APPENDIX A

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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 of Patrick Pote's claims brought under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). Handy primarily contends its motion should have been granted and Pote ordered to arbitrate as an individual because *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), on which the superior court relied to deny Handy's motion, is irreconcilable with the subsequent United States Supreme Court decision in *Epic Systems Corp. v. Lewis* (2018) ___ U.S. ___ [138 S.Ct. 1612] (*Epic Systems*). We affirm.

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 flat rates per job; and Handy's flat 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 had 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 pursuant, in part, to Code of Civil Procedure section 1281.2 and the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.).

a. *The Carson declaration and Handy's Independent Contractor Acknowledgment*

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. Carson's review of Handy's business records showed that on April 9, 2018 Pote logged into Handy's application for mobile devices that he had downloaded to his phone. 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."

b. *The April 9, 2018 Service Professional Agreement*

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

Section 12.2 of the April 9, 2018 agreement, which was titled "Mutual Arbitration Provision," provided in part, 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." Section 12.2 also provided, "This Mutual Arbitration Provision is governed by the Federal Arbitration Act (9 U.S.C. [§§] 1-16) and shall survive the termination of this Agreement."

Section 12.2(c), which was titled "Representative Action Waiver—Please Read" in typeface that was underlined and in bold and all capital letters, provided, "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, 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."

Section 12.2(i), which was titled "Service Professional's Right to Opt Out of Arbitration," provided, "Arbitration is not a mandatory condition of Service Professional's contractual relationship with Handy. . . . In order to opt out, Service Professional must notify Handy of Service Professional's intention to opt out by submitting to Handy . . . a signed and dated written notice stating that Service Professional is opting out of this Mutual Arbitration Provision. Service Professional also may opt out by sending an email. . . . In order to be effective, Service Professional's opt out notice must be provided within 30 days of the date this Agreement is electronically signed by Service Professional ('Effective Date')." The April 9, 2018 agreement provided the mailing and email addresses for any opt-out notice to be sent. In his declaration Carson explained Pote did not exercise his right to opt out of the April 9, 2018 agreement or any subsequent agreements.

c. *The October 26, 2018 Service Professional Agreement*

Carson averred that, any time Handy makes changes to the Acknowledgement or Service Professional Agreement, the service professional must confirm and accept the new terms in Handy's mobile

application. According to Carson, on October 26, 2018 Pote confirmed and accepted an updated version of the Acknowledgment, as well as of the Service Professional Agreement (October 26, 2018 agreement), both of which Carson attached to his declaration.

Carson stated the October 26, 2018 agreement was "substantially similar" to the April 9, 2018 agreement but with "minor changes" to the arbitration provision. Specifically, section 12.2(c) of the October 26, 2018 agreement, which again was titled "Representative Action Waiver—Please Read" in typeface that was underlined and in bold and all capital letters, was modified from the April 9, 2018 version and provided, "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 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."[1]

d. *Handy's arguments in support of its motion*

In support of its motion to compel arbitration Handy argued the parties' mutual agreement to arbitrate was valid and enforceable and required Pote's claims for unpaid wages under PAGA and for PAGA civil penalties to be arbitrated on an individual (non-representative) basis. Specifically, relying on *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, which, as Handy explained, ruled that an employee's PAGA claims seeking victim-specific unpaid wages, as opposed to civil penalties, were not exempt from arbitration under *Iskanian*, *supra*, 59 Cal.4th 348, Handy contended the Representative Action Waiver (in both the April 9, 2018 agreement and the October 26, 2018 agreement) was enforceable as to, and required individual arbitration of, Pote's PAGA claims seeking victim-specific unpaid wages. As for Pote's PAGA claims for civil penalties, Handy asserted the Representative Action Waiver was also enforceable as to, and required individual arbitration of, those claims because "*Iskanian*'s prohibition of individual arbitration of PAGA civil-penalty claims is irreconcilable with *Epic Systems*[, *supra*, 138 S.Ct. 1612]." In the alternative Handy argued, if the superior court were to decline to

[1] The quoted provisions of section 12.2 in the April 9, 2018 agreement (including section 12.2(i)) were otherwise nearly identical to the corresponding provisions in the October 26, 2018 agreement.

enforce the Representative Action Waiver in its entirety, the court should sever and stay Pote's PAGA claims for civil penalties pending completion of individual arbitration of his claims for victim-specific relief.

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

On April 8, 2019 Pote filed an opposition to Handy's motion to compel arbitration and to stay litigation. As procedural background Pote in his opposition explained that on September 14, 2018, pursuant to Labor Code section 2699.3, he (through his attorney) submitted notice to the California Labor and Workforce Development Agency (LWDA) and to Handy of Handy's alleged violations of specific provisions of the Labor Code. The notice also informed the LWDA and Handy of Pote's intent to file an action under PAGA against Handy. Pote's opposition stated the LWDA, pursuant to Labor Code section 2699.3, had 65 days to respond to his PAGA notice and when the 65-day period expired without any action by the LWDA, Pote amended his complaint to add a cause of action under PAGA for those alleged Labor Code violations. In support of his opposition Pote filed his attorney's declaration attaching a copy of the September 14, 2018 PAGA notice. Pote's opposition also stated he filed his action on October 3, 2018 against Handy, initially seeking declaratory relief regarding enforceability of provisions of Handy's Service Professional Agreement, and later

amended his complaint to add a single cause of action under PAGA.[2]

As for Pote's arguments, he contended the Representative Action Waiver was unenforceable under *Iskanian*, *supra*, 59 Cal.4th 348. He presented various arguments why *Epic Systems*, *supra*, 138 S.Ct. 1612 did not overrule *Iskanian*.

Pote also argued Handy's contention the Representative Action Waiver should be enforced as to Pote's victim-specific claims failed, among other reasons, because he made no victim-specific claims and only sought penalties under PAGA. In his supporting declaration Pote's attorney averred Pote was limiting his claims to PAGA representative claims seeking civil penalties, including unpaid wages, on behalf of the State of California. Subsequently, 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 which the Court held representative plaintiffs could not recover unpaid wages under PAGA. Pote's notice of new authority explained Pote thus 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 to compel arbitration. Handy argued,

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[2] In its motion to compel arbitration Handy similarly explained Pote "for the first time" brought a PAGA representative action in his first amended complaint filed on November 19, 2018.

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 initiated the dispute and reaffirmed his assent to that waiver on November 25, 2018, the expiration date of the 30-day window to opt out.

5. *The Superior Court's Order*

The superior court issued a tentative ruling denying Handy's motion. The court rejected Handy's argument that Pote's claims for civil penalties under PAGA should be compelled to individual arbitration based on the Representative Action Waiver. Among other matters the court cited authority for the proposition a single representative PAGA claim could not be split into an arbitrable individual claim and a nonarbitrable representative claim; determined *Epic Systems*, *supra*, 138 S.Ct. 1612 did not invalidate the California Supreme Court's holding in *Iskanian*, *supra*, 59 Cal.4th 348 that an employee's right to bring a representative PAGA action is unwaivable; and, because it was still bound by *Iskanian*, concluded 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, on the ground Handy raised that argument for the first

time in its reply brief and thus to consider it would deprive Pote of the opportunity to respond.

The court also rejected Handy's argument that Pote's PAGA claims seeking damages on behalf of affected workers, such as victim-specific unpaid wages, should be compelled to individual arbitration, finding Pote had not brought any victim-specific claims. Finally, it denied Handy's request for a stay of the litigation pending arbitration of victim-specific or any other claims because it ordered no part of the action to arbitration.

At the hearing on its motion Handy's attorney asked the court to allow Pote to provide supplemental briefing on the postdispute waiver argument so that the court could entertain the issue. Pote's counsel told the court it was inappropriate for Handy to raise a completely new issue on reply. The superior court agreed with Pote's attorney and adopted as its order the tentative ruling denying Handy's motion to compel arbitration and to stay litigation.

DISCUSSION

1. *Standard of Review*

Code of Civil Procedure section 1281.2 requires the trial court to order arbitration of a controversy "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate such controversy . . . if it

determines that an agreement to arbitrate the controversy exists."[3] The party seeking to compel arbitration bears the burden of proving an agreement to arbitrate exists. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*). If an agreement to arbitrate exists, the burden shifts to the party refusing arbitration to demonstrate the agreement is unenforceable. (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972; *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413; see *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [section 2 of the FAA "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract'"].)

Absent conflicting extrinsic evidence, the validity of an arbitration clause is a question of law subject to de novo review. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1468; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277.) We also

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[3] Even where the FAA applies, the question whether an agreement to arbitrate a particular controversy exists is governed by state law. (See *First Options of Chicago*, *Inc. v. Kaplan* (1995) 514 U.S. 938, 944 ["[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary . . . principles that govern the formation of contracts"]; *McGill v. Citibank, N.A*. (2017) 2 Cal.5th 945, 961-962 [rejecting argument that FAA preempts state contract principles; the question whether an agreement has been formed to arbitrate a particular dispute is one of contract interpretation under state law]; see generally *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 289 [FAA simply reverses judicial hostility to arbitration agreements by placing them on same footing as any other contract].)

review de novo the interpretation of an arbitration agreement, including the scope of the agreement, when that interpretation does not depend on the resolution of conflicting extrinsic evidence. (*Pinnacle*, *supra*, 55 Cal.4th at p. 236; see *Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 619, fn. 11 [absent conflicting extrinsic evidence, the "determination whether FINRA's arbitration rules cover a particular dispute" is a question of law subject to de novo review]; *Valentine Capital Asset Management, Inc. v. Agahi* (2009) 174 Cal.App.4th 606, 613 [same].)

2. *This Court Remains Bound by* Iskanian

As the trial court accurately stated, the California Supreme Court in *Iskanian*, *supra*, 59 Cal.4th 348, held representative PAGA action waivers are unenforceable. The United States Supreme Court's decision in *Epic Systems*, *supra*, 138 S.Ct. 1612 did not address that question and did not overrule or disapprove *Iskanian*. Handy's argument the analysis underlying *Iskanian* is incompatible with that in *Epic Systems* is properly addressed to the California Supreme Court or the United States Supreme Court,[4] not to this court: "On federal questions, intermediate appellate courts in

[4] A petition for writ of certiorari, currently pending in the United States Supreme Court in *Viking River Cruises, Inc. v. Moriana* (No. 20-1573), seeks review of an unpublished decision from Division Three of this court and asks the Supreme Court to decide "[w]hether the [FAA] requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA."

California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently." (*Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619; accord, *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 470; *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862, 870; see generally *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) *Iskanian* remains controlling authority.

a. 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 Court also rejected the argument the National Labor Relations Act (NLRA)—which at section 7 provides employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and at section 8(a) states it is an unfair labor practice for an employer to interfere with, coerce or restrain employees in the exercise of rights under section 7 (*Iskanian*, at pp. 360, 367-368)—rendered the class action waiver unlawful: "We . . . conclude, in light of the FAA's '"liberal federal policy

favoring arbitration"' [citation], that sections 7 and 8 [of] the NLRA do not represent '"a contrary congressional command"' overriding the FAA's mandate." (*Id*. at p. 373.)

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 explained a PAGA representative action is "a type of qui tam action. . . . The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." (*Iskanian*, *supra*, 59 Cal.4th at p. 382.) Because "the Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the [LWDA]," "an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code"; "has as its 'object, . . . indirectly, to exempt

[the employer] from responsibility for [its] own . . . violation of law' "; and thus is "against public policy and may not be enforced." (*Id*. at p. 383.)

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.' [Citation.] [¶] . . . Representative 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. Instead, they directly enforce *the state's* interest in penalizing and deterring employers

who violate California's labor laws." (*Id*. at pp. 386-387.) The Court concluded, "California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the [LWDA's] interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution." (*Id.* at pp. 388-389.)

b. Epic Systems

Epic Systems, *supra*, 138 S.Ct. 1612 did not involve waiver of a right to bring a representative action like a PAGA claim. An accounting firm and one of its accountants had agreed to arbitrate any disputes that might arise between them, with arbitration to be individualized so that claims concerning different employees would be heard in separate proceedings. After his employment ended, the accountant sued the firm in federal court, alleging violations of the federal Fair Labor Standards Act (FLSA) and California law, and sought to pursue his federal claim on behalf of a nationwide class under the FLSA's collective action provision and his state claim as a class action. The firm brought a motion to compel arbitration, which the district court granted. The Ninth Circuit reversed: The FAA's saving clause (9 U.S.C. § 2), the Ninth Circuit determined, removed the general obligation to enforce arbitration agreements as written if the agreement violates some other federal law; and an agreement requiring individualized arbitration proceedings violated the NLRA by precluding employees from engaging in the concerted activity of pursuing claims as a

class or collective action. (*Epic Systems*, at pp. 1619-1620.) The United States Supreme Court disagreed, concluding the FAA and the NLRA, "[f]ar from conflicting," "have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful." (*Id*. at p. 1619.)

The decision in *Epic Systems*, which parallels the class action portion of *Iskanian*, did not address whether an employee may waive a right to bring a representative action on behalf of a state government or even consider the underlying premise of *Iskanian* that a PAGA action is not an individual dispute between private parties but an action brought on behalf of the state by an aggrieved worker designated by statute to be a representative of the state. Accordingly, Handy's contention *Iskanian* cannot be reconciled with *Epic Systems* is simply incorrect.[5] As observed by Division

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[5] The same or substantially similar arguments urging courts of appeal to decline to apply *Iskanian*'s anti-PAGA waiver rule have been uniformly rejected. (See, e.g., *Winns v. Postmates Inc.* (2021) 66 Cal.App.5th 803; *Rosales v. Uber Technologies, Inc*. (2021) 63 Cal.App.5th 937, 943-945; *Contreras v. Superior of Los Angeles County*, *supra*, 61 Cal.App.5th at pp. 471-472; *Olson v. Lyft, Inc*., *supra*, 56 Cal.App.5th at pp. 867-868, 872; *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at pp. 619-620; see also *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 86-87 [stating a PAGA claim "is different from a class action" and relying on *Iskanian* for the proposition "[t]here is no individual component to a PAGA action"]; *ZB, N.A. v. Superior Court*, *supra*, 8 Cal.5th at pp. 197-198 ["*Iskanian* established an important principle: employers cannot compel employees to waive their right to enforce the state's interests when the PAGA has empowered employees to do so"; "[a]n employee's predispute

One of the Fourth District in *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at page 620, "*Epic* did not reach the issue regarding whether a governmental claim of this nature is governed by the FAA, or consider the implications of a complete ban on a state law enforcement action. Because *Epic* did not overrule *Iskanian*'s holding, we remain bound by the California Supreme Court's decision."

3. *Handy's Remaining Arguments Do Not Compel a Different Result*

Handy, relying on an unpublished 2009 federal district court decision, asserts the state's ownership of PAGA claims is a "legal fiction." Handy's cryptic argument does not change the fact "the state is the real party in interest." (*Iskanian*, *supra*, 59 Cal.4th at p. 387; see *id*. at p. 388 ["importantly, a PAGA litigant's status as 'the proxy or agent' of the state [citation] is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies"]; see also *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 86 ["a PAGA claim is an enforcement action between the LWDA and the employer, with the PAGA plaintiff acting on behalf of the government"; "civil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' *not* to redress employees' injuries"].)

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agreement to individually arbitrate her claims is unenforceable where it blocks an employee's PAGA claim from proceeding"].)

Advancing a different argument, but again citing federal decisions, including *Valdez v. Terminix International Co. Limited Partnership* (9th Cir. 2017) 681 Fed. Appx. 592, Handy contends individual employees can pursue PAGA claims in arbitration because they are acting with the state's consent, as evidenced by the state's decision not to pursue the PAGA claim itself.[6] In *Valdez*, the Ninth Circuit concluded, "[A]n individual employee, acting as an agent for the government, can agree to pursue a PAGA claim in arbitration. *Iskanian* does not require that a PAGA claim be pursued in the judicial forum; it holds only that a complete waiver of the right to bring a PAGA claim is invalid." (*Id*. at p. 594.) Setting aside whether we agree with those federal decisions, Handy ignores that in the case at bar the Representative Action Waivers in both agreements purported to waive the "right to have any dispute or claim brought, heard or arbitrated as a representative action" and thus to effect a complete waiver of the right to bring PAGA claims, which can

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[6] The party seeking enforcement of an arbitration contract has the burden of establishing the authority of a person who purportedly signed the agreement as an agent on behalf of a nonsignatory party. (See, e.g., *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 506 ["burden of proving ostensible agency is upon the party asserting that relationship"]; *Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 301-302 [skilled nursing facility failed to produce required evidence that children of deceased mother had authority to enter into an arbitration agreement on her behalf]; *Oswald Machine & Equipment, Inc. v. Yip* (1992) 10 Cal.App.4th 1238, 1247 ["[u]nless the evidence is undisputed, the scope of an agency relationship is a question of fact, and the burden of proof rests on the party asserting the relationship"].)

only be brought as a representative action (e.g., *Kim v. Reins International California, Inc.*, *supra*, 9 Cal.5th at pp. 86-87); they are thus unenforceable under *Iskanian*.[7]

Insisting the trial court erred in ruling the argument had been forfeited, Handy contends *Iskanian* does not control, in any event, because its holding was limited to predispute waivers, while Pote's waiver is contained in an agreement signed after he was aware of the claimed Labor Code violations. (*Iskanian*, *supra*, 59 Cal.4th at p. 383 ["Of course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations. [Citation.] But it is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises"].)

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[7] In *Valdez v. Terminix International Co. Limited Partnership*, *supra*, 681 Fed. Appx. at page 594, the Ninth Circuit also stated, "The parties mutually agreed 'to arbitrate covered Disputes.' That clause of the parties' agreement applies even after the representative action waiver is severed." If Handy is relying on *Valdez* to argue the superior court erred by not severing the unenforceable provisions of the October 26, 2018 agreement purporting to waive the right to bring a representative action in any forum (that is, the "right to have any dispute or claim brought, heard or arbitrated as a representative action") and ordering the PAGA claims to arbitration, Handy ignores that the agreement separately provides "an arbitrator shall not have any authority to arbitrate a representative action," that Pote only brought PAGA claims, and that PAGA claims can only be brought as a representative action.

Handy contends Pote's dispute with Handy arose no later than September 14, 2018, when Pote's attorney served Pote's PAGA notice alleging Handy's Labor Code violations on Handy and the state (LWDA). Yet Pote agreed on October 26, 2018 to waive representative actions and failed to exercise his right to opt out by November 25, 2018. Emphasizing the late November date, Handy argues Pote's PAGA waiver was postdispute and thus enforceable because it occurred after Pote's dispute with Handy arose; after Pote was represented by counsel; after Pote filed his original complaint on October 3, 2018; after the LWDA failed to respond within 65 days of the September 14, 2018 PAGA notice; and after Pote filed his operative amended complaint alleging a PAGA claim on November 3, 2018. Handy asserts, during the postdispute phase in which the state has declined to prosecute an employee's PAGA claim (that is, after November 18, 2018), the employee has already been "deputized" to act on the state's behalf and has freedom to control how to pursue the PAGA claim, including whether to agree to individualized arbitration of the claim.

As explained by Division Four of this court in *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 866 (*Julian*), "Labor Code section 2699.3, subdivision (a), sets forth the procedures with which an aggrieved employee must comply in order to commence a PAGA action." "[A]n arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action does not encompass that action. Prior to satisfying those requirements, an

employee enters into the agreement as an individual, rather than as an agent or representative of the state. As an individual, the employee is not authorized to assert a PAGA claim; the state—through LWDA—retains control of the right underlying any PAGA claim by the employee. Thus, such a predispute agreement does not subject the PAGA claim to arbitration." (*Id*. at p. 872; see also *id*. at p. 870 ["Only after employees have satisfied the statutory requirements for commencing a PAGA action are they in a position 'to determine what trade-offs between arbitral efficiency and formal procedural protections best safeguard their statutory rights.' [Citation.] Prior to that point, the employees either have submitted no allegations of Labor Code violations to LWDA, or have done so, but await LWDA's determination regarding the extent to which LWDA itself will resolve the allegations"].)

Whatever the merits of Handy's arguments the superior court erred in finding forfeiture and the *Iskanian* holding is limited to predispute waivers, Pote entered into a predispute, not postdispute, waiver. As our colleagues in *Julian*, *supra*, 17 Cal.App.5th at page 870 explained, "[T]he predispute/postdispute boundary is crossed when the pertinent employee is authorized to commence a PAGA action as an agent of the state." Pote provided his PAGA notice to both Handy and the LWDA on September 14, 2018. Pursuant to Labor Code section 2699.3, subdivision (a), Pote lacked statutory authorization to commence his PAGA action until 65 days after that date—that is, November 18, 2018. He agreed to the waiver of representative actions on

October 26, 2018[8]—prior to both the November 18, 2018 date on which the 65-day waiting period to commence his PAGA action expired and the November 19, 2018 date on which he filed his first amended complaint alleging a cause of action under the PAGA.

Handy's contention we should consider the waiver date to be November 25, 2018, the last day on which he could opt out of the Mutual Arbitration Provision in the October 26, 2018 agreement, rather than October 26, 2018 itself, lacks merit. It is the October 26, 2018 agreement that contains the waiver, and it is that agreement Handy sought to enforce with its motion to compel arbitration. When Pote confirmed and accepted the October 26, 2018 agreement he was not yet authorized to commence his PAGA action as an agent of the state; he agreed in his individual capacity only. His corresponding right to opt out of the arbitration agreement was similarly an individual one. Pote's decision not to exercise that individual right does not effect a

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[8] The unambiguous language of the April 9, 2018 agreement shows Pote did not agree to arbitrate or waive his PAGA claim under that agreement. (See Civ. Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) As discussed, Section 12.2(c) of the April 9, 2018 agreement provided, "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." In its reply brief in this court Handy refers to the Representative Action Waiver of the October 26, 2018 agreement as the "operative version."

waiver of a claim belonging to the state. (Cf. *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at pp. 622-623 ["a person who signs an agreement in a particular capacity is not necessarily bound when acting in a different capacity"]; *Julian*, *supra*, 17 Cal.App.5th at pp. 871-872 ["[o]rdinarily, when a person who may act in two legal capacities executes an arbitration agreement in one of those capacities, the agreement does not encompass claims the person is entitled to assert in the other capacity"].) The provisions of the October 26, 2018 agreement, including any opt-out right, do not compel waiver of the PAGA claim.

Finally, Handy contends *Iskanian* is inapposite because, given section 12.2(i)'s opt-out provision, Pote was not compelled as a condition of his employment to accept Handy's arbitration provision. (See *Iskanian*, *supra*, 59 Cal.4th at p. 360 ["we conclude that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy"]; see *id*. at p. 384 ["[w]e conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law"].) Regardless of the merit of Handy's contention, if any, Handy fails to establish the superior court committed reversible error: Handy argued in the superior court, and asserts on appeal, Pote's PAGA claims must be arbitrated on an individualized, nonrepresentative basis, but, as discussed, "[t]here is no individual component to a PAGA action." (*Kim v. Reins*

International California, Inc., *supra*, 9 Cal.5th at pp. 86-87.)

DISPOSITION

The order denying Handy's motion to compel arbitration is affirmed. Pote is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.

APPENDIX B

Superior Court of California

County of Los Angeles

North Central District

Department B

PATRICK POTE, Plaintiff, v. HANDY TECHNOLOGIES, INC., Defendant.	Case No.: BC723965 Hearing Date: October 18, 2019 **[~~TENTATIVE~~] ORDER RE:** MOTION TO COMPEL ARBITRATION (Filed Oct. 18, 2019)

BACKGROUND

A. Allegations of the FAC

Plaintiff Patrick Pete ("Plaintiff") works as a house cleaner for Defendant Handy Technologies, Inc. ("Defendant" or "Handy"). He alleges he and other service providers clean and repair clients' houses for flat rates per job and that he was not paid for overtime, rest breaks, missed meals or rest breaks, expenses incurred like cleaning supplies or gas, or travel time to and between jobs.

The complaint was filed on October 3, 2018. The first amended complaint ("FAC"), filed November 19, 2018, alleges causes of action for: (1) declaratory relief;

and (2) violations of the Private Attorneys General Act ("PAGA") (Labor Code §2698 *et seq.*).

In the declaratory relief cause of action, Plaintiff alleges that there exists an actual and real controversy between the parties regarding whether the waiver to bring representative actions under PAGA in the arbitration agreement is enforceable. (FAC, ¶¶25-26.)

In the PAGA claim, Plaintiff alleges that he is an aggrieved employee who brings the claim in a representative capacity on behalf of current and former service providers of Defendant who were subjected to unlawful wage-and-hour practices. (FAC, ¶¶8, 31.) Plaintiff seeks to collect civil penalties for various Labor Code violations under sections 2699(f)(2) (for violating sections 432.5, 226,2, 226.7, 558, and 512), 226.3 (for violating section 226(a)), 203 (for violating sections 201 and 202), 558(a) (for violating section 510), 2699(f) (for violating sections 200 and 2802), and 225.5 (for violating section 221). (*Id.*, ¶34.) Plaintiff alleges that he submitted notice to the Labor and Workforce Development Agency ("LWDA") of the specific Labor Code violations. (*Id.*, ¶36.)

B. Motion to Compel Arbitration

On March 26, 2019, Defendant filed a motion to compel arbitration and to stay the litigation.

Plaintiff opposes.

DISCUSSION

a. Terms of the Agreement to Arbitration

In support of this motion, Defendant provides the declaration of Bailey Carson, who is the Senior Vice President of Growth for Defendant. Carson explains that cleaning professionals using Defendants software platform must first agree to Handy's Independent Contractor Acknowledgement and Service Professional Agreement (collectively, "Agreements"). (Carson Decl., ¶2.) Carson states that based on a review of Defendant's business records, Plaintiff is an independent cleaning professional who first booked a job using Handy's platform on April 12, 2018. (*Id.*, ¶4.)

By downloading and using the Handy mobile application, Plaintiff confirmed and accepted the Agreements on April 9, 2018 ("4/9/18 Agreement"). (*Id.*, ¶¶4-5, 9.) By doing so, Plaintiff checked the "I agree" button to various statements that comprise the 4/9/18 Independent Contractor Acknowledgement, including his understanding of a Mandatory and Exclusive Arbitration provision which requires the parties to submit disputes to final and binding arbitration. (*Id.*, ¶¶5-6; Ex. A [plain text of 4/9/18 Independent Contractor Acknowledgement].) Plaintiff then reviewed and accepted the 4/9/18 Service Professional Agreement in the mobile application, where he was informed to download the complete terms and review them without time limit. (*Id.*, ¶¶7-8; Ex. B [4/9/18 Service Professional Agreement].)

The 4/9/18 Service Professional Agreement states in relevant part:

> (c) **REPRESENTATIVE ACTION WAIVER-PLEASE 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, 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.

(*Id*., ¶¶10-13; 4/9/18 Service Professional Agreement, §12.2(c).) After accepting the terms, Plaintiff booked jobs on the Handy mobile application. (Carson Decl., ¶14.)

On October 26, 2018, Plaintiff confirmed and accepted an updated version of the Agreements ("10/26/18 Agreement"). (Carson Decl., ¶15, Exs. C-D.)

The 10/26/18 Service Professional Agreement is similar in content to the 4/9/18 Service Professional Agreement, but has some modification. Section 12.2's Mutual Arbitration Provision provides in relevant part:

> 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.
>
> Disputes and claims covered by this Mutual Arbitration Provision include, but are not limited to, any dispute, claim or controversy, whether based on past, present or future events, arising out of or relating to: this Agreement and any and all prior versions thereof (including the formation, breach, termination, enforcement, interpretation or validity thereof), the Service Professional's classification as an independent contractor, Service Professional's provision of Services under this Agreement, the payments received by Service Professional for providing Services, Service Professional's registration to use the Handy Platform, disputes with any entity or individual arising out of or related to the use of the Handy Platform, background checks, privacy, trade secrets, unfair competition, compensation, classification, minimum wage, seating, expense reimbursement, overtime, breaks and rest periods, retaliation,

discrimination or harassment and claims arising under the Fair Credit Reporting Act, the Uniform Trade Secrets Act, the Defend Trade Secrets Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. Â§1981, Rehabilitation Act, Civil Rights Acts of 1866 and 1871, the Civil Rights Act of 1991, the Pregnancy Discrimination Act, Equal Pay Act, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and (a) covered by the Employee Retirement Income Security Act of 1974 or (b) funded by insurance), Affordable Care Act, Genetic Information Non-Discrimination Act, Uniformed Services Employment and Reemployment Rights Act, Worker Adjustment and Retraining Notification Act, Older Workers Benefits Protection Act of 1990, Occupational Safety and Health Act, Consolidated Omnibus Budget Reconciliation Act of 1985, state or local statutes or regulations addressing the same or similar subject matters, and all other aspects of the Service Professional's relationship with Handy whether arising under federal, state or local statutory and/or common law. . . .

. . .

(c) **REPRESENTATIVE ACTION WAIVER-PLEASE 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 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.

. . .

(k) In the event any portion of this Mutual Arbitration Provision is deemed unenforceable, the remainder of this Mutual Arbitration Provision will be enforceable. In any case in which (1) the dispute is filed as a class, collective, or representative action and (2) there is a final judicial determination that all or part of the Class Action Waiver and/or Representative Action Waiver is invalid or unenforceable, the class, collective, or representative general action to that extent must be litigated in a civil court of competent jurisdiction, but the portion of the Class Action Waiver and Representative Action Waiver that is valid and enforceable shall be enforced in arbitration. To

> 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 Class Action Waiver and/or Representative Action Waiver is unenforceable, the parties agree that litigation of those claims shall be stayed pending the outcome of any individual claims in arbitration.

(*Id*., ¶16; 10/26/18 Service Professional Agreement, §12.2.)

Although not a term in the Agreements, Carson declares that Defendant is willing to bear all AAA's administration fees if this matter proceeds to arbitration. (Carson Decl., ¶18.)

b. Preliminary Issues

As a preliminary matter, the Court notes that the parties do not dispute that a valid agreement to arbitrate exists and that the Federal Arbitration Act (FAA) applies to the arbitration provision.[1]

Also, the delegation provision in the arbitration agreement reserves for the Court—and not an arbitrator—the issue of whether the purported representative

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[1] The 10/26/18 Service Professional Agreement, §12.2 states that the parties agree to submit their disputes to binding arbitration. It further states:

> "This Mutual Arbitration Provision is governed by the Federal Arbitration Act (9 U.S.C. Â§Â§ 1-16) and shall survive the termination of this Agreement."

action waiver clause is invalid or unenforceable under California law.[2] (See 10/26/18 Service Professional Agreement, §12.2(d).)

Thus, the main disagreement that the parties have with regard to the arbitration provision is whether the representative action waiver in the agreement is valid and enforceable.

c. Representative Action Waiver Clause

In the moving papers, Defendant argues that this Court should find that the representative action

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[2] The 10/26/18 Service Professional Agreement states in pertinent part in section 12.2:

> **Except as stated in Section 12.2(d), below, only an arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, validity, enforceability, conscionability, and/or formation of this Mutual Arbitration Provision.**
>
> . . .
>
> (d) Notwithstanding any other clause contained in this Agreement, this Mutual Arbitration Provision, or the AAA Rules, as defined below, any claim that all or part of the Class Action Waiver and/or Representative Action Waiver is unenforceable, invalid, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator. As stated above, all other disputes regarding interpretation, applicability, enforceability, or formation of this Mutual Arbitration Provision shall be determined exclusively by an arbitrator.

(Underline added.)

waiver is enforceable. It argues that Plaintiff's claims for unpaid wages and civil penalties should be compelled to individual arbitration because: (1) PAGA claims are subject to individual arbitration to the extent they seek damages on behalf of the affected workers themselves, such as victim-specific unpaid wages like Plaintiff, pursuant to *Esparza v. KS Industries, LLC* (2017) 13 Cal.App.5th 1228; and (2) any prohibition on the individual arbitration of PAGA civil penalty claims was implicitly overruled by the U.S. Supreme Court in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612.

In opposition, Plaintiff argues that this Court should decide that the representative action waiver is unenforceable and contrary to California law under *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, and that it is unenforceable as to Plaintiff's request for PAGA penalties arising from Labor Code §558. He argues that he seeks only PAGA penalties to be paid primarily to the State of California and that any proposal to send his PAGA claim to arbitration would constitute improper claim splitting.

1. *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348

In *Iskanian*, the California Supreme Court examined whether an employees right to bring a PAGA action is waivable. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382.) After reviewing the relevant statutes and case law, the Court came

to the conclusion that an employees right to bring a PAGA action is unwaivable. (*Id.* at 383.) The Court reasoned as follows:

> "The unwaivability of certain statutory rights 'derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' 'Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced.' [Citation.] Second, Civil Code section 3513 states, 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.'" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*).)"

(*Iskanian*, *supra*, 59 Cal.4th at 382-383.) The Court concluded that where "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." (*Id.* at 384.)

The Court proceeded to note that the FAA does not preempt the state law rule against waiver of an employee's right to bring a representative PAGA action

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*, any resulting judgment is binding on the state, and any monetary penalties largely go to state coffers (75%). (*Id.* at 384.) In sum, 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. (*Id.* at 386–387.) "Indeed, case law suggests that a single representative PAGA claim *cannot* be split into an arbitrable individual claim and a nonarbitrable representative claim. . . . 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. . . ." (*Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649.)

2. *Esparza v. KS Industries, LLC* (2017) 13 Cal.App.5th 1228

In *Esparza*, the Court of Appeal (Fifth District) held that the trial court's failure to order arbitration of some claims violated the FAA because those claims sought individualized, victim-specific relief and were covered by the parties' arbitration agreements. The Court noted that under the FAA, the claims that are *private* disputes between the employer and employee must be arbitrated, while PAGA *representative* claims

for "civil penalties" brought on behalf of the State (who was not a party to the arbitration agreement) need not be arbitrated. (*Esparza*, supra, 13 Cal.App.5th at 1234.)

The Court held that while *Iskanian* prevented the arbitration of claims in representative actions that seek "civil penalties" amounting to monetary relief allocated 75% to the LWDA and 25% to the aggrieved employees, "civil penalties" do not include unpaid wages payable solely to the aggrieved employee such as unpaid wages based on Labor Code §558. (*Esparza*, supra, 13 Cal.App.5th at 1233-34.) The Esparza Court distinguished "civil penalties" (i.e., 75% recovery goes to the LWDA and 25% recovery goes to the aggrieved employees) from "statutory damages" (i.e., damages to which employees may be entitled in their individual capacities). (*Id.* at 1242.) For example, the Court stated that civil penalties were recoverable by the Labor Commissioner under Labor Code §§225.5 (where employer unlawfully withholds wages) and 256 (waiting time penalties). (*Id.*) In contrast, statutory damages are recoverable by the employee in his/her individual capacity, such as under Labor Code, §§203 (employer's willful failure to pay wages due upon employee's termination) and 558 (employee's claim for unpaid wages). (*Id.* at 1243, 1245.) With regard to section 558, the Court stated that an employee's attempt to recover unpaid wages is a private dispute pursued by the employee in his own right, and that his attempt to recover wages on behalf of other aggrieved employees involves

victim-specific relief and private disputes. (*Id.* at 1246.)

Thus, the Court held that the employee's claim for unpaid wages under Labor Code §558 are subject to arbitration pursuant to the arbitration agreement and FAA, while any other representative claims for civil penalties would not be subject to arbitration under *Isakanian*. (*Id.* at 1246.) The Court noted that if the employee waived his claims for individualized relief for recovery of unpaid wages pursuant to section 558, then the litigation could proceed on those claims. (*Id.* at 1247.)[3]

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[3] This Court notes that in *Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 722-23, the Court of Appeal (Fourth District) respectfully parted company with the views expressed by the Fifth District in *Esparza*. The *Lawson* Court held that section 558 expressly provided for civil penalties, including claims for underpaid wages, that were cognizable under PAGA. Thus, it found that section 558 claims were PAGA claims. The *Lawson* Court found that in enacting section 558, the Legislature intended the underpaid wages recovery under statute as well as the $50 and $100 assessments provided by the statute be treated as civil penalties, and that as civil penalties, neither type of recovery is severable for purposes of applying PAGA. (*Id.* at 723-24.) The Court held that because claims under section 558 are indivisible claims for civil penalties, the trial court's order directing the underpaid wages be arbitrated as a representative action was deemed erroneous. (*Id.* at 725.) Thus, the Court directed the trial court to vacate its order and enter a new order denying defendant's motion to arbitrate because, under PAGA, plaintiff was acting as a representative of the state, which did not agree to arbitrate its claim for civil penalties. (*Id.* at 725.)

As will be further discussed below, *Lawson* further supports denying this motion to compel arbitration. Further, Plaintiff has stated in the opposition brief that he is not seeking any individual

3. *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612

In *Epic Systems*, the U.S. Supreme Court set forth the issues: (1) should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration; and (2) should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? (*Epic Systems*, supra, 138 S.Ct. at 1619.)

The Court stated that in the FAA and according to its legislative history. Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. (*Id.* at 1619, 1620 [citing to *Iskanian* as support that arbitration agreements must be enforced according to their terms].) However, the savings clause in the FAA allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or in equity for the revocation of the contract. (*Id.* at 1622.)

The employees in the case argued that the savings clause applied because the NLRA renders their particular class and collection action waivers illegal. (*Id.*) While the NLRA secures to employees the right to organize unions and bargain collectively, it says

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claims pursuant to section 558 and is only seeking civil penalties on behalf of the State. Thus, even if Plaintiff had not made such a clarification, under *Lawson*, his entire PAGA claim under section 558 would not be arbitrable.

nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. (*Id.* at 1619.) The Court stated that the savings clause did not support the employees' argument because the savings clause recognizes only defenses that apply to "any" contract, such as fraud, duress, or unconscionability. (*Id.* at 1622.) The Court found that the employees' arguments failed because they did not suggest that their arbitration agreements were extracted by fraud, duress, or some unconscionable way that would render "any" contract unenforceable, but instead they objected on the basis that the agreements required individualized arbitration proceedings instead of class or collective ones, such that they were illegal. However, the Court found that the employees' attack on the individualized nature of the arbitration proceeding interfered with one of the arbitration's fundamental attributes. (*Id.* at 1622-23.)

The employees also argued that the NLRA supports their argument that the agreements are unlawful. The Court did not find this argument to be persuasive. The Court noted that the NLRA grants the right to organize unions and bargain collectively, but it makes no mention of class or collective action procedures nor provide express approval or disapproval of arbitration. (*Id.* at 1624.) The Court also pointed out that the employees' underlying wage claims did not arise under the NLRA but under the FLSA, which allows employees to sue on behalf of themselves and other employees similarly situated. (*Id.* at 1626.)

However, the FLSA allows agreements for individualized arbitration. (*Id.*)

In its conclusion, the Court reiterated that Congress has instructed that arbitration agreements (including those that state that any disputes must be resolved through one-on-one arbitration) must be enforced as written. (*Id.* at 1632.)

4. The Court does not find that Epic Systems invalidates the holding in *Iskanian*

Defendant argues that under *Epic Systems*, the FAA preempts any prohibition on the waiver of representative PAGA claims and that this Supreme Court case "implicitly" overrules any prohibition on the individual arbitration of PAGA civil penalty claims. However, this Court does not read Epic Systems in this manner.

Such arguments were similarly raised and discussed by the Court of Appeal (Fourth District) in *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602. In *Correia*, the Court of Appeal was asked to disavow *Iskanian*'s continuing validity on PAGA claims in light of Epic Systems, but the Court declined to do so. (*Correia*, supra, 32 Cal.App.5th at 619.) The *Correia* Court recognized that "[o]n federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently." (*Id.*) The Court found that different questions were decided in *Epic Systems* and

Iskanian: (1) *Iskanian* held a ban on bringing PAGA actions in any forum violates public policy and that this rule is not preempted by the FAA because the claim is a governmental claim, which was not an issue considered in *Epic Systems*; (2) *Epic Systems* addressed a different issue pertaining to the enforceability of an individualized arbitration requirement against challenges that such enforcement violated the NRLA; and (3) *Epic System* involved the employees' claims asserted on behalf of other employees under the FLSA or federal class action procedures, while PAGA is fundamentally different as it is an action brought by an employee who has been deputized by the State to bring the qui tam claim on behalf of the state and not on behalf of other employees. (*Id.* at 619-20.) The Court concluded:

> Because the California Supreme Court [in *Iskanian*] found a PAGA claim involved a dispute not governed by the FAA, and the waiver would have precluded the PAGA action in any forum, it held its PAGA-waiver unenforeeability determination was not preempted. *Epic* did not reach the issue regarding whether a governmental claim of this nature is governed by the FAA, or consider the implications of a complete ban on a state law enforcement action. Because *Epic* did not overrule *Iskanian*'s holding, we remain bound by the California Supreme Court's decision.

(*Correia*, supra, 32 Cal.App.5th at 620.)

Following *Iskanian*, multiple California appellate decisions have found that employers cannot rely on pre-dispute arbitration agreements to compel a PAGA action to arbitration because the real party hi interest is the state. (See *Zakaryan v. The Men's Wearhouse, Inc.* (2019) 33 Cal.App.5th 659, 670-71; *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 871 [agreeing with Betancourt and Tonguing that "a predispute agreement to arbitrate is ineffective to compel arbitration of a PAGA claim"]; Betancourt v. Prudential Overall Supply (2017) 9 Cal.App.5th 439, 445 ["The trial court correctly denied Prudential's motion to compel arbitration because a defendant cannot rely on a predispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state."]; *Tonguing v. Bloomingdale 's, Inc.* (2016) 5 Cal.App.5th 665, 678 ["Because a PAGA plaintiff . . . acts as a proxy for the state only with the state's acquiescence [citation] and seeks civil penalties largely payable to the state via a judgment that will be binding on the state, the PAGA claim cannot be ordered to arbitration without the *state's* consent."] [emphasis in original].)

In sum, in *Iskanian*, the California Supreme Court did not find PAGA waivers unenforceable because of the individualized nature of arbitration proceedings. Rather, the Supreme Court found PAGA waivers unenforceable because in a PAGA action the government is the real party in interest and, under Civil Code section 3513, "a law established for a public reason cannot be contravened by a private agreement." (*Iskanian*, supra, 59 Cal.4th at 382-383.) Moreover, the Court found that

the FAA did not preempt California's state law rule against PAGA waivers because "[t]here is no indication that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals." (*Id.* at 385.)

Based on the reasons stated above, the Court finds that *Epic Systems* does not invalidate or implicitly overrule the holding in *Iskanian*. Accordingly, because this Court is still bound by the California Supreme Court's decision in *Iskanian*, the Court finds that the representative action/PAGA waiver in the Agreements is unenforceable.

5. The Court does not find that Plaintiff has brought "Victim-Specific" Claims

Next, Defendant argues that Plaintiff's PAGA claims are subject to individual arbitration to the extent they seek damages on behalf of the affected workers themselves, such as victim specific unpaid wages like Plaintiff, pursuant to *Esparza v. KS Industries, LLC* (2017) 13 Cal.App.5th 1228.

A summary of Plaintiff's 2nd cause of action for PAGA was summarized in the "BACKGROUND" section of this written order. In short, Plaintiff seeks to collect civil penalties for violation of Labor Code, §§2699(f)(2) (for violating sections 432.5, 226.2, 226.7, 558, and 512), 226.3 (for violating section 226(a)), 203 (for violating sections 201 and 202), 558(a) (for violating section 510), 2699(f) (for violating sections 200 and 2802), and 225.5 (for violating section 221). (*Id.*, ¶34.)

Plaintiff alleges that he submitted notice to the Labor and Workforce Development Agency ("LWDA") of the specific Labor Code violations. (FAC, ¶36.)

The parties do not dispute that sections 2699, 226.3, and 225.5 of the Labor Code provide for "civil penalties" paid to the State. (See *Moorer v. Noble L.A. Events, Inc.* 2019) 32 Cal.App.5th 736.) However, Defendant argues that Plaintiffs' allegations regarding sections 203 and 558 involve victim-specific claims that do not involve "civil penalties" payable to the State as required for a PAGA action.

In *Esparza*, the Court of Appeal directed the trial court to conduct further proceedings to determine the plaintiff/employee's intentions with respect to the pursuit of claims for unpaid wages and any other types of individualized relief. (Esparza, supra, 13 Cal.App.5th at 1247.)

Here, by way of the opposition brief, Plaintiff has clarified the scope of the PAGA claim. Plaintiff provides the declaration of his counsel, Steven M. Tindall, who states that Plaintiff is no longer seeking PAGA penalties on behalf of the State of California for Defendant's violation of Labor Code, §203. (Tindall Decl., ¶3.) As such, the Labor Code, §203 claims alleged in the PAGA cause of action are no longer at issue.

Mr. Tindall also states that Plaintiff limits his claims to PAGA representative claims seeking civil penalties on behalf of the State of California, which include unpaid wages as civil penalties under section 558, and states that Plaintiff does not seek any unpaid

wages to be awarded wholly to individual employees separate from the civil penalties available under PAGA. (Tindall Decl., ¶4.) Section 558(a) gave the Labor Commissioner authority to issue overtime violation citations for "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.*" (*ZB, N.A. v. Superior Court of San Diego County* (Cal. 2019) 252 Cal.Rptr.3d 228, 231 [quoting Labor Code, §558(a)].) The FAC alleged that Plaintiff was seeking civil penalties wider section 558 for both "[w]ages recovered pursuant to this section" and "an amount sufficient to recover underpaid wages." (FAC, ¶¶ 28, 34(b).) Thus, Plaintiff has clarified his intention to seek section 558 civil penalties on behalf of the State.

The Court of Appeal in *Zakaryan* stated:

> For violation of the overtime and meal and rest period rules, section 558 specifies what the commissioner may recover—namely, (1) underpaid wages, and (2) an additional $50 for the first violation against each employee for each pay period, and $100 for any subsequent violation against each employee for each pay period. (§ 558, subd. (a).) Any "[w]ages recovered" under section 558 go to the "affected employee" (§ 558, subd. (a)(3));

> all the rest goes to the Labor and Workforce Development Agency (the agency) (§ 558, subd. (b); *Iskanian*, *supra*, 59 Cal.4th at p. 378, 173 Cal.Rptr.3d 289, 327 P.3d 129). Only the Labor Commissioner may directly sue under section 558; individual employees may not. (*Atempa*, *supra*, 27 Cal.App.5th at p. 826, fn. 13, 238 Cal.Rptr.3d 465 ["section 588 . . . do[es] not provide for a private right of action to recover the civil penalties authorized under [that] statute[ ]"]; *Robles v. Agreserves, Inc.* (E.D. Cal. 2016) 158 F.Supp.3d 952, 1006 [same].)

(*Zakaryan v. The Men's Wearhouse, Inc.* (2019) 33 Cal.App.5th 659, 669.) The *Zakaryan* court (Second District) also stated that "[s]plitting a PAGA claim into two claims—a claim for underpaid wages and a claim for the $50/$100 per-pay-period penalties PAGA incorporates from section 558—runs afoul of the primary rights doctrine because it impermissibly divides a single primary right." (*Id.* at 671-72.) It further stated: "Because an individual PAGA plaintiff is at all times acting on behalf of the agency when seeking underpaid wages as well as the $50/$100 penalty, his pursuit of both remedies "involv[es] the same parties seek[ing] compensation for the same harm" and thus involves "the same primary right." " (*Id.* at 672; see also *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1147 [finding that the entire remedy provided by section 558, including the recovery of underpaid wages, is a civil penalty].)

The California Supreme Court also recently addressed in an opinion dated September 12, 2019 whether a plaintiff may seek under section 558, "the amount sufficient to recover underpaid wages" in a PAGA action, recognizing that there was a split of authority over whether an employer may compel arbitration of an employee's PAGA claim requesting unpaid wages under section 558. (*ZB, N.A.*, supra, 252 Cal,Rptr.3d at 231, 233.) The Supreme Court reiterated that section 558 lacks a private right of action and that an aggrieved employee can make use of section 558's remedy only when he acts as the state's proxy—a role he can only play through a PAGA action. (*Id.* at 236.) it concluded that "the civil penalties a plaintiff may seek under section 558 through the PAGA do not include the 'amount sufficient to recover underpaid wages.' Although section 558 authorizes the Labor Commissioner to recover such an amount, this amount—understood in context—is not a civil penalty that a private citizen has authority to collect through the PAGA. . . . Because the amount for unpaid wages is not recoverable under the PAGA, and section 558 does not otherwise permit a private right of action, the trial court should have denied the motion [to compel arbitration]. . . . On remand, the trial court may consider striking the unpaid wages allegations from Lawson's complaint, permitting her to amend the complaint, and other measures." (*Id.* at 231.) The Court ended by stating: "An employee's predispute agreement to individually arbitrate her claims is unenforceable where it blocks an employee's PAGA claim from

proceeding. But a PAGA claim does not include unpaid wages under section 558." (*Id.* at 244-245.)

Because Plaintiff has stated his intention of no longer pursuing section 203 claims under PAGA and that he will seek only civil penalties under section 558 on behalf of the State (and not individual claims), the Court on its own motion will strike allegations from the FAC in accordance with Plaintiff's representations for his claims under section 203 and claims under section 558 to the extent they seek individual damages. (With regard to the section 558 allegations, Plaintiff's only references and quotes section 558's language and does not appear to make actual *individual* claims for damages.) Thus, based on the clarification of the pleading, as well as the case law in support of the proposition that section 558 is not a private action, Plaintiff's PAGA claim will not be compelled to arbitration.

d. Post-Dispute Representative Action Waiver

For the first time in reply. Defendant argues that Plaintiff is bound by a *postdispute* Representative Action Waiver because he notified the LWDA of Defendant's alleged Labor Code violations on September 14, 2018, he commenced this action against Defendant on October 3, 2018, *then knowingly and voluntarily entered into the Representative Action Waiver while represented by counsel on October 26, 2018*, and then filed the operative FAC asserting a PAGA claim on November 19, 2018. (Reply at p.4.)

However, arguments raised for the first time in reply brief will ordinarily not be considered because such consideration would deprive the opposing party an opportunity to counter the argument. (*Reichardi v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Defendant relies on the language from *Iskanian* (i.e., that such waivers are unenforceable if required before any dispute arises) and *Julian v. Glenair, Inc.* (2017) 17 Cal,App.5th 853, but *Iskanian* was not relied upon by Defendant for such a proposition in its initial moving papers, nor did Defendant cite to *Julian* until the reply brief. Thus, considering these arguments for the first time in reply would deprive Plaintiff of the opportunity to respond. Thus, the Court declines to consider these arguments raise for the first time in reply.

e. Stay of Proceedings

Defendant requests that the Court stay the action pending arbitration of Plaintiff's victim-specific claims and alleged PAGA civil penalties claims for unpaid overtime and missed meal/rest breaks. However, as discussed above, Plaintiff no longer asserts a Labor Code §203 claim in the PAGA cause of action, plus Plaintiff has clarified that he is seeking civil penalties (and not individualized damages) under section 558 on behalf of the State.

While the 1st cause of action in the FAC is for declaratory relief. Plaintiff sought a declaration that the arbitration agreement's representative action waiver be deemed unenforceable. As discussed above, the

parties agreed that the arbitration agreement delegated to this Court the determination of that matter.

As no part of this action is ordered to arbitration, the Court denied the request for a stay of the proceedings.

CONCLUSION AND ORDER

Based on the foregoing, Defendant's motion to compel arbitration and to stay the proceedings is denied.

Plaintiff shall provide notice of this order.

DATED: October 18, 2019

/s/ C. Edward Simpson
C. Edward Simpson
Judge of the Superior Court

APPENDIX C

Court of Appeal, Second Appellate District,
Division Seven - No. B302770

S271083

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Nov. 10, 2021)

PATRICK POTE, Plaintiff and Respondent,

v.

HANDY TECHNOLOGIES, INC.,
Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice