of offer and acceptance[,] . . . [and] is determined under an objective standard applied to the outward manifestations or expressions of the parties, *i.e.*, the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." *Pac.* Corp. *Grp. Holdings, LLC v. Keck*, 232 Cal. App. 4th 294, 309 (2014). Olmsted demonstrated the intent to be bound by signing the Agreement. Lindberg Decl., Exhibit 1, at p. 3.

Second, ample consideration existed to support Olmsted's promise to arbitrate, because (even leaving aside the consideration inherent in a job offer), Mercury mutually was bound to arbitrate any claims it might have had against Olmsted. The Agreement applies to all "claims or controversies" between the parties, including those that "the Company . . . may have against [Olmsted]." Lindberg Decl., Exhibit 1, at p. 1. "[T]he parties' mutual promises to forego a judicial determination and to arbitrate their disputes provide consideration for each other." *Strotz v. Dean Witter Reynolds, Inc.*, 223 Cal. App. 3d 208, 216 (1990), *overruled on other grounds by Rosenthal v. Great W. Fin. Secs. Corp.*, 14 Cal.4th 394 (1996); *accord Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002) (employer's "promise to be bound by the arbitration process itself serves as adequate consideration").

(after initial burden is met, the "burden shifted to [the party seeking to avoid arbitration] to prove the falsity of the purported agreement.").

Because all the requirements for a valid contract under California law have been met, Mercury and Olmsted are bound by their agreement to arbitrate.

2. The Agreement is not unconscionable.

a. California's unconscionability test requires that Olmsted show both procedural and substantive unconscionability.

Unconscionability is an affirmative defense to the enforcement of a contract. *Graham v. Scissor-Tail, Inc*., 28 Cal.3d 807, 820 (1981). "The party resisting arbitration bears the burden of proving unconscionability." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 247 (2012); *see also Rosenthal*, 14 Cal. 4th at 413 ("If the party opposing the petition raises a defense to enforcement . . . that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense.").

Unconscionability has both a substantive and a procedural element. An agreement to arbitrate is unenforceable only where both substantive and procedural unconscionability exist; it is not enough that one may exist without the other. *See, e.g*., *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) (both forms of unconscionability must be present to defeat contract formation).

"'With a concept as nebulous as "unconscionability," it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable.'" *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc*., 89 Cal. App. 4th 1042, 1055 (2001) (quoting *American Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1391 (1996)). As the California Supreme Court reiterated, "[t]he unconscionability inquiry is not a license for courts to impose their renditions of an ideal arbitral scheme." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1148 (2013). "[C]ourts may not decline to enforce an arbitration agreement simply on the ground that it appears to be a bad bargain or that one party could have done better." *Id*.; *accord Sanchez v. Valencia Holding Co*., 61 Cal.4th 899, 911 (2015) ("A party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain.").

The Agreement is neither procedurally nor substantively unconscionable, and certainly not both.

b. The Agreement is not procedurally unconscionable.

"Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time." *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th 1322, 1329 (1999). An agreement is only procedurally unconscionable where there is (1) "'oppression' arising from an inequality of bargaining power"; or (2) "'surprise' arising from buried terms in a complex printed form." *McManus v. CIBC World Mkts. Corp.*, 109 Cal. App. 4th 76, 87 (2003). Here there was no oppression, and there was no surprise.

"Oppression arises from an inequality in bargaining power which results in no real negotiation and an absence of meaningful choice." *Id.* With respect to employment situations, courts have long held that presenting an employment arbitration agreement to an employee on a "take it or leave if basis" does not render the agreement unenforceable. *Roman v. Super. Ct.*, 172 Cal. App. 4th 1462, 1470-71 (2009). As explained in *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016), the negotiability of the agreement is only the beginning, not the end, of the analysis. Courts evaluating procedural unconscionability must focus on factors such as whether the plaintiff was "lied to, placed under duress, or otherwise manipulated into signing the arbitration agreement," and whether the agreement was "'artfully hidden.'" *Baltazar*, 62 Cal.4th at 1245-46. In *Baltazar*, plaintiff was told in a job interview, "[S]ign it or no job." *Id.* at 1241. The unanimous California Supreme Court nevertheless enforced the arbitration agreement; there were no indicia of oppression or surprise.[3]

[3] Even before *Baltazar*, '"[t]he cases uniformly agree[d] that a compulsory predispute arbitration agreement is not rendered unenforceable just because it is required as a condition of employment or offered on a "take it or leave it" basis.'" *Serafin v. Balco Props. Ltd., LLC*, 235 Cal. App. 4th 165, 179 (2015) (citation and alteration omitted); *see also Roman*, 172 Cal. App. 4th at 1470-71 n.2, 1473 (finding that any procedural unfairness in an adhesive agreement in the employment context is limited, where there is a "a relatively short agreement . . . written in clear, understandable language;" "[t]he adhesive nature of the contract" is not dispositive); *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 981 (2010) (enforcing agreement and finding minimal procedural unconscionability even though, '"[i]n employment cases, the agreement is typically prepared by the employer, and presented to the employee as a condition of employment without negotiation regarding its terms") (citation omitted).

Surprise "involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Stirlen*, 51 Cal. App. 4th at 1532. It generally arises in the commercial context where consumers complete purchase transactions or other forms containing small print with buried arbitration clauses. *See, e.g.*, *Wayne v. Staples, Inc*., 135 Cal. App. 4th 466, 480 (2006). Here, the Agreement does not contain any indication of potential "surprise" resulting from either the wording or the layout of the Agreement. It is not buried in a "prolix printed form." Rather, it is set forth in a standalone document that is only three pages. The Agreement itself was titled "MUTUAL DISPUTE RESOLUTION AGREEMENT." Its terms clearly explain that the parties mutually agree to arbitrate claims they might have against each other rather than pursue the claims in court. The Agreement articulates all applicable provisions and requirements in clear, unambiguous language broken down into clear and succinct paragraphs with understandable and specific language detailing the obligation to which Olmsted agreed. There is no reasonable argument that the nature or importance of the Agreement was hidden from Olmsted. *See, e.g.*, *Pinnacle*, 55 Cal. 4th at 247 & n.12 (2012) (rejecting contention of unconscionability; "[T]he trial court found no evidence of surprise," and "[w]e agree. The record reflects that the arbitration provisions . . . appear in a separate article under a bold, capitalized, and underlined caption . . . and within a separate section with [a] bold and underlined title . . . .").

Moreover, the following statement is immediately above Olmsted's signature in all capital letters:

> I UNDERSTAND THAT I AM GIVING UP MY RIGHT TO A JURY TRIAL AND TO PARTICIPATE IN CLASS, COLLECTIVE AND REPRESENTATIVE ACTIONS.
>
> I FURTHER ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISHED TO DO SO.

Lindberg Decl., Exhibit 1, at p. 3.

c. The Agreement is not substantively unconscionable.

Even if there were some trace of procedural unconscionability (and there is not, as explained above), the Agreement still is enforceable because there is little to no substantive unconscionability. Substantive unconscionability focuses "on overly harsh or one-sided results." *Baltazar*, 62 Cal.4th at 1243 (citation omitted). That is not the case here.

Armendariz held that, for an employment arbitration agreement to be enforceable, it must meet certain "minimum requirements" to ensure that substantive rights afforded by statute are not waived. Specifically, an arbitration agreement is enforceable if it provides for: (1) a neutral arbitrator; (2) a written decision subject to limited judicial review; (3) payment by the employer of all costs unique to arbitration; (4) recovery of all statutory remedies; and (5) adequate discovery. *Armendariz*, 24 Cal.4th at 90-91, 103-13. The Agreement meets those requirements.

First, the Agreement provides for a neutral arbitrator by incorporating the JAMS Employment Arbitration Rules. Lindberg Decl., Exhibit 1, at p. 1. The Agreement states: "The arbitration will be conducted in accordance with the then-current JAMS Employment Arbitration Rules & Procedures (and no other JAMS rules), which currently are available at http://www.jamsadr.com/rules-employment-arbitration." *Id*. It further provides that "[t]he arbitrator shall be either a retired judge, or an attorney who is experienced in employment law and licensed to practice law in the state in which the arbitration is convened (the 'Arbitrator'), selected as provided by the JAMS rules." *Id*. JAMS Rule 7 provides that "[t]he Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise." JAMS, Employment Arbitration Rules & Procedures. JAMS Rule 15, meanwhile, provides a mechanism by which the neutral arbitrator is selected via the parties' striking potential arbitrators from a list provided by JAMS. *Id.*

Second, the Agreement expressly provides that "[t]he Arbitrator shall render an award and written opinion, which shall include the factual and legal basis for the award, normally within 30 days after a dispositive motion is heard, or an arbitration hearing." Lindberg Decl., Exhibit 1, at p. 1. The JAMS Rules also ensure a written decision. Rule 24(h) requires awards to "consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if

any, as to each claim," and "contain a concise written statement of the reason for the Award," stating the essential findings and conclusions on which the Award is based.

Third, the Agreement expressly provides that, "[t]he Company will be responsible for paying any filing fee and the fees and costs of the Arbitrator; provided, however, that if I am the party initiating the claim, I will contribute an amount equal to the filing fee to initiate a claim in the court of general jurisdiction in the state in which I am (or was last) employed by the Company, unless the JAMS rules or the Arbitrator allow me to proceed without doing so based on demonstrated financial hardship." Lindberg Decl., Exhibit 1, at p. 2. That language precisely tracks *Armendariz*, which said that the employee can be asked to bear an "expense that the employee would . . . be required to bear if he or she were . . . to bring the action in court." *Armendariz*, 24 Cal. 4th at 110-11.

Fourth, the Agreement permits Olmsted to recover all otherwise-available remedies, by providing that "[t]he Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted." Lindberg Decl., Exhibit 1, at p. 2. Since "nothing in the language of the [Agreement] limits remedies," "no limitation should be implied." *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1075 n.1 (2003).

Fifth, the Agreement provides for discovery including three fact witness depositions and the deposition of any expert designated by the other party. The Agreement also provides each party the right to make requests for production of documents consisting of up to 25 individual categories of requested documents, and to subpoena documents from third parties. Further, "[t]he Arbitrator may grant such additional discovery if the Arbitrator finds that the party has demonstrated that it needs that discovery to adequately arbitrate the claim, taking into account the parties' mutual desire to have a speedy, less-formal, and cost-effective dispute-resolution mechanism.." Lindberg Decl., Exhibit 1, at p. 2. The Agreement's discovery rules are consistent with *Armendariz*. *See, e.g.*, *Dotson v. Amgen, Inc.*,181 Cal. App. 4th 975, 982-85 (2010) (reversing trial court and compelling arbitration; the agreement set forth limits on discovery, but allowed the arbitrator to grant more on an appropriate showing of need); *Sanchez v. CarMax Auto*

Superstores Cal., LLC, 224 Cal. App. 4th 398, 404-06 (2014) (same; arbitrator could grant additional discovery based on a showing of "substantial need").

Here there is no indicia of substantive unconscionability that would be sufficient to render the Agreement unenforceable.

d. Any unconscionable provision should be severed and the remainder of the Agreement enforced.

California law abhors "throw[ing] the [arbitration] baby out with the bath water." *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 910 (2001). "[T]he strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement . . . ." *Roman*, 172 Cal. App. 4th at 1477; *see Farrar v. Direct Commerce, Inc*., 9 Cal. App. 5th 1257, 1275 (2017) (compelling arbitration after severing the "aspect in which the arbitration provision is substantively unconscionable"). The Ninth Circuit in *Poublon v. C.H. Robinson Co*., 846 F.3d 1251 (9th Cir. 2017), enforced an agreement following severance of multiple provisions: "Poublon argues that an agreement is necessarily permeated by unconscionability if more than one clause in the agreement is unconscionable or illegal. We disagree . . . ." *Id*. at 1273. *See also Rejuso v. Brookdale Senior Living, Inc*., No. CV 17-4647 DSF (KSx), 2017 U.S. Dist. Lexis 153456, at *15-16 (Sep. 18, 2017) (enforcing arbitration agreement after severing a then-unenforceable term).

If this Court were to find one (or more) unconscionable provisions in the arbitration agreement, the appropriate remedy would be to sever or limit it (or them) and then enforce the rest of the Agreement.

e. The Agreement therefore is enforceable.

"Both procedural unconscionability and substantive unconscionability must be shown" before an agreement may be held unenforceable. *Pinnacle*, 55 Cal.4th at 247. If this Court concludes, as it should, that at least one form of unconscionability is wholly absent, the Agreement is enforceable without more.

Alternatively, the Agreement should be enforced even if both forms of unconscionability were present in some degree (which is not the case here). A reviewing court's task "is not only to determine whether … unconscionability exists, but more importantly, to what degree it may

exist." *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1319 (2005). Where there is minimal procedural unconscionability, the party opposing arbitration must show a high level of substantive unconscionability (or vice versa). *See, e.g.*, *Armendariz*, 24 Cal. 4th at 114 ("[T]he more substantively oppressive the contract term[s], the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.").

In *Marin Storage*, 89 Cal. App. 4th at 1056, the court found that "procedural unconscionability, although extant, was not great" in light of all the circumstances. "In light of the low level of procedural unfairness, we conclude that a greater degree of substantive unfairness than has been shown here was required before the contract could be [invalidated]." *Id*. The court therefore enforced the agreement. *See also Serpa v. Cal. Sur. Investigations, Inc*., 215 Cal. App. 4th 695, 704 (2013) ("When, as here, there is no other indication of oppression or surprise, 'the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high.'") (citation omitted); *Gatton v. T-Mobile USA, Inc*., 152 Cal. App. 4th 571, 586 (2007) (in light of the minimal degree of procedural unconscionability, plaintiff was required to "make a strong showing of substantive unconscionability").

The Agreement is not unconscionable at all, but even assuming otherwise, *arguendo*, it should be enforced under California's sliding-scale test.

IV. THIS COURT SHOULD DISMISS OLMSTED'S PURPORTED CLAIMS ON BEHALF OF OTHER INDIVIDUALS BASED ON *VIKING RIVER CRUISES*

Viking River Cruises holds that when the individual claims of a PAGA action plaintiff are compelled to arbitration, the plaintiff lacks standing to assert a PAGA representative claim on behalf of other current and former employees. *See Viking River Cruises*, 2022 WL 2135491 at *11. Thus, while Olmsted's individual PAGA claim must be compelled to arbitration, his non-individual, representative PAGA claim must dismissed. *Id.* ("As a result, [plaintiff] lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.").

V. CONCLUSION

Olmsted contractually promised to arbitrate any individual disputes he may have with Mercury. *Viking River Cruises* forecloses his ability to avoid arbitration of his individual PAGA claims. Accordingly, Mercury respectfully requests that the Court grant this motion, and (1) order Olmsted to submit his individual PAGA claims against Mercury to arbitration, and (2) dismiss his purported representative PAGA claims on behalf of other current and former employees in their entirety.

DATED: July 1, 2022

PAUL HASTINGS LLP

By: _____
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TAB 4

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

DOUGLASS OLMSTED, on behalf of all aggrieved employees of DEFENDANT in the State of California,

Plaintiff,

vs.

MERCURY INSURANCE SERVICES, LLC; and DOES 1 through 50, Inclusive,

Defendant.

Case No. 21CV376878

Hon. Drew Takaichi
Dept. 2

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL INDIVIDUAL ARBITRATION AND TO DISMISS REPRESENTATIVE PAGA ACTION

Date: September 13, 2022
Time: 9:00 a.m.
Dept.: 2

Complaint Filed: January 29, 2021
Trial Date: None

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Olmsted's Opposition brief does not even attempt to challenge the enforceability of his arbitration agreement (the "Agreement"). This is not surprising, since he has filed an arbitration proceeding asserting other individual claims against Mercury. Instead, his entire Opposition consists of arguments that were considered and rejected by the United States Supreme Court in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), or that are contrary to well-established contract interpretation principles. Specifically, he incredibly argues that (1) the express representative action waiver in the Agreement is ineffective because of the savings clause that no longer applies since *Viking River*, (2) that the Agreement by its terms does not cover his individual PAGA claim because the State of California is the real party in interest, (3) any ambiguity in the Agreement must be construed against Mercury, and (4) if his individual PAGA claim is compelled to arbitration, then his non-individual, representative PAGA claim should be stayed rather than dismissed. Olmsted is wrong on all of these points.

It is well-established in a long line of United States Supreme Court decisions that a court interpreting an arbitration agreement subject to the Federal Arbitration Act ("FAA") must give due regard to the federal policy favoring arbitration, and any ambiguity regarding the scope of the arbitration clause must be resolved in favor of arbitration. Nothing in the representative action waiver in Olmsted's Agreement allows him to avoid arbitration of his individual PAGA claim. The enforcement nature of a PAGA representative action does not change this result. The Supreme Court in *Viking River* ruled that an arbitration agreement can be enforced in a PAGA action and an employee's individual PAGA claim must be excised from the representative PAGA claim and compelled to arbitration. Furthermore, the Supreme Court made it clear that the proper course of action after compelling a plaintiff's individual PAGA claim to arbitration is for the trial court to dismiss the representative PAGA claim for lack of standing.[1]

Olmsted has failed to meet his burden to resist arbitration. *See Green Tree Fin. Corp.*

[1] Olmsted has submitted some trial court orders that appear to ignore the Supreme Court's mandate and stay the representative PAGA claim as opposed to dismissing it. Leaving aside that other trial court orders are not binding on or precedent for this Court, those orders do not mean that this Court should do the same.

Alabama v. Randolph, 531 U.S. 79, 91 (2000). Mercury's motion should be granted.

II. OLMSTED'S OPPOSITION DOES NOT ALLOW HIM TO AVOID ARBITRATION OF HIS INDIVIDUAL PAGA CLAIM

A. The Savings Clause In The Representative Action Waiver Is Not Applicable Or Needed After *Viking River*.

Olmsted argues that the savings clause in the Agreement preserves his right to litigate his individual PAGA claim in this Court.[2] Specifically, Olmsted contends that the intent of the parties to the Agreement at the time of contracting was to effectively waive arbitration of both individual and representative PAGA claims. This strained reading ignores the plain language of the Agreement and is wrong for multiple reasons as a matter of law.

As Olmsted does not dispute that the Agreement is valid and governed by the FAA, this Court must enforce the Agreement by its terms. *See Morgan v. Sundance, Inc*., 142 S.Ct. 1708, 1713 (2022). Further, "language in a contract must be interpreted as a whole." *Int'l Bhd. of Teamsters v. NASA Servs., Inc*., 957 F.3d 1038, 1044 (9th Cir. 2020). "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019).

Here, the Agreement clearly and unequivocally requires arbitration of *all* of Olmsted's individual claims: "the Company ***and I*** mutually consent to the resolution *by arbitration* of *all claims* or controversies . . . , past, present or future, whether or not arising out of my employment (or its termination)" and "[b]oth the Company ***and I*** agree that neither of us shall initiate or prosecute any lawsuit in any way related to any claim covered by this agreement to arbitrate." Agreement at p. 1 (Lindberg Decl., Ex. 1) (emphasis added). This is underscored by the representative action waiver in the Agreement: "***To the maximum extent permitted by law***, I hereby waive any right to bring on behalf of persons other than myself, or to otherwise participate with other persons in, any class, collective, or representative action (including but not limited to

[2] The representative action savings clause states: "*If a court adjudicating a case involving the Company and me were to determine* that there is an unwaivable right to bring a PAGA representative action, any such representative action shall be brought only in court, and not in arbitration." Agreement at p. 2 (Lindberg Decl., Ex. 1) (emphasis added).

any representative action under [PAGA], or other federal, state or local statute or ordinance of similar effect." *Id*. at p. 2 (emphasis added).

The representative action waiver provision above explicitly applies "[t]o the maximum extent permitted by law," and thus cannot be interpreted in a manner that violates *Viking River*, *i.e*., it requires Olmsted to arbitrate his individual PAGA claim, and does not allow arbitration as a representative claim, including a representative PAGA claim.

Olmsted would have this Court ignore these provisions and focus only on the savings clause that no longer is necessary after *Viking River*. Thus, he contends that the representative action waiver in *Viking River* is "meaningfully different" from the representative action waiver in this case because the *Viking River* waiver "did not make any attempt to distinguish between 'individual' and 'non-individual' PAGA claims." Opp. at 10. His argument presupposes that the parties could foresee the holdings in both *Iskanian* and *Viking River*. This is absurd. *See* Cal. Civ. Code § 1643; *Miracle Auto Ctr. v. Superior Ct.*, 68 Cal. App. 4th 818, 821 (1998) ("As a general rule of construction, the parties are presumed to know and to have had in mind all applicable laws extant when an agreement is made. These existing laws are considered part of the contract just as if they were expressly referred to and incorporated.").

The representative action waiver in the Agreement is clear: it preserves the advantages of individual arbitration, whether that be an individual PAGA claim or other type of individual claim. Indeed, the purpose of the representative action waiver is to underscore the agreement of the parties to arbitrate claims and disputes on a one-on-one basis. *See Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1619 (2018) ("Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? … [A]s a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized arbitration."). *See also* Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *Carson v. Mercury Ins*. Co., 210 Cal. App. 4th 409, 420 (2012) ("An interpretation which gives effect to all provisions of the contract is preferred to one

which renders part of the writing superfluous, useless or inexplicable.").

B. Olmsted's Individual PAGA Claim Falls Within The Scope Of "Arbitrable Claims".

Olmsted argues that his individual PAGA claim falls outside the definition of "arbitrable claims" under the Agreement. Specifically, he contends that because the term "arbitrable claims" includes only claims that "the Company (or its subsidiaries and affiliates) may have against me or that I (***and no other party***) may have against" [Mercury], it necessarily excludes PAGA claims because "Plaintiff's representative PAGA claims are brought on behalf of the State, the real party in interest in the litigation." Opp. at 12 (emphasis added).

Olmsted is wrong again. It makes no difference that he brings his individual PAGA claim as a proxy of the State. Indeed, the Supreme Court in *Viking River* explicitly rejected the idea that PAGA actions consist of one, indivisible representative claim, as Olmsted appears to suggest here. As the Court explained, "PAGA plaintiffs are agents" who may recover "the State's claims for civil penalties on a representative basis." 142 S. Ct. at 1914 n.2, 1915. The term "representative," according to the Court, refers to two distinct aspects of a PAGA claim: (1) claims for penalties that "arose from the violation [the plaintiff] suffered" himself, and (2) claims for penalties for violations allegedly "sustained by other . . . employees[.]" *Id*. at 1916.

Under *Viking River*, the FAA allows parties to agree to arbitrate the first category (individual PAGA claim), and by virtue of PAGA's "statutory standing" rule, prohibits the plaintiff from pursuing the second category (a representative PAGA claim) in arbitration *unless* the parties expressly consent to arbitrate on a class or representative basis. *Id*. at 1916, 1925. Since the parties in *Viking River*, like Olmsted, agreed only one-on-one arbitration, the Court held that the plaintiff must arbitrate her PAGA "individual claim" and it dismissed the remaining "non-individual" (representative) PAGA claim for a lack of standing. *Id*. at 1925.

Olmsted appears to argue, however, that even as to his individual PAGA claim, the State of California -- not himself -- is the real party in interest, and because the State is not a signatory to the Agreement, there is no agreement to arbitrate. The employee in *Viking River* made the same argument in an effort to avoid the FAA, but her argument was rejected by the Supreme

Court. *See Viking River*, 142 S. Ct. at 1919, n.4 (rejecting *Iskanian*'s reasoning that, because PAGA is not an employer-employee dispute, there is no arbitration agreement and FAA does not apply to PAGA).

Nevertheless, this argument is a red herring. Mercury does not seek to compel the State to arbitrate any claim it may have against Mercury. Nor does Mercury seek to compel arbitration of the claims of any other employee who is not party to the Agreement. The only claims that Mercury seeks to arbitrate are those of Olmsted, which are covered by his Agreement with Mercury. Regardless of how he chose to style his claim in this Court, it does not change the fact that Olmsted agreed to arbitrate all disputes between himself and Mercury on an individual basis. His individual PAGA claim was not excluded from the ambit of the Agreement. *Viking River* makes it perfectly clear that Olmsted's agreement to arbitrate claims on an individual basis is fully enforceable even if it has been filed as part of a PAGA-only court action.

C. <u>Any Ambiguity Must Be Resolved In Favor Of Arbitration</u>.

The FAA "requires that questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration." *Cronus Investments, Inc. v. Concierge Servs.*, 35 Cal. 4th 376, 386 (2005) (citing 9 U.S.C. § 2). As such, "[a]ny doubts or ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration." *Id*. (citations omitted).

In his Opposition, Olmsted argues that, to the extent there is any ambiguity in the Agreement, rather than resolve ambiguity in favor of arbitration, the Court should rely on the *contra proferentem* doctrine to resolve the ambiguity against Mercury as the drafter of the arbitration agreement. Olmsted ignores that the Supreme Court has considered and rejected this very argument. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019), the Supreme Court reversed and remanded the Ninth Circuit's decision affirming application of the doctrine of *contra proferentem* over the FAA's public policy consideration of interpreting ambiguities in favor of arbitration.

The Court instructed that the *contra proferentem* doctrine applies "only as a last resort" upon exhausting ordinary methods of interpretation, and that such a doctrine was preempted by the FAA's default rule for resolving ambiguities in favor of arbitration. *Id*. at 1418 ("The general

contra proferentem rule cannot be applied to impose class arbitration in the absence of the parties' consent. Our opinion. . . is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. For example, we have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration."); *see also Erickson v. Aetna Health Plans of California, Inc*., 71 Cal. App. 4th 646, 656 (1999) ("[W]here an FAA contract is involved . . . ambiguities in an arbitration clause are to be resolved in favor of arbitration, notwithstanding the California rule that a contract is construed most strongly against the drafter." (quotation omitted)).

Therefore, even if this Court were to conclude that the representative action waiver in Olmsted's Agreement is ambiguous, which it is not, the FAA and clear and controlling authorities require that the Court nonetheless compel Olmsted's individual PAGA claim to arbitration.

III. OLMSTED'S NON-INDIVIDUAL PAGA CLAIM SHOULD BE DISMISSED FOR LACK OF STANDING

Once Olmsted's individual PAGA claim is compelled to arbitration, his non-individual, representative PAGA claim should be dismissed. Olmsted wrongly interprets *Kim v. Reins Int'l California, Inc*., 9 Cal. 5th 73 (2020), to argue otherwise.

A. *Viking River* Holds Once Olmsted's Individual PAGA Claim Is Compelled To Arbitration, He Lacks Standing To Pursue A Representative PAGA Claim.

In *Viking River*, a majority of five Justices on the Supreme Court -- including Justice Sotomayor -- cited the California Supreme Court's decision in *Kim* in support of their holding that once a plaintiff's individual PAGA claim is compelled to arbitration, "PAGA provides no mechanism to enable a court to adjudicate [plaintiff's] non-individual PAGA claims." 142 S. Ct. at 1925. "As a result," the majority in *Viking River* held, "[plaintiff] lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." *Id.*

In *Kim*, the California Supreme Court explained that California law previously authorized members of the general public to sue for relief under the State's Unfair Competition Law. 9 Cal. 5th at 90. The Court also noted, however, that "some private attorneys had exploited the generous standing requirement of the UCL by filing 'shakedown' suits to extort money from

small businesses for minor or technical violations where no client had suffered any injury." *Id.* In response to this practice, to ensure that PAGA suits could not be brought by "persons who suffered no harm from the alleged wrongful act," legislators added a definition of "aggrieved employee," to limit standing to persons who suffered actual harm. *Id.*

As observed by the Supreme Court in *Viking River*, *Kim* stands for the proposition that "PAGA's standing requirement was meant to be a departure from the 'general public' … standing originally allowed" under other California statutes like the UCL. Citing *Kim*, *Viking River* holds that, "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." 142 S. Ct. at 1925. As the Court recognized, the language of the statute fully supports its holding. *Viking River*, 142 S. Ct. at 1925 (citing Cal. Lab. Code Ann. §§ 2699(a) (an aggrieved employee has the right to bring the action only "on behalf of himself or herself *and* other current or former employees.")). Citing to the PAGA statute, *Viking River* therefore holds: "Under PAGA's standing requirement" -- *i.e.*, the requirement to bring a lawsuit on behalf of Plaintiff *and* other employees -- "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." *Id.* at 1925. And since Olmsted's arbitration precludes him from maintaining his individual PAGA claim in court, he lacks standing to maintain any representative action in this Court -- stayed or otherwise.

Olmsted would have this Court ignore the Supreme Court's analysis on standing as mere "dictum" that he deems "unnecessary to the holding in *Viking River*." He further argues that the issue of statutory standing under PAGA was "not fully analyzed" by the Court in *Viking River*." Opp. at 13.[3] To adopt this flawed argument, however, the Court would have to ignore an entire section of the Supreme Court's opinion. Such an argument strains credibility and should be summarily rejected. A majority of the Supreme Court held that "the correct course" is to dismiss

[3] Olmsted also seems to suggest that the majority's analysis of PAGA standing was in fact an analysis of federal Article III standing and that the majority opinion should be disregarded on those grounds. Opp. at 14-15. However, *Viking River* does not turn on Article III principles. Rather, *Viking River* relies on the California Supreme Court's interpretation of PAGA standing in *Kim* to reach its conclusion that the plaintiff lacked standing to pursue non-individual PAGA claims. *Viking River*, 142 S. Ct. at 1925.

non-individual PAGA claims for lack of standing. Olmsted's non-individual PAGA claims can fare no better, particularly because the Supreme Court's decision is fully supported by California law, as demonstrated above.

B. The Court Should Not Ignore *Viking River* In Favor Of Olmsted's Flawed Interpretation of *Kim*.

Olmsted attempts to rely on *Kim* to support his argument that even if his individual PAGA claim is compelled to arbitration, he still has standing to pursue the non-individual representative PAGA claim under California law. Olmsted cannot rely on *Kim* post *Viking River* for two reasons.

First, *Kim* is materially distinguishable. In *Kim*, the California Supreme Court held that an employee who asserts both a PAGA claim and an individual non-PAGA claim, and then settles the non-PAGA claim, can continue to assert the PAGA claim "as the state's authorized representative." 9 Cal. 5th at 80-89. Contrary to Olmsted's argument, *Kim* does not stand for the proposition that when an employee's individual PAGA claim is compelled to arbitration, the employee nonetheless has standing to prosecute non-individual PAGA claims. *Kim* only held that a settlement of non-PAGA claims does not result in a waiver of PAGA claims, because the PAGA claims seeks penalties separate and apart from the other Labor Code claims resolved via settlement. *Id.* at 81. *Kim* does not address a motion to compel arbitration or how PAGA standing should be handled now that *Viking River* has determined PAGA claims are not unitary and must be divided into individual and representative components. *Kim* also does not grapple with any of the thorny issues involving PAGA's conflict with the FAA. *Kim* is, therefore, distinguishable on its facts and cannot be relied upon by Olmsted.

Second, *Kim* was decided in the context of *Iskanian* where individual PAGA claims and non-individual representative PAGA claims were indivisible. After *Viking River*, nothing in *Kim* suggests that once an individual PAGA claim is pared from the litigation, the representative PAGA claim may still be litigated. To the extent Olmsted misreads *Kim* this way, the portions of *Kim*'s analysis that support this reading are now abrogated by *Viking River*. *Kim* relied on *Iskanian*'s now-abrogated indivisibility rule. *Kim* explicitly recognized that "[t]here is no individual component to a PAGA action because '*every* PAGA action ... is a representative action on behalf of

the state.'" *Id.* at 87 (citing *Iskanian*, 59 Cal.4th at 387, emphasis original). *Kim* also recognized that, because of *Iskanian*'s indivisibility rule, "[a]ppellate courts have rejected efforts to split PAGA claims into individual and representative components." *Id.* Based on these observations, *Kim* concluded: "Standing for [] PAGA-only cases," like this one, "cannot be dependent on the maintenance of an individual claim because individual relief has not been sought." *Id*. at 88.

Olmsted cites *Kim* to argue a plaintiff's inability to obtain individual relief is not necessarily fatal to the maintenance of a representative PAGA claim in court. This argument ignores that *Kim* was decided pre-*Viking River*, and disregards the Supreme Court's holding that individual and non-individual representative PAGA claims can be divided and that any contrary rule is preempted: "[The] rule that PAGA actions cannot be divided into individual and non-individual claims is preempted." *Viking River*, 142 S. Ct. at 1913.

Finally, *Viking River* cites directly to *Kim* to support its reading of the PAGA statute, which states that an aggrieved employee may only bring an action "on behalf of himself or herself *and* other current or former employees." Cal. Lab. Code § 2699(a) (emphasis added). Based on *Kim*, *Viking River* concludes the purpose of the word "and" is to clarify that an employee may pursue PAGA claims on behalf of others *only if* he pursues the claims on his own behalf. *Viking River*, 142 S. Ct. at 1925. Olmsted here cannot bring a PAGA claim for himself here, because he agreed to arbitrate it. In short, *Kim*'s position on standing depends on *Iskanian*, which was abrogated in relevant part by *Viking River.*

IV. CONCLUSION

Viking River dictates the outcome of Mercury's motion: the Court should enforce Olmsted's contractual promise to arbitrate his individual PAGA claim. The representative PAGA claim on behalf of *other* employees should be dismissed.

DATED: September 6, 2022

PAUL HASTINGS LLP

By: _____
STEPHEN L. BERRY

Attorneys for Defendant
MERCURY INSURANCE SERVICES, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
CITY OF COSTA MESA AND COUNTY OF ORANGE)
)

I am employed in the City of Costa Mesa and County of Orange, State of California. I am over the age of 18, and not a party to the within action. My business address is 695 Town Center Drive, Seventeenth Floor, Costa Mesa, California 92626-1924.

On September 6, 2022, I served the foregoing document(s) described as:

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL INDIVIDUAL ARBITRATION AND TO DISMISS REPRESENTATIVE PAGA ACTION

on the interested parties by placing a true and correct copy thereof in a sealed envelope(s) addressed as follows:

Graham S.P. Hollis, Esq.
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Attorneys for Plaintiff *Douglass Olmsted*

☒ **VIA ELECTRONIC MAIL:**

By personally emailing the aforementioned document(s) in PDF format to the respective email address(es) listed above on the same date.

☐ **VIA U.S. MAIL:**

I deposited such sealed envelope(s) with postage thereon fully prepaid, in the United States mail at Costa Mesa, California.

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

Executed on September 6, 2022, at Costa Mesa, California.

Winty Thoumaked
Winty Thoumaked

Tab 5

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

DOUGLASS OLMSTED, on behalf of all aggrieved employees of DEFENDANT in the State of California,

Plaintiff,

vs.

MERCURY INSURANCE SERVICES, LLC; and DOES 1 through 50, Inclusive,

Defendant.

Case No. 21CV376878

Hon. Drew Takaichi
Dept. 2

~~[PROPOSED]~~ ORDER GRANTING DEFENDANT'S MOTION TO COMPEL INDIVIDUAL ARBITRATION AND TO DISMISS REPRESENTATIVE PAGA ACTION

Date Action Filed: January 29, 2021
Trial Date: None

The motion of defendant Mercury Insurance Service, LLC ("defendant") to compel arbitration of the individual PAGA claim of plaintiff Douglass Olmsted ("plaintiff") and to dismiss the non-individual, representative PAGA claim came on regularly before the Court on September 13, 2022. Plaintiff was represented by Nathan Reese of Graham Hollis APC. Defendant was represented by Blake R. Bertagna of Paul Hastings LLP. Plaintiff did not arrange for a Court-approved private court reporter to be present to report the proceedings as allowed by the Court's rules, and defendant cancelled the court reporter it had arranged. Therefore, the hearing proceeded as scheduled without a court reporter. The Court, having read and considered

the written and oral arguments of the parties, and good cause appearing therefor, now rules as follows:

Background

1. On January 29, 2021, plaintiff filed a complaint against defendant alleging a representative action pursuant to Private Attorneys General Act of 2004, California Labor Code section 2698, *et seq.* ("PAGA") ("complaint")

2. On May 10, 2022, the court ordered a temporary stay of the action pending the decision by the U.S. Supreme Court on the writ in *Viking River Cruises, Inc. v. Moriana*.

3. On March 30, 2022, the U.S. Supreme Court issued its decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) ("*Viking*")

4. On July 1, 2022, defendant filed a motion to compel individual arbitration and to dismiss the representative PAGA action.

5. On August 30, 2022, plaintiff filed an opposition, and on September 6, 2022, defendant filed a reply.

Agreement to arbitrate claims

6. When considering a motion to compel arbitration, the court initially determines whether the parties agreed to arbitrate the dispute in question. This involves two questions, the first whether there is a valid agreement to arbitrate between the parties, and the second, whether the dispute in question falls within the scope of that arbitration agreement. *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1282 (2008) (citing *Banks v. Mitsubishi Motors Credit of Am.* (citation omitted here)).

7. Defendant asserts that on August 28, 2017, plaintiff and defendant entered into a written mutual dispute resolution agreement that includes provisions for arbitration of all claims alleged by plaintiff in the operative complaint ("arbitration agreement"). Plaintiff does not contest defendant's assertions.

8. The arbitration agreement provides in pertinent part that "all claims or controversies . . . whether or not arising out of (his) employment . . . ." are submitted to arbitration, and "arbitrable claims" include "claims for wages, bonuses, or other compensation

due . . . and claims for violation of any federal, state, or other governmental law, statute, regulation or ordinance . . . ."

9. The court finds that there is a valid agreement to arbitrate between the parties, and that the claims alleged in the complaint are encompassed in the arbitration agreement. The parties agreed to arbitrate the claims set forth in the complaint.

Procedural and substantive unconscionability

10. If a court finds as a matter of law that a contract or any clause is unconscionable, the court may refuse to enforce the contract or clause, or may limit the application of the unconscionable clause to avoid an unconscionable result. Cal. Civil Code section 1670.5 subdivision (a). An agreement to arbitrate is like any other contract, and a court may decline to enforce the agreement if it is unconscionable. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 98 (2000) ("*Armendariz*").

11. Unconscionability consists of both procedural and substantive elements. The procedural element tests the circumstances of contract negotiation and formation, and focuses on "oppression" or "surprise" due to unequal bargaining power. *See Armendariz*, *supra*, 24 Cal. 4th at p. 114. "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC*, 55 Cal. 4th 223, 247 (2012) (citing *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1317 (2005)). The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. *Armendariz*, *supra*, 24 Cal. 4th at p. 114.

12. Substantive unconscionability relates to the fairness of the terms of the arbitration agreement and assesses whether they are overly harsh or one-sided. *Armendariz*, *supra*, 24 Cal. 4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 1213 (1998).

13. Defendant asserts that there are no facts or circumstances of oppression or surprise in connection with the arbitration agreement or with its presentation. Defendant further asserts that all requirements of an enforceable agreement set forth in *Armendariz* are met here by the arbitration agreement. Plaintiff does not contest defendant's assertions.

14. The court finds that neither procedural unconscionability nor substantive unconscionability is present in connection with the arbitration agreement, and the arbitration agreement is enforceable.

Waiver of PAGA claims and division of individual and non-individual claims

15. The arbitration agreement also includes a waiver provision that states: "To the maximum extent permitted by law, I hereby waive any right to bring on behalf of persons other than myself, or to otherwise participate with other persons in, any class, collective, or representative action (including but not limited to any representative action under the California Private Attorneys General Act ('PAGA'), or other federal, state or local statute or ordinance of similar effect). I understand, however, that to the maximum extent permitted by law I retain the right to bring claims in arbitration, including PAGA claims for myself as an individual (and only for myself)."

16. The provision clearly states that plaintiff retains all individual claims in PAGA actions and waives all non-individual claims in PAGA actions; i.e. "of persons other than myself . . . or otherwise participate with other persons in . . . representative action (including . . . any representative action under the California Private Attorneys General Act ('PAGA') . . ." "California precedent holds that a PAGA suit is a 'representative action' in which the employee plaintiff sues as an 'agent or proxy' of the State." *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906, 1914 (2022) ("*Viking*"; citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (citation omitted here)).

17. The waiver of the right to bring representative PAGA claims in the instant pre-dispute arbitration agreement is invalid as a matter of public policy pursuant to the principal rule of *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) ('*Iskanian*'; upheld as to this rule in *Viking*, *supra*, 142 S. Ct. at p. 1916-1922).

18. The language in the waiver here "(T)o the maximum extent permitted by law" and "I understand, however, that to the maximum extent permitted by law I retain the right to bring claims in arbitration, including PAGA claims for myself as an individual (and only for myself)" has the substantive effect of severing plaintiff's individual PAGA claims to arbitration irrespective of whether the waiver provision is found invalid.

19. Severance of plaintiff's individual PAGA claims invokes the secondary rule in *Iskanian*, which precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. However, the U.S. Supreme Court in *Viking* held that this secondary rule of *Iskanian* is preempted by the Federal Arbitration Act, 9 U.S.C. section 1 *et seq.* *Viking*, *supra*, 142 S. Ct. at 1923.

20. Accordingly, pursuant to the U.S. Supreme Court decision in *Viking* as applied to the instant arbitration agreement, plaintiff's individual claims asserted in this action, including plaintiff's individual PAGA claims, are ordered to arbitration.

21. Additionally, as discussed in *Viking*, PAGA's standing requirement that a plaintiff has standing to maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action, is dispositive here because plaintiff's individual claims and non-individual claims are divided, and the individual claims are ordered to arbitration. Plaintiff therefore lacks statutory standing to maintain the non-individual claims in the court action, and such non-individual claims are dismissed.

22. During oral argument, plaintiff's counsel raised for the first time the argument that resolution of this standing issue should be stayed pending the California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.*, 2022 Cal. LEXIS 5021, *1 (review granted on July 20, 2022). The court is not persuaded to issue such a stay in light of the now controlling decision in *Viking*, with the majority of the justices on the nation's highest court concluding that there is no standing on the non-individual PAGA claims following the plaintiff's individual PAGA claims being compelled to arbitration. This Court will follow that directive.

Disposition

23. Plaintiff's claims asserted in this court action are ordered divided into (a) individual claims, including plaintiff's individual PAGA claims, and (b) non-individual PAGA claims; and all of plaintiff's individual claims are ordered to arbitration. As a result, pursuant to *Viking*, plaintiff is no different from a member of the general public as to the non-individual PAGA claims, and PAGA does not allow such persons to maintain suit. *Viking*, *supra*, 142 S. Ct. at p. 1923.

24. Therefore, following the order of division and order of plaintiff's individual claims to arbitration, plaintiff lacks standing to maintain the non-individual claims in this court action, and such non-individual claims are hereby dismissed.

25. Defendant's motion to compel arbitration and to dismiss non-individual PAGA claims is GRANTED.

26. The November 22, 2022, further case management conference is hereby vacated in light of the foregoing Order.

IT IS SO ORDERED.

Signed: 9/15/2022 05:48 PM

Dated: September 15, 2022

Hon. Drew Takaichi
Judge of the Superior Court

Submitted on September 14, 2022

PAUL HASTINGS LLP

By: Blake R. Bertagna

Blake R. Bertagna

Attorneys for Defendant
MERCURY INSURANCE SERVICES, LLC

Tab 6

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Emando Roos Plaintiff/Petitioner(s) vs. SPECTRA360, INC., a Delaware corporation Defendant/Respondent(s)	No. 22CV005271 Date: 09/15/2022 Time: 9:41 AM Dept: 21 Judge: Evelio Grillo ORDER re: Ruling on Submitted Matter

The Court, having taken the matter under submission on 09/13/2022, now rules as follows:

The Motion to Compel Arbitration filed by SPECTRA360, INC., a Delaware corporation on 08/04/2022 is Granted.

The Second Motion of Defendant Spectra360 to compel filed 8/4/22 to compel arbitration of individual PAGA claims is GRANTED. The case is STAYED.

MOTION TO COMPEL ARBITRATION

BACKGROUND

Plaintiff Roos asserts Labor Code claims on behalf of himself and a potential class, as well as claims on behalf of the LWDA under the PAGA.

Defendant Spectra360 on asserts that Plaintiff electronically signed an arbitration agreement on 11/23/20. (James Dec. Exh A.) Spectra360 seeks to enforce that arbitration agreement.

ANALYSIS OF ISSUES

CONTRACT FORMATION

Spectra360 has demonstrated the existence of a contract. See order of 5/17/22 order.

APPLICABILITY OF THE FAA – PRIOR ORDER

On 5/17/22, the court entered an order stating (1) “The Motion of Defendant Spectra 360 to compel arbitration of the individual claims is GRANTED” and (2) “The court does not stay the claims of the LWDA that plaintiff asserts on behalf of the LWDA under PAGA.”

The order of 5/17/22 states: “The FAA does not apply.”

The order of 5/17/22 concluded: “The court notes that the United States Supreme Court in Viking River Cruises v. Moriana, No 20-1573, will decide the question of: “Whether the Federal

Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." After the Supreme Court issues its decision, then defendant may seek reconsideration of this order regarding plaintiff's ability to represent the LWDA under PAGA. The court also notes that the court has already found that the FAA does not apply."

The US Supreme Court issued its decision in Viking River. Defendant then filed this motion based on Viking River.

APPLICABILITY OF THE FAA – CURRENT ORDER

The court revisits the issue of the applicability of the FAA. (Le Francois v. Goel (2005) 35 Cal.4th 1094, 1096.)

The agreement did not state that the parties agreed that the FAA applies. Therefore, defendant must demonstrate that the agreement concerned interstate commerce.

The court finds on reconsideration that defendant has demonstrated that the FAA applies. Plaintiff's job was to "drive a forklift" at a warehouse in Hayward. The Supplemental Declaration of Rudy Primero, ¶ 3 states: "I was familiar with and observed Mr. Roos perform assignments at the Hayward distribution center, including loading, unloading and stacking boxes using a forklift." Although plaintiff was in a warehouse in Hayward, the employer's business involved interstate commerce. Plaintiff moved boxes that "contained products manufactured outside of California and that were shipped to locations throughout the United States." (Supp Dec Primero, ¶ 3.)

The FAA provides that a written arbitration clause in "a contract evidencing a transaction involving commerce ... shall be valid, irrevocable." (9 USC 2) This is broad language. "The Arbitration Act thus establishes a "federal policy favoring arbitration," ... requiring that "we rigorously enforce agreements to arbitrate." (Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal.App.4th 1276, 1285-1286.) Given the legal standard, the court finds that defendant has demonstrated that the FAA applies.

PROCEDURAL UNCONSCIONABILITY

There is minimal procedural unconscionability. See order of 5/17/22.

SUBSTANTIVE UNCONSCIONABILITY

There is no substantive unconscionability. See order of 5/17/22.

WAIVER OF RIGHT TO ARBITRATON

"Arbitration is not a matter of absolute right" and it can be waived. (Sobremonte v. Superior Court (1998) 61 Cal.App.4th 980, 991.) The waiver analysis considers several factors. (St. Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1196.) "No one of these

factors predominates and each case must be examined in context." (Lewis v. Fletcher Jones Motor Cars, Inc. (2012) 205 Cal.App.4th 436, 444.)

Defendant actively litigated the claims of the LWDA under PAGA while governing law held that it could not compel arbitration of those claims. The law on FAA preemption changed when the United States Supreme Court issued Viking River Cruises, Inc. v. Moriana (2022) __ U.S. __, 142 S.Ct. 1906, 1916.

The court finds that defendant's delay in filing the motion to compel arbitration of the LWDA's claim under PAGA was justified because any such motion would have been futile before Viking River. Futility is a valid ground for delaying a motion to compel arbitration. (Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 376.)

NATURE OF A CLAIM ON BEHALF OF THE LWDA UNDER PAGA

The case law on the nature of a claim on behalf of the LWDA under PAGA is unsettled.

On the one hand, there is consistent California Supreme Court case law explaining that when a private plaintiff files a case under PAGA the private plaintiff is acting as an agent or proxy of the state. (Kim v. Reins International California (2020) 9 Cal.5th 73, 81; Z.B. N.A. v. Superior Court (2019) 8 Cal.5th 175, 185; Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348, 381.) If when a private person files a claim under PAGA the claim is asserted only as agent or proxy of the state, then there is no such thing as an "individual PAGA claim."

Consistent with the conclusion that all claims filed under PAGA are brought solely on behalf of the LWDA, there is case law that "a PAGA action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (Williams v. RGIS, LLC (2021) 70 Cal.App.5th 445, 450.) "The civil penalties imposed under PAGA are intended to punish the wrongdoer and to deter future misconduct." (Hutcheson v. Superior Court (2022) 74 Cal.App.5th 932, 939.)

Also consistent with the conclusion that all claims filed under PAGA are solely on behalf of the LWDA, under PAGA a person acting on behalf of the LWDA can recover only "civil penalties." "Civil penalties are an interest of the state." (Z.B. N.A. v. Superior Court (2019) 8 Cal.5th 175, 195.) In Z.B., supra, the California Supreme Court held that "civil penalties" do not include unpaid wages due to employees. A PAGA claim is distinct from individual civil claims under the Labor Code because the employee becomes a proxy or agent of the state, thus the claim is unlike others that confer a right to statutory damages under the Labor Code. (Kim v. Reins Int'l Cal. Inc. (2020) 9 Cal.5th 73, 81.)

Indeed, case law suggests that a single representative PAGA claim cannot be split into an arbitrable individual claim and a nonarbitrable representative claim. … a PAGA claim may not be brought solely on the employee's behalf, but must be brought in a representative capacity. "Because the PAGA claim is not an individual claim, it was not within the scope of [the employer's] request that individual claims be submitted to arbitration...." … Here, … petitioner "does not bring the PAGA claim as an individual claim, but 'as the proxy or agent of the state's labor law enforcement agencies.' " (See also Contreras v. Superior Court of Los Angeles County

(2021) 61 Cal.App.5th 461, 475-477 [collecting cases on same topic]; Provost v. YourMechanic, Inc. (2020)55 Cal.App.5th 982, 993 [same]; Jarboe v. Hanlees Auto Group (2020) 53 Cal.App.5th 539, 556 [same].)

On the other hand, in Viking River Cruises, Inc. v. Moriana (2022) __ U.S. __, 142 S.Ct. 1906, 1916, the United States Supreme Court interpreted California law and held that a claim under PAGA has both an "individual" and a "representative" component.

Viking River's conclusion that claims under PAGA have "individual" and "representative" components arguably fill a gap in California law. Tanguilig v. Bloomingdale's, Inc. (2016) 5 Cal.App.5th 665, 676, states: "It is less than clear whether an "individual" PAGA cause of action is cognizable, … Permitting pursuit of only individual penalties appears inconsistent with PAGA's objectives. An action to recover civil penalties " ' "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." ' " … The Iskanian court observed that " '[A]ssuming it is authorized, a single-claimant arbitration under the PAGA for individual penalties … the Iskanian court did not directly decide whether an "individual PAGA claim" (i.e., a PAGA claim brought solely on behalf of the plaintiff) is cognizable. We need not decide this question either, …"

Addressing the potential for an "individual" claim under PAGA in the context of a motion for preliminary injunction, Brooks v. AmeriHome Mortgage Company, LLC (2020) 47 Cal.App.5th 624, 629, states "Where an employee alleges a single representative cause of action under PAGA, the claim cannot be split into an arbitrable individual claim and a nonarbitrable representative claim." The procedural context of preliminary injunction weighs against giving effect to Brooks because the legal analysis in an order on preliminary injunction is by definition preliminary. (Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty (2005) 129 Cal. App. 4th 1228, 1248-1249.)

Brooks cites Williams v. Superior Court (2015) 237 Cal.App.4th 642, 649, which states: "The trial court cited no legal authority for its determination that a single representative action may be split in such a manner; Pinkerton has identified no case so holding, and we have located none." Williams later states: "petitioner cannot be compelled to submit any portion of his representative PAGA claim to arbitration, including whether he was an "aggrieved employee.""

This trial court accepts the analysis in Viking River that a claim asserted under PAGA has an "individual" and a "representative" component. Although the interpretation of California statutes is ultimately a matter for the California courts, the court follows Viking River's interpretation of PAGA in this order. Furthermore, the parties did not brief the underlying issue of whether PAGA has an "individual" and a "representative" component.

The California Supreme Court might clarify this issue in Adolph v. Uber Technologies, S274671. Their order of 8/1/22 states: "The issue to be briefed and argued is limited to the following: Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are "premised on Labor Code violations actually sustained by" the aggrieved employee (Viking River Cruises, Inc. v. Moriana (2022) 596 U.S. __, __ [142 S.Ct. 1906, 1916] (Viking River Cruises); see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other

employees" (Viking River Cruises, at p. __ [142 S.Ct. at p. 1916]) in court or in any other forum the parties agree is suitable."

ARBITRATION OF INDIVIDUAL PAGA CLAIM

The court GRANTS the motion of defendant to order plaintiff to submit the individual PAGA claim to arbitration. Viking River compels this result.

DISMISSAL OF REPRESENTATIVE PAGA CLAIM

The court DENIES the motion of defendant to dismiss the representative PAGA claim.

In Part IV of Viking River, the U.S. Supreme Court concluded that the remaining nonindividual PAGA claims must be dismissed, stating:

"[A]s we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. See Cal. Lab. Code Ann. §§ 2699(a), (c). When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit. See [Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th 73] at 90, 259 Cal.Rptr.3d 769, 259 Cal.Rptr.3d, 459 P.3d at 1133 ("PAGA's standing requirement was meant to be a departure from the 'general public' ... standing originally allowed" under other California statutes)." (Viking River, 142 S.Ct. at 1925.)

In interpreting California law, the Supreme Court concluded that Moriana lacked statutory standing to continue to maintain her non-individual claims in court, so the correct course was to dismiss her remaining claims. (Id. at p. 1925.)

This court respectfully disagrees with the Supreme Court's suggestion in dicta that PAGA provides "no mechanism" to adjudicate the non-individual PAGA claims once the plaintiff's individual claim are sent to arbitration.

First, the United States Supreme Court's majority opinion relied largely on the Kim decision as quoted above. The California Supreme Court in Kim provided further guidance in the next sentence of the decision: "Reins reads too much into this objective. Nothing in the legislative history suggests the Legislature intended to make PAGA standing dependent on the existence of an unredressed injury, or the maintenance of a separate unresolved claim." (Kim v. Reins Int'l California, Inc., supra, 9 Cal.5th at 90-91.)

Second, the holding of Kim is that an employee does not lose standing to pursue a PAGA claim where they have settled and dismissed their individual claims for Labor Code violations. (9 Cal.5th at 80.) This suggests that an employee who is pursuing an "individual" PAGA claim in arbitration has not lost standing to pursue a "representative" PAGA claim on behalf of the LWDA in court.

Unlike federal rulings interpreting federal law, federal decisions, including U.S. Supreme Court decisions, that purport to interpret a state's law are generally not binding on state courts. (Johnson v. Fankell (1997) 520 U.S. 911, 916 ["Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State . . . This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules."].) As a California trial court, the doctrine of stare decisis obligates this court to follow the California Supreme Court and the California Courts of Appeal on matters of state law. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Kim, Iskanian, and other California appellate case law indicate that disposing of a plaintiff's individual claims (whether claims asserted as an individual or claims asserted as "individual" PAGA claims on behalf of the LWDA) does not strip an aggrieved employee of standing to pursue a "representative" PAGA claim as agent or proxy of the LWDA.

The motion is DENIED to the extent it seeks to dismiss the representative PAGA claims for lack of PAGA standing.

STAY OF CASE

The court STAYS the case pending the resolution of the "individual" PAGA claim subject to periodic status conferences.

The basis for the stay varies with the underlying issue of whether there is an "individual" PAGA claim.

Accepting the Viking River holding that an "individual" PAGA claim exists, then the claims have the same plaintiff, the FAA applies, and the court must stay the case under 9 U.S.C. 3 and Civil Code 1281.4. In that scenario, the court would stay this case until the conclusion of the arbitration of the "individual PAGA" claim. If plaintiff prevails in arbitration then this case would presumably go forward. If defendant prevails in arbitration then this case might also go forward. (Kim v. Reins Int'l California, Inc., supra, 9 Cal.5th at 90 [" PAGA standing is not lost when representatives settle their claims for individual relief"].)

Accepting the indications in California case law that all claims under PAGA are as agent and proxy of the LWDA, then the court can exercise its discretion in whether to stay the claims of the LWDA. (Jarboe v. Hanlees Auto Group (2020) 53 Cal.App.5th 539, 556-557.) The Court may also stay a case in its entirety in the interest of justice. (CCP 187; Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 758.) The court will stay the case pending the resolution of the "individual" PAGA claim in the interest of justice. The court thinks it appropriate to permit resolution of the "individual" PAGA claim in arbitration before the "representative" PAGA claim proceeds in court.

It is plausible that another employee who is not bound by an arbitration agreement might substitute in to the case before or after the conclusion of the plaintiff's "individual" PAGA claim and pursue the LWDA's claims. (Hutcheson v. Superior Court (2022) 74 Cal.App.5th 932.) It is

also plausible that while the case is stayed that the California Supreme Court might clarify California law and hold that an employee who has been compelled to arbitrate "individual" PAGA claims maintains statutory standing to pursue claims on behalf of the LWDA (or other employees) under the PAGA. (Adolph v. Uber Technologies, S274671, order of 8/1/22.) If either of those happens, the court could arguably lift the stay.

The court's decision to stay rather than to dismiss the case is based in part on equity. The defendant delayed filing the motion to compel arbitration while it waited for Viking River, and the plaintiff now seeks to delay any dismissal while waiting for Adolph v. Uber Technologies, S274671. The trial court does not usually delay cases just because there is uncertainty in the law. Otherwise the trial court would never resolve cases. The court also sees no point in dismissing the case with the knowledge that plaintiff might file an appeal to keep the case alive until the decision in Adolph v. Uber. The court has weighed the equities between the parties, the goal of avoiding avoidable appellate practice, and the goals of prompt resolution (Std Jud Admin 2.2(f) and (g)), and concludes that a stay of the "representative" PAGA claims is appropriate.

If parties seek a case management conference date earlier than that set forth below, they are welcome to contact the court and ask the hearing date be advanced.

FURTHER CONFERENCE

The court will set a CMC for a status report on the progress of the individual PAGA claims.

The Case Management Conference scheduled for 10/11/2022 is continued to 03/22/2023 at 10:00 AM in Department 21 at Rene C. Davidson Courthouse.

Dated: 09/15/2022

Evelio Grillo / Judge

Tab 7

No. 20-1573

IN THE

Supreme Court of the United States

VIKING RIVER CRUISES, INC.,

Petitioner,

v.

ANGIE MORIANA,

Respondent.

On Writ of Certiorari to the California Court of Appeal

BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2, the California Employment Law Council ("CELC") respectfully files this *amicus curiae* brief in support of Petitioner.[1]

CELC is an organization of approximately 60 major employers, many of them national and global in scope, that have significant operations in California. CELC regularly files *amicus* briefs in major employment cases in support of fair and equitable employment laws that benefit employer and employee alike. Under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), CELC-member employers regularly enter into arbitration agreements with their employees to resolve, on an individual basis, virtually cost free to the employee, any and all employment disputes. This Court, in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 352 (2011), held such agreements required individualized dispute resolution rather than class litigation.

That all changed when the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), that such individual arbitration agreements were unenforceable as to representative claims brought in court under the California Private Attorneys General Act of 2004 ("PAGA") ("*Iskanian* Rule"). PAGA allows an "aggrieved employee," *i.e.*, one who can claim her employer violated any one of her Labor Code rights, to seek civil

[1] Pursuant to this Court's Rule 37.6, CELC affirms that no party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Petitioner and Respondent have each filed with the Court blanket consents to the filing of *amicus* briefs.

penalties from her employer based on any or all alleged Labor Code violations as to all other employees. Not only has the *Iskanian* Rule eliminated individual arbitration of PAGA claims, but it has forced employers to litigate class-like PAGA actions without any of the protections of class action procedures. Potential PAGA awards are in the millions against small employers and the tens or hundreds of millions against large employers. The *Iskanian* Rule has thus made PAGA litigation the overwhelmingly favored way for employees' attorneys to bring class-type wage-and-hour claims against employers. In so doing, PAGA has wreaked havoc on California employers and those out-of-state employers doing business in California.

CELC is uniquely well positioned to report on the impact of the *Iskanian* Rule because nearly all of CELC's members have had their arbitration agreements with their employees declared unenforceable as to PAGA, and they have had to suffer not only multiple PAGA actions filed against them, but often multiple PAGA actions filed against them at the same time by different plaintiffs regarding the same alleged wage-and-hour violations with respect to the same employees during the same time period. CELC files this brief in support of Petitioner Viking River Cruises because the *Iskanian* Rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress,'" under the FAA. *Concepcion*, 563 U.S. at 352 (citation omitted). The *Iskanian* Rule should be preempted, the California Court of Appeal's decision in *Viking River Cruises*, which relied on the *Iskanian* Rule in reaching its decision, should be reversed, and arbitration limited to Respondent's individual claims against Viking River Cruises should be ordered.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA." *Chamber of Commerce of United States v. Bonta*, 13 F.4th 766, 782 (9th Cir. 2021) (Ikuta, J., dissenting). While the FAA was enacted in response to widespread judicial hostility to arbitration agreements, "it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 563 U.S. at 339, 342. This despite the fact that this Court has held, time and again, that the FAA protects and enforces traditional, individualized arbitration – so much so that, even if an arbitration agreement is silent about class arbitration, "because class-action arbitration changes the nature of arbitration to such a degree[,] . . . it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010). Indeed, even if an arbitration agreement is ambiguous on the subject of class arbitration, "ambiguity does not provide a sufficient basis that parties to an arbitration agreement agreed to 'sacrifice[ ] the principal advantage of [individualized] arbitration.'" *Lamps Plus, Inc. v. Varela*, __ U.S. __, 139 S.Ct. 1407, 1416 (2019).

Shortly after *Stolt-Nielsen*, this Court again reconfirmed that the FAA continues to protect individualized arbitration in *Concepcion*. In that case this Court held the FAA preempted the California Supreme Court's "*Discover Bank* Rule" because such

a Rule made it difficult for parties to enforce agreements requiring the *individual* arbitration of consumer disputes. *See Concepcion*, 563 U.S. at 340; *see also Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). This Court's rationale could not have been clearer: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

But only three years after *Concepcion*, the California Supreme Court bounced back with an end run around it in *Iskanian*. Although *Iskanian* bowed to *Concepcion*'s holding that California had to enforce employment agreements requiring individualized arbitration of *class claims*, it held that *Concepcion* did *not* require California to enforce individualized arbitration of PAGA *representative claims*. *See* 59 Cal. 4th at 364, 366, 384. Why would the FAA protect individual arbitration agreements as to class action claims but not as to PAGA representative action claims? *Iskanian's* unsatisfying answer is that the FAA concerns itself only with the resolution of private disputes, and PAGA disputes are not private because they are supposedly between an employer and the State of California. *See id.* at 386-87. Yet, the California Supreme Court "offer[ed] no case law support" for its position. *Id.* at 396 (Chin, J., concurring). Nor could it. The decision is contrary to this Court's FAA jurisprudence. "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351.

While *Iskanian* cannot be squared with *Stolt-Nielsen, Concepcion and Lamps Plus*, it nevertheless remains the law in California. By allowing any plaintiff to swaddle an employment class action in PAGA

clothing, *Iskanian* has been able to prevent employers from enforcing individualized arbitration agreements. *See* 59 Cal. 4th at 384. Not surprisingly, the number of PAGA actions filed after the *Iskanian* decision increased six-fold from 1,051 PAGA cases filed in FY 2013/14 to 6,942 PAGA cases filed in FY 2019/20, with an average of 5,200 PAGA actions filed each year between FY 2016/17 – FY 2019/20.[2] Because of the exponential calculation of potential civil penalties under PAGA, the amount of PAGA penalties can quickly jump into the tens of millions of dollars even for a small employer, and it has been conservatively estimated that employers pay many billions a year to settle PAGA lawsuits.[3] Not surprisingly, such actions are often not litigated but quickly settled, as a hybrid class/PAGA action with a small fraction of the settlement designated as PAGA civil penalties payable to the State. The way it works in the real world against our CELC members with arbitration agreements is as follows: (1) a PAGA only action is filed; (2) the enormous risk forces the employer to agree to mediation; (3) at mediation, the plaintiff's counsel proposes that in exchange for a nominal PAGA settlement the employer waive its arbitration agreements and settle for millions on a class basis; and (4) the plaintiff's counsel receives 25-35% of the class settlement as attorneys' fees for very little work. The *Iskanian* Rule has thus resurrected what this Court apparently interred in

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[2] CABIA Foundation, "California Private Attorneys General Act of 2004 Outcomes and Recommendations" (Oct. 2021), p. 8, https://cabiafoundation.org/app/uploads/2021/11/CABIA_PAGA-Report-2021.pdf ("PAGA Outcomes").

[3] *Id.*

Concepcion: "the risk of 'in terrorem' settlements that class actions entail." *Concepcion*, 563 U.S. at 350.

* * *

Plaintiff-Respondent Angie Moriana ("Respondent") agreed to submit any dispute arising out of her employment with Defendant-Petitioner Viking River Cruises, Inc. ("Viking") to binding, individual arbitration, waiving any right to bring a class, collective, representative or private attorney general action. "[T]his much the [Federal] Arbitration Act seems to protect *pretty absolutely*." *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018) (emphasis supplied). Regardless, when Viking moved to compel Respondent to arbitrate her PAGA claims on an individual basis, the court below invoked the *Iskanian* Rule and held the agreement unenforceable. *See Moriana v. Viking River Cruises, Inc.*, No. B297327, 2020 WL 5584508, *2 (Cal. Ct. App. Sept. 18, 2020) (unpublished). Based on this Court's FAA decisions, the *Iskanian* Rule should be preempted, and the *Viking* decision should be reversed. This amicus brief accordingly focuses on three related issues:

1. The reality of PAGA litigation: The State of California receives little in the way of PAGA penalties, but plaintiffs' counsel use PAGA as a club to bludgeon class-based settlements that this Court's arbitration cases forbid.

2. *Iskanian* incorrectly held this Court's arbitration precedents are inapplicable to a PAGA action because it is a type of *Qui Tam* claim.

3. A PAGA action, filed in the face of an arbitration agreement, frustrates the FAA's objectives as much as or more than a class action.

ARGUMENT

I. The Reality Of PAGA Litigation: The State Of California Receives Little In PAGA Penalties, But Plaintiffs' Counsel Use PAGA As A Club To Bludgeon Class-Based Settlements That This Court's Arbitration Cases Forbid.

Respondent and her *amici* will romanticize PAGA litigation as securing workplace justice and producing civil penalties to the State of California that its Labor and Workforce Development Agency ("LWDA") can use in its law-enforcement efforts. As shown below, however, the reality differs markedly from the romanticization. PAGA, as the California courts have applied it, nullifies this Court's arbitration precedents.

A. Almost All Of CELC's Members Have Been Subjected To Multiple PAGA Actions As A Result Of The *Iskanian* Rule.

CELC's members are regularly sued by one or more of the numerous plaintiff litigation mills that sprouted in California because of PAGA. These mills use non-lawyers to solicit and find disgruntled or recently terminated employees to serve as named plaintiffs for PAGA actions. Plaintiff's attorney then files a generic letter with the LWDA, waits 65 days, and if the LWDA chooses not to pursue the case, files a generic wage-and-hour complaint alleging the same violations of California's requirements as in all of their complaints, *e.g.*, meal and rest break laws, regular-rate-of-pay issues, off-the-clock work and failure to reimburse expenses, without reference to any facts. The top 10 PAGA law firms (based on the num-

ber of PAGA actions filed) each filed between 380-750 PAGA actions in the 15-year period from 2005-2019.[4]

The PAGA claim ostensibly is brought to recover civil penalties, 75% of which are supposed to go to the State of California. At mediation, however, even if the employer has an arbitration agreement that requires individual arbitrations, plaintiffs propose amending the complaint to add class allegations (even though such claims would be individually arbitrable and not subject to a class action), since in class settlements courts routinely approve attorney fee awards in the 25-35% range despite frequently little work by plaintiff's counsel.

For example, in a typical $10 million PAGA/class settlement, (1) plaintiff's attorney will receive a third of the settlement ($3,300,000), (2) costs and administration charges will be specified ($500,000), (3) an enhancement for the named plaintiff will be granted ($10,000), (4) a small allocation will be designated as PAGA civil penalties ($200,000-$400,000), 75% of which will be sent to the LWDA, and (5) the remainder is distributed as damages to the class. It makes little or no difference whether the employer actually has done anything wrong, because the massive cost of PAGA defense and the theoretical risk of astronomical pyramided PAGA penalties will force a logical employer to settle regardless of the merits, and regardless of arbitration agreements requiring individualized arbitration. Through the *Iskanian* Rule, PAGA thus becomes a club plaintiffs will use to bludgeon a class action settlement; once PAGA has

[4] *See* Complaint, *California Business & Industrial Alliance v. Becerra*, Orange County Superior Court Case No. 30-2018-01036180-cv-JR-CXC (July 12, 2019) at pp. 46-47.

served its purpose, it essentially drops out of the action.

B. Plaintiffs Bank On PAGA Claims Not Being Arbitrable On An Individual Basis And Not Being Removable In Filing PAGA Actions Instead Of Class Actions.

Iskanian held that "[r]epresentative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other." *Iskanian*, 59 Cal. 4th at 387. Nothing could be further from the truth. Under the *Iskanian* Rule, as interpreted by subsequent courts, PAGA cases cannot be compelled to arbitration. *See, e.g., Correia v. NB Baker Electric, Inc.*, 32 Cal. App. 5th 602, 622 (Cal. Ct. App. 2019) (PAGA claim not subject to arbitration); *Collie v. Icee Company*, 52 Cal. App. 5th 477, 483 (Cal. Ct. App. 2020) (same). Under Ninth Circuit law, the only PAGA civil penalties that can be counted towards the jurisdictional minimum to remove an action to federal court are the potential civil penalties that could be awarded to the plaintiff. *See Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013). Consequently, if a plaintiff files a PAGA action instead of a class action, he or she knows that not only can the defendant not enforce its individual arbitration agreement, but the defendant will be unable to remove the action to federal court, regardless of the actual total amount in controversy.

Consequently, because classic class actions can be either removed (under the Class Action Fairness Act or through diversity jurisdiction) or compelled to individual arbitration (under *Concepcion* and this

Court's later cases), plaintiffs now file PAGA actions instead. After *Iskanian*, the number of PAGA actions increased six-fold with an average of 5,200 PAGA actions filed a year during the period.[5] California employers, and those doing business in California, had to spend billions to settle PAGA actions since *Iskanian* was decided.[6]

Moreover, as discussed above, many (if not most) PAGA actions are settled, not as PAGA actions, but as class actions with PAGA claims. The PAGA plaintiff is thus able to use his or her position as a "proxy or agent of the state's labor law enforcement agencies" (*Iskanian*, 59 Cal. 4th at 380) as a cudgel to accomplish what was originally intended: To file a class action against the employer, with a substantial percentage of the settlement becoming attorneys' fees, notwithstanding plaintiff's agreement to arbitrate on an individual basis.

C. Trivial Violations Can Lead To Millions In Penalties.

PAGA civil penalties are calculated based on the number of Labor Code violations per pay period per allegedly aggrieved employee. *See* Cal. Lab. Code § 2699(f)(2). These penalties by themselves generally eclipse whatever small compensatory remedy would result from many trivial Labor Code oversights, such as omitting the last four digits of an employee's Social Security number on a wage statement. *See Lopez v. Friant & Assocs.*, LLC, 15 Cal. App. 5th 773, 779 (Cal. Ct. App. 2017). If an employer has 5,000 employees, each with three Labor Code violations over a two-year

[5] *See* PAGA Outcomes, p. 12.

[6] *See id.*

period, the maximum liability could be over $200 million. It is easy to understand how a business faced with the specter of potentially paying such sums would be eager to settle, even if settling meant waiving individual arbitration agreements and settling on a class action basis. This Court has noted that, even in true class actions, with the procedural protections Rule 23 offers, the specter of massive potential liability as a practical matter compels settlements regardless of the strength of the case or applicable defenses. *See, e.g., Concepcion*, 563 U.S. at 350 ("in terrorem" settlements); *Epic*, 138 S.Ct. at 1632 (class actions "can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claim"). The practical compulsion to settle is even greater in a PAGA case, which is not subject to Rule 23 (or its California counterpart).

D. Millions In Potential Penalties Compel Settlements.

A number of PAGA settlements and judgments illustrate this point. *See, e.g., O'Connor v. Uber Technologies, Inc.*, 201 F. Supp. 3d 1110, 1128 (N.D. Cal. 2016). In *O'Connor*, Uber eventually settled for $84 million, with $1 million allocated to PAGA penalties. Other examples abound: *Viceral v. Mistras Grp., Inc.*, No. 15-cv-02198-EMC, 2016 WL 5907869 (N.D. Cal. Oct. 11, 2016) (approving a $6 million settlement); *John Doe v. Google Inc.*, (San Francisco Cnty. Sup. Ct. Case No. CGC-16-556034, June 1, 2018) (approving $1 million settlement); *Gunther v. Alaska Airlines, Inc.*, 72 Cal.App.5th 334, 246 (Cal. Ct. App. 2021) (awarding $25 million in PAGA penalties (reversed on appeal)); *Sharp v. Safeway*, (Santa Clara Cnty. Sup. Ct. Case No. 2011-1-CV-202901, Oct. 18, 2019) (approving $12 million settlement in a PAGA

suitable seating action); *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021) ($24.8 million PAGA civil penalties); *Brown v. Wal-Mart Inc.*, (N.D. Cal. Case No. 5:09-cv-03339-EJD) (approving $65 million settlement in a PAGA suitable-seating action); *Garrett v. Bank of America*, No. RG13699027, 2016 WL 11431495 (Alameda Cnty. Sup. Ct. Oct. 28, 2016) (approving $15 million settlement in a PAGA suitable seating action); *Reed v. CVS Pharmacy, Inc.*, No. RG-17-855592, 2019 WL 12314054 (Alameda Cnty. Sup. Ct. Oct. 30, 2019) (approving $19.5 million settlement in a PAGA suitable-seating action).

E. PAGA Lacks Meaningful Standing Requirements.

If a PAGA plaintiff can prove that he or she suffered even one Labor Code violation, as a private attorney general under PAGA, he or she may pursue penalties for unrelated Labor Code violations allegedly suffered only by *other* employees. *See Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745, 750-51 (Cal. Ct. App. 2018). Thus, an employee, whose only claim is that an employer's wage statement contains some technical defect, can sue the employer for violation of any of the more than 9,000 sections of the Labor Code that may have been suffered by other employees, creating overwhelming exposure for employers.

More recently, the California Supreme Court has held that even if an employer makes an employee whole by compensating her for any damages suffered by having her Labor Code rights violated, she can still bring a PAGA action for the civil penalties based on the rationale that her Labor Code rights were violated in the first place (apart from any later settlement or make-whole payment). *See Kim v. Reins International Corporation*, 9 Cal. 5th 73, 80, 88 (Cal 2020). Based on *Kim*, a California Court of Appeal has held that a PAGA plaintiff need not have suffered an injury to her Labor Code rights during the statute of limitations for the claim, because PAGA provides that any "aggrieved employee" can bring a PAGA action, with no limitation on when the Labor Code rights were violated. *See Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal. App. 5th 924, 930 (Cal. App. 2021) (plaintiff can sue under PAGA even if her own claim is time-barred). All of these decisions expose employers to unwieldy and overwhelming exposure not only for civil penalties, but also for the costs of defense of unbounded actions. Most employers cannot withstand those risks and expenses and therefore choose to settle even meritless PAGA actions instead – even where an arbitration agreement would require individualized arbitration of the claims of the named plaintiff or the employees he or she claims to represent.

* * *

All this is the reality. As shown below, that reality cannot be reconciled with this Court's arbitration precedents.

II. *Iskanian* Incorrectly Held This Court's Arbitration Precedents Are Inapplicable To A PAGA Action Becanse It Is A Type Of *Qui Tam* Claim.

A. The FAA Enforces Agreements Providing For Individual Arbitration "Pretty Absolutely."

The FAA requires courts to "rigorously" enforce "arbitration agreements according to their terms." *American Express Co. v. Italian Colors Restaurant,*

570 U.S. 288, 233 (2013). And the FAA "seems to protect pretty absolutely" arbitration agreements providing for "individualized rather than class or collective actions procedures." *Epic*, 138 S.Ct. at 1621. *See also Lamps Plus*, 139 S.Ct. at 1418 (even if agreement is silent or ambiguous, class arbitration cannot be implied because it is so antithetical to individualized arbitration).

B. Contrary To The Holding In *Waffle House*, *Iskanian* Held That A PAGA Action Is A Type Of State *Qui Tam* Action That "Lies Outside The FAA's Coverage."

As the California Supreme Court itself has acknowledged, PAGA allows an "aggrieved employee," *i.e.*, "any person who was employed by the alleged violator and against whom *one* or more of the alleged violations was committed," to bring a civil action "personally and *on behalf of other current or former employees* to recover civil penalties for Labor Code violations." *Arias v. Superior Court*, 46 Cal. 4th 969, 981 (Cal. 2009) (emphasis supplied). Under California law, PAGA actions are not class actions and are not required to be certified. *See id.* at 981-88. The California Supreme Court has held that a PAGA plaintiff sues "as the proxy or agent" of the LWDA, and that a PAGA action "is fundamentally a law enforcement action." *Id.* at 986. Based on this reasoning, *Iskanian* found a PAGA claim to be "a type of *qui tam* action" because it met some of the traditional *qui tam* requirements, such as allowing an "informer" to bring suit to recover penalties for violations of law, for which the informer is allowed to recover part of the penalty. *See Iskanian*, 59 Cal. 4th at 382.

Iskanian reasoned that arbitration of *individual* PAGA claims would be contrary to public policy, as employers would escape their own wrongdoing, and individual arbitrations would prevent PAGA from exacting the "penalties contemplated under the PAGA to punish and deter [unlawful] employer practices." 59 Cal. 4th at 383-84. But why would the FAA enforce individualized arbitration agreements of class actions, as *Concepcion* held, and not also enforce individualized arbitration agreements of PAGA representative actions? Citing no case support, *Iskanian* held the FAA applies only to "disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency." *Id.* at 385.

Yet, PAGA actions clearly arise from a dispute between the employer and employee. To bring a PAGA action, the plaintiff must be an "aggrieved employee," which the statute defines as "any person who was employed hy the alleged violator and against whom *one* or more of the alleged violations was committed." Cal. Lab. Code § 2699(a), (c) (emphasis added). Said differently, to have a PAGA claim, a PAGA plaintiff must have worked for the defendant employer and must have an individual Labor Code dispute with that employer, *i.e.*, a private dispute, which *Iskanian* admits is the subject of the FAA. *Iskanian*, 59 Cal. 4th at 386-87. "Thus, although the scope of a PAGA action may extend beyond the contractual relationship between the plaintiff – employee and the employer – because the plaintiff may recover civil penalties for violations as to other employees – *the dispute arises, first and fundamentally, out of that relationship*." *Id.* at 395 (Chin, J., concurring) (emphasis supplied).

Iskanian is also contrary to this Court's holding in *Waffle House*, where the EEOC prosecuted a claim

against an employer who allegedly discriminated against an employee in violation of the Americans with Disabilities Act. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 283-84 (2002). The employer had an arbitration agreement with the employee. The employee filed a charge with the EEOC. The EEOC elected to sue. The employer moved to compel the EEOC to arbitration. Had the employee sued his employer in court, the employee would have been required to arbitrate. But that was not the case, as the EEOC directly prosecuted the action in its own name and on its own authority. Consequently, this Court held that, even though the FAA "ensures the enforceability of private agreements to arbitrate," the employer could not enforce the employee's arbitration agreement against the EEOC because the EEOC was not a party to the arbitration agreement. 534 U.S. at 289-291. This Court reasoned that if "the EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]," the EEOC action might be bound by the arbitration agreement. *Id.* at 291. "But once a charge is filed, the exact opposite is true under the statute – the EEOC is in command of the process." *Id.*

Iskanian asserted that *Waffle House* supported its reasoning, but in fact the opposite is true. If a government agency, upon receipt of a charge, elects to pursue, on its own authority, an alleged violation of the law with respect to an employee, the fact the employee has an arbitration agreement with his employer has no impact on the action: the agency is operating under its own, independent statutory authority, and it has never agreed to arbitrate any dispute it has with the employer. *See* 534 U.S. at 291. However, if the government agency does not sue, and *the employee* brings an action against his employer,

with whom he has agreed to individually arbitrate any claims he had against it, then the employee is bound by the arbitration agreement. *See id.* In a PAGA case, for example, if the LWDA on receipt of the employee's allegations decides to pursue, on its own authority, a violation of the Labor Code against an employer, it may do so unfettered by any arbitration agreement that the employee may have made. *See* Cal. Lab. Code § 2699.3(a)(2)(A) (LWDA may choose to sue in its own name). However, if as in this case the LWDA declines to pursue the claims, and if an employee brings a PAGA action against his employer, with whom he agreed to arbitrate on an individual basis any claims against it, then the employee should be similarly bound by the arbitration agreement. *See Waffle House*, 534 U.S. at 297.

Here, Respondent entered into an individual, bilateral arbitration agreement with Viking, and when she sued she was the only "party" doing so. And once Respondent filed her PAGA action, the LWDA had surrendered all control over the action. *See* Cal. Lab. Code § 2699.3(a)(2)(A). The FAA "ensures the enforceability of private agreements to arbitrate," and nothing in *Waffle House* counsels otherwise. "*Waffle House* "casts considerable doubt on the [*Iskanian*] majority's view that the FAA permits either California or its courts to declare private agreements to arbitrate PAGA claims categorically unenforceable." *Iskanian*, 59 Cal. 4th at 396 (Chin, J., concurring).

C. The Ninth Circuit Explained That PAGA Actions Are Not Like *Qui Tam* Actions Under Federal Law.

In a federal *qui tam* action, the government partially assigns its claims to the relator, who then may sue based upon the government's injury. *See Magadia*

v. Wal-Mart Associates, Inc., 999 F.3d 668, 674-75 (9th Cir. 2021). In *Magadia*, the Ninth Circuit explained how and why a PAGA action is not in fact a *qui tam* action. First, PAGA is brought on behalf of other parties, which conflicts with a core principle of *qui tam* actions, which is that the plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties."[7] *Id.* at 676-77. Specifically, PAGA allows an employee to bring a civil action "on behalf of himself or herself and *other current or former employees*," and PAGA requires a portion of the penalty to go to "*all employees affected by the Labor Code violation*." *Id.* Also, a judgment under PAGA binds California, the plaintiff, *and the nonparty employees* from seeking additional penalties under the statute, therefore creating *nonparty interest* in the penalties. *Id.*

Moreover, a traditional *qui tam* action acts as only a partial assignment of the government's claim; the goverument remains the real party in interest throughout the litigation and may take complete control of the case if it wishes. *See Magadia*, 999 F.3d at 677. Under the Federal False Claims Act ("FCA") the government can intervene in a suit, can settle over the objections of the relator, and must give its consent before a relator can have the case dismissed. *See* 31 U.S.C. § 3730(b)-(f). "These 'significant procedural controls' ensure that the government maintains 'substantial authority over the action,' such that "even

[7] California's *qui tam* statute, the False Claims Act ("FCA"), California Government Code sections 12650-12656, closely follows the federal statute, and the California *qui tam* plaintiff does not bring the action on behalf of other third parties but only on behalf of the *qui tam* plaintiff and the State of California or one of its political subdivisions. *See* Cal. Gov't Code § 12652(c)(1).

if the government partially assigns a claim to a relator, 'it retains a significant role in the way the action is conducted.'"[8] *Magadia*, 999 F.3d at 677. In contrast, "PAGA represents a permanent, full assignment of California's interest to the aggrieved employee." *Id.* Although the LWDA can choose to prosecute the claim itself, if it does not, the State has no authority imdcr PAGA to intervene in a case brought by an aggrieved employee. "PAGA thus lacks the 'procedural controls' necessary to ensure that California – not the aggrieved employee (the named party in PAGA suits) – retains 'substantial authority' over the case." *Id.* Such a complete assignment to the plaintiff "undermines the notion that the aggrieved employee is solely steppiug into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.* at 677.

The factual predicate for PAGA is likewise entirely different from a *qui tam* action. In the typical *qui tam* action, an employee works for a government contractor, discovers fraud against the government, and obtains permission from the government to sue his employer for the fimds that were obtained through the fraud. The employee does not have an employment "dispute" with his employer (since the employee was not defrauded); instead, the employee sues his employer for a non-employment fraud claim. A *qui tam* action is thus also a "one-issue" case focused on the employer's fraud. By contrast, a PAGA plaintiff sues his employer under PAGA because he is claiming his Labor Code rights have been violated, and he or

[8] Likewise, the California FCA provides similar safeguards and controls. *See* Cal. Gov't Code § 12652(c)(1)-(10), (e)(1)-(2), (f)(1)-(2).

she seeks civil penalties for each and every Labor Code violation to every other employee.

D. Regardless Of Whether It Is A *Qui Tam* Action, Because PAGA Is A *State* Action, It Is Not Outside The FAA.

The California Supreme court provided no case to support its proposition that a PAGA claim, as a type of *qui tam* claim, "lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." *Iskanian*, 59 Cal. 4th at 395 (Chin, J., concurring). Quite simply, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting law is displaced by the FAA." *Concepcion*, 563 U.S. at 341. Accordingly, PAGA is not a type of *qui tam* action and, even if it were, states are not free to prohibit arbitration under the FAA of state claims.

III. A PAGA Action, Filed In The Face Of An Arbitration Agreement, Frustrates The FAA's Objectives As Much As Or More Than A Class Action.

A. Regardless Of How Laudable A State Law Might Be, It Is Preempted If It Interferes With The Fundamental Attributes Of Arbitration.

This Court in *Concepcion* identified three primary reasons class arbitrations are inconsistent with the FAA. "First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly and more likely to generate procedural morass than final judgment." *Concepcion*, 563

U.S. at 348. "Second, class arbitration *requires* procedural formality." *Id.* at 349. "Third, class arbitration greatly increases risks to defendants." *Id.* at 350. Although *Iskanian* recognized that *Concepcion* required California to enforce individualized arbitration agreements of class claims, it held that PAGA representative action claims could not be subject to individual arbitration. *See Iskanian*, 59 Cal. 4th at 366. Yet, class action arbitrations and PAGA representative arbitrations are equally inconsistent with the "fundamental attributes" of individualized arbitration under the FAA.

B. Both Class And PAGA Actions Lack Informality, Making Them Slower, More Costly, And More Likely To Generate Procedural Morass Than Individual, Bilateral Arbitrations.

Class and PAGA claims, involving the rights of third parties, cannot help but be slower, more costly, and more procedurally complicated than the individual arbitration that the FAA requires. Before an arbitrator can "decide the merits of a claim in class-wide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should he conducted." *Concepcion*, 563 U.S. at 348.

While a PAGA action is not a "class action," *e.g.*, it does not require class certification, PAGA nevertheless "explicitly involves the interests of others besides California and the plaintiff employee – it also implicates the interests of nonparty aggrieved employees." *Magadia*, 999 F.3d at 676. The civil penalties recovered are based on the number of Labor Code violations in every pay period that allegedly aggrieved

employees worked, with the initial default penalty being $100 per Labor Code violation ($200 for subsequent violations), regardless of any actual harm. *See Kim*, 9 Cal. 5th at 80, 88 (a plaintiff, even though made whole as to the underlying claim, still has standing to seek civil penalties for violation of the Labor Code); Cal. Lab. Code § 2699(f)(2). Because of the way civil penalties are calculated, large employers can be liable for tens of millions of dollars in civil penalties. *See Magadia v. Wal-Mart Associates, Inc.*, 384 F. Supp. 3d 1058, 1111 (N.D. Cal. 2019) (award of approximately $48 million in PAGA penalties based on an alleged improper reporting of retroactive overtime pay as a result of a quarterly bonus even though the employees were not underpaid wages), *rev'd on unrelated grounds*, 999 F.3d 668, 680-82 (9th Cir. 2021).

Even for small employers, PAGA civil penalties quickly add up to potential multi-million-dollar liability. Assume a small employer with 100 employees, with weekly pay periods, and the relevant time period at mediation is two years – approximately 100 pay periods, which, multiplied by 100 employees is 10,000 pay periods. (1) Assume plaintiff alleges that once a pay period a rest period is interrupted by a question. The maximum initial PAGA civil penalty award could be 10,000 pay periods x $50 penalty (Cal. Lab. Code § 558) = $500,000 in penalties. (2) Assume plaintiff also makes the typical allegations that every pay period they also had a late or interrupted meal period ($50 – § 558); (3) they were asked to do something after they clocked out, for which they were not paid ($100 – § 1197.1); (3) which could also mean they had unpaid overtime ($100 – § 2699(f)(2); (4) which could also mean their wage statement was not accurate ($100 – § 2699(f)(2)); and (5) had te use their cell

phone for which they were not reimbursed ($100 – § 2699(f)(2)). Using the same calculations, the potential liability is now $ 4 million plus costs and plaintiff's attorney's fees. And if the small employer is unlucky enough to have 200 employees, then the potential liability becomes $ 8 million.

In *Sakkab v. Luxottica Retail North America, Inc.*, the Ninth Circuit held that PAGA arbitrations "do not require the formal procedures of class arbitrations" because the PAGA plaintiff seeks only civil penalties on behalf of the LWDA, which does not implicate the due process rights of the "aggrieved employees." 803 F.3d 425, 436 (9th Cir. 2015). What the Ninth Circuit overlooked is the due process right of *the employer*, who can be subject to millions of dollars of liability. *Sakkab* also understated the difficulty of trying PAGA claims without any form of certification. "PAGA claims may well present more significant manageability concerns that those involved in class actions."[9] *Wesson v. Staples the Office Superstore*, 68 Cal.App.5th 746, 859-60 (Cal. Ct. App. 2021). This is because PAGA defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Cal. Lab. Code § 2699(c). Consequently, unlike class actions, "a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant." *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246, 1260 (C.D. Cal. 2011). Yet, because PAGA has no class certification requirement, it may "cover a vast number of employees, each of

[9] *Wesson* refused to allow the case to proceed for a unique reason. The plaintiff ignored the trial court's order to submit a trial plan. *See Wesson*, 68 Cal.App.5th at 851-52.

whom may have markedly different experiences relevant to the alleged violations." *Wesson*, 68 Cal. App. 5th at 859. "Under those circumstances, determining whether the employer committed Labor Code violations *with respect to each employee* may raise practical difficulties and may prove to be unmanageable." *Id.* (emphasis supplied). Given the high stakes involved in these determinations, "both of these issues would likely be fiercely contested by parties." *Id.* In any event, compared to individual, bilateral arbitration, PAGA representative arbitrations, no less than class arbitrations, will be slower, more costly, and likely "to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348.

C. In *Williams*, The California Supreme Court Noted The Similarities Between Class And PAGA Representative Actions, Which Require Procedures That Individual, Bilateral Arbitrations Avoid.

In individual, bilateral arbitrations envisioned by the FAA, the parties are already knowledgeable of the subject matter, making discovery less of an issue. "In an individual arbitration, the employee already has access to all of his own employment records (or can easily obtain them from his employer)." *Sakkab*, 803 F.3d at 446 (N.R. Smith, J., dissenting). In such an arbitration, the employee knows how long he has been working for the employer, knows how many pay periods he has worked, and "knows whether he has been affected by the Labor Code violations he is alleging and can provide individual evidence to support his claims." *Id.*

In either a class or a PAGA arbitration, by contrast, when claims of nonparties are being adjudicated, an arbitrator must ensure the adjudication of

nonparty claims against the employer are within the bounds of due process. Consequently, class actions "require[] procedural formality." *Concepcion*, 563 U.S. at 349. In adjudicating third-party claims in a class action, both federal (Fed. R. Civ. Pro. 23) and state (Cal. Code Civ. Proc. § 382) procedures require the plaintiff to establish, *inter alia*, predominant common questions of law or fact; class representatives with claims typical of the class; and class representatives who can adequately represent the class. *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

In this respect, the California Supreme Court has held that discovery in both class and PAGA actions should be the same because of "the similarities between these forms of action." *Williams v. Superior Court*, 3 Cal. 5th 531, 547 (Cal. 2017). For instance, *Williams* found that contact information of all putative class members and aggrieved employees was discoverable because in a class action, "[f]ellow class members are potential percipient witnesses to alleged illegalities," just as "allegedly aggrieved" employees are also "percipient witness[es]." *Id.* at 547-48. *Williams* also found that "absent fellow employees will be bound by the outcome of any PAGA action [citations omitted], just as absent class members are bound [citations omitted]. *Id.* at 548.

> To allow broad discovery of contact information in one type of representative action but not the other, and impose unique hurdles in PAGA actions that inhibit communication with affected employees, would enhance the risk those employees will be bound by a

> judgment they had no awareness of and no opportunity to contribute to or oppose.

Id. Finally, *Williams* found that "overlapping policy considerations support extending PAGA discovery as broadly as class action discovery" because both concern *enforcing* the laws. Specifically, plaintiffs in class actions need to contact other class members to facilitate "meaningful classwide enforcement of consumer and worker protection statutes," while the plaintiff in a PAGA action needs the same information to "directly enforce the *state's* interest in penalizing and deterring employers who violate California labor laws." *Id.*

Quite simply, as the California courts have applied PAGA, *both* PAGA and class actions require the same discovery because plaintiffs in *both* need information from third-party percipient witnesses, because in *both* actions these potential witnesses will be bound by the judgment, and because *both* actions facilitate the state's interest in enforcing consumer and labor laws. *See also Sakkab*, 803 F.3d at 447 (N.R. Smith, J., dissenting) ("procedural complexity" in both PAGA and class actions "is a function of the sheer number of tasks and procedural hurdles present in bringing a [class or] representative PAGA claim.").

D. Both Class And PAGA Actions Greatly Increase The Risks To Defendants Compared To Individual, Bilateral Arbitrations.

"[C]lass arbitration greatly increases risks to defendants," and it is certainly "poorly suited to the higher stakes of class litigation." *Concepcion*, 563 U.S. at 350. Arbitration lacks the "multilayered review," which "makes it more likely that errors will go uncorrected." *Id.* While an employer is willing to accept these errors in individual arbitrations, where the impact is limited, an employer will be unlikely to agree to an arbitration where it could be liable to potentially "tens of thousands of potential claimants," where "risk of an error will often become unacceptable." *Id.*

Employers enter into agreements to arbitrate on an individual, bilateral basis, and the FAA enforces those rights. Indeed, so strong is the presumption of individual arbitration that even if the parties are *silent* on the issue of class arbitration in the agreement, a court cannot imply class arbitration "because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685. "Class arbitration not only 'introduce[s] new risks and costs for both sides,' [citation omitted], it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class – again, with only limited judicial review." *Lamps Plus*, 139 S.Ct. at 1416. Indeed, even if the arbitration agreement is *ambiguous* on the issue of class arbitration, because class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[ ] the principal advantage of arbitration.'" *Id.* at 1416, 1418. As with class actions, PAGA judgments can be in the millions, if not tens of millions, of dollars depending on the size of the workforce. It is hard to imagine that any employer would willingly enter into an agreement to adjudicate an action with such potential liability

without the ability to appeal the verdict. *See Sakkab*, 803 F.3d at 448 (Smith, N.R., J., dissenting).

E. *Iskanian* Notwithstanding, PAGA Claims Can Be Arbitrated On An Individual Basis.

"When state law prohibits outright the [individualized] arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 564 U.S. at 341. In this respect, "[t]he FAA requires courts to 'enforce arbitration agreements according to their terms.'" *Lamps Plus*, 139 S.Ct. at 1415. Unless the parties agreed to class arbitration, a PAGA plaintiff must arbitrate only her own PAGA claims and not those of others, *i.e.*, those Labor Code rights the PAGA plaintiff claims her employer violated as to her only. *See id.* at 1416. If an arbitrator awards civil penalties to the plaintiff, she must distribute 75% of those penalties to the LWDA. *See* Cal. Lab. Code § 2699(i).

CONCLUSION

In *Epic*, this Court asked the question of whether "employees and employers [should] be allowed to agree that any disputes between them will be resolved through one-on-one arbitration." 138 S.Ct. at 1619. This Court answered "Yes." *Iskanian* answered "No." The issue herein is not about waiving PAGA claims but enforcing an agreement for "one-on-one arbitration."

Respectfully submitted,

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February 7, 2022

Tab 8

No. S274671

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ERIK ADOLPH

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

OPENING BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three,
Case Nos. G059860, G060198

Orange County Superior Court
Case No. 30-2019-01103801
The Honorable Kirk H. Nakamura, Presiding

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ISSUE PRESENTED FOR REVIEW

Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are "premised on Labor Code violations actually sustained by" the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1916; see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" (*Viking River*, 142 S.Ct. at p. 1916) in court or in any other forum the parties agree is suitable.

INTRODUCTION

In *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, the U.S. Supreme Court held that the Federal Arbitration Act requires the enforcement of agreements calling for the arbitration of individual claims brought under the Labor Code Private Attorneys General Act, Lab. Code, § 2698 et seq., and that after such claims are sent to arbitration, the remaining non-individual PAGA claims should be dismissed for lack of statutory standing. This case presents the same issues as *Viking River*, and this Court should reach the same result.

PAGA actions may be novel in some ways, but after *Viking River*, it is clear they follow the ordinary rules respecting arbitration. For a time, however, California courts placed PAGA claims outside the normal operation of the FAA. *Viking River* did away with this special treatment of PAGA claims. In doing so, *Viking River* made clear that the FAA preempts the California-law joinder rule forbidding the division of PAGA claims into

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individual claims and non-individual claims. After *Viking River*, parties can agree to arbitrate the individual aspects of PAGA claims (and can agree *not* to arbitrate non-individual violations that concern only other employees), and those agreements must be enforced. While California law formerly prohibited such claim-splitting under PAGA, the FAA—as interpreted in *Viking River*—overrides that rule as applied to arbitration.

The Supreme Court also addressed what happens after an individual PAGA claim has been severed and compelled to arbitration. A majority comprised of Justices Alito, Breyer, Kagan, Sotomayor, and Gorsuch concluded that, in this circumstance, a plaintiff cannot maintain non-individual PAGA claims in court after his individual PAGA claim has been sent to arbitration. As the Court explained, "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (142 S.Ct. at p. 1925.) This, in turn, means that the plaintiff "lacks statutory standing to continue to maintain [the] non-individual claims in court, and the correct course is to dismiss [the] remaining claims." (*Ibid.*)

The Supreme Court's decision on statutory standing applied the plain language of the PAGA statute aud this Court's precedent interpreting PAGA's standing requirement, and its interpretation deserves substantial deference. Both text and precedent support the Supreme Court's holding that a plaintiff like Erik Adolph lacks statutory standing to maintain non-

individual PAGA claims in court once his individual PAGA claim is compelled to arbitration.

PAGA makes a cause of action available to only a subset of people meeting particular conditions. To seek civil penalties on behalf of the State, the plaintiff must be "an aggrieved employee" who sues "*on behalf of himself or herself and* other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.) This means that the action must concern, at least in part, a Labor Code violation allegedly suffered by the plaintiff. PAGA drives this point home by defining an "aggrieved employee" as "any person who was employed by the alleged violator and *against whom one or more of the alleged violations was committed*." (*Id.*, subd. (c), italics added.)

The Legislature intentionally made "aggrieved employee" status the touchstone of PAGA's statutory standing requirement. In enacting PAGA, the Legislature sought specifically to avoid the many problems created by "general public" standing under a separate statute, the pre-Proposition 64 version of the Unfair Competition Law. Under the prior version of the UCL, anyone could sue anyone else about almost any violation of California law. The Legislature understood that such broad statutory standing had led to abusive litigation that the voters eventually rejected. So when authorizing private attorney general lawsuits to seek civil penalties for Labor Code violations, it made a conscious decision to turn the page on the failed experiment of "general public" standing. PAGA's standing requirement was drafted with this aim in mind—to ensure that a plaintiff is an

aggrieved employee with a stake in the outcome. PAGA thus precludes a plaintiff who cannot assert an individual PAGA claim in court from pursuing non-individual PAGA claims on behalf of other employees.

In short, the U.S. Supreme Court correctly interpreted PAGA's statutory-standing requirement in *Viking River*. Adolph's contrary rule not only misreads the statutory text and this Court's precedent, but also would undermine the overriding purpose of PAGA standing, which is to ensure that the State's representative has a stake in the outcome when seeking penalties on behalf of other employees. This Court should reverse and remand with instructions for the trial court to compel Adolph's individual PAGA claim to arbitration and to dismiss the non-individual PAGA claims for lack of standing.

STATEMENT OF APPEALABILITY

The trial court's preliminary injunction is appealable under Code of Civil Procedure section 904.1, subdivision (a)(6), and its denial of Uber's petition to compel arbitration is appealable under section 1294, subdivision (a).

STATEMENT OF THE CASE

I. Adolph Agrees to Arbitrate Claims Related to His Use of Uber's Eats App.

Uber is a technology company that has developed the smartphone application known as the "Eats App," which connects local merchants, consumers, and independent delivery drivers to facilitate the purchase and delivery of food and drink. (6-CT-1545, ¶¶ 4–5.) Adolph is a driver who has used the Eats

App to generate leads for his independent delivery business since March 2019. To do so, he accepted the Technology Services Agreement (the "Agreement"), which governs the relationship between Uber and drivers. (6-CT-1546–1547, ¶¶ 8, 12.)

The first page of the Agreement advised Adolph in bold, capitalized letters that it contained an arbitration agreement (the "Arbitration Provision"):

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW IN SECTION 15.3 CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS, EXCEPT AS PROVIDED IN SECTION 15.3, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION .... IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.**

(6-CT-1555.) The Arbitration Provision stated that the parties agree to submit virtually all disputes to bilateral (i.e., individual) arbitration:

> **This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") .... [T]his Arbitration Provision applies to any dispute, past, present or future, arising out of or related to this Agreement or formation or termination of the Agreement and survives after the Agreement terminates ... .**
>
> [T]his Arbitration Provision is intended to apply to

> the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration .... [T]his Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.
>
> **[T]his Arbitration Provision also applies to all disputes between you and the Company or Uber, as well as all disputes between You and the Company's or Uber's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company or Uber, including the formation or termination of the relationship.**

(6-CT-1571–1572, § 15.3(i).) The Arbitration Provision contained a waiver of PAGA claims to the fullest extent permissible under law, with an accompanying severability clause:

> To the extent permitted by law, you and Company agree not to bring a representative action on behalf of others under the Private Attorneys General Act of 2004, California Labor Code § 2698 et seq. ("PAGA"), in any court or in arbitration ... .
>
> If the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from this Arbitration Provision; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any representative actions brought under the PAGA must be litigated in a civil court of competent jurisdiction .... If the PAGA Waiver is found to be unenforceable or unlawful for any reason, the Parties agree that the litigation of any representative PAGA claims in a civil court of competent jurisdiction shall be stayed, pending the outcome of any individual claims in arbitration.

(6-CT-1574, § 15.3(v).)

The Arbitration Provision afforded Adolph an unfettered right to opt out of arbitration for 30 days after accepting the Agreement simply by sending an email or letter to Uber. (6-CT-1575, § 15.3(viii).) Although thousands of drivers nationwide have exercised their right to opt out of the Arbitration Provision in the Agreement, Adolph did not. (6-CT-1547–1548, ¶¶ 12, 14.)

II. Adolph Initiates Litigation Against Uber on Claims Arising out of His Use of the Eats App.

Notwithstanding the Arbitration Provision, Adolph filed a putative class action in October 2019, claiming that Uber misclassified delivery drivers as independent contractors and failed to reimburse their business expenses. (1-CT-47; 1-CT-52–54.) For this alleged misconduct, Adolph sought damages under Labor Code section 2802 and restitution under the UCL. (1-CT-54–55.) Uber promptly filed a petition to compel arbitration of Adolph's claims on an individual basis and to strike his class allegations pursuant to the Arbitration Provision's class action waiver. (1-CT-67–79.)

In response, Adolph amended his complaint to add a claim for civil penalties under PAGA for Uber's alleged failure to

reimburse business expenses, timely pay all wages due during and upon termination of employment, guarantee overtime wage, provide accurate itemized wage statements, and maintain accurate payroll records. (1-CT-213–214.) Uber renewed its petition to compel arbitration of Adolph's claims on an individual basis. (1-CT-250–264.)

III. The Trial Court Declines to Compel Any Aspect of the PAGA Claim to Arbitration and Enjoins Uber's Arbitration of Adolph's Individual Claims.

The trial court granted Uber's petition to compel the Labor Code and UCL claims to individualized arbitration. For those claims, Adolph did "not dispute agreeing to arbitration" or that the class action waiver was "enforceable under the FAA." (2-CT-431–432.) But "[t]he PAGA waiver [wa]s a different question," the court concluded, because a PAGA claim "belongs to the government" and thus "[a]n employee has no right to waive" it. (2-CT-432.) The court therefore compelled arbitration of Adolph's individual claims for damages and restitution and stayed the PAGA claim pending arbitration. (*Ibid.*)

Rather than proceed to arbitration, however, Adolph asked Uber to stipulate to the waiver of his individual claims under the Labor Code and UCL, so that he could litigate his PAGA claim in court straightaway. (3-CT-611, ¶ 4; 3-CT-616–617.) Uber declined to do so. (*Ibid.*) Uber submitted a demand for arbitration with JAMS in accordance with the trial court's order and the terms of the Arbitration Provision. (3-CT-611, ¶ 5; 3-CT-640–647; see also 6-CT-1573, § 15.3(iv).)

In response, Adolph moved for leave to file a second amended complaint alleging a single cause of action under PAGA and to dismiss his individual claims without prejudice to reviving them later. (2-CT-451–455.) He also sought a preliminary injunction to halt the pending arbitration that the court had just ordered. (2-CT-475–482.)

The trial court granted both motions, dismissing Adolph's individual claims without prejudice and preliminarily enjoining the pending arbitration. (5-CT-1466–1469.) Although arbitration of the original claims for damages and restitution "was permitted," the court found that the suit had since "been converted into a pure PAGA action," which "[wa]s not arbitrable." (5-CT-1469.) The court therefore concluded that Adolph was likely to "prevail[] on the issue of whether his claim is arbitrable" and that he would suffer interim harm absent injunctive relief "as arbitration of a nonarbitrable claim would be futile." (5-CT-1468–1469, cleaned up.) Uber timely appealed the order granting the preliminary injunction. (5-CT-1494.)

Meanwhile, Uber moved to compel arbitration of Adolph's alleged status as an "aggrieved employee" with standing to pursue a PAGA claim. (6-CT-1513–1669.) Uber disputed that Adolph could satisfy either the "aggrieved" or the "employee" component of the requirement. But the trial court denied Uber's motion on the grounds that the State never "consented to the arbitration of [Plaintiff's] PAGA claim," which could "[]not be split in individual arbitrable and representative nonarbitrable components." (6-CT-1734, citation omitted.) Uber again filed a

timely notice of appeal, and this appeal was consolidated with its earlier challenge to the preliminary injunction order. (6-CT-1744.)

IV. The Court of Appeal Affirms.

The Court of Appeal affirmed both orders. While noting that the forthcoming decision in *Viking River* could affect the outcome of the appeal, the court felt bound to "follow the rule of" *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 "[u]nless and until the United States Supreme Court or the California Supreme Court directly overrule[d] it." (Opn., at p. 9.) The court thus held that "despite the FAA's broad terms," Adolph's PAGA claim was "not subject to arbitration" because it "[wa]s brought on behalf of the state, which [wa]s not a signatory to the" Agreement. (*Id.* at pp. 2, 4–5.) And because a PAGA "action cannot be split into individual arbitrable and representative nonarbitrable components," the court concluded that Uber could not compel the "[t]hreshold issue[] involving whether [P]laintiff is an 'aggrieved employee'" to arbitration. (*Id.* at p. 6, citation omitted.)

V. This Court Grants Review.

Uber timely filed a petition for review, urging the Court to consider whether PAGA claims are subject to the FAA and whether the parties may agree to arbitrate Adolph's individual status as an aggrieved employee. (Pet. for Review, at p. 10.) Following the U.S. Supreme Court's ruling in *Viking River*, this Court granted Uber's request to submit supplemental briefing addressing that decision. Uber explained that the Court of

Appeal's decision should be reversed in the wake of *Viking River*, which held that the FAA requires arbitration of Adolph's individual PAGA claim and that PAGA provides no mechanism to adjudicate standalone non-individual claims. (Uber Supp. Letter Br., at p. 1.)

In response, Adolph contended that "the *Viking River* majority misread this Court's unanimous decision in *Kim*, and therefore got its standing analysis exactly backwards." (Adolph Supp. Letter Br., at p. 2.) In his view, a PAGA plaintiff "is *not* stripped of statutory standing upon being forced to adjudicate a portion of her claim in arbitration rather than in court." (*Ibid.*) Adolph thus urged the Court to grant review to correct five Justices of the U.S. Supreme Court in their "mistaken assumption about how state law would operate." (*Id.* at p. 4.)

This Court granted review on the question whether a plaintiff's non-individual PAGA claims must be dismissed for lack of standing once his individual PAGA claim has been compelled to arbitration.

STANDARD OF REVIEW

While the decision to grant a preliminary injunction is ordinarily committed to the trial court's discretion, "the standard of review is de novo" when the decision "involves purely a question of law or statutory interpretation." (*Millennium Rock Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal.App.4th 804, 808; accord *In re Butler* (2018) 4 Cal.5th 728, 739 [de novo review for legal conclusions underpinning decision whether to modify or vacate injunction].) Where, as here, the existence of a binding

arbitration agreement is undisputed, this Court likewise "review[s] the trial court's denial of arbitration de novo." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

ARGUMENT

In *Viking River*, the Supreme Court overruled this Court's precedent forbidding enforcement of agreements calling for the arbitration of individual PAGA claims, ordered the plaintiff's individual PAGA claim to arbitration, and held that the remaining non-individual PAGA claims should be dismissed for lack of statutory standing. The same result is warranted here.

Like the agreement in *Viking River*, the agreement here calls for arbitration of any PAGA claim on an individual basis. Under *Viking River*, that agreement must be enforced. After the individual PAGA claim is compelled to arbitration, all that will remain in court are non-individual PAGA claims seeking civil penalties for alleged violations that occurred only to others.

Adolph lacks statutory standing under PAGA to bring such non-individual claims. As a matter of this Court's longstanding practice, the U.S. Supreme Court's decision on this issue warrants substantial deference. *Viking River* also reached the correct result, as PAGA authorizes a private-plaintiff suit for civil penalties only when "brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.) A plaintiff is an aggrieved employee only when "*one or more* of the alleged violations was committed" against him. (§ 2699, subd. (c), italics

added.) After Adolph's claim is sent to arbitration, he will not be seeking in court any PAGA penalties for alleged Labor Code violations that he purportedly experienced. He simply "is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Viking River*, 142 S.Ct. at p. 1925.)

I. *Viking River* Requires Adolph to Arbitrate His Individual PAGA Claim.

The U.S. Supreme Court held in *Viking River* that the FAA (i) applies to PAGA claims, (ii) preempts the California-law rule against severing individual PAGA claims, and (iii) requires that such claims be sent to arbitration when the parties have so agreed. The judgment below conflicts with the FAA in all three respects. (Opn., at pp. 2, 5–7.)

To begin with, the FAA applies to Adolph's PAGA claim under *Viking River*. The contractual relationship between the parties is the "but-for cause of any justiciable legal controversy." (*Viking River*, 142 S.Ct. at p. 1919, fn. 4.) Adolph necessarily accepted the Agreement before performing any work via the Eats App—work that now forms the basis of his attempt to exact PAGA penalties from Uber. (6-CT-1546–1547, ¶¶ 8, 12.) And although he could have opted out of arbitration, he chose not to.

The Court of Appeal's decision conflicts with *Viking River* because it turned on the now-abrogated rule that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship," but rather "a dispute between the

employer and the *state*" that delegates its claim to the plaintiff. (*Iskanian*, 59 Cal.4th at pp. 386–387; see Opn., at pp. 4–5, 7.)

The Court of Appeal also denied Uber's petition to compel arbitration based on the state-law compulsory joinder rule for PAGA claims invalidated by *Viking River*. *Iskanian* had interpreted PAGA claims as constituting an indivisible whole, such that parties cannot agree to arbitrate only the "individual ... Labor Code violations that an employee suffered." (*Iskanian*, 59 Cal.4th at pp. 383–384.) This rule froze "efforts to split PAGA claims into individual and representative components." (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 88.) The Court of Appeal applied this anti-severability "rule of *Iskanian*" in refusing to enforce the parties' agreement to arbitrate the question whether Adolph is an aggrieved employee. (Opn., at pp. 6, 9.)

The Court of Appeal's refusal to allow the parties to arbitrate their individual disputes conflicts with *Viking River*. There, the Supreme Court held that the FAA preempts *Iskanian* to the extent it invalidated agreements to arbitrate PAGA claims concerning only violations that the plaintiff allegedly experienced. Because "arbitration is a matter of consent," parties may freely "determine the issues subject to arbitration and the rules by which they will arbitrate." (*Viking River*, 142 S.Ct. at pp. 1922–1923, cleaned up.) But the PAGA joinder rule impinged on the parties' freedom by forcing them to choose between litigation or arbitration of "a massive number of claims in a single-package suit." (*Id.* at p. 1924.) Some claims arise from

"Labor Code violations actually sustained by the plaintiff," while others stem from "events involving other employees." (*Id.* at p. 1916.) The Court sought to clear up the confusion by calling the former "individual" PAGA claims and the latter "non-individual" PAGA claims. (*Id.* at pp. 1924–1925.) Under *Viking River*, the FAA preempts *Iskanian* "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (*Id.* at p. 1924.)

Not only does the FAA allow the parties to split a PAGA action into individual and non-individual claims, but the parties also opted to do so here. Adolph agreed "to resolve any claim that [he] may have against ... Uber on an individual basis." (6-CT-1570, § 15.3.) He also waived the right to bring a PAGA claim on behalf of other drivers. (6-CT-1574, § 15.3(v).) But the parties agreed that, if this waiver was "found to be unenforceable," (1) "the provision shall be severed," (2) the severance "shall have no impact whatsoever" on "attempts to arbitrate any remaining claims on an individual basis," and (3) the non-individual PAGA claims shall remain in litigation. (*Ibid.*) In other words, the arbitration provision ensures that, in the event the PAGA waiver is unenforceable, the parties nonetheless will arbitrate their individual disputes.

These contractual provisions require Adolph to arbitrate his individual PAGA claim against Uber for the same reasons as the arbitration agreement in *Viking River*. The U.S. Supreme Court acknowledged that the parties' PAGA waiver would be invalid "if construed as a wholesale waiver" of the claim because

its decision left standing that aspect of *Iskanian*. (*Viking River*, 142 S.Ct. at pp. 1924–1925.) But the parties' agreement there also contained a severability clause specifying that if the waiver "[wa]s invalid in some respect, any 'portion' of the waiver that remain[ed] valid must still be 'enforced in arbitration.'" (*Id.* at p. 1925.) The terms of "this clause," the Court held, entitled the employer "to enforce the agreement insofar as it mandated arbitration of [the] individual PAGA claim." (*Ibid.*)

Because the FAA grants parties the right to divide up claims as the arbitration agreement does here, the Court of Appeal erred in affirming the preliminary injunction halting arbitration and the denial of Uber's petition to compel.

II. Adolph's Non-individual PAGA Claims Should Be Dismissed for Lack of Statutory Standing.

After determining that the FAA requires the enforcement of an agreement to arbitrate an individual PAGA claim, the U.S. Supreme Court in *Viking River* held that remaining non-individual claims must be dismissed for lack of statutory standing. This result, as *Viking River* explains, flows from the text of the PAGA statute and this Court's precedent interpreting PAGA's standing requirement. Although Adolph invoked this Court's opinion in *Kim* to advance a contrary view in his petition-stage briefing, that decision only reinforces that a PAGA plaintiff lacks standing unless his action seeks civil penalties for violations that he allegedly suffered.

A. The U.S. Supreme Court's Interpretation of PAGA's Standing Requirement in *Viking River* Warrants Substantial Deference.

In *Viking River*, the Supreme Court concluded that "PAGA provides no mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (142 S.Ct. at p. 1925.) That result followed from the Legislature's rejection of "general public" standing under PAGA. (*Kim*, 9 Cal.5th at p. 90.) Instead, PAGA actions can be maintained only by a "person who was employed by the alleged violator and against whom one or more of the alleged violations was committed" to bring suit "on behalf of himself or herself and other employees." (Lab. Code, § 2699, subds. (a), (c).) So "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Viking River*, 142 S.Ct. at p. 1925.) The upshot is that a plaintiff without her *own* individual PAGA claim in court "lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." (*Ibid.*)

Adolph urges this Court to entirely disregard the considered views of a majority of the U.S. Supreme Court on this issue. In fact, his attorney has proclaimed that "the U.S. Supreme Court can 'do what it wants' and issue what in effect are advisory opinions, but the California justices have the authority to decide California law and standing for Golden State residents." Dorothy Atkins, *Calif. Justices to Review Uber PAGA Fight After*

Viking River (July 22, 2022) <https://tinyurl.com/4awvs68t>. Similarly, Adolph has told this Court that Justices Alito, Breyer, Sotomayor, Kagan, and Gorsuch "simply guessed" at the meaning of California law just to get it entirely wrong. (Adolph Supp. Letter Br., at pp. 4–5.)

But *Viking River* was no mere "advisory" decision and was certainly not an ill-considered "guess[]." It was instead a square holding from five Justices of the U.S. Supreme Court based on a straightforward reading of PAGA's standing requirement. And the *Viking River* majority reached this conclusion even though three of their colleagues would have declined to address the issue at all. (See 142 S.Ct. at p. 1926 [Barrett, J., concurring in part and concurring in the judgment].) While Adolph cavalierly urges this Court to give no weight to the views of the U.S. Supreme Court on this issue, it is telling that not a single Justice read California law as permitting a plaintiff such as Adolph to continue to pursue non-individual PAGA claims in court if his individual PAGA claim must be arbitrated.

This Court's precedent shows that deference, not derision, is owed to the U.S. Supreme Court's considered judgment on this issue. This Court "do[es] not depart lightly from clear United States Supreme Court rulings"—even going so far as to generally adopt into *California* law the U.S. Supreme Court's interpretations of *federal* law. (*People v. Houston* (1986) 42 Cal.3d 595, 609.) "[I]n the absence of good cause for departure," this Court defers "to United States Supreme Court decisions." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353.) That is to say

that Adolph has the burden to come forward with "persuasive reasons" to break with *Viking River* and "tak[e] a different course." (*People v. Teresinski* (1982) 30 Cal.3d 822, 836.)

This respectful consideration applies no less to "decisions of the federal courts interpreting California law," which this Court has recognized as "persuasive" even though they are "not binding" on matters of state law. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 299.) Even where only a lower federal court has interpreted California law, California courts start from the position that the federal court got it right—not wrong, as Adolph would have it. In *Garcia v. Wetzel* (1984) 159 Cal.App.3d 1093, for instance, the Court of Appeal deferred to the Ninth Circuit's interpretation of Civil Code section 1916.1 after finding its analysis to be "persuasive" and even "compelling." (*Id.* at p. 1098.) Here, the persuasive power of *Viking River* is at its apex: The interpretation came not from a lower federal court, but from the U.S. Supreme Court. (See *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 12.)

B. A Plaintiff Who Must Arbitrate His Individual PAGA Claim Lacks Standing to Maintain Non-individual PAGA Claims in Court.

Absent a "persuasive[] reason" to depart from the U.S. Supreme Court's interpretation of PAGA standing (*Teresinski*, 30 Cal.3d at p. 836), *Viking River* should control the disposition of this case and require that Adolph's non-individual PAGA claims be dismissed. No such persuasive reason exists. In fact, the U.S. Supreme Court got it exactly right. PAGA's text and legislative history, as well as this Court's decisions, show that Adolph lacks

standing to maintain non-individual PAGA claims concerning only alleged violations suffered by *other* alleged employees.

Statutory interpretation begins with the "plain and commonsense meaning" of the text. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165, citation omitted.) This Court places the language "in the context of the statutory framework as a whole to discern its scope and to harmonize various parts of the enactment." (*Mendoza v. Fonseca McElroy Grinding Co.* (2021) 11 Cal.5th 1118, 1125.) If the provision remains ambiguous, this Court may consult legislative history. (See, e.g., *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

PAGA recognized a new type of action to recover civil penalties on behalf of the State for Labor Code violations. It authorized an action "brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.) The plaintiff is not an "aggrieved employee" unless—as the term suggests and the statute mandates—the person (1) "was employed by the alleged violator" and (2) suffered "one or more of the alleged violations." (§ 2699, subd. (c).)

Read together, these provisions defining "aggrieved employee" status establish that the indispensable core of PAGA standing is the request for civil penalties for violations that allegedly occurred to the plaintiff. As another court has aptly put it, PAGA "allows an aggrieved employee to bring a civil action 'on behalf of himself or herself *and* other current or former

employees,' not on behalf of himself *or* other employees." (*Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141, quoting Lab. Code, § 2699, subd. (a).)

That view is consistent with this Court's explanation that every PAGA action must, at minimum, seek "penalties for Labor Code violations" for at least "one aggrieved employee—the plaintiff bringing the action." (*Iskanian*, 59 Cal.4th at p. 387.) While a PAGA plaintiff may seek to represent "other employees *as well*" (*ibid.*, italics added), he cannot recover penalties based only on violations to others (see *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 678 [a PAGA plaintiff may "su[e] solely on behalf of himself or herself or *also* on behalf of other employees"], italics added). Thus, as *Viking River* and other courts have concluded, "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (*Viking River*, 142 S.Ct. at p. 1925; see also, e.g., *Quevedo*, 798 F.Supp.2d at p. 1141 ["employee can pursue claims on behalf of others only if he also pursues claims on behalf of himself"]; *Miguel v. JPMorgan Chase Bank, N.A.* (C.D.Cal., Feb. 5, 2013) 2013 WL 452418, at *9 [same].)

There are additional textual clues in the statute that confirm that a plaintiff seeking to pursue non-individual PAGA claims must also bring the action at least in part on behalf of himself or herself. Section 2699, subdivision (g)(1), clarifies that PAGA does not "limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part."

This qualification would be unnecessary if PAGA was an all-purpose grant of authority to represent *other* employees, whether or not the plaintiff had any personal rights at stake.

Section 2699, subdivision (i), meanwhile allocates 75 percent of civil penalties to the State and 25 percent to "the aggrieved employees." If the plaintiff did not have to be an aggrieved employee with respect to any of the violations in court, the plaintiff could not share in any recovery and thus would personally lack the financial incentive to litigate vigorously on behalf of the State (even if her counsel would still desire to recover an attorneys' fee award). (See *Iskanian*, 59 Cal.4th at p. 382 [critical aspect of PAGA is that the "citizen bringing the suit" can recover a "portion of the penalty"]; cf. *Vt. Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 772 [qui tam relator has "a 'concrete private interest in the outcome of [the] suit'" by virtue of "the bounty he will receive if the suit is successful"], citation omitted.)

Legislative history also confirms that PAGA permits only "an 'aggrieved employee' [to] bring a civil action *personally* and on behalf of other current or former employees to recover civil penalties for Labor Code violations." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, italics added, quoting Lab. Code, § 2699, subd. (a).) The Legislature designed PAGA standing to be "unlike the UCL" standing provisions in effect at the time, which allowed suits by "persons who suffered no harm from the alleged wrongful act." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 29, 2003, p. 7.) Those standing

provisions had led to "well publicized allegations of private plaintiff abuse," which the legislature specifically sought to avoid in enacting PAGA. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) June 26, 2003, p. 6 [hereafter Assem. Com. Analysis]; see also *Kim*, 9 Cal.5th at p. 90 [recounting how "some private attorneys had exploited the generous standing requirement of the UCL by filing shakedown suits to extort money from small businesses for minor or technical violations where no client had suffered an actual injury"], cleaned up.)

The consequence is that PAGA, "[u]nlike the UCL," does "not permit private actions by persons who suffered no harm from the alleged wrongful act." (Assem. Com. Analysis, at p. 6.) Instead, a PAGA plaintiff must show that she is someone "against whom the alleged violation was committed"—not a member of the general public who is a stranger to the suit. (*Ibid.*) "Only persons who have actually been harmed may bring an action." (*Ibid.*, cleaned up.)*

The legislative history thus makes clear that a plaintiff has standing under PAGA only when pursuing civil penalties for violations that he personally suffered. While PAGA permits such suits to "*also* include fellow employees *also* harmed by the alleged

* Proposition 64 eliminated "general public" standing under the UCL by requiring plaintiffs who assert UCL claims to have "lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.)

violation" (Assem. Com. Analysis, at p. 6, italics added), it does not permit a PAGA action that is based solely on alleged violations that others experienced. In this manner, the Legislature intended for "PAGA's standing requirement ... to be a departure from the 'general public' standing originally allowed under the UCL." (*Kim*, 9 Cal.5th at p. 90, citation omitted.)

Adolph nonetheless seeks to maintain *only* non-individual PAGA claims in court, as his individual PAGA claim must be arbitrated. But PAGA forecloses this species of "general public" standing. This Court explained why in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993. There, a union sought to bring a PAGA claim based on its association with its members, who had allegedly suffered Labor Code violations. (*Id.* at p. 999.) PAGA cut off this attempt because the union did not "bring an action on behalf of himself or herself," but solely "on behalf of its members." (*Id.* at p. 1004.)

Like the union in *Amalgamated Transit*, Adolph cannot seek recovery only for violations suffered by other employees and not for any personally experienced violations. PAGA requires each "civil action" to be brought by an aggrieved employee against whom "one or more of the *alleged* violations was committed." (Lab. Code, § 2699, subds. (a), (c), italics added.) But Adolph cannot allege any personally sustained violations here because such individual claims must be severed and compelled to arbitration. (*Viking River*, 142 S.Ct. at p. 1925.) That also means that Adolph cannot seek civil penalties "on behalf of himself" in court—as every PAGA plaintiff must do.

(Lab. Code, § 2699, subd. (a).) It would take a serious rewriting of subdivisions (a) and (c) of section 2699 to allow Adolph to pursue penalties in court for violations that allegedly occurred only to *other* employees after the Legislature intentionally acted to prevent such an outcome.

That Adolph may still assert an individual PAGA claim in arbitration does not give him standing to bring non-individual PAGA claims separately in court. The FAA demands that his individual PAGA claim be severed from his non-individual claims. (*Viking River*, 142 S.Ct. at p. 1925.) And that means that what was once "a single action" must now proceed as "two ... separate and distinct actions with consequent separate judgments." (*Bodine v. Superior Court in and for Santa Barbara County* (1962) 209 Cal.App.2d 354, 361.) As this Court has explained, "severance of an action" results "in[] two or more separate actions." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 738, fn. 3.) And nothing in PAGA suggests that a plaintiff can point to a separate proceeding in a different forum to establish that he has standing. Whatever he might attempt to prove in arbitration, Adolph simply cannot establish he satisfies the "aggrieved employee" requirement in a standalone court action once his own PAGA claim is sent to arbitration.

Justice Sotomayor noted that California courts and the Legislature will "have the last word" on the contours of California law. (*Viking River*, 142 S.Ct. at p. 1925 [Sotomayor, J., concurring].) To be sure, the Legislature could revisit whether to expand statutory standing to allow anyone—whether or not he or

she seeks to litigate "on behalf of himself or herself" (Lab. Code, § 2699, subd. (a))—to sue over violations only *others* have experienced. But the *existing* PAGA statute before this Court forecloses such a result by judicial interpretation, as Justice Sotomayor herself concluded in joining the Court's opinion dismissing the non-individual claims for lack of standing. (*Viking River*, 142 S.Ct. at p. 1925.) Because Adolph cannot allege a personally sustained violation or seek any relief on his own behalf in court, he does not meet the "aggrieved employee" requirement for his non-individual PAGA claims, which should therefore be dismissed. (See *Amalgamated Transit Union*, 46 Cal.4th at p. 1005.)

C. *Kim v. Reins* Supports *Viking River*'s Interpretation of PAGA's Standing Requirement.

Adolph has asserted that this Court's decision in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 requires a different result, but that decision only confirms that Adolph lacks standing to maintain a non-individual claim. In fact, the U.S. Supreme Court expressly relied on *Kim* in support of its analysis of PAGA's standing requirement in *Viking River*. (142 S.Ct. at p. 1925 ["'PAGA's standing requirement was meant to be a departure from the general public standing originally allowed' under other California statutes"], cleaned up, quoting *Kim*, 9 Cal.5th at p. 90.) The U.S. Supreme Court correctly read *Kim* as foreclosing the idea that a plaintiff who cannot maintain an individual PAGA claim in court can nonetheless pursue non-individual PAGA claims.

Kim reaffirmed the two core requirements of PAGA standing discussed above. (See *ante*, at pp. 27–28.) Specifically, "[t]he plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Kim*, 9 Cal.5th at pp. 83–84, quoting Lab. Code, § 2699, subd. (c).) The employer in *Kim* argued that PAGA standing requires that a plaintiff must also have viable individual claims for relief under the Labor Code, and thus that if such claims were settled, the plaintiff could no longer be considered to be an "aggrieved employee." (*Id.* at pp. 82–83.) This Court, however, rejected the notion that "standing somehow ended when [the employee] settled his claims for individual relief." (*Id.* at p. 84.)

Critically, the plaintiff in *Kim* was still seeking penalties under PAGA "on behalf of himself" for personally suffered violations. (Lab. Code, § 2699, subd. (a).) He had settled only "individual Labor Code claims," *not* any claim for civil penalties under PAGA. (*Kim*, 9 Cal.5th at pp. 82–83.) As this Court was careful to clarify, "the civil penalties a PAGA plaintiff may recover ... are distinct from the statutory damages or penalties that may be available to employees suing for individual violations." (*Id.* at p. 81; see also *Iskanian*, 59 Cal.4th at p. 381, cleaned up.) Settlement of one does not affect the other.

The plaintiff in *Kim* continued to press his request for civil penalties on the ground "that he personally suffered at least one Labor Code violation on which the PAGA claim is based." (9 Cal.5th at p. 84.) He had "specifically carved" the whole PAGA

claim "out of the settlement" with his employer. (*Id.* at p. 92, fn. 7.) That was enough to keep his PAGA claim in court. An "employee has PAGA standing," this Court emphasized, "if '*one or more* of the alleged violations was committed' against him." (*Id.* at p. 85, quoting Lab. Code, § 2699, subd. (c).) Because the plaintiff could have brought a "stand-alone PAGA claim[]" to start, his decision to settle his personal Labor Code damages claims could not retroactively defeat his PAGA standing. (*Kim*, 9 Cal.5th at p. 88.)

Adolph argues that he will not "lose" his statutory standing to bring non-individual PAGA claims if he must arbitrate his individual PAGA claim, just as the plaintiff in *Kim* did not lose standing after settling personal damages claims. (Adolph Supp. Letter Br., at pp. 4–5.) But Adolph glosses over the key distinction: PAGA standing depends on the plaintiff being able to assert an individual claim for PAGA penalties. That is why the settlement of damages claims under other provisions of the Labor Code has no impact on a plaintiff's ability to pursue a PAGA claim. By contrast, Adolph is unable to maintain his non-individual PAGA claims if he cannot assert any individual PAGA claim in court.

Suppose, for instance, that Adolph's initial complaint had pleaded a standalone non-individual PAGA claim, seeking civil penalties for violations that occurred *only* to other employees but not to himself. The court would have been required to dismiss such a claim under PAGA, as Adolph would not have brought "the action 'on behalf of himself ... and other current or former

employees.'" (*Arias*, 46 Cal.4th at p. 987, fn. 7, quoting Lab. Code, § 2699, subd. (a).) Nor could he satisfy section 2699, subd. (c), because he would not be "affected by at least one of the violations alleged" in the non-individual PAGA claim. (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 754; compare *Kim*, 9 Cal.5th at p. 88.)

Adolph cannot acquire standing to bring a standalone non-individual PAGA claim simply by joining that claim with an individual PAGA claim in violation of an enforceable arbitration agreement, as he has attempted to do here. As explained above, the FAA preempts *Iskanian*'s joinder rule and requires enforcement of agreements to arbitrate PAGA claims on an individualized basis. (See *ante*, at pp. 20–23.) And because "[t]he Legislature defined PAGA standing in terms of *violations*" composing the action, once Adolph's individual PAGA claim is sent to arbitration, he will not be an aggrieved employee for his non-individual claims because none of the alleged "Labor Code violations were committed against him." (*Kim*, 9 Cal.5th at p. 84, italics added; see Lab. Code, § 2699, subd. (c).)

This does not mean that Adolph's standing "expir[ed]" or somehow was "extinguished." (*Kim*, 9 Cal.5th at pp. 83, 85.) To be clear, Uber disputes that Adolph has standing to bring *any* PAGA claim because he is not an aggrieved employee at all. But his standing for a non-individual claim fails twice over because he cannot maintain a claim in court to recover penalties for violations he allegedly suffered. And the fact that Adolph violated his enforceable agreement to arbitrate his individual

PAGA claim does not mean that the remaining non-individual claims are an action "brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." (Lab. Code § 2699, subd. (a), italics added.) Instead, because Adolph must arbitrate any individual PAGA claim he might attempt to assert in court, this action is necessarily limited solely to non-individual PAGA claims that do not include "[a]t least one violation" that was allegedly "committed against the representative plaintiff." (*Rope v. Auto-Chlor System of Wash., Inc.* (2013) 220 Cal.App.4th 635, 651, fn. 7, superseded by statute on another ground as discussed in *Moore v. Regents of Univ. of Cal.* (2016) 248 Cal.App.4th 216, 245–247.)

Adopting the contrary position would permanently exempt a plaintiff from PAGA's standing requirement so long as the plaintiff is willing to violate an enforceable agreement to arbitrate. Not only would that exalt form over substance, it would also flout the bedrock principle that "standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232–233; see also, e.g., *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1119 [plaintiff who ceases to be a stockholder may lose standing to continue shareholder's derivative suit].)

The Court of Appeal's decision in *Robinson v. Southern Counties Oil Co.* (2020) 53 Cal.App.5th 476, illustrates this point. There, a PAGA settlement in another case precluded the plaintiff from continuing to pursue penalties for violations before a certain

date. (*Id.* at p. 483.) The plaintiff cut his losses and sought penalties only for subsequent violations not covered by the settlement. But there was a problem: He had no longer been employed by the defendant during the period postdating the settlement. (*Id.* at p. 484.) Now that the settlement had occurred, the fact that he once had standing to bring a PAGA action on behalf of himself and others did not forever imbue him with "standing to pursue claims based solely on violations alleged to have occurred after his termination" and that did not affect him at all. (*Id.* at pp. 484–485; accord, e.g., *Gau v. Hillstone Restaurant Group, Inc.* (N.D.Cal., July 20, 2022) 2022 WL 2833977, at *7 [plaintiff not aggrieved employee under revised timespan for PAGA action].)

Adolph is no different from the plaintiff in *Robinson*. Here, as there, Adolph initially sought penalties for violations he allegedly suffered. But the arbitration agreement here, like the preclusive settlement in *Robinson*, means that the only remaining PAGA claim in court will be based on alleged violations experienced only by other employees. That is the end of the road for the non-individual claim under PAGA. (See *Viking River*, 142 S.Ct. at p. 1925.)

This Court's precedent settles beyond any doubt that plaintiffs who are not aggrieved employees have no standing under PAGA. (See *Kim*, 9 Cal.5th at pp. 83–84; *Amalgamated Transit Union*, 46 Cal.4th at p. 1005.) But Adolph's proposed rule would be completely unworkable with respect to this requirement. If a plaintiff does not prove his "aggrieved

employee" status in court, then the court cannot determine whether the plaintiff actually has standing to bring a PAGA claim as a proxy of the State. And under *Viking River*, agreements to arbitrate an individual PAGA claim—which necessarily includes the question whether the plaintiff is an "aggrieved employee" who personally suffered "one or more of the alleged violations" (Lab. Code, § 2699, subd. (c))—must be enforced (*Viking River*, 142 S.Ct. at p. 1923). If a plaintiff who is bound by such an agreement is nonetheless permitted to litigate his "aggrieved employee" status in court (so as to prove that he has standing to pursue non-individual PAGA claims), that would violate the parties' enforceable agreement and thus contravene the FAA as interpreted in *Viking River*.

This case illustrates the problem. The Court of Appeal affirmed the denial of Uber's petition to compel arbitration as to Adolph's status as an aggrieved employee. (Opn., at pp. 7–9.) That ruling cannot be squared with *Viking River*, which compels enforcement of agreements like the one here. The question then is how could Adolph prove that he is an "aggrieved employee" in this action, if it were permitted to proceed on a non-individual basis only. Simply exempting Adolph from the threshold "aggrieved employee" issue would, of course, violate PAGA's plain text. (Lah. Code, § 2699, subd. (c).) Yet allowing him to litigate that issue in court would defy *Viking River*, as it would essentially resurrect *Iskanian*'s preempted joinder rule and deny the parties the right to "determine the issues subject to arbitration." (*Viking River*, 142 S.Ct. at pp. 1922–1923.) The

correct approach, as a majority of the U.S. Supreme Court has already recognized, is to hold that there is "no mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (*Id.* at p. 1925.)

III. In the Alternative, Adolph's Non-individual PAGA Claims Should Be Stayed.

A proper application of the FAA and PAGA sends Adolph's individual claim to arbitration and dismisses the non-individual claims for lack of standing. But if this Court breaks with the *Viking River* decision and concludes that Adolph can still pursue non-individual PAGA claims even though he must arbitrate his individual PAGA claim, Uber would at minimum be entitled to a stay of the non-individual claims.

First, the parties agreed to a stay if anything remains in court. Specifically, Adolph assented to the condition that, "[t]o the extent that there are any claims to be litigated in a civil court of competent jurisdiction because a civil court of competent jurisdiction determines that the PAGA Waiver is unenforceable with respect to those claims, the Parties agree that litigation of those claims *shall be stayed* pending the outcome of any individual claims in arbitration." (6-CT-1598, § 15.3(v), italics added.) That agreement is enforceable, as this Court has held that parties can select stay procedures by contract. (See *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394.)

Second, Code of Civil Procedure section 1281.4 would call for a stay in any event. The overlap between the individual and non-individual claims justifies a stay "to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator's jurisdiction to decide the issues that are subject to arbitration." (*Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 966; see, e.g., *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 966 [same rule for severance of request for public injunctive relief].)

CONCLUSION

The Court should reverse the Court of Appeal and order that Adolph's individual claim be compelled to arbitration and that his non-individual claims be dismissed. In the alternative, this Court should order a stay of the non-individual claims pending the arbitration of the individual PAGA claim and the threshold classification issue.

Dated: September 19, 2022

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

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Attorneys for Defendant and Appellant Uber Technologies, Inc.

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.520(c)(1) of the California Rules of Court, the undersigned hereby certifies that the Opening Brief on the Merits contains 8,513 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: September 19, 2022

Respectfully Submitted,

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PROOF OF SERVICE

I, Patrick J. Fuster, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071-3197. On September 19, 2022, I served:

OPENING BRIEF ON THE MERITS

on the parties stated below, by the following means of service:

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☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the above-titled document was electronically served on the persons listed on the attached service list.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 19, 2022.

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Tab 9

Case No. S274671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three,
Case Nos. G059860, G060198

Orange County Superior Court
Case No. 30-2019-01103801
The Honorable Kirk H. Nakamura, Presiding

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INTRODUCTION

The Court limited its grant of review to a single question: "Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are 'premised on Labor Code violations actually sustained by' the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. __, __ [142 S.Ct. 1906, 1916] (*Viking River Cruises*); see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' (*Viking River Cruises*, at p. __ [142 S.Ct. at p. 1916]) in court or in any other forum the parties agree is suitable." (Aug. 1, 2022 Order.)

Under California law, standing to assert a statutory claim (whether under PAGA or otherwise) turns exclusively upon the language and purpose of the statute. (See *Kim v. Reins Int'l Calif.* (2020) 9 Cal.5th 73, 83 ["When [a California] cause of action is based on statute, standing rests on the provision's language, its underlying purpose, and the legislative intent."].) PAGA's text makes clear that a plaintiff seeking to pursue civil penalties on behalf of the California Labor and Workforce Development Agency (LWDA) need only allege that she is an "aggrieved employee," which the statute defines to mean "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code, § 2699, subd. (c).)[1] As this Court held in *Kim*, PAGA standing

[1] All statutory references are to the California Labor Code unless otherwise provided.

thus imposes only two requirements: "The plaintiff must be an aggrieved employee, that is, [1] someone 'who was employed by the alleged violator' and [2] 'against whom one or more of the alleged violations was committed.'" (9 Cal.5th at pp. 83–84, quoting § 2699, subd. (c).)

Plaintiff Erik Adolph unquestionably had standing when he filed his PAGA claim against Uber Technologies, Inc. (Uber). On that there can be no dispute. His operative Second Amended Complaint alleged he was an "employee" of defendant Uber and that Uber had committed Labor Code violations against him, thereby causing him to be "aggrieved" within the meaning of PAGA. The present dispute over Adolph's dual-forum standing arises because the U.S. Supreme Court in *Viking River Cruises* held that even though PAGA actions are generally indivisible (meaning that the aggrieved employee's claim for civil penalties on behalf of the LWDA must be adjudicated in a single, unitary proceeding (see, e.g., *Kim*, 9 Cal.5th at p. 88)), a PAGA claim may be split between two forums, arbitration and court, *if* the parties so agreed in an arbitration agreement covered by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq. (See *Viking River Cruises*, 142 S.Ct. at p. 1924.)

After the Supreme Court held that the FAA allows California employers to require their employees to seek some PAGA remedies in court and others in arbitration, the five-member majority ventured further to decide two issues of California law, neither of which had been briefed or argued. First, the Court reviewed the language of the parties' arbitration

agreement (including its severability clause) and concluded that, although the parties' agreement expressly *prohibited* all "representative or private attorney general action[s]," they actually intended to *require* plaintiff Angie Moriana to pursue in arbitration the "individual" component of her PAGA representative action (for civil penalties on behalf of the LWDA based on the Labor Code violations committed against her alone) and to pursue in court the "non-individual" component of her PAGA representative action (for penalties on behalf of the LWDA based on Labor Code violations committed against other aggrieved employees). (*Id.* at pp. 1924–1925.)[2] The Court then applied what it understood to be California standing law, based upon a patent misreading of *Kim*, and concluded that once a PAGA plaintiff is required to split her PAGA claim in two pursuant to the parties' arbitration agreement, she is stripped of her statutory standing to pursue the "non-individual" component of the LWDA's claim for PAGA civil penalties in court (even though the parties had *agreed* she could pursue those remedies there)—thus effectively immunizing the employer from

[2] The Supreme Court seems to have misapplied California contract construction principles in construing the parties' arbitration agreement in *Viking River Cruises*. (See *ibid.*) Although that construction would not be controlling here in any event (including because the language of Uber's arbitration agreement is materially different than the language of Viking River's agreement), we explain in Part III why the Court of Appeal should be instructed on remand to determine as a threshold matter whether Uber's arbitration agreement, properly construed, actually requires plaintiff Adolph to pursue *any* component of his PAGA claim in arbitration.

meaningful liability, eviscerating the underlying purposes of the PAGA public enforcement action, and rendering illusory the supposed benefit of the plaintiff's arbitration bargain. (See *infra* at pp. 45–46 [explaining why an arbitration agreement, so construed, would violate California public policy and be unenforceable].)

For the reasons set forth below, the Supreme Court's understanding of PAGA standing under California law was completely wrong.

Adolph's operative complaint expressly pleaded the only two facts required for PAGA standing: that he was an "employee" and that he was "aggrieved." Even assuming that the parties' arbitration agreement required Adolph to pursue PAGA's statutory *remedy* in two forums (but see *infra* at Part III), Adolph therefore still had standing as an "aggrieved employee" to pursue those separate remedies in each contractually designated forum.

To be sure, either the arbitrator or the judge might eventually conclude, based upon an adjudication of the merits of a PAGA plaintiff's "individual" claim, that the plaintiff was not, in fact, an "aggrieved employee." Depending upon the circumstances, any such determination might, or might not, have later issue-preclusive effect on that plaintiff's ability to establish here "aggrieved employee" status in the other forum (another issue beyond the scope of this Court's limited review). But the mere fact that *Viking River Cruises* may require a PAGA plaintiff to assert one portion of his PAGA claim in arbitration and the other portion in court has no bearing on whether that plaintiff

has adequately alleged, or may subsequently prove, the only two elements required to establish "aggrieved employee" PAGA standing.

Uber's strained argument to the contrary rests upon an obvious error, which it repeats throughout its Opening Brief (AOB). Uber confuses the remedy that a plaintiff may be required to pursue in arbitration with that plaintiff's *status* as an "aggrieved employee." That conflation of remedy and status would impermissibly import Article III redressability requirements into PAGA, contrary to the non-compensatory nature of PAGA's remedial scheme and in direct conflict with PAGA's goal of maximizing the enforcement of workplace laws.

While a PAGA plaintiff may not seek the same civil penalties on behalf of the LWDA in two different forums, her *status* as an aggrieved employee should entitle her to proceed in whichever forum or forums have been designated for the adjudication of her PAGA claims. If the parties' FAA-covered arbitration agreement requires plaintiff to pursue some statutory *remedies* in arbitration and others in court, that requirement will be enforceable under *Viking River Cruises* and the FAA. Unless and until the plaintiff has been finally adjudicated *not* to be an "aggrieved employee," though, nothing in PAGA—or this Court's construction of PAGA in *Kim*, or the legislative purposes underlying PAGA—should preclude her from pursuing the separate portions of the available statutory remedies in both forums.

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STATEMENT OF THE CASE

Uber's Arbitration Agreement Expressly Prohibits the Arbitration of PAGA Claims.

Respondent Erik Adolph worked as an Uber driver beginning in March 2019, delivering food to Uber customers through the company's UberEATS app. (6-CT-1547, ¶ 12.) As a condition of his employment, Adolph was bound by Uber's Technology Services Agreement with Portier, LLC ("the Agreement"); and because Adolph did not timely opt out, he became bound by the "Arbitration Provision" in that Agreement. (*Ibid.*)

The Agreement's "Arbitration Provision" required Adolph (like all Uber drivers subject to that Agreement) to arbitrate, on an individual basis only, nearly all work-related claims he might have against Uber, with one critical exception relevant here. (1-CT-137–145, § 15.3.) That exception, described in the Agreement as the "PAGA Waiver," prohibited Adolph from arbitrating, litigating, or pursuing in any other forum, any representative action claim under PAGA:

> To the extent permitted by law, you and Company agree not to hring a representative action on behalf of others under the Private Attorneys General Act of 2004, California Labor Code § 2698 et seq. ("PAGA"), in any court or in arbitration ....

(1-CT-142, § 15.3, subd. (v).) As Uber acknowledges, this Arbitration Provision "contained a waiver of PAGA claims to the fullest extent permissible under law." (AOB at p. 13.)

Uber's PAGA Waiver also included a severability clause that described what would happen in the event its PAGA Waiver is held unenforceable:

> If the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from this Arbitration Provision; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any representative actions brought under the PAGA must be litigated in a civil court of competent jurisdiction.

(1-CT-142, § 15.3, subd. (v).)

Erik Adolph Brings a PAGA Claim Against Uber for Labor Code Violations.

Adolph initially filed this action in October 2019, alleging two claims for relief under Labor Code § 2802 and the Unfair Competition Law (UCL). (1-CT-47.) The gist of Adolph's claim was that Uber had misclassified him and other delivery drivers as independent contractors, rather than as employees, and that it had wrongfully failed to reimburse them for their necessary business expenses, including for the use of their cell phones.

Adolph subsequently added a claim for relief under PAGA based on the same theory of misclassification, in which he sought civil penalties based on Uber's alleged failure: to reimburse its drivers for their reasonable business expenses, to timely pay them all wages due during and upon termination, to pay required overtime premiums, to provide accurate itemized wage statements, and to maintain accurate payroll records. (1-CT-213–214). On January 21, 2021, with permission of the trial court, Adolph filed his operative Second Amended Complaint (SAC),

which eliminated his previous Labor Code and UCL claims and retained only his claims for civil penalties under PAGA. (5-CT-1484.)

Uber Unsuccessfully Seeks to Compel Arbitration.

Uber sought to compel Adolph's PAGA claims to arbitration in the trial court and again in the court of appeal. Both courts rejected Uber's arguments. In pertinent part, the court of appeal explained that it was bound to "follow the rule of" *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, which prohibits contractual waiver of statutory rights enacted for public purpose. (*Adolph v. Uber Technologies* (Cal. Ct. App. 2022) 2022 WL 1073583, at p. *5.). The court of appeal also rejected Uber's contention that an arbitrator, rather than a judge, should decide the threshold issue of whether Adolph was an "employee" (rather than as an independent contractor) and thus potentially an "aggrieved employee" within the meaning of PAGA. (*Id.* at p. *3, citing *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 996 and *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 471–472.)

This Court Grants Limited Review After *Viking River Cruises.*

On May 20, 2022, Uber filed a petition for review, principally contending that the trial court should have compelled arbitration to enable an arbitrator in the first instance to determine all threshold issues of enforceability and arbitrability, including Adolph's status as an "employee." (See Pet. for Rev. at p. 10.)

Before Adolph could file his Answer, the United States Supreme Court decided *Viking River Cruises*. In Part II of its opinion, the Supreme Court held that the FAA did *not* preempt "*Iskanian*'s principal rule" (which prohibits the enforcement of contractual waivers of state statutory rights enacted for public purpose, pursuant to California public policy and Civil Code § 3513). (See 142 S.Ct. at pp. 1922–1923.) In Parts III and IV, the court held that: (1) FAA preemption requires enforcement of an arbitration clause that requires a PAGA plaintiff to adjudicate the "individual" component of her representative PAGA claim in arbitration and the "non-individual" component in court (*id.* at p. 1924); (2) Viking River's arbitration clause did in fact require such separate adjudication; and 3) under California law as construed by this Court in *Kim*, a PAGA plaintiff who has been compelled to arbitrate the "individual" component of her PAGA claim thereby loses standing to pursue the "non-individual" component in court, because she is no longer an "aggrieved employee" but is simply an undifferentiated member of the "general public" (*id.* at p. 1925, quoting *Kim*, 9 Cal.5th at p. 90).

Uber requested and obtained leave to file a supplemental brief in support of review to address the potential impacts of *Viking River Cruises*. (See June 16, 2022 Order.)

Uber's supplemental brief principally focused upon the final two sections of the Supreme Court's decision. Uber contended that the Supreme Court's analysis of FAA preemption in Part III of *Viking River Cruises* and its analysis of California law in Part IV required reversal of the court of appeal's decision

and should be applied to require Adolph to arbitrate the "individual" component of his PAGA claim against Uber and to dismiss the "non-individual" remainder of that claim. Uber asked this Court to grant review and to transfer this case to the court of appeal with instructions to reconsider its decision in light of *Viking River Cruises*. (Uber Supp. Letter Br. at p. 1.)

Adolph's supplemental letter brief construed the governing legal principles quite differently. Pointing to Justice Sotomayor's concurring opinion in *Viking River Cruises* and her status as the fifth, and thus decisive, member of the Court's majority, Adolph noted that this Court, not the U.S. Supreme Court, is the final arbiter of California standing law. Adolph therefore asked this Court to grant review to determine for itself and the lower California courts, as a matter of state law based on the plain language and established legislative purposes of PAGA, whether an aggrieved-employee plaintiff who is required (as a result of FAA preemption) to split a representative PAGA claim into "individual" and "non-individual" components, is thereby stripped of statutory standing to pursue, on behalf of the LWDA, the portion of that claim seeking civil penalties based on the number of Labor Code violations committed against other aggrieved employees. (Adolph Supp. Letter Br. at 2.)

This Court granted review, limited to that single question of PAGA statutory standing. (Aug. 1, 2022 Order.)[3]

[3] Since then, many trial courts in California, state and federal, have addressed that question, with most (thus far) agreeing with the plaintiffs that an order compelling arbitration of the "individual" component of an aggrieved employee's PAGA

ARGUMENT

I. An Aggrieved Employee Who Has Been Compelled to Arbitrate the Portion of His Representative PAGA Claims Based on Labor Code Violations Personally Suffered Continues to Have Standing to Pursue the Remaining Portion of that Representative PAGA Claim in Court.

The question before this Court raises a pure issue of statutory construction. We therefore begin by summarizing PAGA's key language and underlying purposes, as set forth by the Legislature and as construed by this Court. We then turn to *Viking River Cruises* and the U.S. Supreme Court's application of the FAA—and its misapplication of California law—to the facts and issues in that case. After demonstrating why Uber's arguments in support of that misapplication of California law are wrong, we conclude by identifying the issues that remain for the court of appeal to address after this Court decides the issue of PAGA standing upon which review was granted.

A. PAGA Serves a Broad Enforcement Purpose by Allowing the State to Deputize Aggrieved Employees to Collect Civil Penalties in a Representative Action on its Behalf.

The California Legislature enacted PAGA in 2003 to address two structural problems that were significantly impeding the State's efforts "'to achieve maximum compliance with state labor laws.'" (*Iskanian*, 59 Cal.4th at p. 379, quoting *Arias v.*

claim does not require dismissal of the remaining "non-individual" component. That question is also currently pending in several district courts of appeal, but none have yet decided the issue.

Superior Court (2009) 46 Cal.4th 969, 980.) First, many Lahor Code provisions were only enforceable through criminal prosecution and not through the more easily prosecuted administrative actions for civil penalties. Second, because the State's workplace enforcement agencies were woefully understaffed and underfunded, they lacked the resources necessary to pursue relief against most Lahor Code violators, even for the civil penalties that were previously availahle. (*Iskanian*, 59 Cal.4th at pp. 377–379; *Arias*, 46 Cal.4th at p. 986; see also 2003 Cal. Legis. Serv. Ch. 906 (S.B. 796) ["Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade," and it is "in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected hy aggrieved employees acting as private attorneys general."].)

To address those problems, and consistent with the State's overarching goal of facilitating increased Labor Code enforcement, the Legislature in PAGA: (1) established a "default" civil penalty for violations of nearly every provision of the Labor Code, including those that had not previously supported administrative actions for civil penalties, and (2) created a new private right of action, in which "aggrieved employees" acting as the State's "agent" or "proxy" were authorized to bring suit as private attorneys general to recover those civil penalties against Labor Code violaters. (§ 2699, subds. (f), (g)(1); *Arias*, 46 Cal.4th at pp. 985–986.) "The Legislature's sole purpose in enacting [these provisions] was 'to augment the limited enforcement

capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency.' [Citation.]" (*Kim*, 9 Cal.5th at p. 86.)

PAGA defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).) It defines "violation" as "a failure to comply with any requirement of the [Labor] code." (§ 22.)

All PAGA claims are "representative." This is true in two distinct senses. First, they are representative because they may *only* be brought by a plaintiff as a representative of the State LWDA. As this Court has repeatedly stated and as the U.S. Supreme Court in *Viking River Cruises* recognized, in every PAGA action the aggrieved-employee plaintiff acts as "'the proxy or agent of the state's labor law enforcement agencies'" and "'represents the same legal right and interest as'" those agencies—"'namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency.'" (*Iskanian*, 59 Cal.4th at p. 380, quoting *Arias*, 46 Cal.4th at p. 986; *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185 ["All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf."].) Second, PAGA claims are representative because PAGA permits an aggrieved-employee plaintiff suing on behalf of the State to seek civil penalties not only for Labor Code violations committed against the plaintiff personally, but also for Labor Code violations committed against the plaintiff's aggrieved-employee co-workers.

(§ 2699, subd. (a); *Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 750–751; see *Viking River Cruises*, 142 S.Ct. at p. 1916 [recognizing the two senses in which all PAGA claims are "representative"].)

Under PAGA, 75% of all civil penalties recovered must be paid to the LWDA "for enforcement of labor laws ... and for education of employers and employees," while the remaining 25% must be distributed "to the aggrieved employees." (§ 2699, subd. (i).)

Before *Viking River Cruises*, this Court had repeatedly held that all representative PAGA actions were indivisible, or unitary, meaning that a PAGA plaintiff could neither choose nor be required to split her claim for PAGA civil penalty remedies among multiple proceedings. (See *Kim*, 9 Cal.5th at p. 88; *Iskanian*, 59 Cal.4th at pp. 383–384; *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649; *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 420.) That remains the general rule (which the U.S. Supreme Court described as *Iskanian*'s "secondary rule.") (*Viking River Cruises*, 142 S.Ct. at p. 1923.) Under *Viking River Cruises*, however, in cases involving arbitration agreements covered by the FAA, courts must now give effect to the parties' agreement to split any representative PAGA action into its "individual" and "non-individual" components. (See *infra* at pp. 25–26.)[4]

[4] Although millions of employees in California are subject to mandatory arbitration agreements, few if any of those agreements currently include express language requiring the employees to split their PAGA claims between court and

Although absent class members in a conventional class action under Code of Civil Procedure § 382 have due process rights in the underlying claim (and thus, for example, a right to class action notice, to opt out of the action, and to object to any settlement), aggrieved employees under PAGA (other than the duly authorized plaintiff) have no such rights. Those other aggrieved employees are entitled to share in the 25% of the civil penalties recovered by the PAGA plaintiff, but they are not parties to the PAGA action and have no legally protected interest in that action. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 547 fn. 4; *Arias*, 46 Cal.4th at pp. 986–987.) For that reason, although all aggrieved employees (like the LWDA itself) are bound by a PAGA judgment as they would be "bound by a judgment in an action brought by the government" (*Arias*, 46 Cal.4th at p. 986), they remain entitled to pursue their own individualized backpay and other remedies in separate actions under the Labor Code, regardless of how any related PAGA action may be resolved. (*ZB*, 8 Cal.5th at pp. 194–195; *Iskanian*, 59 Cal.4th at pp. 380–382; *Kim*, 9 Cal.5th at p. 89.)

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arbitration (because such splitting was not permitted under any circumstances before *Viking River Cruises*). It is not known how many arbitration agreements that unlawfully prohibit representative PAGA actions include severability clause language that, *properly* construed, would require such claim-or-remedy splitting. (See *infra* Part III [explaining why Uber's Arbitration Provision should *not* be so construed].)

B. Under *Viking River Cruises*, Arbitration Agreements that Waive PAGA Rights are Unenforceable, but the Contracting Parties May Agree to Require Enforcement of Agreements to Arbitrate the "Individual" Portion of a Representative PAGA Claim.

In *Iskanian*, this Court held, *inter alia*, that pre-dispute employment arbitration agreements that prohibit aggrieved employees from pursing representative private attorney general claims under PAGA are void and unenforceable, because they violate California public policy and Civil Code § 3513 (which provides that "a law established for a public reason cannot be contravened by a private agreement"). (59 Cal.4th at p. 383.) The Court further held that this rule (which *Viking River Cruises* termed "*Iskanian*'s principal rule") was not preempted by the FAA. (*Id.* at p. 384; *Viking River Cruises*, 142 S.Ct. at p. 1916.) The Ninth Circuit reached the same result in *Sakkab v. Luxottica Retail N.A., Inc.* (9th Cir. 2015) 803 F.3d 425, 439. Although the U.S. Supreme Court repeatedly denied certiorari over the ensuing years in cases seeking to challenge *Iskanian*'s and *Sakkab*'s prohibition against contractual PAGA waivers, that changed in December 2021, when the Supreme Court granted certiorari in *Viking River Cruises*.

The defendant employer in *Viking River Cruises* had moved to dismiss a PAGA claim brought by one of its employees, Angie Moriana, under an arbitration agreement providing "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a ... representative or private attorney action ...." (See Brief for Petitioner at p. *13, *Viking River*, 142 S.Ct. 1906,

2022 WL 327146.) The trial court and court of appeal denied the employer's motion to compel arbitration, based on the *Iskanian* rule precluding enforcement of contractual waivers of PAGA representative actions. (See 59 Cal.4th at p. 383.)

Viking River made three arguments in support of its FAA-preemption challenge. It contended that: (1) PAGA claims are functionally equivalent to class actions that may be waived in an arbitration agreement as a procedural mechanism that interferes with fundamental attributes of arbitration under *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333; (2) PAGA claims, which by definition are "representative," for that reason also interfere with the fundamental "bilaterality" attribute of arbitration; and (3) PAGA claims may be waived in an arbitration agreement because the FAA requires arbitration agreements to be enforced as written, even if they strip contracting parties of substantive state law rights. (142 S.Ct. at pp. 1919–1922.)

The five-member majority of the Supreme Court rejected all three arguments in Part II of its opinion. (*Ibid.*; Alito J., joined by Breyer, Kagan, Sotomayor, and Gorsuch, JJ.)

The Supreme Court did not end its analysis there, however. In the next part of its opinion the Court concluded that *Iskanian* had also created a "secondary rule," which required PAGA actions to be adjudicated on a unitary basis, with all civil penalties calculated in the same proceeding. (*Id.* at p. 1923.) The Court concluded that the FAA *did* preempt this "secondary" rule, which it described as a rule of mandatory "claim joinder," because the effect of such a rule was to require parties to arbitrate claims

they intended not to arbitrate. Enforcing the state's mandatory claim-joinder rule, the Court concluded, would be inconsistent with the FAA because it "would defeat the ability of parties to control which claims are subject to arbitration." (*Id.* at p. 1924.)

After having thereby resolved the only issues of federal law presented, the Court's majority proceeded to decide two quintessentially state law issues (which, like the challenge to PAGA as a mandatory claim-joinder statute, had not been briefed or argued): (1) whether Viking River's arbitration agreement—which did *not* split plaintiff's PAGA claims between court and arbitration but instead *prohibited* plaintiff from pursuing her claims in either forum—should nonetheless be construed as if it *required* such splitting; and (2) whether, if the agreement were construed as splitting plaintiff's PAGA claims between court and arbitration, plaintiff would lose standing to litigate her "non-individual" representative action claims in court upon being compelled to arbitrate her "individual" representative action claims. Citing *Kim*, the Court concluded that plaintiff *would* lose standing under those circumstances, because "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Id.* at p. 1925, citing *Kim*, 9 Cal.5th at p. 90.)[5]

[5] All eight Justices to address the merits agreed these were exclusively state law issues. (See *id.* at p. 1925; *id.* at p. 1925 [Sotomayor, J., concurring]; *id.* at p. 1926 [Justice Barrett, joined by Justice Kavanaugh and the Chief Justice, concurring in part and in the judgment].) Justice Thomas expressed no view on the

Justice Sotomayor, who provided the crucial fifth vote, separately concurred to explain that if the majority's characterization of state law were wrong, the state courts or state legislature could correct that non-binding mischaracterization. As she wrote, "Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word." (*Id.* at p. 1925 [Sotomayor, J., concurring].)

Now that this Court has granted review to decide the state law issue of PAGA standing issue addressed in Part IV of *Viking River Cruises*, it is poised to have that "last word" and thus to provide guidance to the lower courts throughout California that are currently facing this issue. (See *supra* fn. 3.)

C. **This Court's Analysis of PAGA Standing Should Be Based on a De Novo Review of the Statutory Language and Legislative Intent, With No Deference to the Supreme Court's Mischaracterization of California Law.**

Uher begins by urging this Court not to conduct an independent review of PAGA standing hut instead to give "substantial deference" to the U.S. Supreme Court's characterization of the governing California law. (AOB at p. 24.) But it is fundamental that "a State's highest court is the final judicial arbiter of the meaning of state statutes." (*Gurley v. Rhoden* (1975) 421 U.S. 200, 208; see also *Hollingsworth v. Perry* (2013) 570 U.S. 693, 717–718; *Brown v. Ohio* (1977) 432 U.S. 161, 167; *Cole v. Richardson* (1972) 405 U.S. 676, 697; *Green v. Neal's*

merits because of his long-held position that the FAA "does not apply to proceedings in state courts." (*Id.* at p. 1926 [Thomas, J., dissenting].)

Lessee (1832) 31 U.S. 291, 298.) That is why Justice Sotomayor made clear that she joined Part IV of *Viking River Cruises* only "with [the] understanding" that, because PAGA standing in state court is exclusively a state-law issue, "California courts, in an appropriate case, will have the last word," subject, of course, to any state legislative override. (*Viking River Cruises*, 142 S.Ct. at p. 1925 [Sotomayor, J., concurring].)

Nearly every "deference" case cited by Uber involved a state statute or constitutional provision that paralleled or was based upon its federal law counterpart. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353; *People v. Teresinski* (1982) 30 Cal.3d 822, 835–836 & fn.9.) While a policy of deference may he appropriate where the U.S. Supreme Court has definitively construed parallel federal language designed to accomplish parallel ends, that is not this case. Even if it were, this Court has rejected any "*mandate* [of] the state courts' hlind ohedience" to such decisions, and it has not infrequently rejected the U.S. Supreme Court's construction in such instances. (*Raven*, 52 Cal.3d at p. 353, emphasis in original; see also *Reynolds v. Superior Court* (1974) 12 Cal.3d 834, 842 [construction of the state Constitution "is left to this court, informed hut untrammelled by the United States Supreme Court's reading of parallel federal provisions"]; *People v. Houston* (1986) 42 Cal.3d 595, 610; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 514.)

PAGA has no federal statutory counterpart. The closest analogue may be the federal False Claims Act, because PAGA

actions are a "type of *qui tam* action." (*Iskanian*, 59 Cal.4th at p. 382.) But the language of those statutes is entirely different, and the Supreme Court in *Viking River Cruises* expressly *rejected* the analogy between PAGA litigation and False Claims Act cases. (142 S.Ct. at p. 1914.) Nor are state and federal statutory standing principles parallel, because Article III has no counterpart in the California Constitution. (See *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247–1248 ["Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine."]; *Midpeninsula Citizens for Fair Hous. v. Westwood Invs.* (1990) 221 Cal.App.3d 1377, 1385, *reh'g denied and opinion modified* (July 31, 1990) ["Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted."].)

Uber argues that deference is nonetheless appropriate because the Supreme Court's analysis of PAGA standing was so persuasive. (AOB at p. 26.) But Justice Alito's terse, three-sentence analysis for the Court majority is skimpy at best and it rests upon an obvious misreading of *Kim*. (See 142 S.Ct. at p. 1925, citing *Kim*, 9 Cal.5th at p. 90.) Surely this Court is best positioned to understand what it did and did not hold in *Kim* and what a plaintiff must demonstrate to establish statutory standing under California's PAGA statute.

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D. Under California Law, an Aggrieved Plaintiff's Standing to Pursue PAGA Relief Does Not Disappear Upon Being Compelled to Pursue the Individual Component of His Representative PAGA Action in Arbitration.

Although the question presented by this case arises in a novel context—because the concept of a split PAGA action did not exist prior to *Viking River Cruises*—well-established principles governing PAGA standing, as set forth in the statutory language and this Court's construction of that language in *Kim*, necessarily control the answer to that question.

The plaintiff in *Kim* sued his employer for back wages under the Labor Code and civil penalties under PAGA, based on alleged overtime pay violations. (9 Cal.5th at p. 82.) After settling his "individual claims" under the Labor Code (without releasing his claims under PAGA), Kim sought to pursue those PAGA claims in court, only to have those claims dismissed on the ground that, because Kim's underlying Labor Code claims had been "completely redressed," he was no longer an "aggrieved employee." (*Id.* at pp. 82–83.)

This Court unanimously reversed, based on its construction of PAGA's statutory language and purpose. (*Id.* at p. 83.) Beginning with the text, the Court explained that "[t]he plain language of section 2699(c) has only two requirements for PAGA standing. The plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Id.* at pp. 83–84.) The Court found those requirements fully satisfied, even though Kim no longer had a live Labor Code claim, because

the "readily ascertainable facts" demonstrate that "Kim was employed by [defendant] Reins and alleged that he personally suffered at least one Labor Code violation on which the PAGA claim is based." (*Id.* at p. 84.) Nothing more was required.

The Court rejected the defendant's argument that Kim's "standing somehow ended" once his Labor Code claims became no longer redressable, finding that argument contrary to the text, purpose, and legislative history of PAGA. As the Court wrote:

> The Legislature defined PAGA standing in terms of violations, not injury. Kim became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. (See § 2699(c).) Settlement did not nullify these violations. The *remedy* for a Labor Code violation, through settlement or other means, is distinct from the *fact* of the violation itself.

(*Ibid.*, emphasis in original.) For PAGA standing, then, all that matters is whether plaintiff can allege, and eventually prove, that he was an employee of the defendant and that one or more Labor Code violations was committed against him, even if the existence of those violations had previously been adjudicated or otherwise resolved.

The Court found ample support for its construction of PAGA in the statute's underlying purpose—to expand Labor Code enforcement by deputizing "aggrieved employees" to pursue existing and newly created civil penalties on behalf of the State LWDA. As the Court explained in *Kim*, while PAGA standing is limited to those who allege such aggrieved-employee status, it does not impose any additional requirement of ongoing or unredressed injury. Any such requirement would be particularly inappropriate under PAGA given that the "civil penalties

recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' *not* to redress employees' injuries'" or otherwise compensate the plaintiff or others. (*Ibid.*, citation omitted.) Any other result would erect procedural "'[h]urdles that [would] impede the effective prosecution of representative PAGA actions [and thus] undermine the Legislature's objectives.' [Citation.]" (*Id.* at p. 87.)

The reference in *Kim* to "general public" standing, which the Supreme Court quoted in *Viking River Cruises*, was to pre-Proposition 64 standing under the Unfair Competition Law (UCL), Bus. & Prof. Code, § 17200. (*Kim*, 9 Cal.5th at p. 90.) When PAGA was enacted in 2003, UCL standing was available to anyone who chose to sue on behalf of the general public, leading to complaints of abuses. (See *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 178 fn.10.) While Uber is correct that the Legislature did not authorize such untethered "general public" standing in PAGA, neither did it impose the type of strict redressability and other Article III-like requirements that Uber would have this Court impose. Rather, the Legislature in PAGA simply required the plaintiff to allege that she was an employee of the defendant and had been aggrieved by one or more of that defendant's Labor Code violations, thus limiting the universe of potential plaintiffs to those with personal exposure to at least one challenged workplace violation. (*Kim*, 9 Cal.5th at p. 90, quoting Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Apr. 22, 2003, p. 7; compare *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior*

Court (2009) 46 Cal.4th 993 [labor union lacks PAGA standing because it is not itself an "aggrieved employee"].) Nothing more was required, other than compliance with PAGA's statutory notice requirement (§ 2699.3), before the LWDA as the real party in interest could authorize that aggrieved employee to sue for PAGA civil penalties on its behalf.

This same status-based approach to PAGA standing was central to the court of appeal's decision in *Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924, *reh'g denied* (Aug. 9, 2021), *review denied* (Nov. 10, 2021). The plaintiff in *Johnson* filed a PAGA notice with the LWDA alleging that her employment agreement included an unlawful non-compete clause in violation of Lahor Code § 432.5. The plaintiff sought PAGA civil penalties for herself and other aggrieved employees who had signed similar agreements. Even though the plaintiff's own Labor Code claim was time-barred (because she had signed her agreement more than three years earlier), the Court of Appeal held she could still pursue her PAGA claims because she had been "aggrieved" by her employer's imposition and continued maintenance of the unlawful non-compete clause. (*Id.* at p. 929.) Citing *Kim*, the court of appeal held that even without a currently actionable Labor Code claim, "Johnson is an 'aggrieved employee' with standing to pursue her PAGA claim" because she alleged she was employed by defendant and "personally suffered at least one Labor Code violation on which the PAGA claim is based." (*Id.* at p. 930.) The court concluded that "the fact that Johnson's individual claim may be time-barred does not nullify

the alleged Labor Code violations nor strip Johnson of her standing to pursue PAGA remedies." (*Ibid.*)[6]

For the same reason, even if Adolph is required to arbitrate the "individual" portion of his PAGA claim for himself and the LWDA, that should not preclude him from seeking to adjudicate the rest of that claim in court, where he may continue to assert his "aggrieved employee" status unless and until there has been a final and binding determination to the contrary.

Erik Adolph alleges that he was a misclassified employee of Uber and that he personally suffered one or more of the Labor Code violations underlying his claim for PAGA penalties. Those allegations, coupled with the fact that Adolph filed a timely, legally adequate notice with the LWDA and Uber (see § 2699.3) are sufficient to establish his PAGA standing. Even if Adolph

[6] The Court of Appeal in *Johnson* distinguished *Robinson v. S. Counties Oil Co.* (2020) 53 Cal.App.5th 476, upon which Uber relies. (See *Johnson*, 66 Cal.App.5th at pp. 930–932; AOB at pp. 37–38.) The plaintiff in *Robinson* was a former employee who brought a claim for meal and rest hreak violations. (53 Cal.App.5th at p. 480.) Those claims were settled in a different PAGA case brought by a different plaintiff, which bound Robinson (and the LWDA). (*Id.* at p. 482.) Robinson then attempted to amend his complaint to bring a PAGA claim for post-settlement violations only. Because Robinson's own employment had terminated before any of those violations had occurred, however, he could neither allege nor prove that he had been "aggrieved" by the new violations. Consequently, Rohinson lacked standing to pursue a PAGA claim based on those post-termination violations. (*Id.* at p. 484.) In sharp contrast, Adolph (like the plaintiff in *Johnson*) alleged he was personally aggrieved by one or more of the violations that he suffered during the limitations period applicable to his PAGA claim. *Robinson* is thus readily distinguishahle.

were required to arbitrate a small portion of his representative PAGA claim for civil remedies (with 75% of those penalties based on Labor Code violations he personally suffered going to the LWDA), the only consequence would be that he could not then seek those same penalties when adjudicating the remainder of his representative PAGA claim in court. It certainly does not mean he was never "aggrieved" by the Labor Code violations giving rise to his PAGA claims. As this Court concluded in *Kim*, what matters for purposes of PAGA standing is the *fact* of the violation, not the continued availability of a personal remedy. (See *Kim*, 9 Cal.5th at p. 84.)

II. Uber's Interpretation of PAGA Standing Is Contrary to the Statutory Language and Inconsistent with its Purpose.

Uber does not contend that *Kim* was wrongly decided (and it does not mention *Johnson* at all). Instead, Uber seeks to distinguish *Kim* factually, on the ground that it involved a plaintiff who could no longer pursue his underlying Labor Code claim, while in this case plaintiff Adolph, once compelled to "individual" arbitration, can (according to Uber) no longer pursue in court his claim to be an "aggrieved employee." But Uber never explains *why* that should be, and there is no logical, let alone textual or contextual, reason why, even if Adolph is required to prove his aggrieved-employee status in arbitration in the first instance, he would thereafter be precluded from proceeding as an aggrieved-employee in court.

The absurdity of Uber's position is demonstrated by the scenario in which a plaintiff pursues her claim in arbitration and

prevails, thus establishing her "aggrieved employee" status. Under Uber's construction, the plaintiff in that common scenario would be barred from pursuing the remaining civil penalties available under PAGA, despite the contract language authorizing her to seek those remedies in court, even if the trial judge confirms the arbitration award in plaintiff's favor. That makes no sense.

Uber's argument that a PAGA plaintiff loses standing once she can no longer pursue a personal remedy, even if her aggrieved-employee status was adjudicated in her favor, would create a host of other anomalies as well. Imagine a case where an employee brings a PAGA claim in court based upon a series of Labor Code violations, some committed against her and some against others. (See, e.g., *Huff*, 23 Cal.App.5th at pp. 750–751.) Under Uber's approach, if the plaintiff seeks and obtains summary adjudication of the violations that only affected her, she would lose her statutory standing to pursue statutory remedies for those Labor Code violations committed against others. Similarly, if that plaintiff were to prevail at trial as to violations committed against her and lose as to violations committed only against others, she would have no standing to appeal the trial court's adverse ruling as to those other violations. These results—which would be the inevitable consequence if Uber's position were accepted—would effect a dramatic transformation of PAGA and significantly undercut its goal of encouraging heightened Labor Code enforcement throughout the State.

Uber's argument largely rests upon a fiction: that because a PAGA plaintiff has been compelled to pursue some remedies in arbitration and some in court, the two proceedings should be treated for PAGA standing purposes as two entirely separate and independent actions, i.e., as if the plaintiff had voluntarily chosen to file two separate claims, one denominated an "individual" PAGA action and the other denominated a "non-individual" action. But Adolph filed his PAGA claim as a single unitary action and he brought that action in his capacity as an aggrieved employee. The only reason his claims on behalf of the LWDA might potentially be split into two proceedings is because Uber, which initially sought to prohibit Adolph's PAGA claim altogether (pursuant to its contractual PAGA Waiver, 1-CT-142, § 15.3, subd. (v)), is now arguing that its arbitration agreement must be construed as requiring Adolph to pursue some PAGA remedies in court and some in arbitration. But whether the two portions of Adolph's PAGA claim proceed sequentially or in parallel (if arbitrable at all, see *infra* at Part III), they are still two parts of the same statutory claim as to which the LWDA remains the real party in interest. But for the U.S. Supreme Court's application of the FAA-preemption doctrine in *Viking River Cruises*, they would still be adjudicated in the same proceeding because, as this Court has repeatedly held, the California Legislature envisioned that PAGA claims would be unitary. (*Iskanian*, 59 Cal.4th at p. 387; *Kim*, 9 Cal.5th at p. 87.)[7]

[7] Moreover, because arbitration awards must be judicially confirmed to be enforceable, even if a plaintiff's PAGA claim were

Uber's contention that two parts of a bifurcated PAGA proceeding must be treated as entirely independent rests upon cases interpreting the pre-1971 version of Code of Civil Procedure § 1048, which provided that "[a]n action may be severed ... in the discretion of the court, whenever it can be done without prejudice to a substantial right." (*Bodine v. Superior Court* (1962) 209 Cal.App.2d 354, 361; see AOB at p. 32.) According to the principal case Uber now relies upon, severance under that superseded provision had the effect of dividing a single action into two separate actions "with consequent separate judgments." (*Bodine*, 209 Cal.App.2d at p. 361.) Even if this case had arisen under that superseded version of Section 1048, however, the existence of separate judgments has nothing to do with standing or whether a plaintiff may assert the same facts in support of standing in two parts of a severed action. More fundamentally, Uber never explains why an otherwise indivisible PAGA action, pursued in two forums as a result of FAA preemption, should be treated like an action severed under the pre-1971 version of § 1048. (Cf. *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 737 fn. 3 [distinguishing between "severance" under the pre-1971 version of § 1048 and "order[ing] a separate trial" under the current version].) Moreover, the previous version of § 1048 *precluded* severance where the consequence would be to

split in two for remedial purposes, the two parts could eventually be re-joined in court in conjunction with the parties' motions to confirm or vacate the arbitrator's award.

"prejudice a substantial right," so it would not apply to this case in any event.

The *Bodine* and *Morehart* cases provide no insight into the Legislature's intended meaning of PAGA's statutory standing provisions, including in circumstances where the remedial component of a PAGA claim bas been split in two as the result of a defendant's contractual authority under a non-negotiable, boilerplate arbitration agreement, covered by the FAA, to require the plaintiff to pursue relief in two related proceedings rather than one.

Uber's assertion that the Court should treat Adolph's standing as if his initial complaint had pleaded a standalone claim for "non-individual" PAGA remedies is also unhelpful. First, it is a false hypotbetical, because Adolph's PAGA complaint sought the full range of statutory civil penalties, as did his September 2019 PAGA notice to the LWDA. Second, even if Adolph had done what Uber suggests—i.e., even if he had filed his PAGA notice and subsequent lawsuit in court as an "aggrieved employee," yet for some inexplicable reason had disclaimed any interest in any statutory penalty attributable to tbe Labor Code violations he personally suffered—there is no reason why he could not have done so. Just as a PAGA plaintiff may decide for herself (upon proper notice to the LWDA and her employer) bow broadly or narrowly to plead *which* other "aggrieved employees" allegedly suffered Labor Code violations at the hands of defendant, so should a PAGA plaintiff be entitled to disclaim any personal interest in recovering a portion of her

"individual" PAGA penalties—although that would not excuse her from having to establish her aggrieved-employee standing like every other PAGA plaintiff.

Even if Uber were correct that an FAA-covered arbitration agreement that required PAGA plaintiffs to pursue some remedies in court and some in arbitration should be treated as two separate and independent actions, Uber's challenge to Adolph's standing would still fail. While such an agreement would limit which civil penalties the plaintiff could pursue in which forum, it could not affect plaintiff's *status* as an aggrieved employee (unless and until a final judgment were entered to the contrary). As *Kim* made clear, it is plaintiff's status as an aggrieved employee, not the redressability of any injury the plaintiff may have suffered, that determines the availability of PAGA standing. Any other result would decimate, rather than further, PAGA's statutory purposes.

Uber never explains why a PAGA plaintiff could not assert his aggrieved-employee status in two different forums as a predicate for seeking statutory penalties if the parties' arbitration agreement required plaintiff to pursue different portions of those penalties in different forums. Given the Legislature's goal of achieving "maximum compliance with state labor laws'" (*Arias*, 46 Cal.4th at p. 980), there should be no reason wby a PAGA plaintiff could not allege (and if necessary, prove) the required elements of ber claim for relief in both forums, as long as she does not seek duplicate penalties.

To the extent Uber's position has even superficial appeal, it is because throughout its brief, Uber quietly substitutes the term "pursuing civil penalties" for the term "aggrieved employee." Nearly every time Uber makes an argument about the unfairness or impropriety of giving a PAGA plaintiff two bites of the remedial apple, it is referring to the reasons a plaintiff should not be permitted to recover the same civil penalties in two different forums (not to a plaintiff's right to assert her aggrieved-employee status in those two forums). Uber's argument thus conflates two separate and distinct concepts: the PAGA plaintiff's right to recover PAGA civil penalties based on Labor Code violations personally suffered (which the plaintiff can only seek once, in arbitration, and cannot recover again in court), and that plaintiff's status as an "aggrieved employee" for the purpose of enforcing civil penalties for violations suffered by others.[8]

But Adolph has *never* contended that he is entitled to double-recover "individual" PAGA penalties in arbitration and court; and nothing in PAGA, either on its face or as construed in *Kim*, requires an aggrieved-employee plaintiff to pursue "individual" remedies in a particular forum as a condition of

[8] See, e.g., AOB at p. 23 ["a PAGA plaintiff lacks standing unless his action seeks civil penalties for violations that he allegedly suffered."]; *id.* at p. 27 ["the indispensable core of PAGA standing is *the request for civil penalties* for violations that allegedly occurred to the plaintiff," emphasis added]; *id.* at p. 30 [PAGA "makes clear that a plaintiff has standing under PAGA only when pursuing civil penalties for violations that he personally suffered,"]; *id.* at p. 35 ["PAGA standing depends on the plaintiff being able to assert an individual claim for PAGA penalties."].

establishing standing to pursue all other statutory remedies in that forum.

Uber's new requirement for PAGA standing does not appear anywhere in the statute. Uber frequently refers to Labor Code § 2699, subdivision (a), which provides, in relevant part, that "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ... may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (§ 2699, subd. (a).) But that language simply states what a PAGA action *is*: a civil action to recover penalties owed to the LWDA, brought on behalf of employees who suffered violations, including the plaintiff. That is precisely the action that Adolph is seeking to prosecute.

Under the statute, *standing* requires a showing that plaintiff is an employee who has been aggrieved. Nothing in PAGA also requires plaintiff to seek a particular form of relief, such as the "individual" portion of the potentially available PAGA penalties. "In construing a statute, we are 'careful not to add requirements to those already supplied by the Legislature.' [Citation.]" (*Kim*, 9 Cal.5th at p. 85.) The only two requirements for PAGA standing are those set forth in the statutory definition of "aggrieved employee." (See *Williams*, 3 Cal.5th at p. 546; *Huff*, 23 Cal.App.5th at 761 ["[S]o long as [plaintiff] was affected by at

least one of the Labor Code violations alleged in the complaint, he can recover penalties for all the violations he proves."].)[9]

Even if PAGA's language were unclear, its purposes would surely foreclose Uber's interpretation. "In construing a statute, [this Court's] task is to ascertain the intent of the Legislature so as to effectuate the purpose of the enactment." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.) Although the Legislature may not have anticipated that FAA preemption would sometimes require dividing the remedial portions of a PAGA claim in two, there can be little question that, if faced with that prospect, the Legislature would not have imposed Uber's additional standing requirement on plaintiffs, because that would effectively eliminate the critical deterrent effect of PAGA civil penalties tied to *all* Labor Code violations committed by the employer, leaving the threat of PAGA enforcement toothless and ineffectual, and enabling employers to eliminate workplace-wide

[9] Uber quotes two pre-*Iskanian* federal district cases that compelled a PAGA plaintiff to individual arbitration and held that the remainder of the claims could not be brought in court. (AOB at pp. 27–28, quoting *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141 and *Miguel v. JPMorgan Chase Bank, N.A.* (C.D.Cal., Feb. 5, 2013) 2013 WL 452418 at p. *9.) Not only do those cases have no precedential value, but they rest upon a theory that *Iskanian* and the Supreme Court in *Viking River Cruises* expressly rejected: that PAGA representative actions should be treated like class actions for purposes of applying the FAA-preemption doctrine. (See *Quevedo*, 798 F.Supp.2d at p. 1142; *Miguel*, 2013 WL 452418 at p. *10.) Those cases thus did not address whether, if the plaintiffs had enjoyed a contractual right to pursue their PAGA claims in two forums, they would have had standing to do so.

liability simply by offering the plaintiff her (and the LWDA's) small portion of the available statutory penalty for the violations she personally suffered—a tiny fraction of the civil penalty the Legislature found essential to effectively deter violations of the California Labor Code.

Uber's approach to PAGA standing seeks to impose an extra-statutory requirement of individualized redressability. In order to have PAGA standing, the plaintiff would have to be entitled to collect civil penalties based on her own particular injuries. Although redressability is required for federal Article III standing (see *Lujan v. Defs. of Wildlife* (1992) 504 U.S. 555, 560), Article III does not apply in California state courts and would be particularly inapposite under PAGA, which is a type of *qui tam* action designed to facilitate the state's efforts to achieve greater workplace compliance, not to provide compensation for harms suffered by the aggrieved employees. (*Iskanian*, 59 Cal.4th at p. 382; *ZB*, 8 Cal.5th at pp. 185–186.) "[C]ivil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' *not to redress employees' injuries*. [Citation.]" (*Kim*, 9 Cal.5th at p. 86, emphasis added.)

Uber argues that a redressability requirement should be incorporated into PAGA because a plaintiff who "could not share in any recovery ... would personally lack the financial incentive to litigate vigorously on behalf of the State." (AOB at p. 29.) That is the Legislature's call, not Uber's. As a practical matter, moreover, it is hard to believe that a plaintiff's incentive to vigorously pursue PAGA statutory remedies for workplace-wide

violations would be materially diminished once she proved that those violations had affected her personally, especially given that her individual recovery would only be 25% of the statute's per-pay-period penalty. (Cf. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) June 26, 2003, p. 6 [noting that the "relatively low" penalties and 75%/25% allocation scheme may "discourage any potential plaintiff from bringing suit over minor violations in order to collect a 'bounty' in civil penalties."].)[10]

Uber's arguments, at their core, seek to eliminate PAGA as an effective enforcement tool by eliminating the centerpiece of the statutory scheme—the private right of actions for civil penalties tied to the volume of Lahor Code violations committed against an employer's own workforce. Uber began its effort to contract out of PAGA liability by drafting arhitration language that expresely prohibited its delivery drivers from asserting representative PAGA claims in any forum. That contractual prohibition was held unenforceable in *Iskanian*, and that part of *Iskanian* was affirmed in *Viking River Cruises*. Uber now attempts to achieve indirectly what *Iskanian* and *Viking River Cruise* held it could

[10] Uber relies on *Iskanian* to argue that a "critical aspect of PAGA is that the 'citizen bringing the suit' can recover a 'portion of the penalty.'" (AOB at p. 29.) But that language in *Iskanian* was merely describing the "traditional criteria" for *qui tam* actions, which are echoed in PAGA "except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." (*Iskanian*, 59 Cal.4th at p. 382.) Nowhere does *Iskanian* suggest that this portion of the penalty is "critical" to vigorous litigation on behalf of the state, as Uber suggests.

not achieve directly: to strip its delivery drivers of their statutory right to pursue claims for civil penalties based on the total number of Labor Code violations Uber committed, by construing its contract as requiring plaintiff to pursue those penalties in a forum that, according to Uber, lacks authority to adjudicate plaintiff's claim. PAGA should not be construed in a manner that permits that result; and if it did, the same *Iskanian* rule invalidating contract language that expressly waives the right to pursue PAGA claims should also invalidate contract language that, as so construed, has the effect of waiving a PAGA plaintiff's right to pursue the most substantial, "non-individual" component of her (and the LWDA's) statutory claim. Because the Legislature has concluded that "individual" penalties are insufficient to punish and deter Labor Code violations, Uber's construction of its Arhitration provision as indirectly prohibiting all "non-individual" PAGA penalties would impermissihly "frustrate[] the PAGA's objectives" no less than its direct prohibition on all PAGA representative actions would do. (*Iskanian*, 59 Cal.4th at p. 384).[11]

This Court should not construe the PAGA's standing requirement in a manner that would frustrate the Legislature's

[11] By seeking to block Adolph's right to seek "non-individual" PAGA penalties in this manner, Uber's construction of its statute and the doctrine of PAGA standing would also violate its implied covenant of good faith and fair dealing, which "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." (*Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818.)

intent and statutory enforcement purposes by allowing the very waiver of representative PAGA actions that *Iskanian*'s principal rule prohibits. Instead, under a straightforward application of *Kim*, a PAGA plaintiff whose individual claim is compelled to arbitration should be found to remain an "aggrieved employee" for the purposes of PAGA standing.

III. The Court of Appeal Should be Instructed on Remand to Determine, as a Threshold Issue, Whether Uber's Arbitration Provision Requires Plaintiff to Arbitrate the "Individual" Component of His Representative PAGA Action.

Uber assumes throughout its briefing that however this Court decides the narrow standing question, once this case is returned to the lower courts Uber will be able to establish that its Arbitration Provision does in fact require plaintiff to pursue the "individual" component of his PAGA claim in arbitration. (See, e.g., AOB at pp. 8, 9–10, 20, 24, 32, 46).

Uber has gotten ahead of itself. The lower courts have not yet had the opportunity to consider whether Uber's construction of the language in its Arbitration Provision is correct. And the text of that provision, read in light of the applicable contract construction principles, demonstrates that Uber's construction is wrong.

Because this Court limited its review to a single legal issue, plaintiff is not asking the Court to decide that issue of contract construction now. However, for the reasons briefly summarized below, plaintiff disputes Uber's construction and requests that this Court instruct the court of appeal on remand—regardless of how the Court decides the question presented—that its first task

should be to determine whether, properly construed, Uber's Arbitration Provision requires plaintiff Adolph to arbitrate rather than litigate *any* portion of his PAGA claim for relief.[12]

Uber's Arbitration Provision on its face expressly prohibits *all* PAGA representative actions. (1-CT-142, § 15.3, subd. (v).) Uber contends that under *Viking River Cruises*, that sweeping contractual prohibition must be construed as requiring plaintiff Adolph to pursue the "individual" component of his PAGA claim in arbitration and the "non-individual" component of that claim in court (where Uber contends the claim should be dismissed for lack of statutory standing). (AOB at pp. 20–24.) While that was the result reached by the U.S. Supreme Court based on Viking River's agreement, the language in Uber's Arbitration Provision is materially different (although even if it were similar, established principles of contract construction under California law would still require the entirety of plaintiff Adolph's PAGA claim to be adjudicated in court, because that is what the contract language shows the parties intended).[13]

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[12] Several cases pending in California Courts of Appeal raise contract construction issues involving similar language, but the only such appeal to have been decided thus far resulted in an unpublished opinion.

[13] *See DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 54 ["the interpretation of a contract is ordinarily a matter of state law to which we defer"]; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 177 ["'[E]ven when the [FAA] applies, interpretation of the arbitration agreement is governed by state law principles . . . .' "]; see also *Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, 1714 [courts construing arbitration agreements under the FAA must apply generally applicable contract

Here is why.

Uber acknowledges that its Arbitration Provision "contained a waiver of PAGA claims to the fullest extent permissible under law ...." (AOB at p. 13). That prohibition is set forth in the first sentence of the PAGA Waiver, which states:

> To the extent permitted by law, you and Company agree not to bring a representative action on behalf of others under [PAGA], *in any court or in arbitration.*

(1-CT-142, § 15.3, subd. (v), emphasis added; see also 1-CT-140, § 15.3, subd. (i) ["[T]his Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual hasis only and not by way of ... representative action."]; *ZB*, 8 Cal.5th at p. 185 ["All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf."].) Under *Viking River Cruises*, just as under *Iskanian*, such sweeping prohibitory language is invalid and unenforceable because neither California law nor the FAA permit employers to enforce contractual waivers of the statutory right to assert PAGA claims in all forums. The Supreme Court's majority thus affirmed "*Iskanian*'s principal rule" that contractual waivers of California statutory rights violate Civil Code § 3513 and California public policy and are therefore unenforceable. (See 142 S.Ct. at pp. 1917, 1925.) Consequently, when the court of appeal on remand of this case is asked to construe the language in Uber's Arbitration Provision, its first

construction principles, without regard to whether they favor or disfavor arbitration].)

conclusion must be that the sweeping contractual PAGA waiver is invalid and unenforceable.[14]

Once the "PAGA Waiver" set forth in the first sentence of Uber's Arbitration Provision is found to be unlawful and unenforceable under the principal *Iskanian* rule, the following paragraph of that agreement explains what happens next:

> If the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) *the unenforceable provision shall be severed* from this Arbitration Provision; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) *any representative actions brought under the PAGA must be litigated in a civil court* of competent jurisdiction.

(1-CT-142, § 15.3, subd. (v), emphasis added.) That language (which has no counterpart in the Viking River arbitration agreement but would have to be construed de novo by the court of appeal applying basic principles of California contract law in any event, see *supra* at fn. 13) makes clear that if the PAGA waiver is found to be "unenforceable or unlawful for any reason," it must be "severed." In other words, because Uber's PAGA Waiver violates the principal *Iskanian* rule, it may not be given any force or effect.[15]

[14] Although none of the PAGA Waiver language in Uber's Arbitration Provision is ambiguous, if there were any ambiguity it would have to be construed against Uber as the drafter. (See *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248 [uncertainty in arbitration provision must be construed against drafter]; see also *Morgan*, 142 S.Ct. at pp. 1713–1714.)

[15] If the Arbitration Provision did not have a severability clause, that unlawful PAGA Waiver would cause the Arbitration

What happens next is governed by subsection (3) of the Arbitration Provision, which states that if the PAGA Waiver is found unenforceable and severed—i.e., if the prohibition against asserting PAGA claims in any forum is stricken—any PAGA claim asserted by the plaintiff must be litigated in court and cannot be adjudicated in arbitration. In the words of Uber's agreement, that PAGA claim "must be litigated in a civil court of competent jurisdiction." (1-CT-142, § 15.3, subd. (v).)[16]

For these reasons, the court of appeal should be instructed on remand to determine, as a threshold matter, whether *any* component of plaintiff's PAGA claim is arbitrable—a question the lower courts previously answered in the negative, but may revisit post-*Viking River Cruises*, based upon those courts' de novo construction of the applicable contract language. (Cf. *Adolph*, 2022 WL 1073583 at p. *4, [previous decision, construing the plain words of Uber's Arbitration Provision: "The arbitration provision in Uber's agreement with Adolph purports to waive all representative PAGA claims, gives the courts the exclusive jurisdiction to consider whether the waiver is valid, and requires that any PAGA claims be resolved in court and not in arbitration."].)

CONCLUSION

For the reasons stated above, this Court should conclude that an aggrieved employee who has been compelled to arbitrate PAGA claims premised on Labor Code violations actually sustained by that individual does not thereby lose statutory standing to pursue PAGA claims arising out of events involving other employees. The Court should also instruct the court of appeal on remand to determine, as a threshold matter, whether Uber's Arbitration Provision, properly construed, requires plaintiff Adolph to arbitrate any portion of his PAGA claims against defendant Uber.

Provision as a whole to be invalidated on unconscionability grounds. (*Securitas Sec. Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1123 [arbitration agreement that does not permit severance of unlawful PAGA waiver is unconscionable].)

[16] The final sentence of the Arbitration Provision reinforces this requirement, as it states that the prosecution of plaintiff's PAGA claim *in court* must be stayed if the plaintiff has any other claims that remain to be arbitrated on an individual basis, for example, any individual Labor Code claims for back wages or other relief. (*Ibid.*, emphasis added ["If the PAGA Waiver is found to be unenforceable or unlawful for any reason, the Parties agree that the litigation of any representative PAGA *claims in a civil court of competent jurisdiction* shall be stayed, pending the outcome of any individual claims in arbitration."].) In this case, of course, there would be no basis for such a stay, because plaintiff's SAC asserts only a single PAGA claim and does not seek relief under any other statutory or common law provision. Consequently, even though plaintiff disagrees with Uber's argument in the last section of its brief that any litigation of his PAGA claim should be stayed while the arbitration of his individual claim proceeds (AOB at pp. 40–41), there is no need for the Court to reach that issue, which is also beyond the scope of the single question presented.

Document received by the CA Supreme Court.

Dated: October 19, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief is produced using 13-point Century Schoolbook type, including footnotes, and contains 11,444 words, as counted by Microsoft Word, which is within the 14,000 words permitted.

By: */s/Michael Rubin*
Michael Rubin

Document received by the CA Supreme Court.

PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On October 19, 2022, I served the following document(s):

RESPONDENT'S BRIEF ON THE MERITS

By Filing via TrueFiling: I filed such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service pursuant to CRC 8.212(b)(1), (c), as follows:

	ADDRESSEE	PARTY
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By First-Class Mail: I am familiar with Altshuler Berzon LLP's practice of collection and processing correspondence for mailing with the United States Postal Service, and I placed a true copy thereof, via U.S. Mail enclosed in a sealed envelope, postage pre-paid, addressed as follows:

Hon. Kirk Nakamura
Judge Presiding
Orange County Superior Court
751 W. Santa Ana Blvd.
Santa Ana, CA 92701

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

Executed October 19, 2022, at San Francisco, California.

Isabella Kearns

Document received by the CA Supreme Court.

Tab 10

Filed: 10/17/22 on remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PATRICK POTE, Plaintiff and Respondent, v. HANDY TECHNOLOGIES, INC., Defendant and Appellant.	B302770 (Los Angeles County Super. Ct. No. BC723965)

APPEAL from an order of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed.

Manatt, Phelps & Phillips, Robert H. Platt, Andrew L. Satenberg and Benjamin G. Shatz for Defendant and Appellant.

Gibbs Law Group, Steven M. Tindall and Amanda M. Karl for Plaintiff and Respondent.

Handy Technologies, Inc. (Handy) appeals the denial of its motion to compel arbitration on an individual (nonrepresentative) basis of the claims alleged in Patrick Pote's lawsuit under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). In our original opinion we affirmed the superior court's order based on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360, 388-389 (*Iskanian*), which primarily held the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) did not preempt state law that prohibits waiver of PAGA representative actions in an employment contract. After the California Supreme Court denied Handy's petition for review (*Pote v. Handy Technologies, Inc.* (Nov. 10, 2021, S302770)), the United States Supreme Court granted Handy's petition for writ of certiorari, vacated the judgment and ordered the case remanded to this court for further consideration in light of its decision in *Viking River Cruises, Inc. v. Moriana* (2022) 595 U.S. ___ [142 S.Ct. 1906] (*Viking River*), which held the FAA preempted what *Viking River* characterized as *Iskanian*'s secondary indivisibility rule, which precluded dividing an action into an employee's arbitrable "individual PAGA claim[s]" (defined in *Viking River* to mean "claims based on code violations suffered by the plaintiff") and nonarbitrable nonindividual PAGA claims premised on code violations suffered by other allegedly aggrieved employees. (*Viking River*, at pp. 1916-1917, 1924.)

Viking River does not require reversal of the order denying Handy's motion to compel arbitration. Under *Viking River* state courts cannot prohibit arbitration, based on the indivisibility rule, of what the Supreme Court designated as an individual PAGA claim if the parties have agreed to arbitrate those claims. Here, however, the parties excluded all of Pote's representative

claims for civil penalties (whether individual for violations Pote suffered or nonindividual for violations suffered by other allegedly aggrieved employees) from arbitration: The arbitration agreement expressly provides no representative claim of any sort, specifically including any representative claim for civil penalties, is subject to arbitration. Although the agreement provides for arbitration of claims for recovery of underpaid wages, there is nothing here to arbitrate because Pote has agreed to dismiss that portion of his complaint seeking to recover unpaid or underpaid wages.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pote's Complaint and First Amended Complaint*

On October 3, 2018 Pote filed a complaint and on November 19, 2018 the operative first amended complaint alleging causes of action against Handy under PAGA and for declaratory relief. Pote alleged he had been employed as a house cleaner for Handy since April 2018; he and other service providers cleaned and repaired clients' houses for fiat rates per job; and Handy's fiat rate payment policy resulted in Pote and other providers not being paid for overtime, missed rest and meal breaks, expenses and travel time to and between jobs in violation of various Labor Code provisions. He sought civil penalties under PAGA for those alleged Labor Code violations, which affected Pote and other California service providers.

Pote also alleged that, at the time he was hired and as a mandatory condition of his employment, Handy required him to agree to a Service Professional Agreement containing provisions purporting to prohibit the pursuit of a representative PAGA action for underpaid wages in any forum. Pote sought a declaration those provisions were void as against public policy.

2. *Handy's Motion To Compel Arbitration*

On March 26, 2019 Handy moved to compel arbitration and to stay litigation. Contending *Iskanian* was irreconcilable with the subsequent United States Supreme Court decision in *Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [138 S.Ct. 1612], Handy argued the parties had entered into a mutual agreement to arbitrate that was valid and enforceable and required Pote's claims for "victim-specific unpaid wages"[1] under PAGA and for PAGA civil penalties to be arbitrated on an individual (nonrepresentative) basis. With regard to the PAGA civil penalties claims, Handy asserted it was a "legal fiction" that those claims belonged to the State of California and the civil penalties claims could thus be arbitrated in a nonrepresentative manner apart from the State. Handy further requested that, if the court were to decline to enforce the representative action waiver in its entirety, the court sever and stay Pote's claims for PAGA civil penalties, which Handy expressly contrasted with Pote's claims for victim-specific relief on behalf of himself and other allegedly aggrieved employees, until the completion of arbitration on the victim-specific claims.

In support of its motion Handy filed the declaration of Bailey Carson, a Handy senior vice-president. Carson averred Handy was a New York-based technology company offering an online platform allowing individuals seeking cleaning services to connect with professionals providing those services. Gaining access to Handy's platform required a cleaning professional to agree to Handy's Independent Contractor Acknowledgment (Acknowledgment) and the Service Professional Agreement.

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[1] We omit unnecessary underlining of text.

Carson's review of Handy's business records showed that on April 9, 2018 Pote had logged into Handy's application for mobile devices. By checking boxes and selecting "Confirm" or "Accept" buttons, Pote accepted the Acknowledgment, which was comprised of nine bullet points, and the Service Professional Agreement.

Carson's declaration included images of what he described as screenshots depicting how the Acknowledgment's nine bullet points appeared in Handy's mobile device application. One of the nine bullet points stated, "I understand that the Handy Service Professional Agreement contains a Mandatory and Exclusive Arbitration provision which requires Handy and me to submit disputes to final and binding arbitration."

Carson explained Pote could not have gained access to Handy's online platform without checking the box that stated, "I agree to the Service Professional Agreement" or without selecting the "Accept" button in Handy's mobile device application. Carson declared Pote had accepted the Service Professional Agreement on April 9, 2018 and attached the agreement as an exhibit to his declaration.

Section 12.2 of the April 9, 2018 agreement, titled "Mutual Arbitration Provision," provided, in its introductory paragraphs (in typeface containing all capital letters), "Handy and Service Professional mutually agree to waive their respective rights to the resolution of disputes in a court of law by a judge or jury and agree to resolve any dispute in arbitration . . . . [¶] . . . [¶] Except as expressly provided below, all disputes and/or claims between you and Handy shall be exclusively resolved in binding

arbitration on an individual basis; class arbitrations and class actions are not permitted."[2]

Section 12.2(c), titled "Representative Action Waiver—Please Read," provided, "Handy and Service Professional mutually agree that by entering into this agreement to arbitrate, botb waive their right to have any dispute or claim brougbt, heard or arbitrated as a representative action, including but not limited to, a private attorney general action, and an arbitrator shall not have any authority to arbitrate a representative action, including, but not limited to, a private attorney general action ('Representative Action Waiver'). Private attorney general representative actions brought on behalf of the state under the California Labor Code are not arbitrable, not within the scope of this Agreement and may be maintained in a court of law, but any claim brought by Service Professional for recovery of underpaid wages (as opposed to representative claims for civil penalties) under the California Labor Code shall be arbitrable, and must be brought, if at all, on an individual basis in arbitration as set forth in this Mutual Arbitration Provision."

Carson also explained, when Handy changed the Acknowledgement or Service Professional Agreement, the service professional had to confirm and accept the new terms in Handy's mobile application. On October 26, 2018 Pote accepted updated versions of the Acknowledgment and the Service Professional Agreement.

Carson stated the October 26, 2018 agreement was "substantially similar" to the April 9, 2018 agreement, with

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[2] The Mutual Arbitration Provision also stated it was governed by the FAA and survived termination of the agreement.

"minor changes" to the arbitration provision. The referenced excerpts of section 12.2's introductory paragraphs remained the same. As for section 12.2(c), containing the Representative Action Waiver, the entire paragraph now read, "Handy and Service Professional mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as a representative action, and an arbitrator shall not have any authority to arbitrate a representative action ('Representative Action Waiver'). Notwithstanding the foregoing, private attorney general representative actions brought prior to the effective date of this Agreement on behalf of the state under the California Labor Code are not arbitrable, not within the scope of this Agreement and may be maintained in a court of law, but any claim brought hy Service Professional for recovery of underpaid wages (as opposed to representative claims for civil penalties) under the California Labor Code shall be arbitrable, and must he brought, if at all, on an individual basis in arbitration as set forth in this Mutual Arbitration Provision."

3. *Pote's Opposition and Handy's Reply*

On April 8, 2019 Pote filed an opposition to Handy's motion to compel arbitration, arguing the Representative Action Waiver was unenforceable under *Iskanian, supra,* 59 Cal.4th 348. Pote also asserted that Handy had mistakenly construed his PAGA claims as seeking damages for unpaid wages in addition to civil penalties under PAGA, which would be apportioned, as with all PAGA penalties, 75 percent to the California Labor and Workforce Development Agency (LWDA) and 25 percent to the employees. In his supporting declaration Pote's attorney averred Pote was limiting his claims to PAGA representative claims

seeking civil penalties, including purported civil penalties in the amount of unpaid wages under Labor Code section 558,[3] on behalf of the State of California.

On October 10, 2019 Pote filed a notice of new authority stating that, on September 12, 2019, the California Supreme Court decided *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175. In that case the Supreme Court addressed Lahor Code section 558, which before enactment of PAGA gave the Labor Commissioner authority to issue overtime violation citations for a civil penalty consisting of a fixed statutory amount ($50 for the first violation; $100 for subsequent violations) for each underpaid employee for each pay period an employee had heen underpaid "in addition to an amount sufficient to recover underpaid wages" (see footnote 3, above). The *ZB* Court held the civil penalties a private plaintiff could seek through a PAGA action did not include underpaid wages: "[T]his amount—understood in context—is not a civil penalty that a private citizen has authority

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[3] Labor Code section 558, subdivision (a), provides an employer guilty of an overtime violation is "subject to a civil penalty as follows: [¶] (1) for any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. [¶] (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages."

Pote's cause of action for PAGA civil penalties as alleged in his first amended complaint sought recovery of both fixed statutory amounts and amounts sufficient to recover unpaid wages for Handy's alleged Labor Code violations as to Pote and other aggrieved service providers.

to collect through the PAGA." (*ZB*, at p. 182.) Pote's notice explained, by virtue of this new authority, Pote no longer sought to recover unpaid wages as part of his representative PAGA action and agreed to dismiss that portion of his complaint.

On October 10, 2019 Handy filed its reply in support of its motion. Handy argued, even assuming *Iskanian, supra*, 59 Cal.4th 348 remained good law, the case only held a predispute waiver of the right to assert a PAGA claim on a representative basis was unenforceable but the Representative Action Waiver was a postdispute waiver: Pote, while represented by counsel, agreed to the Representative Action Waiver on October 26, 2018 after Pote had initiated the dispute, as required by Labor Code section 2699.3, by notifying the LWDA and Handy in September 2018 of Handy's alleged violations of specific provisions of the Labor Code and of Pote's intent to file an action under PAGA against Handy; and Pote reaffirmed his assent to that waiver on November 25, 2018 (the expiration date under the October 26, 2018 agreement of a 30-day window to opt out of the Mutual Arbitration Provision).[4] Handy also argued, even if the waiver were determined to be unenforceable as to the civil penalties, Pote's first amended complaint alleged claims for victim-specific unpaid wages as to Pote and other aggrieved employees that were subject to individual arbitration regardless of whether Pote had labeled them PAGA civil penalty claims: The California Supreme Court, Handy asserted, had determined unpaid wages were not recoverable as PAGA civil penalties.

[4] In the trial court the parties agreed Pote first pleaded a PAGA claim in his November 19, 2018 first amended complaint. The original complaint is not included in the record on appeal.

4. *The Superior Court's Order*

The superior court denied Handy's motion. Stating the parties' main disagreement was whether the Representative Action Waiver was enforceable, the court concluded *Epic Systems Corp. v. Lewis, supra*, 138 S.Ct. 1612 did not invalidate the holding in *Iskanian, supra*, 59 Cal.4th 348 that an employee's right to bring a representative PAGA action is unwaivable. Accordingly, the court ruled, under *Iskanian* the Representative Action Waiver was unenforceable. The court declined to consider Handy's contention the Representative Action Waiver was a postdispute waiver and thus enforceable because Handy had raised that argument for the first time in its reply brief. Finally, the court rejected Handy's argument that Pote's PAGA claims for damages in the form of unpaid wages on behalf of affected workers should be compelled to individual arbitration, finding Pote had not brought any such victim-specific claims.

DISCUSSION

1. *Iskanian*

Iskanian concerned an employee who sought to bring a class action on behalf of himself and similarly situated employees for the employer's alleged failure to compensate its employees for overtime and meal and rest breaks. The employee had entered into an arbitration agreement waiving the right to class actions. The *Iskanian* Court held state law precluding enforcement of such class action waivers on the grounds of unconscionability or public policy was preempted by the FAA. (*Iskanian, supra*, 59 Cal.4th at pp. 359-360.)

The arbitration agreement, however, required the waiver of not only class actions but also "representative actions"; and the

employee also sought to bring a representative action under PAGA, which "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state." (*Iskanian, supra*, 59 Cal.4th at pp. 378, 360.) An employment agreement compelling the waiver of representative claims under PAGA, the Supreme Court held, "is contrary to public policy and unenforceable as a matter of state law," and the FAA does not preempt such law. (*Id.* at pp. 360, 384.)

The Court rejected the argument the FAA preempts the state law rule against PAGA waivers because "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state [LWDA]." (*Iskanian, supra*, 59 Cal.4th at p. 384.) Relying on the statutory text and the legislative history of the FAA, the Court stated, "There is no indication that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals." (*Id.* at p. 385.) "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [LWDA] or aggrieved employees—that the employer has violated the Labor Code. . . . '[*E*]*very* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state.'"

Applying the rationale of *Iskanian* in *ZB, N.A. v. Superior Court, supra*, 8 Cal.5th 175, the Supreme Court held an employee's predispute agreement to individually arbitrate claims "is unenforceable where it blocks an employee's PAGA claim from proceeding" (*id.* at p. 198) and, quoting *Iskanian*, held in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 87, "[t]here is no individual component to a PAGA action because '"*every* PAGA action . . . is a representative action on behalf of the state."'"

2. *Viking River*

When hired as a sales representative by Viking River Cruises, Angie Moriana agreed to submit any disputes arising out of her employment to arbitration. (*Viking River, supra*, 142 S.Ct. at p. 1916.) The parties' agreement provided no dispute could be brought "as a class, collective, or representative PAGA action." (*Ibid.*) As described by the United States Supreme Court, the agreement "also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court. But under that severability clause, if any 'portion' of the waiver remained valid, it would be 'enforced in arbitration.'" (*Ibid.*)

After leaving the company, Moriana sued Viking River alleging a single PAGA cause of action for various Labor Code violations, including a claim that Viking River had failed to pay her final wages in a timely manner and had violated minimum wage, overtime and meal and rest break provisions adversely affecting other employees. (*Viking River, supra*, 142 S.Ct. at p. 1916.) Viking River moved to compel arbitration of Moriana's 'individual' PAGA claim—that is, the claim that arose from the

violation she suffered—and to dismiss the balance of her PAGA claim. The trial court denied that motion. Our colleagues in Division Three of this court affirmed, holding that categorical waivers of PAGA standing are contrary to state policy and that a PAGA claim cannot be split into an arbitrable individual claim and nonarbitrable "representative" claim. (*Ibid.*)

Reversing the court of appeal's judgment, the United States Supreme Court first posited that the word "representative" when used in connection with a PAGA action has two meanings. (*Viking River, supra*, 142 S.Ct. at p. 1916.) "In the first sense, PAGA actions are 'representative' in that they are brought by employees acting as representatives—that is, as agents or proxies—of the State. But PAGA claims are also called 'representative' when they are predicated on code violations sustained by other employees. In the first sense, '"*every* PAGA action is . . . representative"' and '[t]here is no individual component to a PAGA action,' [citation], because every PAGA claim is asserted in a representative capacity. But when the word 'representative' is used in the second way, it makes sense to distinguish 'individual' PAGA claims, which are premised on Labor Code violations actually sustained by the plaintiff, from 'representative' (or perhaps quasi-representative) PAGA claims arising out of events involving other employees." (*Ibid.*)

Using the term "individual PAGA claim" to refer to claims based on Labor Code violations allegedly suffered by the plaintiff, the Supreme Court explained the *Iskanian* rule, by prohibiting bifurcation of a PAGA action into individual and representative claims, precluded parties from agreeing to arbitrate claims based on personally sustained violations: An employer was either compelled to withhold the individual claim from arbitration or

coerced into accepting arbitration of all other PAGA claims in the same arbitral proceeding. That restriction on the freedom of the parties to determine the issues subject to arbitration and the rules by which they will arbitrate, the Supreme Court held, violated the FAA. Accordingly, "the FAA 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 River, supra*, 142 S.Ct. at p. 1924.)

Significantly, however, the Supreme Court also held the rule of *Iskanian* invalidating wholesale waivers of PAGA claims (that is, agreements that purported to bar an employee from bringing a representative claim in any forum) was not preempted by the FAA. (*Id.* at pp. 1924-1925.) Accordingly, that portion of the Viking River arbitration agreement remained unenforceable.

Turning its focus to the severability provision in the arbitration agreement, the Supreme Court concluded, "[T]he severability clause in the agreement provides that if the waiver provision is invalid in some respect, any 'portion' of the waiver that remains valid must still be 'enforced in arbitration.' Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim. The lower courts refused to do so based on the rule that PAGA actions cannot be divided into individual and non-individual claims. Under our holding, that rule is preempted, so Viking is entitled to compel arbitration of Moriana's individual claim." (*Id.* at p. 1925.)[5]

[5] Section 12.2(k) of Handy's Service Professional Agreement contains a similar severability provision, stating, if any portion of the Representative Action Waiver is deemed unenforceable, the

3. *The Parties' Agreement Did Not Provide for Arbitration of Pote's PAGA Claims Seeking Recovery of Civil Penalties*

Under *Viking River*, if a plaintiff files a PAGA action based in part on Labor Code violations that he or she has actually suffered, the plaintiff can be compelled to arbitrate the "individual PAGA claim" if the parties' agreement to arbitrate includes such claims. That was the situation in *Viking River*, where Moriana had agreed to arbitrate on an individual basis any dispute arising out of her employment, a broad agreement that included her individual PAGA claim once the Supreme Court held *Iskanian*'s anti-divisibility rule was preempted by the FAA and applied the severability clause to the invalid provision waiving the right to bring a representative action.

Here, in contrast, although Pote generally agreed all disputes with Handy would be resolved in binding arbitration on an individual basis, the April 9 and October 26, 2018 iterations of the Service Professional Agreement prefaced this otherwise all-encompassing provision by stating, "Except as expressly provided below . . . ." And "expressly provided below" in section 12.2(c), the Representative Action Waiver, was a clear statement in both iterations of the agreement, albeit in slightly different language, that an arbitrator had no authority to arbitrate representative actions, and that section expressly distinguished as arbitrable on an individual basis claims for underpaid wages from representative claims for civil penalties. Indeed, Handy in the trial court requested as alternative relief that, if the court were to decline to enforce the Representative Action Waiver in its

portion that is valid and enforceable "shall be enforced in arbitration."

entirety,[6] the court should sever and stay Pote's representative claims for PAGA civil penalties—which Handy expressly contrasted with claims for victim-specific underpaid wages suffered by Pote and other aggrieved employees—until the completion of arbitration of any victim-specific claims.

Pote has expressly and repeatedly stated he is no longer asserting any claim for unpaid (and, necessarily, underpaid) wages on behalf of himself or any other aggrieved employee. He seeks only civil penalties under PAGA. Unlike in *Viking River*, here there is no agreement by Pote and Handy to arbitrate those remaining claims for civil penalties, or any portion of them, on any basis. (See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 [""a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit""]; see also *Viking River, supra*, 142 S.Ct. at p. 1918 [the first principle of FAA jurisprudence is that arbitration is strictly a matter of consent].)[7] Because there is nothing to arbitrate, Handy's petition to compel arbitration was properly denied.

[6] As discussed, the United States Supreme Court in *Viking River, supra*, 142 S.Ct. 1906 did not abrogate existing state law regarding the unenforceability under California public policy of purported waivers of the right to bring a representative action in any forum, such as the Representative Action Waiver in the case at bar.

[7] Whether an arbitration agreement applies to a controversy is a question of law to which we apply our independent judgment in the absence of conflicting extrinsic evidence. (*Ahern v. Asset Management Consultants, Inc.* (2022) 74 Cal.App.5th 675, 687; see *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 12.)

Pointing to the arbitration opt-out provision (section 12.2 (i)) in the Service Professional Agreement, Handy also argues Pote was not compelled as a condition of his employment to accept Handy's arbitration provision. That argument is similarly unavailing: As discussed, the agreement did not provide for arbitration of Pote's PAGA civil penalties claims. No opt out was required.

Moreover, even if there is merit to Handy's contention that the Representative Action Waiver is enforceable in its entirety, precluding Pote's claims for PAGA civil penalties,[8] wholesale enforcement of the waiver would not, by its terms, require individual arbitration of representative actions falling within its scope. Enforcing the waiver in its entirety would bar Pote's entire action, which asserts only PAGA claims on behalf of the State as the real party in interest. (See *Viking River*, *supra*, 142 S.Ct. at pp. 1914, 1916; *Kim v. Reins International California, Inc.*, *supra*, 9 Cal.5th at pp. 86-87). Nothing would be left to arbitrate.

[8] As discussed, Handy has argued the Representative Action Waiver in its October 26, 2018 arbitration agreement with Pote was a "postdispute" waiver of the right to bring a PAGA action and thus enforceable because *Iskanian*'s holding was limited to predispute waivers.

DISPOSITION

The order denying Handy's motion to compel arbitration is affirmed. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.

TAB 11

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October 20, 2022

VIA ELECTRONIC FILING

Acting Presiding Justice Lavin and Justices Dhanidina and Egerton
Court of Appeal of the State of California
Second Appellate District, Division Three
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, California 90013

SUPPLEMENTAL OPENING LETTER BRIEF

Re: *Angie Moriana v. Viking River Cruises, Inc.*
United States Supreme Court Case No.: 20-1573
California Court of Appeal Case No.: B297327
Los Angeles County Superior Court Case No.: BCC687325

Dear Acting Presiding Justice Lavin and Associate Justices Dhanidina and Egerton:

In compliance with this Court's October 5, 2022 Order, Defendant and Appellant Viking River Cruises, Inc. ("Viking") respectfully submits the following Supplemental Opening Letter Brief addressing the effect of the U.S. Supreme Court's June 15, 2022 opinion in *Viking River Cruises, Inc. v. Moriana* (2022) __ U.S. __, 142 S.Ct. 1906 ("*Viking River*") which reversed this Court's judgment and remanded the case for further proceedings not inconsistent with the U.S. Supreme Court's opinion.

I. INTRODUCTION

In *Viking River,* the U.S. Supreme Court held that the Federal Arbitration Act ("FAA") requires the enforcement of agreements calling for the arbitration of individual claims brought under the California Private Attorneys General Act,

Labor Code section 2698 et seq., ("PAGA"). In so doing, the U.S. Supreme Court's decision explicitly rejected the portion of the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 ("*Iskanian*") that prohibited employers from compelling arbitration of employees' individual PAGA claims separate and apart from the non-individual claims they allege on behalf of other so-called aggrieved employees. (*Viking River*, at p. 1924.) Specifically, the U.S. Supreme Court expressly held "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-arbitrable claims through an agreement to arbitrate." (*Id.*)

Viking River also recognized that the plain language of PAGA's standing provisions require both individual and non-individual claims to be litigated together in the same action. (Labor Code § 2699 (a).) In this regard, the U.S. Supreme Court correctly observed that, "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (*Viking River,* at p. 1925.) As a result, the U.S. Supreme Court held that once an individual PAGA claim is ordered to arbitration, that individual lacks standing to bring a representative action, and the non-individual PAGA claims must be dismissed. (*Id.*)

In short, in *Viking River* the U.S. Supreme Court overruled California precedent forbidding enforcement of agreements calling for the arbitration of individual PAGA claims, ordered Plaintiff and Respondent Angie Moriana's ("Moriana") individual PAGA claim to arbitration, and held that the remaining non-individual PAGA claims in the trial court be dismissed for lack of statutory standing.

II. ARGUMENT

A. MORIANA'S INDIVIDUAL PAGA CLAIM MUST BE COMPELLED TO ARBITRATION.

In *Iskanian,* the California Supreme Court held that a PAGA action lies outside the FAA's coverage because Section 2 is limited to controversies "arising out of" the contract between the parties, and a PAGA action "is not a dispute between an employer and an employee arising out of their contractual relationship," but "a dispute between an employer and the state." (*Iskanian,* 59 Cal.4th at 387.)

The U.S. Supreme Court expressly rejected this argument, recognizing that although a PAGA claim "is in some sense also a dispute between an employer and the State," the plaintiff's and defendant's contractual relationship "is a but-for cause of any justiciable legal controversy between the parties under PAGA" and "nothing in the FAA categorically exempts claims belonging to sovereigns from the scope of §2." (*Viking River*, at p. 1924.) In so doing, the U.S. Supreme Court disaffirmed the conclusion that the FAA does not apply to PAGA. (*Id.*)

Instead, the U.S. Supreme Court opined that the FAA preempts the *Iskanian* rule precluding the arbitration of individual PAGA claims. (*Id.* at p. 1924.) In this regard, the U.S. Supreme Court abrogated California's prior precedent holding a plaintiff's PAGA claim could not be compelled to individual arbitration because the individual and non-individual components were indivisible, finding that by requiring an employer to choose between arbitrating all the alleged aggrieved employees' claims or none of them, California's "indivisibility" rule was coercive and preempted by the FAA. (*Id.*, at p. 1924.) Thus, the U.S. Supreme Court held that PAGA's nature as a representative action did not preclude the division of PAGA actions into "individual" and "non-individual" claims. (*Id.*) Given this, while the U.S. Supreme Court did not disturb California law that precludes enforcement of a categorical waiver of the right to bring a PAGA action at all, where a PAGA plaintiff is bound by an agreement to arbitrate her individual claims, she must prosecute her individual claims in arbitration. (*Id.,* at pp. 1923-1924.)

Here, the U.S. Supreme Court held "that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. This holding compels reversal in this case ... so Viking is entitled to compel arbitration of Moriana's individual claim." *(Id.* at pp. 1924-1925.) Thus, the trial court order denying Viking's motion to compel arbitration must be reversed with instructions that Moriana be compelled to individual arbitration of her PAGA claim in this case.

B. MORIANA'S REPRESENTATIVE CLAIMS REMAINING IN THE TRIAL COURT MUST BE DIMISSED BECAUSE PAGA PROVIDES "NO MECHANISM" TO ADJUDICATE NON-INDIVIDUAL CLAIMS AFTER INDIVIDUAL PAGA CLAIMS ARE COMPELLED TO ARBITRATION.

The U.S. Supreme Court also addressed what happens after Moriana's individual PAGA claim is severed and compelled to individual arbitration. A majority comprised of Justices Alito, Breyer, Kagan, Sotomayor, and Gorsuch concluded that, in this circumstance, Moriana cannot maintain a non-individual PAGA claim in court after her individual PAGA claim is compelled to arbitration. As the U.S. Supreme Court opined:

> The remaining question is what the lower courts should have done with Moriana's non-individual claims. Under our holding in this case, those claims may not be dismissed simply because they are 'representative.' *Iskanian's* rule remains valid to that extent. But as we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. See Cal. Lab. Code Ann. §§ 2699(a), (c). When an employee's own dispute is pared away from the PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit. See *Kim,* 9 Cal.5th, at 90, 459 P. 3d, at 1133 ('PAGA's standing requirement was meant to be a departure from the 'general public' … standing originally allowed' under other California statutes.) As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.

(*Id.* at pp. 1924-1925.)

California precedent shows that deference is owed to the U.S. Supreme Court's considered judgment on this issue. As the California Supreme Court has held, it "do[es] not depart lightly from clear United States Supreme Court rulings[.]" (*People v. Houston* (1986) 42 Cal.3d 595, 609.) Indeed, as discussed below, the U.S. Supreme Court's well-reasoned conclusion that PAGA provides "no

mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding[]" is based on its reading of the plain language of Section 2699 and the California Legislature's rejection of "general public" standing under PAGA as discussed by the California Supreme Court in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73. (*Id.* at pp. 1924-1925; *Kim*, 9 Cal.5th at p. 90.)

1. PAGA's Plain Language Provides that a Civil Action for PAGA Penalties on Behalf of Other "Aggrieved Employees" May Only be Pursued by a Plaintiff Who Also Maintains an Individual Claim.

The language of Section 2699(a) is plain and unambiguous - a civil penalty may be "recovered through a civil action brought by an aggrieved employee on behalf of himself or herself *and* other current or former employees …" (Labor Code § 2699(a), emphasis added.) It necessarily follows that once Moriana's individual PAGA claim is compelled to arbitration, she can no longer maintain a PAGA action on behalf of herself in the trial court, which statutorily precludes her from acting as a representative on behalf of the alleged "aggrieved employees." (Labor Code § 2699(a).) In other words, a plaintiff has standing to bring a PAGA action *only* when she also maintains an individual claim. (Labor Code § 2699(a).)

The rules governing statutory construction are well established. "In examining the language, the courts should give to the words of the statute their ordinary, everyday meaning unless, of course, the statute itself specifically defines those words to give them a special meaning." (*Halbert's Lumber, Inc. v. Luck Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1240; *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 ("[L]egislation must be construed as a whole while avoiding an interpretation which renders any of its language surplusage.")) "If the meaning is without ambiguity, doubt, or uncertainty, then the language controls." (*Id.*) "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*People v. Knowles,* (1950) 35 Cal.2d 175, 183.)

Here, the key word in Section 2699(a) is "*and*," which is a grammatical conjunction used to connect words that are to be taken jointly, and it is one of the most ordinary, everyday words in the English language. There is no

ambiguity in the Legislature's use of the word "and" as opposed to "or" or "and/or" as requiring a statutory PAGA action to be brought on behalf of the individual *and* other current or former employees. (Labor Code § 2699(a).) Based on the unambiguous statutory language, regardless of its outcome, once Moriana is compelled to individual arbitration she will not have statutory standing to maintain a representative PAGA claim in the trial court. As a result, as instructed by the U.S. Supreme Court, the non-individual representative PAGA claim remaining in the trial court should be dismissed because it will be without a named representative once individual arbitration of Moriana's PAGA claim is compelled.

2. Legislative History Also Confirms that a Civil Action for PAGA Penalties on Behalf of Other Alleged "Aggrieved Employees" May Only be Pursued by a PAGA Plaintiff Who Also Seeks Individual Recovery.

Legislative history also confirms that PAGA permits only "an 'aggrieved employee' [to] bring a civil action *personally* and on behalf of other current or former employees to recover civil penalties for Labor Code violations." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, italics added, quoting Lab. Code § 2699 (a).) The Legislature designed PAGA standing to be "unlike the UCL [Unfair Competition Law]" standing provisions in effect at the time, which allowed suits by "persons who suffered no harm from the alleged wrongful act." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 29, 2003, p. 7.) The open-ended standing provisions in the UCL had led to "well publicized allegations of private plaintiff abuse," which the Legislature specifically sought to avoid in enacting PAGA. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) June 26, 2003, p. 6 ("Assem. Com. Analysis"); see also *Kim*, 9 Cal.5th at p. 90 (recounting how "some private attorneys had exploited the generous standing requirement of the UCL by filing shakedown suits to extort money from small businesses for minor or technical violations where no client had suffered an actual injury").) The consequence is that PAGA, "[u]nlike the UCL," does "not permit private actions by persons who suffered no harm from the alleged wrongful act." (Assem. Com. Analysis, at p. 6.) Instead, a PAGA plaintiff must show that she is someone "against whom the alleged violation was committed" - not a member of the "general public" who is a

stranger to the suit. (*Id.*) "Only persons who have actually been harmed may bring an action." (*Id.*)

The legislative history thus makes clear that a plaintiff has standing under PAGA only when pursuing civil penalties for violations that she personally suffered. While PAGA permits such suits to "*also* include fellow employees *also* harmed by the alleged violation" (Assem. Com. Analysis, at p. 6, italics added), it does not permit a PAGA action that is based solely on alleged violations that others experienced. In this manner, the Legislature intended for "PAGA's standing requirement … to be a departure from the 'general public' standing originally allowed under the [UCL]." (*Kim*, 9 Cal.5th at p. 90.)

3. Once Moriana's Individual PAGA Claim Is Compelled to Individual Arbitration, She Cannot Satisfy PAGA's Requirement to Pursue Civil Penalties on Behalf of Herself *and* Other Alleged "Aggrieved Employees" in the Same Action.

Once Moriana's individual PAGA claim is compelled to individual arbitration, her non-individual representative PAGA claim would be founded on "general public" standing. As the California Supreme Court explained in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, PAGA does not allow such "general public" standing. There, a union sought to bring a PAGA claim based on its association with its members, who had allegedly suffered Labor Code violations. (*Id.* at p. 999.) PAGA cut off this attempt because the union did not "bring an action on behalf of himself or herself," but solely "on behalf of its members." (*Id.* at p. 1004.) Like the union in *Amalgamated Transit*, Moriana cannot seek recovery only for violations suffered by other employees and not for any personally experienced violations. (Lab. Code, § 2699 (a), (c).)

Here, Moriana cannot allege any personally sustained violations because as the U.S. Supreme Court's opinion mandates, her individual claims must be severed and compelled to arbitration. (*Viking River*, 142 S.Ct. 1906.) It necessarily follows that Moriana cannot seek civil penalties "on behalf of herself" in court as every PAGA plaintiff must do. (Lab. Code, § 2699 (a).) It would take a serious rewriting of subdivisions (a) and (c) of section 2699 to allow Moriana to pursue

penalties in court for violations that allegedly occurred only to *other* employees after the Legislature intentionally acted to prevent such an outcome.

Justice Sotomayor noted that California courts and the Legislature will "have the last word" on the contours of California law. (*Viking River*, 142 S.Ct. at p. 1925, Sotomayor, J., concurring.) To be sure, the Legislature could in the future revisit whether to expand statutory standing to allow anyone - whether or not he or she seeks to litigate "on behalf of himself or herself" (Lab. Code, § 2699 (a)) - to sue over violations only *others* have experienced. It has not to date. The *existing* PAGA statute before this Court forecloses such a result by judicial interpretation, as Justice Sotomayor herself concluded in joining the High Court's opinion dismissing the non-individual claim for lack of standing. (142 S.Ct. at p. 1925.)

Because Moriana cannot allege a personally sustained violation or seek any relief on her own behalf in court, she does not meet either the "aggrieved employee" requirement for her non-individual PAGA claim (Lab. Code § 2699(c); *Amalgamated Transit Union*, 46 Cal.4th at p. 1005), nor can she bring suit on behalf of herself *and* other alleged "aggrieved employees" (Lab. Code § 2699(a); *Viking River,* 142 S.Ct. at 1925). As a result, as the U.S. Supreme Court held, Moriana's non-individual PAGA claims should therefore be dismissed. In the wake of *Viking River*, courts have routinely been dismissing PAGA actions. *See, e.g., Johnson v. Lowes Home Centers, LLC*, No. 2:21-cv-00087-TLN-JDP (Sept. 21, 2022).

4. *Kim v. Reins* Supports *Viking River's* Interpretation of PAGA's Standing Requirement.

In *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, the California Supreme Court noted that statutory standing in California "rests on the [statute's] language, its underlying purpose, and the legislative intent." (*Id.* at p. 83.) In fact, the U.S. Supreme Court expressly relied on *Kim* in support of its analysis of PAGA's standing requirement in *Viking River*. (*Viking River,* 134 S.Ct. at p. 1925 ("'PAGA's standing requirement was meant to be a departure from the general public standing originally allowed' under other California statutes") quoting *Kim*, 9 Cal.5th at p. 90.) The U.S. Supreme Court correctly read *Kim* as foreclosing the idea that a plaintiff who cannot maintain an

individual PAGA claim in court can nonetheless pursue a non-individual PAGA claim.

Kim held that a plaintiff's settlement of his individual underlying Labor Code claims did not preclude him from pursuing a PAGA claim in court. In that case, the defendant-employer argued that the plaintiff was not still "aggrieved" after the underlying Labor Code violations were resolved in settlement. (*Kim*, 9 Cal.5th 73.) The California Supreme Court rejected this argument, explaining that Section 2699(c) only imposed two requirements for being an "aggrieved employee": the plaintiff must be someone who was "employed by the alleged violator" and "against whom one or more of the alleged violations was committed." (*Id.* at pp. 83-84.) The settlement of the underlying Labor Code claims did not change that the plaintiff had still suffered the violations and was therefore still "aggrieved." The plaintiff was free to litigate the PAGA claims on behalf of herself and other alleged aggrieved employees. (*Id.*)

But whether Moriana would still be considered an "aggrieved employee" after the resolution of arbitration is of no consequence to the analysis at hand because her individual PAGA claim cannot be litigated in court. (*Kim,* 9 Cal.5th at pp. 83-84.) Once Moriana's individual PAGA claim is compelled to arbitration, Moriana cannot bring a PAGA claim *on behalf of herself* in a court of law. (*See* Labor Code § 2699 (a).) Thus, regardless of whether Moriana still meets the statutory definition of an "aggrieved employee" after arbitration is compelled, she does not have statutory standing to pursue a representative PAGA action separate from her own individual action.

5. Pending Review in *Adolph v. Uber* Does Not Prevent the Dismissal of Moriana's Representative PAGA Claim.

The California Supreme Court's review in *Adolph v. Uber Technologies, Inc.* (July 20, 2022, So. S274671) __ Cal.5th __ [2022 Cal. LEXIS 4066, at *1] ("*Adolph*") does nothing to change that Moriana's nonindividual representative PAGA claims remaining in the trial court must be dismissed in this case. Courts have consistently held that lower courts must continue to follow existing law pending a Supreme Court decision. (*Hoeun Yong v. I.N.S.* (9th Cir. 2000) 208 F.3d 1116, 1119 citing *McClellan v. Young* (6th Cir. 1970) 421 F.2d 590, 691 ("Once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the

Supreme Court before applying the circuit court's decision as binding authority."))

Here, neither the California Supreme Court nor any Court of Appeal has rendered an opinion on the issue pending in *Adolph*: "Whether an aggrieved employee who has been compelled to arbitrate claims under the [PAGA] that are 'premised on Labor Code violations actually sustained by' the aggrieved employee (Viking River Cruises, Inc. v. Moriana (2022) 596 U.S. ___, ___ [142 S.Ct. 1906, 1916] (Viking River Cruises); see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' (Viking River Cruises, at p. ___ [142 S. Ct. at p. 1916]) in court or in any other forum the parties agree is suitable." (*Adolph,* Supreme Court Case No. S274671, 08/01/22 Order.) As a result, this Court must rely on the existing direct guidance from the U.S. Supreme Court as to the handling of this specific case.

III. ORAL ARGUMENT -

Viking respectfully requests oral argument.

IV. CONCLUSION

Consistent with *Viking River,* the order of the trial court denying Viking's motion to compel must be reversed with instructions that the trial court compel Moriana to individually arbitrate her alleged PAGA claims and dismiss Moriana's non-individual PAGA representative claims.

Respectfully submitted,

Keith A Jacoby, Shareholder

PROOF OF SERVICE

I am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action; my business address is 2049 Century Park East, Fifth Floor, Los Angeles, CA 90067. On October 20, 2022, I served the following document(s):

SUPPLEMENT OPENING LETTER BRIEF

on the parties for service as designated below:

By filing via TrueFiling: I filed and served such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed October 20, 2022, at Los Angeles, California.

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October 20, 2022

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Re: Plaintiff's Supplemental Letter Brief in *Moriana v. Viking River Cruises, Inc.*, Court of Appeal Case No. B297327, Los Angeles County Superior Court Case No. BC687325

Dear Presiding Justice and Associate Justices:

Plaintiff and Respondent Angie Moriana submits this letter brief pursuant to the Court's November 5, 2022 Order, to address the impact of *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906 ("*Viking River*") on the issues presented on remand.

As the Court will recall, Plaintiff Moriana was employed as a commissioned sales representative by Defendant Viking River Cruises, Inc. ("Viking") in Los Angeles, California. In December 2017, she filed a PAGA notice with the California Labor and Workforce Development Agency ("LWDA") and with Viking pursuant to Labor Code § 2699.3. After waiting the required statutory period (*id.* § 2699.3(a)(2)(B)), Ms. Moriana filed a PAGA-only complaint against Viking, seeking statutory civil penalties on behalf of the LWDA, herself, and other Viking sales representatives in California who were aggrieved by the company's Labor Code violations. Ms. Moriana's operative Second Amended Complaint pleaded nine Labor Code violations that Viking had allegedly committed against her and her co-workers.

Viking moved to compel arbitration of Ms. Moriana's PAGA claim, based on a pre-dispute arbitration agreement (referred to as the Dispute Resolution Protocol or "DRP") that Viking contended she had entered with TriNet HR Corporation ("TriNet"), a company that provided human resources and other administrative support to Viking. The trial court denied Viking's motion to compel based on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, which held that contractual waivers of statutory PAGA rights violate California public policy and Civil Code § 3513, and that the Federal Arbitration Act ("FAA"),

9 U.S.C. §§ 1 et seq., does not preempt California's rule prohibiting such PAGA waivers. This Court affirmed in an unpublished opinion, agreeing that *Iskanian* was controlling. The California Supreme Court subsequently denied review.

Viking successfully petitioned for a writ of certiorari to the U.S. Supreme Court, which reversed, principally on state law grounds that were neither briefed nor argued by the parties or their amici. After denying Ms. Moriana's petition for rehearing, the Supreme Court remanded to this Court for further proceedings consistent with its opinion.[1]

In Part II of *Viking River* (142 S.Ct. at pp. 1917–1923), the five-member majority *affirmed* what it described as "*Iskanian*'s principal rule" (*id*. at p. 1916)—that contractual waivers of statutory PAGA rights are unenforceable under California law and that the FAA does not preempt that principal rule as applied to waivers in a pre-dispute arbitration agreement, like the Viking/TriNet DRP.

In Part III of its opinion, Court identified what it described as "*Iskanian*'s secondary rule," which treated PAGA actions as unitary or indivisible, meaning that state law required all PAGA civil penalties (based on violations committed against other aggrieved employees as well as violations committed against the plaintiff) to be adjudicated in a single proceeding. (*Id*. at p. 1923.) Eight Justices held that the FAA *did* preempt that secondary rule, which they characterized as a rule requiring mandatory joinder of claims, because that rule would preclude enforcement of agreements to limit arbitration to a plaintiff's personal claims only. (*Id*. at p. 1924.) In the Court's view, that rule would impermissibly force contracting parties to choose between not arbitrating PAGA claims at all or agreeing to arbitrate all PAGA claims that an employee could assert, including claims for penalties attributable to violations suffered by other employees. (*Id*. at pp. 1924–1925.)

Although the Court could have stopped there, consistent with its longstanding practice of not deciding issues of state law that were not essential to reaching the federal issues presented (see, e.g., *Missouri ex rel. Wabash Ry. v. Pub. Serv. Comm'n* (1927) 273 U.S. 126, 131), five members of the Court in Part IV of the opinion, (142 S.Ct. at pp. 1925), reached out to address two additional, but quintessentially state law, issues.

First, as a matter of contract construction, the majority read the severability clause in the Viking/TriNet DRP (while quoting only four words) in a way that transformed the clause's express *prohibition* against plaintiff's prosecution of *any* "representative or private attorney general" action in any forum into an affirmative *requirement* that Ms. Moriana must arbitrate the "individual" component of her PAGA claim and must litigate in court the "non-individual" component of that claim. (*Id.* at p. 1925.)

Second, the Court expressed its view that, under PAGA's text and the California Supreme Court's interpretation of that text in *Kim v. Reins Int'l Calif., Inc.* (2020) 9 Cal.5th 73, once a PAGA plaintiff has been compelled to arbitrate the "individual" component of her (and the LWDA's) PAGA claim for civil penalties, she is stripped of statutory standing as an "aggrieved employee" under PAGA to pursue the remaining "non-individual" component of

[1] The denial of rehearing has no bearing on the merits of any issue raised here, as such petitions are granted "[o]nly in very exceptional situations" and have "hardly any chance of success." (Shapiro et al., Supreme Court Practice (10th ed. 2017), ch. 15.6(a), pp. 837-839.)

that claim in court. (142 S.Ct. at p. 1925.) The Court thus read PAGA to permit a defendant employer to contract out of its principal exposure to PAGA statutory penalties by requiring arbitration of the "individual" component of a plaintiff's PAGA claim—even though, as the majority recognized, the part of *Iskanian*'s holding that the Court upheld against preemption challenge bars enforcement of any contractual waiver of an individual employee's right to bring claims on the State's behalf under PAGA for penalties attributable to violations suffered by other employees.

State courts, not federal courts (and not the Supreme Court) are the ultimate arbiters of state law, particularly in cases arising from the state courts. That is why, as Justice Sotomayor suggested in her concurring opinion in *Viking River*, this Court should now decide for itself whether the *Viking River* majority correctly applied California law in Part IV of its opinion.

Justice Sotomayor provided the crucial fifth vote for Part IV of the opinion in *Viking River.* She specially concurred to explain that she was joining the other four Justices in the majority only "with th[e] understanding" that if the Court's characterization of California law were wrong, the state courts or state legislature could correct that non-binding mischaracterization. (142 S.Ct. at p. 1926 [Sotomayor, J., concurring].) That "pivotal" concurrence[2] requires this Court to take a fresh look at the exclusively state law issues decided by the majority in Part IV—just as the California Supreme Court is now doing in *Adolph v. Uber Technologies, Inc.*, No. S274671 with respect to PAGA standing, and just as dozens of California trial courts and several other courts of appeal are doing in the many other pending cases raising these same state-law issues post-*Viking River.* (See, e.g., *Pote v. Handy Technologies, Inc.* (Oct. 17, 2022) 2nd DCA, Div. 3, No. B302770 [unpublished].)

For the reasons explained below, the majority's "understanding of state law" in Part IV of *Viking River was* "wrong" and needs to be corrected, either by this Court or the trial court (if this Court chooses to remand to have those state law issues decided by the trial court in the first instance). Moreover, even if the majority correctly applied California law, this Court (or the trial court) should declare the Viking/TriNet DRP void and unenforceable for an entirely separate reason that the U.S. Supreme Court in *Viking River* did not even consider: because any arbitration agreement that requires a plaintiff to pursue the most substantial portion of her PAGA claim in a judicial forum that lacks authority to adjudicate the claim is contrary to California public policy and unenforceable under Civil Code §§ 3513 and 1668 and *Iskanian.*

State Courts Have Ultimate Authority to Decide State Law Issues

Eight of the nine Justices in *Viking River* agreed that the majority's analysis in Part IV of its opinion addressed purely state-law questions of contract and statutory interpretation. (See 142 S.Ct. at p. 1925 [asking whether, in light of "PAGA's standing requirement," "PAGA provides [a] mechanism" to address the "non-individual PAGA claims."]; *ibid.* [Sotomayor, J., concurring] ["Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."]; *id.* at p. 1926 [Barrett, J., joined by Justice Kavanaugh and the Chief Justice, concurring in part and in the judgment] [declining to join

[2] *See* T. Bennet et al., *Divide & Concur: Separate Opinions & Legal Change* (2018) 103 Cornell L. Rev. 817 (explaining the weight to be given such "pivotal" concurrences).

Part IV, which "addresses disputed state-law questions."].)[3]

Subject to constitutional constraints not applicable here, the state courts alone have ultimate authority under our system of cooperative federalism to decide state-law issues in cases arising from state court—a principle that has been consistently applied for nearly two centuries. (See, e.g., *Green v. Neal's Lessee* (1832) 31 U.S. 291, 298.)[4] This authority extends to the state-law questions of contract construction and statutory standing at issue here. (See, e.g., *Hollingsworth v. Perry* (2013) 570 U.S. 693, 717-718; *Cole v. Richardson* (1972) 405 U.S. 676, 697; cf. *Bank of Am. Corp. v. City of Miami* (2017) 137 S. Ct. 1296, 1302-1303 ["statutory standing" is a matter of "statutory interpretation"].) Even in FAA preemption cases, "the interpretation of a contract is ordinarily a matter of state law to which [the Supreme Court] defer[s]." (*DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 54; see also *Marmet Health Care Ctr., Inc. v. Brown* (2012) 565 U.S. 530, 534 [remanding to determine whether arbitration clauses "are unenforceable under state common-law principles that are not specific to arbitration and pre-empted by the FAA"]; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 177 ["'[E]ven when the [FAA] applies, interpretation of the arbitration agreement is governed by state law principles….'"], second alteration in original.)

Only rarely does the Supreme Court opine on an issue of state law, and it almost never does so when it has already resolved the federal-law issues in dispute and only state-law issues remain. When that happens, the state courts remain free to disagree with the Supreme Court's state law analysis—as Justice Sotomayor suggested the California state courts may do here, in her crucial fifth vote which rested upon that understanding. (See, e.g., *Bell v. State* (1964) 236 Md. 356, 368, on remand from *Bell v. Maryland* (1964) 378 U.S. 226 [rejecting Supreme Court majority's characterization of Maryland law governing extinction of criminal liabilities].)

The most recent example of an appellate court rejecting the Supreme Court's stated understanding of state law is *Whole Woman's Health v. Jackson* (5th Cir. 2022) 23 F.4th 380 (*Jackson II*). In that case, the Fifth Circuit, in a case remanded from the Supreme Court, *Whole Woman's Health v. Jackson* (2021) 142 S.Ct. 522 (*Jackson I*), certified to the Texas Supreme Court a question of Texas state law that the U.S. Supreme Court had addressed in its opinion. After obtaining the Texas Supreme Court's binding construction of that state law question, the Fifth Circuit in *Whole Woman's Health v. Jackson* (5th Cir. 2022) 31 F.4th 1004, 1006 (*Jackson III*) directed the district court to follow the law as construed by the state court, not by the U.S. Supreme Court in the same case. Notably, in *Jackson I*, several Justices had "acknowledge[d] uncertainty about Texas law" and their opinion "[wa]s laden with qualifiers," including the Court's recognition that "'[o]f course, Texas courts and not this one are the final

[3] Justice Thomas expressed no view on the issue, based on his long-held position that the FAA "does not apply to proceedings in state courts" (although that perspective would treat *every* issue in the case as a state law issue). (*Id.* at p. 1926 [Thomas, J., dissenting].)

[4] In cases originating in state court in which review is based on 28 U.S.C. § 1257, the Supreme Court generally does not even have *jurisdiction* to decide state-law questions. (See *Murdock v. City of Memphis* (1874) 87 U.S. 590, 630-633; see also *BP P.L.C. v. Mayor & City Council of Baltimore* (2021) 141 S. Ct. 1532, 1540 ["Concerned with the constitutional implications of allowing federal courts to review questions of state law, the Court in *Murdock* construed [§ 1257] as authorizing this Court to examine only issues of federal law contained within state court judgments and decrees."].)

arbiters of the meaning of state statutory directions.'" (*Jackson II*, 23 F.4th at pp. 385-386, quoting *Jackson I* 142 S.Ct. at p. 536, emphasis omitted.)

The Supreme Court in *Viking River* was similarly clear that in Part IV of its opinion, it was addressing state law issues (over which state courts have final authority), and Justice Sotomayor expressly joined the majority with the understanding that California courts could correct the Court if its "understanding of state law is wrong." (142 S.Ct. at p. 1925 [Sotomayor, J., concurring].) The justification for revisiting the state law issues on remand is of course even stronger here than in *Jackson II*, because *Viking River* arose from, and was remanded directly to, the California state courts, not the federal courts. Consequently, there are no concerns here about having to "delay implementation of the Supreme Court's mandate" in order to certify a question of state law to the State Supreme Court, or about whether a federal appellate court is required to abide by the Supreme Court's interpretation of state law, concerns that animated the dissent in that case. (See *Jackson II*, 23 F.4th at p. 390 [Higginson, J., dissenting].) Moreover, unlike *Jackson I*, in which the parties had comprehensively briefed and argued the state law issue in dispute (see *id.* at p. 385, quoting *Jackson I*, 142 S.Ct. at p. 535), the state law questions decided in *Viking River* were not briefed or argued by either party or any amicus, and arose only because Part III of the Court's opinion rested on a novel ruling on FAA-preemption (regarding *Iskanian*'s "secondary rule") that differed significantly from the approaches advocated in both parties' briefs and arguments.

The Plain Language of the Parties' Agreement Does Not Require Ms. Moriana to Arbitrate the "Individual" Component of Her Representative PAGA Action

The TriNet DRP that Viking River relied upon in moving to compel arbitration contains a sweeping prohibition against plaintiff's assertion of *any* PAGA claim, in arbitration, court, or any other forum. In pertinent part, that prohibition provides:

> *There will be no right or authority for any dispute to be brought, heard or arbitrated as a* class, collective, *representative or private attorney general action*, or as a member in any purported class, collective, representative or private attorney general proceeding, including, without limitation, uncertified class actions ("Class Action Waiver") ….

(AA at p. 93, emphasis added.) Because the DRP's Class Action Waiver prohibits all "representative or private attorney general action[s]," it unquestionably violates "Iskanian's principal rule" and is for that reason unenforceable. (142 S.Ct. at p. 1924.) Moreover, that prohibition is unenforceable with respect to *both* components of plaintiff's PAGA claim—the "individual" component no less than the "non-individual" component—because, as the California Supreme Court has repeatedly explained and as the U.S. Supreme Court in *Viking River* has now reiterated, all PAGA claims are "representative" claims insofar as they are brought by aggrieved employees as delegated *representatives* of the State LWDA and because 75% of all civil penalties recovered must be allocated *to the LWDA as the real party in interest*. (See *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185 ["All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf."]; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; *Viking River*, 142 S.Ct. at p. 1916 [all "PAGA actions are 'representative' in that they are brought by employees acting as representatives—that is, as agents or proxies—of the State"].)

In light of *Iskanian* and *Viking River*, there can be no dispute that the DRP's contractual

prohibition of all "representative or private attorney general action[s]" is unenforceable, as it plainly violates *Iskanian*'s "principal rule." Thus, the first question this Court should consider on remand is the effect of that invalidity and, in particular, what impact, if any, the severability clause in the DRP might have on the enforceability of the rest of that agreement.

The severability provision in the DRP states, in pertinent part:

> In any case in which (1) the dispute is filed as a ... representative or private attorney general action and (2) a civil court of competent jurisdiction finds all or part of the Class Action Waiver unenforceable, the ... representative and/or private attorney general action *must be litigated in a civil court of competent jurisdiction,* but the portion of the Class Action Waiver that is *enforceable* shall be enforced in arbitration.

(AA at p. 93, emphasis added.)

The Supreme Court quoted just four words from the final clause in that sentence ("portion" and "enforced in arbitration"), concluding that those words somehow transformed the parties' intended wholesale *ban* on PAGA representative actions into a mandatory requirement that PAGA actions must be adjudicated in two separate proceedings, one in arbitration and one in court. (142 S.Ct. at p. 1925.) But contract construction is a matter of state law, and this Court (or the trial court on further remand) must therefore determine the meaning of that language for itself. (See, e.g., *DIRECTV, Inc.*, 577 U.S. at p. 54 ["the interpretation of a contract is ordinarily a matter of state law to which we defer"]; *Sandquist v. Lebo Auto., Inc.* (2016) 1 Cal.5th 233, 244 ["'When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts,'" alteration in original; see also *Morgan v. Sundance, Inc*. (2022) 142 S.Ct. 1708, 1714 [courts construing arbitration agreements under the FAA must apply generally applicable contract construction principles, without regard to whether they favor or disfavor arbitration].)

Applying well-established contract construction principles, the Court should conclude that the plain text of this provision, read in light of the contracting parties' evident intent, requires the parties to litigate Ms. Moriana's *entire* PAGA representative action "in a civil court of competent jurisdiction." After all, (1) plaintiff filed her action "as a … representative or private attorney general action"; (2) the DRP waiver language is "unenforceable" under *Iskanian*'s principal rule (which the Supreme Court upheld in *Viking River*) because it unlawfully prohibits "any dispute to be brought, heard or arbitrated as a …. representative or private attorney general action"; and (3) no "portion" of the DRP's prohibition of disputes brought on a "representative or private attorney general action" basis is "enforceable." Under the plain contractual language, then, plaintiff's entire PAGA action "must be litigated in a civil court."

To be clear, although *Viking River allows* contracting parties to enter into an arbitration agreement that requires a plaintiff, as a representative of the LWDA, to arbitrate the State's claim for penalties based on violations she personally suffered and to litigate the State's claim for penalties for violations suffered by others, the Viking/TriNet DRP does not draw that distinction. To the contrary, by its express terms it prohibits *all* "representative or private attorney general action[s]" without exception and without regard to which remedies a plaintiff might seek in which forum. Indeed, in its reply brief to this Court in the prior appeal, Viking

admitted that it was only seeking to arbitrate the portion of Ms. Moriana's individual PAGA claim as to which "[t]he State is not a party," i.e., to limit that arbitration to 25% of the penalty potentially available under PAGA for the violations the plaintiff personally suffered. (See Appellant's Reply Br. at p. 18.) Because no "portion" of the DRP's PAGA waiver is "enforceable," the plain language of the DRP requires plaintiff's entire "representative" PAGA action to be litigated in court. Any conclusion to the contrary would force the parties to arbitrate a claim they expressly agreed *not* to arbitrate, thereby violating "[t]he most basic corollary of the principle that arbitration is a matter of consent" (*Viking River*, 142 S.Ct. at p. 1923)—that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." (*Ibid*.; accord *Granite Rock Co. v. Teamsters* (2010) 561 U.S. 287, 299).) Even if there were some ambiguity about the parties' underlying intent, moreover, the ambiguous contract language would have to be construed against Viking/TriNet as the drafter of the non-negotiable, boilerplate DRP. (See, e.g., *Sandquist*, 1 Cal.5th at p. 248 [uncertainty in arbitration provision must be construed against the drafter].)

A PAGA Aggrieved-Employee Plaintiff is Not Stripped of Statutory Standing Upon Being Compelled to Arbitrate the Individual Component of Her PAGA Action

Even if this Court (or the trial court) were to construe the DRP as requiring Ms. Moriana to split the remedial portion of her PAGA claim between arbitration and court, it should reject the Supreme Court majority's mistaken understanding of PAGA standing under California law—as Justice Sotomayor's concurrence suggests might be warranted—and should conclude, based on the plain language of PAGA and the California Supreme Court's construction of that language in *Kim*, that a PAGA "aggrieved employee" plaintiff has standing to sue for civil penalties on behalf of the LWDA even if she agreed with her employer to split her PAGA action between court and arbitration. Although this issue of PAGA standing post-*Viking River* is also now being considered by the California Supreme Court in *Adolph v. Uber Technologies, Inc.*, No. S27467, the analysis is straightforward and there is no reason for this Court to await *Adolph* (or the decisions from any of the other district courts of appeals that have requested supplemental briefing on this subject in pending cases) before deciding this issue.[5]

In California state court, statutory standing is exclusively an issue of statutory construction (unlike Article III standing in federal court). When "a cause of action is based on statute, standing rests on the provision's language, its underlying purpose, and the legislative intent." (*Kim*, 9 Cal.5th at p. 83; see also *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1246.)

In *Kim*, the California Supreme Court held that "[t]he plain language of [PAGA's] section 2699(c) has only two requirements for PAGA standing," which are set forth in the statute's definition of "aggrieved employee": (1) the plaintiff must be someone "who was employed by the alleged violator," and (2) the plaintiff must be a person "against whom one or

[5] For the reasons addressed *infra* at pp. 9-10, if the parties' arbitration agreement is construed as requiring plaintiff to pursue the "non-individual" component of her representative PAGA claim in a forum that lacks authority to adjudicate that claim (because plaintiff lacks standing), that agreement would for that reason be unenforceable under *Iskanian* and California contract law.

more of the alleged violations was committed." (*Id.* at pp. 83-84, quoting § 2699(c).) Ms. Moriana's PAGA complaint unquestionably alleged both elements.

In *Kim*, after the plaintiff had settled his individual Labor Code claims, the defendant employer contended that Mr. Kim no longer had standing to assert a representative PAGA claim. The California Supreme Court disagreed, unanimously rejecting the defendant's argument that PAGA "standing somehow ended" once plaintiff could no longer seek redress for those underlying claims. (*Id.* at p. 84.) As the Court explained:

> The Legislature defined PAGA standing in terms of violations, not injury. Kim became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. (See § 2699(c).) Settlement did not nullify these violations. The *remedy* for a Labor Code violation, through settlement or other means, is distinct from the *fact* of the violation itself.

(*Ibid.*, emphasis in original.) For PAGA standing, the Court held, all that matters is whether plaintiff can allege, and eventually prove, having been defendant's employee and having thereby suffered one or more Labor Code violations. (See also *id*. at pp. 85-86 [plaintiff's "inability to obtain individual relief" on her underlying Labor Code claim does not preclude PAGA claim]; *Johnson v. Maxim Healthcare Servs., Inc.* (2021) 66 Cal.App.5th 924, 929 [plaintiff has standing to pursue PAGA representative claim even if her underlying Labor Code claim is time-barred, because she was still an "aggrieved employee"].)

This analysis is fully consistent with the statute's underlying purpose—"'to achieve maximum compliance with state labor laws'" (*Iskanian*, 59 Cal.4th at p. 379, quoting *Arias*, 46 Cal.4th at p. 980) by deputizing "aggrieved employees" to pursue existing and newly created civil penalties on behalf of the State LWDA. (*Kim*, 9 Cal.5th, at p. 86.) Any standing requirement based on unredressed injury or the need to pursue individual relief is especially inappropriate under PAGA, because the "civil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' *not* to redress employees' injuries'" or otherwise compensate the plaintiff. (*Ibid*.).

The *Viking River* majority's quotation of *Kim*'s reference to "general public" standing, (142 S.Ct. at p. 1925, quoting *Kim*, 9 Cal.5th at p. 90), completely misses the point. When PAGA was enacted in 2003, the Unfair Competition Law allowed standing for anyone who chose to sue on behalf of the general public, which led to complaints of abuses. (See *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 178 fn.10.) While the Legislature did not authorize such untethered "general public" standing in PAGA, neither did it impose strict Article III-like standing requirements. Rather, it simply required the plaintiff to allege that she was an employee against whom the defendant had committed one or more Labor Code violations, thus limiting the universe of potential plaintiffs to those with personal exposure to at least one challenged workplace violation. (*Kim*, 9 Cal.5th at p. 90.). Nothing more was required, other than compliance with PAGA's statutory notice requirement (§ 2699.3), before the LWDA as the real party in interest could authorize that aggrieved employee to sue for the full range of PAGA civil penalties on its behalf.

An "aggrieved employee" is thus not suing as a member of the general public, but as a member of the specifically defined class of workers to whom the Legislature has granted standing to sue on the State's behalf. That status does not end if the "individual" portion of

her claim is compelled to arbitration. Yet under the counter-intuitive approach adopted in Part IV of *Viking River*, a PAGA plaintiff would be stripped of standing to pursue the LWDA's "non-individual" PAGA claims in court *even if she had first arbitrated her "individual" PAGA claim successfully and had been found to have been an "aggrieved employee"*—and even if that arbitration award were later confirmed by the trial court. That cannot be what the Legislature intended.

The *Viking River* majority's cursory analysis of PAGA standing appears to rest upon a fiction: that because a PAGA plaintiff has been compelled to pursue some remedies in arbitration and some in court, the two proceedings should be treated for PAGA standing purposes as two entirely independent actions, i.e., as if the plaintiff had voluntarily chosen to file an "individual" PAGA action and a separate "non-individual" action. But Ms. Moriana filed her PAGA claim as a single unitary action and she brought that action in her capacity as an aggrieved employee. The only reason her claims on behalf of the LWDA might be split into two is because Viking now contends that its DRP, which on its face seeks to prohibit Ms. Moriana's PAGA claim in its entirety, should instead be construed as requiring her to pursue some PAGA remedies in court and some in arbitration. But although Ms. Moriana is not entitled to seek the *same* penalties for the *same* violations in both forums, neither PAGA's statutory text nor its underlying purposes preclude her from asserting her "aggrieved employee" status in both.

For these reasons, even if the Court were to conclude that an FAA-covered arbitration agreement that required PAGA plaintiffs to pursue some remedies in court and some in arbitration should be treated as two separate and independent actions, Ms. Moriana would still have "aggrieved employee" standing to pursue her representative claims. While such an agreement would limit which civil penalties she could pursue in which forum, it could not affect her status as an aggrieved employee unless and until a final judgment were entered that definitively established that she was *not* an aggrieved employee. As *Kim* makes clear, it is plaintiff's status as an aggrieved employee, not the redressability of any injury she may have suffered, that determines the availability of PAGA standing. Any other result would decimate, rather than further, PAGA's statutory purposes.

If Ms. Moriana Cannot Pursue Her "Non-Individual" PAGA Claims in Court, the Agreement Must be Found Unenforceable Under State Law

Finally, if this Court (or the trial court) agrees with Part IV of *Viking River* and concludes that the DRP requires Ms. Moriana to pursue her representative claims for "individual" civil penalties in arbitration and for "non-individual" penalties in an *unavailable* (for lack of standing) judicial forum, that non-negotiable DRP would be violate California public policy, and would therefore be void and unenforceable. That is because it would strip Ms. Moriana of non-waivable statutory rights while immunizing Viking from all but the tiniest portion of the PAGA statutory penalties made available by the Legislature to deter and punish employers who commit Labor Code violations against their workers. (See *Iskanian*, 59 Cal.4th at p. 384, quoting *Brown v. Ralphs Grocery Co*. (2011) 197 Cal.App.4th 489, 502 ["As one Court of Appeal has observed, '[A]ssuming it is authorized, a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. That plaintiff and other employees might be able

to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if an individual claim has collateral estoppel effects.'"].)

Iskanian's principal rule, which prohibits contractual waivers of statutory rights enacted for a public purpose, rests in part upon Civil Code § 3513, which states that "a law established for a public reason cannot be contravened by a private agreement," and Civil Code § 1668, which states that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his … violation of law, whether willful or negligent, are against the policy of the law." This same rule that invalidates arbitration agreements that *directly* waive an aggrieved employee's right to pursue PAGA relief should also invalidate agreements that accomplish that result *indirectly*. Just as an employer may not prohibit its employees from pursuing PAGA claims altogether, neither may it require them to pursue the most substantial portion of those claims in a forum that is not legally available to them because of a contractual requirement mandating that the claim be split in two. Because that construction of the DRP and PAGA standing would allow Viking—or any company—to structure its arbitration agreements to exempt it from responsibility for its own future violations of law, any such agreement must be declared void and unenforceable, thus permitting the plaintiff to pursue her entire statutory claim in court. (See *Iskanian*, 59 Cal.4th at p. 383; *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 100.)

Under California law, "'[i]f a contract is capable of two constructions courts are bound to give such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect....'" (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 953-954, quoting *Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 160; see also *People v. Parmar* (2001) 86 Cal.App.4th 781, 802 ["[W]e will not construe a contract in a manner that will render it unlawful if it reasonably can be construed in a manner which will uphold its validity."].) The Court should therefore construe the DRP as allowing plaintiff to pursue *both* components of her representative PAGA action; and for the reasons stated above, to allow her to pursue all the PAGA claims in court, because that is what the language of the DRP requires.[6]

Conclusion

For the reasons stated, the Court should again affirm the ruling of the trial court and should order this matter to proceed to trial in Superior Court.

Plaintiff requests oral argument with respect to the issues set forth herein.

Respectfully submitted,

[6] To the extent Viking argues otherwise, it would also be violating its implied covenant of good faith and fair dealing, which "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement" (*Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818) and which "not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (*Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1093.)

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PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On October 20, 2022, I served the following document(s):

Supplemental Letter Brief

on the parties for service as designated below:

By filing via TrueFiling: I filed and served such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service.

By email: I caused such document(s) to be served via electronic mail on the parties in this action by transmitting true and correct copies to the following email address(es):

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By First-Class Mail: I am familiar with Altshuler Berzon LLP's practice of collection and processing correspondence for mailing with the United States Postal Service, and I placed a true copy thereof, via U.S. Mail enclosed in a sealed envelope, postage prepaid, addressed as follows:

Honorable Gail Killefer
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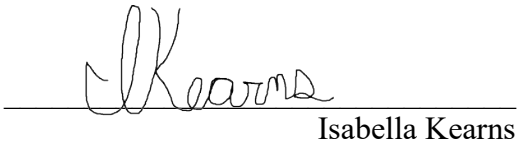
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed October 20, 2022, at San Francisco, California.



Isabella Kearns

TAB 13

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Larry Van Steenhuyse Plaintiff/Petitioner(s) vs. UBS Financial Service, Inc. Defendant/Respondent(s)	No. RG18894787 Date: 10/06/2022 Time: 4:13 PM Dept: 21 Judge: Evelio Grillo ORDER re: Ruling on Submitted Matter

The Court, having taken the matter under submission on 10/05/2022, now rules as follows: The Motion of defendant to compel plaintiff to arbitrate "individual" PAGA claims is DENIED. The motion to dismiss "representative" PAGA clams is DENIED.

BACKGROUND - GENERAL

On 2/16/18, Van Steenhuyse filed the first filed case of Van Steenhuyse v. UBS, RG18-894787, asserting claims on behalf of the LWDA under PAGA.

On 4/3/18, UBS filed an answer. UBS's Thirtieth Affirmative Defense was that plaintiff Van Steenhuyse had an arbitration agreement.

UBS removed the case to federal court. On 7/5/18, the federal court remanded the case to state court. (Van Steenhuyse v. UBS Fin. Servs. (N.D. Cal. 2018) 317 F.Supp.3d 1062)

On 2/22/19, Hutcheson filed the second filed case of Hutcheson v. UBS, RG19-008003, asserting claims on behalf of the LWDA under PAGA.

On 5/9/19, UBS filed an answer. UBS's Thirty-First Affirmative Defense was that plaintiff Hutcheson had an arbitration agreement.

On 9/3/19, the court entered an order permitting filing of First Amended Complaint that removed Van Steenhuyse as a plaintiff in Van Steenhuyse v. UBS, RG18-894787, and added Hutcheson as a plaintiff in that case, which is the currently pending case.

On 10/23/19, Hutcheson dismissed the second filed case of Hutcheson v. UBS, RG19-008003.

On 9/29/19, UBS filed a motion for summary judgment on the relation back issue in the context of claims on behalf of the LWDA under the PAGA. The trial court granted the motion. The Court of Appeal reversed, holing that that the doctrine of relation back does apply to PAGA claims in these circumstances. (Hutcheson v. Superior Ct. (2022) 74 Cal.App.5th 932.)

On 6/15/22 the United States Supreme Court issued Viking River Cruises, Inc. v. Moriana (2022) __ U.S. __, 142 S.Ct. 1906, 1916.

On 6/27/22, UBS filed a motion to compel Hutcheson to arbitrate his "individual" PAGA claims and to dismiss the "representative" PAGA claims.

Andrew Hutcheson worked for UBS as a financial advisor from 4/29/11 through 12/20/17. Hutcheson signed agreements containing substantially similar arbitration clauses. The most recent agreement was the Deferred Cash Award Agreement (Agreement) attached as Exhibit 1 to the Clapp declaration. (Hutcheson Dec., para 2)

WAIVER OF RIGHT TO ARBITRATION - LAW

The arbitration agreement states it is governed by the FAA. (Maryott Dec, Exh A, Agreement para 6.a) Therefore, the question of whether UBS has waived its right to compel arbitration is governed by federal law. (Aviation Data, Inc. v. Am. Express Travel Related Servs. Co. (2007) 152 Cal.App.4th 1522, 1535.)

The United States Supreme Court recently held that under the FAA a defendant waives arbitration when it "knowingly relinquish[es] the right to arbitrate by acting inconsistently with that right." (Morgan v. Sundance, Inc. (2022) 142 S.Ct. 1708, 1714.) No showing of prejudice to the opposing party is required because the FAA's "equal treatment" principle prohibits courts from construing arbitration contracts any differently than other contracts, whether more or less favorably, and prejudice is not an element of common-law waiver. (142 S.Ct. at 1713.) The FAA prohibits courts from adopting any "special, arbitration-preferring procedural rules" that "tilt the playing field in favor of (or against) arbitration." (142 S.Ct. at 1713-14.)

The court has found very little federal law on waivers of contract terms outside the arbitration context.

Regarding the burden of proof, the court finds that the party asserting waiver has the burden of proof.

Regarding the quantum of proof, the court finds that under federal law the party asserting waiver must prove waiver by the normal standard of preponderance of evidence.

The preponderance of evidence standard is consistent with the Morgan's statement that the FAA prohibits courts from adopting any "special, arbitration-preferring procedural rules" that "tilt the playing field in favor of (or against) arbitration." (142 S.Ct. at 1713-14.) (Westfed Holdings, Inc. v. U.S. (Fed Cir., 2005) 407 F.3d 1352, 1360 ["As the party claiming waiver, the government bears the burden of proof to show by a preponderance of evidence that Westfed waived its rights to assert its breach of contract claim."].)

The court has considered the federal cases on removal waivers that distinguish between contractual waivers, which are subject to normal contract law, and litigation based waivers, which require clear and unequivocal evidence of waiver. (Snapper, Inc. v. Redan (11th Cir., 1999) 171 F.3d 1249, 1261; Nortek Security & Control LLC v. Security Data Supply, LLC (N.D. Cal., 2018) 2018 WL 6411352.)

Litigation based waivers require clear and unequivocal evidence of waiver because "Otherwise, parties would be put in the difficult position of, on the one hand, not taking any action in state court in order to preserve definitively the right to remove and, on the other hand, running the risk of a default judgment unless they take steps to defend the action in state court. " (Snapper, 171 F.3d at 1261.)

Any non-FAA based rationale for the "clear and unequivocal" standard does not apply for motions to compel arbitration. The defendant is presumably aware of its own contractual right to arbitrate. The defendant can file a motion to compel arbitration with its initial pleading. Under the FAA, the defendant filing a motion to compel arbitration can seek to stay the case. (9 USCA 3) Under California law, a defendant seeking arbitration can also seek to stay the case before the court has decide the motion to compel arbitration. (CCP 1281.4.) Therefore, the defendant is not in "the difficult position" of determining whether to file a motion to compel arbitration or to run the risk of a default judgment. The defendant can file the motion at the earliest possible opportunity.

Regarding what constitutes "knowingly relinquish the right to arbitrate by acting inconsistently with that right," the court has considered federal cases on waiver in other contexts.

In the context of a contractual right to remove to federal court, Kenny v. Wal–Mart Stores, Inc. (9th Cir. 2018) 881 F.3d 786, 790, states: "For example, when "a party takes necessary defensive action to avoid a judgment being entered automatically against him, such action does not manifest an intent to litigate in state court, and accordingly, does not waive the right to remove." … Generally speaking, "the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits.""

In the context of a contractual forum selection clause, Allianz Global Risks U.S. Ins. Co. v. Ershigs, Inc. (W.D. Wa., 2015) 138 F.Supp.3d 1183, 1188, states: " Some courts have imposed a requirement that "a defendant must assert a motion to dismiss for forum non conveniens within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant." … However, even when imposing such a reasonableness requirement, "untimeliness will not effect a waiver"; rather, "it should weigh heavily against the granting of the motion because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconvenience the doctrine is meant to relieve.""

WAIVER OF RIGHT TO ARBITRATION – FACTS

First, UBS knew that it had the contractual right to arbitration. The contract clause was in the UBS contract and UBS was aware of the contract terms. On 4/3/18 and again on 5/9/19, UBS filed an answer that asserted arbitration as an affirmative defense.

Second, UBS acted inconsistently with its right to arbitration. In Morgan, the Supreme Court did not itemize factors for the court to consider. The trial court considers the facts in the record.

UBS delayed filing a motion to compel arbitration. The stated purpose of private arbitration is prompt and simple resolution of private disputes. UBS delayed for a long period before seeking a

stay – on 2/16/18, Van Steenhuyse filed the first filed case, on 2/22/19, Hutcheson filed the second filed case, and it was not till 6/27/22 that UBS filed a motion to compel arbitration.

UBS sought adjudication in the trial court on a substantive issue. UBS's motion for summary adjudication in the court was inconsistent with its stated desire to resolve the dispute in arbitration. (Hutcheson v. Superior Ct. (2022) 74 Cal.App.5th 932.) A party cannot seek summary adjudication in court and then after losing in court then rely on an arbitration agreement to start again in the arbitration forum.

The court finds that plaintiff has demonstrated waiver by a preponderance of the evidence. If the "clear and unequivocal" standard applies, then the court also finds that plaintiff has demonstrated waiver with the "clear and unequivocal" evidence of the over four year delay and the motion for summary adjudication.

WAIVER OF RIGHT TO ARBITRATION – FUTILITY – LAW

UBS's argument against waiver rests almost entirely on the argument that a motion to compel arbitration would have been futile before Viking River.

Under federal law, a party arguing futility must demonstrate with "clear and positive evidence that the … remedies are futile or useless." (Kunda v. C.R. Bard., Inc, 671 F.3d 464, 472 (4th Cir.2011) "The futility exception ... is quite restricted, and has been applied only when resort to administrative remedies is 'clearly useless.' " (Kern v. Verizon Commc'ns, Inc., 381 F.Supp.2d 532, 537 (N.D.W.Va.2005).) (See also Coomer v. Bethesda Hosp., Inc. (2004) 370 F.3d 499, 505 ["The standard for adjudging the futility of resorting to the administrative remedies … is whether a clear and positive indication of futility can be made."].)

Under federal law, " a party must move to compel arbitration whenever "it should have been clear to [the party] that the arbitration agreement was at least arguably enforceable."" (Garcia v. Wachovia Corp. (11th Cir. 2012) 699 F.3d 1273, 1278.) "The more lenient unlikely-to-succeed standard that [defendant] proposes would only "encourage litigants to delay moving to compel arbitration until they could ascertain how the case was going in federal district court," …, and would undermine one "of the basic purposes of arbitration: a fast, inexpensive resolution of claims."" (Garcia, 699 F.3d at 1279.) (See also Coomer v. Bethesda Hosp., Inc. (2004) 370 F.3d 499, 505 ["A plaintiff must show that "it is certain that his claim will be denied on appeal, not merely that he doubts that an appeal will result in a different decision."].)

The "futility" argument has a high standard because it cannot override all the other aspects of the requirement to preserve objections and exhaust remedies. The law is always in a state of development and clarification. It would wreak havoc generally if any clarification of the law permitted a party to raise new issues on appeal that the party had not raised in the trial court because the party thought they had little merit. It would wreak

havoc specifically if any clarification of the law on the enforceability of arbitration agreements permitted a party (plaintiff or defendant) to reopen the issue of whether a dispute should be resolved in court or in arbitration after substantive proceedings in one forum or the other were underway.

WAIVER OF RIGHT TO ARBITRATION – FUTILITY – FACTS

USB has the burden of demonstrating futility with clear and positive evidence. USB has not demonstrated that a motion to compel in 2018 or 2019 would have been futile.

Generally, the court need only look at the procedural history of Viking River. The US Supreme Court decided the case on 6/15/22. The California Court of Appeal decided the case on 9/18/20. (Moriana v. Viking River (9/18/20) 2020 WL 5584508.) The notice of appeal in the California Court of Appeal was filed on 5/6/19. (Judicial notice of the Court of Appeal record. Evid Code 452.) The court has no evidence regarding the exact month or date of the trial court motion or the trial court order, but the court can reasonably infer that Viking River filed its motion to compel arbitration in or about December 2018. This is shortly after the federal court remanded this case to state court. UBS could reasonably have filed motion to compel arbitration at the same time as Viking River filed its motion to compel arbitration.

Specifically, on 4/3/17 UBS actually did file a motion seeking arbitration in a different PAGA case, and it made the very argument that the U.S. Supreme Court eventually accepted in Viking River (Sahu v. UBS Financial Services, Inc., Case No. RG16837082 [Mtn. at 17 n.4; Maryott Dec., Exh. 6 and 7].)

CONCLUSION

The court finds that plaintiff has demonstrated that UBS has waived its right to compel arbitration. The court finds that UBS has not demonstrated that it was excused from filing a motion to compel arbitration because such a motion would have been futile.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 10/06/2022

Evelio Grillo / Judge