No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ForwardLine Financial, LLC and ForwardLine Payment Services, LLC,

Applicants,

v.

Brandon Ahlmann,

Respondent.

On Petition for a Writ of Certiorari to the
California Court of Appeal

APPLICATION FOR EXTENSION OF TIME TO FILE

A PETITION FOR A WRIT OF CERTIORARI

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FORWARDLINE FINANCIAL, LLC and FORWARDLINE PAYMENT SERVICES, LLC

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: Hon. Elena Kagan, Circuit Justice for the Ninth Circuit:

Under this Court's rules 13.5 and 22, Applicants ForwardLine Financial, LLC and ForwardLine Payment Services, LLC (collectively "ForwardLine") respectfully request a 60-day extension to file their Petition for Writ of Certiorari. In support of this application, Applicants state:

1. Applicants intend to seek review of the decision of the California Court of Appeal's decision in *Ahlmann v. ForwardLine Financial, LLC, et al.,* Case No.: B304367 (Cal. Ct. App. 2d Dist. 2021), a copy of which is annexed hereto. The California Court of Appeal issued its decision on November 12, 2021. ForwardLine petitioned for review in the California Supreme Court in Case No. S272381. The California Supreme Court denied discretionary review on February 23, 2022. A copy of the order denying the petition for review is also annexed hereto. Absent the requested extension of time, a petition for writ of certiorari would be due on May 24, 2022. Applicants requests that the time for filing be extended by 60 days, to and including July 23, 2022.

2. The California Court of Appeal affirmed the trial court's decision to deny ForwardLine's petition to compel arbitration of Plaintiff Ahlmann's claims under California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Labor Code §§ 2698 *et seq*. In doing so, the court found that, because PAGA claims are by their nature "representative" claims between the employer and the state, they cannot be

compelled to arbitration pursuant to a predispute contractual agreement between employer and employee, and preemption under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. does not apply. *See Ahlmann v ForwardLine Financial LLC et al.* (No. B304367) Slip Op. at 7-18 (Cal Ct. App. 2d Dist. Nov. 12, 2021).

3. That decision – as a petition for writ of certiorari will develop more fully – is a serious candidate for this Court's review because:

a. The arbitrability of claims under California's Private Attorneys General Act has been a heated subject of litigation in recent years. This Court's opinions in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (FAA preempts California state law precluding bilateral arbitration in class-action context) and *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (courts must enforce class-action waivers in arbitration agreements) are in tension with the California Supreme Court's ruling in *Iskanian v. CLS Transportation Los Angeles*, 59 Cal.4th 348 (Cal. 2014) (waiver of PAGA claims cannot be enforced; FAA preemption does not apply).

b. On December 15, 2021, this Court granted certiorari in *Viking River Cruises, Inc. v. Angie Moriana*, No. 20-1573. The question presented in *Viking River Cruises* is:

> Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.

Viking River Cruises, No. 20-1573, Brief for Petitioner at p. i.

Oral argument in *Viking River Cruises* was held on March 30, 2022, and a decision is expected before the end of the Court's current term.

c. The facts in *Viking River Cruises* are substantively identical to those in this case, namely that (1) an employer and employee mutually agreed to arbitrate all disputes arising from the employment relationship, (2) the employee subsequently brought an action in court raising only PAGA claims, and (3) the employer then unsuccessfully sought to compel arbitration based on the parties' agreement and FAA preemption.

d. The question presented in *Viking River Cruises* is therefore material to ForwardLine's contemplated petition for writ of certiorari, and the Court's opinion in *Viking River Cruises* may in fact be dispositive of ForwardLine's claims.

e. Accordingly, it would be illogical and inefficient for ForwardLine to file its petition before *Viking River Cruises* has been decided.

4. Applicants' counsel of record, had and has, among other urgent professional commitments, an oral argument in a Ninth Circuit case raising complex jurisdictional issues on May 11, 2022, a reply brief in the state court of appeal due June 1, an opening brief due in the state court of appeal on June 6, a hearing on a bail motion in the federal district court on a major criminal case on June 27, and an opening brief on a petition for writ of mandate in the Los Angeles County Superior Court due July 8, 2022.

5. The undersigned counsel also had to travel to Portland, Oregon, for the aforementioned Ninth Circuit argument, and will be traveling through May 16, to attend her daughter's college graduation.

For these reasons, Applicants request that the date for filing a petition for a writ of certiorari be extended to and including July 23, 2022.

Respectfully submitted,

Becky S. James

Counsel for Applicants ForwardLine Financial, LLC and ForwardLine Payment Services, LLC

CERTIFICATE OF SERVICE

ForwardLine Financial, LLC, et al. v. Brandon Ahlmann

I hereby certify that on this 11th day of May, 2022, I caused one copy of this Application for Extension of Time to File a Petition for Writ of Certiorari to be served on each of the following by first-class mail:

Scott S. Harris
U.S. Supreme Court
1 First St. NE
Washington DC, 20543

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Justice Law Corporation
751 N. Fair Oaks Avenue, Suite 101
Pasadena, CA 91103

Rebecca L. Torrey
The Torrey Law Firm
1626 Montana Avenue, Suite 647
Santa Monica, CA 90403

I hereby certify that all parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 11, 2022 at Los Angeles, California

Sheila Lara
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EXHIBIT “A”

Filed 11/12/21 Ahlmann v. ForwardLine Financial CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BRANDON AHLMANN, Plaintiff and Respondent, v. FORWARDLINE FINANCIAL, LLC, et al., Defendants and Appellants.	B304367 Los Angeles County Super. Ct. No. 19VECV01352

APPEAL from an order of the Superior Court of Los Angeles County, Theresa M. Traber, Judge. Affirmed.

Dykema Gossett and Becky S. James; The Torrey Firm and Rebecca L. Torrey for Defendants and Appellants.

Justice Law Corporation, Douglas Han, Shunt Tatavos-Gharajeh and Talia Lux for Plaintiff and Respondent.

Defendants ForwardLine Financial, LLC, and ForwardLine Payment Services, LLC (ForwardLine), appeal an order denying their motion to compel arbitration of plaintiff Brandon Ahlmann's claim to recover civil penalties under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.).[1] The relevant arbitration clause requires plaintiff to arbitrate "any dispute of any nature between you and the Company," but specifies that "[e]ach party may pursue arbitration solely in an individual capacity, and not as a representative or class member in any purported class or representative proceeding." Because an action to recover civil penalties under PAGA is a *representative proceeding* arising out of a dispute between the employer and *the state* that cannot be waived by contractual agreement, we conclude the arbitration clause does not apply to plaintiff's PAGA claim. The trial court did not err in denying the motion to compel arbitration. We affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff's operative first amended complaint asserts a single cause of action, on behalf of plaintiff and other aggrieved ForwardLine employees, for the recovery of civil penalties under PAGA, based on ForwardLine's alleged violation of the Labor Code's wage-and-hour provisions. The complaint alleges plaintiff notified the Labor and Workforce Development Agency (LWDA)—the agency that enforces California's labor laws—of his intent to seek PAGA penalties, and the LWDA did not intervene within the 65-day notice period. (See § 2699.3, subd. (a)(2)(A).)

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[1] Statutory references are to the Labor Code, unless otherwise designated.

ForwardLine moved to compel arbitration of the claim under an arbitration clause in plaintiff's signed offer letter.[2] The clause states:

> "While we of course hope that your employment relationship with the Company will be mutually satisfying and rewarding, we recognize that disputes can sometimes occur. Therefore, as a condition of your employment, the Company requires that you hereby agree that any and all disputes, claims, or proceedings between you and the Company arising out of or relating to your employment with the Company, the nature, terms, or enforceable [*sic*] of this letter agreement, or any dispute of any nature between you and the Company shall be settled by a binding and final arbitration held before a single arbitrator from the Judicial Arbitration Mediation Service, Inc. ('JAMS'). Arbitration shall be held in the

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[2] ForwardLine also purported to base its motion on a section of its employee handbook that referenced the arbitration clause in plaintiff's offer letter. However, the acknowledgement that plaintiff signed upon receiving the handbook states, "It is specifically agreed that the Handbook is for informational purposes only and that it is not a contract for, or guarantee of, employment or continuing employment." Thus, by its terms, the handbook is not a contract under which arbitration could be compelled. Even if it were, the parties agree the handbook's relevant section merely complements and is at most coextensive with the arbitration clause in plaintiff's signed offer letter. We therefore focus exclusively on the clause in the offer letter.

> County of Los Angeles, California, and shall be pursuant to the laws of the State of California. Each party may pursue arbitration solely in an individual capacity, and not as a representative or class member in any purported class or representative proceeding. The arbitrator may not consolidate more than one person's or entity's claims, and may not otherwise preside over any form of representative or class proceeding. The arbitrator shall also have the power to impose any sanction against any party permitted by California law. The arbitration award shall be final. Judgment on any arbitration award may be entered into [*sic*] any court in the County of Los Angeles."

The trial court denied the motion to compel arbitration, finding the operative complaint alleged "only 'public' claims for civil remedies pursuant to PAGA," and concluding such a claim "may not be sent to arbitration pursuant to [a] pre-litigation arbitration clause[ ]."

ForwardLine timely appealed.

DISCUSSION

ForwardLine contends the trial court's ruling is premised on a misreading of our Supreme Court's holding in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*). In ForwardLine's view, the trial court (and a consistent line of Court of Appeal opinions) erroneously interpreted *Iskanian* to hold agreements to arbitrate PAGA claims are unenforceable, when in fact our high court held only that employment agreements requiring the outright waiver of

PAGA claims could not be enforced. ForwardLine also argues *Iskanian* cannot be interpreted to preclude the arbitration of PAGA claims, because the Federal Arbitration Act (FAA) would preempt a state law rule that did so.[3]

We need not reach these contentions, however, because ForwardLine failed to satisfy its threshold burden to present a valid agreement to arbitrate plaintiff's PAGA claim. The arbitration clause in plaintiff's offer letter applies only to disputes "between [plaintiff] and the Company," while a claim for civil penalties under PAGA is a representative action to resolve a dispute between an employer and *the state*. Moreover, because the arbitration clause expressly precludes the parties

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[3] Plaintiff contends ForwardLine's appellate arguments are frivolous and has moved to dismiss the appeal and for sanctions under rule 8.276 of the California Rules of Court. We deny this motion. ForwardLine's arguments largely track the Court of Appeals for the Ninth Circuit's reasoning in *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, wherein a majority of the circuit court panel held the FAA does not preempt the *Iskanian* rule because parties remain free under *Iskanian* to select informal arbitration procedures to litigate PAGA claims. (*Sakkab,* at pp. 434–439.) Regardless of whether we would agree with the *Sakkab* court's reasoning were we to consider the issue, we plainly cannot say an analysis that a federal circuit court has advanced in a published opinion regarding FAA preemption is frivolous. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 ["[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit."].)

from pursuing arbitration "as a representative . . . in any purported . . . representative proceeding," the clause cannot be construed to cover a representative PAGA action without running afoul of the *Iskanian* rule prohibiting PAGA waivers. Because the arbitration clause does not cover representative PAGA claims, the trial court properly denied ForwardLine's petition to compel arbitration.[4]

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[4] We directed the parties to file supplemental briefs under Government Code section 68081 addressing these issues—specifically, whether the arbitration clause's reference to "any and all disputes, claims, or proceedings between you and the Company arising out of or relating to your employment" covers a representative PAGA claim and, if so, whether the clause's prohibition against pursuing a claim in arbitration "as a representative or class member in any purported class or representative proceeding" is susceptible of an interpretation that does not result in a waiver of plaintiff's representative PAGA claim. Among other arguments (which we discuss later in this opinion), ForwardLine contends plaintiff did not "ever argue or even imply, below or on appeal" that the language of the arbitration clause "defeated ForwardLine's motion to compel arbitration."

Contrary to this assertion, the record shows plaintiff did in fact emphasize in his opposition to the motion to compel arbitration that "[t]he arbitration provision requires the parties to arbitrate disputes that arise out of Plaintiff's employment with Defendants and also purports to preclude Plaintiff from acting as a private attorney general or in a representative capacity on behalf of any person, ***which of course renders the agreement substantively unconscionable***." In any event, whether plaintiff made the argument is irrelevant. Because the issues raised in our Government Code letter implicate a legal determination, "we are not bound by the trial court's rationale, and thus may affirm the denial [of the motion to compel

1. *Governing Law Under* Iskanian*: A Representative PAGA Claim Lies Outside the FAA's Coverage Because It Is Not a Dispute Between an Employer and an Employee—It Is a Dispute Between an Employer and the State*

In *Iskanian*, our Supreme Court addressed two issues relevant to this appeal: (1) whether arbitration agreements waiving the right to prosecute representative PAGA actions in any forum are unenforceable, and (2) whether the FAA preempts a state law rule prohibiting such waivers. (*Iskanian, supra,* 59 Cal.4th at pp. 382–384.) The plaintiff in *Iskanian* had signed an arbitration agreement providing that all claims arising out of his employment were to be submitted to arbitration and that the parties would not assert class or representative claims in arbitration. (*Id.* at pp. 360–361.) He sued his employer, asserting wage-and-hour class action claims and PAGA claims seeking statutory penalties for Labor Code violations. (*Id.* at p. 361.) The trial court granted the employer's motion to compel individual arbitration of the PAGA claim and the reviewing court affirmed, reasoning the plaintiff was contractually obligated to arbitrate the PAGA claim and was barred from litigating it in a representative capacity. (*Id.* at pp. 361–362.) Our Supreme Court reversed.

Addressing the first issue, the *Iskanian* court held predispute waivers that require employees to relinquish the right to assert a representative PAGA claim in any forum are

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arbitration] on any correct legal theory supported by the record, even if the theory was not invoked by the trial court." (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 864 (*Julian*).)

contrary to public policy and unenforceable as a matter of state law because they "harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Iskanian, supra,* 59 Cal.4th at p. 383.) As our high court explained, the Legislature enacted PAGA to enhance the state's enforcement of labor laws by authorizing aggrieved employees, acting as private attorneys general, to recover civil penalties for violations, with the understanding that the enforcement agencies would retain primacy over private enforcement efforts. (*Id.* at p. 379.) To maintain state oversight, PAGA requires the employee to provide the LWDA with written notice of the alleged Labor Code violations and authorizes an employee to pursue a PAGA claim in court only if the agency does not intervene. (*Id.* at p. 380; see § 2699.3, subd. (a)(2).) Of the civil penalties recovered in a representative PAGA action, 75 percent goes to the LWDA, leaving the remaining 25 percent for the "aggrieved employees." (*Iskanian,* at p. 380; see § 2699, subd. (i).)

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 Agency," the *Iskanian* court reasoned "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." (*Iskanian, supra,* 59 Cal.4th at p. 383.) And, because "such an agreement has as its 'object, . . . indirectly, to exempt [the employer] from responsibility for [its] own . . . violation of law,' " our Supreme Court held "it is against public policy and may not be enforced." (*Ibid.*, quoting Civ. Code, § 1668.)

Turning to the second issue, the *Iskanian* court held the FAA does not preempt this state law rule invalidating 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 [Labor and Workforce Development] Agency." (*Iskanian, supra,* 59 Cal.4th at p. 384.) Our high court explained: "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 Agency or aggrieved employees—that the employer has violated the Labor Code." (*Id.* at pp. 386–387, italics added.) The *Iskanian* court emphasized that a PAGA claim is " 'fundamentally a law enforcement action designed to protect the public and not to benefit private parties' " and that " 'an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself.' " (*Id.* at pp. 381, 387.) "The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit," and this is confirmed by "[t]he fact that any judgment in a PAGA action is binding on the government." (*Id.* at pp. 382, 387.)

Thus, the *Iskanian* court analogized a PAGA claim to "a type of *qui tam* action," which, as the court explained, is the type of claim that generally falls outside the FAA's purview:

> "Nothing in the text or legislative history of the FAA nor in the Supreme Court's construction of the statute suggests that the FAA was intended to limit the ability of states

to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions. 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. . . . [¶] . . . [¶]

"In sum, the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims *belonging to a government agency*, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances." (*Iskanian, supra,* 59 Cal.4th at pp. 387–388, second italics added; accord, *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619 (*Correia*); *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 671 (*Tanguilig*).)

Since *Iskanian*, a series of appellate courts have held that, without the state's consent, an employee's predispute agreement to arbitrate PAGA claims is not enforceable. (See *Correia, supra,* 32 Cal.App.5th at p. 622; *Julian, supra,* 17 Cal.App.5th at pp. 869–872; *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445–448; *Tanguilig, supra,* 5 Cal.App.5th at pp. 677–680.) Because, as *Iskanian* explains, the state is the real party in interest in a PAGA action and a PAGA plaintiff asserts the claim solely on behalf of, and as the proxy or agent for, the state, these courts reason a PAGA claim for civil penalties cannot be subject to an employee's predispute arbitration agreement, as *the state* never agreed to arbitrate the claim. (*Correia,* at pp. 621–622; *Julian,* at pp. 871–872; *Betancourt,* at pp. 445–448; *Tanguilig,* at pp. 677–680.)

2. *The Arbitration Clause Here Does Not Cover Representative Claims to Recover Civil Penalties Under PAGA*

We turn now to the dispositive issue in this appeal—whether plaintiff can be compelled to arbitrate a representative PAGA claim under an arbitration clause that applies only to "disputes, claims, or proceedings *between you and the Company*" and that expressly specifies "[e]ach party may pursue arbitration *solely in an individual capacity*, and *not as a representative* or class member in any purported class or *representative proceeding*." (Italics added.) Because a PAGA claim is a dispute between the employer and *the state*, and because the waiver of such a claim (in an arbitration agreement or otherwise) is invalid under *Iskanian*, the trial court correctly determined plaintiff cannot be compelled to arbitrate his PAGA claim under the arbitration clause.

"The denial of a motion to compel arbitration is an appealable order." (*Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 176 (*Hernandez*).) "To the extent the denial relies on a pertinent factual finding, we review that finding for the existence of substantial evidence. [Citation.] In contrast, to the extent the denial relies on a determination of law, we review the trial court's resolution of that determination de novo. [Citation.] Nonetheless, we are not bound by the trial court's rationale, and thus may affirm the denial on any correct legal theory supported by the record, even if the theory was not invoked by the trial court." (*Julian, supra,* 17 Cal.App.5th at p. 864, fn. omitted.)

Code of Civil Procedure section 1281.2 requires a trial court to grant a petition to compel arbitration " 'if [the court] determines that an agreement to arbitrate the controversy exists.' " Thus, " ' "when presented with a petition to compel arbitration the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute. [¶] . . ." [Citation.]' [Citations.] 'A party seeking to compel arbitration has the burden of proving the existence of a valid agreement to arbitrate. [Citations.] Once that burden is satisfied, the party opposing arbitration must prove by a preponderance of the evidence any defense to the petition.' " (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59; *Hernandez, supra,* 7 Cal.App.5th at p. 176.)

" ' "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." ' " (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 540–541; *Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 912 (*Rebolledo*).) "The right to

arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.] There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." (*Engineers Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) " 'Whether the parties formed a valid agreement to arbitrate is determined under general California contract law.' " (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348; *Rebolledo,* at pp. 912–913.)

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. (Civ. Code, § 1639.) 'The words of a contract are to be understood in their ordinary and popular sense.' (Civ. Code, § 1644.)" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) "[A]mbiguities in standard form contracts are to be construed against the drafter. [Citations.] This court must apply [the above] basic principles [of contract interpretation] to determine whether [plaintiff's] [PAGA claim] fall[s] within the scope of the arbitration clause." (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739; *Rebolledo, supra,* 228 Cal.App.4th at p. 913.)

Here, ForwardLine's offer letter to plaintiff included an arbitration clause stating, "as a condition of your employment, the Company requires that you hereby agree that . . . any dispute of any nature *between you and the Company* shall be settled by a binding and final arbitration." (Italics added.) As we have said, in *Iskanian* our Supreme Court held "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"; rather, "[i]t 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." (*Iskanian, supra,* 59 Cal.4th at pp. 386–387, first italics added.) By the same logic, plaintiff's claim to recover civil penalties under PAGA lies outside the coverage of the arbitration clause because the claim is not a dispute "between [plaintiff] and the Company"—it is a dispute between "the Company" and the state. (See *Hernandez*, *supra*, 7 Cal.App.5th at p. 178 [where plaintiff brought only representative PAGA claim, there were "no 'disputes' between the employer and employee as stated in the arbitration policy"].)

Notwithstanding this logic, ForwardLine contends the arbitration clause covers this dispute because plaintiff has "fashioned" his PAGA claim around what is essentially "a single employee's individual complaints against an employer" and his "PAGA claim aris[es] from grievances specific to him only." That argument is inconsistent with our Supreme Court's construction of the PAGA statute in *Iskanian*. As our high court explained, the Legislature enacted PAGA "to allow *aggrieved employees*, acting as private attorneys general, to recover civil penalties for Labor Code violations" and these "civil penalties recovered *on behalf of the state* under the PAGA are distinct from the statutory damages to which employees may be entitled in their *individual capacities*." (*Iskanian, supra,* 59 Cal.4th at pp. 379, 381, italics added.) Here, while the complaint alleges facts specific to plaintiff's status as an aggrieved employee that could support an individual claim for statutory damages under the Labor Code,

the complaint's prayer for relief seeks only *civil penalties* to be recovered on behalf of the state and other similarly situated aggrieved employees under PAGA. (See § 2699, subds. (a) & (c) [authorizing recovery of civil penalties to be assessed and collected by LWDA "through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees," and defining " 'aggrieved employee' " to mean "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed"].)

Because plaintiff can assert a claim for civil penalties only "as 'the proxy or agent' of the state," the allegations concerning his aggrieved employee status do not convert the "fundamental character of the claim as a public enforcement action" into an individual action between plaintiff and ForwardLine. (*Iskanian, supra,* 59 Cal.4th at p. 388 ["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 *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649 [because the plaintiff did " 'not bring the PAGA claim as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies," ' " he could not be compelled to arbitrate "the 'underlying controversy' . . . [of] whether he is an 'aggrieved employee' under the Labor Code with standing to bring a representative PAGA claim"].) The trial court correctly determined plaintiff's operative complaint "alleges only 'public' claims for civil remedies [under] PAGA and, thus, is not subject to the parties' arbitration clause."

Even if the arbitration clause were susceptible of an interpretation covering a PAGA action, we still could not construe it to apply to plaintiff's claim. While the clause purports to require "any dispute of any nature between [plaintiff] and the Company [to] be settled by a binding and final arbitration," it specifies that "[e]ach party may pursue arbitration *solely in an individual capacity*, and *not as a representative* or class member in any purported class or *representative proceeding*." (Italics added.) The effect of this provision is to preclude the arbitration of representative proceedings, like plaintiff's representative claim on behalf of the LWDA and other aggrieved ForwardLine employees to recover civil penalties under PAGA. (See *Iskanian, supra,* 59 Cal.4th at pp. 380–382.) This necessary construction is reinforced by the clause's next sentence, which specifies that "the arbitrator may not consolidate more than one person's or entity's claims, and *may not otherwise preside over any form of representative* or class proceeding." (Italics added.) Because these provisions effectively preclude the arbitration of representative PAGA actions, the arbitration clause cannot be construed also to compel the arbitration of plaintiff's PAGA claim without resulting in an invalid waiver under *Iskanian*.[5]

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[5] Indeed, the arbitration clause in plaintiff's offer letter closely resembles the arbitration provision in *Iskanian* that the Supreme Court deemed to result in an invalid PAGA waiver. (See *Iskanian, supra,* 59 Cal.4th at pp. 360–361, 378 [arbitration clause providing " 'any and all claims' arising out of [plaintiff's] employment were to be submitted to binding arbitration," and specifying " 'class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement' "; parties " 'agree that each will not assert class action or representative action claims

And, because we are statutorily compelled to give the clause "such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect" (Civ. Code, § 1643), we must construe the clause to exclude representative PAGA actions from the provision requiring arbitration of "any dispute of any nature between [plaintiff] and the Company."

ForwardLine says the "use of the word 'representative' in the [arbitration] clause is perhaps misleading and inaptly chosen in light of *Iskanian*," but it maintains the "language of the offer letter was designed to prevent multi-employee arbitration without running afoul of state law forbidding preemptive PAGA waivers." In ForwardLine's telling, the clause was not intended to preclude plaintiff from arbitrating a PAGA claim; rather, it was meant to force plaintiff to arbitrate the claim "by himself and not in concert with coworkers, current or former." But ForwardLine fails to explain what the term "representative" means under this construction, or how barring plaintiff from pursuing a claim in a representative capacity prevents him from pursuing a claim in concert with other coworkers—a goal that was already accomplished by prohibiting "consolidat[ion] [of] more than one person's or entity's claims." And, as it is settled under *Iskanian* that "civil penalties recovered *on behalf of the state* under the PAGA are distinct from the statutory damages to which employees may be entitled in their *individual capacities*" (*Iskanian, supra,* 59 Cal.4th at pp. 379, 381, italics added), we

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against the other in arbitration or otherwise' "; and parties " 'shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person' " constituted invalid waiver of the plaintiff's representative PAGA claim].)

cannot see how a provision that requires an employee to "pursue arbitration *solely in an individual capacity*" (italics added) does not have the effect of precluding arbitration of a PAGA claim for civil penalties. (See also *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."].) The clause is not reasonably susceptible of ForwardLine's proffered interpretation.[6]

Because the arbitration clause in plaintiff's offer letter does not evidence an agreement to arbitrate a representative PAGA claim, ForwardLine failed to meet its threshold burden to prove the existence of a valid agreement to arbitrate. (See Code Civ. Proc., § 1281.2; *Hernandez, supra,* 7 Cal.App.5th at p. 176.) Accordingly, it is unnecessary to address ForwardLine's other contentions regarding the arbitrability of representative PAGA claims and FAA preemption. The trial court properly denied the petition to compel arbitration.

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[6] Moreover, because the offer letter does not contain a severance provision, the invalid PAGA waiver cannot simply be excised from the clause. (Cf. *Correia, supra,* 32 Cal.App.5th at p. 621 [arbitration clause covered plaintiff's representative PAGA claims, as representative claim waiver could be severed under agreement's severance clause to allow enforcement of remaining portion of the agreement].)

DISPOSITION

The order is affirmed. Plaintiff Brandon Ahlmann is entitled to his costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

MATTHEWS, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EXHIBIT “B”

Court of Appeal, Second Appellate District, Division Three - No. B304367

S272381

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BRANDON AHLMANN, Plaintiff and Respondent,

v.

FORWARDLINE FINANCIAL, LLC, et al., Defendants and Appellants.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice