**NOT TO BE PUBLISHED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 (Filed Nov. 12, 2021)

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

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

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).)

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

[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.

> 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 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]

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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."].)

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 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

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

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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 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*).)

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 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. . . . [¶] . . . [¶]
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> "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] And, because we are

[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

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

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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 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].)

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 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

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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].)

representative PAGA claims and FAA preemption. The trial court properly denied the petition to compel arbitration.

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.

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.

(Filed Feb. 23, 2022)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – NORTHWEST DISTRICT

BRANDON AHLMANN, individually, and on behalf of other members of the general public similarly situated and on behalf of aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"), Plaintiff, vs. FORWARDLINE FINANCIAL, LLC, a California company, FORWARDLINE PAYMENT SERVICES, LLC, a California company, and DOES 1 through 100, inclusive, Defendant(s).	CASE NO. 19VECV01352 ORDER DENYING DEFENDANTS FORWARDLINE FINANCIAL, LLC & FORWARDLINE PAYMENT SERVICES, LLC'S RENEWED MOTION TO COMPEL ARBITRATION Dept. U 8:30 a.m. February 5, 2020 (Filed Feb. 10, 2020)

I. BACKGROUND

On September 18, 2019, Brandon Ahlmann (Plaintiff) filed a complaint against ForwardLine Financial, LLC, ForwardLine Payment Services, LLC, and Does one through one-hundred (Defendants). Plaintiff amended his complaint on November 25, 2019 to include a single cause of action for violation of the

Labor Code, section 2698 et seq, the Private Attorneys General Act of 2004 (PAGA). In his First Amended Complaint (FAC), Plaintiff prays for "civil penalties pursuant to statute as set forth in Labor Code §2698 *et seq.*, for Defendants' violations of Labor Code §§ 201, 202, 203, 204, 226(a), 226.2, 226.3, 226.7, 510, 512(a), 558, 1174, 1194, 1197, 1197.1, 1198, 2800, and 2802," in addition to statutory attorneys' fees and costs and "such other and further relief as the court may deem just and proper." (FAC, p. 8.)

Defendants hired Plaintiff in August 2018 to work as a loan representative at ForwardLine. Plaintiff's offer letter from Defendants included an arbitration agreement which Plaintiff was required to sign. Plaintiff was also required to sign an employee handbook acknowledgment certifying that Plaintiff's employment was at-will and that he had read and agreed to the contents of the employee handbook. The employee handbook also included the arbitration agreement Plaintiff had already agreed to in his offer letter.

The arbitration clause in Plaintiff's offer letter reads:

> 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 enforceability 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 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 any court in the County of Los Angeles.

The arbitration agreement in Defendants' employee handbook reads:

> Any and all employment-related disputes between you and the Company will be resolved through final and binding arbitration in accordance with the agreement letter voluntarily signed by you and the Company at the time of employment. In this process, a registered arbitrator of Judicial Arbitration and Mediation Services, Inc. (JAMS) will hear both sides of the issue and render a decision. Arbitration shall be held in the County of Los Angeles,

> California, and shall be pursuant to the laws of the State of California. The decision will be binding on both you and the Company. For further information about arbitration, please refer to your agreement letter. Each employee should have his or her own copy of the agreement letter; however, if you have somehow misplace yours, there is always a copy on file for your reference. While we hope that disputes between you and the Company do not arise, we have provided this provision as a means of efficiently settling disputes. Nothing in this provision, however, should be construed as altering our employment-at-will relationship.

On January 2, 2020, Defendants filed their renewed Motion to Compel Arbitration after Plaintiff filed his first amended complaint.

II. LEGAL STANDARD

Code of Civil Procedure, section 1281.2 permits a party to file a petition to request that the Court order the parties to arbitrate a controversy. The Court may grant the motion if the Court determines that an agreement to arbitrate the controversy exists. Employment agreements that require the employee to arbitrate disputes have been upheld so long as the arbitration clause does not impair the employee's statutory rights and is not unconscionable. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1271.)

Under Code of Civil Procedure, section 1281.2, it is the trial court that determines if there is a duty to arbitrate the particular controversy which has arisen between the parties. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 652-653.) In performing its duty to determine if the parties have agreed to arbitrate that type of controversy, the Court is necessarily required to examine and, to a limited extent, construe the underlying agreement. (*Id.*)

Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. (*Id*.) The Court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute. (*Id*.) Unless the parties' agreement clearly and unmistakably provides otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. (*Id.*)

The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. (*Id.*) There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. (*Id.*) The party seeking to enforce the arbitration agreement bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence. (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284.) The trial court first decides whether an enforceable arbitration agreement exists between the parties and then determines

whether the plaintiff's claims are covered by the agreement. (*Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 961.)

The party opposing the petition to compel arbitration bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. (*Giuliano v. Inland Empire Personnel, Inc. supra*, 149 Cal.App.4th at 1284.) In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. (*Id.*)

III. DISCUSSION

a. Motion to Compel Arbitration

Defendants assert that Plaintiff agreed to the arbitration agreements present in both his offer letter and employee handbook by signing them. Despite this agreement, Defendants argue that Plaintiff is attempting to avoid his obligation to arbitrate his disputes with Defendants by bringing his claims in a representative capacity under the PAGA. Defendants complain that Plaintiffs first amended complaint is a generic template that is void of any details relevant to Plaintiffs personal claims and that it was specifically pled to circumvent the force of the arbitration clause agreed to by Plaintiff.

Defendants contend that the Federal Arbitration Act (FAA) governs whether Plaintiff's claims are

arbitrable. The FAA applies to any agreement "evidencing a transaction involving commerce." (9 U.S.C. section 2.) Defendants argue that its business involves interstate commerce because ForwardLine is a nationwide lender that receives applications for loans online and transfers funds to small businesses throughout the country. Thus, Defendants assert that its arbitration agreements are governed by the FAA because its business involves interstate commerce. Additionally, the position Plaintiff was employed in, as a loan representative, is responsible for communicating with and conducting transactions with loan applicants throughout the country.

Defendants maintain that PAGA claims can be arbitrated, despite some California courts holding otherwise. Defendants argue that *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 559 Cal.4th 348, 384, held only that employment agreements compelling waiver of representative claims under the PAGA are contrary to public policy, and that subsequent cases interpreting this holding as preventing all PAGA claims from being arbitrated are erroneous. Additionally, Defendants argue that the FAA preempts state law and judicial holdings that attempt to act as obstacles to arbitration. Thus, Defendants argue that Plaintiff's claims are arbitrable under the relevant arbitration clauses because these agreements are meant to encompass all disputes arising from the employment relationship.

If the Court holds that the PAGA claims are not arbitrable, Defendants urges the Court to send

Plaintiff's claims for statutory penalties to arbitration, while the PAGA claims are stayed in the Court pending arbitration.

Plaintiff opposes arbitration by arguing that PAGA claims are not arbitrable and that they cannot be split into individual and representative claims. Plaintiff contends that a PAGA representative action cannot be arbitrated based on an employee's predispute arbitration agreement unless there is evidence that the State of California consented to the waiver of the right to bring the PAGA claim in court. Plaintiff claims that PAGA actions are public enforcement actions and, therefore, they fall outside the scope of the FAA. Plaintiff concedes that unpaid wages are not recoverable in a PAGA cause of action and, thus, he has removed any reference to such relief from the first amended complaint, leaving a single PAGA claim seeking only civil penalties that cannot be split between arbitration and court.

Defendants replied to Plaintiffs opposition with the argument that Plaintiff's first amended complaint continues to reference statutory penalties, which are individual claims that fall outside the PAGA statute, despite Plaintiff's contention that all such requests have been eliminated. They also argue that private litigants, as opposed to those suing in representation, can be awarded statutory relief, thus, Plaintiff's claims can be split into those seeking statutory recovery and those seeking recovery under PAGA. Defendants contend that the request for individual statutory penalties can

and should be arbitrated while the PAGA claims are stayed in the Court.

The Court finds that there exists a valid arbitration agreement in both Plaintiff's offer letter and employee handbook provided by Defendant. Both documents contain provisions requiring Plaintiff and Defendants to submit any disputes arising from Plaintiff's employment with Defendants to binding arbitration. Plaintiff signed both his offer letter and the employee handbook acknowledgment, binding himself to their provisions.

This Court's reading of *Iskanian v. CLS Transportation Los Angeles*, (2014) 59 Cal.4th 348, precludes Plaintiff from being compelled to arbitrate his PAGA claim. *Iskanian* specifically held "waiver of employees' rights to representation action under PAGA violated public policy and FAA does not preempt state law as to unenforceability of waiver of PAGA." (*Iskanain, supra*, 59 Cal.4th at 384-385.) The Supreme Court explained its rationale in terms of private versus public remedy. It said that the FAA ensures that parties to a contract have private rights of action to resolves disputes, while PAGA allows an individual to assert the rights of a state agency in a representative capacity. (*Id.*) Consequently, Plaintiff cannot be compelled to arbitrate his claims brought under PAGA.

Contrary to Defendants' contentions, Plaintiff's FAC alleges only "public" claims for civil remedies pursuant to PAGA and, thus, is not subject to the parties' arbitration clause. As noted above, the prayer for relief

in the FAC advances Plaintiff's request for civil penalties, attorneys' fees and costs. There is no prayer for unpaid wages or statutory penalties, as Defendants seem to suggest. Thus, the entire FAC is properly before the Court and may not be sent to arbitration pursuant to the pre-litigation arbitration clauses on which Defendants rely. (*Iskanain, supra*, 59 Cal.4th at 384-385.)

Defendants raise a number of arguments in an attempt to have this Court ignore the clear import of the prayer in Plaintiff's FAC, but none are persuasive. Defendants point to the text of the PAGA notice letter Plaintiff delivered to them in June 2019 as evidence that Plaintiff is actually seeking unpaid wages and statutory penalties in addition to the civil penalties available under PAGA. This contention is belied by the plain language of the FAC's prayer. Further, Defendants point to no authority holding that Plaintiff is obligated to bring a PAGA action that matches the scope of a broadly drafted PAGA notice. While the notice must be broad enough to encompass the PAGA lawsuit, nothing precludes Plaintiff from pursuing a court action that is narrower than the statutory notice.

Defendants also point to the allegation in Paragraph 27 that Defendants "owe waiting time penalties pursuant to Labor Code § 203," as support for their argument that Plaintiff is seeking individual relief that is subject to the arbitration clause. While the FAC makes the theoretical charge that Defendants "owe waiting time penalties," the prayer reveals Plaintiff does not seek to recover such penalties through his

lawsuit. Thus, rather than a central defining allegation, this language in Paragraph 27 appears to be superfluous to the PAGA claims alleged in the FAC. As the Supreme Court explained in *ZB, N.A. v Superior Court* (2019) 8 Cal. 5th 175, 186 and n. 4, an employee bringing a PAGA action for a violation of Labor Code § 203 may seek civil penalties under section 1197.1, in addition to asserting individual claims for compensatory relief and statutory penalties. Based on Plaintiffs prayer for relief, it is plain that he is properly seeking the former but not the latter.

Defendants also argue that the FAC's attempt to use a violation of Labor Code § 226 as a predicate for Plaintiff's PAGA claim reveals his intent to seek individual statutory penalties because there are no civil penalties available for a wage statement infraction under section 226. In light of the prayer's limited focus on recovering civil penalties, this argument amounts to a contention that Plaintiff is seeking penalties that are not available. Such an argument does not support a motion to compel arbitration but might be raised to advance a motion to strike that aspect of the prayer. Further, Defendant's argument is incorrect, since civil penalties are available for a violation of Labor Code 226. (*Lopez v. Friant & Assocs., LLC* (2017) 15 Cal. App. 5th 773, 782-83.)

Finally, Defendants argue that the temporal scope of Plaintiffs discovery reveals his intent to recover unpaid wages rather than simply a one-year measure of civil penalties. But the scope of the pleading defines

the proper range of discovery, not the reverse. Further, whether Plaintiff's discovery extends beyond the standards of relevance in this case is not before the Court on this motion to compel arbitration. The Court notes, however, that many of the same payroll, time records and other employment documents that are relevant to calculating unpaid wages may also be probative of whether the employer has violated key Labor Code requirements.

For all the reasons above, the Court finds that Plaintiff's FAC asserts only a single cause of action under PAGA seeking to recover only civil penalties and holds that, under controlling California Supreme Court law, this claim may not be compelled to arbitration pursuant to the pre-litigation arbitration clauses relied on by Defendants in this case.

b. Defendants' Motion to Stay the Proceedings

As Defendants' Motion to Compel Arbitration is unpersuasive, discussion of its Motion to Stay Proceedings Pending Arbitration is unnecessary.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Compel Arbitration and Motion to Stay Proceedings Pending Arbitration are DENIED.

Defendants are ordered to give notice of the Court's ruling.

DATED: February 10, 2020

/s/ Theresa M. Traber
Hon. Theresa M. Traber
Judge of the Superior Court